No. 09-530

In The
Supreme Court of the United States

NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION, *et al.*,

Petitioners,
v.

ROBERT M. NELSON, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE OPEN-ENDED QUESTIONS ON FORM 42 AND SUBSEQUENT INTERVIEWS GREATLY EXCEED PERMISSIBLE INQUIRIES ABOUT CURRENT EMPLOYEES USED OR AVAILABLE TO PRIVATE EMPLOYERS 3

A. The Form 42 Inquiries Must Be Examined in Their Context; Respondents Are Current Employees Not Applicants Of A Private Sector Employer 3

B. The Government's Argument That Such Inquiries Are Lawful Based On Investigations of Government Employees Or Job Applicants Generally Is Irrelevant 4

II. OPEN-ENDED QUESTIONS, WHERE USED IN PRIVATE SECTOR BACKGROUND CHECKS, ARE NARROWLY DRAWN AND TIED TO LAWFUL INQUIRIES OF JOB RELATED MATTERS 4

III. FORM 42'S OPEN-ENDED QUESTIONS AND THE FOLLOW-UP INTERVIEWS ARE SUBSTANTIALLY LIKELY TO ELICIT INFORMATION IRRELEVANT TO ANY LEGITIMATE GOVERNMENT INTEREST..... 6

A. The Form 42 Instructions to Recipients are Wrong in that Respondents are Not Seeking Government Employment 7

B. Recipients of Form 42 Must Guess at What "Suitability for a Security Clearance" Means 8

IV. FORM 42'S OPEN-ENDED QUESTIONS AND THE FOLLOW-UP INTERVIEWS ARE SUBSTANTIALLY LIKELY TO ELICIT INFORMATION WHICH VIOLATES FEDERAL AND STATE STATUTES FORBIDDING DISCLOSURE 8

A. The Americans with Disabilities Act 8

B. Title VII of the Civil Rights Act 10

C. The Fair Credit Reporting Act 11

D. State Law 12

E. Tort Liability 12

V. THE GOVERNMENT'S CITED EXPERT AUTHORITIES DO NOT SUPPORT OPEN-ENDED QUESTIONS NOT TETHERED TO LAWFUL INQUIRY 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES:

Acuff v. IBP, Inc., 777 F. Supp. 2d 914 (C. D. Ill. 1999) 13

Cossette v. Minnesota Power & Light, 188 F. 3d 964 (8th Cir. 1999) 9

Griffin v Steeltek, Inc., 160 F. 3d 591 (10th Cir. 1998) 8

Nathanson v. Medical College of Pennsylvania, 926 F. 2d 1368 (3d Cir. 1991) 9

Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F. 3d 1221 (10th Cir. 1997) 8

STATUTES:

15 U.S.C. §1681, *et seq.* 11

42 U.S.C. §§2000e et.seq 10

42 U.S.C. §2000e(k) 10

42 U.S.C. §§2000e-2 10

42 U.S.C. §12102(1)(B) 9

42 U.S.C. §12112(d)(4) 8

42 U.S.C. §12112(d)(4)(B) 9

42 U.S.C. §12112(b)(2) 9

California Government Code §12940(f) 12

REGULATIONS:

29 C.F.R. §1630.2(g) 9

29 C.F.R. §1630.13(a), (b) 3

29 C.F.R. §1630.14 9

29 C.F.R. §1630.14(a), (b) and (c) 3

29 C.F.R. §1630.13(b) 9

TREATISES

Restatement (Second) of Torts 13

MISCELLANEOUS:

Barada & Laughlin, Reference Checking for Everyone: What You Need to Know to Protect Yourself, Your Business and Your Family (2004) 5, 14-15

Muller, The Managers Guide to HR: Hiring, Firing, Performance Evaluations, Documentation, Benefits, and Everything Else You Need to Know (2009) 5, 14

Dickinson, Hiring Smart: How to Conduct Background Checks (1997) 5, 14

INTEREST OF AMICUS CURIAE

The California Employment Lawyers Association ("CELA") is a statewide affiliate of the National Employment Lawyers Association ("NELA") and represents over 900 lawyers, law clerks, paralegals, mediators and arbitrators who practice employment law in California. CELA represents its members in advocacy, litigation and education in all areas of employment law including privacy issues affecting public and private sector employees. CELA submits this amicus brief in support of Respondents.[1]

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[1] No counsel for a party authored this brief in whole or in part and no such counsel, party or person other than amicus curiae, their members or their counsel, made a monetary contribution to fund its preparation and submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Petitioners aver that the open-ended inquiries on Form 42 and the related interviews are not essentially different from what routinely occur in the private sector. (Pet. Br. 38, 45). The reality is that private sector employers face severe legal and practical limitations in employee inquiries and reference interviews. Utterly prohibited and typically avoided are the sort of sweeping boundless questions that could easily and forseeably invite information having nothing to do with performance in the workplace. This is exactly the problem with the scope of the government's queries here, and why private sector employers are well-advised not to engage in the kinds of questions and interviews used to evaluate Respondents here.

