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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL AERONAUTICS AND SPACE :

ADMINISTRATION, ET AL., :

Petitioners : No. 09-530

v. :

ROBERT M. NELSON, ET AL. :

- - - - - x

Washington, D.C.

Tuesday, October 5, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

GENERAL NEAL K. KATYAL, ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioners.

DAN STORMER, ESQ., Pasadena, California; on behalf of Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 09-530, National Aeronautics and Space Administration v. Nelson.

Mr. Katyal.

ORAL ARGUMENT OF GENERAL NEAL K. KATYAL

ON BEHALF OF THE PETITIONERS

GENERAL KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

Background checks are a standard way of doing business. The Government has required them for all civil service employees since 1953 and for contractors since 2005. If the Ninth Circuit in this case held that a constitutional right to informational privacy precluded asking the questions it asked, that was wrong for two basic reasons.

First, the background checks' mere collection of information with accompanying safeguards vitiates no constitutional privacy interest. These checks have been going on for millions of employees for dozens of years. They are part of the employment process. They are manifestly not roving checks on random individuals. And, second -

JUSTICE SOTOMAYOR: Mr. Katyal, is there any

1 limit to what questions the Government can ask --

2 GENERAL KATYAL: Well, the --

3 JUSTICE SOTOMAYOR: -- an applicant?

4 GENERAL KATYAL: The -- the limits are -- in
5 this case, are the ones on SF-85 and Form 42. And we do
6 think that that's a fairly --

7 JUSTICE SOTOMAYOR: What does that mean?

8 GENERAL KATYAL: Well, those two --

9 JUSTICE SOTOMAYOR: Could you ask somebody,
10 what's your genetic make-up, because we don't want
11 people with a gene that's predisposed to cancer,
12 whatever other -- could you ask that?

13 GENERAL KATYAL: Well, I think that the
14 Court doesn't need to confront that fairly --

15 JUSTICE SOTOMAYOR: We do, because I have to
16 start with the question of what are the limits on the
17 Government, if any? Are you taking the position that,
18 as an employer, there are absolutely none, or are you
19 taking the position that there are some, and what would
20 they be?

21 GENERAL KATYAL: Our position is, in a case
22 such as this, where there are collections on the
23 Government's dissemination of the information --

24 JUSTICE SOTOMAYOR: So what you are saying
25 is, there's no limit?

1 GENERAL KATYAL: I -- I think that this
2 Court in Whalen -- and there is no decision thus far
3 that has recognized any constitutional limit on the
4 Government's collection of information, so long as there
5 are accompanying safeguards on the disseminations and --

6 JUSTICE GINSBURG: General Katyal, why are
7 we getting into this? Because this case, it seems to
8 me, is a challenge -- your challenge to a preliminary
9 injunction which was quite narrow. There was only one
10 question at issue. There is no cross-appeal, is there?

11 GENERAL KATYAL: There -- there is no
12 cross-appeal.

13 JUSTICE GINSBURG: So we have Form 85. The
14 only thing that's in contention there is the question
15 about treatment or counseling. Nothing else. So why
16 are we talking about the universe of what questions
17 might be asked?

18 And on the other form, I take it, it's just
19 the so-called open-ended questions, not everything on
20 the form.

21 GENERAL KATYAL: I quite agree, Justice
22 Ginsburg. That's what I was trying to say to Justice
23 Sotomayor; that is, I think that this case doesn't force
24 the Court to answer questions it has never really
25 answered, which are the outer limits of what the

1 Government can do in terms of the collection of
2 information.

3 Here you have a narrow decision by the Ninth
4 Circuit, one whose reasoning, I think, could radiate
5 very broadly and undermine Government -- the
6 Government's background checks generally.

7 JUSTICE GINSBURG: So, what do you think has
8 been -- there hasn't been a formal injunction entered, a
9 preliminary -- a preliminary injunction, has there?

10 GENERAL KATYAL: It's only -- it's at the
11 preliminary injunction stage.

12 But our -- our point is that the reasoning
13 that the Ninth Circuit used, if adopted -- if adopted to
14 create a permanent injunction, could preclude the
15 Government from asking all sorts of questions in
16 background -- in background checks, not just the ones it
17 isolated here, but more general ones, because the Ninth
18 Circuit decision is essentially a how-to manual on how
19 to question, various individual questions, and
20 micromanage them and inject Federal courts into --

21 JUSTICE GINSBURG: I thought the -- the
22 entire Form 85 was approved, and there's no question you
23 could ask about, have you used drugs within the last
24 year? It's only the question about treatment and
25 counseling that's -- that is at issue, right?

1 GENERAL KATYAL: That's -- that's all that
2 the Ninth Circuit ruled on at the preliminary injunction
3 stage.

4 CHIEF JUSTICE ROBERTS: Does that -- does
5 that ruling stop you from asking that question right now
6 throughout the Ninth Circuit?

7 GENERAL KATYAL: Which question? The drug
8 treatment question?

9 CHIEF JUSTICE ROBERTS: No, no, no. The --
10 yes. Yes, the counseling and treatment question.

11 GENERAL KATYAL: Well, there's a -- the
12 mandate has been stayed --

13 CHIEF JUSTICE ROBERTS: Right.

14 GENERAL KATYAL: -- so we haven't been able
15 to --

16 CHIEF JUSTICE ROBERTS: But if we sustained
17 -- if we sustain the preliminary injunction, the
18 Government can't ask that question throughout the --
19 the -- the reach of the Ninth Circuit?

20 GENERAL KATYAL: That's exactly correct.

21 JUSTICE KENNEDY: And -- and if we did so,
22 it would be because there is an underlying privacy right
23 that's somewhat ill-defined or undefined?

24 GENERAL KATYAL: Exactly, Justice Kennedy.
25 And if this Court were to embrace that reasoning -- and

1 this is my answer to you, Justice Ginsburg, as well --
2 then it doesn't just reach drug treatment. I could
3 imagine other litigants doing it for other forms of
4 questions, whatever they may be.

5 JUSTICE GINSBURG: But the -- the circuit
6 precedent, as far as the other questions on Form 85 --
7 the circuit said that's okay. It's permissible to ask
8 those questions.

9 GENERAL KATYAL: Thus far, that's correct.
10 But I could imagine other litigants coming in, and maybe
11 not just with respect to these questions but questions
12 on SF-85P or Form 86, any number of other things.

13 JUSTICE SCALIA: Mr. Katyal, what is the
14 well-defined, the well-defined, constitutional right to
15 institutional -- to informational privacy that the
16 Government is -- is willing to acknowledge? You -- you
17 apparently don't -- don't challenge the existence of
18 such a constitutional right.

19 GENERAL KATYAL: Justice Scalia, our
20 position is that the Court doesn't need to answer that
21 question. It's just like Whalen, because in Whalen this
22 Court assumed the existence of some sort of
23 constitutional right and then said: Is that right
24 violated here?

25 JUSTICE SCALIA: It's a strange way to

1 proceed. We normally don't do that, see? If there were
2 a constitutional right, would it cover this?

3 GENERAL KATYAL: I agree --

4 JUSTICE SCALIA: Do we do that in cases? I
5 don't think so.

6 GENERAL KATYAL: I agree that in many other
7 contexts, it might not be appropriate, but here I think
8 there are some good reasons why. This Court has had
9 special reticence to the rule broadly in the range of
10 privacy, and I think the reason is privacy is something
11 that is in flux in ways that other things aren't, both
12 in terms of our social understandings, technology, and
13 legislation itself.

14 And for that reason, I think this Court has
15 spoken narrowly whenever it's dealt with --

16 JUSTICE SCALIA: That would justify not
17 defining it broadly or narrowly. It wouldn't justify
18 not reaching the question of whether there is any such
19 constitutional right at all.

