Section 7: Individual Rights

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Plaintiffs, various business and civil-rights organizations, brought the actions against 15 county attorneys of the state, the governor, the state Attorney General, the state registrar of contractors, and the director of the state revenue department (collectively defendants). They alleged that the Act was expressly and impliedly preempted by the federal Immigration Reform and Control Act of 1986 (IRCA). They also alleged that the Legal Arizona Workers Act (Act) violated employers’ rights to due process by denying them an opportunity to challenge the federal determination of the work-authorization status of their employees before sanctions were imposed. The district court held that the law was not preempted. The main argument on appeal was that the law was expressly preempted by the federal immigration law provision preempting state regulation other than through licensing and similar laws. The appellate court held that the district court correctly determined that the Act was a licensing law within the meaning of the federal provision, and therefore was not expressly preempted. The court also held that the Act could and should be reasonably interpreted to allow employers, before any license could be adversely affected, to present evidence to rebut the presumption that an employee was unauthorized.

Questions Presented: (1) Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly “preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” 8 U.S.C. § 1324a(h)(2). (2) Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. (3) Whether the Arizona statute is impliedly preempted because it undermines the “comprehensive scheme” that Congress created to regulate the employment of aliens.

CHICANOS POR LA CAUSA, INC.; Somos America, Plaintiffs-Appellants, and Arizona Employers for Immigration Reform Inc. et al., Plaintiffs,

v.

Janet NAPOLITANO; Terry Goddard; Gale Garriott, Defendants-Appellees.

United States Court of Appeals for the Ninth Circuit

Filed September 17, 2008

[Excerpt; some footnotes and citations omitted.]
SCHROEDER, Circuit Judge:

This case is a facial challenge to an Arizona state law, enacted in 2007 and aimed at illegal immigration, that reflects rising frustration with the United States Congress's failure to enact comprehensive immigration reform. The Arizona law, called the Legal Arizona Workers Act, targets employers who hire illegal aliens, and its principal sanction is the revocation of state licenses to do business in Arizona. It has yet to be enforced against any employer.

Various business and civil-rights organizations (collectively, "plaintiffs") brought these actions against the fifteen county attorneys of the state of Arizona, the Governor of Arizona, the Arizona Attorney General, the Arizona Registrar of Contractors, and the Director of the Department of Revenue of Arizona (collectively, "defendants"). Plaintiffs allege that the Legal Arizona Workers Act ("the Act"), Ariz. Rev. Stat. §§ 23-211 to 23-216, is expressly and impliedly preempted by the federal Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §§ 1324a-1324b, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), codified in various sections of 8 U.S.C. and 18 U.S.C. They also allege that the Act violates employers' rights to due process by denying them an opportunity to challenge the federal determination of the work-authorization status of their employees before sanctions are imposed.

The district court held that the law was not preempted. The main argument on appeal is that the law is expressly preempted by the federal immigration law provision preempting state regulation "other than through licensing and similar laws." The district court correctly determined that the Act was a "licensing" law within the meaning of the federal provision and therefore was not expressly preempted.

There is also a secondary, implied preemption issue that principally relates to the provision requiring employers to use the electronic verification system now being refined by the federal government as a tool to check the work-authorization status of employees through federal records. It is known as E-Verify. Under current federal immigration law, use of the system is voluntary, and the Arizona law makes it mandatory. We hold that such a requirement to use the federal verification tool, for which there is no substitute under development in either the state, federal, or private sectors, is not expressly or impliedly preempted by federal policy.

Plaintiffs also contend that the statute does not guarantee employers an opportunity to be heard before their business licenses may be revoked. The statute can and should be reasonably interpreted to allow employers, before any license can be adversely affected, to present evidence to rebut the presumption that an employee is unauthorized.

We uphold the statute in all respects against this facial challenge, but we must observe that it is brought against a blank factual background of enforcement and outside the context of any particular case. If and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision.

Background

Sanctions for hiring unauthorized aliens were first created at the federal level when Congress passed IRCA in 1986. IRCA prohibits knowingly or intentionally hiring or continuing to employ an unauthorized
alien, which it defines as an alien either not lawfully admitted for permanent residence or not authorized to be employed by IRCA or the U.S. Attorney General.

IRCA also sets out the method of demonstrating an employer's compliance with the law through a paper-based method of verifying an employee's eligibility, known as the I-9 system. It requires employees to attest to their eligibility to work and to present one of the specified identity documents. IRCA then requires employers to examine the identity document the employee presents and attest that it appears to be genuine. The employer is entitled to a defense to sanctions if the employer shows good-faith compliance with the I-9 system, unless the employer has engaged in a pattern or practice of violations.

The Attorney General is charged with enforcing violations of IRCA. Hearings are held before selected administrative law judges ("ALJs"), and the ALJs' decisions are reviewable by the federal courts.

IRCA contains an express preemption provision, which states: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." The scope of the savings clause, which permits state "licensing and similar laws," is a critical issue in this appeal.

IIRIRA directed the Attorney General to establish three pilot programs to ensure efficient and accurate verification of any new employee's eligibility for employment. One of these programs, the Basic Pilot Program, was to be made available in at least five of the seven states with the highest estimated populations of aliens not lawfully present in the United States. Congress amended IIRIRA in 2002 by extending the four-year period for the pilot programs to a six-year period and again in 2003 by extending the six-year period to an eleven-year period. The Basic Pilot Program has thus been extended until November 2008. The Expansion Act also expanded the availability of the Basic Pilot Program to all fifty states.

The Basic Pilot Program, now known as E-Verify, is an internet-based system that allows an employer to verify an employee's work-authorization status. It is an alternative to the I-9 system. After an employer submits a verification request for an employee, E-Verify either issues a confirmation or a tentative nonconfirmation of work-authorization status. If a tentative nonconfirmation is issued, the employer must notify the employee, who has eight days to challenge the finding. The employer cannot take any adverse action against the employee during that time. If an employee does challenge the tentative nonconfirmation, the employer will be informed of the employee's final work-authorization status. Any employee who either does not challenge a tentative nonconfirmation or is unsuccessful in challenging a tentative nonconfirmation must be terminated, or the employer must notify the Department of Homeland Security ("DHS") that it will continue to employ that person. An employer who fails to notify DHS of the continued employment of a person who received a final nonconfirmation is subject to a civil money penalty. An employer who continues to employ a person after receiving a final nonconfirmation is subject to a rebuttable presumption that it knowingly employed an unauthorized alien.

Against this federal backdrop, we turn to the state law at issue here. Arizona enacted the
Legal Arizona Workers Act on July 2, 2007, with an effective date of January 1, 2008. The Act allows the superior courts of Arizona to suspend or revoke the business licenses of employers who knowingly or intentionally hire unauthorized aliens. Any person may submit a complaint to the Arizona Attorney General or a county attorney. After determining a complaint is not false or frivolous, the appropriate county attorney is charged with bringing an action against the employer in superior court. The Act uses IRCA’s definition of “unauthorized alien.” Additionally, the Act requires that the court use the federal government’s determination of the employee’s lawful status.

The Act makes participation in E-Verify mandatory for all employers, although it provides no penalty for violation of the requirement. The Act also includes an affirmative defense for good-faith compliance, explicitly incorporating IRCA.

The Act mandates a graduated series of sanctions for violations. A first violation requires the employer to terminate the employment of all unauthorized aliens, file quarterly reports of all new hires for a probationary period, and file an affidavit stating that it terminated all unauthorized aliens and will not intentionally or knowingly hire any others. A second violation during the probationary period results in the permanent revocation of the employer’s business license.

Plaintiffs originally filed an action challenging the Act on July 13, 2007, less than one month after the Act’s enactment. The district court dismissed the first action for lack of subject matter jurisdiction because it did not name as defendants any of Arizona’s county attorneys, who have the responsibility of enforcing the Act.

In December 2007, plaintiffs filed a second complaint, this time including the Arizona county attorneys as defendants. The principal contentions were that the Act was expressly preempted by federal law because the Act was not a “licensing” or “similar” law within the meaning of the savings clause of IRCA’s preemption provision; that, even if the Act was not expressly preempted, it was impliedly preempted because its sanctions provisions and E-Verify requirement conflict with federal law; and that the Act violated employers’ due process rights because it did not allow them an adequate opportunity to dispute the federal government’s response that an employee was not authorized to work.

The matter proceeded to hearing, and the district court dismissed the Arizona Attorney General for lack of subject matter jurisdiction, because he lacks the authority to bring enforcement actions. The court ruled in favor of the remaining defendants on the merits. It held that the Act is not expressly preempted by IRCA because the Act is a licensing law within the meaning of the savings clause. It held that neither the Act’s sanctions provisions, nor the provision mandating use of E-Verify, was inconsistent with federal policy, and thus they were not impliedly preempted. Finally, the court held that the Act did not, on its face, violate due process because employers’ due process rights were adequately protected. Plaintiffs now appeal.

Discussion

I. Preemption

Federal preemption can be either express or implied. When a federal statute contains an explicit preemption provision, we are to “identify the domain expressly pre-empted by that language.” IRCA contains an express preemption clause in its provision creating
sanctions for hiring unauthorized aliens. It preempts all state sanctions "other than through licensing and similar laws." Plaintiffs contend that the Act is expressly preempted.

Implied preemption has two subcategories. The first is field preemption, where "the depth and breadth of a congressional scheme . . . occupies the legislative field." The second is conflict preemption, which occurs when either "compliance with both federal and state regulations is a physical impossibility," or where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." For conflict preemption to apply, the conflict must be an actual conflict, not merely a hypothetical or potential conflict. Plaintiffs contend that even if the entire Act is not expressly preempted, the mandatory requirement to use E-Verify is impliedly preempted because it conflicts with the voluntary program in IIRIRA.

A. The Act is not expressly preempted because it falls within IRCA's savings clause.

The explicit preemption provision in IRCA states: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." The parties agree that the Act is expressly preempted by IRCA unless it falls within the savings clause of IRCA's express preemption provision. Plaintiffs argue that the Act does not fall within the savings clause because they contend the Act is not a "licensing law" within the ordinary meaning of the phrase, and that the savings clause was not intended to permit a state to create an adjudication and enforcement system independent of federal enforcement of IRCA violations.

The district court held that the plain language of section 1324a(h)(2) does not facially preempt the Act because it does no more than impose conditions on state licenses to do business and thus falls within the savings clause. The court rejected plaintiffs' argument that section 1324a(h)(2) permits only licensing sanctions that are preceded by a federal adjudication of employer liability, reasoning that neither the plain language of section 1324a(h)(2) nor the legislative history supports plaintiffs' position.

The district court also rejected plaintiffs' argument that the savings clause should be interpreted narrowly, holding that because regulation in the employment field is traditionally an area of state concern, there is a presumption against preemption. An issue central to our preemption analysis is thus whether the subject matter of the state law is in an area of traditionally state or federal presence. When Congress legislates "in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Conversely, we do not assume non-preemption "when the State regulates in an area where there has been a history of significant federal presence."

* * *

. . . We conclude that, because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of non-preemption applies here.

Plaintiffs contend that the term "license" was intended to encompass only licenses to
engage in specific professions, such as medicine or law, and not licenses to conduct business. There is no support for such an interpretation. “Licensing” generally refers to “[a] governmental body’s process of issuing a license,” and a “license” is “a permission, usually revocable, to commit some act that would otherwise be unlawful.” The Act provides for the suspension of employers’ licenses to do business in the state. Such licenses are defined as “any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state.”

The statute’s broad definition of “license” is in line with the terms traditionally used and falls within the savings clause. The language of the savings clause therefore exempts such state licensing regulation from express preemption. A recent district court case that considered the same issue reached the same conclusion.

Plaintiffs nevertheless contend that the legislative history demonstrates that Congress intended the savings clause to permit states to impose a state sanction only after there had been a federal determination of an alien’s unauthorized status. Plaintiffs rely on the second sentence in a paragraph from Part I of House Report 99-682.

As the district court found, however, this paragraph as a whole does not support plaintiffs’ argument. The paragraph describes the federal law as preempting “civil fines and/or criminal sanctions,” neither of which the Act imposes. The paragraph does not suggest that the federal law would preempt local laws that suspend or revoke licenses on the basis of IRCA violations, or state licensing laws that require employers not to hire unauthorized workers.

In sum, the Act does not attempt to define who is eligible or ineligible to work under our immigration laws. It is premised on enforcement of federal standards as embodied in federal immigration law. The district court therefore correctly held that the Act is a “licensing” measure that falls within the savings clause of IRCA’s preemption provision.

Plaintiffs finally contend that this kind of state regulation must be preempted because there is a potential for conflict in the practical operation of the state and federal law. They point to a hypothetical situation in which an employer may be subject to conflicting rulings from state and federal tribunals on the basis of the same hiring situation. Whether principles of comity or issue preclusion would allow such a result are questions not addressed by the parties. In any event, a speculative, hypothetical possibility does not provide an adequate basis to sustain a facial challenge.

B. The Act’s provision mandating the use of E-Verify is not impliedly preempted by federal law.

Plaintiffs argue that the Arizona provision mandating the use of E-Verify is impliedly preempted because it conflicts with Congressional intent to keep the use voluntary. They contend that Congress wanted to develop a reliable and non-burdensome system of work-authorization verification, and that mandatory use of E-Verify impedes that purpose. They rely on the Supreme Court’s decision in Geier v. Am. Honda Motor Co. Geier recognized that state laws that fall within a savings clause and are therefore not expressly preempted are still subject to the “ordinary working of conflict pre-emption principles.” A state law is preempted through conflict preemption when it “stands as an obstacle to
the accomplishment and execution of the full purposes and objectives of Congress." Geier involved a Department of Transportation regulation that was designed to encourage competition among automobile manufacturers to design effective and convenient passive-restraint systems. The regulation required only 10% of a car manufacturer’s production to include airbags. The Court in Geier held that state tort law, permitting liability to be imposed for failure to provide airbags, conflicted with the federal policy to encourage development of different restraint systems.

The district court here held that Arizona’s requirement that employers use E-Verify was not preempted because, while Congress made participation in E-Verify voluntary at the national level, that did not in and of itself indicate that Congress intended to prevent states from making participation mandatory. We agree with that holding. Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation. It certainly knew how to do so because, at the same time, it did expressly forbid “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”

Furthermore, this case is unlike Geier, where the Supreme Court found strong evidence of Congress’s intent to promote competition and balance federal goals in a competitive environment encouraging alternative systems. Here, E-Verify is a federal government service that Congress has implicitly strongly encouraged by expanding its duration and its availability (to all fifty states). Though Congress did not mandate E-Verify, Congress plainly envisioned and endorsed an increase in its usage. The Act’s requirement that employers participate in E-Verify is consistent with and furthers this purpose, and thus does not raise conflict preemption concerns.

Appellants contend that conflict preemption is a concern here also because of the Act’s potentially discriminatory effects. Their argument is that E-Verify increases discrimination against workers who look or sound “foreign,” and that mandatory E-Verify usage thus upsets the enforcement/discrimination balance that Congress has maintained by keeping E-Verify optional. This argument fails because Congress requires employers to use either E-Verify or I-9, and appellants have not shown that E-Verify results in any greater discrimination than I-9.

II. Due Process

The deprivation of a property interest must “be preceded by notice and opportunity for hearing appropriate to the nature of the case.” An Arizona business license is a property interest. An opportunity to be heard must be “at a meaningful time and in a meaningful manner.” Employers thus should be given an opportunity to be heard before their business licenses are suspended or revoked under the Act.

The Act sets forth the procedures to be followed in bringing an enforcement action. Any person may submit a complaint about a suspected violation to either the Arizona Attorney General or a county attorney. The Attorney General or county attorney investigating a complaint must verify the alleged unauthorized alien’s work-authorization status with the federal government pursuant to 8 U.S.C. § 1373; the state official is prohibited from attempting to make an independent determination of the alien’s status. After a complaint is investigated and found not to be false or frivolous, a county attorney must bring an enforcement action against the employer in
state court in the county in which the alien was employed. The court is to expedite the action, which includes scheduling the hearing as quickly as is practicable.

* * *

Plaintiffs contend, in this facial challenge, that the Act violates due process because it deprives employers of their business licenses without providing them an adequate opportunity to dispute whether an employee was authorized to work. Plaintiffs rely on the first sentence of subsection (H) to argue that the Act prohibits employers at the state-court hearing from presenting any evidence to rebut the federal government's §1373 response on the issue of the employee's work status. Defendants, however, point to the second sentence of subsection (H), which provides that the federal response creates only a rebuttable presumption. They contend that the employer can rebut the federal response with other evidence during a hearing.

Plaintiffs' interpretation of subsection (H) is flawed because it gives no meaning to the second sentence of the provision. That sentence at least implicitly contemplates a hearing to rebut the presumption created by the federal determination of an employee's unauthorized status. Arizona law, consistent with ordinary principles of statutory interpretation, requires that “[e]ach word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial.” We conclude that the statute provides an employer the opportunity, during the state court proceeding, to present rebuttal evidence.

* * *

We therefore conclude that the district court correctly determined that the Act provides sufficient process to survive this facial challenge. More importantly, the district court also found that the statute does not preclude the presentation of counterevidence when an employer's liability is at issue and we agree with this interpretation. An employer's opportunity to present evidence at a hearing in superior court, in order to rebut the presumption of the employee's unauthorized status, provides the employer a meaningful opportunity to be heard before sanctions are imposed. We conclude that subsection (H) is facially constitutional.

The district court's judgment is AFFIRMED.
The U.S. Supreme Court agreed on Monday to hear an appeal from business and civil rights groups trying to overturn a 2007 Arizona law that prohibits employers from knowingly hiring illegal immigrants.

The state law was intended to lessen the economic incentive for immigrants to sneak into the U.S. by holding employers accountable for hiring them.

The prohibition is separate from a new Arizona immigration law that's also being challenged in court and requires police to question the immigration status of people they suspect are in the country illegally.

Supporters say the employer sanctions law was needed because the federal government hasn't adequately enforced a similar federal law.

Critics say the law is an unconstitutional attempt by the state to regulate immigration and that cracking down on illegal hires is the sole responsibility of the federal government.

Julie Pace, a lawyer representing the business groups, said the object of the legal challenge is to stop states from creating differing immigration laws that make it cumbersome for businesses that operate in multiple states.

"This is not a path that is good for the country," Pace said. "We need uniform guidance for businesses so they can have a legal supply of labor without having a patchwork of laws across the country."

The state’s employer sanctions law has been upheld by a federal district court and the San Francisco-based 9th U.S. Circuit Court of Appeals.

Businesses found to have knowingly hired illegal immigrants can have their business licenses suspended or revoked. The law also requires employers to verify the work eligibility of new workers through a federal database.

Authorities across Arizona have examined several dozen complaints of employer sanctions violations since it went into effect in Jan. 2008. So far, only two businesses—a west Phoenix sandwich shop and a Glendale amusement park—have entered settlements in which they admit violating the law.

Arizona Attorney General Terry Goddard, whose office is defending the law in court, said in a written statement that he expects the court to find the law valid and enforceable.

The Obama administration urged the high court to prevent the state from enforcing the state’s employer sanctions law, arguing that federal immigration law trumps state efforts. The court’s next term begins in October and a decision is expected in the spring.

The case is Chamber of Commerce v. Candelaria, 09-115.
The Obama administration on Friday urged the Supreme Court to review and set aside an Arizona law that sanctions employers who hire illegal immigrants, saying it would disrupt the “careful balance” that Congress struck in federal immigration law.

The act in question is not the strict new Arizona law that President Obama and other members of his administration have criticized. That measure requires police to question anyone who appears to be in the country illegally.

The law being challenged, the Legal Arizona Workers Act, imposes tougher sanctions than federal law for hiring illegal workers. If the court chooses to hear the case, its ruling could show how receptive the justices would be to arguments that enforcing immigration laws is a federal responsibility that cannot be usurped by the states.

The Arizona act is being challenged by a coalition of organizations that include the U.S. Chamber of Commerce, Hispanic groups and civil libertarians. Business groups want to head off a proliferation of conflicting state laws on employer sanctions, while others worry that the penalties, which include the loss of business licenses, would discourage companies from hiring even those legally in the country.

The administration, in a brief submitted by Acting Solicitor General Neal Katyal, said federal law should preempt state efforts.

The Arizona law would “disrupt a careful balance that Congress struck nearly 25 years ago between two interests of the highest importance: ensuring that employers do not undermine enforcement of immigration laws by hiring unauthorized workers, while also ensuring that employers not discriminate against racial and ethnic minorities legally in the country,” Katyal wrote.

The court asked the government in November for its view of the case. The response might have been delayed by two factors. Homeland Security Secretary Janet Napolitano is the state’s former governor and was the first defendant when the challenge was filed. And Obama selected Solicitor General Elena Kagan this month as his choice to replace retiring Justice John Paul Stevens.

Separately, Justice Department officials met Friday in Phoenix with Arizona Attorney General Terry Goddard and aides to Gov. Jan Brewer (R) to express strong reservations about the new law, which goes into effect July 29. The administration fears the law could lead to widespread racial profiling.

The case the court is considering is Chamber of Commerce v. Candelaria.
A three-judge panel of the 9th U.S. Circuit Court of Appeals unanimously upheld the constitutionality of the Legal Arizona Workers Act of 2007. The panel rejected the plaintiffs’ claims that the act violated the supremacy and due process clauses of the U.S. Constitution.