ARGUMENT

I. THE OPEN-ENDED QUESTIONS ON FORM 42 AND SUBSEQUENT INTERVIEWS GREATLY EXCEED PERMISSIBLE INQUIRIES ABOUT CURRENT EMPLOYEES USED OR AVAILABLE TO PRIVATE EMPLOYERS.

A. The Form 42 Inquiries Must Be Examined In Their Context: Respondents Are Current Employees Not Applicants of A Private Sector Employer.

Petitioners' brief blurs important distinctions about the status of Respondents. In the employment context, whether one is a current employee or a job applicant bears significantly on what type and level of employer investigation is permissible. Compare the medical inquiries available under 29 C.F.R. § 1630.13(a) (applicants) with (b) (employees) and 1630.14(a) and (b) (applicants) with (c) (employees).

The relevant inquiry in this case concerns what investigation is permitted into the backgrounds and lives of current employees against whom there has been no allegation of misconduct, poor job performance, drug usage, workplace sexual impropriety or government risk. Notwithstanding the implications of low level security clearance and work on a government contract discussed in

Res. Br. 46-48, Respondents are private sector not government employees into whose lives employers have limited access. Respondents have neither bargained away their privacy rights to obtain government employment nor acquiesced to any sweeping government investigation by waiving rights to gain contract work.

B. The Government's Argument That Such Inquiries Are Lawful Based On Investigations of Government Employees Or Job Applicants Generally Is Irrelevant.

Much of the government's brief analyses, without distinction, governmental investigation into applicants for government employment (Pet. Br. 35) or background investigations of job applicants in the public and private sector generally. (Pet. Br. 34-35, 45.) These points are irrelevant. The proper focus is on current employees, working for a private sector employer under a government contract.

II. OPEN-ENDED QUESTIONS, WHERE USED IN PRIVATE SECTOR BACKGROUND CHECKS, ARE NARROWLY DRAWN AND TIED TO LAWFUL INQUIRIES OF JOB-RELATED MATTERS

As explained *infra*, private sector employer inquiries into the backgrounds, health and lives of current employees are very circumscribed. Federal,

state and common law create a matrix of limitations on any such inquiry. Employers cannot cast a net of open-ended questions, such as those contained in Form 42, in the hopes that some lawful or usable information may be captured along with everything else. Regardless of whether the employer acts on information irrelevant to lawful concerns in the workplace, the damage is done through the very acquisition of non-work-related information.

For that reason, employers tailor their inquiries narrowly to elicit only legally permissible information. The issue is not whether to use open-ended questions, common in the workplace, but whether or not such questions are designed to elicit lawful performance-based responses. Even the human resource sources referenced by Petitioners caution employers to ask only validly job-related questions. See Barada & Laughlin, *Reference Checking For Everyone: What You Need to Know to Protect Yourself, Your Business and Your Family* (2004) pp. 52-53 ("Put in the most simple terms, if the question has nothing to do with job performance, don't ask it."); Muller, *The Managers Guide to HR: Hiring, Firing, Performance Evaluations, Documentation, Benefits, and Everything Else You Need To Know* (2009) pp. 204-205 (identifying "the okay four" questions which an employer can answer about a previous employee); Dickinson, *Hiring Smart: How to Conduct Background Checks* (1997) pp. 67-68 ("Do not ask questions about or that in-

vite comments regarding – race, sex, religion, national origin, disabilities or age, military service, bankruptcy, garnishments, discrimination complaints or lawsuits, union activities, sympathies etc." and with personal references "avoid topics implicating discrimination issues, such as religious affiliations, child care responsibilities, sexual orientation, prior arrests, use of alcohol, past drug use or known disabilities."

III. FORM 42'S OPEN-ENDED QUESTIONS AND THE FOLLOW-UP INTERVIEWS ARE SUBSTANTIALLY LIKELY TO ELICIT INFORMATION IRRELEVANT TO ANY LEGITIMATE GOVERNMENT INTEREST

A. The Form 42 Instructions to Recipients are Wrong in that Respondents are Not Seeking Government Employment.

Question 8 on Form 42 erroneously asks the recipient to provide information as to the person's suitability for government employment. Clearly this is wrong as applied to Respondents. Forseeably a reference pondering government employment would likely respond differently and with a heightened sense of caution than if requested to provide information on a private sector employee working with a low level security clearance on a government contract.

