Nelson v. NASA, No. 07-56424, 512 F.3d 1134 (9th Cir. 2008), withdrawn and superseded, 530 F.3d 865 (9th Cir. 2008).

CALLAHAN, Circuit Judge, with whom KLEINFELD, TALLMAN and BEA, Circuit Judges, join, dissenting from the denial of rehearing en banc:

This case places before the court an issue of exceptional importance: the degree to which the government can protect the safety and security of federal facilities. With an annual budget of over $1.6 billion, NASA's Jet Propulsion Laboratory ("JPL") is the foremost leader in exploring the solar system's known planets with robotic spacecraft. As the lead center for NASA's deep space robotics and deep space communications missions, the science and technology developed at JPL for each mission entails extensive planning, research, and development, spanning years and costing taxpayers hundreds of millions of dollars. The technology developed at JPL features some of the most sensitive and expensive equipment owned by NASA, which involves a myriad of scientific, medical, industrial, commercial, and military uses.

Plaintiffs, twenty-eight scientists and engineers employed as contractors at JPL, object to NASA's requirement that they undergo the same personnel investigation for non-sensitive contract employees as those already in existence for

all civil service employees in non-sensitive positions. Although the district court denied a motion for a preliminary injunction designed to prevent these personnel investigations from taking place, a panel of this court reversed, concluding that the district court's decision was based on legal errors. See Nelson v. NASA, 530 F.3d 865 (9th Cir. 2008). The panel held that a questionnaire asking applicants about treatment or counseling received for illegal drug use within the past year and a related written inquiry sent to references implicate the constitutional right to informational privacy. See id. at 879. Applying intermediate scrutiny, the panel held that the government did not have a legitimate state interest in asking applicants to disclose their drug treatment or counseling history, id., and that the written inquiry was not narrowly tailored to serve the government's legitimate interests related to the security of JPL. Id. at 879-81.

I dissent from the denial of rehearing en banc because the panel's opinion constitutes an unprecedented expansion of the constitutional right to informational privacy. Further, assuming that the panel's opinion correctly assesses the scope of this right, it does not properly apply intermediate scrutiny. This expansion of constitutional privacy rights reaches well beyond this case and may undermine personnel background investigations performed daily by federal, state, and local governments.

Until now, no court had held that applicants have a constitutionally protected right to privacy in information disclosed by employment references. The Supreme Court has consistently held that individuals do not have a legitimate expectation of privacy in information they voluntarily turn over to third parties. See, e.g., Smith v. Maryland, 442 U.S. 735, 743-44 (1979); United States v. Miller, 425 U.S. 435, 442-44 (1976). Similarly, no court had previously held that a government employee has a constitutionally protected right to privacy to prevent the disclosure of treatment or counseling received for illegal drug use in the face of a legitimate need by the employer to protect the safety and security of a facility. Cf. Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) (finding that disclosure of drug use cannot violate constitutional right to informational privacy). Thus, the panel's opinion effects an unwarranted extension of the constitutional right to informational privacy.

Even assuming that a constitutional right to information privacy is implicated here, the panel fails to engage in the requisite "delicate balancing" of plaintiffs' privacy rights and NASA's legitimate need for information ensuring that those it trusts with access to JPL do not pose an unacceptable safety and security risk. The panel's opinion sets our circuit apart from the District of Columbia Circuit and Fifth Circuit, both of which have rejected privacy-based challenges to

background checks similar to, or more intrusive than, the one here. See Am. Fed'n of Gov't Employees v. Dep't of Hous. & Urban Dev., 118 F.3d 786 (D.C. Cir. 1997); Nat'l Treasury Employees Union v. U.S. Dep't of Treasury, 25 F.3d 237 (5th Cir. 1994). These circuits emphasized that the information to be disclosed to the government in those cases would not be disclosed to the public; indeed, the D.C. Circuit recognized that even if a constitutional right to informational privacy is implicated, the Privacy Act, 5 U.S.C. § 552a(b), adequately safeguards against public disclosure.

