No. 09-530

In the Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., PETITIONERS

v.

ROBERT M. NELSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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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.

PARTIES TO THE PROCEEDING

Petitioners are the National Aeronautics and Space Administration (NASA); Charles F. Bolden, Jr., Administrator of NASA, in his official capacity; the Department of Commerce; and Gary Locke, Secretary of Commerce, in his official capacity.

Respondents are the California Institute of Technology, a defendant below, and 28 contract employees at NASA's Jet Propulsion Laboratory, who were plaintiffs below: Robert M. Nelson, William Bruce Banerdt, Julia Bell, Josette Bellan, Dennis V. Byrnes, George Carlisle, Kent Robert Crossin, Larry R. D'Addario, Riley M. Duren, Peter R. Eisenhardt, Susan D.J. Foster, Matthew P. Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J. Haw, James Kulleck, Sharon L. Laubach, Christian A. Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P. McElrath, Susan Paradise, Konstantin Penanen, Celeste M. Satter, Peter M.B. Shames, Amy Snyder Hale, William John Walker, and Paul R. Weissman.

The complaint named Does 1-100 as defendants but they were not identified as parties in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the National Aeronautics and Space Administration (NASA) and the other federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 530 F.3d 865. A prior opinion of the court of appeals (Pet. App. 30a-49a) is reported at 512 F.3d 1134. The order and opinions of the court of appeals on denial of rehearing en banc (Pet. App. 75a-130a) are reported at 568 F.3d 1028. The opinion of the district court denying respondents' motion for a preliminary injunction (Pet. App. 54a-74a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2008. A petition for rehearing was denied on June 4, 2009 (Pet. App. 75a-130a). On August 25, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 2, 2009. On September 23, 2009, Justice Kennedy further extended the time to and including November 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any person be * * * deprived of life, liberty, or property, without due process of law." Pertinent portions of the Privacy Act of 1974, 5 U.S.C. 552a, are reproduced in the appendix to this petition. Pet. App. 131a-136a.

STATEMENT

Government agencies are required by Presidential directive and implementing standards to conduct a minimum level of background investigation before providing federal contract employees with the identity credentials necessary to work at federal facilities. The forms used for this process are the same ones that have long been used to conduct background checks for applicants for federal employment. Respondents are federal contract employees working at NASA's Jet Propulsion Laboratory who object to the background-check process. In their view, the government's collection of certain information relevant to their eligibility for federal cre-

dentialing violates a constitutional right to informational privacy. The district court disagreed and denied respondents' request for a preliminary injunction. Pet. App. 54a-74a. The court of appeals reversed and ordered the entry of a preliminary injunction barring the use of the forms for the background checks of respondents. *Id.* at 1a-29a.

1. Since 1953, the federal government has required a minimum level of background investigation for federal employees in the civil service. See Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953) (5 U.S.C. 7311 note). The standard background-check process is called the National Agency Check with Inquiries (NACI). Pet. App. 3a-4a. That process includes, at a minimum, the completion of two forms: Standard Form 85 (SF-85), Questionnaire for Non-Sensitive Positions, which is completed by the applicant, see *id.* at 137a-144a; and Form 42, Investigative Request for Personal Information, which is completed by references identified by the applicant, see *id.* at 145a-146a.

a. SF-85 asks the federal job applicant a variety of questions designed to determine whether the applicant is "suitable for the job." Pet. App. 137a. The form notifies the applicant that "[g]iving us the information we ask for is voluntary," *ibid.*; that the information is used "for the purpose of determining your suitability for Federal employment," *id.* at 138a; and that the government "will protect [the information provided] from unauthorized disclosure," *ibid.* In particular, SF-85 states that "[t]he collection, maintenance, and disclosure of background investigative information is governed by the Privacy Act." *Ibid.* The Privacy Act permits a federal agency to maintain in its records "only such information about an individual as is relevant and necessary to ac-

complish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. 552a(e)(1). The Act requires agencies to give individuals access to records that pertain to them, 5 U.S.C. 552a(d), and to request amendments to their records, 5 U.S.C. 552a(f). Subject to certain limited exceptions, the Act also prohibits agencies from disclosing any record about an individual maintained in a system of records without the written consent of that individual. 5 U.S.C. 552a(b).

SF-85 requests basic biographical information such as where the applicant has lived, worked, and gone to school. Pet. App. 139a-142a. The form asks the applicant to provide contacts who can verify former residences, jobs, and schooling, and to provide the names of three persons who know the applicant well and thus can serve as references. *Id.* at 140a-142a. The form also asks whether, in the last year, the applicant has used, possessed, supplied, or manufactured illegal drugs, while advising the applicant that "[n]either your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding." *Id.* at 143a. If an applicant answers "yes" to the question regarding drug use, she is asked to "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," "[i]nclud[ing] any treatment or counseling received." *Ibid.* Finally, the form requests the applicant's authorization for the release of information, so that federal investigators may contact individuals listed on the form, verify the information provided, and inquire about the applicant's suitability for employment. *Id.* at 144a.