B. Recipients of Form 42 Must Guess at What "Suitability for a Security Clearance" Means

In addition to inaccuracy, Form 42 provides no definitions, standards or criteria for response. Recipients may or may not have any idea what the term "suitability for security clearance" means nor are they told that the Respondents have low level security clearance and what that means.

Form 42 thus begs the question for each recipient of what character, background, personal life or other characteristic he or she thinks a person should have to be suitable for government employment or to gain a security clearance (level unspecified). One can easily imagine one's prejudices or misinformation coloring these judgments. Gays and Lesbians could be susceptible to blackmail and therefore a security risk; Muslims could have sympathy for terrorists and therefore are not suitable; America is a Christian nation so all government employees with security clearances should be practicing Christians; a person with a given disease or disability is unsuitable; and a myriad of other impermissible criteria.

IV. FORM 42'S OPEN-ENDED QUESTIONS AND THE FOLLOW-UP INTERVIEWS ARE SUBSTANTIALLY LIKELY TO ELICIT INFORMATION WHICH VIOLATES FEDERAL AND STATE STATUTES FORBIDDING DISCLOSURE

As explained below, questions which are likely to elicit information either not bearing on job performance or protected from disclosure are beyond the pale of lawful employer inquiry. In the world of private employment, questions 6, 7 and 8 on Form 42 would never be asked because of the inherent likelihood that private, legally prohibited information would be revealed.

A. The Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") severely limits what an employer may learn about current employees either through inquiry or examination. § 102(c)(4) of the Act provides that covered entities shall not inquire whether an employee is an individual with a disability, or ask about the nature or severity of the disability, unless such inquiry is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4). *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F. 3d 1221, 1229-31 (10th Cir. 1997) (inquiring what prescribed drugs employees are using violates ADA); *Griffin v. Steeltek, Inc.*, 160 F. 3d 591, 593-

594 (10th Cir. 1998) (asking prospective employee about prior workers compensation claims or disability benefits violated ADA); *Cossette v. Minnesota Power & Light*, 188 F. 3d 964, 968-9 (8th Cir. 1999) (liability of past employer for sharing confidential medical information with prospective employer). While an ADA covered entity may make inquiry into the ability of an employee to perform job related functions (42 U.S.C. § 12112(d)(4)(B)), an employer cannot accomplish indirectly, through contract or other relationship, what the employer is prohibited from doing directly. 42 U.S.C. § 12112(b)(2). See also 29 C.F.R. § 1630.13(b) and 1630.14.

In the same vein, the ADA includes within its definition of "disability," having a record of a physical or mental impairment that substantially limits one or more of the major life activities of an individual. 42 U.S.C. § 12102(1)(B); 29 C.F.R. § 1630.2(g). Thus, as the Third Circuit has explained: "A person with a record of impairment can still qualify as a handicapped individual even if that individual's impairment does not presently limit one or more of that person's major life activities. Thus, for example, a person who has recovered from a history of mental or emotional illness, heart disease, or cancer may always be a handicapped individual under the statute. 45 C.F.R., pt. 84, App. A (1990)." *Nathanson v. Medical College of Pennsylvania,* 926 F. 2d 1368, 1382 (3d Cir. 1991).

As Respondents stated, one element of a claim under "prong 2" (history of impairment) of the ADA is employer knowledge. It therefore defies credibility that an employer would purposefully seek to learn about an employee's history of mental or emotional illness, heart disease, cancer or a myriad of other qualifying illnesses or injuries where the employee's current job performance was not an issue. Should these employees be disciplined or terminated in the future, they would have at least an open question as to whether their history of impairment was a motivating factor in the adverse action, an avenue made possible solely by the employer's inquiry.

B. Title VII of the Civil Rights Act

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII") bars discrimination because of race, color, religion, sex or national origin. 42 U.S.C. §§ 2000e-2. While some of the protected classifications such as race or a person's sex are often obvious, employers often will not know (or care) about religion, national origin or various items included within "sex" such as pregnancy, childbirth or related medical conditions and women affected by pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e(k). As with other information unrelated to job performance, a private sector employer would have no reason to investigate and therefore learn of the protected classification characteristics of its employees

because such knowledge does nothing to advance business interests but may provide the employer knowledge necessary to establish culpability for a Title VII violation.

