

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 OF *AMICUS CURIAE*
UNION OF CONCERNED SCIENTISTS
IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS CURIAE¹

The Union of Concerned Scientists (“UCS”), an alliance of more than 300,000 citizens and scientists, is the leading U.S. non-profit organization dedicated to the use of science to foster a healthy environment and a safer world. UCS combines independent scientific research and citizen action to develop innovative and practical solutions to pressing environmental and security problems and to secure responsible changes in government policy, corporate practices, and consumer choices.

UCS believes this case has significant implications with respect to the vigor and independence of government-sponsored scientific research at Federally Funded Research and Development Centers (“FFRDCs”), which play a significant role in scientific research and technological advancement in the U.S. The government’s position in this case is inconsistent with long-established federal policies and procurement regulations designed to ensure the independence of federally funded scientific research at FFRDCs by requiring that it will be carried out by autonomous universities, research institutions and private corporations under contract with the federal government. In this case, for instance, California Institute of Technology (“Caltech”) scientists conduct research at the Jet Propulsion Laboratory (“JPL”)

¹ Pursuant to Rule 37.6 of this Court, UCS states that this brief was not written in whole or in part by counsel for a party and that no one other than UCS made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of the brief are on file with the Clerk.

under a contract between Caltech and the National Aeronautics and Space Administration (“NASA”).

By proposing that this Court should treat Caltech employees working at JPL as federal government employees for purposes of evaluating the constitutionality of background investigations of the Caltech employees, the government contradicts and undermines its own long-established policy of maintaining an arms-length contractual relationship with independent academic and research institutions that do scientific research for the government at FFRDCs.

UCS is concerned that if Caltech and other universities are no longer seen as independent research institutions but rather as extensions of the federal government, then they will not be able to attract or retain highly talented scientists who seek an independent academic environment. As a result, the quality of scientific research conducted at FFRDCs is likely to suffer, adversely affecting the vitality and quality of the scientific enterprise in the U.S. as a whole.

STATEMENT OF FACTS

In 2005, NASA changed its longstanding procedures to require that employees of NASA contractors must undergo the same National Agency Check with Inquiries (“NACI”) background investigation that the government has traditionally used for federal civil service employees. NASA Procedural Requirements: NPR 1600.1; J.A. 151. In 2007, over Caltech’s objection, NASA unilaterally modified its contract with Caltech to apply these procedures to all Caltech employees working at JPL. Pet. App. 5a; J.A. 225; J.A. 157-162. Caltech subsequently adopted a policy that scientists refusing to undergo the background investigation would be considered to have voluntarily resigned from Caltech. Pet. App. 6a. The new policy was imposed as part of a post-9/11 effort to heighten security at federal facilities. Pet. Br. 8.

The government imposed the NACI background investigation requirement on the Caltech scientists working at JPL, despite the fact that the vast majority of these scientists work on unclassified “non-sensitive” and “low-risk” subjects, and all had previously undergone standard criminal background checks and employment reference checks in order to work for Caltech. Pet. App. 79a; C.A. App. at 1397.

As part of the background investigation, Caltech scientists working at JPL must allow federal investigators to question any person about a broad range of issues related to their public and private lives such as their “general behavior or conduct” or “other matters.” Pet. App. 5a. The government has not denied that the inquiries may cover the scientist’s sex lives and whether they had received drug counseling. *Id.*

In *Nelson v. NASA*, 530 F.3d 865 (9th Cir. 2008), the U.S. Court of Appeals found it likely that the appellants would prevail on their claim that the background investigation’s “vague solicitation of derogatory information” constituted an unwarranted invasion of the Caltech scientists’ constitutional privacy rights. Pet. App. 1a-29a. The court reversed the District Court’s denial of a preliminary injunction against the imposition of the investigations and remanded the case to the District Court. *Id.* 29a. The court denied rehearing en banc in *Nelson v. NASA*, 568 F.3d 1028 (9th Cir. 2009); Pet. App. 75a-130a.

SUMMARY OF ARGUMENT

The government claims this case raises no constitutional privacy issue because it is entitled, as an “employer and a proprietor of federally owned facilities and information systems,” to conduct background investigations for purposes of determining whether the Caltech scientists should have long-term access to JPL and its resources. Pet. Br. 33 (citing *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 128 S.Ct. 2146, 2152 (2008)). But the government’s invocation of its plenary powers as an employer and proprietor is inappropriate in this case. As a matter of federal regulation, longstanding government policy, and the terms of NASA’s contract with Caltech, only Caltech is the scientists’ employer.