b. Form 42 is a two-page form that is sent to persons listed on SF-85 as references, former landlords, or persons who can verify periods of self-employment and/or unemployment. See Pet. App. 145a-146a.[1] Form 42 advises its recipient that it is seeking information relevant to the applicant's "suitability for employment or security clearance." *Id.* at 145a. It asks how long the recipient has known the applicant and how often the recipient associates or has associated with the applicant. *Id.* at 146a. It then asks a series of yes/no questions, including whether the recipient has "any reason to question [the applicant's] honesty or trustworthiness," *ibid.* (Item 6), or has "any adverse information about [the applicant's] employment, residence or activities" concerning "violations of the law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters," *ibid.* (Item 7). If the answer is "yes," Form 42 asks the recipient to "explain in Item 8," which in turn asks the recipient for "additional information which you feel may have a bearing on [the applicant's] suitability for government employment or a security clearance," noting that "this space may be used for derogatory as well as positive information." *Ibid.* (capitalization altered). Form 42 concludes by asking whether the recipient would recommend the applicant for a government security clearance or employment. *Ibid.* The Office of Personnel Management (OPM) estimates that approximately 980,000 Form 42 inquiries are sent out each year, and that Form 42

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[1] Similar forms are sent to the educational institutions (Form 43) and former employers (Form 41) identified by the applicant.

should take approximately five minutes to complete. See 70 Fed. Reg. 61,320 (2005).

2. The background-check process long required for federal civil service employees recently has been made applicable to contract employees at federal facilities. In 2004, the President issued a directive to the Department of Commerce to develop a mandatory and uniform "Federal standard for secure and reliable forms of identification" to control access to federally controlled facilities and information systems. *Homeland Security Presidential Directive / HSPD 12—Policy for a Common Identification Standard for Federal Employees and Contractors*, Pub. Papers 1765-1766 (2004) (*HSPD-12*). The President charged the Office of Management and Budget (OMB) with ensuring compliance with that standard. *Id.* at 1765. The President explained that the directive was designed to improve the security of federally controlled facilities and information systems, increase government efficiency, reduce identity fraud, and protect personal privacy. *Ibid.* The directive applies to all Executive Branch departments and agencies. *Ibid.*; Pet. App. 56a.

In accordance with *HSPD-12*, the Department of Commerce put in place a minimum standard for the issuance of identity credentials to federal contract employees. Pet. App. 57a; see Nat'l Inst. of Standards & Technology, Dep't of Commerce, *Personal Identity Verification (PIV) of Federal Employees and Contractors*, *Federal Information Processing Standards Publication* at v (Mar. 2006) (*FIPS 201-1*) <http://csrc.nist.gov/publications/fips/fips201-1/FIPS-201-1-chng1.pdf>. As relevant here, that standard includes the initiation of a background check using the NACI process, involving SF-85 and Form 42, described above. Pet. App. 57a.

FIPS 201-1 establishes (at 7-8, 44) detailed privacy requirements to protect the information received.[2]

OMB then issued a memorandum to guide the implementation of the federal credentialing standard. Memorandum from Joshua B. Bolten, Director, OMB, to the Heads of All Departments and Agencies (Aug. 5, 2005) <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-24.pdf> (C.A. App. 449-461). That memorandum required all federal agencies to begin the required background investigation process for employees of current contractors by October 27, 2007. C.A. App. 454.

3. The Jet Propulsion Laboratory (JPL) is a federal research and development facility owned by NASA. Pet. App. 56a. JPL is the leading NASA center for deep space robotics and communications missions, and it is renowned for its work in developing satellites, rockets, missiles, spacecraft, and telescopes. See *id.* at 96a, 98a-99a (Callahan, J., dissenting from denial of rehearing en banc); C.A. App. 470.

JPL is operated by the California Institute of Technology (Caltech) pursuant to a contract with NASA. All positions at JPL are filled by contract employees. C.A. App. 470. These employees, hired by Caltech, perform duties functionally equivalent to those of federal civil service employees at other NASA centers, and they have access to NASA physical facilities and information technology systems that is similar to the access of their civil service counterparts. *Id.* at 469-470.

In 2005, NASA established a new agency-wide policy for the issuance of security credentials. Pet. App. 5a; see C.A. App. 511 (NASA Procedural Requirement

[2] Although *FIPS 201-1* authorizes the use of the NACI or an alternative investigation approved by OPM (*FIPS 201-1*, at 6), NASA has not sought to utilize an alternative investigation.

(NPR) 1600.1).[3] As relevant here, the new policy required that all contract employees working at JPL undergo the NACI background investigation process before receiving security credentials. *Ibid.* That change was designed to bring NASA into compliance with the requirements for all agencies under *HSPD-12*. Pet. App. 57a. The new procedures also responded to NASA's own conclusion that failing to conduct background checks of contract employees would pose a security vulnerability for the agency. C.A. App. 471.

In 2007, NASA modified its contract with Caltech to require that contract employees working at JPL undergo the NACI process. Pet. App. 5a; C.A. App. 473, 649-652, 658-659. NASA initiates the necessary background investigation by collecting a contract employee's completed SF-85, which it submits to OPM for investigation. *Id.* at 473. OPM sends inquiries, including Form 42, to various individuals and institutions listed on SF-85. Pet. App. 4a. OPM then furnishes a report of the investigation to NASA, and NASA determines whether to grant access, deny access, or investigate further. C.A. App. 474.