20 GENERAL KATYAL: Justice Scalia, that's what
21 this Court has done throughout its history. And Whalen
22 was a unanimous decision, and Nixon, on that particular
23 question, I don't think there was a disagreement about.
24 So --

25 JUSTICE ALITO: How can the Court determine

1 that the right is not violated here without having some
2 idea about either the existence or the contours of the
3 right?

4 GENERAL KATYAL: Well, I think it would just
5 be like in Whalen itself. So in Whalen, the Court said
6 there might be some right to informational privacy, but
7 so long as there are safeguards on the disclosure, the
8 Government's dissemination of the information, that
9 means that there is no --

10 JUSTICE ALITO: Is it -- is it your argument
11 that the Government can collect whatever information it
12 wants from private individuals so long as the
13 information is not publicly disseminated?

14 GENERAL KATYAL: No, that's not our
15 position. Our position here is that the Government can
16 collect information so long as it is not disseminated in
17 the employment context. And this case, unlike Whalen,
18 is one that has that added fact to it, that the
19 Government here is asking --

20 JUSTICE KENNEDY: Well, does it -- does it
21 help us in finding what this residual background right
22 is and asking you: Why is it that you can't disclose
23 it?

24 GENERAL KATYAL: I'm sorry?

25 JUSTICE KENNEDY: Why can't you disseminate

1 the information?

2 GENERAL KATYAL: Surely -- we are restricted
3 by statute, the privacy of --

4 JUSTICE KENNEDY: Let's assume no statute.

5 GENERAL KATYAL: If you assume --

6 JUSTICE KENNEDY: In other words, this is
7 just testing whether there is some background
8 constitutional right and how to define it, if we have to
9 use that as a beginning premise.

10 GENERAL KATYAL: Absolutely. If we took out
11 all of the safeguards that are at issue here, then the
12 case wouldn't be like Whalen or Nixon, in which you had
13 those -- in which you had safeguards in the
14 dissemination. And then you would have to confront the
15 question, which we think you shouldn't confront in this
16 case, for the reasons I said to Justice Scalia.

17 JUSTICE KENNEDY: And what would be your
18 position if the -- all this information were disclosed?
19 Or that there was an attempt to disclose all the
20 information, and they asked you for your advice --

21 GENERAL KATYAL: Right.

22 JUSTICE KENNEDY: -- on a constitutional
23 basis?

24 GENERAL KATYAL: Right. I mean, our
25 position is that the Court really shouldn't, for all of

1 the reasons I said, get into it, but if the Court had to
2 get into it and ask is there some constitutional right
3 that would be violated, Justice Kennedy, by your
4 hypothetical, our answer would be no.

5 But we do think the way that this has been
6 traditionally been handled is legislation. Safeguards
7 for political processes --

8 CHIEF JUSTICE ROBERTS: So when you say your
9 position would be no, you mean that there is no right of
10 any kind under -- I know you don't want us to reach it,
11 but you would say there is no right of any kind for a
12 citizen to tell the Government that that's none of your
13 business. The Government will decide that it can ask
14 anything of a citizen, so long as you don't disclose it.

15 GENERAL KATYAL: Well, in the
16 employment/proprietor context. Okay? So if the Court
17 had to confront that question, it would apply the matrix
18 that Justice Scalia has talked about, the Glucksberg
19 matrix, of whether a right -- the right is firmly rooted
20 in the traditions of the people, and -- and ask: Is the
21 Government's collection --

22 CHIEF JUSTICE ROBERTS: Do you think it's
23 firmly rooted in our traditions that there is some right
24 to tell the Government that's none of your business?

25 GENERAL KATYAL: I think there is some

1 right. The question about whether it employs in the
2 unique employment/proprietor context is one the Court
3 hasn't confronted, and our strong -- our strong position
4 here is the Court shouldn't confront it.

5 JUSTICE ALITO: What is the test -- what is
6 the test for determining what sort of questions can be
7 asked in the employment context? Is there any limit?

8 Suppose the -- suppose the Government says,
9 well, we want to know all about your diet; we want to
10 know whether you smoke cigarettes; we want to know
11 everything you read; we want to know what your hobbies
12 are, what forms of entertainment you enjoy, sexual
13 practices, every aspect of your private life, just
14 because that gives us a better picture of who you are as
15 an employee. Is that okay?

16 GENERAL KATYAL: Sure. No, there are
17 limits, and I should have said this earlier. If the
18 Government's collection of information or the disclosure
19 of the information burdens some other fundamental
20 constitutional right, that is certainly one limit.

21 So if the Government were collecting
22 information, Justice Alito, on sexual practices of its
23 employees, it may burden the exercise of other rights.

24 CHIEF JUSTICE ROBERTS: Yes, but that's
25 putting those aside. I mean, what about some of the

1 hypotheticals that Justice Alito posed? Your diet?

2 GENERAL KATYAL: Right. So --

3 CHIEF JUSTICE ROBERTS: That's certainly
4 relevant in the employment context, right? They're
5 going to have to pay for your health care, worry you
6 might miss things, miss days of work.

7 So I guess the point is: Do you think the
8 Government's right to inquire in the employment context
9 is exactly as broad as a private employer's right?

10 GENERAL KATYAL: I do think that if the
11 private employer -- the private employers are a good
12 template. If the Government is simply mirroring what
13 private employers do, as Justice Scalia said in *O'Connor*
14 *v. Ortega*, that's a good suggestion that what it's doing
15 is reasonable.

16 Now, to the extent, Justice Alito, that they
17 are gradating far beyond what private employers do, in
18 terms of asking about eating habits and the like, I do
19 think that that may pose -- that there may be some
20 limits. The Court doesn't need to confront that here.
21 It simply needs to look at the Ninth Circuit's decision,
22 which recognize a broad, free-standing right against
23 informational collection of its employees to make sure
24 and -- and realize that that is a serious problem for
25 the way the Government does business.

1 JUSTICE SCALIA: We do have a legislature,
2 don't we, that can place some limits on what the
3 Government asks employees or anybody else?

4 GENERAL KATYAL: Absolutely.

5 JUSTICE SCALIA: It's the same legislature
6 that prohibited the Government from disclosing a lot of
7 information, isn't it?

8 GENERAL KATYAL: That's precisely correct.

9 JUSTICE SCALIA: And it's possible that
10 that's the protection that the Framers envisioned,
11 rather than having courts ride herd on -- on Government
12 inquiries.

13 GENERAL KATYAL: It's certainly possible,
14 Justice Scalia. I think that all of these hypotheticals
15 are enormously interesting, but the --

16 JUSTICE SOTOMAYOR: Were these two forms
17 approved by Congress?

18 GENERAL KATYAL: The forms themselves were
19 not approved by Congress, but the Privacy Act, which is
20 the main restriction --

21 JUSTICE SOTOMAYOR: That's a restriction on
22 disclosure, but the same Congress can change that,
23 correct?

24 GENERAL KATYAL: That's absolutely correct.
25 The Privacy Act has been around since 1975, and the

1 Government has collected -- you know, it's been used
2 millions of times, SF-85. It's been used 553,000 times
3 in the last 4 years, and we have not seen the types of
4 disclosure or complaints that I think animate the worry
5 that my friends on the other side are saying.

6 CHIEF JUSTICE ROBERTS: What is the
7 reason -- I've had trouble putting my finger on it --
8 that you need the information about counseling?

9 You already have the information, have you
10 used drugs in the past year? I couldn't tell if you
11 thought the question about counseling was for the good
12 of the employee -- oh, you are taking steps to -- or was
13 it to allow you to show, well, it must be serious,
14 because you need counseling.

15 GENERAL KATYAL: It is for the good of the
16 employee, so it's a --

17 CHIEF JUSTICE ROBERTS: Well, now that's --
18 whenever the Government comes and says this is for your
19 own good, you have to be --

20 (Laughter.)

