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

AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PLAINTIFFS APPEAL FROM ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

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

November 1, 2007

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

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STATEMENT OF AMICUS CURIAE

Amicus curiae Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect free speech and privacy rights. As part of that mission, EFF has served as counsel or *amicus* in key cases addressing privacy issues and rights as applied to the Internet and other new technologies.

This case challenges privacy-invasive practices of the federal government and of the California Institute of Technology ("CalTech") associated with the issuance of a government identification ("ID") card under the auspices of Homeland Security Presidential Directive 12 ("HSPD-12"), which set forth a "Policy for a Common Identification Standard for Federal Employees and Contractors."

Government ID cards and their associated databases of personal information are a major privacy concern for many reasons. EFF and other privacy groups have publicly criticized the HSPD-12 common identification system, which Defendants offer as the justification for the invasive background investigation and suitability determination Plaintiffs challenge here. Our concerns are based on the HSPD-12 system's lack of clear policy on background checks and their implementation, and the risk that unnecessarily intrusive background checks can pose to disfavored individuals – all problems inherent in the Standard Form (SF) 85 and "National

Agency Check with Inquiries" ("NACI") process at issue in this litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under threat of losing their jobs, Plaintiffs must authorize the federal government to collect "any information" about their activities from various entities, including "other sources of information." Plaintiffs' Motion for Preliminary Injunction ("P.I. Motion"), at 7.

Plaintiffs must provide the names of three persons who know them well, who will (along with others) be asked to report any adverse information about "abuse of alcohol or drugs," "financial integrity," "mental or emotional stability," "general behavior or conduct," and "other matters." *Id.* at 7-8. Any "derogatory or unfavorable information" obtained in this process will be used to determine "employment suitability." *Id.* at 8. Grounds for being deemed unsuitable include: "sodomy," "attitude," "personality conflict," "homosexuality," "physical health issues," "mental, emotional, psychological or psychiatric issues," "issues . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation." *Id.* at 8.

The scope of this investigation is extreme. When the federal government requires long-standing federal contractor employees who are not suspected of wrongdoing, who are categorized as "non-sensitive personnel," who do not work with classified material, and who are not seeking security clearances, to submit to

open-ended investigations of their private lives in order to keep their jobs, the investigation invades the employees' legitimate expectations of privacy regardless of whether the inquiry involves a physical invasion or the government subsequently reveals the information collected to third parties. Plaintiffs' religious, political, cultural, medical and sexual histories are all fair game – as are the lives of their friends and family. Thus, First Amendment freedoms of expression and association, as well as privacy rights, are at issue here.

In this brief *amicus curiae* in support of Plaintiffs, EFF focuses on the misconceptions and misstatements about Fourth Amendment law that the federal Defendants made in opposition to Plaintiffs' Motion for a Preliminary Injunction.

A FOURTH AMENDMENT CLAIM CAN BE ASSERTED WHEN THE GOVERNMENT COMPELS EXTREMELY PRIVATE INFORMATION FROM A CITIZEN WITHOUT GOOD CAUSE EVEN IF THE INVESTIGATION IS NOT PHYSICALLY INVASIVE AND THE INFORMATION OBTAINED IS NOT SUBSEQUENTLY DISCLOSED TO THIRD PARTIES

The Fourth Amendment protects citizens against unreasonable government searches and seizures. To be reasonable, a search ordinarily must be based on individualized suspicion of wrongdoing. *Yin v. California*, 95 F.3d 864, 869 (9th Cir. 1996), *cert. denied*, 519 U.S. 1114 (1997). Where the government is acting as an employer, searches and seizures are still subject to the restraints of the Fourth Amendment, but the fact that the government is not acting in a law enforcement capacity affects the assessment of what is reasonable under the circumstances. *O'Connor v. Ortega*, 480 U.S. 709, 725-26 (1987). For example, when a public

employer alleges "special needs" as a justification for a Fourth Amendment intrusion, courts do not require the employer to get a warrant, but do examine closely the competing private and public interests advanced by the parties. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-666 (1989). The employer must show both a compelling government interest in obtaining personal information about plaintiffs, and that plaintiffs have a reduced expectation of privacy. *AFGE, Local 1533 v. Cheney*, 754 F.Supp. 1409, 1419 (N.D. Cal. 1990).

The Constitution protects Plaintiffs from being forced to disclose the kind of medical and sexual information that Defendants seek here. Sexual and medical data are protected by a constitutional right to privacy. *Whalen v. Roe*, 429 U.S. 589, 600 (1977) (constitutional liberty right in non-disclosure of medical information about prescription drugs). Informational privacy rights are not limited to information relating to "marriage, procreation, contraception, family relationships, and child rearing and education," Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ("Opposition") at 31-32, though investigation of those matters are clearly part of the background checks at issue here. The informational privacy right covers medical information, social security numbers and weapon ownership. See *In re Crawford*, 194 F.3d at 960 (HIV status, sexual orientation, genetic makeup, social security numbers); *Doe v. City of*

New York, 15 F.3d 264, 267 (2d Cir. 1994) (medical information); *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002) (facts about assault weapon ownership).