4. The individual respondents are 28 Caltech employees working at JPL. Pet. App. 55a. Seeking to represent a class of similarly situated employees, respondents sued NASA, the Department of Commerce, Caltech, and others, and moved for a preliminary injunction to bar implementation of the background-check process at JPL. *Ibid.*; C.A. App. 1501-1523.[4] They argued,

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[3] NASA promulgated the policy pursuant to its authority under the National Aeronautics and Space Act of 1958, 42 U.S.C. 2455, 2456, 2456a, and 2473.

[4] The case has not been certified as a class action.

inter alia, that the background checks would violate the Fourth Amendment, the Privacy Act, and a constitutional right to informational privacy.[5]

The district court denied respondents' motion for a preliminary injunction. Pet. App. 54a-74a. The court first rejected respondents' Fourth Amendment claim, *id.* at 63a-64a, explaining that respondents "make no argument that a questionnaire, background check, or authorization to release records constitutes a 'search,'" and that, in any event, "there has not been an actual invasion of privacy, but only a potential invasion since the government has not yet checked any of [respondents'] backgrounds," *id.* at 64a. The court then rejected the Privacy Act claim because "SF-85 specifically states that it complies with the Privacy Act" and respondents have not shown that "information collected via SF-85 was not properly maintained or gathered" for purposes of the Act. *Id.* at 67a.

Finally, the court concluded that respondents had not established a likelihood of success on the merits of

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[5] Respondents also alleged that the background-check process violates the Administrative Procedure Act (APA) because it is not authorized by statute and violates various provisions of the California Constitution. Pet. App. 55a; C.A. App. 1520, 1522. The district court rejected the APA claim, Pet. App. 65a-66a, and did not expressly rule on the state-law claims. Respondents appealed on the APA claim, but the court of appeals rejected it, *id.* at 11a-13a.

Respondents also alleged that, once the background-check process was complete, NASA would rely on improper factors to determine whether to issue to contract employees credentials for access to federal facilities. C.A. App. 1515-1516. The government denies that it made such determinations based on improper factors, but that claim is not at issue here, because the district court (Pet. App. 62a-63a) and the court of appeals (*id.* at 8a-9a) concluded that respondents lack standing to bring the claim and that the claim is not ripe for review.

their claim that the background-check process violates a constitutional right to informational privacy. Pet. App. 68a-73a. The court noted that SF-85 "does not seek extensive or overly-sensitive information," and that there are "very high-tech and sensitive devices at JPL, such as satellite monitoring equipment, that warrant strict security measures." *Id.* at 72a. The court concluded that the government's collection of information about respondents was narrowly tailored to advance the government's legitimate interest in enhancing security at federal facilities. *Id.* at 68a-72a.

5. Respondents appealed, challenging the district court's rulings on the Fourth Amendment and informational privacy, but not on the Privacy Act. A motions panel of the court of appeals granted respondents an injunction pending appeal, which is still in effect. Pet. App. 50a-53a. A merits panel then reversed the district court's denial of a preliminary injunction. *Id.* at 30a-49a. In response to the government's petition for rehearing en banc, the merits panel withdrew its initial opinion and issued a revised opinion. *Id.* at 1a-29a.

The court held that respondents were unlikely to succeed on their Fourth Amendment claim. The court explained that requests for information from third parties would be deemed "searches" only if the individual has a "reasonable expectation of privacy" in the information being sought—a requirement that is not satisfied "merely because that information is of a 'private' nature." Pet. App. 13a. The court determined that Form 42's questions are permissible under those principles because "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." *Id.* at 15a (quoting *United States* v. *Miller*, 425 U.S. 435, 443

(1976)). The court also rejected the Fourth Amendment challenge to SF-85. Relying on the Seventh Circuit's decision in *Greenawalt* v. *Indiana Department of Corrections*, 397 F.3d 587 (2005) (Posner, J.), the court reasoned that disclosure of information through "direct questioning" is not a Fourth Amendment search. Pet. App. 16a-17a.

The court of appeals concluded, however, that the district court had erred in finding that respondents were unlikely to succeed on the merits of their constitutionally-based informational privacy claim, Pet. App. 26a, holding that respondents had raised sufficiently serious questions on that claim to warrant a preliminary injunction, *id.* at 8a, 29a. See *id.* at 17a-26a. The court explained, without citing to any decision of this Court, that it had "repeatedly acknowledged that the Constitution protects an 'individual interest in avoiding disclosure of personal matters.'" *Id.* at 17a (quoting *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999)). In the court's view, the government must justify its collection of personal information by 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." *Id.* at 18a (quoting *Crawford*, 194 F.3d at 959).

The court described this inquiry as a balancing of "the government's interest in having or using the information against the individual's interest in denying access." Pet. App. 18a (quoting *Doe* v. *Attorney Gen. of the United States*, 941 F.2d 780, 796 (9th Cir. 1991)). The court provided a non-exclusive list of potentially relevant factors, including "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" to the information, "and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest" justifying that access. *Ibid.* (quoting *Doe*, 941 F.2d at 796).