I. Factual Background

A. Work conducted at the JPL facilities

JPL is a NASA facility that the California Institute of Technology ("Caltech") operates pursuant to a contract with NASA, and its facilities are an integral part of the nation's space program. JPL is the lead center for NASA's deep space robotics and deep space communications missions, which require broad access to many NASA physical and logical facilities. These missions entail "extensive and detailed parallel planning, research, and development, often spanning years, scores of persons, and hundreds of millions of taxpayer dollars." JPL's discoveries have provided new insights into studies of the Earth, its atmosphere, climate, oceans, geology, and the biosphere; created the most accurate

topographic map of the Earth; provided insight into global climate and ozone depletion; launched an oceanographic satellite to provide new details about the ocean seafloor; and provided space-based operational, communication, and information processing for the Defense Department. JPL operates a number of high profile projects including the Phoenix Mars Lander Mission, the Mars Exploration Rovers Mission, the Cassini Equinox Mission to Saturn, and the Voyager Mission to Jupiter, Saturn and beyond. The command center for the Mars Rovers, the Space Flight Operations Center for JPL missions, and JPL's Space Craft Assembly building are located on the JPL campus. JPL also partially manages the Deep Space Network, which is responsible for monitoring and communicating with numerous satellites and other space missions, and is involved in other highly confidential projects.

All positions at JPL, from administrative support to engineers, scientists, and JPL's Director, are filled by contract employees.[1] Plaintiffs are scientists and engineers employed in some of the most important positions at JPL, including the remote operator of the Spirit and Opportunity Rovers that explore the surface of Mars and a navigation team member for the Phoenix Mars Lander Mission.

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[1] Caltech has filled JPL positions with about 5,000 of its own employees and with over 4,000 "affiliates" and contractors.

B. Implementation of Homeland Security Presidential Directive 12

The 9/11 Commission found that "[a]ll but one of the 9/11 hijackers acquired some form of U.S. identification document, some by fraud," and recommended that the federal government set standards for the issuance of identification because identification fraud is a concern at "vulnerable facilities." THE 9/11 COMMISSION REPORT 390 (2004). On August 27, 2004, the President of the United States issued Homeland Security Presidential Directive 12 ("HSPD-12") in response to security concerns identified by the 9/11 Commission Report and mandated that the Commerce Department develop a uniform federal standard, applicable to federal employees and contractors alike, for secure and reliable forms of identification. The order emphasized that the Commerce Department should act to eliminate the "[w]ide variations in the quality and security of forms of identification used to gain access to secure Federal and other facilities where there is potential for terrorist attacks . . . ." HSPD-12 ¶ 1.

Acting pursuant to this directive, the Commerce Department promulgated Federal Information Processing Standards ("FIPS") 201 and 201-1, which required security measures for contract employees commensurate with those applicable to comparable federal employees. FIPS 201-1 sets forth a standard for "identification

issued by Federal departments and agencies to Federal employees and contractors (including contractor employees) for gaining physical access to federally-controlled facilities and logical access to Federally controlled information systems . . . ."

Since 1953, federal civil service employees have been subject to mandatory background investigations, with the scope varying based on the potential for adverse security consequences associated with a particular position. See Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 29, 1953), reprinted as amended in 5 U.S.C. § 7311 (2007). Thus, for over fifty years, Executive Order 10,450 has required that "in no event shall the investigation [of civil service employees] include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person." Id. § 3(a). Now, under FIPS 201-1, federal contractors in non-sensitive positions must meet these same minimum security guidelines.

In 2001, before the promulgation of FIPS 201, NASA conducted an internal review of contractor security requirements and concluded that the failure of contractors to undergo background checks posed a vulnerability. NASA, acting

pursuant to its statutory authority under the National Aeronautics and Space Act of 1958 (the "Space Act") to conduct "personnel investigations," revised NASA Procedural Requirement ("NPR") 1600.1, to require application of security requirements for contract employees parallel to those of federal employees. On November 8, 2005, NASA updated NPR 1600.1 to incorporate FIPS 201 and require that all low risk contractors be subject to a National Agency Check with Inquiries ("NACI") prior to the issuance of permanent NASA photo-identification. NASA explained that these requirements would "assist NASA Centers and component facilities in executing the NASA security program to protect people, property, and information" by establishing "security program standards and specifications necessary to achieve Agency-wide security program consistency and uniformity." NPR 1600.1, § P.1.