The same regulations and policies which prevent the government from asserting the unbounded authority of an employer over the Caltech scientists also circumscribe its authority as proprietor of JPL. These regulations and policies require the government to maintain a balance between its interest in protecting its facilities and its interest in obtaining

the type of high quality research that is available from an independent institution. Historically, the government has maintained that balance by tailoring its security requirements to the type of access sought. The government's purported "proprietary" interest in JPL does not give it free rein to override that long-established balance. Moreover, the fact that NASA has made a special exception to the background investigation requirements for certain faculty members working at JPL demonstrates that it is capable of protecting its proprietary interest in the security of the JPL site without imposing blanket intrusions on personal privacy.

By asking the Court to find that NASA has unfettered authority over the Caltech scientists as their employer or as proprietor of JPL, the government is asking the Court to set a significant legal precedent that would contradict and undermine its own previously established policy of protecting the independence of academic and research institutions which manage FFRDCs. UCS believes that such a decision would reduce the attractiveness of those institutions to talented scientists, thereby diminishing the vitality and quality of the research at these institutions and the value of the institutions' contributions to the U.S. scientific enterprise as a whole.

ARGUMENT

I. THE GOVERNMENT DOES NOT HAVE THE BROAD AUTHORITY OF AN EMPLOYER TO INVADE THE CONSTITUTIONALLY PROTECTED PRIVACY OF CALTECH SCIENTISTS.

In seeking to justify the constitutionality of its far-ranging background investigations into the personal lives of Caltech scientists, the government characterizes itself as an “employer” collecting “employment-related information.” *See, e.g.*, Pet. Br. 2, 17, 18, 19-21, 26. In its capacity as an employer, the government claims to have “far broader” constitutional powers than it would have as a “sovereign” attempting to regulate the lives of private individuals. Pet. Br. 33 (citing *Engquist v. Oregon Dep’t of Agric.*, 128 S.Ct. 2146, 2152 (2008) (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion))).

The government is wrong. Consistent with federal regulation, longstanding government policy, and the terms of NASA’s contract with Caltech, the federal government is *not* an employer in these circumstances. Only Caltech is the employer of the Caltech scientists for whom the government wants to require its own background investigations. Thus the government is not entitled to claim any constitutional authority beyond its ordinary powers as a sovereign.

A. Federal Regulations Protect the Independence of Caltech Scientists.

JPL is one of thirty-nine institutions referred to as Federally Funded Research and Development Centers or “FFRDCs.” These unique institutions are established for the purpose of providing government

funding and support for scientific research that is independent of direct government control. FFRDCs use research facilities owned by the federal government, but they are managed by universities, research institutions, and private corporations under government contracts. Federal procurement regulations provide that an FFRDC is not managed by the federal government, but must be run by an “autonomous organization or as an identifiable separate operating unit of a parent organization.” 48 C.F.R. § 35.017(a)(3). Thus at JPL, scientists employed by Caltech conduct research under a contract between NASA and Caltech.²

The basic structure of an FFRDC, as established under 48 C.F.R. § 35.017(a)(3), therefore prevents the government from having a direct employment relationship with the Caltech scientists who work at JPL. The government may negotiate contract terms with Caltech, but its relationship is solely with that “autonomous organization,” not with the scientists who work for Caltech. Only Caltech is the employer

² The other thirty-eight FFRDCs in the United States include, for example, Brookhaven National Laboratory (which operates under a contract between the U.S. Department of Energy and Brookhaven Science Associates, L.L.C); the National Astronomy and Ionosphere Center (which operates under a contract between the National Science Foundation and Cornell University); and the Studies and Analyses Center (which operates under a contract between the Department of Defense and the Institute for Defense Analyses). The National Science Foundation, maintains a list of all FFRDCs and publishes basic information about them and their relationships with their sponsoring agencies on its website at: <http://www.nsf.gov/statistics/ffrdclist/admin.cfm> (last visited July 16, 2010).

of the Caltech scientists who work at JPL. Accordingly, the government's claim to have the powers and interests of an employer vis-à-vis the Caltech scientists is inconsistent with the basic structure of an FFRDC as defined in the governing regulations.

B. The Government's Argument is Inconsistent with Longstanding Federal Policy of Protecting the Independence of Research at FFRDCs.