The court first applied its test to the questions on SF-85. Pet. App. 19a-22a. The court determined that "most of the questions * * * are unproblematic and do not implicate the constitutional right to informational privacy," *id.* at 19a, and that the specific question requiring disclosure of prior drug activity is narrowly tailored to achieve the government's legitimate interest in uncovering and addressing illegal drug activity among its contract employees, *id.* at 20a-21a. But the court decided that the government may not ask an applicant who has used drugs whether she has obtained treatment or counseling, because, in the court's view, the government does not have "any legitimate interest" in seeking such information. *Id.* at 22a.

The court found Form 42 "much more problematic." Pet. App. 22a. The court acknowledged that the government "has several legitimate reasons for investigating its contractors," *id.* at 24a, and that Form 42's request 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," *id.* at 25a. But the court characterized Form 42's questions as "broad" and "open-ended," and found it "difficult to see how" these questions were narrowly tailored to justify the government's interests in conducting background checks of contract employees having access to federal facilities, particularly those persons categorized as low risk. *Id.* at 24a-25a.

6. The government filed a second petition for rehearing en banc, which was denied. Judge Wardlaw issued an opinion concurring in the denial of rehearing en banc, Pet. App. 76a-95a, expressing the view that the court should await "a fully developed factual record" before reviewing the legal issues further, *id.* at 91a-92a, and that the "provocative questions" raised by other judges about the court's privacy doctrine only "underscore[] [the] panel's conclusions that serious questions were raised justifying the preliminary injunction," *id.* at 92a.

A total of five judges joined three published dissents from denial of rehearing en banc. Pet. App. 96a-130a. Judge Callahan's dissent (*id.* at 96a-120a) regarded the panel's opinion as "an unprecedented expansion of the constitutional right to informational privacy" that "reaches well beyond this case and may undermine personnel background investigations performed daily by federal, state, and local governments." *Id.* at 97a (Callahan, J., joined by Kleinfeld, Tallman, and Bea, JJ.). She noted that the panel's decision "sets our circuit apart from the District of Columbia Circuit and the Fifth Circuit, both of which have rejected privacy-based challenges to background checks similar to, or more intrusive than, the one here." *Id.* at 98a (citing *AFGE* v. *HUD*, 118 F.3d 786 (D.C. Cir. 1997), and *NTEU* v. *United States Dep't of Treasury*, 25 F.3d 237 (5th Cir. 1994)). Judge Callahan also expressed the view that the practical result of the panel's decision is to "sharply curtail[] the degree to which the government can protect the safety and security of federal facilities." *Id.* at 120a.

Judge Kleinfeld's dissent (Pet. App. 120a-124a) focused on Form 42, stating that the panel's opinion calls into question the most basic investigation of an applicant

by a prospective employer, such as when a federal judge about to "hire law clerks and secretaries * * * talk[s] to professors and past employers and ask[s] some general questions about what they are like." *Id.* at 124a (Kleinfeld, J., joined by Callahan and Bea, JJ.). He explained that the references and landlords the applicant lists on SF-85 are highly likely to have information relevant to job fitness, and without some "open-ended questions, it is hard to know what potential problems might need an explanation." *Id.* at 122a-124a. Judge Kleinfeld expressed concern that, as a result of the panel's decision, NASA "cannot exercise the reasonable care an espresso stand or clothing store exercises when hiring" its employees. *Id.* at 124a.

Chief Judge Kozinski raised questions about the nature and scope of a constitutional right to informational privacy, particularly a right to prevent collection of information, as distinguished from its disclosure. Pet. App. 125a-130a (Kozinski, C.J., joined by Kleinfeld and Bea, JJ.). He observed that this Court had "hinted" at a constitutional right to informational privacy in two cases in the 1970s and then "never said another word about it." *Id.* at 125a (citing *Whalen* v. *Roe*, 429 U.S. 589 (1977), and *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977)). As a result, he observed, the courts of appeals "have been left to develop the contours of this free-floating privacy guarantee on their own," which he believed had resulted in the Ninth Circuit in "a grab-bag of cases on specific issues" without any "theory as to what this right (if it exists) is all about." *Ibid.*

Chief Judge Kozinski pointed to a number of distinctions that he believed would be important in defining such a right: between collection and disclosure of information, Pet. App. 125a-126a; between situations in which

a person cannot avoid the government's collection of information and cases in which the applicant can do so by seeking other employment, *id.* at 126a-127a; between information "pertain[ing] to a fundamental right, such as the right to an abortion or contraception," and "a free-standing right not to have the world know bad things about you," *id.* at 127a-128a; between collection of information from private files and collection of information from third parties, *id.* at 128a; and between the government's "functions as enforcer of the laws and as employer," *id.* at 128a-129a. Chief Judge Kozinski criticized the panel for failing to address those distinctions and characterized Ninth Circuit law as "so subjective and amorphous" that it cannot reliably be applied to new factual situations. *Id.* at 129a-130a.

REASONS FOR GRANTING THE PETITION

The court of appeals has directed the entry of a preliminary injunction exempting respondents—who are contract employees working at an important federal facility—from routine background checks of the sort that are performed hundreds of thousands of times each year for federal employees. That ruling is wrong and warrants this Court's review.