The Legal Arizona Workers Act, which took effect Jan. 1, 2008, prohibits Arizona employers from intentionally or knowingly employing unauthorized aliens. The law grants jurisdiction to the superior courts of Arizona to hear complaints brought by county attorneys to suspend or revoke the business licenses of employers that violate the law. The act also makes participation in the federal E-Verify program, administered by the U.S. Department of Homeland Security (DHS), mandatory for all employers, although it provides no penalty for violating this requirement.

Civil rights groups and a business trade group coalition challenged the law in two separate actions, seeking injunctive relief to prevent the act from taking effect. The district court consolidated the two actions, and in December 2007 dismissed the case because the plaintiffs failed to sue the appropriate defendants, but it also strongly suggested that the plaintiffs’ legal theories lacked merit.

The plaintiffs quickly refiled their complaint naming the proper defendants. Following an expedited discovery, motion and hearing schedule, the district court entered judgment for the state defendants in February 2008, holding:

- The Arizona Legal Workers Act was a licensing law directed at protecting the jobs of qualified U.S. workers, and it was legally authorized under the savings clause of the federal Immigration Reform and Control Act of 1986 (IRCA).
- The state act’s requirement that employers participate in the federal E-Verify program was not pre-empted by federal law.
- The Arizona statute can and should be reasonably interpreted to preserve an employer’s due process rights to rebut a federal determination that its workers were undocumented prior to the revocation of a state business license.

A 9th Circuit panel affirmed. It rejected the plaintiffs’ argument that Congress pre-empted state regulation of employers for employing undocumented workers under IRCA. Congress carved out an exception to federal pre-emption by authorizing the states to exercise their licensing powers to protect local workers from competition with undocumented workers.

The 9th Circuit panel further rejected the plaintiffs’ contention that the Arizona act’s mandatory E-Verify provision conflicted with federal law, which treats employer participation as voluntary under the administration of the DHS. The court reasoned that because Congress did not forbid the states from using the E-Verify system to verify the immigration status of state workers for purposes of effectuating a licensing scheme, and because Congress had otherwise strongly encouraged expansion of
the E-Verify system on a national level over the years, there is no basis for declaring that the Arizona scheme was pre-empted.

Finally, the panel rejected the plaintiffs' argument that the Arizona statute violates the due process rights of employers by mandating that the superior courts use the federal government's determination of immigration status in business license revocation and suspension proceedings. Because the act otherwise implicitly provided employers with the right to a hearing to present evidence to rebut the presumption of unauthorized status under the federal determination, the state hearing procedure satisfied the requirements of the Fifth Amendment due process clause.

**Professional Pointer**

To date, more than 10 states have adopted similar licensing schemes without legal challenge. As a result of the 9th Circuit's action, more states can be expected to adopt such legislation.
On the same day the controversial Arizona Immigration Law went into effect, the Supreme Court granted cert in *Candelaria v. Chamber of Commerce*—a case that raises the issue whether federal law preempts Arizona’s existing Legal Arizona Workers Act (“LAWA”). That law—like its federal counterpart the Immigration Reform and Control Act (“IRAC”)—prohibits employers from hiring undocumented workers. Unlike IRAC, the Arizona bill imposes a corporate “death penalty” on any employer that twice violates the Act’s provisions, a penalty Arizona lawmakers hoped would exempt the Act from preemption by bringing it within a “licensing” exception to IRAC’s otherwise exclusive provisions.

The Supreme Court’s decision to hear this case should be good news for employers doing business in more than one state. As the Reply Brief in support of the national Chamber of Commerce’s Petition for Cert notes, employers are currently required to keep abreast of hundreds of state laws concerning the hiring of undocumented workers, many of them requiring inconsistent or duplicative proofs of legal residency.

Arizona defends its right to regulate that which the federal law already pervasively addresses, by interpreting the term “license” as including the ordinary documentation every business must file to conduct its affairs in any State—Articles of Incorporation and the like. The federal trial and appellate courts bought this rationale for reasons that defy logic but make political sense given the current anti-immigrant climate in Arizona and other border states. It’s difficult to imagine, however, that the Supreme Court will permit the licensing exception to swallow the preemption rule in this manner.

Because Arizona’s right to regulate the employment of undocumented workers rests upon so spare a basis as the meaning of the word “license,” we cannot expect the high court to decide the issue now burning up the country’s news wires—whether the recently enacted Arizona immigration law will also be preempted by its federal counterpart. That law authorizes state and local law enforcement officials to inquire into the immigration status of any person who is reasonably suspected of being unlawfully present in the United States and to arrest such an individual if there is probable cause to do so. Back in April, Constitutional Law Professor Steven L. Schwinn concluded that the new immigration provision would be preempted because the Arizona law falls under the doctrines of both “field” and “conflict” preemption.

As Schwinn wrote at the time,

> The federal scheme reflects Congress’s judgment to completely occupy the field of immigration and naturalization . . . a judgment that is well within its powers under Article I, Section 8.

Schwinn went on to argue that even if the “field” theory did not invalidate the
controversial new Arizona legislation, the doctrine of “direct conflict” would. As he explained, the Arizona law authorizes state authorities to arrest anyone the official believes has committed a “public offense” that “makes the person removable from the United States.” His conclusion? Because an alien’s “unauthorized presence in the United States is just such an offense under 8 U.S.C. Sec. 1227 . . . Arizona’s law is . . . in conflict with the federal law and likely violates the Supremacy Clause.” Legal opinions about the viability of the Arizona law under preemption standards are, however, all over the board, as most comprehensively reported at The Volokh Conspiracy’s post “Is the Arizona Immigration Law Preempted?”

Mayer Brown’s Andrew Tauber in a June 28 article on the grant of cert, optimistically suggests that the Supreme Court’s decision in Candelaria will illuminate the extent to which states can impose their own work-eligibility verification requirements, and sanctions for hiring unauthorized workers, on employers. Let’s hope so. Given the Court’s recent propensity for deciding cases of significance on hyper-technical grounds, there is considerable danger that its opinion will decide only the “safety clause” issue and not the broader questions presented by the new and far more controversial Arizona immigration law. As Tauber notes, “[a]bsent extensions, which are likely, amicus briefs in [Candelaria that] support . . . the petitioners will be due on August 19, 2010, and [those] in support of the respondents will be due on September 20, 2010.
The U.S. Supreme Court later this year will hear arguments on the constitutionality of Arizona’s landmark 2007 law that penalizes employers for hiring illegal immigrants. A decision is expected next year.

The high court’s ruling, expected in late spring 2011, also could provide legal guidance on SB 1070, a new Arizona law making it a state crime to be in the country illegally, those involved in the employer-sanctions case say.

The court, following a request from the U.S. solicitor general, announced Monday that it will hear challenges to the Legal Arizona Workers Act, which went into effect Jan. 1, 2008.

The law punishes companies by suspending or revoking their business licenses for knowingly hiring illegal immigrants. It also requires Arizona employers to use a federal electronic system to verify if an employee is authorized to work.

The law was challenged by a coalition of 11 U.S. and Arizona business groups, which contend that it is the federal government’s role to regulate the hiring of immigrants. They argue that permitting states to impose their own penalties against violators encourages a crazy quilt of differing laws that have penalties more severe than those in federal statute and are less likely to be balanced against discrimination concerns.

Supporters say the law has mostly been a deterrent, as only two businesses have faced sanctions.

Maricopa County Sheriff Joe Arpaio has used the law to conduct 36 investigations to crack down on illegal immigrants. His workforce raids have resulted in 415 suspects being arrested, with 277 arrested on charges of identity theft.

“Everyone tends to forget the victims who get their identities stolen and the devastation that it has on the victims,” said Chief Deputy David Hendershott of the Sheriff’s Office. “Has it been effective? Look at what has happened. There has been widespread self-policing by major corporations and businesses.”

A U.S. District Court and the San Francisco-based 9th U.S. Circuit Court of Appeals had upheld the constitutionality of Arizona’s employer-sanctions law.

The Arizona Attorney General’s Office, which did not return calls Monday, defeated challenges by citing a 1986 federal law that gave states permission to impose sanctions through licensing and similar laws.

Arizona has allocated nearly $5.6 million to the state’s 15 county attorneys during the past three years to enforce the law. Maricopa County received the most: nearly $3.6 million.

This past fiscal year, the state gave money only to Maricopa County after The Republic reported at least $1.44 million was sitting idle in nine counties because there were so few complaints about employers violating the law. For the new fiscal year, which begins Thursday, the county is projected to
receive $1.21 million, bringing the state’s spending total to nearly $6.8 million.

The law has been mirrored in other states and communities across the country. Both sides of the lawsuit agree the Supreme Court’s ruling will give states some guidance on an important aspect in the illegal-immigration debate.

“This will give clarity as to the appropriate role of states in regulating at least one aspect of immigration,” said Glenn Hamer, chief executive of the Arizona Chamber of Commerce and Industry, one of the suit’s plaintiffs.

Hendershott said the high court will let everyone know what to do.

But Paul Bender, an Arizona State University law professor and constitutional-law expert, said the Supreme Court’s ruling on the employer-sanctions case could be narrow, not providing much direction on SB 1070. Bender added that because the employer-sanctions ruling won’t come for about a year, lower courts may have no guidance, as rulings on the new law could occur during that time.

The new law states that an officer engaged in a lawful stop, detention or arrest shall, when practicable, ask about a person’s legal status when reasonable suspicion exists that the person is in the U.S. illegally.

The federal government is expected to file a lawsuit soon challenging the SB 1070, which goes into effect July 29.
"Immigration Raids Often Start with Tips from Disgruntled Employees"

Phoenix Business Journal
September 3, 2009
Mike Sunnucks

It often starts with a disgruntled current or former employee calling a Maricopa County Sheriff’s Office tip line or a worker who has gotten into legal trouble sharing information on an employer.

The result can be dozens of armed MCSO deputies raiding a business, shutting it down for hours and arresting suspected undocumented workers.

A 2007 state law, designed to suspend or the revoke business licenses of employers who knowingly hire undocumented workers, has led to many employee arrests, but few bosses or businesses have been charged.

Maricopa County Sheriff Joe Arpaio has raided 22 Phoenix-area businesses suspected of hiring illegal immigrants since 2008. Those resulted in 310 arrests on immigration, fake identification and identify theft charges.

The raids are welcomed by those who back Arpaio’s get-tough approach to illegal immigration, but others question how the sheriff’s tactics and targeting people whose only crime is illegally entering the U.S. for work.

Arpaio says the raids are conducted under the 2007 Legal Arizona Workers Act and a federal 287(g) agreement, which allows the MCSO to arrest illegal immigrants.

Arpaio said it is tough to prove businesses knowingly hire illegal immigrants who show fake IDs, but will arrest suspected workers during the raids. “It’s hard to hook the employer,” Arpaio said.

Maricopa County Attorney’s Office spokesman Michael Scerbo said the county is investigating two managers at businesses raided by the MCSO under the employer sanctions law: a former supervisor with the Golfland Entertainment Inc. water parks; and Raphael Libardi, owner of Aracruz International Granite, which imports and sells granite and marble slabs and countertops used in homes and commercial buildings.

Libardi was indicted in July on charges of illegally using the Social Security number of deceased man.

“We are not interested and I have no comment,” said Ive Dummer Libardi Lopez in response to a request for comment from Aracruz Granite.

Officials at Golfland did not respond to a request for comment.

Lock down

Arpaio said most of the business raids start with a tip from a disgruntled current or former employee who knows or suspects the business in question is hiring illegal immigrants. The MCSO has received more than 5,000 such tips.

The MCSO then checks Social Security and Arizona Department of Economic Security databases for duplicates, after which search
warrants often are secured.

"We don’t just knock the door down and grab people cause they look like they are from Mexico," Arpaio said.

Julie Pace, an immigration attorney with Ballard Spahr Andrews & Ingersoll LLP who represents businesses, agreed that many times disgruntled employees call the MCSO, but added the sheriff’s business investigations also originate from other sources.

"Sometimes MCSO's investigations arise from a current employee who is arrested based on a DUI or outstanding charge and then is interviewed by MCSO about the company and hiring practices and that can cause an investigation," Pace said.

"Raid by MCSO have lots of officers and search warrants that generally identify the names of the individual employees—current and former—whom they want to talk with, search warrants identify documents such as personnel files for the individuals' names on the search warrant list," Pace said.

The MCSO gives no advance notice of the raids and generally locks down the operation. No phone calls, bathroom visits, or even getting a drink of water are allowed. Officers often cuff employees who they arrest as being undocumented and detain those who are legal as they check them out, Pace said.

Arpaio said the raids require significant number of officers to cordon off the area and make sure suspects do not escape. "They are always trying to escape," he said.

Some business owners privately acknowledge they tell workers they know or suspect of being undocumented to leave the premises if they see MCSO deputies. Informal communications "trees" also exist among immigrant communities to notify workers and others if there appears a raid appears to be under way.

No apologies to critics

The MCSO has more than 160 officers trained to enforce federal immigration laws. Companies hit have included Royal Paper Converting Co., Gold Canyon Candle and Handyman Maintenance Inc. Several of the companies subject to MCSO raids refused or did not respond to requests for comment.

But the owner of a Scottsdale custom furniture business where 12 people were arrested in a January raid said the actions are misguided.

"We are not interested in this fight because we believe it is a lost out-of-control cause," said Jerry Martin, owner and manager of the Scottsdale! Art Factory which makes custom furniture. "Due to the sheriff's egomaniacal polices he assumes it is OK to use his office to advance some personal cause, while hard working business folks make up the very tax base that allows him to exist try to survive in this economy."

The MCSO raid on the Scottsdale business involved 45 officers. Arpaio makes no apologies for the number of deputies used in the raids saying they need to be prepared for various situations. He also makes no apologies for enforcing immigration laws and said investigations sometimes take months to develop.

"We need to have probable cause," the sheriff said.

The U.S. Immigration and Customs Enforcement Agency also can conduct raids
against businesses hiring undocumented workers. The waning days of the Bush administration saw some increased activity on that front, including threats of prosecution. The Obama administration has promised to step up such investigations.

U.S. Homeland Security Secretary Janet Napolitano said earlier this summer the administration wants to rework 287(g) pacts with local police, including the MCSO, to focus more criminal activity. Arpaio said he believes the MCSO and ICE will work out a new agreement.

Pace said businesses should audit I-9 forms, which list employees’ identification information and legal status. Companies should have workers sign forms further testifying they are legal to work in the U.S. and use the federal E-Verify database system to help determine workers’ status.

The business raids are part of Arpaio’s hard-line approach to illegal immigration, including crime sweeps and raids at day labor sites where undocumented migrant workers congregate. The U.S. Department of Justice is looking at whether such tactics unfairly target Hispanics and there are a couple of lawsuits against the sheriff filed by Hispanics caught in raids.

A Hispanic father and son are suing Arpaio in U.S. District Court claiming they were unlawfully detained in a February raid against a Phoenix landscaping business. The American Civil Liberties Union filed the suit on behalf of Julian Mora, 66, and Julio Mora, 19. The senior Mora is a legal resident of the U.S. and his son is a U.S. citizen, according to the lawsuit.

The Moras claim MCSO officers pulled them over on a Phoenix street in February, arrested them and transported them to the site of a raid on Phoenix landscaping business Handyman Maintenance Inc. Julian Mora was an employee of HMI at the time of the raid.

The suit claims the Moras were unfairly arrested because they look Hispanic. The pair were detained by deputies at HMI for three hours before being released. Fifty-nine immigrant workers were arrested.

The ACLU also is party to a federal lawsuit against the MCSO brought by a Mexican national who says he is in the U.S. legally. *Melendres v. Arpaio* involves MCSO’s treatment of Manuel De Jesus Ortega Melendres in 2007 in Cave Creek. Arpaio says the DOJ investigation and lawsuits are being pushed those who don’t like his immigration enforcement.

**Immigration Raids**

Raid on businesses by the Maricopa County Sheriff’s Office and number of alleged illegal immigrants detained:

- Golfland Entertainment: 20
- (Waterworld/SunSplash): 20
- Artistic Land Management: 31
- Gold Canyon Candle: 60
- Management Cleaning Control: 6
- Scottsdale Art Factory: 12
- Handyman Maintenance Inc.: 59
- Cochran Painting: 8
- Lindstrom Family Car Wash: 14
- Royal Paper: 47
Nearly two years and 26 business raids after the state’s employer-sanctions law took effect, county prosecutors on Wednesday filed the first case against a business owner they say knowingly hired illegal workers.

Michelle Hardas, owner of Scottsdale Art Factory, has been named in a civil complaint in Maricopa County Superior Court.

The complaint alleges she knowingly violated the Legal Arizona Workers Act when, according to prosecutors, she hired a subcontractor who was actually her employee and whom she knew to be in the country illegally.

“It’s the first time a case like this has been brought any place in the United States,” County Attorney Andrew Thomas said. “It’s the first time a state law has been used to try to suspend or revoke a business license of an employer who had hired illegal immigrants.”

In the suit, the County Attorney’s Office asks that any illegal workers be fired and that the company’s business license be suspended for at least 10 days. A hearing is scheduled for next week.

Hardas denies any wrongdoing.

The case focuses on a Mexican national named Hilario Santiago Hernandez, who was arrested during a Jan. 29 immigration raid by sheriff’s deputies at Scottsdale Art Factory, a custom-furniture and cabinet business on Greenway Road.

Acting on a tip

Santiago Hernandez was voluntarily deported. But, according to the court filing, he was back in Phoenix by April and filed paperwork with the Arizona Corporation Commission to start a company called Santiago Homemade Furniture.

Investigators believe he and Hardas then tried to sidestep the employer-sanctions law by claiming Santiago Hernandez was an independent contractor and not a full-time employee, because the law does not hold general contractors responsible for verifying the legal status of a subcontractor’s employees.

Acting on a tip, investigators sent another man to the Scottsdale Art Factory to act as if he were seeking work.

That man was wired with an undercover video camera, and he recorded Hardas as she counseled him—in Santiago Hernandez’s presence—on how to set up his own company, file the paperwork and pay the taxes.

Hardas said Wednesday that the paperwork for Santiago Hernandez was in order but that she was not in the position to check the status of employees at Santiago Homemade Furniture.

Hardas added that she used E-Verify to confirm the status of employees Scottsdale Art Factory hired since the January raid.
“Absolutely, every employee that we have hired has been E-Verify,” she said. “There has been no question.”

Scottsdale Art Factory registered with the Corporation Commission in 1997, and investigators believe there are fewer than 20 employees.

The Legal Arizona Workers Act was designed to help law enforcement target business owners instead of the employees typically ensnared during workplace raids.

When the law took effect on Jan. 1, 2008, it followed months of debate about the impact the measure would have on the state’s economy and a legal challenge that was ultimately rejected in federal court, though the U.S. Supreme Court could still consider the challenge this year.

And then nothing.

There were more than two dozen raids that netted 327 arrests, but none of the busts resulted in charges against employers, which law-enforcement officials blamed on provisions in the law requiring prosecutors to prove business owners had knowingly hired an illegal immigrant after the law went into effect.

Thomas has said the law is weak, and he wants the Legislature to consider strengthening the powers of investigators with the ability to subpoena business records.

**Proving intent**

As written, the law requires investigators to spend months comparing employee files with data from the Department of Economic Security, but the comparison does little to help prove the intent of the business owner when the worker was hired.

A ruling against Hardas could result in the suspension of Scottsdale Art Factory’s business license for 10 days; another violation within a year would mean the loss of a business license.

Either would be a victory for Thomas and Sheriff Joe Arpaio, who have consistently tried to deflect the perception that the employer-sanctions law is just another method to target illegal immigrants.

“‘It’s an important day, not only in Arizona but nationally, and we thought it was important that we try to do it right, and I believe we have,’” Thomas said.

Those undercover recordings and Hardas’ version of events should end up in court soon.

Shortly after the Legal Arizona Workers Act was passed, the state Legislature also passed laws to ensure that such cases would be fast-tracked. The Scottsdale Art Factory case has a hearing set for next Wednesday before Superior Court Judge Sam Myers, and the company will be expected to have an attorney by that date.

The tapes will be a key piece of evidence.

“It’s like having a real business . . . even though we’re just using it to put the money through,” Hardas is heard saying on the video recording.

But she also states that she worries about what other company employees will think because “maybe somebody doesn’t like the fact that I’m hiring you guys and trying to get around the system.”

Her fear turned out to be well-founded.
On the recording, Hardas worries that if the sheriff’s deputies return, those employees might say the undocumented workers are there every day.

She then counsels the undercover job applicant to say that he is a subcontractor and just comes in occasionally to drop off work.

When reached for comment, Santiago Hernandez said that he no longer works for Scottsdale Art Factory but that he was an employee there about three years ago. He admitted he has a company called Santiago Furniture but claimed he no longer does business with Hardas. He declined to answer if he was in the country illegally.

Santiago Hernandez also said that he knew nothing about the civil lawsuit filed against Hardas.

Thomas said he does not believe Hardas is the only business owner violating the law.

“It is an attempt to game the system,” he said. “But we held this company accountable today, and it’s an important step forward to fight illegal immigration.”
Flores-Villar v. United States

09-5801


Appellant challenges two sections of the Immigration and Nationality Act, which consider the transmission of citizenship from a citizen parent to a child born out of wedlock where the second parent is not a citizen and the child is born outside of the United States. These sections impose different standards based on whether the citizen parent is male or female. If the citizen parent is male, then he must have resided in the United States continuously for five years after attaining the age of fourteen for his citizenship to pass to the child. If the citizen parent is female, however, she must have resided in the United States for a period of only one year for her citizenship to pass to the child. The Court has previously recognized two important state interests that are substantially furthered by these sections: assuring (1) that a biological parent-child relationship exists and (2) that a “real, every-day” parent-child relationship exists. The lower court held that these relationships are more readily established with regard to the mother than the father. The lower court also held that a more lenient stance with regard to citizen mothers is important because it helps to avoid the problem of “stateless” children born without any citizenship in foreign countries that recognize citizen status based on bloodline as opposed to place of birth.