Longstanding federal policy also contradicts the position taken by the government in this case that it should be treated as the employer of Caltech scientists and therefore entitled to determine their suitability for employment. That federal policy was established in reaction to the government's experience during World War II, when vast amounts of federal funding were poured into U.S. academic institutions for the development of the atomic bomb and other military purposes.³ As set forth in *Science: the Endless Frontier*, the influential report to Franklin D. Roosevelt by presidential advisor Vannevar Bush:

The Government is peculiarly fitted to perform certain functions, such as the coordination and support of broad programs on problems of great national importance. But we must proceed with caution in carrying over the methods which work in wartime to the very different conditions of peace. We must remove the rigid controls

³ JPL, for example, began as a Caltech-run military research center that was transferred to NASA in 1958. "NASA Facts," published on NASA's website at: http://www.jpl.nasa.gov/news/fact_sheets/jpl.pdf (last visited on August 5, 2010).

which we have had to impose, and recover freedom of inquiry and that healthy competitive scientific spirit so necessary for expansion on the frontiers of scientific knowledge.

Vannevar Bush, *Science: The Endless Frontier: a report to the President by Vannevar Bush, director of the Office of Scientific Research and Development* 7 (U.S. G.P.O. 1945).

In response to President Roosevelt's request for recommendations on how the federal government should continue its support of both public and private scientific research after the war, Bush proposed as a principle of "utmost importance" that the "internal control of policy, personnel, and the method and scope of the research" to be performed in colleges, universities and research institutions should be left to the institutions themselves. *Id.* at 27.

Bush also proposed four other principles for government sponsorship of scientific research: that the government should commit to stable and long-term funding of research projects, that it should promote research through grants and contracts rather than government-owned laboratories, that government agencies should be composed of individuals with a broad base of experience and interest in scientific research, and that government agencies should be accountable to Congress and the President for their decisions. Bush recommended the establishment of a new agency to oversee and promote government sponsorship of scientific research. *Id.* at 28-34.

Five years later, consistent with Bush's recommendation, Congress created the National Science Foundation ("NSF") to encourage scientific research and development in the public and private sectors.

National Science Foundation Act of 1950, ch. 171. § 3, 64 Stat. 149 (1950) (codified as amended at 42 U.S.C. §§ 1861-1887 (2010)). The Act provided that one of the functions of NSF would be “to strengthen basic research and education in the sciences, including independent research by individuals, throughout the United States, including its Territories and possessions, and to avoid undue concentration of such research and education.” *National Science Foundation Act of 1950* § 3(b) (current version at 42 U.S.C. § 1862(e)). When making contracts or otherwise using available appropriations, Congress also instructed the NSF to focus on the following objectives:

- (1) having the work performed by organizations, agencies, and institutions, or individuals in the United States or foreign countries, including Government agencies of the United States and of foreign countries, qualified by training and experience to achieve the results desired, (2) strengthening the research staff of organizations, particularly nonprofit organizations, in the States, Territories, possessions, and the District of Columbia, (3) aiding institutions, agencies, or organizations which, if aided, will advance basic research, and (4) encouraging independent basic research by individuals.

National Science Foundation Act of 1950 § 14(g) (current version at 42 U.S.C. § 1873(e)). Thus, the Act signaled a Congressional policy of encouraging the strength and independence of researchers and research institutions.

The decades following World War II marked a rapid increase in the amount of federal funding for scientific research, leading President John F. Ken-

ned to request a study by the Bureau of the Budget. The resulting report expressed significant concern that the government was unable to hire and retain top scientists because of restrictions on the levels of compensation that could be paid to civil service employees. Bureau of the Budget, *Report to the President on Government Contracting for Research and Development*, S. Doc. No. 94 at viii (2d Sess. 1962). The report noted that pay restrictions affect not just the government's access to scientists, but also its access to capable managers for their research and development programs. *Id.* at 9. By turning to universities and other public or private institutions, the government could access the high-quality scientists and managers it was unable to retain on a government salary. Use of non-governmental researchers also would give the government access to the "unique intellectual environment" that results from the combination of graduate education and research. Such research, the report noted, "is not amenable to management control by adherence to firm schedules, well-defined objectives, or predetermined methods of work." *Id.* at 11.