Meanwhile, on August 5, 2005, the Office of Management and Budget ("OMB") provided guidance on the implementation of HSPD-12, requiring agencies "develop a plan and begin the required background investigations for all current contractors who do not have a successfully adjudicated investigation on record . . . no later than October 27, 2007." Memorandum from OMB on Implementation of Homeland Sec. Presidential Directive (HSPD) 12 – Policy for a Common Identification Standard for Fed. Employees and Contractors 6 (Aug. 5,

2005). OMB stated that the completion of a NACI would be a prerequisite to the issuance of any identification. Id. at 5. Across all NASA facilities, over 57,000 individuals are subject to these new requirements, over 46,000 had applied as of August 31, 2007, and approximately 39,000 NASA contractors had completed the background investigation as of September 21, 2007.

C. The SF-85 Questionnaire and the Form 42 inquiries

The NACI requires the completion of a SF-85 Questionnaire, which asks the applicant to answer basic questions regarding citizenship, previous residences over the past five years, educational background, employment history over the past five years, selective service record, military history, and illegal drug use over the past year.[2] The panel took issue with Question #14, which asks:

> In the last year, have you used, possessed, supplied, or manufactured illegal drugs? When used without a prescription, illegal drugs include marijuana, cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), stimulants (cocaine, amphetamines, etc.), depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.). (NOTE: Neither your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding.)
>
> If you answered "Yes," provide information relating to the types of substance(s), the nature of the activity, and any other details relating

[2] The SF-85 also includes an "Authorization for Release of Information," which may be used only for purposes of the SF-85 and is limited by the Privacy Act.

to your involvement with illegal drugs. Include any treatment or counseling received.

The SF-85 also asks for three references who know the applicant well. Form 42 written inquiries are then sent to educational institutions, former employers, landlords, and the designated references in order to verify the information on the SF-85 and confirm the applicant's trustworthiness and compliance with the law. Question #7 on Form 42 asks references to indicate either "Yes" or "No" as to whether they "have any adverse information about this person'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." References are then asked whether they "wish to discuss the adverse information [they] have." If so, they can provide "additional information which [they] feel may have a bearing on this person's suitability for government employment or a security clearance. This space may be used for derogatory as well as positive information." Form 42 written inquiries are sent to roughly 980,000 recipients annually. 70 Fed. Reg. 61,320 (Oct. 21, 2005).

D. Procedural History

Plaintiffs filed suit on August 30, 2007, and subsequently moved for a preliminary injunction. The district court denied the plaintiffs' motion on a

number of grounds, rejecting the plaintiffs' claims that NASA lacked the statutory authority to conduct these investigations, and that the NACI violated plaintiffs' informational privacy rights. The district court found that the NACI served a legitimate governmental interest, i.e., to enhance security at federal facilities. Finding the NACI narrowly tailored with adequate safeguards in place, the court concluded that the government must be given some leeway in conducting its investigation to verify that applicants are not connected to activities that pose a security threat.

Plaintiffs filed an emergency motion for a stay of the district court's order. A panel of this court granted a temporary stay pending appeal. Nelson v. NASA, 506 F.3d 713 (9th Cir. 2007). Following an expedited briefing schedule and argument, a merits panel held that the district court abused its discretion and reversed the denial of the preliminary injunction. Nelson v. NASA, 512 F.3d 1134 (9th Cir. 2008).

Subsequently, the panel vacated its opinion and filed a superseding opinion. Nelson v. NASA, 530 F.3d 865 (9th Cir. 2008) ("Nelson II"). The panel's opinion concludes that "the Space Act appears to grant NASA the statutory authority to require the [background] investigations," id. at 875, and that the portion of SF-85's Question #14 requiring disclosure of prior drug use, possession, supply, and

manufacture does not violate the plaintiffs' constitutional right to informational privacy. Id. at 878-79. However, the panel held that the portion of SF-85's Question #14 requiring applicants to disclose "any treatment or counseling received" for illegal drug use, id. at 879, and Form 42's written inquiries violate the plaintiffs' constitutional right to informational privacy. Id. at 879-81. Accordingly, the panel concluded that "[t]he district court's denial of the preliminary injunction was based on errors of law and hence was an abuse of discretion" and ordered the district court to issue an injunction. Id. at 883.

