No. 09-530

IN THE

# Supreme Court of the United States

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

*Petitioners*,

*v.*

ROBERT M. NELSON, *et al.*,

*Respondents.*

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

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly concluded, based on the as-yet undeveloped factual record before it, that a preliminary injunction was warranted because "serious questions" regarding respondents' informational privacy claim were raised by NASA's decision to institute—for the first time in more than 50 years—background investigations of low-risk, long-time employees of the California Institute of Technology (which operates the Jet Propulsion Laboratory under a contract with NASA), including investigation regarding medical treatment or counseling for drug use and any "adverse" information about the employee, which could include investigation into private sexual matters.

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### STATEMENT

This case arises from NASA's decision to institute background investigations for employees of the California Institute of Technology (Caltech) who currently work at the Jet Propulsion Laboratory (JPL). Respondents are long-time employees of Caltech at JPL and are required to submit to this background investigation or else lose their jobs. Respondents challenged the legality of the background investigation, arguing that it violates their constitutional right to informational privacy. The Ninth Circuit issued a preliminary injunction, concluding that, on the limited record before it, respondents had raised "serious questions" going to the

merits of their informational privacy claim and that the balance of hardships strongly favored respondents.

That decision does not warrant this Court's review. The Ninth Circuit's decision is interlocutory, and it made no final decision on the merits of respondents' informational privacy claim. To the contrary, the Ninth Circuit has simply made a preliminary ruling, which reflects (a) the indisputably severe hardship to respondents of losing their jobs (which some have held for decades) if they do not submit to the investigation into them that the government suddenly wants to undertake, and (b) the current, undeveloped state of the record on the merits—and in particular, the government's failure, in the lower courts, to offer a justification for carrying out an unbounded investigation that could reach into respondents' private lives. That decision is correct and does not conflict with any decision of this Court or any other court.

### A. Factual Background

1. Respondents are 28 scientists, engineers, and administrative personnel who work at JPL. Pet. App. 56a. They are not employees of the federal government, and they are not job applicants. They are employees of Caltech, and many of them have been employed by Caltech at JPL for more than 20 years. *Id.* They are considered "low-risk" employees, and they do not work on projects that are classified or otherwise restricted from the public. *Id.* at 3a. In fact, many of them chose to work at JPL precisely because it offers a research environment where their work is in the public domain. *E.g.*, C.A. App. 1391. Consequently, their

work is largely theoretical or research-oriented,[1] and they are part of the wider academic and scientific community, collaborating with other scientists and engineers around the world, publishing in peer-reviewed journals, and teaching at universities, *e.g.*, *id.* at 1359.

JPL, which is NASA's laboratory for robotic spacecraft, is operated by Caltech pursuant to a contract with NASA. Pet. App. 3a; C.A. App. 470, 765. JPL has a distinct identity reflecting its mission and culture. It operates as a division of Caltech, which hires and provides all of JPL's employees. Pet. App. 56a. As such, "JPL has always operated more as a university campus type environment than as a high-security government facility." C.A. App. 145. It is located on an open campus, has limited security precautions, and welcomes outside visitors. *Id.* Furthermore, none of the robotics research at JPL is classified, and unlike the other nine NASA centers around the country, JPL has no NASA employees at all. *Id.* at 470, 735.

Because of the nature of respondents' work, NASA has classified them as "low risk."[2] Pet. App. 3a. That means that, in NASA's own judgment, even if respon-

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[1] Most of them have advanced degrees in fields such as astronomy, electrical engineering, computer science, and physics (*e.g.*, C.A. App. 1218, 1388, 1417, 1438), and their work covers subjects such as quantum fluids, planetary geology, and applied mathematics (*e.g.*, *id.* at 1287, 1406, 1413).

[2] Federal agencies classify positions as low, moderate, or high risk. *See* 5 C.F.R. § 731.106(a). Positions at the high or moderate level are normally designated as "public trust" positions. *Id.* § 731.106(b). NASA has classified the vast majority (more than 97 percent) of JPL's 5,000 employees as "low risk." C.A. App. 735. All of the respondents here are classified by NASA as "low risk."

dents "misused" their responsibilities or authorities at JPL, it would have "limited or no adverse impact on the Agency's mission." C.A. App. 587. Much of respondents' work, for example, involves mathematical analysis of data or theoretical calculations, using software in the public domain, and requiring nothing more than "a desk, a computer, a pencil, a sheet of paper, and a calculator." *Id.* at 1434.