There is no need in this case to determine the scope of a constitutionally-based right to privacy for certain information or the range of governmental actions that may impermissibly interfere with such a right. Here, respondents' facial challenge to the inquiries in the background-check process is foreclosed in light of the reduced expectations of privacy in the employment context, the longstanding and widespread use of SF-85 and Form 42, and the Privacy Act's protections regarding the maintenance and dissemination of the information.

The ramifications of the decision below are potentially dramatic. 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 civil service employees for over 50 years. The decision also is in substantial tension with decisions of the Fifth and D.C. Circuits. Those courts have upheld against privacy-based challenges background investigations that are similar to or more intrusive than the process at issue here. This Court's review is therefore warranted.

I. THE COURT OF APPEALS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION WITHOUT GIVING DUE REGARD TO THIS COURT'S PRECEDENTS

The court of appeals has held that the Constitution requires the entry of a preliminary injunction to prevent the government from undertaking routine background checks of respondents to determine their suitability for credentials to enter federal facilities. The court's decision goes well beyond any decision of this Court, has no sound legal basis, and threatens substantial interference with important governmental functions.

1. This Court has issued two decisions discussing a constitutional right to prevent disclosure of certain information. The primary case concerning this question is *Whalen* v. *Roe*, 429 U.S. 589 (1977). In that case, the Court rejected a constitutional challenge to a state statute requiring doctors to disclose to a state agency, for maintenance in a database, the identity of persons who received certain prescription narcotics. *Id.* at 600-602. The Court observed that "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests": "the individual

interest in avoiding disclosure of personal matters," and "the interest in independence in making certain kinds of important decisions." *Id.* at 598-600. The Court then determined that the state statute did not pose a sufficiently grievous threat to either interest to establish a constitutional violation. *Id.* at 600, 604. With respect to the interest in avoiding disclosure, the Court noted that disclosures of private medical information to hospitals, insurers, and state agencies "are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient." *Id.* at 602. The Court also stressed that the state statute prohibited public disclosure of the information reported to the state agency, *id.* at 594-595, 601, observing that the government collects and uses data of a personal character for a wide variety of purposes, and that its right to do so is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosure, *id.* at 605. The Court recognized that "in some circumstances that duty arguably has its roots in the Constitution," but concluded that even were that so in *Whalen*, the statutory scheme and implementing regulations "evidence a proper concern with, and protection of, the individual's interest in privacy." *Ibid.*

The other decision in which this Court addressed a claim of constitutionally protected privacy interests in personal information is *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). In that case, the Court rejected a variety of challenges to the Presidential Recordings and Materials Preservation Act authorizing the collection and archiving of Presidential papers. As relevant here, the Court, relying on *Whalen*, rejected the claim that the mere screening of the former President's private materials by government archivists

violated his constitutional right to privacy. *Id.* at 455-465. The Court explained that *Whalen* had "[e]mphasiz[ed] the precautions utilized by New York State to prevent the unwarranted disclosure of private medical information retained in a state computer bank system," and concluded that the Presidential records act mandated regulations similarly aimed at preventing undue dissemination of private material. *Id.* at 458.

2. Without citing either of these decisions, the Ninth Circuit in this case suggested that "the right to informational privacy" encompasses any information that "is not generally disclosed by individuals to the public," Pet. App. 22a (internal quotation marks omitted), even when sought by the federal government from a contract employee and third parties for purposes of making employment-related decisions. In stating this holding, the court of appeals did not define with any particularity what information counts as sufficiently "private," and in what contexts, to outweigh the governmental interest in obtaining the information for specified purposes. See *id.* at 122a-123a (Kleinfeld, J., dissenting from denial of rehearing en banc). The court simply described the relevant inquiry as a balancing of "the government's interest in having or using the information against the individual's interest in denying access," provided a non-exclusive list of factors that are potentially relevant, and determined that under this test respondents had raised serious constitutional concerns about critical aspects of the government's most commonly used employment forms. *Ibid.* (quoting *Doe* v. *Attorney Gen. of the United States*, 941 F.2d 780, 796 (9th Cir. 1991)).

3. a. In enjoining the background-check process, the court of appeals ignored the guidance that this Court provided in *Whalen* and *Nixon* for assessing a constitu-

tional claim to informational privacy. Both *Whalen* and *Nixon* distinguished between the government's collection of information and its dissemination of information to the public, indicating that the latter presents more serious constitutional concerns than the former. See *Nixon*, 433 U.S. at 456-457; *Whalen*, 429 U.S. at 600-601. Yet the court of appeals indicated that it would apply the same balancing test any time the "government's actions compel disclosure of private information," regardless of whether the information is provided to the government for its own limited use or instead is disseminated publicly. Pet. App. 17a-18a.