II. Discussion

A. The panel's expansion of the constitutional right to informational privacy is unprecedented

While the Supreme Court has never clearly addressed whether there is a constitutional right of privacy in the non-disclosure of personal information, see Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977); Whalen v. Roe, 429 U.S. 589, 605-06 (1977), this circuit — along with a majority of other circuits — has found a limited right to informational privacy.[3] See In re Crawford, 194 F.3d 954,

[3] The Sixth Circuit appears to be the only circuit to reject this view. See Cutshall v. Sundquist, 193 F.3d 466, 481 (6th Cir. 1999). In addition, recognizing that it was not writing on a "blank slate" because earlier decisions indicated that such a right existed, the District of Columbia Circuit has expressed "grave doubts" as to the existence of a federal right of confidentiality. See Am. Fed'n of Gov't Employees, 118 F.3d at 791. The First Circuit has similarly expressed concern, but

958 (9th Cir. 1999). We have said that constitutionally protected privacy interests include "avoiding disclosure of personal matters" and an "interest in independence in making certain kinds of important decisions." Id. (citations omitted). "The right to informational privacy, however, is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest." Id. at 959 (internal quotation marks and citation omitted). Where a constitutional right to informational privacy is implicated, we apply intermediate scrutiny, which requires the government to show 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. (internal quotation marks and citation omitted).

For example, we have held that an employer's non-consensual pre-employment blood testing for syphilis, sickle cell genetic trait, and pregnancy implicated a constitutionally protected privacy interest in avoiding disclosure of personal, confidential medical information. See Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1269-70 (9th Cir. 1998). We have also held that a physician has a right to privacy in revealing whether he or she has AIDS to prospective patients. See Doe v. Att'y Gen., 941 F.2d 780, 796 (9th Cir. 1991).

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declined to address the issue. See Borucki v. Ryan, 827 F.2d 836, 841-42 (1st Cir. 1987).

Further, we have held that a female minor has a privacy interest in avoiding disclosure of the fact that she is pregnant as part of a judicial bypass proceeding used as an alternative to parental consent. See Planned Parenthood of S. Ariz. v. Lawall, 307 F.3d 783, 789-90 (9th Cir. 2002). We have also stated that questions during a polygraph given to a police officer applicant asking about a possible abortion and the identity of her sexual partners implicated this privacy right. See Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983). And, we have held that a constitutional right of informational privacy may extend to the indiscriminate public disclosure of social security numbers out of a fear of identity theft. See In re Crawford, 194 F.3d at 958. Never before, however, has a court concluded that a government worker employed in a secure facility has a constitutional right of privacy to prevent the government from inquiring into whether that employee has received drug treatment within the past year or to prevent the government from sending a questionnaire to references in order to verify the veracity of the employee.

1. There is no expectation of privacy in information disclosed by a designated reference responding to a questionnaire

The panel's opinion concludes that individuals have a constitutionally protected right to privacy in information disclosed to third-party employment

references. No other court has held as much, and for good reason — the Supreme Court "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith, 442 U.S. at 743-44 (citing Miller, 425 U.S. at 442-44; Couch v. United States, 409 U.S. 322, 335-36 (1973); United States v. White, 401 U.S. 745, 752 (1971) (plurality opinion); Hoffa v. United States, 385 U.S. 293, 302 (1966); Lopez v. United States, 373 U.S. 427 (1963)); see also SEC v. O'Brien, 467 U.S. 735, 743 (1984) (same). For example, the Miller Court held that a bank depositor did not have an expectation of privacy in financial information that he voluntarily turned over to banks and their employees in the normal course of business. The Court explained:

> The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

425 U.S. at 443 (emphasis added and citations omitted). Absent some privilege (e.g., attorney-client, physician-patient, priest-penitent, marital, etc.), an applicant does not have an expectation of privacy to information disclosed by a reference.