Question Presented: Whether the Court’s decision in Nguyen v. INS permits gender discrimination that has no biological basis.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

RUBEN FLORES-VILLAR, Defendant-Appellant.

United States Court of Appeals for the Ninth Circuit

Decided August 6, 2008

[Excerpt; some footnotes and citations omitted.]

RYMER, Circuit Judge:

Ruben Flores-Villar raises a challenge under the equal protection component of the Fifth Amendment’s due process clause on the basis of age and gender to two former sections of the Immigration and Nationality Act, 8 U.S.C. 1401(a)(7) and 1409 (1974), which impose a five-year residence requirement, after the age of fourteen, on United States citizen fathers—but not on United States citizen mothers—before they may transmit citizenship to a child born out of wedlock abroad to a non-citizen. This precise question has not been addressed before, but the answer follows from the Supreme Court’s opinion in Nguyen v. INS,
533 U.S. 53 (2001). There the Court held that 1409's legitimation requirements for citizen fathers, but not for citizen mothers, did not offend principles of equal protection. Assuming, as the Court did in *Nguyen*, that intermediate scrutiny applies to Flores-Villar's gender-based claim and rational basis review applies to his age-based claim, we conclude that the residence requirements of 1401(a)(7) and 1409 survive. As this is what the district court held in a published opinion, *United States v. Flores-Villar*, 497 F. Supp. 2d 1160 (S.D. Cal. 2007), and we see no other error, we affirm.

* I

Flores-Villar was born in Tijuana, Mexico on October 7, 1974 to Ruben Trinidad Floresvillar-Sandez, his United States citizen biological father who was sixteen at the time, and Maria Mercedes Negrete, his non-United States citizen biological mother. Floresvillar-Sandez had been issued a Certificate of Citizenship on May 24, 1999 based on the fact that his mother—Flores Villar's paternal grandmother—is a United States citizen by birth.

His father and grandmother brought Flores-Villar to the United States for medical treatment when he was two months old. He grew up in San Diego with his grandmother and father. Floresvillar-Sandez is not listed on Flores-Villar's birth certificate, but he acknowledged Flores-Villar as his son by filing an acknowledgment of paternity with the Civil Registry in Mexico on June 2, 1985.


He was arrested again on February 24, 2006, and this time was charged with being a deported alien found in the United States after deportation in violation of 8 U.S.C. 1326(a) and (b). He sought to defend on the footing that he believed he was a United States citizen through his father. Meanwhile, Flores-Villar filed an N-600 application seeking a Certificate of Citizenship, which was denied on the ground that it was physically impossible for his father, who was sixteen when Flores-Villar was born, to have been present in the United States for five years after his fourteenth birthday as required by 1401(a)(7). The government filed a motion in limine to exclude evidence of derivative citizenship for the same reason, which the district court granted. The court denied Flores-Villar's corresponding motion in limine, to be allowed to present evidence that he believed he was a United States citizen.

The district court found Flores-Villar guilty following a bench trial on stipulated facts. It denied his motion for judgment of acquittal. Flores-Villar timely appeals his conviction.

* II

When Flores-Villar was born, 1401(a)(7) provided, in relevant part:

(a) The following shall be nationals and citizens of the United States at birth:

...  

(7) a person born outside the geographic limits of the United States and its outlying possessions of
parents one of whom is an alien, and
the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.

Section 1409 provided:

(a) The provisions of paragraphs (3) to (5) and (7) of section 1401(a) of this title, and of paragraph (2) of section 1408, of this title shall apply as of the date of birth to a child born out of wedlock . . . if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

... 

(c) Notwithstanding the provision of subsection (a) of this section, a person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person’s birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

Thus, if a United States citizen father had a child out of wedlock abroad, with a non-United States citizen mother, the father must have resided in the United States for at least five years after his fourteenth birthday to confer citizenship on his child. But a United States citizen mother had to reside in the United States for a continuous period of only one year prior to the child’s birth to pass on citizenship. It is this difference that Flores-Villar claims makes an impermissible classification on the basis of gender and age.

In *Nguyen*, the United States citizen father of a child born in Vietnam to a Vietnamese mother challenged 1409’s imposition of different rules for obtaining citizenship depending upon whether the one parent with American citizenship is the mother or the father. There, the father complained about the affirmative steps a citizen father, but not a citizen mother, was required by 1409(a)(4) to take: legitimation; a declaration of paternity under oath by the father; or a court order of paternity. Assuming, without deciding, that the intermediate level of scrutiny normally applied to a gender-based classification applies even when the statute is within Congress’ immigration and naturalization power, and drawing on Justice Stevens’s prior opinion in *Miller v. Albright*, the Court identified two important governmental interests substantially furthered by 1409’s distinction between citizen fathers and citizen mothers. The first is “assuring that a biological parent-child relationship exists.” Mothers and fathers are not similarly situated in this respect; the relation is verifiable from the birth itself in the case of the mother, while a father’s biological relationship to the child is not so easily established. The second interest is ensuring “that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.” The mother knows that the child is in being and has immediate contact at birth such that an opportunity for a meaningful relationship exists, whereas, as the Court put it, “[t]he same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case
of the unwed father.” Unlike an unwed mother, there is no assurance that the father and his biological child will ever meet, or have the kind of contact from which there is a chance for a meaningful relationship to develop. The Court emphasized that Congress need not ignore these realities for purposes of equal protection, and found that the means chosen—additional requirements for an unwed citizen father to confer citizenship upon his child—are substantially related to the objective of a relationship between parent and child, and in turn, the United States.

Although the means at issue are different in this case—an additional residence requirement for the unwed citizen father—the government’s interests are no less important, and the particular means no less substantially related to those objectives, than in *Nguyen*. The government argues that avoiding stateless children is an important objective that is substantially furthered by relaxing the residence requirement for women because many countries confer citizenship based on bloodline (jus sanguinis) rather than, as the United States does, on place of birth (jus soli). We explained the conundrum in *Runnett v. Shultz*:

“One obvious rational basis for a more lenient policy towards illegitimate children of U.S. citizen mothers is that illegitimate children are more likely to be “stateless” at birth. . . . As the government notes, if the U.S. citizen mother is not a dual national, and the illegitimate child is born in a country that does not recognize citizenship by jus soli (citizenship determined by place of birth) alone, the child can acquire no citizenship other than his mother’s at birth. This policy clearly demonstrates a “rational basis” for Congress’ more lenient policy towards illegitimate children born abroad to U.S. citizen mothers.”

While Flores-Villar points out that the opposite would be true in Iran, for example, where an illegitimate child born to an Iranian mother and a father who is not an Iranian citizen is regarded as having the father’s nationality, this does not diminish the strength of Congress’ interest in trying to minimize the risk of statelessness overall. As the Supreme Court remarked in a different context, statelessness is a deplored condition with potentially “disastrous consequences.” In any event, as *Nguyen* makes clear, we do not expect statutory classifications always to be able to achieve the ultimate objective.

Avoiding statelessness, and assuring a link between an unwed citizen father, and this country, to a child born out of wedlock abroad who is to be a citizen, are important interests. The means chosen substantially further the objectives. Though the fit is not perfect, it is sufficiently persuasive in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship. . . .

Flores-Villar acknowledges that the prevention of stateless children is a legitimate goal, but contends that it cannot be furthered by penalizing fathers. In his view, the real purpose of the statute is to perpetuate the stereotypical notion that women should have custody of illegitimate children. Further, he suggests, the length of residence in the United States says nothing about the father-child relationship or the biological basis of that relationship. And understandably, Flores-Villar emphasizes that his father in fact had a custodial relationship with him. However, the Court rejected similar submissions by the father in *Nguyen*. As it explained:
"This line of argument misconceives the nature of both the governmental interest at issue and the manner in which we examine statutes alleged to violate equal protection. As to the former, Congress would of course be entitled to advance the interest of ensuring an actual, meaningful relationship in every case before citizenship is conferred. Or Congress could excuse compliance with the formal requirements when an actual father-child relationship is proved. It did neither here, perhaps because of the subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular bond or tie. Instead, Congress enacted an easily administered scheme to promote the different but still substantial interest of ensuring at least an opportunity for a parent-child relationship to develop. Petitioners’ argument confuses the means and ends of the equal protection inquiry; 1409(a)(4) should not be invalidated because Congress elected to advance an interest that is less demanding to satisfy than some other alternative."

The residence differential is directly related to statelessness; the one-year period applicable to unwed citizen mothers seeks to insure that the child will have a nationality at birth. Likewise, it furthers the objective of developing a tie between the child, his or her father, and this country. Accordingly, we conclude that even if intermediate scrutiny applies, 1401(a)(7) and 1409 survive.

Sections 1401(a)(7) and 1409 satisfy rational basis review as well. Legislation is presumed valid, and “will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” Having passed intermediate scrutiny, the statutory scheme necessarily is rationally related to a legitimate government purpose. This follows from Runnett. There we held that it was rational to adopt a more lenient policy for illegitimate children of United States citizen mothers who satisfied a residence requirement than for legitimate children whose mothers failed to meet a higher residency requirement.

* * *

AFFIRMED.
The Supreme Court on Monday agreed to decide if mothers and fathers may be treated differently in determining whether their children may claim American citizenship.

The case, *Flores-Villar v. United States,* involves Ruben Flores-Villar, who was born in Tijuana, Mexico, but was raised by his father and grandmother, both American citizens, in San Diego. His mother was Mexican, and his parents were not married.

Mr. Flores-Villar tried to avoid deportation by claiming American citizenship. The United States Court of Appeals for the Ninth Circuit, in San Francisco, rejected that claim under a law that spelled out different requirements for mothers and fathers whose children were born abroad and out of wedlock to a partner who was not an American citizen.

The law, since amended, allowed fathers to transmit citizenship to their children only if the fathers had lived in the United States before the child was born for a total of 10 years, five of them after age 14. Mothers were required to have lived in the United States for a year before their child was born. (The amended law kept the general system but shortened the residency requirement for fathers.)

Mr. Flores-Villar’s father was 16 when his son was born, making it impossible for him to fulfill the part of the law requiring five years of residency after age 14.

Mr. Flores-Villar argued that the differing treatments violated equal protection principles. The Supreme Court has said that sex-based classifications are permissible only if they serve important governmental goals and are substantially related to achieving those goals.

In 2001, the Supreme Court upheld a law that imposed differing requirements in a similar situation. In that case, *Nguyen v. Immigration and Naturalization Service,* a closely divided court said that American fathers of children born out of wedlock abroad had to get a court order establishing paternity or swear to it under oath for their children to obtain American citizenship. American mothers were not subject to that requirement.

Mr. Flores-Villar said that decision turned on biological factors concerning the establishment of paternity that are not present in his case, *Flores-Villar v. United States,* No. 09-5801.

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A great program on KPBS this morning covered the case of Ruben Flores-Villar. Flores-Villar, 35, was born in Tijuana, Mexico, but grew up in the San Diego area, in the care of his father and grandmother. [The case is Flores-Villar v. United States.]

When he sought U.S. citizenship in 2006—to fend off criminal charges of being in the country illegally—U.S. immigration authorities turned him down. For people born before 1986, their U.S. citizen fathers had to have lived in the U.S. for 10 years, at least five of them after the age of 14. Flores-Villar’s father could not meet the second part of that requirement because he was only 16 when his son was born. American mothers need only have lived in the U.S. continuously for a year before the birth of a child.

Later this year, the Supreme Court will enter a curious corner of U.S. immigration law that applies only to children born outside the U.S. to one parent who is an American and one who is not. The law makes it easier for children whose mother is a citizen to become citizens themselves. Even after reform legislation in 1986, children of American fathers face higher hurdles claiming citizenship for themselves.

Lower federal courts upheld Flores-Villar’s conviction and rejected his discrimination claims. Flores-Villar has previously been deported at least five times since he was convicted of importing marijuana when he was 22, the government said in court papers. The Obama administration argued that the less stringent residency requirement in the 1986 law was one of several reasons for the court to stay out of the case.

The 1986 Citizenship law states:

Children born abroad to two US citizen parents, one of whom has resided in the US prior to the birth of the child, continue to be US citizens at birth, and need take no special actions to retain citizenship.

Children born to one citizen parent and one foreign national will obtain citizenship at birth if the citizen parent resided in the US for five years before the birth, with two of those years after the age of 14. The child does not need to take any special action to retain US citizenship.

Children born out of wedlock to a US citizen mother will be US citizens if the mother resided in the US for one year prior to the birth of the child. Children born out of wedlock to a US citizen father will acquire US citizenship if the following conditions are met:

There is an established blood relationship between the father and the child,

The father was a US citizen at the time of the birth,

The father has agreed to financially support the child until it is 18, and

Before the child is 18 it is
legitimated, or the father acknowledges paternity in a document signed under oath.

The court ruled on a related issue in 2001, holding that it was all right to require American fathers, but not mothers, of children born out of wedlock and abroad to get a court order of establishing paternity or swear to it under oath...
The Ninth U.S. Circuit Court of Appeals yesterday held [in United States v. Flores-Villar, 07-50445,] that disparate residence requirements for unwed male and female citizens over the age of 14 who seek to transmit citizenship to a child born abroad to a non-citizen do not violate equal protection.

Assuming that intermediate scrutiny applied to Ruben Flores-Villar’s gender-based challenge and rational basis review applied to his age-based challenge to former sections of the Immigration and Nationality Act, a three-judge panel rejected his claim to citizenship through his father and affirmed his conviction for illegally reentering the country following deportation.

Flores-Villar was born in Tijuana, Mexico in 1974. His biological father, Ruben Trinidad Floresvillar-Sandez, was not listed on Flores-Villar’s birth certificate, but acknowledged Flores-Villar as his son by filing an acknowledgment of paternity with the Civil Registry in Mexico.

When Flores-Villar was two months old, his father and paternal grandmother brought him to the United States, and he was raised in San Diego.

He was convicted of importing marijuana and illegally entering the country in 2007 after being ordered removed a total of six times between 1998 and 2005.

Citizenship Claimed

After his 2006 arrest and charge for being a previously deported alien found in the United States, Flores-Villar argued that he thought he was a citizen through his father, who had attained citizenship through his mother—Flores-Villar’s paternal grandmother—a citizen by birth.

The government moved in limine to exclude evidence of derivative citizenship on the ground that it was physically impossible for Flores-Villar’s father, who was sixteen when Flores-Villar was born, to have been present in the United States for five years after his fourteenth birthday as required by 8 U.S.C. § 1401(a)(7) and 1409.

When Flores-Villar was born, the sections provided that if a United States citizen father had a child out of wedlock abroad, with a non-citizen mother, the father must have resided in the United States for at least five years after his 14th birthday to confer citizenship on his child. In contrast, an out-of-wedlock child born abroad to a United States citizen mother had only to reside in the country for a continuous period of one year prior to birth in order to pass citizenship.

U.S. District Judge Barry T. Moskowitz of the Southern District of California granted the government’s motion and later found Flores-Villar guilty following a bench trial on stipulated facts.

Stateless Children

But on appeal, Judge Pamela Ann Rymer explained that most foreign countries confer
citizenship by bloodline, not place of birth, as in the United States. Thus, a United States citizen mother who gives birth to an illegitimate child in a foreign country that confers citizenship based on bloodline alone will have a child with no nationality at birth.

She reasoned that the disparate treatment between mothers and fathers was justified because the government has a substantial interest in avoiding "stateless" children born to citizen mothers, and also a substantial interest in assuring a link between an unwed citizen father and the United States.

Although "the fit is not perfect," she wrote, "the means chosen substantially further [these] objectives." Thus, she concluded, the sections withstood constitutional scrutiny. Flores-Villar also contended that the statutory scheme treated men over 19 years of age differently than those under 19 insofar as it made it legally and physically impossible for United States citizen fathers under that age to confer citizenship upon their foreign-born, illegitimate children, even if they had resided in the United States for 10 years.

But Rymer opined that a rational basis supported such disparate treatment because a father who has spent at least five years of his life in the United States as a teenager would have more of a connection with the country to pass on to his child than a father who lived in the country between the ages of 1 and 10.

Judges Cynthia Holcomb Hall and Andrew J. Kleinfeld joined Rymer in her opinion...
The government may make it more difficult for children born out of wedlock overseas to U.S. citizen fathers to claim citizenship than for the children of American mothers, the Supreme Court ruled yesterday, rejecting a claim that the different treatment violates the constitutional guarantee of equal protection.

By a vote of 5 to 4, the court held that, in adopting different rules depending on whether the mother or father was a U.S. citizen, Congress was attempting to ensure that such children have a clear biological and social attachment to their U.S. citizen parent, and therefore was engaging in a constitutionally acceptable form of gender discrimination.

Women’s rights groups had challenged the law as one of the few surviving examples in federal law of what they called gender-based stereotypes about the parenting roles of men and women.

But Justice Anthony M. Kennedy, in the opinion for the court, wrote, “There is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother’s knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype.”

The law in question says children born out of wedlock abroad to mothers who are U.S. citizens may become citizens almost automatically. In the case of children of U.S. citizen fathers, however, one of several legal steps must be taken first to establish paternity—before the child reaches the age of 18.

The case decided yesterday involved Tuan Ahn Nguyen and his father, Joseph Boulais of Texas. Nguyen was born in Saigon in 1969 and abandoned by his Vietnamese mother soon thereafter. Boulais, who had come to Vietnam with the U.S. government during the Vietnam War, took custody of the child and brought him to the States in 1975—but never acted to establish legal paternity or have his son naturalized as a citizen.

In 1992, Nguyen pleaded guilty in a Texas court to two counts of sexual abuse of a minor, and was sentenced to 16 years in prison. Three years later, the Immigration and Naturalization Service moved to deport him to Vietnam, his country of citizenship, as an alien who had committed felonies involving moral turpitude.

While that matter was tied up in the immigration bureaucracy, Boulais obtained a court order declaring him Nguyen’s father based on a DNA test. But an immigration appeals board rejected Nguyen’s subsequent claim of citizenship, citing Boulais’s failure to act before his son’s 18th birthday.

They appealed to a federal appeals court, contending that the immigration law discriminated against them on the basis of sex. Last year that court, too, sided with the federal government.

Having wrestled inconclusively with the
same issue in a 1998 case, the Supreme Court agreed to hear the appeal.

The case presented the unusual situation that women's rights groups, who strongly supported the appeal, were going to bat for two men—one of them an admitted sex offender—claiming sex discrimination.

The groups did so, they said, to establish the larger principle that the government should not legislate based on outmoded notions of parenting roles. Indeed, the groups argued, the fact that Nguyen's mother abandoned him while his father took responsibility refutes a premise of the immigration law's gender-based distinction between men and women.

"We tried to show that a lot of what this is based on is historic discrimination," said Nancy Duff Campbell of the National Women's Law Center, which filed a friend-of-the-court brief on behalf of Nguyen and Boulais.

Dissenters agreed, saying that gender-neutral alternatives to the law could easily be devised and emphasizing that modern DNA testing can establish paternity reliably, even if a father is not present at the child's birth.

"Indeed, the majority's discussion may itself simply reflect the stereotype of male irresponsibility that is no more a basis for the validity of the classification than are stereotypes about the traditional behavior patterns of women," Justice Sandra Day O'Connor wrote in a dissenting opinion joined by Justices David H. Souter, Stephen G. Breyer and Ruth Bader Ginsburg.

The case is *Nguyen v. INS*, No. 99-2071.
The question [in *Flores-Villar v. United States*] is a narrow one: whether the court's decision in *Nguyen v. INS*, 533 U.S. 53 (2001), permits gender discrimination that has no biological basis?

Recall that the Court in *Nguyen* upheld 8 U.S.C. § 1409 which imposed different requirements for a child's acquisition of citizenship depending upon whether the citizen parent is the mother or the father. Writing for the Court, Kennedy found that the statutory gender-based distinction—applicable when the parents were unmarried, when only parent was a citizen, and when the child was born outside of the United States—survived a constitutional challenge based on the "equal protection guarantee embedded in the Due Process Clause of the Fifth Amendment." The Majority found that the statute served two important governmental interests: the importance of assuring that a biological parent-child relationship exists and the importance of assuring that the child and the citizen parent have a demonstrated opportunity or potential to develop the "real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States." The Court in *Nguyen* relied on biological reasoning: women give birth and men may not even realize their paternity, concluding:

> Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity. This fact takes on particular significance in the case of a child born overseas and out of wedlock. One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries.

The Court then provided statistics about the number of military men in foreign countries in 1969, the year Nguyen was born in Viet Nam. Although, as the dissenting opinion noted, after Nguyen's parents split up, he lived with the family of his father's new girlfriend and in 1975, before his sixth birthday, Nguyen came to the United States, where he was raised by his father. A DNA test showed a 99.98% probability of paternity and the father obtained an order of parentage from a state court.

The Court's grant of certiorari in *Flores-Villar* will involve a reconsideration of *Nguyen*. Flores-Villar was born in Tijuana, Mexico 1974 to a non-citizen mother and a United States citizen father who, importantly, was sixteen at the time. His father and grandmother, also a citizen, brought Flores-Villar to the United States for medical treatment when he was two months old. He grew up in San Diego with his grandmother and father, who acknowledged paternity with the Civil Registry in Mexico on June 2, 1985. Apparently, Flores-Villar was not in touch with his mother, who remained in Mexico.