Of particular significance, both *Whalen* and *Nixon* determined that any privacy concerns with respect to the information in question were met by statutory and regulatory protections limiting the public dissemination of the information. *Nixon*, 433 U.S. at 458-460; *Whalen*, 429 U.S. at 601-602. In this case, those protections include the Privacy Act, which requires, *inter alia*, that a federal agency that has a system of records maintain in those records only such information about an individual as is "relevant and necessary" to accomplish a purpose required by statute or executive order of the President, 5 U.S.C. 552a(e)(1), grants individuals a right of access to and correction of their records, 5 U.S.C. 552a(d), and strictly regulates any disclosures, 5 U.S.C. 552a(b). In addition, specific privacy requirements adopted by the Department of Commerce in its credentialing standard, *FIPS 201-1*, supplement the Privacy Act protections in this context. Pet. App. 117a-118a (Callahan, J., dissenting from denial of rehearing en banc). Yet the court of appeals gave short shrift to the statutory and regulatory provisions that prevent public dissemination of information collected during background checks. *Id.* at 23a-24a.

Indeed, the court did not even mention the Privacy Act, although SF-85 expressly notes that important source of protection. *Id.* at 138a; see *id.* at 117a-118a (Callahan, J., dissenting from denial of rehearing en banc). And the court directed entry of an injunction barring use of the forms, even though *Whalen* made clear that "the remote possibility" that existing safeguards "will provide inadequate protection against unwarranted disclosures" is "surely not a sufficient reason for invalidating the entire" information-collection program. 429 U.S. at 601-602.

b. The court of appeals erred in several other respects as well. The court did not distinguish between "disclosures that the target may refuse"—such as those made or authorized by a person seeking federal employment or access to federal facilities—and "those imposed regardless of his consent," even though the latter is "inherently more invasive." Pet. App. 126a-127a (Kozinski, C.J., dissenting from denial of rehearing en banc). The court also apparently assumed that the informational privacy right would apply to any information that is not generally disclosed to the public, *id.* at 22a, regardless of whether that information pertained to an independently recognized private sphere, such as "marriage, procreation, contraception, family relationships, child rearing, and education," *Washington* v. *Glucksberg*, 521 U.S. 702, 726 (1997), or concerned matters that are comparably sensitive.

Further, the court applied its standard equally to information obtained from the applicant himself and information obtained from third parties. Pet. App. 17a-18a, 22a n.5. As Judge Callahan noted, prior to the decision below, no court had held "that individuals have a constitutionally protected right to privacy in information

disclosed to [third parties]." *Id.* at 107a. That is unsurprising, because this Court has often recognized in the Fourth Amendment context that an individual does not have a reasonable expectation of privacy in information he voluntarily reveals to a third party, who subsequently conveys that information to the government. See, *e.g.*, *Smith* v. *Maryland*, 442 U.S. 735, 743-744 (1979); *United States* v. *Miller*, 425 U.S. 435, 443 (1976). The court of appeals responded to that longstanding Fourth Amendment precedent by stating that the inquiry in the context of a claim to informational privacy is different and should turn on "the *nature* of the information sought—in particular, whether it is sufficiently 'personal' to merit protection—rather than on the manner in which the information is sought." Pet. App. 22a n.5 (internal citation omitted). But an individual's prior disclosure of information to third parties (such as employers, landlords, or educational institutions)—or the third parties' acquisition of such information in the ordinary course of their business—may be highly relevant in assessing a constitutional claim relating to informational privacy. That is especially true when the information sought is employment-related, and the persons contacted are former employers, landlords, or other references whom the applicant identified as part of a process to determine his suitability for employment or access to federal facilities and information systems.

Finally, and relatedly, the court did not distinguish between the government's interests as a regulator and its interests as an employer. Pet. App. 129a (Kozinski, C.J., dissenting from denial of rehearing en banc); see *id.* at 110a-111a (Callahan, J., dissenting from denial of rehearing en banc). See *Engquist* v. *Oregon Dep't of Agric.*, 128 S. Ct. 2146, 2152 (2008) (courts should "con-

sider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer"). In particular, the court essentially ignored the widespread and accepted use of SF-85 and Form 42 in determining the suitability of individuals for federal employment—a practice so entrenched as itself to rebut the notion that the inquiries on these forms unconstitutionally intrude upon privacy interests.

4. The court of appeals also erred in finding the challenged inquiries to be insufficiently "tailored" to the important governmental interests underlying them. Contrary to the court's suggestion (Pet. App. 22a, 24a-25a), the inquiries seek only job-related information. SF-85 requests information about illegal drug use and related counseling because they are relevant to the government's decision whether an applicant is sufficiently trustworthy to gain access to federal facilities and information systems as a contract employee. See *id.* at 138a (SF-85 seeks information "for the purpose of determining your suitability for Federal employment"). The court of appeals acknowledged that the government has an interest in asking about recent drug use, *id.* at 21a, but decided that no such interest exists in seeking information about drug counseling or other treatment, because such treatment "presumably would *lessen* the government's concerns regarding the underlying activity." *Id.* at 22a. But that is the very reason for asking about counseling and treatment. Just as recent drug usage raises legitimate concerns about government credentialing, so too does recent, successful drug therapy mitigate those concerns. Thus, counseling and treatment, no less than use, are relevant to the government's decision

about an individual's suitability for employment or access to federal facilities.