In 1984, recognizing the need to establish a "single policy applicable to all types of FFRDCs," the Office of Federal Procurement Policy issued a policy letter regarding the establishment of Federal Acquisition Regulations for FFRDCs. Issuance of Policy Letter No. 84-1, "Federally Funded Research and Development Centers (FFRDCs), 49 Fed. Reg. 14,462 (April 11, 1984). The Policy Letter included a definition of FFRDCs specifying that their activity is "operated, managed and/or administered by either a university or consortium of universities, other non-profit organization or industrial firm as an autono-

mous organization or as an identifiable separate operating unit of a parent organization.” 49 Fed. Reg. at 14,481. In 1990, this definition of an FFRDC was codified at 48 C.F.R. § 35.017(a)(3). 55 Fed. Reg. 3885 (February 5, 1990).

In sum, since World War II, both Congress and the Executive Branch of the U.S. government have pursued a policy of setting up frameworks such as the FFRDCs that recognize and value the independence of scientific research institutions from the government agencies that fund or contract with them. The government’s claim that Caltech scientists are no different from government employees is inconsistent with and contradicted by this policy.

C. Caltech’s Contract with NASA Protects its Independence.

Caltech’s contract with NASA for the operation of JPL also shows that respondents are Caltech scientists, subject to Caltech’s autonomous management and independent from the federal government. The contract requires Caltech to “provide, either directly or through subcontract, the management, scientific, engineering, technical and other personnel, labor and services necessary to perform all work required” under the contract. Part I, Section C-2, par. (a); C.A. App. at 1054. Caltech is responsible for management controls and payment of wages. *Id.*, Sections H-4 and H-6; C.A. App. at 1088, 1089-90. The contract lists only two types of “key” positions for which Caltech must obtain NASA’s approval before removing, replacing or diverting personnel: Directors and Project Managers and Project Scientists who are assigned full time to perform for a “flight project.” *Id.*, Section H-3; C.A. App. at 1088.

The contract's Appendix 1, "NASA and Caltech Understanding Concerning the NASA Jet Propulsion Laboratory" also recognizes the "dual character" of JPL: "it is a NASA-owned facility in Pasadena, California, as well as an operating division of Caltech staffed with regular Caltech employees." *Id.* at 2; J.A 164. NASA's understanding of its role is further described as follows:

NASA recognizes the special character of JPL within the NASA family and the desirability of maximizing the benefits which this university-related FFRDC can bring to NASA. In carrying out its mission JPL will adopt programmatic management policies and practices compatible with those elsewhere in the Agency and will strive to achieve the highest levels of performance, safety and cost effectiveness. *While recognizing the importance of its interface with NASA, the Laboratory will conduct its business, administrative, and personnel affairs in a manner consistent with its role as an operating division of Caltech, and will seek to adopt the best business practices available. NASA will consider JPL's FFRDC status as a university managed FFRDC and other factors to ensure that Government policies to be applied to JPL are appropriate.*

Id. at 4; J.A. 169 (emphasis added). Thus, consistent with federal procurement regulations and government policies dating back to World War II, the contract between NASA and Caltech keeps the government at arms-length from Caltech and its employees.

II. THE GOVERNMENT'S PROPRIETARY INTEREST IN JPL DOES NOT MAKE IT THE EQUIVALENT OF THE CALTECH SCIENTISTS' EMPLOYER.

A. The Government's Proprietary Interest in JPL Facilities and Resources Does Not Give it the Power of an Employer Over the Caltech Scientists.

The government also claims that as the “proprietor of federally owned facilities and information systems,” it has power to “manage [its] internal operation” that is equivalent to the power of the federal government over its employees. Pet. Br. 33 (quoting *Engquist*, 128 S.Ct. at 2151 (quoting *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 367 U.S. 886, 896 (1961) (brackets in original)). But the fact that the government owns the facilities and resources used by the Caltech scientists at JPL does not make it the equivalent of the Caltech scientist’ employer. *Engquist*, which concerned a constitutional claim by a federal government employee against her employer, does not hold otherwise. In that case, the Court addressed the government’s role as employer and had no reason to address the rights of a government proprietor independent of its rights as an employer.