The panel concludes that Fourth Amendment case law defining whether an individual has an expectation of privacy over information that he has already disseminated to the public is not the proper focus in the evaluation of information privacy rights and contends that, instead, we should focus on the general nature of the information sought. See Nelson II, 530 F.3d at 880 n.5. Although I agree with the panel that the constitutional right to informational privacy is not limited to Fourth Amendment searches, see, e.g., Thorne, 726 F.2d at 468 (questions during a polygraph to a police applicant), I disagree with the suggestion that whether an individual has an expectation of privacy under a constitutional right to informational privacy is not informed by Supreme Court case law interpreting an expectation of privacy under the Fourth Amendment. In fact, one of the Supreme Court's first decisions recognizing a constitutional right to informational privacy specifically cited to Fourth Amendment case law in defining this right. See Nixon, 433 U.S. at 457-58 (citing Katz v. United States, 389 U.S. 347, 351-53 (1967), in evaluating whether President Nixon had a legitimate expectation of privacy over presidential papers and tape recordings).

The panel's expansion of the constitutional right to privacy and what constitutes a legitimate expectation of privacy is unprecedented. The Supreme Court has planted a set of "guideposts for responsible decisionmaking" concerning

limited fundamental rights "deeply rooted in this Nation's history and tradition" in an attempt "to rein in the subjective elements that are necessarily present in due-process judicial review." Washington v. Glucksberg, 521 U.S. 702, 720-22 (1997) (citations and quotation marks omitted). "[I]n addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." Id. at 720 (citations omitted); see also Thorne, 726 F.2d at 468 (stating that informational privacy claims must fall within the zone protected by the constitution). "[E]stablishing a threshold requirement . . . avoids the need for complex balancing of competing interests in every case." Glucksberg, 521 U.S. at 722. The panel's opinion expands the right to informational privacy by elevating personnel investigations to the realm of constitutional protection.

The panel's opinion opens the doors to lawsuits against employers who perform standard reference checks to ensure that applicants are suitable candidates for employment. In an area where States have sought measures to promote the free flow of information, see, e.g., Noel v. River Hills Wilsons, Inc., 7 Cal. Rptr. 3d 216, 220-21 (Ct. App. 2003) (recognizing that a California state statute extending a

conditional privilege against defamatory statements applies in the employment context), the panel's opinion will have the opposite effect.

The panel's opinion also fails to adhere to the Supreme Court's recent admonition that there is "a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2151 (2008) (quoting Cafeteria & Rest. Workers v. McElroy, 367 U.S. 886, 896 (1961) (rejecting Fifth Amendment due process claim of civilian contractor summarily denied access to military facility for security reasons)). As the Court stated in Engquist, "in striking the appropriate balance" between employee rights and the government's needs as an employer, courts should "consider 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." Id. at 2152.

The constitutional right to informational privacy allows individuals to safeguard certain private information — like the fact that they have had an abortion or have contracted AIDS — and ensures that those wishing to keep such information from the eyes and ears of others can do so. However, those

individuals that disclose such information to people like their landlords or employers lack any expectation that such information will be kept private. For this reason, plaintiffs have no expectation of privacy with respect to the Form 42 written inquiries.

2. There is no expectation of privacy for prior drug treatment or counseling when seeking employment with the government

The panel's opinion recognizes that the constitutional right to informational privacy does not protect an applicant from having to disclose to the government in a background investigation whether they have used, possessed, supplied, or manufactured illegal drugs within the past year. Nelson II, 530 F.3d at 878-79. However, the panel maintains that the plaintiffs are likely to succeed on their informational privacy challenge to a follow-up question regarding the disclosure of "any treatment or counseling received" for illegal drug use once an applicant acknowledges involvement with illegal drugs in the past year. Id. at 879.

The panel's position is predicated on the assertion that "[i]nformation relating to medical treatment and psychological counseling fall squarely within the domain protected by the constitutional right to informational privacy." Id. (citing Norman-Bloodsaw, 135 F.3d at 1269, and Doe, 941 F.2d at 796). However, the authority the panel cites — Norman-Bloodsaw and Doe — respectively deal with

the "highly private and sensitive medical and genetic information" from non-consensual pre-employment blood testing for syphilis, sickle cell genetic trait, and pregnancy, see Norman-Bloodsaw, 135 F.3d at 1264, 1269, and whether a doctor must disclose to patients that he has AIDS, see Doe, 941 F.2d at 796. We held in those cases that the constitutional right to informational privacy protects those individuals from having such highly private medical information enter the public domain. But here, the panel agrees that an applicant does not have a constitutional right to shield from the government the fact that he has used illegal drugs.