21 CHIEF JUSTICE ROBERTS: -- you have to be a
22 little suspicious.

23 I mean, if it's -- the employee gets to
24 expand upon his or her answer. They say, tell us about
25 it. And they can say, don't worry, I'm in counseling or

1 treatment. And even then, that doesn't sound like it's
2 for their good. It's one thing to say, I had a drink.
3 It's another thing to say, I'm in AA.

4 GENERAL KATYAL: Mr. Chief Justice, the way
5 the question is framed is, first, they are asked, have
6 you used illegal drugs in the last year? And then --
7 and then, if the answer is yes, provide details and then
8 indicate any treatment or counseling received.

9 CHIEF JUSTICE ROBERTS: Now, I had a
10 question about the way it's worded. You're supposed --
11 it says, if you've used it in the last year, detail your
12 involvement with drugs and any counseling you received.

13 Do you understand the counseling question to
14 be limited to the past year, or to reach back as far
15 as --

16 GENERAL KATYAL: I -- I think that the
17 question itself is vague.

18 Now, the way that our -- that the Office of
19 Personnel Management will process such a form is it will
20 process anything so long as there is information about
21 just drug use on the question --

22 CHIEF JUSTICE ROBERTS: But do you think
23 it's required? I mean, you do sign at the end, this is
24 true to the best -- do you think it's required to
25 disclose counseling and treatment you received more than

1 a year back?

2 GENERAL KATYAL: No. This is unlike, for
3 example, SF-86, which does ask for treatment and
4 counseling back up to, I think, a 7-year period.

5 So I think this is a much more narrow
6 inquiry, and I think the reason for that inquiry is to
7 help the employee. The Government -- the background
8 investigation --

9 JUSTICE GINSBURG: The answer to that is
10 obvious. It was raised by the other side. If it's for
11 the good of the employee, make it voluntary.

12 GENERAL KATYAL: Well, Justice Ginsburg, I
13 think that that's the type -- that that's the type of
14 inquiry that this Court rejected in Whalen. Because in
15 Whalen, the whole debate in the court, in the district
16 court below, was, well, if you want to stop doctor
17 prescription mills people from providing too many
18 narcotics, you don't need the names and ages of the
19 patients. We could change the triplicate forms and
20 redact that.

21 But what this Court said on the second page
22 of its opinion was it called that Lochnerian, that
23 Federal courts shouldn't be policing forms and excising
24 or suggesting random different -- you know, a few
25 different words here or there.

1 And here, experts put this form together to
2 try and get at, basically, are you using drugs and are
3 you using treatment which might ameliorate the fact that
4 you had used illegal drugs in the last year.

5 JUSTICE ALITO: Well, I had thought before
6 the argument that one of the purposes for asking about
7 treatment was to identify employees who may have
8 undergone treatment on numerous occasions and dropped
9 out of programs and been unsuccessful, so as to identify
10 chronic drug abusers. But I guess in light of what
11 you've just said, that this only reaches back 1 year,
12 that is not a purpose of this -- this question.

13 GENERAL KATYAL: That is correct, and in
14 preparation for this, we did survey all of the NASA
15 different centers to ask, has treatment ever been used
16 in any sort of way to hurt an employee? And the answer
17 that came back was, no, it has not been used. It has
18 only been used to help. It is to retain someone who did
19 use illegal drugs but is taking steps to mitigate.

20 CHIEF JUSTICE ROBERTS: Well, how do you
21 know -- how do you know that? I mean, you ask a lot of
22 questions on these forms, and they say, well, we're not
23 going to hire you. How can you go back and say it was
24 because you put in, you know, in treatment for -- for
25 drug abuse?

1 GENERAL KATYAL: Well, the process by which
2 this takes place is the form is filled out. It is
3 ultimately sent to an adjudicator if there is negative
4 information, and that -- and that information is then
5 discussed with the candidate for employment or the
6 employee to see if they have an explanation. And of the
7 times that this has happened, that someone has been
8 denied -- and I think the number is 128 times over the
9 -- over the last 5 years -- none have been denied for a
10 positive answer to drug treatment.

11 CHIEF JUSTICE ROBERTS: Over the last 5
12 years, this has only come into play 128 times across the
13 Federal bureaucracy?

14 GENERAL KATYAL: For Federal contractors.
15 That is correct.

16 CHIEF JUSTICE ROBERTS: Federal contractors.

17 GENERAL KATYAL: Yes.

18 JUSTICE SOTOMAYOR: I'm sorry. I'm not sure
19 I understand the answer. Only 128 times has somebody
20 identified themselves as a drug user?

21 GENERAL KATYAL: One hundred and
22 twenty-eight times, the SF-85 process, is my
23 understanding, has been used to deny someone a
24 credential of the Federal contractor --

25 JUSTICE SOTOMAYOR: So it could be for any

1 other answers as well?

2 GENERAL KATYAL: For anything. Exactly.
3 About -- and I think there have been about 74,000
4 contractors that have sought -- sought badges through
5 the SF-85 since --

6 JUSTICE SOTOMAYOR: Are you representing to
7 us that every employee who is rejected will know the
8 reason?

9 GENERAL KATYAL: That is correct. That is
10 part of -- that is part of the regulations that are in
11 place, so that if someone is denied a credential -- and
12 this is, I think, at Joint Appendix page 180 -- they are
13 told the reason for that denial. They are given an
14 opportunity to explain themselves, and a process is then
15 put in place. There is then also robust appeal and
16 other things that may happen as well.

17 But one thing that doesn't happen, Justice
18 Sotomayor, is that JPL, the contractor, is not told the
19 basis for why the person is denied a credential, that it
20 is private as between the Government -- here, NASA --
21 and the individual employee. And that is the --

22 JUSTICE SOTOMAYOR: So where does the
23 suitability matrix come in?

24 GENERAL KATYAL: It doesn't.

25 JUSTICE SOTOMAYOR: It doesn't?

1 GENERAL KATYAL: It doesn't.

2 JUSTICE SOTOMAYOR: And NASA has never used
3 it? You're representing that to the Court?

4 GENERAL KATYAL: I'm representing that NASA
5 has -- NASA will not and does not use this employee
6 suitability chart to make contractor credentialing
7 decisions.

8 JUSTICE GINSBURG: Where did it come from?

9 GENERAL KATYAL: Well, it's -- it's been
10 hard to actually pin down where it came from. I think
11 it is derived from earlier Office of Personnel
12 Management materials at a time when it listed out what
13 various crimes were. And so some of those things that
14 are on there that are quite salacious are things that
15 OPM, at earlier points in time, looked to, not for
16 contractors, but for Government employees.

17 But I can represent to the Court that NASA
18 does not and will not use this chart for credentialing
19 decisions.

20 JUSTICE GINSBURG: Do you -- do you have a
21 clear idea of how the Form 42 would have to be amended
22 if the Respondents are correct? Form 85, we know, is
23 the excised "counseling or treatment." What in the Form
24 85 did the Ninth Circuit say -- it said "open-ended
25 questions," but I looked at the form, and it's not clear

1 to me which ones they considered open-ended.

2 GENERAL KATYAL: Justice Ginsburg, I quite
3 agree with you. I don't think that the Ninth Circuit's
4 reasoning is capable of being ameliorated easily.

5 So we talked before about how the drug
6 treatment was just a narrow part of the Ninth Circuit
7 decision, but this Form 42 -- the invalidation of Form
8 42, goes to the heart of what the Government does all
9 the time and what all employers do. They ask open-ended
10 questions to figure out whether someone is trustworthy
11 and reliable. I think as Judge --

12 JUSTICE SOTOMAYOR: General -- I'm sorry.
13 Go ahead and finish.

14 GENERAL KATYAL: I think as Judge Kleinfeld
15 said, that's how law clerks are hired, and that's how
16 baristas at Starbucks are hired. You have to ask these
17 open-ended questions because as an employer, you don't
18 really know what -- where the pressure points or danger
19 spots in an individual application are.