2. Respondents, like all those who work at JPL, were hired by Caltech and were vetted by Caltech for initial employment through standard criminal background checks and employment reference checks. *E.g.*, Pet. App. 79a; C.A. App. 1397. For the more than 50 years that Caltech has operated JPL, NASA has never required any additional background checks on JPL employees such as the ones that respondents challenge here. Pet. App. 5a. NASA has never suggested in this case that additional background investigations into Caltech employees at JPL were necessary because of any risk of harm to NASA's operations created by any JPL employee. Nor has NASA suggested in this case that the standard background check carried out by Caltech into applicants for employment at JPL had failed to identify any individual who posed a risk to NASA or was otherwise unsuitable.

Recently, however, NASA decided to institute its own, additional background investigations of its contract employees. Specifically, NASA decided to require contract employees of JPL (including persons who had been employed there for decades) to undergo the National Agency Check with Inquiries (NACI), which is the background check used for federal civil service employees. Pet. App. 5a. NASA implemented the change at JPL in 2007, when it unilaterally modified its contract with Caltech—over Caltech's opposition—to re-

quire all JPL employees to undergo the NACI. *Id.* at 3a, 5a. Employees who do not complete the NACI "would be deemed to have voluntarily resigned their Caltech employment." *Id.* at 6a.

Contrary to the government's suggestions, there is no requirement that federal agencies conduct NACI background investigations of contract employees. The government's petition mistakenly states (Pet. 2, 6-8, 24) that NASA imposed the NACI on contract employees to comply with a presidential directive that requires federal agencies to adopt a uniform standard of identification for civil service and contract employees who have access to federal facilities. *See Homeland Security Presidential Directive/HSPD 12—Policy for a Common Identification Standard for Federal Employees and Contractors*, 2 Pub. Papers 1765-1767 (Aug. 27, 2004) (HSPD-12) (reprinted at App. 1a-3a). In fact, HSPD-12 was intended only to ensure that the *identity* of employees and contractors at federal facilities can be reliably verified. *See id.*; Pet. 6; Pet. App. 82a n.9. Thus, the government's own declarant admitted in the district court that "HSPD-12 did not prompt" the background investigation policy, and that, "[a]bsent HSPD-12, NASA's NACI requirement for both employees and contractors would remain." C.A. App. 473.

3. The NACI has three steps. First, the subject individual must complete a Standard Form 85 (SF-85). Pet. App. 137a-144a. The SF-85 asks for, among other things, background information, such as employment and educational history, the names of three references, and details on recent drug use, including any drug-related treatment or counseling. It also requires the subject individual to sign a release authorizing the government to collect an expansive range of information from other sources. Based on the release, the govern-

ment can "obtain any information" from schools, landlords, employers, businesses, "or other sources of information." *Id.* at 144a. That information "may include, but is not limited to ... academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information." *Id.* Although SF-85 states that the information will be covered by the federal Privacy Act, it also explains that any such information may be "routine[ly]" disclosed "without your consent" to the news media or the general public, Congress, the courts, and "any source or potential source from which information is requested in the course of [the background] investigation." *Id.* at 138a. NASA submits the completed SF-85 to the Office of Personnel Management (OPM), which conducts the investigation. Pet. 8; C.A. App. 473.

Second, OPM sends each of the subject individual's references, employers, and landlords a Form 42 ("Investigative Request for Personal Information"). Pet. App. 145a-146a; Pet. 8.[3] This form asks the reference unbounded questions about the subject individual's character. Specifically, the form requests whether the reference has "any adverse information about this person'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 reference may "discuss the adverse information I have." Alternatively, the form provides space for the reference to write any information "which you feel may have a bearing on this person's suitability for government em-

[3] This brief will use the term "reference" for the recipient of a Form 42.

ployment," including "derogatory as well as positive information."

Third, NASA will examine the information collected in OPM's investigation, and NASA will then determine whether the individual is "suitable" for access to NASA facilities, and therefore for continued employment at JPL. Pet. App. 4a-5a. The assessment of "suitability" is left to NASA's discretion. *See id.* at 82a (citing 5 C.F.R. § 731.103(a) ("[The U.S. Office of Personnel Management] delegates to the heads of agencies authority for making suitability determinations and taking suitability actions.")).

After concerned JPL employees asked what criteria NASA would use to determine their "suitability," JPL's management posted a "suitability matrix" on its website. Pet. App. 5a n.2; C.A. App. 1487; *see* App. 4a-10a. This matrix is titled "Issue Characterization Chart" and lists various factors, apparently reflecting criteria NASA will use in determining suitability. These factors include, among others, carnal knowledge, sodomy, indecent exposure, voyeurism, obscene telephone calls, indecent proposals, incest, bestiality, homosexuality, cohabitation, adultery, illegitimate children, and mental, emotional, psychological, or psychiatric issues. *Id.*; Pet. App. 5a n.2.