Form 42's questions likewise are limited to matters bearing on suitability for federal employment, including contract employment. As the court of appeals recognized, "NASA has an interest in verifying its contractors' identities to make sure that they are who they say they are" and investigating them to "ensure[] the security of the JPL facility so as not to jeopardize the costly investments housed therein." Pet. App. 24a. The court held that this interest is insufficient because "there are no safeguards in place to limit the disclosures to information relevant to these purposes." *Id.* at 25a. But that conclusion is belied by Form 42 itself. The form states at the outset that its purpose is "to help [the government] determine [the applicant's] suitability for employment or security clearance." *Id.* at 145a. And even the question on the form most subject to the court of appeals' characterization as "open-ended" specifically limits the response requested to information that the recipient feels "may have a bearing on this person's suitability for government employment or a security clearance." *Id.* at 146a. Equally important, to the extent that this or other questions raise a concern about the information that might be received in a particular case, the Privacy Act ensures that an agency will maintain such information only if it is "relevant" to an agency function, and the Act affords an individual a right of access to his records and the opportunity to seek an amendment of them. 5 U.S.C. 552a(d), (e)(1) and (f). The court of appeals disregarded these important limitations and protections.

5. Recognition of a constitutional right to informational privacy that restricts the government's solicitation of basic employment-related information has poten-

tially far-reaching consequences. First, the court's decision finds likely constitutional violations in key aspects of the background-check process that is used for a significant portion of the 57,000 contract employees working at NASA facilities. Pet. App. 102a (Callahan, J., dissenting from denial of rehearing en banc). The President issued *HSPD-12* in response to concerns that arose after September 11, 2001, about individuals gaining access to federal facilities through identification fraud, and the Department of Commerce and NASA determined that an important way to ensure the security of federal facilities is to require federal contract employees working at those facilities to undergo the NACI process. Pet. App. 100a-101a (Callahan, J., dissenting from denial of rehearing en banc). The court of appeals' decision overrides that considered judgment by the agencies about the proper way to comply with the President's directive to ensure the security of federal facilities and information systems. Those security concerns are particularly significant with respect to JPL, a multi-billion-dollar facility that houses "some of the most sensitive and expensive equipment owned by NASA." *Id.* at 96a (Callahan, J., dissenting from denial of rehearing en banc).

The decision below also casts a constitutional cloud on the background-check process that has been required for federal civil service employees for over 50 years. Although the judge who authored the panel's decision suggested, on denial of rehearing, that the government could "continue reasonable reference checks" and "even * * * utilize Form 42" when the government has a "sufficiently great" justification and "adheres to proper limiting standards," Pet. App. 85a (Wardlaw, J., concurring in denial of rehearing en banc), the panel's decision provides little guidance as to what would be "reason-

able," "sufficient[]," or "proper." Worse yet, that substantial uncertainty may have effects beyond the Ninth Circuit, because the federal government promulgates standard forms and procedures on a nationwide basis.

Finally, the court of appeals' ruling calls into question even the most basic inquiries, beyond the forms used here, that public employers undertake for prospective employees. The federal government, like any other prospective employer, commonly solicits information from former employers and other references. In this process, government officials often ask general questions about the candidate's fitness, because they think that these questions may uncover information that narrowly focused inquiries have failed to produce. Yet the court of appeals' decision, in its hostility to "broad" and "open-ended" questions, Pet. App. 24a-25a, casts constitutional doubt on such general requests. Indeed, the decision's analysis appears to render suspect the most commonplace reference checks conducted by employers, such as when judges "hir[ing] law clerks and secretaries * * * talk[] to professors and past employers and ask[] some general questions about what they are like." *Id.* at 124a (Kleinfeld, J., dissenting from denial of rehearing en banc). Those potentially far-reaching consequences of the court of appeals' decision warrant this Court's consideration.

II. THE DECISION BELOW DIVERGES FROM DECISIONS OF OTHER CIRCUITS UPHOLDING SIMILAR BACKGROUND CHECKS

The Ninth Circuit's decision stands in stark contrast to decisions of other courts of appeals that have rejected privacy-based challenges to background checks for federal civil service employees.

1. In *AFGE* v. *HUD*, 118 F.3d 786, 794 (1997), the D.C. Circuit rejected constitutional and statutory challenges to particular portions of SF-85P, a form required for employees in public trust positions, and SF-86, a form required for employees who are in national security positions or who have access to classified information. *Id.* at 788-790. The employees challenged, *inter alia*, questions concerning prior illegal activity, drug use, and bankruptcies; delinquent financial obligations; and mental health treatment. *Ibid.* The employees also challenged the forms' authorization for federal investigators to contact individuals identified on the form. *Ibid.* As relevant here, the court of appeals rejected those challenges without deciding whether the Constitution protected the information, because even assuming that it does, the government had "presented sufficiently weighty interests in obtaining the information sought by the questionnaires to justify the intrusions into their employees' privacy." *Id.* at 793.

The court explained that "the individual interest" in protecting private information "is significantly less important where the information is collected by the government but not disseminated publicly." *AFGE*, 118 F.3d at 793. That is especially true, the court stated, where "there are measures designed to protect the confidentiality of" the information collected, such as the Privacy Act. *Ibid.* The court then determined that the government's interests in hiring trustworthy employees and protecting national security are sufficient to justify each of the challenged questions, and that the forms' authorization for contacting third parties is supported by the government's need to verify the information provided by the applicant that is relevant to job suitability. *Id.* at 793-794.