In National Treasury Employees Union, the Fifth Circuit noted that a public employee's expectation of privacy "depends, in part, upon society's established values and its expectations of its public servants, as reflected in our representative government." 25 F.3d at 243. Observing that "[t]oday's society has made the bold and unequivocal statement that illegal substance abuse will not be tolerated," the court held that "[s]urely anyone who works for the government has a diminished expectation that his drug and alcohol abuse history can be kept secret, given that he works for the very government that has declared war on substance abuse." Id. I see no principled distinction between an applicant having to disclose that he has used illegal drugs and having to additionally indicate whether he sought treatment or counseling for illegal drug use. In Mangels, the Tenth Circuit, assessing the

constitutionality of a requirement of public disclosure of illegal drug use by firefighters, stated "[t]he possession of contraband drugs does not implicate any aspect of personal identity which, under prevailing precedent, is entitled to constitutional protection. Validly enacted drug laws put citizens on notice that this realm is not a private one." 789 F.2d at 839 (citation omitted).

B. Even assuming that a constitutional right to privacy is implicated, NASA's procedures should be upheld because they are narrowly tailored to meet legitimate state interests.

Even if the SF-85's questions and Form 42 inquiries implicate a constitutional right to information privacy, the panel opinion's analysis does not give adequate weight to NASA's need for this information to ensure that those it trusts with access to JPL do not pose an unacceptable risk to the safety and security of the facility. It also fails to appreciate the fact that NASA's actions are narrowly tailored because the Privacy Act prevents public disclosure of this information.

1. Safety and security are legitimate state interests.

The panel's opinion acknowledges that NASA has a legitimate government interest in conducting background investigations. NASA must "protect its facilities and their occupants from harm and its information and technology from improper disclosure." NPR 1600.1, § 4.1.1. In order to "ensure maximum protection of NASA assets," NASA determined that the security requirements for

contractors should "be equitable with the employment suitability criteria for NASA Civil Service employees" and "be uniformly and consistently applied." Id. § 4.2.3.

The NACI has two components: the National Agency Check ("NAC"), which requires the completion of a SF-85, and the Form 42 Inquiries. Although a standard NAC checks name and fingerprint databases, the government determined that this was insufficient to accomplish the security objectives of HSPD-12 because these database checks would detect only individuals whose fingerprints are on file at the FBI or individuals for whom there is a known history with law enforcement or other government agencies. Thus, the government determined that a NACI was necessary because Form 42's written inquiries would help verify information on an employee's SF-85. The information would confirm or raise questions as to the applicant's trustworthiness and compliance with the law. The NACI provides a disincentive to using false information by subjecting an applicant to a potential perjury charge, and also creates a means by which the government can readily verify the validity of information entered onto the SF-85. This substantially improves the probability of detecting individuals claiming a false identity.

NASA has a legitimate need to ensure that those it trusts with access to its facilities do not pose an unacceptable risk to the safety and security of its costly

equipment or its personnel. The work performed by the plaintiffs at JPL involves some of the most sensitive and important technology developed by NASA, and implicates significant taxpayer money. Once individuals pass through one of the three main entrances, they have access to most of the facility and, while they may not be able to enter areas where classified work is actually being done, they can travel unescorted to any building on JPL's campus. Also, a NASA identification badge will ordinarily give access to other NASA facilities, and depending on other agencies' practices, access to other federal facilities. Accordingly, NASA must be able to ensure that those given identification badges meet at least minimum security guidelines.

2. NASA's procedures are narrowly tailored

Balancing NASA's legitimate needs for this information with plaintiffs' right to keep this information private requires that we look to the "overall context." See In re Crawford, 194 F.3d at 959. Our engagement in the "delicate task of weighing competing interests" requires that we consider such factors as:

> the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Id. (quoting Doe v. Attorney Gen., 941 F.2d at 796).