Although the current record is undeveloped and unclear as to the "exact extent" and "manner" that NASA will inquire into these matters in order to assess suitability (Pet. App. 4a), NASA, in this litigation, has refused to deny that it will use the factors in the suitability matrix as part of the background investigations to determine suitability. *Id.* at 5a n.2 ("NASA neither concedes nor denies that these factors are considered as part of its suitability analysis"). Furthermore, at an

informational meeting on implementation of the NACI, the director of JPL stated that NASA would use the matrix as part of the NACI background investigations to determine suitability. C.A. App. 1471.

### B. Procedural Background

1. Respondents sued NASA, arguing, as relevant here, that NASA's recently adopted requirement that employees like themselves—current Caltech employees in low-risk positions at JPL—submit to NACI background investigations violated their constitutional right to informational privacy. The district court denied respondents' motion for a preliminary injunction.

Viewing the privacy claim in two parts, one part challenging SF-85 and the other challenging NASA's suitability matrix (Pet. App. 62a), the district court first determined that the challenge to SF-85 was ripe because it was "undisputed" that if respondents did not complete SF-85, they would "be deemed to have voluntarily resigned." *Id.* at 63a. However, the court determined that the challenge to the suitability matrix, which had not yet been used to find any specific contractor "unsuitable," was unripe. *Id.*

The court then concluded that respondents were unlikely to succeed on their claim that SF-85, by itself, was unconstitutional. The court held that SF-85's questions were permissible because they were "relatively non-intrusive." Pet. App. 70a. The court also held that SF-85's signed release was narrowly tailored to two legitimate interests: " 'enhancing security' at federal facilities" and "[v]erifying the identity of federal contractors." *Id.* at 71a. The district court, however, did not address respondents' principal argument: that the background investigation as a whole—the SF-85, with

its release authorizing the government to collect "any information," *together* with Form 42's broad and open-ended questions and the "suitability matrix" that apparently informs all those inquiries—is unconstitutional. *Id.* at 10a, 26a.

2. The court of appeals reversed and granted a preliminary injunction.[4] The court concluded that a preliminary injunction was warranted because respondents had "raised serious questions as to the merits of their informational privacy claim and the balance of hardships tips sharply in their favor." Pet. App. 29a.[5]

The court first made clear that the district court had erred in construing respondents' challenge. The district court had erroneously "limit[ed] its analysis to the SF-85 questionnaire," and had thus "failed to consider the most problematic aspect of the government's investigation—the open-ended Form 42 inquiries,"

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[4] The court of appeals vacated its initial opinion (Pet. App. 30a-49a) after the government petitioned for rehearing, and issued a new opinion (*id.* at 1a-29a) cited herein.

[5] Under the standard applied by the Ninth Circuit, the grant of a preliminary injunction requires the applicant to show "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 [the applicant's] favor." Pet. App. 7a-8a (citation omitted). The court found that the second prong was satisfied here. The government does not object to the standard applied by the court of appeals. Nor does this Court's recent decision in *Winter* v. *Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008), affect the standard, for the court of appeals made a specific finding that respondents would be irreparably harmed absent a preliminary injunction. *See* Pet. App. 29a.

which are posed against the backdrop of the suitability matrix. Pet. App. 17a, 25a.

The court of appeals then described the legal framework for assessing the informational privacy claim. The court recognized that the right to informational privacy, as developed in the lower courts following this Court's decisions in *Whalen* v. *Roe*, 429 U.S. 589 (1977), and *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), "protects an individual interest in avoiding disclosure of personal matters" such as sexual activity, medical information, and financial matters. Pet. App. 17a-18a (citations and internal quotation marks omitted). Under those decisions, the government may "compel disclosure of [such] information" only if it can establish "that its use of the information would advance a legitimate state interest and that its actions [were] narrowly tailored to meet the legitimate interest." *Id.* at 18a (citation omitted).

Applying this framework, the court first concluded that most of SF-85 was "unproblematic" (Pet. App. 19a), including the question about the subject individual's recent illegal drug use, which the court found narrowly tailored to the government's "strong stance in its war on illegal drugs" (*id.* at 21a).

By contrast, there were "serious questions" about two aspects of the investigation: SF-85's inquiry on drug treatment or counseling, and Form 42's potentially overbroad scope. The court observed that SF-85's question requiring subject individuals to disclose drug treatment or counseling fell "squarely within the domain protected by the constitutional right to informational privacy." Pet. App. 22a. Yet "the government ha[d] not suggested any legitimate interest in requiring the disclosure of such information." *Id.* Thus,

the court concluded that, at this early stage of the litigation, there was a serious question whether this "narrow" aspect of SF-85 could survive respondents' constitutional challenge. *Id.*

With respect to Form 42, the court similarly concluded that the government had thus far, at the initial stage of litigation, failed to justify the broad scope of inquiry. Form 42's "broad, open-ended questions" and its solicitation of "any adverse information" appeared "designed to elicit a wide range" of information, potentially including information about private sexual matters, such as to "seemingly implicate the right to informational privacy." Pet. App. 22a. The information sought "range[d] far beyond" the scope of the government's posited "legitimate reasons for investigating its contractors" (including "verifying" their identities and "ensuring the security" of JPL's facilities (*id.* at 24a-25a)). Moreover, the court observed that the government had "steadfastly refused to provide any standards narrowly tailoring the investigations to the[se] legitimate interests" (*id.* at 26a), including refusing to disavow that the background investigation would involve inquiry into private sexual matters, as reflected in the suitability matrix (*id.* at 5a n.2, 25a).