The gendered differential imposed by the statute at issue in *Flores-Villar* was the requirement that a citizen father must have
resided in the United States for at least five years after his fourteenth birthday to confer citizenship on his child, while a citizen mother had to reside in the United States for a continuous period of only one year prior to the child's birth to pass on citizenship. Moreover, in the case of Flores-Villar, INS denied a petition for citizenship on the basis that because the citizen father was 16 years old at the time of the child's birth, it was "physically impossible" for the father to have the required physical presence after the age of 14 in order to comply with the statute.

The Ninth Circuit upheld the statutory scheme, holding that avoiding statelessness, and assuring a link between an unwed citizen father, and this country, to a child born out of wedlock abroad who is to be a citizen, are important interests, and that the means chosen substantially further the objectives. The Court stated: "Though the fit is not perfect, it is sufficiently persuasive in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship."

This "fit" will certainly be at issue before the United States Supreme Court. Justice O'Connor's dissenting opinion in Nguyen, joined by Souter, Ginsburg, and Breyer, stressed the heightened scrutiny required by Virginia v. US (VMI) with its requirement of a closer fit between the "discriminatory" means chosen and gender stereotypes. The dissenting Justices reasoned that the statute was "paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children" and could easily be rendered sex-neutral.

In Flores-Villar, because the gender differential is a residency requirement—and not, as in Nguyen, a relationship with child requirement—the "fit" may not be sufficiently tight. If the Court applies VMI, the question will be whether or not there is something unique about men that requires them to have a longer residency than women before men are truly "citizens." However, the Court will also certainly rely on the plenary power of Congress in the area of citizenship. Balancing gender equality and citizenship will be the task for the Court—a task which the newest Justice will certainly undertake.
NASA v. Nelson

09-530


NASA adopted a new policy requiring low-risk employees at Caltech’s Jet Propulsion Laboratory to submit to in-depth background investigations to retain their employment at the facility. The employees filed suit alleging three primary claims: (1) NASA violated the Administrative Procedure Act (“APA”) by acting without statutory authority in imposing the investigations on contract employees; (2) the investigations constitute unreasonable searches prohibited by the Fourth Amendment; and (3) the investigations violate their constitutional right to informational privacy. The district court denied the employees’ request for a preliminary injunction and rejected the employees’ Fourth Amendment argument, holding that a background investigation was not a search within the meaning of the Fourth Amendment. On appeal, the appellate court granted a temporary injunction. The appellate court agreed with the district court that the investigations did not implicate the Fourth Amendment’s prohibition against unreasonable searches, but found that the employees had raised serious questions as to the merits of their informational privacy claim. The information sought in some of the questionnaires raised serious privacy issues. Additionally, the balance of hardships tipped sharply in the employees’ favor since they risked either losing their jobs or subjecting themselves to a violation of their constitutional rights.

Questions Presented: (1) Whether the government violates a federal contract employee’s constitutional right to informational privacy when it asks in the course of a background investigation whether the employee has received counseling or treatment for illegal drug use that has occurred within the past year, and the employee’s response is used only for employment purposes and is protected under the Privacy Act, 5 U.S.C. § 552a. (2) Whether the government violates a federal contract employee’s constitutional right to informational privacy when it asks the employee’s designated references for any adverse information that may have a bearing on the employee’s suitability for employment at a federal facility, the reference’s response is used only for employment purposes, and the information obtained is protected under the Privacy Act, 5 U.S.C. § 552a.

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

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, an Agency of the United States; Michael Griffin, Director of NASA, in his official capacity only; United States Department of Commerce; Carlos M. Gutierrez, Secretary of Commerce, in his official capacity only; California Institute of Technology, Defendants-Appellees.

United States Court of Appeals for the Ninth Circuit

Filed June 20, 2008
WARDLAW, Circuit Judge:

The named appellants in this action ("Appellants") are scientists, engineers, and administrative support personnel at the Jet Propulsion Laboratory ("JPL"), a research laboratory run jointly by the National Aeronautics and Space Administration ("NASA") and the California Institute of Technology ("Caltech"). Appellants sued NASA, Caltech, and the Department of Commerce (collectively "Appellees"), challenging NASA’s recently adopted requirement that "low risk" contract employees like themselves submit to in-depth background investigations. The district court denied Appellants' request for a preliminary injunction, finding they were unlikely to succeed on the merits and unable to demonstrate irreparable harm. Because Appellants raise serious legal and constitutional questions and because the balance of hardships tips sharply in their favor, we reverse and remand.

I

JPL is located on federally owned land, but operated entirely by Caltech pursuant to a contract with NASA. Like all JPL personnel, Appellants are employed by Caltech, not the government. Appellants are designated by the government as "low risk" contract employees. They do not work with classified material.

Appellants contest NASA’s newly instated procedures requiring "low risk" JPL personnel to yield to broad background investigations as a condition of retaining access to JPL’s facilities. NASA’s new policy requires that every JPL employee undergo a National Agency Check with Inquiries (NACI), the same background investigation required of government civil service employees, before he or she can obtain an identification badge needed for access to JPL’s facilities. The NACI investigation requires the applicant to complete and submit Standard Form 85 (SF 85), which asks for (1) background information, including residential, educational, employment, and military histories; (2) the names of three references that "know you well;" and (3) disclosure of any illegal drug use, possession, supply, or manufacture within the past year, along with the nature and circumstances of any such activities and any treatment or counseling received. . . . Finally, SF 85 requires the applicant to sign an "Authorization for Release of Information" that authorizes the government to collect "any information relating to [his or her] activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." . . . The record is vague as to the exact extent to and manner in which the government will seek this information, but it is undisputed that each of the applicants' references, employers, and landlords will be sent an "Investigative Request for Personal Information" (Form 42), which asks whether the recipient has "any reason to question [the applicant’s] honesty or trustworthiness" or has "any adverse information about [the applicant’s] employment, residence, or activities" concerning "violations of law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters." The recipient is asked to explain any adverse information noted on the form. Once the information has been collected, NASA and the federal Office of Personnel Management determine whether the employee is "suitable" for continued access to NASA’s facilities, though the exact mechanics of this suitability
determination are in dispute.

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On August 30, 2007, Appellants filed suit alleging, both individually and on behalf of the class of JPL employees in non-sensitive or "low risk" positions, that NASA's newly imposed background investigations are unlawful. Appellants bring three primary claims: (1) NASA and the Department of Commerce (collectively "Federal Appellees") violated the Administrative Procedure Act ("APA") by acting without statutory authority in imposing the investigations on contract employees; (2) the investigations constitute unreasonable searches prohibited by the Fourth Amendment; and (3) the investigations violate their constitutional right to informational privacy.

[The district court denied the Appellants' request for a preliminary injunction against the new policy.]

On appeal, a motions panel of our court granted a temporary injunction pending a merits determination of the denial of the preliminary injunction. Nelson v. NASA, 506 F.3d 713 (9th Cir. 2007). The panel concluded that the information sought by SF 85 and its waiver requirement raised serious privacy issues and questioned whether it was narrowly tailored to meet the government's legitimate interest in ascertaining the identity of its low-risk employees. The panel further found that "[t]he balance of hardships tips sharply in favor of [A]ppellants," who risk losing their jobs pending appeal, whereas there was no exigent reason for performing the NACI investigations during the few months pending appeal given that "it has been more than three years since the Presidential Directive [upon which the government relies] was issued."

II

To obtain preliminary injunctive relief, Appellants must demonstrate either "(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." . . .

Upon review of the merits of the district court's denial of preliminary injunctive relief, we find ourselves in agreement with the motions panel. Appellants have demonstrated serious questions as to their informational privacy claim, and the balance of hardships tips sharply in their favor. We therefore conclude that the district court abused its discretion in denying Appellants' motion for a preliminary injunction, and we reverse and remand.

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B. APA Claim

Appellants first claim that Federal Appellees violated the APA by imposing background investigations on contract employees without any basis in executive order or statute. The district court found that Congress gave NASA the authority to conduct such investigations in the Space Act of 1958 . . .

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. . . Because the Space Act appears to grant NASA the statutory authority to require the investigations here at issue, we agree with the district court that Appellants are unlikely to succeed on the merits of their APA claim.

C. Fourth Amendment Claim

We also agree with the district court's conclusion that Appellants are unlikely to
succeed on their Fourth Amendment claims, because the government's actions are not likely to be deemed "searches" within the meaning of the Amendment. An action to uncover information is generally considered a "search" if the target of the search has a "reasonable expectation of privacy" in the information being sought, a term of art meaning a "subjective expectation of privacy . . . that society is prepared to recognize as reasonable." One does not have a "reasonable expectation of privacy" in one's information for Fourth Amendment purposes merely because that information is of a "private" nature; instead, Fourth Amendment protection can evaporate in any of several ways. To succeed on their Fourth Amendment claim, therefore, Appellants must demonstrate that either the Form 42 inquiries sent to third parties or the SF 85 questionnaire itself violates a "reasonable expectation of privacy" so as to be considered a "search" within the meaning of the Amendment.

1. Form 42 Inquiries

"What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection," Katz v. United States, 389 U.S. 347, 351, (1967); however, information does not lose Fourth Amendment protection simply because it is conveyed to another party. For example, in Katz, FBI agents attached an electronic listening device to the outside of a public telephone booth and recorded the defendant transmitting illegal betting information over the telephone. Even though the booth's occupant had voluntarily conveyed the information in the conversation to the party on the other end of the line, the Court found that he was "surely entitled to assume that the words he utters into the mouthpiece w[ould] not be broadcast to the world," so the covert surveillance was considered a search within the meaning of the Amendment.

On the other hand, in United States v. White, the Supreme Court held that the electronic surveillance of a conversation between a defendant and a government informant did not constitute a "search" for Fourth Amendment purposes. 401 U.S. 745, 754. The Court acknowledged that, as in Katz, the speaker likely expected the content of the conversations to be kept private; however, it held as a bright-line rule that the Fourth Amendment "affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" In United States v. Miller, 425 U.S. 435 (1976), holding that the government could subpoena private bank records without implicating the Fourth Amendment, the Court extended the bright-line rule to all information knowingly revealed to the government by third parties. . .

In the challenged background investigations, the government will send written Form 42 inquiries to the applicant's acquaintances. Through these inquiries, the third parties may disclose highly personal information about the applicant. As in White and Miller, the applicant presumably revealed this information to the third party with the understandable expectation that this information would be kept confidential. Nonetheless, these written inquiries appear to fit squarely under Miller's bright-line rule and therefore cannot be considered "searches" under the Fourth Amendment.

2. SF 85 Questionnaire

The SF 85 questionnaire required of the applicant is also unlikely to be considered a Fourth Amendment "search." Requiring an individual to answer questions may lead to the forced disclosure of information that he or she reasonably expects to keep private.
Historically, however, when “the objective is to obtain testimonial rather than physical evidence, the relevant constitutional amendment is not the Fourth but the Fifth.” *Greenawalt v. Ind. Dep't of Corr.*, 397 F.3d 587, 591 (7th Cir. 2005) (holding that a psychological examination required for continued government employment was not a search under the Fourth Amendment).

As Judge Posner notes in *Greenawalt*, direct questioning can potentially lead to a far greater invasion of privacy than many of the physical examinations that have in the past been considered Fourth Amendment “searches.” Nonetheless, applying the Fourth Amendment to such questioning would force the courts to analyze a wide range of novel contexts (e.g., courtroom testimony, police witness interviews, credit checks, and, as here, background checks) under a complex doctrine, with its cumbersome warrant and probable cause requirements and their myriad exceptions, that was designed with completely different circumstances in mind. Moreover, declining to extend the Fourth Amendment to direct questioning will by no means leave individuals unprotected, as such contexts will remain governed by traditional Fifth and Sixth Amendment interrogation rights, and the right to informational privacy described below.

Because neither the written inquiries directed at third parties nor the SF 85 questionnaire directed at the applicants will likely be deemed “searches,” Appellants are unlikely to succeed on their Fourth Amendment claims.

**D. Informational Privacy Claim**

Although the district court correctly found that Appellants were unlikely to succeed on their APA and Fourth Amendment claims, it significantly underestimated the likelihood that Appellants would succeed on their informational privacy claim.

We have repeatedly acknowledged that the Constitution protects an “individual interest in avoiding disclosure of personal matters.” This interest covers a wide range of personal matters, including sexual activity, medical information, and financial matters. If the government’s actions compel disclosure of private information, it “has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest.” We must “balance the government’s interest in having or using the information against the individual’s interest in denying access,” weighing, among other things:

“the type of [information] requested,

. . . the potential for harm in any subsequent nonconsensual disclosure, . . . the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating towards access.”

Both the SF 85 questionnaire and the Form 42 written inquiries require the disclosure of personal information and each presents a ripe controversy. Therefore, whereas the district court limited its analysis to the SF 85 questionnaire, we consider the constitutionality of both aspects of the investigation in turn.

**1. SF 85 Questionnaire**

Appellants concede that most of the questions on the SF 85 form are unproblematic and do not implicate the constitutional right to informational privacy.
They do however challenge the constitutionality of one group of questions concerning illegal drugs. The questionnaire asks the applicant:

In the last year, have you used, possessed, supplied, or manufactured illegal drugs? . . . If you answered "Yes," provide information relating to the types of substance(s), the nature of the activity, and any other details relating to your involvement with illegal drugs. Include any treatment or counseling received.

The form indicates that "[n]either your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding." The district court concluded that the requested information implicated the right to informational privacy, but found that there were "adequate safeguards in place [to deal with these] sensitive questions."

Other courts have been skeptical that questions concerning illegal drug use—much less possession, supply, or manufacture—would even implicate the right to informational privacy. For example, in Mangels v. Pena, 789 F.2d 836 (10th Cir. 1986), the Tenth Circuit held that the disclosure of firefighters' past illegal drug use did not violate their informational privacy, but found that there were "adequate safeguards in place [to deal with these] sensitive questions."

The Court also noted that the plaintiffs in that case were all federal employees in either "High" or "Moderate" risk "public trust" positions, and were thus acutely "aware of [their] employer's elevated expectations in [their] integrity and performance."

Like the Tenth and Fifth Circuits, we are sensitive to the government's interest in uncovering and addressing illegal substance abuse among its employees and contractors, given the public stance it has taken against such abuse. This government interest is undoubtedly relevant to the constitutional balancing inquiry: whether the forced disclosure "would advance a legitimate state interest and [is] narrowly tailored to meet the legitimate interest." We are less convinced, however, that the government's interest should inform the threshold question of whether requested information is sufficiently personal to invoke the constitutional right to privacy. We doubt that the government can strip personal information of constitutional protection simply by criminalizing the underlying conduct—instead, to force disclosure of personal information, the government must at least demonstrate that the disclosure furthers a legitimate state interest. Drug
dependence and abuse carries an enormous stigma in our society and "is not generally disclosed by individuals to the public." If we had to reach the issue, therefore, we would be inclined to agree with the district court that SF 85's drug questions reach sensitive issues that implicate the constitutional right to informational privacy.

We do not need to decide this issue, however, because even if the question requiring disclosure of prior drug use, possession, supply, and manufacture does implicate the privacy right, it is narrowly tailored to achieve the government's legitimate interest. As our sister circuits have lucidly explained, the federal government has taken a strong stance in its war on illegal drugs, and this stance would be significantly undermined if its own employees and contractors freely ignored its laws. By requiring applicants to disclose whether they have "used, possessed, supplied, or manufactured illegal drugs" within the past year, and, if so, to explain the "nature of the activity" and "any other details relating to [the applicant's] involvement with illegal drugs," the government has crafted a narrow inquiry designed to limit the disclosure of personal information to that which is necessary to further the government's legitimate interest.

The same cannot be said, however, for requiring applicants to disclose "any treatment or counseling received" for their drug problems. Information relating to medical treatment and psychological counseling fall squarely within the domain protected by the constitutional right to informational privacy. The government has not suggested any legitimate interest in requiring the disclosure of such information; indeed, any treatment or counseling received for illegal drug use would presumably lessen the government's concerns regarding the underlying activity. Because SF 85 appears to compel disclosure of personal medical information for which the government has failed to demonstrate a legitimate state interest, Appellants are likely to succeed on this—albeit narrow portion of their informational privacy challenge to SF 85.

2. Form 42 Inquiries

The Form 42 written inquiries—omitted from the district court's analysis as a result of its erroneous ripeness holding—are much more problematic. Form 42 solicits "any adverse information" concerning "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," and "other matters." These open-ended questions are designed to elicit a wide range of adverse, private information that "is not generally disclosed by individuals to the public" and therefore seemingly implicate the right to informational privacy. The government suggests that even if the information disclosed in the investigation implicates the right to informational privacy, the scheme must be upheld because the government has taken measures to keep the information from being disclosed to the general public. Although the risk of public disclosure is undoubtedly an important consideration in our analysis, it is only one of many factors that we should consider. Therefore, although safeguards exist to help prevent disclosure of the applicants' highly sensitive information, Federal Appellees must still demonstrate that the background investigations are justified by legitimate state interests and that Form 42's questions are "narrowly tailored to meet those legitimate interests."

In this respect, the right to informational privacy differs from the Fourth Amendment. . . . If the constitutional right to informational privacy were limited to cases that involved a Fourth Amendment "search,"
the two rights would be entirely redundant. Indeed, although the two doctrines often overlap, we have repeatedly found the right to informational privacy implicated in contexts that did not involve a Fourth Amendment "search."

We agree with the government that it has several legitimate reasons for investigating its contractors. NASA has an interest in verifying its contractors' identities to make sure that they are who they say they are, and it has an interest in ensuring the security of the JPL facility so as not to jeopardize the costly investments housed therein. Appellants concede, as they must, that these are legitimate government interests.

The government has failed to demonstrate, however, that Form 42's questions are "narrowly tailored" to meet these legitimate interests. Initially, we note that although NASA has a general interest in keeping the JPL facility secure, there is no specific evidence in the record to suggest that any of the "low risk" JPL personnel pose such a security risk; indeed, NASA appears to designate as "moderate risk" any individual who has the "opportunity to cause damage to a significant NASA asset or influence the design or implementation [of] a security mechanism designed to protect a significant NASA asset." More importantly, Form 42's broad, open-ended questions appear to range far beyond the scope of the legitimate state interests that the government has proposed. Asking for "any adverse information about this person's employment, residence, or activities" may solicit some information relevant to the applicant's identity or security risk, but there are no safeguards in place to limit the disclosures to information relevant to these interests. Instead, the form invites the recipient to reveal any negative information of which he or she is aware. It is difficult to see how the vague solicitation of derogatory information concerning the applicant's "general behavior or conduct" and "other matters" could be narrowly tailored to meet any legitimate need, much less the specific interests that Federal Appellees have offered to justify the new requirement.

Finally, the context in which the written inquiries are posed further supports Appellants' claim. In Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983), we focused not only on the private nature of questions asked, but also on the lack of standards governing the inquiry. . . . "When the state's questions directly intrude on the core of a person's constitutionally protected privacy and associational interests . . . , an unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the heightened scrutiny with which we must view the state's action." In this case, the government's questions stem from SF 85's extremely broad authorization, allowing it "to obtain any information" from any source, subject to other releases being necessary only in some vague and unspecified contexts. Federal Appellees have steadfastly refused to provide any standards narrowly tailoring the investigations to the legitimate interests they offer as justification. Given that Form 42's open-ended and highly private questions are authorized by this broad, standardless waiver and do not appear narrowly tailored to any legitimate government interest, the district court erred in finding that Appellants were unlikely to succeed on their informational privacy claim.

E. Balance of Hardships

The balance of hardships tips sharply toward Appellants, who face a stark choice—either violation of their constitutional rights or loss of their jobs. The district court erroneously concluded that Appellants will not suffer any irreparable harm because they could be
retroactively compensated for any temporary denial of employment. It is true that "monetary injury is not normally considered irreparable," and the JPL employees who choose to give up their jobs may later be made whole financially if the policy is struck down. However, in the meantime, there is a substantial risk that a number of employees will not be able to finance such a principled position and so will be coerced into submitting to the allegedly unconstitutional NACI investigation. Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm. Moreover, the loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages.

On the other side of the balance, NASA has not demonstrated any specific harm that it will face if it is enjoined for the pendency of the adjudication from applying its broad investigatory scheme to "low risk" JPL contract employees, many of whom have worked at the laboratory for decades. As Caltech argues, JPL has successfully functioned without any background investigations since the first contract between NASA and JPL in 1958, so granting injunctive relief would make NASA no worse off than it has ever been. Moreover, an injunction in this case would not affect NASA's ability to investigate JPL personnel in "high risk" or "moderate risk" positions, significantly undercutting any lingering security fears. Finally, we note that NASA has taken years to implement NACI at JPL, a fact we construe as weakening any urgency in imposing the investigations before Appellants' claims are fully adjudicated on their merits.

III

[The court concludes that preliminary injunctive relief should apply both to Caltech and to Federal Appellees.]

IV

Appellants have raised serious questions as to the merits of their informational privacy claim and the balance of hardships tips sharply in their favor. The district court's denial of the preliminary injunction was based on errors of law and hence was an abuse of discretion. Accordingly, we reverse and remand with instructions to fashion preliminary injunctive relief consistent with this opinion.

REVERSED and REMANDED.
The U.S. Supreme Court has elected to review a federal appeals court’s decision to grant a request by NASA scientists for a preliminary injunction to halt allegedly deep-reaching background checks on low-risk employees at the space agency’s Jet Propulsion Laboratory [in NASA et al. v. Nelson et al.].