The Fifth Circuit rejected a similar challenge to SF-85P in *NTEU* v. *United States Department of the Treasury*, 25 F.3d 237 (1994). In that case, a union challenged the request for information about illegal drug use within the past five years and its follow-up request for information about "any treatment or counseling received." *Id.* at 239-240. The court of appeals rejected that challenge on standing grounds because the employees "ha[d] no reasonable expectation that they can keep [this information] confidential from their government employer." *Id.* at 244. The court explained that an important public interest in ensuring the trustworthiness of employees supports collecting the information at issue. *Id.* at 243-244. And, like the D.C. Circuit, the Fifth Circuit emphasized that the information collected was disclosed only to the government, in its role as an employer, "and certainly not to the public." *Id.* at 244.

2. The decision below diverges from the decisions of the Fifth and D.C. Circuits. See Pet. App. 98a, 116a, 120a (Callahan, J., dissenting from denial of rehearing en banc). Although the Fifth and D.C. Circuits considered the use of SF-85P and SF-86 for employees in public trust and national security positions, rather than the use of SF-85 for other employees, the questions posed on all three forms are similar. The drug and counseling questions challenged in this case directly parallel those at issue in *AFGE* and *NTEU*. Compare pp. 3-6, *supra*, with *AFGE*, 118 F.3d at 788, 790, and *NTEU*, 25 F.3d at 239-240. Further, all three forms conclude with a release that authorizes federal officials to contact third parties to inquire about the applicant's suitability for employment. Pet. App. 144a; *AFGE*, 118 F.3d at 789-790.

In considering the legality of these forms, the Ninth Circuit held that the government has no legitimate interest in seeking information from federal contract employees about treatment for illegal drug use and discredited the government's interest in seeking information from third parties about the contract employees' suitability for access to federal facilities. See Pet. App. 22a (drug treatment question); *id.* at 23a, 25a, 26a (Form 42 inquiries). The Fifth and D.C. Circuits, however, determined that similar inquiries were supported by important governmental interests, including hiring trustworthy employees and ensuring facility and information-system security. See *AFGE*, 118 F.3d at 793-794; *NTEU*, 25 F.3d at 243-244. Perhaps most fundamentally, the Ninth Circuit, unlike the other courts to have addressed similar issues, essentially disregarded the considered judgment of the Department of Commerce and NASA about how best to promote those interests, showing not the slightest reluctance to intrude on the actions of the Executive as an employer in a sensitive realm of operations.

Further, the Ninth Circuit's reasoning differs significantly from that used by the other circuits. The Ninth Circuit's analysis fails to distinguish between the collection of information by the government and the disclosure of that information to the public, and largely disregards the safeguards protecting against public disclosure. See Pet. App. 17a-18a. The Fifth and D.C. Circuits, by contrast, found a crucial difference between the government's collection of employment-related data and the dissemination of such data to the public, and the D.C. Circuit expressly relied on the Privacy Act as an important mechanism for preventing public disclosure. *AFGE*, 118 F.3d at 793; *NTEU*, 25 F.3d at 244. See also

Walls v. *City of Petersburg*, 895 F.2d 188, 194 (4th Cir. 1990) (stressing the importance of such protections); *Fraternal Order of Police* v. *City of Philadelphia*, 812 F.2d 105, 117-118 (3d Cir. 1987) (same).

3. The procedural context here does not diminish the need for the Court to resolve these disagreements. The court of appeals' ruling arises in the context of a request for a preliminary injunction. But contrary to the suggestion of the concurrence in the denial of rehearing en banc (see Pet. App. 91a-92a), an expanded record is not necessary for this Court's review because the Ninth Circuit's decision rests on legal errors. The question before the court of appeals and before this Court is whether the Constitution precludes the government from asking certain questions on the face of SF-85 and Form 42. That is an issue of law to be decided under this Court's decision in *Whalen*. The validity of the questions should be sustained under *Whalen* based on the nature of the questions on SF-85 and Form 42, the persons to whom the questions are directed, the widespread and longstanding use of the forms in federal employment, and the Privacy Act's restrictions on the maintenance and disclosure of personal information.

As noted, the Ninth Circuit has already rejected the rationale for the drug counseling question posed in SF-85 and has explicitly doubted that Form 42 is adequately tailored to survive constitutional scrutiny. And the fundamentally flawed mode of analysis adopted in the decision—including its failure to distinguish between the collection and dissemination of information, its discounting of statutory provisions and regulations designed to prevent dissemination, and its treatment of information in the hands of third parties as entitled to significant privacy protection—is now binding circuit law. The dis-

trict court on remand and other courts in the Ninth Circuit will not be free to re-examine these mistaken legal premises. Given the widespread use of the forms at issue here, and the routine nature of the employment-based inquiries such forms exemplify, the Ninth Circuit's decision, as it stands, therefore threatens significant interference with government operations. This Court should grant review now to remove the constitutional shadow the Ninth Circuit has cast on heretofore widely accepted employment-related practices of the government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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