Cafeteria & Restaurant Workers Union Local 473 is also inapposite because it concerned the proprietary power of the Navy to regulate the conduct of a government contractor employee, *i.e.*, a cook in a privately run restaurant, on the site of a gun manufacturing facility where the government had “traditionally exercised unfettered control” in its military capacity. 367 U.S. at 896. Here, in contrast, the gov-

ernment has traditionally limited its own control of JPL and other FFRDCs through the promulgation of federal procurement regulations, the establishment of federal policy favoring the independence of non-governmental entities that operate FFRDCs, and the terms of Caltech's contract, which respect that independence. Rather than asserting unfettered control over Caltech, the government has struck a delicate balance that gives it the benefit of independent research by Caltech scientists in exchange for giving those scientists financial support and access to resources. As set forth in the federal procurement regulations governing FFRDCs:

An FFRDC meets some special long-term research or development need which cannot be met as effectively by existing in-house or contractor resources. FFRDCs enable agencies to use private sector resources to accomplish tasks that are integral to the mission and operation of the sponsoring agency. An FFRDC, in order to discharge its responsibilities to the sponsoring agency, has access, beyond that which is common to the normal contractual relationship, to Government and supplier data, including sensitive and proprietary data, and to employees and installations equipment and real property. The FFRDC is required to conduct its business in a manner befitting its special relationship with the Government, to operate in the public interest with objectivity and independence, to be free from organizational conflicts of interest, and to have full disclosure of its affairs to the sponsoring agency.

48 C.F.R. § 35.017(a)(2). Historically, the government has maintained the balance between Caltech's

independence and its access to government resources by tailoring any access restrictions to the sensitivity of the information being accessed by the individual. The majority of individuals, who worked on non-sensitive and low-security issues (J.A. 75), underwent standard criminal background checks and employment reference checks. Pet. App. 79a; *e.g.*, J.A. 197. A smaller number of individuals, who worked with classified information or held positions of “public trust” complied with more rigorous security requirements. J.A. 124, 191, 197. In *Cafeteria & Restaurant Workers Union Local 473*, the Navy had no such history or legal framework for balancing the Navy’s proprietary interests against the interests of employees of private contractors on the site. Therefore that decision does not support the government’s argument.⁴

As the Ninth Circuit recognized in *Nelson*, the government has legitimate interests in “verifying its contractors’ identities to make sure they are who they say they are” and in “ensuring the security of the JPL facility so as not to jeopardize the costly investments housed therein.” 530 F.3d at 880. But

⁴ In addition, in *Cafeteria & Restaurant Workers Union Local 473*, the Court found that the private interest that was adversely affected by the Navy’s security clearance denial was insignificant because it amounted only to the denial of the opportunity to work as a cook at “one isolated and specific military installation,” not the right to follow a “chosen trade or profession.” 367 U.S. at 895-96 (quoting *Dent v. West Virginia*, 129 U.S. 114 (1889); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Truax v. Raich*, 239 U.S. 33 (1915)). Here, in contrast, the government’s actions threaten unique and highly technical scientific careers developed over twenty years in some cases. *See, e.g.*, J.A. 187-93; J.A. 194-99.

NASA's legitimate proprietary interest does not translate into unlimited authority to significantly alter the longstanding balance between Caltech's independence and its access to government resources by requiring virtually all Caltech employees working at JPL to undergo a full NACI background investigation, regardless of any individual's degree of access to the facility or its information. Instead, it is appropriate to inquire, as the Ninth Circuit did in *Nelson*, whether the government could show that its background investigation was "narrowly tailored" to meet its interests. *Id.* Because the government could not make the constitutionally required showing, the Ninth Circuit appropriately found that issuance of a preliminary injunction was warranted.

B. The Government's Creation of an Exception for Certain Caltech Faculty Members Undermine its Claim That Broad Application of the NACI Background Investigation is Necessary to Protect its Proprietary Interest in the JPL Facilities.

The government repeatedly asserts that its proprietary interest in protecting the JPL facilities and information systems justifies the broad application of the NACI background investigation. Pet. Br. 34, 35, 36. According to the government:

It is particularly important for the government to conduct background checks at key federal research facilities like JPL. JPL is one of the Nation's premier space and robotics research and development facilities, and it is staffed exclusively with contract employees. . . . Its annual operating budget is over \$1.5 billion, representing a significant investment by American tax-

payers. . . . The government may legitimately conduct background investigations of individuals with access to JPL facilities and information systems in order to protect those investments.

Pet. Br. 35-36. The government also argues that use of the NACI background investigation to protect its facilities and information systems is necessary regardless of whether the subject Caltech employees are “low risk.” *Id.* at 36. Thus, the government asserts that it has required that “*all* JPL employees” must undergo NACI background investigations. *Id.* at 11 (emphasis added).