Throughout its opinion, the court of appeals recognized that this case is still at a very early stage, that the record is still undeveloped, and that many important questions remain to be resolved. In particular, the court emphasized that the existing record was vague as to several key points necessary to deciding the merits of respondents' claim, including the extent to and manner in which the government would gather information, the role of the suitability matrix, the nature of any security risk thought to be posed by respondents, the standards governing the Form 42 inquiries, and

whether the information collected would be disclosed to anyone, including respondents' employer, Caltech. *See* Pet. App. 4a, 5a n.2, 22a, 24a, 25a, 91a.

The court also concluded that the balance of hardships "tips sharply toward [respondents], who face a stark choice—either violation of their constitutional rights or loss of their jobs." Pet. App. 26a. By contrast, NASA had not demonstrated any irreparable harm that would flow from retaining respondents in their current positions (without the additional background check) during the pendency of the litigation, given that "JPL has successfully functioned without any background investigations since the first contract between NASA and JPL in 1958." *Id.* at 27a.

The court of appeals denied the government's second petition for rehearing and rehearing en banc (Pet. App. 75a-130a) in a vote that was "not close" (*id.* at 76a).

## REASONS FOR DENYING THE PETITION

The decision below does not warrant this Court's review. The court of appeals' decision is not a final judgment: it made no legal conclusions or factual findings that are binding in further proceedings on the merits, and it did not strike down NASA's background investigation process or otherwise finally resolve any issue. Instead, the court of appeals correctly decided, based on the limited record before it, that respondents had raised "serious questions" about their informational privacy claim. Nothing in the decision below precludes the government from fully making its case on remand to resolve those questions on the merits.

Nor does the government's petition offer any valid basis for this Court to grant certiorari. Contrary to the

government's suggestion, the decision below is not inconsistent with this Court's precedent, nor is it in conflict with decisions of other circuits. The government's argument that review is warranted because the court of appeals used a "flawed mode of analysis" (Pet. 29) in reaching its interlocutory decision is also without merit. The petition should therefore be denied.

## I. THE COURT OF APPEALS' INTERLOCUTORY DECISION IS OF LIMITED SIGNIFICANCE

The procedural posture of this case makes it a poor vehicle for review. This Court disfavors review of interlocutory decisions and "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari). Indeed, as the Solicitor General routinely argues, "[t]he lack of finality of the judgment below is 'of itself alone' a 'sufficient ground for the denial of the [writ].' " *See, e.g.*, Brief for the Federal Respondents in Opposition, *Equity in Athletics, Inc.* v. *Dep't of Educ.* 16 (U.S. Feb. 4, 2009) (No. 08-672) (quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)). There is no reason to depart from that principle here.

Because a preliminary injunction is not a final decision, *Public Serv. Comm'n of Wisc.* v. *Wisconsin Tel. Co.*, 289 U.S. 67, 70 (1933), any legal or factual findings made in the course of granting such an injunction "are not binding at trial on the merits." *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981); *see also id.* ("[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held"). Thus, this Court has made clear that it will not review the grant of a pre-

liminary injunction except under extraordinary circumstances, such as when the decision was "clearly erroneous." *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam); *see also* Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007) (review is warranted only if there is a "clear-cut issue of law" that the court of appeals got "patently incorrect"). Moreover, those instances usually arise when the court of appeals' decision had the substance, if not the form, of finality—in other words, when the grant of a preliminary injunction effectively precluded, or at least diminished the need for, further proceedings. *See, e.g.*, *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 54 (2006) (court of appeals granted preliminary injunction because "the Solomon Amendment violated the unconstitutional conditions doctrine"); *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 857-858 (2005) (court of appeals granted preliminary injunction because counties' display of Ten Commandments violated the Establishment Clause); *Legal Servs. Corp.* v. *Velasquez*, 531 U.S. 533, 539 (2001) (court of appeals granted preliminary injunction because it "invalidated" a portion of the Legal Services Corporation Act).

