

States must be made by the Solicitor General, see 28 C.F.R. § 0.20(a), and can be made only after extensive consultations and deliberations within the federal government.

1. A party who seeks a stay of the mandate pending the filing of a petition for a writ of certiorari “must show that a petition for certiorari would present a substantial question and that there is good cause for a stay.” Fed. R. App. P. 41(d)(2)(A). See also Circuit Advisory Committee Note to Rule 41-1 (“The motion will not be routinely granted; it will be denied if the Court determines that the application for certiorari would be frivolous or is made merely for delay.”). “Ordinarily,” however, “a party seeking a stay of the mandate following this court’s judgment need not demonstrate that exceptional circumstances justify a stay.” United States v. Pete, 525 F.3d 844, 851 n.9 (9th Cir. 2008) (quoting Bryant v. Ford Motor Co., 886 F.2d 1526, 1528-1529 (9th Cir. 1989) (noting that a stronger showing must be made when an applicant seeks to stay the mandate after certiorari has been denied)).

2. The criteria for a stay of the mandate are plainly satisfied here. Any petition for a writ of certiorari would present a substantial question. As Judge Callahan observed in her dissent from the denial of rehearing en banc, “[t]his case places before the court an issue of exceptional importance: the degree to which the

government can protect the safety and security of federal facilities.” See also Kleinfeld, J., dissenting from denial of rehearing (noting that almost one million Form 42 “inquires are sent out every year, not just for people applying for jobs at the Jet Propulsion Lab managing space missions and protecting national security on secret space matters, but also for most other government jobs”).

The decision is based on the Court’s interpretation of a constitutional right in informational privacy. The Supreme Court has only twice adverted to a possible constitutional right in informational privacy, and has not revisited the issue in over three decades. See Whalen v. Roe, 429 U.S. 589, 599 (1977); Nixon v. Administrator of General Services, 433 U.S. 425, 457 (1977) (citing Whalen). In the interim, in the absence of Supreme Court guidance, “the courts of appeals have been left to develop the contours of this free-floating privacy guarantee on their own.” Kozinski, C.J., dissenting from denial of rehearing.

This Court’s ruling on the constitutional right to informational privacy squarely conflicts with the precedent of one circuit, and stands in considerable tension with the analysis of another. See Cutshall v. Sundquist, 193 F.3d 466, 480 (6th Cir. 1999) (“Absent a clear indication from the Supreme Court we will not construe isolated statements in Whalen . . . more broadly than their context allows to recognize a general constitutional right to have disclosure of private information

measured against the need for disclosure. . . . [T]he Constitution does not encompass a general right to nondisclosure of private information.”) (quoting J.P. v. DeSanti, 653 F.2d 1080, 1089-90 (6th Cir. 1981)); American Federation of Government Employees, AFL-CIO v. Department of Housing & Urban Development, 118 F.3d 786, 791 (D.C. Cir. 1997) (“expressing [the court’s] grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information” and stating that “[t]he Supreme Court has addressed the issue in recurring dicta without, we believe, resolving it”). The parameters of such a right, if it exists, are the subject of even greater controversy. The three dissents from denial of rehearing en banc, joined by a total of five judges of this Court, illustrate the substantial nature of the questions that a petition for a writ of certiorari would present.

“Good cause” to stay the mandate exists. As Chief Judge Kozinski pointed out in his dissent from denial of rehearing en banc, the Supreme Court has not opined on the existence or the nature of a constitutional right to informational privacy in over thirty years. Any further litigation in the district court could prove unresponsive to – or even unnecessary in light of – a Supreme Court announcement regarding the existence or contours of this constitutional right.

Similarly, carrying out discovery in the district court at this juncture would be burdensome and could prove unnecessary.

Staying the mandate can result in no harm to plaintiffs. This Court issued an injunction pending appeal shortly after plaintiffs' request for relief was denied by the district court. For that reason, plaintiffs incurred no injury during the pendency of the government's petitions for rehearing, the second of which was filed in August 2008. It is appropriate that the Solicitor General be given the opportunity to exercise her responsibilities in determining whether to seek further review and, if she determines to do so, it is appropriate that the Supreme Court be permitted to determine whether to review the order addressed in the concurrences and dissents from the denial of rehearing en banc. We will inform the Court promptly of any determination made by the Solicitor General in this matter.

CONCLUSION

For the foregoing reasons, the Court should stay issuance of the mandate for a period of ninety (90) days, to and including September 8, 2009 with the stay to be extended if the Solicitor General files a petition for certiorari within this period.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Melissa N. Patterson
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