The Defendants' compelled collection of sensitive information can constitute a search and a seizure under Fourth Amendment law even in the absence of any physical trespass. The Fourth Amendment is triggered by infringement of a reasonable expectation of privacy, not by trespass on a protected place, as Defendants assert. Prior to 1967, the Fourth Amendment was closely tied to a property interest in the place searched or the thing seized. *See, e.g. Olmstead v. United States*, 277 U.S. 438 (1928) (use of a wiretap to intercept a private telephone conversation was not a search for Fourth Amendment purposes because there had been no physical intrusion into the person's home).

The Court rejected the property-based trespass view asserted in both *Olmstead* and the Opposition in the seminal case of *Katz v. United States*, 389 U.S. 347 (1967). *Katz* held that the Fourth Amendment had been violated when police recorded a telephone conversation the defendant was having in a public phone booth. First, the Court noted that the Fourth Amendment protects people, not places. *Id.* at 351. It rejected the government's assertion that a search or seizure requires a physical invasion. The Court stated that physical penetration of a constitutionally protected area, the test asserted by Defendants here, is not the

proper inquiry for determining an unlawful search or seizure. Rather, the Court embraced a more modern interpretation of the Fourth Amendment based on protecting a reasonable expectation of privacy.

Following *Katz*, the collection of intangible information without the consent of the subject can be a Fourth Amendment search without any physical invasion into a protected space. Under both *Katz* and *Berger v. New York*, 388 U.S. 41 (1967), wiretapping is a search, even though all that is taken is the defendant's thoughts, as expressed in conversation. *Katz*, 389 U.S. at 353; *Berger*, 388 U.S. at 59 ("[A]uthorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause.")

Similarly, in *Kyllo v. United States*, 533 U.S. 27, 121 (2001), the Court found a Fourth Amendment violation when police used a sensor that picked up heat waves emanating from a house. The police did not invade a protected area, but collected information from a public space. Nevertheless, because the technology allowed officers to intuit private facts about the defendant's activities, using the device was a search. *Id.* at 40.

Forcing a citizen to provide intimate evidence about himself can constitute a search even in the absence of any physical intrusion. For example, the Fourth Amendment governs a public employer's drug testing of its employees regardless of whether the analysis is performed after a blood draw, which invades the body,

or on urine, which is merely an analysis of a waste product. Contrary to Defendant's contention, urinalysis is subject to Fourth Amendment restrictions because the testing reveals highly private medical facts, not because the collection is physically invasive, as Defendants erroneously argue. Opposition at 24.

In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989), the Supreme Court stated that, while the process of collecting urine samples may in some cases involve "visual or aural monitoring of the act of urination," "the chemical analysis can reveal a host of private medical facts." The Court held that urine testing is a search not only because of "invasive" collection, but also because of the private facts disclosed by the testing. *Id.* at 616 ("[t]he ensuing chemical analysis of the sample to obtain physiological data is a further intrusion of the tested employee's privacy interests."). In *Chandler v. Miller*, 520 U.S. 305 (1997), the Court struck down on Fourth Amendment grounds a Georgia law mandating drug testing for candidates for public office, even though the "the testing method the Georgia statute describes is relatively noninvasive," because the information was private. *Id.* at 313.

Similarly, in *Norman-Bloodsaw v. Lawrence Berkeley Laboratories*, 135 F.3d 1260, 1270 (9th Cir. 1998), the plaintiffs alleged that their government laboratory employer violated the Fourth Amendment and the Due Process Clause by testing blood samples obtained during routine physical examinations for sickle

cell anemia, syphilis and pregnancy, among other things. The District Court had held that because the initial full scale physical examination during which medical personnel took the plaintiffs' blood was both intrusive and justified, the additional analysis was not a Fourth Amendment search. The Ninth Circuit reversed and remanded, holding that the more intensive testing, though it required no additional **physical** invasion of the plaintiffs, was nevertheless a Fourth Amendment search because the **facts** revealed by the subsequent tests are highly personal. *Id.* at 1270. Physical intrusion is not the key; expectation of privacy in the facts revealed by testing is.