The interlocutory decision below does not present any such extraordinary circumstances. It is not "clearly erroneous" (*see infra* Parts II and III) nor does the government even argue that it is. It also has none of the indicia of finality. The court of appeals did not hold that respondents are entitled to prevail on their informational privacy claim. The court of appeals did not even hold that respondents are "likely" to succeed on that claim. It determined only that NASA's newly instituted background investigation process for low-risk, current employees of Caltech at JPL raises "serious questions" (Pet. App. 3a, 8a), and that, in light of

the severe hardship that would be visited upon respondents through loss of their employment if they declined to submit to the NASA background investigation, a preliminary injunction should be put in place allowing them to remain in their positions without the need for that additional background check during the pendency of the litigation.

The government asserts, however (Pet. 29), that this "procedural context" should not prevent review because "the Ninth Circuit's decision rests on legal errors." The government mischaracterizes the nature of this lawsuit. Although the government's petition for certiorari now describes this lawsuit as a facial challenge to SF-85 and Form 42 (*see* Pet. 15), no one (until the Solicitor General's petition) has conceived of it that way before. To the contrary, all parties to this litigation have understood that respondents are challenging only NASA's application of its background investigation process *to them*—low-risk, long-time employees of Caltech who perform contract work for the government. As such, the complaint sought only an injunction against "further implementation of this background investigation program against JPL employees in non-sensitive positions." C.A. App. 1502. Likewise, the government's own trial counsel agreed that this case was not a facial challenge (*id.* at 58), and the court of appeals understood that this case applied only to "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" (Pet. App. 3a).

Moreover, there is no merit to the government's suggestion that the decision below "rests on legal errors." Based on the limited record before it, the court of appeals only found that it "appears, although it has

yet to be conclusively proven, that the government intends to pry into constitutionally protected private matters." Pet. App. 93a. Because the government, on the current record, has not offered justification for inquiring about medical or psychological counseling for drug use nor denied that it intends to collect (and possibly disclose) information about sexual practices and other highly private matters, the court of appeals concluded that the background investigation process raised "serious questions" regarding the informational privacy claim. However, the court of appeals repeatedly cautioned that the record was vague on important issues going to the merits of the informational privacy claim, and that the nature of those privacy rights could only be thoroughly considered on a fully developed record. *Id.* at 4a, 5a n.2, 92a. Indeed, the court—and the judges concurring in the denial of rehearing en banc—listed several key questions that need to be answered in order to decide the legal issue, including the extent to and manner in which the government will gather information based on the SF-85 release, the role of the suitability matrix, the nature of any security risk posed by respondents, the standards governing the Form 42 inquiries, and whether the information collected would be disclosed to anyone, including Caltech. *See id.* at 4a, 5a, 22a, 24a, 25a, 91a, 92a, 94a, 95a.

There is also no merit to the government's expressed concerns that the decision below has "potentially far-reaching consequences" (Pet. 23-24) and that it somehow "casts a constitutional cloud" on the background check process for civil service employees. As the court of appeals noted, it is difficult to argue that the preliminary injunction will have adverse consequences when "JPL has successfully functioned" for more than 50 years "without *any* background investi-

gations" of its low-risk employees. Pet. App. 27a (emphasis added). And the decision below has nothing to do with civil service employees; the preliminary injunction applies only to those current Caltech employees who work at JPL and are classified as low-risk.

In short, the decision below does not rest on legal errors in addressing a facial challenge, and it presents no "extraordinary circumstances" that would justify departing from this Court's practice of awaiting final judgment before granting review.

## II. THE DECISION BELOW IS CORRECT

This Court has recognized that the Constitution protects a right to informational privacy: "the individual interest in avoiding disclosure of personal matters." *Whalen* v. *Roe*, 429 U.S. 589, 599 (1977); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 457 (1977). The court of appeals issued a preliminary injunction here because "serious questions" about respondents' right to informational privacy were raised by two aspects of the background check for low-risk employees at JPL: SF-85's requirement that respondents disclose information about drug treatment or counseling, and Form 42's potentially overbroad scope. That decision was correct, given that NASA has not yet provided any justification for requiring disclosure of drug treatment nor explained the extent to which it intends to delve into unquestionably private matters when assessing suitability (much less provided any justification for doing so).

1. The court of appeals correctly determined that there is a "serious question" whether SF-85's inquiry on drug treatment or counseling violates respondents' right to informational privacy. As the court of appeals

recognized (and as the government's petition does not challenge), that inquiry falls squarely within "the domain protected by the constitutional right to informational privacy" because it relates to highly personal "medical treatment and psychological counseling." Pet. App. 22a. Because the government did not even offer a legitimate interest for that inquiry, the court of appeals sensibly concluded that there was a serious question on the merits of this "narrow" issue. *Id.*; *see Whalen* v. *Roe*, 429 U.S. at 605 (evaluating informational privacy claim by balancing privacy interest with competing governmental interests); *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) (same).