The high court on Monday granted NASA’s Nov. 2 petition for writ of certiorari, allowing the agency a chance to argue that the U.S. Court of Appeals for the Ninth Circuit erred in its January 2008 reversal of a lower court’s decision to deny the scientists injunctive relief in their challenge to government rules regarding background checks.

Twenty-eight senior scientists and engineers at JPL—which conducts research for NASA in conjunction with the California Institute of Technology—filed suit against NASA, the U.S. Department of Commerce and Caltech in the U.S. District Court for the Central District of California in August 2007, seeking to stop the implementation of new background investigation requirements.

The requirements were created through a 2004 executive order by President George W. Bush, and compelled all federal agencies and facilities to require their workers to have identification badges, according the complaint.

To get a badge needed to enter JPL’s facilities, all workers had to submit to a background check, the suit states. They were required to sign a broad written waiver, permitting investigators to obtain records from their past employment files, and to question friends and associates about their emotional health, financial integrity and general conduct, it claims.

The workers argue that the rules surrounding these background checks are unconstitutional and intrusive, and that they unlawfully allow unknown government officials to ask all manner of questions about people’s personal lives, including sex lives and emotional states.

The district court denied the workers’ request for injunctive relief in October 2007, but the Ninth Circuit overturned that decision, ruling that the workers had raised serious legal and constitutional questions that warranted a preliminary injunction barring NASA’s policies.

Current law doesn’t allow background investigations in the way NASA intended, the appeals court said. According to the law, investigations can only be in the interest of national security if the target of the investigation holds a sensitive position, but in this case the workers are low-risk employees who don’t hold sensitive positions, it ruled.

Considering the breadth of questions the workers would be asked, it would be difficult to see how these questions could be narrowly tailored to meet any legitimate need, much less the specific interests that NASA offered, the Ninth Circuit found.
“Asking for ‘any adverse information about this person’s employment, residence or activities’ may solicit some information relevant . . . but there are absolutely no safeguards in place to limit the disclosures to information relevant to these interests,” the opinion said. “Instead, the form invites the recipient to reveal any negative information of which he or she is aware.”

The appeals court also disagreed with the district court’s finding that the employees wouldn’t suffer any irreparable harm as a result of the policy.

The government filed a petition for a rehearing en banc following the reversal, but the Ninth Circuit issued a new opinion in June 2008 that mooted the appeal.

The U.S. again appealed for an en banc hearing, and lost its bid in a June 2009 vote that “was not close,” according to a concurrence that accompanied the denial.

Dan Stormer, an attorney for the scientists, on Monday called the Supreme Court’s decision to hear the appeal “disappointing” but remained confident in his clients’ position in the suit.

“The informational privacy right is well-founded by constitutional analysis, and the Supreme Court, when fully and properly presented with the information, will find that,” he said.

***

The case is NASA et al. v. Nelson et al., case number 09-530, in the U.S. Supreme Court.
"New Supreme Court Case on the Constitutional Right to Informational Privacy"

The Volokh Conspiracy
March 8, 2010
Eugene Volokh

The Supreme Court has just granted cert in NASA v. Nelson.

The case involves a challenge brought by various contract employees working indirectly for NASA, claiming that NASA's then-new background check policy violated a federal constitutional right to informational privacy. The Ninth Circuit found that the plaintiffs were likely to succeed on this claim, and thus held that they were entitled to a preliminary injunction against enforcement of the policy. In particular, the Circuit concluded that it was likely unconstitutional for the government to ask various people who knew the employees—at least "references, employers, and landlords" and perhaps others—broad questions. Such question presumptively violated a constitutional right to privacy discussed by the Supreme Court in Whalen v. Roe, and the presumption couldn't be overcome on the grounds that the questioning was "narrowly tailored" to the government's interests:

Form 42 [which was sent to people who had dealt with the employees] solicits "any adverse information" concerning "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," and "other matters." These open-ended questions are designed to elicit a wide range of adverse, private information that "is not generally disclosed by individuals to the public"; accordingly, they must be deemed to implicate the right to informational privacy.

Considering the breadth of Form 42's questions, it is difficult to see how they could be narrowly tailored to meet any legitimate need, much less the specific interests that Federal Appellees have offered to justify the new requirement. Asking for "any adverse information about this person's employment, residence, or activities" may solicit some information relevant to "identity," "national security," or "protecting federal information systems," but there are absolutely no safeguards in place to limit the disclosures to information relevant to these interests. Instead, the form invites the recipient to reveal any negative information of which he or she is aware. There is nothing "narrowly tailored" about such a broad inquisition.

It seems to me that despite the court's insistence that the opinion is quite narrow, its implications seem stunningly broad; and in particular, it seems to me they would dramatically affect the course of ordinary government investigations.

Say a police officer—or SEC investigator or FBI agent or a wide range of other government investigator—is trying to investigate a crime. Naturally, to get a search warrant for someone's property, the officer would need probable cause to believe that the warrant would uncover evidence of
a crime. But the officer often doesn’t start out with such probable cause.

Instead, I take it that the officer would often ask around about each person who might be involved in the crime, even if chances are that the person isn’t involved. He might go to landlords, employers, hotel clerks, acquaintances, and others, and ask questions, including open-ended questions. And the questions might deal with private matters, such as the suspect’s romantic entanglements, sexual orientation, political ideology, financial pressures, medical problems, and the like. It would be wrong and possibly unconstitutional for the government to misuse this information, for instance by arresting and prosecuting the suspect because of his political views, even when he wouldn’t have been arrested and prosecuted for the same offense if his views were different. But getting this information might well be helpful, depending on the circumstances, since it might reveal possible motives, associates, and other important information.

What’s more, the police officer would generally be able (with a prosecutor’s help) to order people to answer such questions, by subpoenaing them to testify. The officer and prosecutor can get even highly confidential information, such as bank records, records of the telephone numbers the person has called, and the like, without probable cause: All it would take is a subpoena to the bank, and such subpoenas to third parties don’t violate the Fourth Amendment, even when there is no probable cause for them. I realize that many disagree with this position, as to subpoenas (though I haven’t heard much disagreement as to the asking around mentioned in the preceding paragraphs). But it is pretty clear that this is indeed the Court’s view of the Fourth Amendment.

There are some limits on this; for instance, the officer can’t subpoena privileged lawyer-client communications, and there are likely limits on the officer’s power to subpoena abortion records and the like. But generally speaking a great many records, including bank and telephone records, are available without the need for probable cause or any showing of “narrow tailoring.” In fact, the way that officers are supposed to develop the probable cause needed to get search warrants is precisely by gathering information without search warrants—including asking questions of people who might know the information.

The Ninth Circuit’s decision, however, suggests that all such investigations are potentially subject not just to the Fourth Amendment (and the Fifth Amendment privilege against self-incrimination, when it comes to coercive questioning of the suspect himself), but also to the right of privacy. After all, the police officer or other government investigator is as much a government actor as is NASA. (The right to privacy, if it applies here, applies equally to the federal government and state and local governments.) If anything, the constitutional constraints might apply even more to the government acting as sovereign to investigate private individuals, as opposed to the government acting as employer to investigate its own employees or contractors. They certainly wouldn’t apply any less.

So say an officer is investigating an alleged theft, and there a bunch of people who had the opportunity to commit the theft, though the great majority of them are likely to be innocent. The officer will no longer be free to ask people broad questions about what they know about a potential suspect, and in particular whether they have any information about their “financial integrity,” “abuse of alcohol and/or drugs,” “mental or emotional stability,” or “other matter.”
After all, while asking such questions “may solicit some information relevant to [the investigation], there are absolutely no safeguards in place to limit the disclosures to information relevant to these interests.” How could there be? The officer doesn’t know yet exactly what’s going to be relevant, and might not know until much later, when a casual revelation that Joe was sleeping with Mary, coupled with the revelation that Mary had an expensive cocaine habit, might explain why Joe might have had a special motive to commit the crime.

And presumably asking around about a person’s sexual partners, political beliefs, medical condition, financial obligations, and the like would be even more likely unconstitutional, since that would be direct questioning about matters that are most likely to be seen as private. Yet, as I mentioned above, that sort of picture of people’s lives is often vital to figuring out who might have the motive to do something, or who his likely accomplices might be, or even who else might be worth asking about the matter.

Now maybe this is the way things should be. Maybe even when there’s no search or seizure for Fourth Amendment purposes, and when there’s no compelled self-incrimination for Fifth Amendment purposes, there should be an extra constitutional requirement that asking around about a suspect be “narrowly tailored” if the questioning may reveal private information. Maybe the police shouldn’t ask broad questions, but be limited to focused questions that are directly supportable at that point by what the police already know.

But I’m pretty skeptical that this would indeed be a good constitutional law rule—and I see no basis in Whalen or in the Court’s other precedents for suggesting that there’s a constitutional right to information privacy that so constrains the government’s asking questions about people. The government doesn’t need the employee’s agreement to ask around about him, just as it doesn’t need a potential suspect’s agreement to ask around about him. There just isn’t a constitutional right not to have the government ask other people questions about you. So I’m glad the Court agreed to hear the case, and I predict that it will reverse. I’ll go further and say that I doubt there’ll be more than 2 votes to affirm the Ninth Circuit (at least on the informational privacy grounds), and quite possibly fewer.
The U.S. Supreme Court has just granted cert. on *NASA v. Nelson*, 512 F.3d 1134 (9th Cir. 2008). In this case, NASA required employees to undergo background checks and answer questions about very private matters, including “any adverse information” about financial integrity, alcohol and drug abuse, and mental and emotional stability. Plaintiffs, a group of “low risk” contract employees, sought a preliminary injunction that the investigation violated their constitutional rights. The U.S. Court of Appeals for the 9th Circuit granted the injunction.

There is a lot at stake in this case, for it potentially involves whether or not a constitutional right exists—the little-known constitutional right to information privacy. Despite its obscurity, this right is recognized by the vast majority of federal circuit courts and there are scores of decisions involving this right.

Here are the issues cert. was granted on:

1. Whether the government violates a federal contract employee’s constitutional right to informational privacy when it asks the employee’s designated references for any adverse information that may have a bearing on the employee’s suitability for employment at a federal facility, the reference’s response is used only for employment purposes, and the information obtained is protected under the Privacy Act, 5 U.S.C. 552a.

2. Whether the government violates a federal contract employee’s constitutional right to informational privacy when it asks whether the employee has received counseling or treatment for illegal drug use that has occurred within the past year, and the employee’s response is used only for employment purposes and is protected under the Privacy Act, 5 U.S.C. 552a.

The cert. questions are narrowly posed, so there’s hope the Supreme Court will not eliminate the right. But I see it as a possibility. Ultimately, I believe the following:

1. The constitutional right to information privacy does (and should) exist.

2. The court’s holding in *NASA v. Nelson* constitutes a big expansion of the constitutional right to information privacy. It doesn’t follow from most of the cases interpreting that right.

3. There may be a First Amendment argument to support the plaintiffs.

I will address the first contention in this post, and the other two in a subsequent post.

The constitutional right at issue is a little-known spinoff right to the constitutional right to privacy, most famously declared in *Griswold v. Connecticut*, 381 U.S. 478
(1965) and Roe v. Wade, 410 U.S. 113 (1973). In these cases, the Supreme Court recognized that the Constitution protects a “right to privacy” grounded in the First, Third, Fourth, Fifth, and Ninth Amendments. The Supreme Court issued an extensive line of cases involving the constitutional right to privacy, and these cases have generally involved freedom from government interference in making certain kinds of private decisions about one’s health, contraception, child-rearing, and abortion.

The constitutional right to information privacy emerged in a case called Whalen v. Roe, 429 U.S. 589 (1977). The case involved a government record system of people taking prescriptions for certain medications. Although the government promised that the information was confidential and secure, the plaintiffs feared the possibility of the information leaking out.

The Supreme Court began its opinion by noting that the right to privacy protects not only “independence in making certain kinds of important decisions” but also the “individual interest in avoiding disclosure of personal matters.” Ultimately, the Court concluded that the plaintiffs lost because the government provided adequate security to the information, thus meeting its constitutional obligations to avoid disclosure. At the end of the opinion, the Court stated:

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. . . . The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. . . . [I]n some circumstances that duty has its roots in the Constitution.

There has long been a debate about what the Court was doing in Whalen. Some believe that the discussion of the constitutional right to information privacy was just dicta, and the Court was just reiterating an argument plaintiffs in that case made and then waxing eloquent at the end of the opinion. But I don’t believe this is the case.

In addition to Whalen, the Supreme Court decided one other case involving the constitutional right to information privacy—Nixon v. Administrator of General Services, 433 U.S. 425 (1977). President Nixon asserted a privacy interest in his communications and records while President. The Court concluded that the Constitution protected the privacy of his personal communications with his family but not his records dealing with his official duties. In so holding, the Court cited Whalen:

One element of privacy has been characterized as “the individual interest in avoiding disclosure of personal matters. . . .” Whalen v. Roe, 429 U.S. 589 599 (1977). We may agree with appellant that, at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity. Presidents who have established Presidential libraries have usually withheld matters concerned with family or personal finances, or have deposited such materials with restrictions on their screening.
Whalen and Nixon were the only two Supreme Court cases to mention the constitutional right to information privacy.

But in subsequent years, a majority of federal circuit courts have explicitly recognized the right, including the 2nd, 3rd, 4th, 5th, 7th, and 9th Circuits. The 6th Circuit recognizes the right, but less broadly than the circuit courts above. “Absent a clear indication from the Supreme Court we will not construe isolated statements in Whalen and Nixon more broadly than their context allows to recognize a general constitutional right to have the disclosure of private information measured against the need for disclosure.” J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981). The only circuit to express doubts about the constitutional right to information privacy is the D.C. Circuit.

I believe that the constitutional right to information privacy exists, and it ensures that whenever the government collects personal information, it has a duty to avoid unwarranted disclosures. This duty consists in avoiding the intentional disclosure of the information when there isn’t a compelling reason to do so. It also consists in providing adequate data security.

I hope that the Supreme Court does not use NASA v. Nelson as an opportunity to eliminate the constitutional right to information privacy. For one, I’d have to do a major revision of my casebook since I include many cases involving this right, see Daniel J. Solove & Paul M. Schwartz, Information Privacy Law (3rd ed. 2009)—and that certainly wouldn’t be fun! But more importantly, the constitutional right to information privacy serves a profound function in today’s Information Age. The government has vast powers to gather personal information and maintains extensive dossiers of people’s data, and this information can be very sensitive, critical to people’s reputations and well-being, and the leaking of it can result in serious harm. I doubt we can go back to the early days of government where not much personal data was collected. But if the government is going to keep our data, it should have a responsibility to avoid unwarranted disclosures and to keep it secure. The constitutional right to information privacy is a sensible extension of the right to privacy.

***
The Supreme Court has agreed to hear a case challenging the federal government's background check process. (The case is called National Aeronautics and Space Administration v. Nelson...)

The underlying challenge was raised by a group of scientists, engineers, and administrative support employees who worked at the Jet Propulsion Laboratory (JPL), a research lab run by NASA and the California Institute of Technology. The employees were officially employed by CalTech. Following a policy change in 2007, all JPL employees whom the government categorized as “low risk” (they didn’t have access to classified material) had to submit to the background check procedures routinely applied to federal civil service employees in order to maintain their access to the JPL. The employees filed a lawsuit and sought a preliminary injunction to stop the new policy from going into effect until the court had a chance to decide whether it was constitutional.

The background check—called the Nationwide Agency Check with Inquiries (NACI)—requires employees to provide information on their residential, education, employment, and military histories; give references; and disclose any use of illegal drugs in the past year, along with any treatment or counseling received. Employees must also sign a release form allowing the government to collect information from landlords, employers, and references on a wide variety of topics, including “financial integrity,” “mental or emotional stability,” and “general behavior or conduct.”

The Ninth Circuit Court of Appeals ruled in favor of the government on several issues. However, the Court found that the employees were entitled to a preliminary injunction because they had raised serious questions as to whether their constitutional right to informational privacy was violated by the question asking about drug treatment or counseling and by the release form (and subsequent inquiries it authorized). NASA petitioned the Supreme Court to hear the case, and the Court agreed to do so earlier this month.

This case challenges background checks applicable to government employees and contractors. The U.S. Constitution protects only against action by the government (in this case, NASA’s decision that JPL employees had to pass a background check), not actions by private companies and employers. So, while the outcome of the case could be hugely significant to federal sector employees, who have been subject to these same background check requirements for decades, it won’t be directly applicable to those who work in the private sector. However, state courts often follow the Supreme Court’s lead and guidelines in deciding cases alleging violations of privacy, even though the right to privacy applicable in those cases generally comes from a state constitution, statute, or case law, not the U.S. Constitution.

Private sector employees could be more
directly affected by some of the background check developments reported on this week by SHRM [Society for Human Resource Management]. SHRM reports that the EEOC is considering issuing new enforcement guidance explaining when employers may consider an applicant's credit history and arrest and conviction record in the hiring process. The EEOC has long stated that using credit reports and criminal records to disqualify applicants could have a disparate impact based on race; if so, the employer would have to show that the practice is job-related and consistent with business necessity. SHRM offers some tips that will help employers avoid legal trouble when performing background checks, including that employers should be selective in deciding which positions require a background check and should allow applicants to explain negative information that turns up.
The U.S. Supreme Court has agreed to hear a background-screening case involving federal contractors at the National Aeronautics and Space Administration's Jet Propulsion Laboratory that could have far-reaching implications for all employers, federal and private, according to one attorney familiar with the case.

The case, NASA vs. Nelson, involves a group of 28 scientists, engineers and administrative personnel—including lead plaintiff Robert Nelson—working at the NASA facility, which is operated by the California Institute of Technology in Pasadena, Calif., under contract with NASA. It's known for developing satellites, rockets, spacecraft and telescopes.

The plaintiffs claim NASA's contract with Caltech—which was modified in 2007 to require background screening tests as a condition of being allowed access to the facility—violates their rights to privacy under the Fourth Amendment, the Privacy Act and a constitutional right to informational privacy.

Though a federal district court judge rejected their initial motion for a preliminary injunction to block the background investigations and ruled for NASA, the 9th U.S. Circuit Court of Appeals said the questions asked in the investigations threatened the constitutional rights of workers and NASA should be blocked from continuing the checks.

The space agency, backed by the Obama administration, appealed that decision to the U.S. Supreme Court, asking that the temporary restraining order the appeals court placed on the checks be dissolved and the checks be allowed to continue.

What the high court ultimately decides could affect how the federal government investigates the backgrounds of all current and future employees. It could also easily serve as precedent for the private sector as well, says Pamela Devata, partner in the labor and employment practice group of Chicago-based Seyfarth Shaw and a former member of the National Association of Professional Background Screeners.

In addition to deciding whether the laboratory workers' rights to privacy were violated by the checks, one of the issues the court may consider is whether the background questions asked of federal contractors must be specifically related to the job. Currently, there is no federal law saying information secured from a background screener must relate to the specific job a federal contractor is applying for or carrying out.

"If the Supreme Court justices come out and say, 'When you're doing a background check for a federal contractor, the check must relate to the job specifically,' that could even go beyond the jurisdiction of federal contractors and have immediate bearing in private-sector cases," Devata says. "It would be an easy step to take. It's just a little 'hop-over.'"

In the case of the plaintiffs, nearly all have worked at the Caltech facility for many years and are considered low-risk, i.e., none of them work on top-secret projects. In their
lawsuit, they claim the investigations go well beyond what is appropriate for the work they do—including probes into medical records and interviews with friends and family about their finances and even their sex lives.

NASA, in its petition to the Supreme Court, says the forms “are the same ones that have long been used to conduct background checks for applicants for federal employment.”

“The ramifications of the [appeals court] decision are potentially dramatic,” the government and NASA state in the petition. “The decision prevents the routine background checks of many government-contract employees and it casts a constitutional cloud over the background-check process the government has used for federal and civil-service employees for over 50 years.”

The San Francisco-based appeals court’s ruling, however, says the forms NASA—via Caltech—required the laboratory workers to fill out sought “highly personal information using an open-ended technique including asking for ‘any adverse information which . . . may have a bearing on this person’s suitability for government employment.’”

“There is nothing ‘narrowly tailored’ about such a broad inquisition,” the ruling states.

The Caltech case, says Devata, also raises “sort of a joint-employer issue . . . a very, very hot topic right now for background screeners.” Conflicts arise regularly in public and private sectors, she says, over contracts that specify one agency’s or organization’s jurisdiction over someone, but aren’t clear about the roles of other agencies or companies involved in the work being done.

“Some might claim a contract is clear,” she says, “but that doesn’t prevent other parties from arguing that they have jurisdiction. It’s a really interesting dilemma. When this case first came out, it was huge, hot news because of this.”

Though Caltech was dismissed from the case by the 9th Circuit District Court, a statement released through its media relations and online communications office says the school will “continue to follow the case closely.”

“We have and will abide by the orders issued by the courts,” the statement reads. Calls and e-mails to NASA seeking comment were not returned.

The arguments that will be brought before the Supreme Court in its upcoming term, beginning in October, will be closely watched, says Devata, particularly anything that addresses job-relatedness.

“The Equal Employment Opportunity Commission is all over this,” she says. “This is a huge and very hot topic right now among background screeners. The EEOC has already said there needs to be job-relatedness in background checks. So it wouldn’t surprise me if the Supreme Court says, ‘What’s asked of an employee or potential employee must be related to the job, so then, the question becomes, ‘What is job-related? What does job-related mean?’”