20 JUSTICE SOTOMAYOR: Is your position today
21 that our ruling should say that the Government is free
22 to ask, as a private employer or a contractor -- it is
23 free to ask any question it wants whatsoever?

24 GENERAL KATYAL: That is not what we're
25 saying. We --

1 JUSTICE SOTOMAYOR: If you were not saying
2 that, then what's the narrower ruling? Because that's
3 what I thought I heard at the beginning of our colloquy
4 today.

5 GENERAL KATYAL: Justice Sotomayor, the
6 narrow rule is what we said in our petition and what we
7 said on the very last page of our reply brief and all
8 throughout, which is, this Court should simply say what
9 it said in Whalen, which is assuming that there is some
10 sort of right to informational privacy, the -- the use
11 of a background check with accompanying safeguards to
12 collect information doesn't violate any constitutional
13 right to privacy.

14 JUSTICE SOTOMAYOR: Well, why wouldn't that
15 violate it if the question involved a fundamental right?
16 If you were asking the question that Justice Alito
17 asked, which is, what's your sexual practices in the
18 bedroom, if there are security checks against you
19 disclosing it, you're saying even that would be okay?

20 GENERAL KATYAL: I could imagine a
21 circumstance far afield from this one in which the
22 Government's just mere collection of information about
23 sexual practices might burden the exercise of those
24 rights. I'm saying it's not at all present here, but --
25 and I don't think the Court should get into it.

1 But that's a really different question than
2 the one here, which is: Is there some free-standing
3 right to constitutional privacy that is unburdened by
4 the fact that there are protections against the
5 disclosure of information? Here, the Privacy Act
6 imposes strong protections against the disclosure of
7 information. And so what's left is a very residual
8 interest in the part of the employees.

9 JUSTICE SOTOMAYOR: Don't -- this is a bit
10 unsatisfying because you start by saying to us, as long
11 as there are some nondisclosure protections, then
12 virtually any question, whether it impinges a
13 fundamental right or not, would be okay, because
14 there's -- I don't even know what the Government's
15 interest is in asking every question it wants to.

16 There has to be a need for a set of
17 questions, doesn't there?

18 GENERAL KATYAL: Well, I could imagine an
19 as-applied challenge to, for example, you know, the
20 hypothetical on sexual practices or whatever.

21 I do think, as Justice Scalia said, the real
22 check on that is the political process check. The fact
23 is that the Government doesn't ask those kinds of
24 questions, and -- and to the extent it ever did, the
25 Court could confront that in an as-applied challenge.

1 JUSTICE GINSBURG: I still don't see why
2 that -- why the universe is before us, because the Ninth
3 Circuit said some of this form is okay; most of Form 85
4 is okay, and some of Form 42 is okay. I thought it was
5 only the questions under 7 and 8, the open-ended
6 questions. I didn't think the Ninth Circuit had
7 enjoined anything other than those questions.

8 GENERAL KATYAL: Those questions,
9 Justice Ginsburg, are really the heart of the form. I
10 mean, those are the most -- in many ways the most
11 important questions, because they're the ones that
12 employers have to ask because they don't know the
13 weaknesses in an individual applicant's background.

14 JUSTICE KENNEDY: There are a number of
15 statements in, I guess, the concurrence from the denial
16 of en banc, explaining how JPL is fairly open, and it is
17 close to the Pasadena courthouse. Pasadena residents
18 and judges visit JPL often.

19 Are there any statements of fact that you
20 don't agree with that are not in the record, other than
21 the matrix question? Leave that aside.

22 GENERAL KATYAL: Well, yes, I mean, I would
23 say a few things. Number one is I think that the
24 concurring judge did -- did, I think, underestimate how
25 important security is there.

1 First of all, there are armed guards when
2 you're coming in. It is not the campus-like atmosphere.
3 It's not like a campus I'm familiar that she described.
4 The information at the debate -- at JPL is sensitive,
5 quite sensitive, both, you know, in terms of
6 scientifically and with respect to our nation's secrets.

7 And I think more important point about this
8 is the badge that the Plaintiffs were seeking access to
9 don't -- doesn't just give them access to JPL. It will
10 also give them other access to all other NASA
11 facilities. And it's such an important credential that
12 it would allow them to get within, for example, 6 to 10
13 feet of the space shuttle as it's being repaired and
14 readied for launch. So this is a credential not just
15 for JPL and getting onto JPL, but other places as well.

16 If I could reserve the balance of my time.

17 CHIEF JUSTICE ROBERTS: Thank you, General.

18 Mr. Stormer.

19 ORAL ARGUMENT OF DAN STORMER

20 ON BEHALF OF THE RESPONDENTS

21 MR. STORMER: Mr. Chief Justice, and may it
22 please the Court:

23 The issue as now characterized is really how
24 far may a Government go, may this Government go, to
25 intrude into the private lives of its citizens, both in

1 positions that do not involve sensitive issues,
2 classified issues, national security issues, or
3 positions of public trust?

4 JUSTICE SCALIA: Mr. Stormer, what provision
5 of the Constitution are you relying -- I looked at your
6 table of authorities in your brief, and you have cases
7 listed, you have statutes listed; there is not a single
8 citation anywhere in your brief to a provision of the
9 Constitution.

10 What provision of the Constitution are you
11 relying on?

12 MR. STORMER: It would mostly fall --

13 JUSTICE SCALIA: I think it's a very nice
14 thing that the Government shouldn't ask intrusive
15 questions. I also think it's a nice thing that the
16 Government should pay a living wage to its employees,
17 but I don't feel authorized to go around saying how much
18 the Government should pay each of its employees because
19 there is nothing in the Constitution about that, and the
20 question is left to Congress.

21 What do you rely on in the Constitution that
22 enables me to decide how much intrusiveness is too much,
23 rather than leaving that to Congress?

24 MR. STORMER: It would flow from the ordered
25 concept of liberty component of the Fifth Amendment, as

1 well as the First Amendment.

2 JUSTICE SCALIA: The Fifth Amendment? Okay.
3 Which says no person shall be deprived of what?

4 MR. STORMER: Of life -- I mean, no person
5 shall be deprived of due process of law, and then the
6 last --

7 JUSTICE SCALIA: Due process of law.

8 MR. STORMER: -- refers to the concept of --
9 ordered concept of liberty.

10 JUSTICE SCALIA: All right. That -- that's
11 what I thought. You're talking substantive due process
12 here.

13 MR. STORMER: Well, the Whalen case, the
14 Nixon case, and to some extent, the Reporters Committee
15 case refer to this concept of privacy. And they are, in
16 fact, vague, but they do talk about the concept of
17 privacy as being the right to control information about
18 oneself.

19 And -- and both -- and all of the --

20 JUSTICE SCALIA: I mean, I like that, but I
21 just don't see it anywhere in the Constitution. That's
22 all I'm taking about.

23 MR. STORMER: Well, I -- there -- those
24 cases, in fact, do not refer to a term called
25 "informational privacy." Those terms have grown from

1 the various cases that have flowed from the
2 determinations in Whalen and Nixon and, to some extent,
3 Reporters Committee.

4 JUSTICE SOTOMAYOR: So that right is subject
5 to what level of scrutiny? Is it always strict
6 scrutiny? And how do you square Whalen and Nixon's
7 balancing with strict scrutiny?

8 MR. STORMER: The -- the standard would
9 be -- I think the appropriate standard was applied by
10 the Ninth Circuit, which is a legitimate state interest
11 narrowly tailored to meet that need.