The record below, however, indicates that in reality, the government does not apply the NACI background investigation requirement consistently to all Caltech employees who work at JPL facilities. While the government would require all non-faculty Caltech employees to undergo the NACI background investigation in order to obtain long-term access to JPL facilities, it would excuse Caltech faculty members who work at JPL from the NACI background investigation if they do not have access to JPL “data systems.” C.A. App. at 1354-55, 1427-29. NASA’s apparent decision to allow some Caltech faculty members long-term access to the JPL facilities without requiring completion of a NACI background investigation is inconsistent with NASA security procedures which require that “no contractor employee” may have access to NASA facilities without “submission of required investigated paperwork required to complete the “Inquiries portion of the NACI . . .” NPR 1600.1, § 4.5.1 (2005); J.A. 154.

The implications of NASA’s apparent decision to waive the NACI background investigation require-

ment for one category of Caltech employees working at JPL, *i.e.*, faculty members who lack access to data systems, are not addressed in either party's opening brief. UCS believes, however, that NASA's creation of an exception to the background investigation requirement for one particular group of Caltech employees significantly undermines the credibility of the government's argument that in order to protect its proprietary interest in the JPL facilities, it must broadly apply the NACI background investigation to "all" Caltech employees before permitting long-term access to JPL. Pet. Br. 11.

Under the circumstances, the Court should reject the government's claim to broad authority over Caltech employees as proprietor of JPL and remand the case for an appropriate balancing between the government's role as proprietor and the privacy interests of the Caltech scientists who work at JPL.

III. THE COURT SHOULD AVOID SETTING A PRECEDENT THAT WOULD DEGRADE THE INDEPENDENCE AND THEREBY DIMINISH THE QUALITY OF WORK BY ACADEMIC AND RESEARCH INSTITUTIONS ASSOCIATED WITH FFRDCS.

UCS believes that the federal policy of protecting the independence of scientific research at FFRDCs from undue government interference is vital to the maintenance of vigorous and high-quality government-sponsored scientific research in the United States. As Vannevar Bush observed in *Science: the Endless Frontier*:

The publicly and privately supported colleges, universities, and research institutes are the centers of basic research. They are the wellsprings

of knowledge and understanding. As long as they are vigorous and healthy and their scientists are free to pursue the truth wherever it may lead, there will be a flow of new scientific knowledge to those who can apply it to practical problems in the government, industry and elsewhere.

Id. at 7. By asking the Court to find that NASA has unfettered authority over the Caltech scientists as their employer or as proprietor of JPL, the government proposes a serious incursion on the independence of academic and research institutions such as Caltech. A decision upholding the government's position could have a significant detrimental effect on the constitutional rights of any employee of an independent academic or research institution who works at an FFRDC.

A decision that the government stands in the shoes of the Caltech scientists' employer in this case would also send a message throughout the scientific and academic community in the U.S. that scientific research at FFRDCs has lost its freedom from government intrusion. UCS is concerned that such a message would discourage the country's best scientists from seeking positions at academic and research institutions associated with FFRDCs. As demonstrated in many of the declarations by Caltech scientists that were filed in the District Court, protection of their privacy from government invasion was a factor in their decisions to seek Caltech positions that would allow them to work at JPL. *E.g.*, C.A. App. at 1374, 1409.

UCS is also concerned that out of an understandable desire to avoid the loss to JPL of distinguished

Caltech faculty members who are unwilling to undergo intrusive background investigations, the government has made selective and unfair application of the background investigation requirement. By quietly creating a double standard for Caltech faculty members and other Caltech scientists who work at JPL, the government may foster resentment between faculty and non-faculty scientists working at JPL, thereby undermining the collegial atmosphere which is so important to the success of scientific research. The government's creation of a double standard for faculty and non-faculty Caltech scientists working at JPL also diminishes the attractiveness of both institutions as scientific workplaces.

In the long term, if Caltech is unable to attract the same high caliber scientists to work at JPL as it has in the past, the quality of work produced under Caltech's contracts with the federal government will decline, thus defeating one of the government's central goals in establishing FFRDCs and potentially eroding the critical contributions FFRDCs make to the scientific enterprise in the U.S.

CONCLUSION

For the foregoing reasons, the Court should find that the government's claim to broad powers over the Caltech scientists as their employer or as proprietor of the JPL facilities is inconsistent with the government's own regulations and policies and that the government's own actions undermine its argument that the exercise of those powers is necessary.

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