Furthermore, the Fourth Amendment can apply to the coerced collection of private facts even when the government employer does not disclose those facts to third parties. *Cf.* Opposition at 29. In *Norman-Bloodsaw*, even though the employer did not disclose the results of the blood tests to third parties, the Ninth Circuit held that the very performance of unauthorized tests was itself a constitutional violation. 135 F.3d at 1269. This ruling is solidly in accord with the principles behind the constitutional right to informational privacy, which "applies both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public." *Tucson Women's Clinic v. Eden*, 371 F.3d 1173, 1193 (9th Cir. 2004); *Planned Parenthood of S. Ariz v. Lawall*, 307 F.3d 783, 789-90 (9th Cir.

2002) (citing *Whalen,* 429 U.S. at 599 n. 24)*; Norman-Bloodsaw,* 135 F.3d at 1269. The SF 85 form and the NACI background check seek to obtain this protected information, since the investigation seeks evidence about physical health, mental and emotional health and private sexual practices. *See* P.I. Motion at 8, citing Declaration of Konstantin Penanen, ¶ 20 and Exhibit R thereto. The collection itself can be a privacy issue, regardless of whether the employer plans on subsequently keeping the information safe from public disclosure.

Despite the ruling regarding psychological testing in *Greenawalt v. Indiana Department of Corrections*, 397 F.3d 587 (7th Cir. 2005), other Fourth Amendment cases support the view that mandatory questionnaires and other required public disclosures are searches or seizures. In *National Federation of Federal Employees v. Greenberg*, 983 F.2d 286 (4th Cir. 1992), employees seeking security clearances brought a facial challenge to a questionnaire that included a drug use question. The court held that the employees had a right to have the constitutionality of the questionnaire reviewed and did not reject out of hand the assertion that the questionnaire could violate the Constitution; instead, the court ultimately found that because the plaintiffs were making a facial rather than "as applied" challenge, they failed to meet the burden of showing that the questionnaire could never be reasonable. *Id.* at 292. Further, the questionnaire informed employees that compliance was voluntary rather than mandatory. *Id.* at

294. Because there was no evidence that the employer would impose any adverse consequences on the employee's failure to cooperate, the challenge also failed. *Id.*

Similarly, in *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566 (6th Cir. 2002), the court rejected the plaintiffs' claim that a county policy mandating public disclosure of real estate holdings by employees of certain departments and their family members violated the Fourth Amendment. The court did so, however, not because requiring this kind of testimonial information was not a search or seizure, but because the plaintiff had no reasonable expectation of privacy in the particular type of financial information sought by the defendant. *Id.* at 577.

In contrast, Plaintiffs here have both a strong expectation of privacy in the information Defendants are seeking and are challenging the background check procedure as it applies to them specifically. Given these distinctions, both *Greenberg* and *Overstreet* suggest that this claim is entitled to Fourth Amendment review.

The SF 85 and NACI background check are highly privacy invasive because a government employer is coercing the disclosure of highly private, constitutionally protected medical and sexual information about an individual from that individual as a condition of continuing employment.

Though the background investigation here seeks the most protected types of

information, there is little nexus between the government's asserted need for this intrusion and the type of information sought. The government argues that it must assess the individual's fitness to work in a federal government facility to protect national security. But not every government facility is related to national security and not every employee has the ability to affect national security. Plaintiffs have been working in a government facility for many years without incident or cause for any individualized suspicion. They do not have access to classified information or work on national security matters. Nor is the information that plaintiffs seek to protect here likely to indicate whether a Plaintiff is a "convicted murderer" or "wanted terrorist suspect." Collecting identity information and checking criminal history records or terrorism watch lists could reveal this information. Collecting medical or sexual data does not.

CONCLUSION

Amicus does not argue that all government background investigations implicate the Fourth Amendment, but this one is particularly worrisome because of the character of information sought, the coercion of employees' cooperation, and the lack of nexus between the investigation and the government's asserted need. On the Defendants' view, Plaintiffs' privacy is not violated because investigators invade no protected space and the agency does not plan to redistribute the information. Neither of these claims obviates Fourth Amendment review. The

Fourth Amendment can apply to non-intrusive searches and seizures that nonetheless would reveal highly private and personal facts, regardless of whether those facts are ultimately disclosed to others.

Respectfully Submitted,

November 1, 2007

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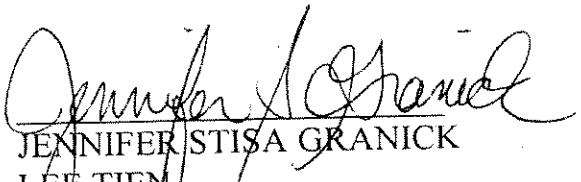
Certificate of Compliance with Circuit Rule 32-1

Pursuant to Rules 29(c)(5) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I hereby certify that the foregoing brief uses 14-point Times New Roman spaced type; the text is double-spaced; and footnotes are single-spaced. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) as it is less than one-half the maximum length of the Plaintiffs' principal brief.

Respectfully Submitted,

November 1, 2007



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