12 In this case, there is some -- like the Von
13 Raab case, which is not cited in our brief but which is
14 a Fourth Amendment case, the -- this Court used a
15 compelling state interest standard for a Fourth
16 Amendment invasion. And in that case, the Court
17 remanded on the issue of whether or not the positions
18 involved classified or sensitive materials.

19 JUSTICE BREYER: So what is your view of
20 what the liberty -- you're saying that the words in the
21 Constitution that protect the right that you claim was
22 violated are the words, "No person shall be" -- I
23 guess -- "deprived of life, liberty, or property,
24 without due process of law." I guess you mean the word
25 "liberty."

1 MR. STORMER: That's correct.

2 JUSTICE BREYER: All right. And in your
3 words, it is liberty -- define it. Liberty to what?

4 MR. STORMER: Liberty to control information
5 about oneself. The liberty to --

6 JUSTICE BREYER: There is a right to liberty
7 to control information about oneself?

8 MR. STORMER: Without governmental
9 intrusion.

10 JUSTICE BREYER: All right. And all
11 information? Some information?

12 MR. STORMER: Well, there --

13 JUSTICE BREYER: Liberty -- there's a
14 liberty to control all information? Protected from --
15 from what? From the state? The state doesn't have a
16 right to give you any -- get any information about you?
17 On a driver's license? It's -- what? When does it come
18 into play?

19 MR. STORMER: It comes into play when the
20 government, the state, seeks to intrude and obtain
21 information from an individual. The -- the --

22 JUSTICE BREYER: So the fact that the
23 government says -- I go and I want my driver's license,
24 and they say fill out the form, we want to see how
25 you -- if you can drive or not, that potentially could

1 violate the Constitution?

2 MR. STORMER: Well --

3 JUSTICE BREYER: Potentially. It might not,
4 because it might be justified, but each such case would
5 have to be justified. Is that -- is that your theory?

6 MR. STORMER: Any intrusion into private
7 lives would have to have some --

8 JUSTICE BREYER: It says "liberty." The
9 liberty, you said, was liberty to control information
10 about yourself.

11 MR. STORMER: That was the --

12 JUSTICE BREYER: So I want to know how that
13 works. Every time anyone in the Government asks a
14 question about you personally -- of course, it wouldn't
15 be unconstitutional -- but every time it would have to
16 be a justified thing; is that -- is that your theory?
17 I'm just asking.

18 MR. STORMER: That -- yes, it is.

19 JUSTICE SOTOMAYOR: So that's all
20 information about yourself?

21 MR. STORMER: Well --

22 JUSTICE SOTOMAYOR: I think what Justice
23 Breyer is getting to and that I'm trying to figure out
24 is you've used the word "privacy." What does privacy
25 relate to?

1 MR. STORMER: Privacy relates, in this case,
2 to the --

3 JUSTICE SOTOMAYOR: No, I'm talking
4 about -- answer his broad question, which is -- you've
5 defined the constitutional right to information about
6 yourself.

7 MR. STORMER: Correct.

8 JUSTICE SOTOMAYOR: Is that all information
9 about yourself, including your date of birth, your
10 Social Security number, your -- where you live, where
11 you've gone to school, who your friends, who your
12 references are? Because as broadly as you've defined
13 that, it would include all of that.

14 MR. STORMER: It -- the -- the nature of
15 what is included can be intruded upon based upon a
16 governmental need. So if there's a rational basis for
17 knowing Social Security numbers, driver's license,
18 census information, that type of information, then --
19 then there's not an issue.

20 CHIEF JUSTICE ROBERTS: So this gets back to
21 Justice Sotomayor's earlier question. You just said if
22 there is a rational basis, so is that the test?

23 MR. STORMER: The test --

24 CHIEF JUSTICE ROBERTS: No matter what type
25 of information? I suppose it's harder to show a

1 rational basis when you get into certain areas that --
2 that concern you, but is it a rational basis test?

3 MR. STORMER: In this case, I think it's a
4 legitimate state interest, narrowly tailored to meet
5 that interest, Your Honor. It's --

6 CHIEF JUSTICE ROBERTS: But in the case of a
7 date of birth for a driver's license, you say it's
8 rational basis?

9 MR. STORMER: Yes.

10 JUSTICE BREYER: And so, what -- how do we
11 decide? I'm a little interested, if you could spend 2
12 or 3 minutes elaborating this.

13 A number of laws, Federal laws -- I imagine
14 the regulations fill this room, and I think many --
15 maybe more, maybe several rooms. And many of them
16 involve asking people for information. And the number
17 of forms that ask people for information, I guess, about
18 themselves, might fill several rooms. And I can imagine
19 in a country of 300 million people, you would find
20 someone objecting to many of the questions.

21 And so, how is the system supposed to work,
22 in your view, where judges will decide whether a
23 particular question -- I'm not saying you're wrong. I
24 just wanted to get an idea from you as to how this legal
25 system works, where any question asked by the Government

1 about a person is potentially subject to challenge as
2 unconstitutional. You and I will agree that many are
3 fine. But you are worried about some that aren't fine.

4 How does it work, the system, distinguishing
5 the ones from the other?

6 MR. STORMER: Well, this Court has done much
7 of that already in a whole history of cases:
8 Contraception, procreation, marriage, sexual relations,
9 family relations --

10 JUSTICE SOTOMAYOR: The fundamental rights
11 issue that the Sixth Amendment identified, are those the
12 questions that are subject to that greater scrutiny?

13 MR. STORMER: The -- the rights that go --
14 the questions that go to those types of -- which could
15 elicit that type of information.

16 For instance, on Form 42, if they said, tell
17 us any adverse information you have about this person,
18 which includes any other matters. This could be -- they
19 could respond with saying, well, I don't like the way
20 he -- how many kids he has; I don't like his religion; I
21 don't like his sexual practices.

22 JUSTICE GINSBURG: But isn't that question,
23 that kind of open-ended question, routinely used in
24 employment situations? That is, the employer wants to
25 know is there any adverse information about this person?

1 Doesn't know which question to ask, because there's a
2 whole -- many things that could be relevant.

3 So are you suggesting that that kind of
4 question is off-limits to the Government, although it is
5 routinely used in other employment sectors?

6 MR. STORMER: It is not routinely used in
7 employment sectors where there is allowed to inquiry --
8 inquiry into non-employment-related --

9 JUSTICE GINSBURG: Well, it has a legend on
10 the top. Everything that we are asking you is meant
11 to -- to determine suitability for employment. So they
12 want to find out information relevant to suitability for
13 employment.

14 MR. STORMER: And for security clearances.
15 Those are the two issues.

16 JUSTICE KENNEDY: Well, I -- I have to agree
17 with the implication of Justice Ginsburg's remark, at
18 least what I imply from it.

19 Look at the private employment sphere. It
20 seems to me that for a sensitive position, a bank who
21 has people taking care of -- its employees taking care
22 of other people's money, or the medical profession, that
23 the employer could be sued and would be remiss if it did
24 not ask this question.

25 Do you know anything adverse about this

1 person whom we're going to hire for a very sensitive
2 position?

3 MR. STORMER: That --

4 JUSTICE KENNEDY: This is done all the time,
5 and we do it with -- a judge said below, with our law
6 clerks.

7 MR. STORMER: That would be exactly my
8 point, Your Honor. It is in those situations where
9 there are sensitive issues, you're allowed to inquire
10 based on the need.

11 But here, they are inquiring -- the snack
12 bar worker, the -- the bus driver, the gift shop
13 operator, are -- are required to respond to these
14 questions. The GS-4 Interior Department clerk. The
15 Government's position is all of those are subject to
16 this same type of inquiry.