“Realistically,” she says, “I can see the Supreme Court saying these are things that must be looked at and addressed by the federal legislators who are allowing these people to be contractors,” which would return the case to the lower federal courts to decide.

“Frankly, this is just another weight on the
scale in terms of when you are evaluating what background checks to run and what information to gather, and how you should gather and what you should be gathering,” Devata says.

What she and her firm tell clients—many of them HR executives—is to “absolutely do background checks,” she says. “People do lie on their applications. In this economy, people want jobs, so people are willing to fabricate or lie.

“But know what checks you’re getting and make sure you’re getting your information from an accurate source, one you know is committed to compliance” with the latest laws and rulings—including what NASA vs. Nelson may add to the mix. “There are many, many valid and conscientious background screeners,” she says, adding that employers would be well-advised to go through the NAPBS.

When considering using a vendor or background-screening provider, she adds, “I think you have to ask them what their policies for complying with the Federal Credit Reporting Act and other laws are. Be very clear in asking, ‘What information are you providing me?’

“Having clear communication with background screeners is one of the biggest challenges I have witnessed for HR.”
**Ortiz v. Jordan**

09-737


Ortiz, a former inmate, brought a § 1983 action against prison officials, Jordan and Bright, alleging that she was sexually assaulted by a prison guard while incarcerated and that the officials failed to protect her and retaliated against her for reporting the incident. The district court entered judgment for Ortiz. The officials then appealed the court's denial of summary judgment based on qualified immunity. The court of appeals held that the case manager, Jordan, acted reasonably and was entitled to qualified immunity. The court also held that the investigator, Bright, was entitled to qualified immunity because she did not violate Ortiz's due process rights. The case was remanded.

**Question Presented:** May a party appeal an order denying summary judgment after a full trial on the merits if the party chose not to appeal the order before trial?

Michelle ORTIZ, Plaintiff-Appellant,

v.

Paula JORDAN and Rebecca Bright, Defendants-Appellees.

United States Court of Appeals for the Sixth Circuit

Filed March 12, 2009

[Excerpt; some footnotes and citations omitted.]

JULIA SMITH GIBBONS, Circuit Judge:

Michelle Ortiz, a former inmate, brought a § 1983 claim against various prison officials alleging that, while incarcerated, she was sexually assaulted by a prison guard on two successive nights and that prison officials failed to protect her from the second assault. She also claimed that prison officials retaliated against her for reporting the incident. The jury found in favor of the former inmate and against two prison officials, Paula Jordan and Rebecca Bright. The prison officials appealed. For the reasons set forth below, we conclude that both Jordan and Bright are entitled to qualified immunity.

I.

The evidence, as reflected by the jury's verdict and, therefore, viewed on appeal in the light most favorable to Ortiz, established that at the time of the events at issue in this case, Michelle Ortiz, a former inmate at the Ohio Reformatory for Women, was serving a one-year sentence for aggravated assault in the stabbing of her husband, apparently in retaliation for multiple incidents of domestic violence to which she had been subjected over a period of several years. While incarcerated, she was sexually assaulted by a
corrections officer, Douglas Schultz, on two successive nights. Ortiz testified that the first assault occurred on Friday, November 8, 1996 in her living quarters at the JG Cottage. Schultz, who reportedly had a habit of being “overly friendly” and “touching people,” walked up behind Ortiz while she was alone in the washroom and grabbed her shoulder. Ortiz said, “Oh, are you giving me a back rub?” and Schultz replied, “No, that’s not what I was reaching for” and grabbed her breast. Upset, Ortiz told him to get away from her. After a brief verbal altercation, Schultz complied, but later that night he told Ortiz, “I’ll get you tomorrow, watch.”

The next day, Saturday, November 9, 1996, Ortiz approached another corrections officer, Steve Hall, and told him that Schultz had assaulted her the night before. Hall immediately took Ortiz to see the acting case manager for the JG Cottage, Paula Jordan. Hall testified that when he dropped Ortiz off at Jordan’s office, he told Jordan what Ortiz had told him, including the name of the officer in question, but did not stay because his shift was about to end.

Despite the fact that Ortiz was crying and obviously upset, Jordan told her that it was Schultz’s last day at the JG Cottage because of a previously planned reassignment to another correctional facility. Although Jordan said that “no one has the right to touch you,” she also told Ortiz to “keep in mind that the man was leaving,” that “this was his nature,” and that he “is just an old dirty man.” Jordan encouraged Ortiz to “hang out with [her] friends” for the rest of the day so that Schultz would not have the chance to be alone with her. Ortiz explained at trial that upon learning from Jordan that it was Schultz’s last day, she decided not to file a complaint but instead just to “let it go” and get through Schultz’s last day by following Jordan’s suggestion that she use what amounted to a buddy system. Jordan also told Ortiz that “if anything happens” again, she could report it on Tuesday, when Jordan returned to work.

The second assault occurred later on Saturday, the same day that Ortiz had spoken with Jordan. Ortiz testified that she was feeling ill, went to her room, and subsequently fell asleep. Although there were three other people in the room with Ortiz when she went to sleep, they were gone when she woke up and found Schultz standing over her, one hand fondling her breast and the other in her “crotch area” inside her underwear. When she realized what was occurring, Ortiz raised a ruckus, hitting and scratching Schultz until he left the room.

The written statement that Ortiz submitted regarding the second assault reported that Schultz “fluttered his fingers across my left breast [and] smoothed across my blanket on my crotch area.” She later testified that Schultz had succeeded in “putting his fingers inside [her],” saying that it upset her to the point that she asked Jordan whether “[she] needed to put it in” the written statement and was told to refer simply to contact with “the crotch area.”

The day after the second assault, Sunday, November 10, 1996, Ortiz told Officer Hall that Schultz had “touched [her] again,” and Hall took her to the sergeant’s office to report the incident. As a result, the matter was referred to institutional investigator Rebecca Bright, who received a call about the incident on Sunday but, because she was told that Schultz had just been transferred and was no longer assigned to the facility, did not actually begin an investigation until Monday. During the course of that investigation, Bright met with Ortiz and other relevant persons, including Officer Schultz, collected relevant documents, and scheduled a lie detector test for Ortiz, which
Ortiz “passed.”

Ortiz’s claim against Jordan stemmed at least in part from Bright’s conclusion that Jordan had violated the standards of employee conduct by failing to turn in the incident report promptly. Bright testified at trial that if Jordan had reported the first incident immediately, “the proper people would have taken a role in protecting Ms. Ortiz.” As for Officer Schultz, although he initially denied any wrongdoing, he voluntarily resigned his position. Bright explained that this event effectively ended her investigation because her administrative role was limited to investigating employee misconduct.

Ortiz’s claim against Bright emanated from Bright’s recommendation early in her investigation that Ortiz be placed in “security control.” As a result, on the Tuesday after the assault, Ortiz was transferred to the “ARN Unit,” otherwise referred to by the inmates as “the hole,” where she was put into solitary confinement. Bright later testified that she had warned Ortiz several times not to speak about the investigation with other inmates, indicating in her final warning to Ortiz that this was a “direct order.” When she received reports that Ortiz was still discussing the investigation with other inmates, Bright recommended to the warden that Ortiz be placed in “security control,” and the warden approved the action. Bright explained that this gag order was intended both to protect the integrity of the investigation and to protect Ortiz from possible altercations with other prisoners who were loyal to Schultz. But Bright also attributed her action to compliance with Ohio Administrative Code § 5120-9-11, a provision that provides for the placement of an inmate in isolation prior to a hearing for investigation if there is a threat of disruption to the institution. Ortiz was taken in handcuffs and shackled to a location that she described as lacking adequate bedding, heating, and clothing.

Ortiz alleges that Bright’s motive for placing her in “the hole” was purely punitive rather than protective, recalling that Bright told her that she was being put into the hole “because [she] had lied.” Ortiz also testified that after a day in solitary confinement, Bright called her back into her office, asked her to change her statement, and said, “[A]re you ready to tell me the story again?” When Ortiz responded she had already told her the story, Bright said, “[A]re you ready to tell me the truth?” Ortiz replied that she had already told the truth and began crying. Bright’s reaction was to tell Ortiz, “[I]f you are going to cry, I am going to have to take you back to the hole right now.” Within two days of this confrontation, a psychologist at the facility called Bright, told her that Ortiz was “not really handling the ARN complex very well,” and was ill and vomiting. Ortiz was moved to the infirmary that day, on the recommendation of the psychologist, and she remained there for a week before being transferred back to her regular room in the JG Cottage.

Ortiz filed this § 1983 action against Jordan, Bright, Schultz, Warden Shirley Rogers, and Ohio Governor George Voinovich, alleging, among other claims, an Eighth Amendment violation by Jordan for failing to protect Ortiz and a due process claim violation by Bright for placing her in solitary confinement. When Schultz could not be served with process, he was dismissed from this action. The remaining four defendants filed a motion for summary judgment denying liability and claiming qualified immunity. Ortiz filed a brief in opposition to the motion, in which she requested that “the defendants’ Motion for Summary Judgment be denied as it pertains to defendant Paula Jordan” but did not mention the other three defendants. The district court denied
summary judgment on the Eighth Amendment claim against Jordan and the due process claims against Bright and Warden Rogers, but dismissed all other claims. The district court also denied qualified immunity to the remaining defendants, but the defendants did not file an interlocutory appeal of the denial of qualified immunity.

Before the case reached trial, Warden Rogers died, leaving only two defendants, Jordan and Bright. The jury awarded Ortiz $250,000 in compensatory damages and $100,000 in punitive damages against Jordan and $25,000 in compensatory damages and $250,000 in punitive damages against Bright. The district court entered judgment in Ortiz's favor based on those verdicts. Jordan and Bright now appeal the verdict and the award of damages in Ortiz's favor. Both contend that they are entitled to qualified immunity.

II.

A.

Although courts normally do not review the denial of a summary judgment motion after a trial on the merits, denial of summary judgment based on qualified immunity is an exception to this rule and, just as in interlocutory appeals of qualified immunity, the standard of review is de novo. To determine whether an officer is entitled to qualified immunity, we must first determine as a threshold matter whether, considering the facts in the light most favorable to the plaintiff, a constitutional right was violated and, if so, whether that right was clearly established at the time of the violation.

i.

"[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." "But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."

Jordan contends that she did not violate Ortiz's Eighth Amendment rights because she was not "deliberately indifferent" to the substantial danger that Schultz posed to Ortiz. She cites, for example, her advice to Ortiz to use the buddy system as evidence that although she may have been negligent, she was not "deliberately indifferent." In support of this position, Jordan relies on Marsh v. Arn, a case in which we upheld the grant of qualified immunity to a prison official who took some steps to protect an inmate from threats by another inmate, even though the prison official did not believe the threat was serious.

Here, viewing the facts in the light most favorable to Ortiz, Ortiz reported the first encounter with Schultz to Jordan on the afternoon of Saturday, November 9, 1996, the day after it occurred. Jordan was made aware of Schultz's identity. There is no evidence that Jordan knew that Schultz had said that he would "get [Ortiz] tomorrow." Jordan told Ortiz that nobody had a right to touch her and that Ortiz could report the incident. Jordan asked Ortiz what she wanted to do. Jordan also told Ortiz that the day on which Ortiz spoke to Jordan was Schultz's last day at the institution. She told Ortiz to keep this in mind and that Schultz was "just an old dirty man." Jordan suggested that Ortiz stay with her friends for the rest of the day so that Schultz would not
have an opportunity to be alone with her. Jordan did not have the authority to reassign an officer, such as Schultz. Reassignment required approval of the warden and was typically initiated at the request of a captain. Because Ortiz elected not to make a voluntary statement, Jordan did not bring the matter to the captain’s immediate attention. Instead, she wrote an “Incident Report” relating her version of the conversation. She forgot to place the report in the mailbox outside the warden’s office when she left work on Saturday. Instead, she turned it in when she returned to work on Tuesday, the first business day after a holiday weekend.

Jordan’s conduct does not rise to the level of deliberate indifference. Jordan was aware that Schultz would be at the institution only a few more hours and suggested a course of conduct by which Ortiz could effectively protect herself during that limited time. Jordan advised Ortiz of her options. She also wrote an incident report. Given Ortiz’s decision not to proceed to make a voluntary statement, Jordan did not immediately approach the captain about a reassignment for Schultz. These steps were a reasonable approach to the risk at hand. The fact that they were ineffective does not change our analysis. Jordan did not violate Ortiz’s Eighth Amendment rights because she was not “deliberately indifferent” to the substantial danger that Schultz posed to Ortiz. Therefore, Jordan is entitled to qualified immunity.

ii.

The Due Process Clause of the Fourteenth Amendment states that a state shall not “deprive any person of life, liberty, or property, without due process of law.” The doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed has come to be known as substantive due process.”

The Supreme Court’s decision in Sandin v. Conner dooms Ortiz’s due process claim against Bright and ultimately entitles Bright to qualified immunity. In Sandin, the Court held that prison regulations affording prisoners certain procedures before punishment is imposed create a protected liberty interest only when the punishment in question “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” The Court went on to hold that “discipline in segregated confinement did not present the atypical, significant deprivation in which a State might conceivably create a liberty interest.” Similarly, Bright’s act of transferring Ortiz to the ARN Unit did not constitute a violation of Ortiz’s due process rights because a temporary placement in solitary confinement is not an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”

Ortiz is correct in pointing out that Sandin does not sanction the use of solitary confinement for retaliatory purposes. The Sandin court itself noted that “[p]risoners . . . of course, retain other protection from arbitrary state action even within the expected conditions of confinement. They may invoke the First and Eighth Amendments and Equal Protection Clause of the Fourteenth Amendment where appropriate.” Ortiz, however, did not stake her claim on any of these available provisions. Although Ortiz alleged in her complaint that Bright placed her in isolation “with a distinctly punitive purpose,” arguably invoking a retaliation theory of the case, it is evident from the language in her complaint, as well as from the record as a whole, that her claim was conceived of and analyzed squarely as a due process violation and not as a First Amendment retaliation claim. We cannot reconstitute Ortiz’s claim.
under a new theory at this stage of the proceedings. Bright did not violate Ortiz’s due process rights and is entitled to qualified immunity.

B.

The principal appellate challenge to the damages award was mounted by Bright, contending with regard to the jury’s verdict against her that the ten-to-one ratio of punitive damages to compensatory damages, when measured by the “guideposts” enunciated by the Supreme Court in *BMW of North America, Inc. v. Gore*, was so “grossly excessive” as to violate due process. That issue has become moot in light of our determination that Bright cannot be held liable in this case. Similarly, Jordan’s arguments regarding damages and her challenges to the district court’s evidentiary rulings are moot.

III.

For the reasons set out above, we reverse the denial of qualified immunity to both Bright and Jordan and remand for further proceedings consistent with this opinion.

DISSENT

MARTHA CRAIG DAUGHTREY, Circuit Judge, dissenting:

A review of the annual report of dispositions by this court would reveal that each year we process several hundred section 1983 actions brought by state and federal prison inmates scattered throughout the Sixth Circuit. I would venture to guess that at least 90 percent—and probably even closer to 100 percent—of those cases come to us by way of summary judgment granted by the district court and are affirmed on appeal, virtually out of hand. Almost none of the cases that we review involves a jury verdict, let alone a jury verdict in favor of a plaintiff, because respondents routinely and successfully invoke the doctrine of qualified immunity. Indeed, when a district judge does find a material dispute of fact that prevents a grant of summary judgment and sends a section 1983 claim to trial, the plaintiff, being an inmate, is unlikely to arouse the sympathy of a jury of 12 law-abiding, “free-world” peers. This, then, is the exceedingly rare instance in which an inmate’s claims not only survived the prison officials’ defense of qualified immunity but, after a jury trial, also resulted in a significant monetary award of damages in the prisoner’s favor. Nevertheless, the majority in this appeal has managed to extinguish that award by overturning the jury verdict and finding, contrary to the decision of the district court, that the respondents are entitled to qualified immunity. In view of the uncontested facts before the district court and the jury, I view this result as a legal travesty, and I therefore dissent.

There is arguably room for disagreement about the liability of Rebecca Bright. The majority emphasizes what it sees as a flawed pleading that, in its judgment, prevents the plaintiff’s reliance on a retaliation theory of recovery. But the majority concedes that she alleges in her complaint that Bright placed her in isolation “with a distinctly punitive purpose.” Hence, the majority’s basis for rejecting the retaliation claim seems hyper-technical at the very least. Equally unpersuasive is the majority’s endorsement of Bright’s invocation of Ohio Administrative Code § 5120-9-11, governing “security control and disciplinary control,” as justification for Ortiz’s transfer to isolation, an action that clearly affected her adversely. Even a superficial reading of that administrative code section reveals that the authority to isolate an inmate pending investigation of a rule violation applies to the rule violator, not the victim of the
violation, to the inmate threatening disruption, not the inmate who has suffered from disruption during his or her incarceration. We have in the record a prison psychologist’s report that Ortiz was “not handling [isolation in] the ARN complex very well” and was ill and vomiting, as well as prison records showing that she spent the following week in the prison infirmary recovering from the ill-effects of Bright’s order relegating Ortiz to “the hole,” purportedly for discussing the assaults that she had endured with other inmates. Viewing this evidence in the light most favorable to Ortiz, it seems evident that Bright’s action could reasonably be found by a jury to constitute illegal retaliation.

But if there is any room for disagreement about Bright’s liability in this case, there is none at all concerning Jordan’s liability, because it was her deliberate indifference to a known risk to Ortiz that made the second assault by Douglas Schultz possible, if not inevitable. Ironically, the majority opinion that robs Ortiz of her victory before the jury also proves her case . . . .

***

Significantly, rather than intervene in some reasonable way on Saturday, Jordan reported the situation to no one, instead leaving Ortiz with instructions to rely on a makeshift “buddy system” for protection from Schultz—one that proved to be sadly inadequate, as it turned out. Equally significant was Bright’s testimony at trial that “if Jordan had reported the first incident immediately, ‘the proper people would have taken a role in protecting Mrs. Ortiz.’” But, leaving an inmate such as Ortiz wholly unprotected in the face of a known risk of an assault has repeatedly been held by this court and others to amount to deliberate indifference sufficient to establish liability under section 1983.

The jury credited Ortiz’s testimony, as well as that presented in her behalf, and we are charged to review the record in the light most favorable to her. Although the majority’s opinion sets out facts that obviously support the plaintiff’s claims, those facts appear to carry no weight or substance with the majority. Moreover, the majority pays no discernible deference to the fact that the judgment in this case rests on a jury verdict. Given the legal posture of this case and the strength of the evidence against defendants Bright and Jordan, the majority’s decision to overturn the jury’s verdict strikes me not just as an unfortunate result in this case, but as one that is thoroughly senseless. I therefore dissent.
The U.S. Supreme Court has agreed to take up the question of whether an order denying summary judgment can be appealed after trial if the party did not appeal the order before trial, in a case involving the alleged sexual assault of a female inmate at an Ohio prison. [The case is Ortiz v. Jordan.]

The high court on Monday granted a petition for certiorari by the woman’s counsel, who argued that there is a split among federal circuit courts on the question of whether a denial of summary judgment can be appealed after a full trial, with some courts barring such appeals and others allowing them when they are based on legal grounds.

The cert petition stated that the circuits are also divided on whether such appeals are permissible if the party didn’t bring an interlocutory appeal. The former inmate’s case, the petition stated, presents the opportunity to resolve the question of when, if ever, denial of a summary judgment motion can be appealed.

The cert petition argued that allowing post-trial reviews of summary judgment undermines fundamental tenets of federal procedure.

Allowing such appeals undermines both motions for judgment as a matter of law, by rewarding parties who fail to file them to preserve summary judgment issues, and the process for certifying issues of law for pretrial appeal, the motion argues, and also diminishes the discretion of district courts.

The case arose out of a 1996 incident at the Ohio Reformatory for Women, where inmate Michelle Ortiz was allegedly sexually assaulted by a corrections officer on two consecutive nights, according to the ruling by the U.S. Court of Appeals for the Sixth Circuit being appealed.

On the first night, the officer, Douglas Schultz, allegedly grabbed Ortiz’s breast, after which she reported the incident to the case manager for her living quarters, Paula Jordan. Jordan advised Ortiz that Schultz was on his last day at the facility and to try to avoid being alone with him until he left, the ruling states.

That night, Ortiz awoke to find Schultz standing over her with his hands on her breast and down her underwear, and fought him off, the ruling states.

The case was then referred to institutional investigator Rebecca Bright, who advised that Ortiz be put in solitary confinement because she had discussed the investigation with other inmates, the ruling states.

Ortiz became sick in solitary and later filed suit against Jordan and Bright. She alleged that Jordan failed to protect her from Schultz and that Bright violated due process by placing her in solitary.

Jordan and Bright filed a motion for summary judgment claiming qualified immunity, which was denied by the district court. They did not file an interlocutory appeal of that decision.
The case then proceeded to trial, where a jury ruled in favor of Ortiz and awarded her $625,000. Jordan and Bright appealed, arguing that they were entitled to qualified immunity, despite the fact that the lower court had denied their motion for summary judgment.

The Sixth Circuit held that while courts do not normally review the denial of summary judgment after a trial, the issue of qualified immunity is an exception.

The appeals court ruled 2-1 that both Jordan and Bright were entitled to immunity, and overturned the jury’s verdict.