The government now suggests (Pet. 22) that it does have a legitimate interest for requiring respondents to disclose drug treatment or counseling: that information could allay the government's concerns about the subject individual's illegal drug use. *Id.* ("Just as recent drug usage raises legitimate concerns about government credentialing, so too does recent, successful drug therapy mitigate those concerns."). The government, however, did not raise this purported legitimate interest below,[6] and in any event it is unavailing. If the government wishes to know about recent drug treatment

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[6] The government first raised this point at oral argument in the court of appeals (*see* Oral Argument 34:20-40) and under Ninth Circuit precedent, that argument was waived. *Butler* v. *Curry*, 528 F.3d 624, 642 (9th Cir.), *cert. denied*, 129 S. Ct. 767 (2008); *see also FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) ("It is this Court's practice to decline to review those issues neither pressed nor passed upon below."). In any event, the government took a directly opposite position in its court of appeals brief, claiming that "treatment for an addiction to illegal drugs does not make the use of those drugs less illegal." Gov't C.A. Br. 30-31 n.5.

or counseling only to mitigate any concerns about illegal drug use, such that any response to the question presumably could only help the subject individual, then there would be no reason to *mandate* an answer, as SF-85 does. *See* Pet. App. 143a.

2. The court of appeals also correctly concluded that a "serious question" was raised whether NASA's use of Form 42 would violate respondents' right to informational privacy.

The court first determined that Form 42's "open-ended questions" would elicit information that "seemingly implicate[s] the right to informational privacy." Pet. App. 22a. There can be little doubt about that. The government claims (Pet. 23) that Form 42 only asks references for information about an applicant's suitability. However, NASA has a list of factors relevant to suitability that include carnal knowledge, sodomy, homosexuality, cohabitation, adultery, illegitimate children, and mental, emotional, psychological, or psychiatric issues. *See* App. 4a-10a. The government has never denied that it will use these factors to determine suitability, and there is evidence in the record that NASA will in fact use Form 42—and the SF-85 release that allows the government to obtain "any information"—to collect (and possibly disclose to Caltech) such highly private information. C.A. App. 471, 1471; Pet. App. 26a, 91a. That information unquestionably "pertain[s] to an independently recognized private sphere" (Pet. 20) and implicates the right to informational privacy.[7]

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[7] Although the court of appeals found that respondents' direct challenge to the constitutionality of NASA's suitability determinations was unripe (Pet. App. 9a), it did not suggest that the suitabil-

The court then determined that the government had not justified its use of such a potentially overbroad inquiry. That determination was also proper. Although the court agreed that the government has legitimate interests for investigating respondents, including "verifying [their] identities" and "ensuring the security of the JPL facility" (Pet. App. 24a), the court noted that the government had not properly explained how its use of Form 42 was tailored to these legitimate interests.

The government has refused to disavow the suitability matrix (Pet. App. 5a n.2) or to explain why factors such as sexual orientation or illegitimate children could help the government verify respondents' identity or ensure the security of the JPL facility. Indeed, the court found that the government has "steadfastly refused to provide any standards narrowly tailoring the investigations" to these interests. *Id.* at 26a.

Because NASA's use of Form 42 inquiries (and the SF-85 release) could delve into unquestionably private matters, and because on the current record the government has provided no explanation for that intrusion, the court of appeals correctly concluded that respondents had raised "serious questions" warranting a preliminary injunction. Pet. App. 26a.

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ity matrix was irrelevant to the other aspects of respondents' challenge, and in particular their challenge to the unbounded waiver compelled by the SF-85 and the open-ended nature of the questions on Form 42. The existence of the matrix, a NASA administrator's statement that the matrix would be used to determine respondents' suitability for access to NASA facilities, and NASA's consistent refusal to disavow that the matrix will be used highlight the kinds of information that NASA seeks to delve into through the use of Form 42 and the background investigation process.

## III. THE GOVERNMENT'S REASONS FOR GRANTING CERTIORARI LACK MERIT

Contrary to the government's contentions, the decision below does not conflict with any decision of this Court or any another court. Nor do the government's sundry other arguments for granting review have merit.

### A. The Decision Below Does Not Conflict With This Court's Precedent

The government does not argue that there is no constitutional right to informational privacy. Nor does it argue that the decision below contravenes a holding by this Court. The government only suggests (Pet. 18) that the court of appeals did not follow two aspects of this Court's guidance in *Whalen* v. *Roe* and *Nixon* v. *Administrator of General Services*. That suggestion is incorrect; in any event, nothing in the decision below conflicts with this Court's precedents.[8]

The government first contends (Pet. 19) that *Whalen* and *Nixon* "distinguished" between collection of information and dissemination of information while the court of appeals "indicated that it would apply the same balancing test" regardless of the situation. But *Whalen* and *Nixon* did not draw any such bright line. Instead, both decisions suggested that the distinction between collection and dissemination is one of many case-specific factors to consider in the balancing analysis for an informational privacy claim. *See, e.g., Nixon,*

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[8] The government faults the court of appeals (Pet. 18) for failing to cite either *Whalen* or *Nixon*. That is a spurious charge. The court of appeals relied on several of its own precedents, which themselves relied on *Whalen*. *See* Pet. App. 17a-18a.