17 JUSTICE ALITO: I don't see what the
18 alternative, as a practical matter, is to asking this
19 sort of open-ended question. The -- the alternative
20 would seem to be to try to compile a list of every
21 possible thing that the -- the person might do that
22 would raise serious questions about suitability for
23 employment or would be disqualifying for employment.
24 And that seems to be impractical.

25 There's almost no limit to the -- the sorts

1 of things that might be relevant in that respect; isn't
2 that right?

3 MR. STORMER: This goes to the very basic
4 question of why does the Government need to know this
5 information for these individuals, most of whom have
6 been there for 20 to 30 years? The Government can't
7 show a single instance of any of these individuals doing
8 anything that would require any of the type of
9 scrutiny --

10 JUSTICE GINSBURG: Are you then saying that
11 these people have to be grandfathered or grandparented
12 because they worked for 20 years --

13 (Laughter.)

14 JUSTICE GINSBURG: -- without --

15 MR. STORMER: I am not, Your Honor. But the
16 Government has some burden to show a need to inquire
17 into these privacy areas. It needs to know if you have
18 gone to the Betty Ford Clinic.

19 JUSTICE GINSBURG: But you are making a --
20 you said that these people have worked there for
21 20 years. Are they different from the new employee?
22 Are you suggesting it's okay for the new employee, but
23 not okay --

24 MR. STORMER: I am not.

25 JUSTICE GINSBURG: -- for the person who is

1 already in the job?

2 MR. STORMER: I -- I am not. The -- the
3 difference between this case and, ultimately, what was
4 allowed in both Whalen and Nixon -- excuse me,
5 particularly in Whalen -- is that there was some
6 overarching societal need to have this information.

7 JUSTICE ALITO: Well, suppose the person who
8 works at the -- at the gift shop or the snack bar -- I
9 think that's what you mentioned -- has a big sign on his
10 front lawn that says, "I hope the space shuttle blows
11 up."

12 Is that information the Government has a
13 legitimate reason to get?

14 MR. STORMER: I would agree that -- that in
15 that instance, "I hope the space shuttle blows up,"
16 would certainly implicate some First Amendment issues,
17 but the Government should know that information.

18 JUSTICE ALITO: And now, what's the
19 alternative to acquiring that information through an
20 open-ended question? You have to have a specific
21 question on the form: Does this individual have a big
22 sign on his front lawn that says --

23 (Laughter.)

24 JUSTICE ALITO: -- "I hope the space shuttle
25 blows up"?

1 MR. STORMER: I wouldn't think that that
2 would be needed. I think that --

3 JUSTICE ALITO: Do you see what I am getting
4 at? I don't see how you are going to do this, other
5 than by asking an open-ended question.

6 MR. STORMER: Only if you need to know the
7 answers. And for the snack bar worker or the GS
8 clerk-typist, for those types of people who have no
9 access to sensitive information, do not -- it can -- the
10 definition here is that these are no- or low-risk --
11 they are low-risk employees, which is defined as, if
12 they misuse their position, they will have little or no
13 impact on the agency mission.

14 So we know that these questions are being
15 asked of people who, if they completely misused their
16 position, there will be no impact --

17 CHIEF JUSTICE ROBERTS: So -- just to -- I'd
18 like to get back to Justice Breyer's question.

19 So now you not only have to decide which
20 questions -- they can challenge any question they want
21 and say this isn't pertinent, but you also have to
22 categorize which employees are being asked that
23 question.

24 This is a -- SF means "standard form,"
25 right?

1 MR. STORMER: It does.

2 CHIEF JUSTICE ROBERTS: Well, that -- you
3 know, it's a big government, and they can't tailor every
4 inquiry, every form, to the individual applicant.

5 MR. STORMER: It -- it can to the positions.
6 This -- this -- what is being done now, if they've done
7 70,000 inquiries, that means -- and 128 issues arose,
8 that means a whole host of people, over 69,000 people,
9 have had to give up information that otherwise they
10 would not have to give up --

11 JUSTICE GINSBURG: Are you suggesting
12 that this is no good for Government employment? You
13 were dealing with a contractor here, but this form, as I
14 understand it, has been used for -- for many years for
15 standard Government employment.

16 Is it -- are they okay? And for
17 nonsensitive positions, are you -- are you arguing just
18 Government contractor or are you saying even for the
19 Government employee, the person who's hired to work at
20 the snack bar in the Senate, let's say, the Government
21 can't ask these questions?

22 MR. STORMER: If I understand Your Honor's
23 question, and I apologize, I -- I think this cannot be
24 asked of -- these questions cannot be asked of people
25 for whom the Government does not have a justifiable need

1 to know that information.

2 JUSTICE SCALIA: But we can handle those
3 details. My goodness, it's all right there in the
4 Constitution. And we can decide what -- what employees
5 have to know what, and what questions you can ask them,
6 and how much privacy is too much privacy, right?

7 MR. STORMER: Well --

8 JUSTICE SCALIA: It's a piece of cake.

9 MR. STORMER: The Government is -- claims to
10 be acting as the employer here. In fact, it is not. It
11 is -- it's once or twice removed. But assuming that the
12 Government is the employer, there is a massive amount of
13 waste that is generated by this form.

14 JUSTICE GINSBURG: You are -- you are
15 attacking these forms for all Government employment, not
16 just the contractors?

17 MR. STORMER: I -- I don't -- it -- I think
18 it would apply to all of those people who are in
19 nonsensitive positions. This is the Government's
20 definition; it's not our definition. We chose the
21 Government's definition.

22 And if it is a low-risk or a no-risk
23 employee, then the Government doesn't have a need to
24 know. A private employer could not --

25 CHIEF JUSTICE ROBERTS: But you don't

1 know -- you don't know if it's a low-risk employee until
2 you find out what he -- he or she is like or what the
3 neighbor thinks. Well, you know, he keeps practicing
4 planting bombs or something. I mean, then he becomes a
5 high-risk employee. You don't know until you get the
6 information. That's the reason you ask for it.

7 MR. STORMER: In the context of these
8 employees for this particular case, we absolutely know,
9 because the Government went through, and of the 7,500
10 employees there, it categorized 97 percent as low- or
11 no-risk employees. So, we know in this context where
12 they are already employed and it's just a badging
13 procedure. What the Government did here --

14 JUSTICE SCALIA: Excuse me. I thought -- I
15 thought that your friend said that the badge enables you
16 to get within 10 feet of the shuttle?

17 MR. STORMER: I don't know that for a fact.
18 I do know that --

19 JUSTICE SCALIA: Well, do you contradict
20 that? And if it's so, how can you say that these people
21 are low-risk employees?

22 MR. STORMER: Because the Government says
23 they are low- or no-risk employees.

24 This is a campus atmosphere. I have been
25 there. I have seen it. If you want -- if I want to go

1 on, I just call up Dr. Nelson and say, can you get me
2 on? If I'm on there, and my car breaks down and I call
3 up and I say can the AAA auto come on, I just call the
4 gate and the AAA auto person, they say, yeah, just let
5 him in. The -- the people who have -- bring supplies on
6 they just come on. This is a campus where they don't
7 have --

8 JUSTICE SCALIA: Does al-Qaeda know all this
9 stuff?

10 MR. STORMER: I'm sorry.

11 JUSTICE SCALIA: Does al-Qaeda know this?

12 (Laughter .)

13 MR. STORMER: Well, the interesting response
14 to that, Your Honor, is that it wouldn't matter if they
15 knew this, because it's open, transparent science by a
16 civilian agency in a campus atmosphere. This is not
17 a -- weapons, national security --

18 CHIEF JUSTICE ROBERTS: What you're
19 saying -- what you're saying is it may not make much
20 sense to have the people here fill out Standard Form 85,
21 but the Government can't tailor its open -- opening
22 security form to people that -- you know, maybe down the
23 road at a different NASA laboratory, they do work on
24 more sensitive information. It's a standard form. The
25 Government has to do things in a standard way.