C. The Fair Credit Reporting Act

The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.* pertains to all forms of background screening. The definition of a "consumer report" includes "any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or model of living which is used or expected to be used or collected in whole or in part for ... employment purposes."

The term "employment purposes" means a report used for the purposes of evaluating a consumer for employment, promotion, reassignment or retention as an employee. As *amici curiae* Consumer Data Industry Association, *et al.* state in their brief in support of Petitioners, "when a hardware store, housing authority, fire department, or other entity retain *amici* to ask questions like those listed above (pp. 7-8) for employment and housing purposes, that activity constitutes preparation of an investigative consumer report regulated by ....FRCA." *Id.* p. 9. Thus private employers may use others to do background investigations of employees in certain circumstances subject to strict controls.

FRCA requires that employees be notified of the third party investigation including a clear and conspicuous disclosure before the report is procured and that the employee authorize in writing the obtaining of the report. Further, before any adverse action can be taken against the employee, the employer must provide a copy of the report to the employee. Penalties for non-compliance include actual damages, punitive damages, costs and attorney's fees. Criminal penalties may also apply.

D. State Law

State anti-discrimination statutes also pose significant limitations on investigation of employees. For example, the California Fair Employment and Housing Act, California Government Code § 12940(f), makes it unlawful for an employer or employment agency "to make any inquiry whether an employee has a mental disability, physical disability or medical condition" or regarding the nature or severity of a physical disability, mental disability or medical condition unless it can show the inquiry is job-related and consistent with business necessity.

E. Tort Liability

Employees who intrude upon the seclusion of employees face common law tort liability for invasion of privacy. The elements of the tort are

intrusion, physical or otherwise, into a private place, matter or conversation in a manner highly offensive to a reasonable person. Restatement (Second) of Torts § 652B. See e.g. *Acuff v. IBP, Inc.*, 777 F. Supp. 2d 914, 921 (C. D. Ill. 1999) (allowing claims for intrusion upon seclusion based on employer videotaping of employees). The tort does not require anything be done with the gained information. The violation occurs by the intrusive act. Rest. 2d § 652B.

V. THE GOVERNMENT'S CITED EXPERT AUTHORITIES DO NOT SUPPORT OPEN-ENDED QUESTIONS NOT TETHERED TO LAWFUL INQUIRY

The fundamental problem with the Form 42 questions is not that they are open-ended but that they are not carefully drawn to elicit information pertaining to the government's legitimate interests. The sources relied upon by the Government as support for its untethered or loosely tethered questions stress the importance of valid job-related questions while avoiding questioning that might lead into areas protected from disclosure. In that respect it is important to note that Form 42 and the follow-up interviews are likely to elicit not only information which the employee has voluntarily disclosed to third parties but also information known or observed by the third parties even though not disclosed by the candidate. Petitioners'

argument that "the fact that an individual has already disclosed certain information to the third parties surely must diminish any privacy interest in that information" lacks merit since the Government seeks both disclosed and undisclosed information.

In any event, Petitioners' sources advise against sweeping questioning like Form 42. Dickinson, *supra*, urges open-ended questions in the context of verifying information received from the applicant and answering lingering questions that were not sufficiently explained by the applicant. "Many of the questions are likely to be the same things you asked the applicant." *Id.* p. 66. Personal references should be asked to comment on "specific job-related issues" and "[i]nquiries still should be confined to matters related to the job." *Id.* p. 68.

Muller, *supra*, employs a double standard: one set of questions for employers to respond to and a different set for potential employers to ask. Compare "When Answering Inquiries" with "When Making Inquiries." *Id.* at 204-205. Also medically related information sought by the employer must be job-related and have been consented to in writing by the employee. *Id.* 209.

Barada, *supra*, suggests a variety of open-ended questions which bear directly on job performance and job-related issues. *Id.* pp. 50-52. He then discusses "What Not To Ask!" and

observes that "all the questions outlined previously relate specifically to job performance." In the same section where the author urges use of open-ended questions, he also clarifies that reference checkers should "[c]onfine all questions to job performance" and "[n]ever ask questions about personal matters in the protected categories we outlined (age, race, sex, religion, national origin, medical, marital status or sexual orientation)." *Id.* 57. Barada also has different advice for employers giving references for past employees than employers asking for references. "If a departing candidate does not want to sign the waiver allowing your employees to speak to a prospective employer, for whatever reason, then just go back to your no-comment policy regarding that employee." *Id.* p. 86.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Date: August 6, 2010