433 U.S. at 465 (listing eight relevant factors, including the likelihood of disclosure). That framework was followed here by the court of appeals, which noted that "the risk of public disclosure is undoubtedly an important consideration." Pet. App. 23a. But the possible protection against such disclosure was outweighed at this stage of the litigation by other factors, especially the government's failure to offer any justification for SF-85's drug treatment or counseling question or the use of Form 42 to delve into unquestionably private matters.

The government also contends (Pet. 19) that *Whalen* and *Nixon* determined that a privacy claim can be overcome by "statutory and regulatory protections limiting the public dissemination of the information," whereas the court of appeals "gave short shrift" to such protections. That is incorrect. The court of appeals acknowledged that "safeguards," such as the Privacy Act, "exist to help prevent disclosure of the applicants' highly sensitive information." Pet. App. 24a. But it found the existence of the Privacy Act not dispositive at this stage of the litigation, given that the Privacy Act broadly allows disclosure of personal information in many circumstances, including whenever the federal agency determines that disclosure of personal details would be in the public interest and would not constitute a clearly unwarranted invasion of personal privacy. *See* 5 U.S.C. § 552a(b)(2); *id.* § 552(b)(6).

Moreover, *Whalen* and *Nixon* both had the benefit of a full record that provided proof of stringent safeguards. *See Whalen*, 429 U.S. at 594 (computer tapes containing confidential records were "kept in a locked cabinet," and the computer system was inaccessible to the public); *Nixon*, 433 U.S. at 462 (archivists handling confidential presidential materials had "an unblemished

record for discretion"). By contrast, the current record in this case is undeveloped as to the existence or effectiveness of any safeguards. Although the government has suggested that it "has taken measures to keep the information from being disclosed to the general public" (Pet. App. 23a), the government has never fully explained what its disclosure safeguards are, how they will work in practice, or how effective they might be. Moreover, respondents have alleged that NASA in fact plans to share the private information it collects with Caltech, potentially in violation of the Privacy Act. *See id.* at 92a-93a.

### B. The Decision Below Does Not Create A Circuit Conflict

The government makes a half-hearted suggestion that the decision below creates a circuit split, asserting that the decision is in "substantial tension" with decisions from the D.C. and Fifth Circuits. Pet. 16. But there is no "tension," much less a circuit split.

The two decisions relied on by the government are readily distinguishable from this case. Those decisions involved federal government, civil service employees who held positions of public trust, meaning that they held moderate- or high-risk positions. *See American Fed. of Gov't Employees* v. *HUD*, 118 F.3d 786, 788 (D.C. Cir. 1997) (*AFGE*); *National Treasury Employees Union* v. *U.S. Dep't of Treasury*, 25 F.3d 237, 239 (5th Cir. 1994) (*NTEU*). These factual circumstances were crucial to the reasoning of both cases. Thus in *NTEU*, the Fifth Circuit recognized that public trust employees have "a diminished expectation of privacy." 25 F.3d at 244. The court took "pains to underscore the obvious: we are determining the rights of [the plaintiffs] in their capacity as public trust employees and

certainly not in their role as ordinary private citizens." *Id.* And in *AFGE*, the D.C. Circuit similarly explained that it was "reluctant to second-guess the [government's] conclusions regarding [the need to delve into private matters about] *employees in public trust positions*." 118 F.3d at 794 (emphasis added).

This case is not like *AFGE* or *NTEU*. Respondents are not civil service employees; they work for Caltech, not NASA. Respondents hold "low risk" positions; they are not in positions of public trust and do not have "a diminished expectation of privacy." To the extent the "Ninth Circuit's reasoning differs" (Pet. 28) from the reasoning of the D.C. and Fifth Circuits, it is because the critical facts are different.[9]

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[9] None of the government's arguments to the contrary is sound. The government first suggests (Pet. 28) that, unlike the D.C. and Fifth Circuits, the court of appeals ignored the legitimate interests it offered. This is a surprising accusation—surprising because it has no basis in the record. The court of appeals actually took note that the government had never offered a legitimate interest for its drug treatment or counseling question. Pet. App. 22a. And the court of appeals actually "agree[d] with the government that it has several legitimate reasons for investigating its contractors," including "verifying [their] identities" and "ensuring the security of the JPL facility." *Id.* at 24a. The government in this case, however, "steadfastly refused" to explain how its planned inquiries would serve these interests. *Id.* at 26a. The government next suggests (Pet. 28) that unlike the D.C. and Fifth Circuits, the court of appeals disregarded NASA's "considered judgment." This again is difficult to square with the Ninth Circuit's decision. The government explained its rationale for SF-85's question on recent drug use, and the Ninth Circuit credited it. Pet. App. 21a. The government did not explain its reason for SF-85's question on drug treatment or for Form 42, *see supra* pp. 17-21, and so the court had nothing to credit. Finally, the government argues (Pet. 28) that, unlike the D.C. and Fifth Circuits, the court