The appeals court ruled that Jordan was not “deliberately indifferent” to the danger Ortiz faced from Schultz, and reasonably advised her to avoid Schultz, entitling Jordan to immunity.

Likewise, Bright was entitled to immunity, the court ruled, because Ortiz’s rights were not violated by being placed in solitary since it was not an “atypical and significant hardship” compared to ordinary prison life.

Sixth Circuit Judge Martha Craig Daughtrey, who dissented from the opinion, described it as “a legal travesty” and “thoroughly senseless,” finding that Jordan’s indifference led to Ortiz’s second assault and that the court’s finding of immunity for Bright was “hyper-technical.”

Sixth Circuit Judges Danny J. Boggs and Julia Smith Gibbons voted to overturn the verdict.

The Mills Law Office LLC is representing Ortiz.

The Ohio Attorney General’s Office is representing Jordan and Bright.

The case is *Ortiz v. Jordan*, case number 09-737, in the U.S. Supreme Court.
The U.S. Supreme Court announced Monday that it will hear [Ortiz v. Jordan,] the case of an Elyria woman who won $625,000 for being punished by Ohio prison officials after she reported that a guard sexually assaulted her—only to have the verdict kicked out because of a disputed procedural issue.

Michelle Ortiz's legal odyssey has dragged on for a decade and a half, starting with a 12-month sentence for aggravated assault after she fought off her physically abusive husband with a knife. Imprisoned at the Marysville Correctional Facility for Women, she was sexually assaulted by a guard on Nov. 18, 1996.

The next day, she told a different guard about the assault and was escorted to see a case manager at the prison. The case manager told her that the guard who assaulted her was "just an old dirty man" who only had one day left before a planned transfer to another facility, and until then, she should surround herself with friends at the prison to keep him away.

But according to court records, the offending guard assaulted her again that very night. Ortiz reported the attack—and soon was admonished by an institutional investigator for telling others about the incidents. Three days after the second attack, Ortiz was put in solitary confinement.

She later sued for violation of her rights. The case manager and institutional investigator tried to get the case dismissed on the grounds that they had "qualified immunity" from lawsuits because they were state employees and only doing their jobs. Their legitimate duties, their attorneys said during court proceedings, included protecting Ortiz from inmates loyal to the guard by putting her in isolation, and preserving the integrity of the investigation by keeping claims about the attacks from spreading in the prison.

A judge was not persuaded, refusing to dismiss the case, and the trial started. A jury awarded Ortiz $625,000 in damages. The case manager and institutional investigator then appealed and last year won a reversal before the 6th U.S. Circuit Court of Appeals, which ruled two-to-one against Ortiz.

But this appeal was not about the trial verdict or monetary award. Rather, the prison employees contended that the trial judge was wrong not to dismiss the case earlier because, they said, they should have been granted immunity from the suit.

Lawyers for Ortiz contend otherwise, and say that if prison officials were so sure of their right to immunity, they should have appealed on that point before allowing the case to go to a full trial. Instead, they gambled that they could win during the trial, and only after that failed did they try to resurrect their claimed immunity right, says David Eduard Mills, the Cleveland-based attorney who filed the Supreme Court case.

Federal and state appeals courts have disagreed on this point in other cases, Mills said, and the Supreme Court has a chance to settle the matter. Indirectly, it would affect
the *Ortiz* verdict. But the high court case isn't about that. It's about whether lawyers who lose procedural points before a trial must appeal on those points right away, or whether they can roll the dice at a chance of winning the trial itself, making the procedural appeal unnecessary.
The Supreme Court has agreed to consider reinstating a $625,000 judgment against Ohio prison officials who did nothing to prevent a guard's sexual assault of an inmate and then punished the victim. [The case is *Ortiz v. Jordan and Bright.*]

The justices said Monday they will review a federal appeals court that threw out the award to Michelle Ortiz. The lower court had said the prison officials did not violate her constitutional rights. Another federal judge called the appellate decision a "legal travesty."

Ortiz was serving 12 months at the Ohio Reformatory for Women in November 2002 when she reported that a male guard fondled her breasts and warned, "I'll get you tomorrow, watch." He did, returning when Ortiz was asleep to molest her again.

When Ortiz discussed the attacks with other inmates, she was shackled and sent to solitary confinement. She won a jury verdict.

But the appeals court in Cincinnati found by a 2-1 vote that one official, Paula Jordan, could not be held liable even though she did not take immediate action when Ortiz reported the first incident. The court said the other official, Rebecca Bright, did not violate Ortiz's rights by sending her to solitary confinement.

Bright and Jordan tried to get the case against them dismissed before the trial. A judge refused to do so and they did not appeal then. The legal issue in the case is whether they could wait until after the trial to appeal the judge's ruling.

It is extremely rare for a prison inmate's civil rights complaint to overcome preliminary legal obstacles and persuade a jury there was a violation, said Judge Martha Craig Daughtrey, the dissenting appeals court judge.

Given the statistics, Daughtrey said, "I view this result as a legal travesty."

The evidence against Bright and Jordan was strong, she said. "The majority's decision to overturn the jury's verdict strikes me not just as an unfortunate result in this case, but as one that is thoroughly senseless."

Arguments will take place in the fall.

The Associated Press normally does not name victims of alleged sexual abuse. In this case, her attorney, David E. Mills of Cleveland, said she could be identified publicly.

The case is *Ortiz v. Jordan and Bright,* 09-737.
Nearly six years after President George W. Bush signed legislation to reduce prison rape, a blue-ribbon commission is calling on corrections officers to identify vulnerable inmates, offer better medical care and allow stricter monitoring of their facilities.

The National Prison Rape Elimination Commission, in a study to be released today, affirms that more than 7.3 million people in prisons, jails and halfway houses across the nation have "fundamental rights to safety, dignity and justice."

The number of rapes committed by detention staff members and other inmates remains a subject of intense scrutiny. A 2007 survey of state and federal prisoners estimated that 60,500 inmates had been abused the previous year. But experts say that the stigma of sexual assault often leads to underreporting of incidents and denial by many of the victims.

Too often, the report says, sexual abuse of prisoners is viewed as a source of jokes rather than a problem with destructive implications for public health, crime rates and successful reentry of prisoners into the community.

"If you have a zero-tolerance policy on prison rape and it is known from the highest ranks that this will not be tolerated and there will be consequences for it, that goes a long way in sending a message," said U.S District Judge Reggie B. Walton, the commission chairman. "Just because people have committed crimes and are in prison, that doesn't mean that part of their punishment is being sexually abused while in detention."

The panel hosted hearings and visited 11 corrections sites before issuing its report. Among the strongest recommendations: Staff members should be subject to robust background checks and given training, which could help victims of sexual assault secure emergency medical and mental health treatment.

Panel members are preparing to send their report to Attorney General Eric H. Holder Jr., who will have one year to prepare mandatory national standards. The recommendations will not bind state corrections officers, but states that do not adopt them will have their criminal justice funding cut, panel members said.

Jamie Fellner, senior counsel at Human Rights Watch, said the panel's recommendations are common-sense steps to prevent, detect and punish prison rape, not "pie in the sky" ideals. "This problem wouldn't exist with good prison management," Fellner said.

But the recommendations could pose a challenge for wardens who already battle crowding. Corrections officers, who according to inmate surveys commit a significant percentage of inmate assaults, also may protest more oversight.

Brenda V. Smith, an American University law professor who worked on the commission, said sexual abuse in prison
“isn’t just a random event that can happen to other bad people.”

Instead, political protesters, people accused of driving under the influence of alcohol and substance abusers have shared harrowing incidents of rape while in custody, sometimes while spending only one night behind bars. “This is something that could happen to a kid who has no priors and who happens to make a mistake,” Smith added.

Hope Hernandez said in an interview that she was raped multiple times by a corrections guard in the District years ago. She said she was suffering through withdrawal in a medical unit while she awaited sentencing on a drug-related charge. Hernandez said the guard led her to a secluded room while nurses slept.

Hernandez said she wanted to share her story to put a face on the problem of rape in detention facilities.

After her release on probation, she went on to earn a master’s degree in social work. She said she remains unsettled that the guard’s only punishment was a week-long suspension. But her work with foster children and substance abusers and her attendance at the White House signing ceremony for the prison rape bill brought her a measure of peace.

“I’m certainly not bitter over how long it’s taken,” Hernandez said of the panel report. “I think it’s great that it’s getting any attention at all.”
The Department of Justice (DoJ) defended itself Tuesday against those criticizing the agency for its failure to meet a deadline for drafting new rules to prevent prison rape.

Under a 2003 law, Wednesday marks the deadline for the DoJ to finalize those rules—a deadline the agency isn’t planning to meet.

In a letter to several House lawmakers Tuesday, Attorney General Eric Holder said the issue remains a priority, but “it is essential that the Department take the time necessary to craft regulations that will endure.” Of major concern, Holder wrote to Reps. Frank Wolf (R-Va.) and Robert “Bobby” Scott (D-Va.), both long-time supporters of stricter protections for prisoners, is the cost to implement the reforms.

“State and local correctional authorities may be resistant to adopting new measures, or may be tempted to cut other programs vital to protecting inmates and ensuring their eventual reintegration into society,” Holder wrote. “Assessing such costs, therefore, is a key part of the Department’s efforts.”

That defense is hardly news. In March, Holder told members of a House appropriations panel that prison officials were pressuring him to scale back some of the recommendations of the National Prison Rape Elimination Commission (NPREC), the group created by the 2003 law to examine prison assaults and propose reforms.

“When I speak to wardens, when I speak to people who run local jails, when I speak to people who run state facilities, they look at me and they say, ‘Eric, how are we supposed to do this?’”” Holder said at the time. “If we are going to segregate people, build new facilities, do training, how are we supposed to do this?”

Holder used most of Tuesday’s five-page letter to outline the DoJ’s steps to rein in prison assaults under the Obama administration, including efforts to strengthen punishments for prison rapes and help prisons treat victims of sexual assault. Regarding the national guidelines, however, the DoJ has yet to propose an amended timeline for installation.

Considering what’s at stake, many lawmakers and human rights advocates are wondering why the administration isn’t moving more quickly.

“Delay,” said Jamie Fellner, senior counsel at Human Rights Watch and a member of the NPREC, “means more people are at risk of abuse.”
Virginia Office of Protection and Advocacy v. Reinhard

09-529


The Virginia Office for Protection and Advocacy (VOPA), a state agency, sought declaratory and injunctive relief providing it access to peer review records relating to persons who died or were injured in facilities operated by another state agency. VOPA alleged that the state officials were violating the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act) and the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act) by denying VOPA access to those records. The district court held that sovereign immunity did not bar VOPA's suit, but the appellate court reversed. Although Congress could have sought to provide a federal forum for the action through its abrogation power or by requiring a waiver of the states' sovereign immunity in exchange for federal funds, Congress had not unequivocally expressed its intent to abrogate the states' sovereign immunity and the DD Act did not expressly condition funding under the DD Act and the PAIMI Act on a state's consent to be sued in federal court. The court declined to expand the doctrine of Ex parte Young, which permitted a private individual to sue state officials for prospective relief from an ongoing violation of federal law, to lift the bar of sovereign immunity in federal court where plaintiff was a state agency. VOPA was permitted to bring an action in state court to obtain the relief that it sought.

Question Presented: Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of Ex parte Young.

COMMONWEALTH OF VIRGINIA, Virginia Office for Protection and Advocacy, Plaintiff-Appellee,

v.

James REINHARD, in his official capacity as Commissioner, Department of Mental Health, Mental Retardation and Substance Abuse Services of the Commonwealth of Virginia; Denise D. Micheletti, in her official capacity as Director, Central Virginia Training Center; Charles M. Davis, in his official capacity as Director, Central State Hospital, Defendants-Appellants.

United States Court of Appeals for the Fourth Circuit

Decided June 2, 2009

[Excerpt; some footnotes and citations omitted.]

WILKINSON, Circuit Judge: A state agency known as the Virginia Office for Protection and Advocacy, or "VOPA,"
brought this action in federal court against three Virginia officials in their official capacities. VOPA claims that the defendant state officials are violating federal law and seeks declaratory and injunctive relief. We hold that sovereign immunity bars VOPA's suit. While Congress could seek to provide a federal forum for this action through its abrogation power or by requiring a waiver of the states' sovereign immunity in exchange for federal funds, Congress has attempted neither of those options here. And we decline to expand the doctrine of Ex parte Young to lift the bar of sovereign immunity in federal court when the plaintiff is a state agency. VOPA may pursue its claims in state court, but it would be inconsistent with our system of dual sovereignty for a federal court to rely on Ex parte Young to adjudicate an intramural state dispute like this one. Accordingly, we reverse the judgment of the district court and remand this case with directions to dismiss it.

I.

VOPA is an “independent state agency” in Virginia that protects and advocates for the rights of persons with mental illnesses and developmental disabilities. Congress encourages the states to create entities like VOPA by providing federal funding to protection and advocacy systems that meet the requirements of two federal statutes: the Developmental Disabilities Assistance and Bill of Rights Act of 2000 and the Protection and Advocacy for Individuals with Mental Illness Act. Under those acts, states may choose to make their protection and advocacy systems either public agencies or private, nonprofit entities. Virginia chose the public option.

In accordance with the requirements for receiving federal funds, Virginia law authorizes VOPA to engage in various pursuits on behalf of the mentally ill and the disabled, such as investigating complaints of discrimination, abuse, and neglect. Two features of VOPA's authority under Virginia law are particularly relevant in this case. First, VOPA operates independently of the Office of the Attorney General in Virginia and employs its own legal counsel. Second, VOPA has the authority, consistent with the requirements of the DD and PAIMI Acts, to access the records of an individual with a disability in certain circumstances, including the situation in which VOPA has probable cause to believe that a person has been abused or neglected.

VOPA claims in this action that Virginia is denying VOPA access to certain records in violation of the DD and PAIMI Acts. In particular, VOPA seeks declaratory and injunctive relief providing it access to “peer review” records relating to three persons who died or were injured in facilities for the mentally ill. The facilities in question are operated by another state agency in Virginia, the Department of Mental Health, Mental Retardation and Substance Abuse Services. The defendants are three officials in that department, named in their official capacities (“the state officials”).

Before the district court, the state officials moved to dismiss VOPA's complaint on two grounds. First, they argued that VOPA had failed to state a claim on which relief could be granted because the state officials were not violating federal law. Specifically, the state officials argued that peer review records were privileged under Virginia law and that federal regulations under the DD Act and the PAIMI Act left that state-law privilege intact. Second, the state officials argued that Virginia's sovereign immunity barred VOPA's suit in any event.

The district court denied the state officials' motion to dismiss on both grounds. First, the
court held that VOPA had stated a claim that the state officials were violating federal law and that the state officials’ argument based on the peer review privilege was inappropriate for resolution on a Rule 12(b)(6) motion because it was an “affirmative defense to the merits.” And second, the court held that sovereign immunity did not bar VOPA’s suit. The district court agreed with the state officials that Congress had not abrogated Virginia’s sovereign immunity, nor had Virginia waived its sovereign immunity against this action. However, the court agreed with VOPA that this suit satisfied the sovereign immunity exception of *Ex parte Young* because VOPA had sued the state officials for prospective relief from an ongoing violation of federal law. In reaching that conclusion, the district court rejected the state officials’ argument that the doctrine of *Ex parte Young* did not permit a suit in federal court by one state agency against officials of another agency of the same state.

The state officials immediately appealed the district court’s sovereign immunity decision (and only that decision) under the collateral order doctrine; our review is *de novo*.

II.

State sovereign immunity is a bedrock principle of “Our Federalism.” Indeed, the “central purpose” of the sovereign immunity doctrine “is to ‘accord the States the respect owed them as joint sovereigns.’” When the Constitution “split the atom of sovereignty,” the states “did not consent to become mere appendages of the Federal Government.” Rather, they consented to a system of dual sovereignty, and the states therefore “entered the Union ‘with their sovereignty intact.’”

Along with their status as sovereigns, the states retained “the dignity and essential attributes inhering in that status.” And one of those essential attributes of sovereignty retained by the states is immunity from suit absent their consent. While the Eleventh Amendment reflects this foundational principle of sovereign immunity, the Amendment does not define the immunity’s scope.

Exceptions to the states’ sovereign immunity do exist, however. Three of those exceptions are pertinent here. First, “Congress may abrogate a State’s immunity pursuant to its enforcement power under § 5 of the Fourteenth Amendment.” Second, a state may waive its sovereign immunity if it consents to suit in federal court. Third, the states’ sovereign immunity “does not preclude private individuals from bringing suit against State officials for prospective injunctive or declaratory relief designed to remedy ongoing violations of federal law.”

The parties correctly agree that Virginia’s sovereign immunity bars VOPA’s suit against the state officials in their official capacities unless one of these exceptions to sovereign immunity applies. We therefore examine each of the three relevant exceptions in turn.

III.

We begin with abrogation. To abrogate the states’ sovereign immunity, Congress must both “unequivocally express[ ] its intent to abrogate” and “act[ ] pursuant to a valid grant of constitutional authority.” We agree with the state officials and the district court that Congress has not unequivocally expressed its intent to abrogate Virginia’s sovereign immunity in this case. Indeed, VOPA does not argue that Congress has made any effort, much less a clear one, to abrogate the states’ immunity in the DD Act or the PAIMI Act. Thus, the abrogation exception does not permit VOPA’s suit
against state officials.

We do not hold, however, that Congress is powerless to abrogate in the circumstances presented by this case. Indeed, the Supreme Court and this court have upheld Congress's authority to abrogate sovereign immunity under Section 5 of the Fourteenth Amendment in certain actions involving the rights of disabled persons under Title II of the Americans with Disabilities Act. ... 

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IV.

We turn next to the issue of waiver. VOPA claims that Virginia waived its sovereign immunity against this action by choosing to receive federal funding under the DD Act and the PAIMI Act because Congress conditioned that funding on the Commonwealth's consent to be sued in federal court. In particular, VOPA argues that the following provision of the DD Act placed Virginia on notice that it was waiving its sovereign immunity: "Nothing in this subchapter shall preclude a system from bringing a suit on behalf of individuals with developmental disabilities against a State, or an agency or instrumentality of a State."

VOPA's waiver argument is not persuasive. The Supreme Court has held repeatedly that the waiver of a state's sovereign immunity requires an explicit, emphatic statement. That is, a state waives its immunity from suit in federal court only where that waiver is "stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." The purpose of this "stringent" test is "to be certain that the State in fact consents to suit." Thus, we will not find "consent by implication or by use of ambiguous language."

A state does not waive its sovereign immunity through its mere receipt of federal funds or participation in a federal program. Instead, Congress must also express "a clear intent to condition participation ... on a State's consent to waive its constitutional immunity." These strict requirements reflect both the importance of sovereign immunity in our federal system and the fact that a waiver of sovereign immunity is "an exercise, rather than a limitation of, State sovereignty."

Applying these principles, we agree with the district court that the provision of the DD Act cited by VOPA is not sufficiently explicit to waive Virginia's sovereign immunity. Indeed, the language in that provision is far from the emphatic, "express," and "unequivocal" statement that is necessary to constitute a waiver. The district court correctly observed that Section 15044(b)(1) "simply indicates an intent not to abrogate any preexisting rights to sue." That section does not, however, provide states with the necessary notice that they are consenting to suits in federal court that their sovereign immunity would otherwise bar.

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V.

A.

We turn finally to the doctrine of Ex parte Young. VOPA argues, and the district court held, that the Ex parte Young exception to sovereign immunity permits VOPA's suit against the state officials in federal court. To support that argument, VOPA points to Verizon Maryland, Inc. v. Public Service Commission of Maryland. There, the Supreme Court held that "[i]n determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit"
against state officials in their official capacities, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" VOPA argues that this action satisfies *Ex parte Young* under Verizon Maryland's "straightforward inquiry" because VOPA, in seeking access to peer review records to which it is allegedly entitled under the DD and PAIMI Acts, is pursuing injunctive relief from an ongoing violation of federal law by state officials. And, VOPA contends, that should be the end of the matter.

But it is hardly so simple. While VOPA's reliance on a straightforward application of *Ex parte Young* may have superficial appeal, this case differs from *Ex parte Young* in a critical respect: the plaintiff there was not a state agency. Instead, the plaintiffs in *Ex parte Young* were private parties. And while no subsequent decision has expressly limited the application of *Ex parte Young* to suit by a private plaintiff, many decisions have recognized this basic element of the doctrine.

Moreover, VOPA has cited no case, nor have we found any, holding that—or even analyzing whether—the *Ex parte Young* doctrine applies equally when the plaintiff is a state agency. This lack of historical support for VOPA's suit is important in light of the Supreme Court's presumption that the states are immune from proceedings that were "anomalous and unheard of when the constitution was adopted."

VOPA argues, however, that its status as a state agency should not affect our *Ex parte Young* analysis. Indeed, VOPA claims that the identity of the plaintiff is wholly irrelevant to the doctrine of *Ex parte Young*. But VOPA cites no authority for that proposition either... . . . [W]e confront a novel question: whether to expand the *Ex parte Young* exception to allow a suit, in federal court, by a state agency against officials of the same state. The state officials concede that *Ex parte Young* would permit this action if the plaintiff were a private person, or even a private protection and advocacy system. The limited question we face, therefore, is "whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*," when the plaintiff is a state agency.

**B.**

When we consider the sovereign interests and federalism concerns at stake, we are convinced that the *Ex parte Young* exception should not be expanded beyond its traditional scope to permit a suit by a state agency against state officials in federal court. "The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." And federal court adjudication of an "intramural contest" between a state agency and state officials encroaches more severely on the dignity and sovereignty of the states than an *Ex parte Young* action brought by a private plaintiff.