1 MR. STORMER: And the Government has a form
2 for those people who work in classified information.
3 That's SF-85P, SF-85S, and SF-86. The Government can
4 standardize, and when it acts as the employer, it has an
5 obligation, because it can't take both it's ability and
6 authority as the Government and -- and overreach into
7 the private lives of its citizens. The questions that
8 are being asked here would not be allowed for a private
9 employer --

10 JUSTICE GINSBURG: I'm -- I'm very surprised
11 to hear that. I thought that -- that it -- there were
12 in -- in the private sector similar questions.

13 MR. STORMER: Similar but not questions that
14 would go -- you couldn't, as a private employer, say you
15 have to turn over your medical records, you have to turn
16 over --

17 JUSTICE GINSBURG: Where does it say you
18 have to turn over your medical records?

19 MR. STORMER: That's in SF -- SF-85 page 6,
20 which is the release. And all of this has to be
21 inquired into --

22 CHIEF JUSTICE ROBERTS: Under what -- under
23 what law could you -- a private employer not ask for
24 those records?

25 MR. STORMER: In the State of California

1 under the right to privacy.

2 CHIEF JUSTICE ROBERTS: No, we're talking
3 about under general federal law.

4 MR. STORMER: Most -- general federal law, I
5 cannot answer that.

6 CHIEF JUSTICE ROBERTS: But it's a matter of
7 statutory law.

8 MR. STORMER: Yes -- well, in some States
9 there's a -- where there's a privacy right.

10 JUSTICE KENNEDY: Question 42, do you
11 have -- pardon me. Question 7 on Form 42, the -- the
12 standard one -- do you have any adverse information
13 about this person's employment, residence, or activities
14 concerning, and so forth -- a violation of the law? Are
15 you saying that private employers cannot ask that
16 question?

17 MR. STORMER: They can't ask the question --

18 JUSTICE KENNEDY: The prospective private
19 employer?

20 MR. STORMER: -- in the context of the
21 release which is SF-85 page 6, which requires that you
22 release your private records, extensive records,
23 residential, retail businesses, where you shop, your
24 educational, your --

25 JUSTICE KENNEDY: I -- I'm asking whether or

1 not a private employer can ask third persons the
2 question that's at Form 42 question 7. I thought your
3 representation to me was that private employers cannot
4 ask that question.

5 MR. STORMER: I -- I -- if I said that, Your
6 Honor, I misspoke. The question goes --

7 JUSTICE KENNEDY: But that was enjoined by
8 the court below; was it not?

9 MR. STORMER: It was.

10 JUSTICE KENNEDY: All right.

11 MR. STORMER: Question 7 talks about
12 financial integrity, mental and emotional stability,
13 general -- general behavior or conduct, or other
14 matters. If a private employer, in many States, goes
15 into non-employment-related issues, it's -- it's
16 contrary to --

17 JUSTICE BREYER: What is your view on that
18 question? You know, there's a famous, funny example
19 that supposedly may be untrue. Senator Hruska used to
20 ask and say -- in giving a reference, he would write
21 about someone, you'll be lucky if you can get Smith to
22 work for you. That's --

23 (Laughter.)

24 JUSTICE BREYER: That's the kind of thing
25 that you might want to know, and despite the ambiguity

1 there, and it seemed to me that question 7 sort of drove
2 at that. And so -- but they did enjoin it. So, in your
3 view, is that aspect of the injunction wrong?

4 MR. STORMER: No.

5 JUSTICE BREYER: All right, then, if it's
6 right, why is it right? Because it seems to me the
7 basic thing any employer would want to know is whether
8 I'm lucky to get this person to work for me, that kind
9 of thing.

10 MR. STORMER: Any employer can ask issues
11 that are employment-related and based upon the nature of
12 the job. You can ask those questions, but any employer
13 can't require, as a condition of employment, that you
14 sign a release that gives them all manner of information
15 as to where you shop, how you shop --

16 JUSTICE BREYER: I mean, what is the
17 specific thing about question 7 that you think is
18 unlawful or should be changed? What words do you object
19 to in that question?

20 MR. STORMER: Well, other matters, general
21 behavior or conduct, certainly.

22 JUSTICE BREYER: All right. So they cannot
23 ask, do you have any information about this person's
24 employment, residence, or activities concerning general
25 behavior or conduct or other matters? Now, I am an

1 employer and I'd like to find out if he's going to do a
2 good job. So what am I supposed to say? There doesn't
3 seem to be a place here other than that to get into that
4 question.

5 MR. STORMER: That's because these -- this
6 question for the types of situations is not needed. The
7 question that is needed is, what are the characteristics
8 that you feel he has for this job?

9 JUSTICE BREYER: I see. I see.

10 JUSTICE SCALIA: Why do you say a private
11 employer could not ask a question of such detail? Why
12 could not --

13 MR. STORMER: Primarily because of the
14 release. That's the sixth page of Standard Form 85.
15 That release just allows the Government --

16 JUSTICE SCALIA: Why could a private
17 employer not -- not do it?

18 MR. STORMER: Because, in virtually every
19 State, there are laws requiring the disclosure of
20 private information --

21 JUSTICE SCALIA: Well, you mean that
22 legislatures take care of these matters? I find it
23 curious that in order to establish a Federal
24 constitutional right, which turns this area over to this
25 Court, you invoke laws that have been democratically

1 enacted by State legislatures. I mean, if indeed that's
2 -- that's the criterion, maybe you don't need us.

3 MR. STORMER: I -- the reason I invoke that
4 is because the Government has stated that any private
5 attorney could ask these questions, and that's a
6 misstatement of the law in most States.

7 JUSTICE ALITO: May I ask you this question
8 about the question on drug treatment? Would it be
9 unconstitutional for the Government to take the position
10 that to require an employee or applicant for employment
11 to disclose whether this individual had violated Federal
12 or State drug laws and take the position that if the
13 person gave an affirmative answer that was
14 disqualifying, would that be unconstitutional?

15 MR. STORMER: If they've said I violated
16 State or Federal laws, not on its face so long as if it
17 said voluntarily you may show mitigation that -- that
18 would show that this is not a problem that would make
19 you unfit for the job.

20 JUSTICE ALITO: So they could -- they could
21 say, have you bought, sold, used drugs in violation of
22 Federal or State law? If so, you're disqualified,
23 unless you can show that you have had treatment. And
24 then it's up to you to disclose whether you've had
25 treatment.

1 MR. STORMER: That's correct.

2 JUSTICE ALITO: What's really the difference
3 between that regime and this -- and what you have here?

4 MR. STORMER: The difference is here is
5 because it is compelled. It's a compelled disclosure
6 and not offering you the opportunity to make a showing.
7 And in this concept, the appeal right that you have from
8 this is not a robust appeal right that was described.
9 It's a very limited appeal that's internal to the
10 department, that does not have a right to confront or
11 cross-examine --

12 JUSTICE GINSBURG: Can I ask you to clarify
13 your understanding of what has been enjoined? We know
14 it's easy for Form 85. For Form 42, you mentioned the
15 releases. I thought that the Ninth Circuit's order
16 covers parts of question 7 and perhaps question 8. I
17 didn't see -- is there something, maybe I missed it,
18 that says they can ask for release of the records?