In sum, the decision below does not conflict with *AFGE* or *NTEU*. In fact, the only other federal court to confront the same question on similar facts as the court of appeals did here—*i.e.*, whether a preliminary injunction was warranted where the government sought to impose in-depth background investigations of low-risk, incumbent employees—came out the same way. *See National Treasury Employees Union* v. *U.S. Dep't of Treasury*, 838 F. Supp. 631, 637-638 (D.D.C. 1993) (noting that incumbent employees both have a heightened expectation of privacy and present a reduced risk of harm to the agency).

### C. The Government's Remaining Arguments Lack Merit

Finally, the government raises four miscellaneous challenges to the court of appeals' analysis. None of these arguments supports granting the petition; in any event, they are meritless.

*First*, the government contends (Pet. 20) that the court of appeals should have distinguished between voluntary and compulsory disclosures of private information. That submission is completely without merit. Respondents would not be disclosing information "voluntarily" during the NACI process. They have all been working at JPL for years, and if they do not complete the investigation process, they will be terminated. Pet. App. 6a. This leaves respondents with "a stark choice—either violation of their constitutional rights or loss of their jobs." *Id.* at 26a. A background investigation that is imposed as a condition of keeping one's job

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of appeals did not distinguish between collection and dissemination. As explained *supra* pp. 21-22, that reasoning is unavailing.

is no more "voluntary" than is a demand that a government contractor support a particular political party, *see Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668 (1996), or a requirement that a government employee lose his job unless he takes a loyalty oath, *see Wieman* v. *Updegraff*, 344 U.S. 183 (1952).

*Second*, the government contends (Pet. 20) that the court of appeals "apparently assumed" that the informational privacy right covers "any information that is not generally disclosed to the public." According to the government (*id.*), the right should cover only "information pertain[ing] to an independently recognized private sphere." The government is wrong. As an initial matter, neither *Whalen* nor *Nixon* limited the informational privacy right in that way. And in any case, the court of appeals' holding was not so broad. In defining the privacy right, the Ninth Circuit pointed specifically (Pet. App. 17a-18a) to its earlier decisions that addressed unquestionably private spheres such as sexual activity, *Thorne* v. *City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), medical information, *Norman-Bloodsaw* v. *Lawrence Berkeley Lab.*, 135 F.3d 1260 (9th Cir. 1998), and financial matters, *In re Crawford*, 194 F.3d 954 (9th Cir. 1999). It then held (Pet. App. 22a) that there were "serious questions" that both SF-85's question on drug treatment or counseling and NASA's use of Form 42 would result in the disclosure of such protected information, and that the government had not provided any counterbalancing justifications. As explained *supra* pp. 17-21, that holding is correct.

*Third*, the government contends (Pet. 20) that the court of appeals should have distinguished between information obtained from the individual and information obtained from third parties. To support this contention, the government analogizes to Fourth Amendment

doctrine, according to which "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." *Id.* at 21. The government's analogy is inapt, however, because the Fourth Amendment is different in kind from the right to informational privacy. The Fourth Amendment is concerned with *how* the government obtains information, while the right to informational privacy is concerned with *what* information the government obtains, regardless of how or from whom the information is obtained. The court of appeals recognized this important distinction, explaining that the right to informational privacy depends on "the *nature* of the information sought ... rather than on the manner in which the information is sought." Pet. App. 22a-23a n.5; *see also Nixon*, 433 U.S. at 465 (specifically holding that the right to informational privacy protects "personal communications" with third parties).

*Fourth*, the government contends (Pet. 21) that the court of appeals should have taken note that the government is acting as an employer in this case. This argument, however, assumes that respondents are employees of the federal government, which they are not. As the court of appeals correctly recognized, respondents "are employed by Caltech, not the government." Pet. App. 3a. In any event, this Court has never held that federal employees (or contractors) lose their constitutional rights while on the job. To the contrary, "a citizen who works for the government is nonetheless a citizen" and the Constitution "limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti* v. *Ceballos*, 547 U.S. 410, 419 (2006).

In sum, the government has failed to present the Court with any reason why it should depart from its well-settled practice and grant review of an interlocutory decision in which the court of appeals did not make a definitive adjudication of the parties' legal rights. Accordingly, the Court should deny review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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