The *Ex parte Young* doctrine rests on the well-established fiction that a private party's suit to enjoin state officials from violating federal law is not a suit against the state. An action by a state agency against state officials in federal court, by contrast, has no similar historical pedigree, and it would be a more obvious affront to a state's sovereign interests. Indeed, the infringement on a state's sovereign dignity would be substantial if a state agency, acting unilaterally, could force other state officials to appear before a federal tribunal. We therefore see no reason to extend the *Ex parte Young* doctrine to allow such a suit.
Splintering a state’s internal authority in this manner would be antithetical to our system of dual sovereignty. After all, “[t]he Framers split the atom of sovereignty”—they did not shatter it.

In contrast to the expansion of *Ex parte Young* proposed by VOPA, the interest of the states in avoiding excessive federal meddling with their internal authority is well recognized in the Supreme Court’s sovereign immunity jurisprudence. In *Alden v. Maine*, for example, the Supreme Court held that Congress did not have the power under Article I to abrogate the states’ sovereign immunity in their own courts. The Court recognized that if Congress had such a power, the federal government would be able “to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will.” The Court renounced “[s]uch plenary federal control of state governmental processes” because it would “denigrate[ ] the separate sovereignty of the States.” Moreover, *Alden* recognized that for the federal government to “assert[ ] authority over a State’s most fundamental political processes” would “strike[ ] at the heart of the political accountability so essential to our liberty and republican form of government.”

For similar reasons, the Supreme Court held in *Pennhurst State School & Hospital v. Halderman* that *Ex parte Young* did not permit suits in federal court to enjoin state officials from violating state law. The Supreme Court in *Pennhurst* sought to avoid the significant “intrusion on state sovereignty” that would result “when a federal court instructs state officials on how to conform their conduct to state law.” That is, the Court recognized that federal court resolution of internal state disputes would “conflict[] directly with the principles of federalism that underlie the Eleventh Amendment.”

The reasoning of *Alden* and *Pennhurst* is persuasive here. VOPA seeks to expand *Ex parte Young* to allow a federal court, without the imprimatur of Congress or the consent of the state, to resolve a dispute between a state agency and state officials. Recognizing an inherent power in the federal courts to settle this sort of internecine feud—“to turn the State against itself”—would disparage the status of the states as sovereigns. Moreover, just as *Pennhurst* observed that states and their officials have an interest against appearing in federal court over issues of state law, states have a similar interest in not having a federal court referee contests between their agencies. Further, allowing a state agency to decide on its own accord to sue officials of another state agency and to obtain relief from an Article III judge would create difficult questions of political accountability. Where exactly could citizens dissatisfied with the outcome of such a federal court case turn for political redress? The answer is not obvious. For these reasons, granting a federal forum to “a state’s warring factions” based on alleged violations of federal law would be an unwarranted extension of *Ex parte Young*.

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**C.**

VOPA insists, however, that this action does not actually implicate any special sovereign interests on the part of Virginia. Instead, VOPA argues that this suit, like all *Ex parte Young* actions, is primarily about enforcing federal law. VOPA points out that Virginia accepted federal funds under the DD Act and the PAIMI Act and created VOPA to enforce the accompanying requirements of those statutes. And VOPA argues that Virginia and its officials therefore have no sovereign interest in avoiding VOPA’s use of *Ex parte Young*. In other words: “This is
not, as the state officials mischaracterize it, simply an intramural contest between state agencies. . . . [T]he question is whether the state officials are required to comply with federal law.”

These arguments are unpersuasive as well. As an initial matter, VOPA’s emphasis on the enforcement of federal law proves too much. The Supreme Court in *Alden* specifically rejected the “contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States.” Instead, the Court held that even federal law must be applied “in a manner consistent with the constitutional sovereignty of the States.” Indeed, if a federal claim alone were enough to invoke *Ex parte Young*, many of the Supreme Court’s cases, including *Coeur d’Alene Tribe*, would have been wrongly decided.

Moreover, the Supreme Court has recognized in cases related to the political subdivisions of the states that alleging a violation of federal law does not itself override the states’ interest in maintaining their sovereignty with respect to internal state conflicts. These cases demonstrate that the parties to a dispute matter in deciding whether a federal forum is available.

To be specific, the Supreme Court has held repeatedly that political subdivisions of states could not obtain relief under federal law against the application of state statutes, even where the political subdivisions claimed that the state laws in question violated the federal constitution. In *City of Trenton*, for example, Trenton challenged—under the Contract Clause and the Fourteenth Amendment—a New Jersey statute imposing a fee on the city for withdrawing water from the Delaware River. The Supreme Court rejected the challenge because Trenton, as a “creature of the State . . . subject to the sovereign will” could not “invoke such restraints upon the power of the State.” And in *Williams*, the Supreme Court rejected a challenge brought by the cities of Baltimore and Annapolis on constitutional grounds against a Maryland statute, holding that “[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.”

Sovereign immunity was not at issue in these political subdivision cases. But these decisions are nonetheless relevant to our sovereign immunity inquiry because the Court made clear that, even in the presence of an alleged violation of federal law, the nature of the party making the federal claim implicated the state’s interest in keeping its internal authority intact. Moreover, the Court demonstrated, consistently and emphatically, its unwillingness to override the states’ control of their own internal disputes.

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**D.**

VOPA also argues that denying it access to federal court will lead to inconsistent application of substantive protections for persons with disabilities. For example, VOPA claims that “federal law [will] apply differently” in different jurisdictions because private protection and advocacy systems in other states, unlike VOPA, will be able to sue state officials in federal court. VOPA also argues that, within Virginia, disabled persons in public facilities will “not enjoy the same protections under federal law” as disabled persons in private facilities if VOPA cannot sue the state officials in
These concerns are illusory. The state officials concede, and VOPA does not dispute, that VOPA may bring this suit in state court and obtain the same relief that it seeks here. Specifically, the parties agree that at a minimum Virginia’s sovereign immunity would not bar an original action by VOPA for a writ of mandamus brought in the Virginia Supreme Court. And in such a suit, the Supremacy Clause requires Virginia courts to enforce federal law. VOPA is therefore incorrect to argue that our decision will cause any discrepancies in the application of substantive federal law. Moreover, the Supreme Court has the authority to review decisions by state courts on matters of federal law without regard to sovereign immunity.

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E.

Finally, VOPA argues that denying it access to federal court based on Virginia’s sovereign interests is inconsistent with state law. VOPA points out that Virginia law designates VOPA as an independent agency. For example, VOPA operates independently of the Office of the Attorney General in Virginia and can retain its own legal counsel. Because Virginia has exercised its sovereignty in making VOPA an independent entity under state law, VOPA suggests that Virginia cannot invoke its sovereign interests to complain when VOPA uses that independence to sue Virginia’s officials in federal court under Ex parte Young.

This argument is erroneous. While Virginia did grant VOPA some independence under state law, that limited independence in no way implies that Virginia granted VOPA the authority to sue the Commonwealth or its officials in federal court. Indeed, VOPA does not point to any provision of state law to that effect. “A State’s constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued.” Thus, we interpret VOPA’s independence to suggest only what the state officials have conceded in this case—that VOPA can bring this suit in state court.

Furthermore, VOPA’s argument based on its independence has the problem of being potentially limitless. Many other state entities have features of independence. For example, the State Corporation Commission in Virginia is a state agency that also has the authority to hire its own legal counsel outside of the Attorney General’s office. And public universities in Virginia are governed by boards that have the same powers as corporations and that are subject to the control of the General Assembly. If we were to adopt VOPA’s position, these state entities and countless others might suddenly possess the authority to pursue Ex parte Young actions against other state officials. After all, nearly every state agency receives federal funding and must comply with federal law of some sort, so under VOPA’s argument, nearly every state agency would be subject to an Ex parte Young suit by another supposedly independent arm of the state. As we have learned from experience, an exception like the one VOPA proposes, given time, tends to expand far beyond its original scope. There is no telling where that expansion might end here, and we are not disposed to find out.

VI.

VOPA’s argument ultimately boils down to the claim that, if VOPA is to maximize its effectiveness in representing the federal rights of persons with disabilities and mental illnesses, VOPA should be able to bring this
suit in federal court. We express no view on that claim. We hold only that, because VOPA is a state agency, *Ex parte Young* is the improper vehicle for VOPA to gain access to a federal forum. This holding in no way limits the scope of *Ex parte Young* for private plaintiffs. We also do not hold that Congress lacks the authority to grant VOPA access to federal court—indeed, Congress could attempt to abrogate the states’ immunity from suit or seek a waiver of that immunity in return for federal funds. And for now, VOPA can enforce federal law in state court, where we have no reason to think that VOPA will not find a just resolution of its claims. However, allowing a state’s officials to be called before a federal court by one of the state’s own agencies, without notice or consent, cannot be reconciled with the separate sovereignty of the states. And expanding *Ex parte Young* to permit a suit in these circumstances cannot be reconciled with the “real limitation[s]” of the doctrine of sovereign immunity. The judgment of the district court is therefore reversed, and the case is remanded with directions to dismiss it.

*REVERSED AND REMANDED*
Understandably lost in the other news coming out of the Supreme Court this morning was its decision to grant certiorari in Virginia Office for Protection & Advocacy v. Reinhard, a case coming out of the Fourth Circuit. Specifically, Reinhard raises whether state-created agencies (created to enforce the state’s compliance with a particular federal statute in exchange for federal funds) are allowed to invoke the Ex parte Young “exception” to the Eleventh Amendment in suits against states for prospective relief. The Fourth Circuit, in an opinion by Judge Wilkinson, held that they could not. [Full disclosure: I co-authored an amicus brief in support of certiorari in Reinhard.]

As I’ve noted previously, the grant in Reinhard was all-but foreordained. Even if it wasn’t enough that the SG (whose views the Court solicited) recommended the grant, the Seventh Circuit effectively sealed the deal in late April, when, sitting en banc, it unanimously disagreed with the Fourth Circuit’s analysis, holding in a closely analogous case that there was no reason why the identity of the plaintiffs should matter under Ex parte Young.

Whatever one’s views of the merits of this issue, Reinhard is now the second major state sovereign immunity case on the Court’s docket for the 2010 Term; last month, the Court granted certiorari in Sossamon v. Texas, which raises whether the Religious Land Use and Institutionalized Persons Act (RLUIPA) validly subjects states (and state officials in both their official and individual capacities) to damages liability. The argument there is not that RLUIPA abrogates the state’s sovereign immunity, but rather that states, in accepting funds under RLUIPA, are voluntarily waiving their sovereign immunity.

Together, then, Reinhard and Sossamon may well make the 2010 Term the bellwether for the Roberts Court when it comes to either following or retreating from the Rehnquist Court in one of the latter’s more controversial areas of jurisprudence. Indeed, the Supreme Court’s last significant decision in this area was one of the last cases in which Justice O’Connor participated—Central Virginia Community College v. Katz in 2006. There, a 5-4 Court (with O’Connor surprisingly in the majority) held that Congress could abrogate state sovereign immunity pursuant to the Bankruptcy Clause of Article I, even though the entire foundation of the Seminole Tribe line of cases was that Congress could only subject non-consenting states to suit pursuant to the enforcement clauses of the Reconstruction amendments (and not pursuant to any of its Article I powers—including, one would think, the Bankruptcy Clause). One may well suspect that Justice Alito does not hold his predecessor’s views on this issue (or, at least, her latest views as manifested in Katz), but, in four Terms, the issue has yet to squarely arise (assuming one doesn’t count Chief Justice Roberts’s dissent earlier this month in Alabama v. North Carolina).

It is definitely worth debating these issues
on the merits, especially in the unique context of the Spending Clause, where, in my view, there is a fairly strong argument that (so long as the regulation survives *South Dakota v. Dole*), the states really are voluntarily waiving their immunity. But for the moment, and for those who can’t wait to look forward to the Court’s upcoming Term (perhaps as a distraction from what’s likely to come in the next 10 days), it seemed worth noting the atmospherics, too. I suspect that it’s still too early to decide whether the Roberts Court is as deeply committed to federalism as its predecessors, but if these cases are any guide (*Sossamon*, especially), we should know a lot more by this time next year.
For Federal Courts fans, one of the more intriguing cases in which a cert. petition is currently pending is a little-noticed lawsuit out of the Fourth Circuit, Virginia Office of Protection & Advocacy v. Reinhard. In Reinhard, the Fourth Circuit, in an opinion by Judge Wilkinson, held that state-created public agencies are not entitled to invoke the Ex parte Young exception to Eleventh Amendment immunity in suits against state officials in their official capacities—that sovereign immunity in general precludes the federal courts from resolving such "intramural" conflicts, even those arising under federal law.

To be blunt, such a conclusion is rather inconsistent with the doctrine of Ex parte Young (which has never looked to the identity of the plaintiff, but has instead turned on what Justice Scalia described in 2002 as "a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."). More than just a problematic application of Ex parte Young, though, such analysis could also open the door for courts to identify additional previously unrecognized requirements for Young actions. With those concerns in mind, Reinhard first unsuccessfully sought rehearing en banc (with the support of the United States as amicus curiae), before filing a petition for certiorari. [Full disclosure: I co-authored an amicus brief on behalf of a group of federal courts scholars in support of certiorari.]

Rather than dispose of the cert. petition, the Court called in January for the views of the SG as to whether cert. should be granted. This maneuver was particularly curious at the time, since the Government had already taken a position in this case—arguing in favor of rehearing en banc in the Court of Appeals. Thus, whether or not the Court would be swayed by the SG’s view as to cert., it seemed rather clear what that view would be.

But, although the government has yet to share its views, a little-noticed development three weeks ago probably sealed the deal: The Seventh Circuit, sitting en banc in Indiana Protection & Advocacy Services v. Indiana Family & Social Services Admin., expressly disagreed with the Fourth Circuit’s analysis. Although Judge Easterbrook dissented from other parts of the opinion (which was otherwise 8-1), the Seventh Circuit was unanimous in concluding that state-created agencies may, in fact, invoke Ex parte Young against their own state’s officers, especially to enforce the statute at issue in these cases—the Protection and Advocacy for Individuals With Mental Illness (PAIMI) Act. Indeed, as Judge Hamilton explained,

Indiana’s use of IPAS’s status as an independent state agency to support the State’s late reliance on the Eleventh Amendment to block this lawsuit also seems, frankly, unfair. Congress gave each state the choice to establish a protection and advocacy system as either an independent state agency or a private not-for-profit entity. Indiana made the choice to set up IPAS as an
independent state agency. If we gave that choice any weight in the Eleventh Amendment inquiry, we would be permitting Indiana to use its own choice to set up an independent state agency as a means to shield its state hospitals and institutions from the very investigatory and oversight powers that Congress funded to protect some of the state’s most vulnerable citizens. That result would be strange indeed. The combination, moreover, of the state’s choice to set up an independent agency and its failure to raise the Eleventh Amendment issue itself also makes it difficult to see how this lawsuit poses a serious threat to any special sovereignty interest of the state.

Whatever the merits, then, there is now a clear and sharp circuit split on a potentially significant—but usefully narrow—question concerning the scope of *Ex parte Young* remedies. Moreover, the split is among judges whose views tend to receive particular attention on the Court—Posner and Easterbrook in support of the Seventh Circuit’s analysis (Posner penned a separate concurrence); Wilkinson in the other direction. Finally, the Supreme Court has not really taken a significant state sovereign immunity case since Justice O’Connor’s parting gift in *Central Virginia Community College v. Katz* in 2006. It will be interesting to see whether the three new Justices (and by then, perhaps four) have views that materially differ from their predecessors. [In 2006, then-Judge Sotomayor wrote an opinion for the Second Circuit closely resembling the Seventh Circuit’s analysis in IPAS.]

One last thought: Because the SG’s office no doubt authorized the government’s amicus brief in the Fourth Circuit, it’s entirely possible that, if confirmed, then-Judge Kagan would recuse. I still don’t think that hurts the chances for cert., though. After all, Justices Scalia and Thomas have repeatedly written in favor of the traditional understanding of *Ex parte Young*, and, of the current Justices, only Justice Kennedy seems more positively disposed toward Judge Wilkinson’s approach.

All of this is a long way of saying that I suspect there will be some fun and serious heavy lifting later this year on the continuing meaning, relevance, and force of *Ex parte Young*. Future Federal Courts students, beware!
A Virginia state advocacy agency for the mentally disabled cannot sue other state officials for alleged violations of federal statutes in denying plaintiff agency access to “peer review” records related to three persons who died or were injured in state facilities for the mentally ill; the 4th Circuit reverses the district court and says sovereign immunity bars this suit and a federal court cannot look to Ex parte Young to decide this kind of “intramural state dispute.”

VOPA is an “independent state agency” in Virginia that protects and advocates for the rights of persons with mental illnesses and developmental disabilities. VOPA brought suit in federal court against three Virginia officials in their official capacities, claiming that Virginia is denying VOPA access to certain records in violation of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD) and the Protection & Advocacy for Individuals with Mental Illness Act (PAIMI). In particular, VOPA seeks access to “peer review” records relating to three persons who died or were injured in facilities for the mentally ill. The facilities in question are operated by another state agency, the Department of Mental Health, Mental Retardation & Substance Abuse Services. The defendants are three officials in that department, named in their official capacities.

The district court denied the state officials’ motion to dismiss, holding that VOPA had stated a claim that the state officials were violating federal law and that the state officials’ argument based on peer review privilege was inappropriate for resolution of a Rule 12(b)(6) motion because it was an affirmative defense to the merits. The district court also held that sovereign immunity did not bar VOPA’s suit.

The district court agreed with the state officials that Congress had not abrogated Virginia’s sovereign immunity, nor had Virginia waived its sovereign immunity against this action. However, the court agreed with VOPA that this suit satisfied the sovereign immunity exception of Ex parte Young, 209 U.S.123 (1908), because VOPA had sued the state officials for prospective relief from an ongoing violation of federal law. The district court rejected the state officials’ argument that the doctrine of Ex parte Young did not permit a suit in federal court by one state agency against officials of another agency of the same state.

We hold that sovereign immunity bars VOPA’s suit. While Congress could seek to provide a federal forum for this action through its abrogation power or by requiring a waiver of the states’ sovereign immunity in exchange for federal funds, Congress has attempted neither of those options here. And we decline to expand the doctrine of Ex parte Young to lift the bar of sovereign immunity in federal court when the plaintiff is a state agency. VOPA may pursue its claims in state court, but it would be inconsistent with our

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system of dual sovereignty for a federal court to rely on *Ex parte Young* to adjudicate an intramural state dispute like this one.

We reverse the judgment of the district court and remand this case with directions to dismiss it.

Reversed and remanded.
One week after the federal government urged the Supreme Court to resolve a split in lower courts over who can sue state officials to get them to obey a federal law protecting mentally ill patients from neglect and abuse, Indiana officials asked the Supreme Court to block a lower court ruling exposing them to a new lawsuit on the same issue. In a new application (09A1156) filed Thursday, the officials noted that they, too, are trying to head off being sued by another arm of the Indiana state government to get access to records of state institutions.

The Court already has before it the case of Virginia Office for Protection and Advocacy v. Reinhard (09-529), and last week got the response it had requested from the Justice Department on whether to take on the right-to-sue issue in that case. Acting Solicitor General Neal K. Katyal urged the Court to grant review, noting that the Fourth Circuit Court in the Virginia case had blocked one state agency from suing other state officials over access to records of mental patients, while the Seventh Circuit Court had allowed just that kind of lawsuit to go forward in an Indiana case. It was in the Indiana case that arrived this week as a challenge to the Seventh Circuit—Indiana Family and Social Services Administration v. Indiana Protection and Advocacy Services.

Since 1975, Congress has been providing funds to states to use for systems of advocacy to protect individuals with disabilities or mental illness from abuse or neglect. Laws passed in 1975, 1986 and 2000 have followed the principle that states must promote advocacy of the rights of the disabled and mentally ill when they are in state facilities. In the Virginia and Indiana cases, states created such advocacy organizations within state government. Those groups are now carrying on investigations incidents of abuse or neglect in state-run facilities, and are seeking medical records about patients.

The Fourth Circuit barred the Virginia advocacy group’s lawsuit against state officials, saying that the case implicated “special sovereign interests.” because the lawsuit was essentially an “intramural contest” between the state’s own officials and agencies. That argument, however, was rejected in the Seventh Circuit in the Indiana case, saying the key issue on whether state officials could be sued depended upon the identity of the officials being sued and the nature of the claim against them, not the identity of who was suing.

The Solicitor General sided with the Seventh Circuit’s view, saying that, when a state advocacy organization sues under the federal laws protecting the disabled and mentally ill, and seeks a court order to assure access to records of such patients, it is “implementing federal law and policy, intramural state political dispute.”

The Indiana officials, in their filing on Thursday, sided with the Fourth Circuit’s view. The state advocacy group’s lawsuit against other state officials, the application asserted, implicates the state’s “special sovereignty interests.” They argued: “There is at least a reasonable possibility that either
[Indiana officials] or their Virginia counterparts . . . will persuade the Court that sovereign immunity precludes this federal court action.” Thus, they asked the Supreme Court to order the Seventh Circuit in the Indiana case to put its ruling on hold, so that the lawsuit does not proceed until the Supreme Court has settled the dispute among the Circuit Courts.

Now that the Justices have the Solicitor General’s views urging them to hear the Virginia case, they are expected to decide shortly whether to grant review. The Solicitor General’s view is not binding on the Court, however.