19 MR. STORMER: There was in the emergency
20 order specific reference to the -- to the release.
21 There was not in the final order, but the order -- the
22 question can't -- has to be read in the context of the
23 release, because that's how they get to -- if you go to
24 the Betty Ford Clinic --

25 JUSTICE GINSBURG: But they didn't say,

1 Government, you can't ask for the release.

2 MR. STORMER: They did not.

3 JUSTICE GINSBURG: They said you can't ask
4 open-ended questions.

5 MR. STORMER: That's correct. They did not
6 say that, but it has to be implicit in their ruling
7 because in many of the cases --

8 JUSTICE GINSBURG: If somebody is going to
9 be enjoined, I mean, it can't be implicit in the ruling
10 if you are enjoined. Because it has been stayed, you
11 don't have a formal order, but you can't say, well, it's
12 implicit in the, how many page, opinion.

13 MR. STORMER: The -- well, in the court
14 below, for instance, the argument that the Government
15 made was that they needed to have the medical records,
16 not that they just needed this information, that they
17 needed to have the medical records.

18 The question that logically flows is, what
19 can they do with this information once they learn that
20 you had counseling? Then I guess they can ask you who
21 the counsellor was, what you told the counsellor, what
22 was the purpose of --

23 JUSTICE GINSBURG: As I understand this
24 process, this is not an oral interview. It's not -- you
25 fill out a form, you meet somebody, and they ask

1 follow-up questions. This is -- this handled on the
2 papers, right?

3 MR. STORMER: It's handled -- first you
4 reveal the information, and then there are 22 approvers
5 at JPL, civilians who are not employed by NASA. They
6 review it; then it goes to NASA and then there's a whole
7 series --

8 JUSTICE GINSBURG: Yes. But is there -- is
9 there an oral interview in this process?

10 MR. STORMER: There is not.

11 JUSTICE GINSBURG: So then they wouldn't
12 say -- it says here, so I'm going to ask this, that, and
13 the other thing. There's this -- it's a
14 written procedure.

15 MR. STORMER: I may have misspoken. It
16 doesn't preclude an oral interview. I am not aware of
17 oral interviews having been made or taken.

18 JUSTICE KENNEDY: You said there are 22
19 people at JPL that are involved in the employment?

20 MR. STORMER: There are 22 in the -- the
21 Government has approved 22 so-called approvers, who are
22 at JPL, who look over -- who are eligible to look over
23 these forms and the responses to the forms.

24 CHIEF JUSTICE ROBERTS: What do you
25 understand the scope of the preliminary injunction to

1 be? Does it bar the solicitation of this information
2 throughout the Ninth Circuit or only with respect to
3 JPL?

4 MR. STORMER: At this point, it only applies
5 to -- well -- this is not before the -- part of the
6 record, but when it went back to the district court, the
7 district court and all parties agreed that it would only
8 apply -- HSPD-12 would be limited to these 28
9 individuals, that investigation.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 General Katyal, you have 4 minutes.

13 REBUTTAL ARGUMENT OF NEAL K. KATYAL

14 ON BEHALF OF THE PETITIONERS

15 GENERAL KATYAL: Justice Ginsburg, you had
16 asked earlier whether this was a narrow decision on just
17 a couple of questions, and I think that the argument
18 that you just heard from my friend illustrates that it's
19 not. He asks for a, quote, "free-standing right to
20 control information" --

21 JUSTICE GINSBURG: But whatever he asks, we
22 are reviewing a judgment.

23 GENERAL KATYAL: Right. And the judgment --

24 JUSTICE GINSBURG: And the judgment is not
25 the universe; it's certain questions can be asked.

1 GENERAL KATYAL: And the judgment is based
2 on the following rationale -- this is from the Petition
3 Appendix at page 18a from the Ninth Circuit. "If the
4 Government's actions compel disclosure of private
5 information, it has the burden of showing that its use
6 of the information would advance a legitimate state
7 interest and that its actions are narrowly tailored to
8 meet the legitimate interest."

9 Now, that reasoning was used to invalidate a
10 question, as Justice Kennedy said, on Form 42, that
11 employers ask all the time. Banks ask it and the like.
12 And it's a -- and it's used to invalidate parts of a
13 standard form that the Government uses day in and day
14 out and that employers generally use in order to make
15 employment decisions.

16 JUSTICE SOTOMAYOR: Are you conceding you
17 can't meet that standard, or are you saying that the
18 Ninth Circuit misapplied that standard?

19 GENERAL KATYAL: Well, no, we're not
20 conceding that at all. I do think we would meet the
21 standard, but our point is it's the same point as in
22 Engquist, in the Chief Justices's opinion in Engquist v.
23 Oregon, which is forcing the Government to have to march
24 into court every time and justify a question here or an
25 employee there or soup clerk here or whatever, all of

1 those different inquiries pose practical burdens on the
2 ability of the Government to operate. And so --

3 JUSTICE SOTOMAYOR: Do you think there's
4 something wrong with the Government having to explain
5 why it seeks information? I mean, I would think that
6 would be fairly simple in virtually every situation.

7 GENERAL KATYAL: I think --

8 JUSTICE SOTOMAYOR: I ask that question
9 because that begs the question of can you ask anything
10 you want regardless of why?

11 GENERAL KATYAL: I think that political
12 process ensures that the Government generally has to ask
13 -- has answer that question writ large, but in order for
14 the Ninth Circuit's reasoning to apply, it would permit
15 any individual person here or there to ask the
16 question --

17 JUSTICE GINSBURG: I don't see how that's so
18 because, at least if you're in the Ninth Circuit, you
19 know that the Ninth Circuit has blessed all the
20 questions on that form but one.

21 GENERAL KATYAL: Well, that's only --

22 JUSTICE GINSBURG: So, I mean, you could
23 raise the question, but you'd be out of court in a
24 minute.

25 GENERAL KATYAL: Justice Ginsburg, I think

1 that's only because the challenge -- or the Petitioners
2 here only challenge certain questions. Now, I could
3 imagine other petitioners challenging other questions.

4 JUSTICE GINSBURG: I thought they did in the
5 lower court but abandoned it here, challenge the
6 question about the drug use.

7 GENERAL KATYAL: The drug use piece, but I
8 could imagine all sorts of inquires about other aspects
9 of the form. And, indeed, the rationale, the language
10 that I just read to you is a road map for anyone to be
11 able to come in and say, well, this -- this question
12 isn't -- isn't necessary for me because I got a
13 background clearance before, I'm rehired, or whatever.
14 And it would be a huge practical burden in the same way
15 as recognizing the cause of action in Engquist was a
16 practical burden. Instead, we think what the Court
17 should do here is what it did in Whalen, which is
18 recognize governments collect information all the time,
19 collect --

20 JUSTICE ALITO: How much of the information
21 that's at issue here can be released and to whom?

22 GENERAL KATYAL: The information that can be
23 collected that's released here is governed by the
24 Privacy Act. And so there are -- the appendix to our
25 brief lists out precisely to whom they could be released

1 to, and that has been around since 1975. We've seen
2 virtually no complaints about the Government disclosing
3 this type of background information on the SF-85.

4 JUSTICE GINSBURG: Is that also within the
5 Government itself? I know the Privacy Act says the
6 Government can't disclose, but how about checks -- I
7 mean, we have a vast government -- checks about
8 circulating the information within the Government?

9 GENERAL KATYAL: If it is for a -- if it is
10 to further the Government purpose for which the
11 information is collected, it can be distributed to other
12 folks in the Government. There are restrictions on
13 that, so -- and they're specified in the Privacy Act,
14 and they're quite extensive. And to the extent the
15 Court is concerned that there is something that isn't
16 robust enough in the Privacy Act, we suggest that would
17 -- that could wait for an as-applied challenge down the
18 road when information is disclosed.

19 And we don't think it will, but if, heaven
20 forbid, that happens, that's the basis for an as-applied
21 challenge down the road. But here what they're asking
22 you to do is invalidate questions and forms that the
23 Government asks all of its employees and now just wants
24 to ask contractors.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, General.

2 The case is submitted.

3 (Whereupon, at 11:03 a.m., the case in the

4 above-titled matter was submitted.)

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