The panel's opinion makes our circuit the first one to find that a background security questionnaire violates a constitutional right of privacy, and diverges from the reasoning of the D.C. and Fifth Circuits, both of which have rejected privacy-based challenges to background checks similar to, or more intrusive than, the one here. In American Federation of Government Employees, the D.C. Circuit held that, assuming a constitutional right to privacy even existed, the government "presented sufficiently weighty interests in obtaining the information sought by the questionnaires to justify the intrusions into their employees' privacy." 118 F.3d at 793. The background investigations at issue included the more extensive SF-85P Public Trust Positions and the SF-86 Sensitive Questionnaires. Significantly, the D.C. Circuit held that "the individual interest in protecting the privacy of the information sought by the government is significantly less important where the information is collected by the government but not disseminated publicly." Id. (noting that "the employees could cite no case in which a court has found a violation of the constitutional right to privacy where the government has collected, but not disseminated, the information").

The Fifth Circuit similarly found that the government employees in that case had no reasonable expectation of privacy in keeping confidential the information

requested in the SF-85P Questionnaire. See Nat'l Treasury Employees Union, 25 F.3d at 244. The Fifth Circuit observed that the questionnaire requires the employees "only to disclose information to the [government], as their employer – not to anyone else, and certainly not to the public." Id.

The panel's opinion disregards the distinction between a privacy interest in avoiding *collection* of information by the government and an interest in avoiding *disclosure* by the government — a distinction recognized by both the D.C. and Fifth Circuits. This distinction is critical to this case because the government has provided adequate safeguards to ensure that the information is not disseminated to the public. The Privacy Act protects the information collected from public and/or unauthorized access and disclosure. See 5 U.S.C. § 552a(b). Courts have routinely held that security provisions designed to prevent the public disclosure of protected information weigh heavily in favor of the government. See Whalen, 429 U.S. at 601-02 (finding that extensive security procedures required by statute and regulation substantially reduce employees' privacy interests); Lawall, 307 F.3d at 790 (statute contained adequate protection to prevent unauthorized disclosure of abortion by minor female). In American Federation of Government Employees, the D.C. Circuit found it significant that the Privacy Act prohibited public dissemination of the information obtained in personnel background investigations.

118 F.3d at 793. The court was satisfied that the protections of the Privacy Act substantially reduced the employees' privacy interests. Id. at 793; see also Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 118 (3d Cir. 1987) (holding "complete absence of comparable protection of the confidential information to be disclosed in response to the . . . questionnaire" was a significant factor in finding violation of right of privacy).

In addition to Privacy Act protection, FIPS 201-1 establishes detailed privacy requirements governing the collection and retention of information, including (1) the assignment of a senior agency official to oversee privacy-related matters; (2) a Privacy Impact Assessment, ensuring that only personnel with a legitimate need for access to personal information are authorized to access this information; (3) continuous auditing of compliance; (4) use of an electromagnetically opaque sleeve or other technology to protect against any unauthorized contactless access to personal information; and (5) disclosure to applicants of the intended uses and privacy implications of the information submitted in order to obtain credentials. See FIPS 201-1, § 2.4. NASA also issued an Interim Directive augmenting NPR 1600.1, which details how "all [a]pplicants will have their information protected by applicable provision of the Privacy Act."

The Privacy Act, FIPS 201-1, and NASA's Interim Directive ensure that collected information will not be disclosed to the public.

The panel, however, is concerned that Form 42's "open-ended questions appear to range far beyond the scope of the legitimate state interests that the government has proposed." Nelson II, 530 F.3d at 881. But an effective investigation of an applicant generally requires asking open-ended questions to allow investigators some flexibility to follow up on relevant leads. Instead, the panel's opinion would second-guess determinations regarding suitability for federal employment and the security of federal institutions that are best left to the Executive Branch.

In assessing whether NASA's actions are narrowly tailored, we look at the nature of the inquiry and ask whether it is an appropriate matter of inquiry based on the legitimate concerns raised by the government. See Thorne, 726 F.2d at 469. Form 42's questions to designated references are limited to "additional information which [they] feel may have a bearing on this person's suitability for government employment or a security clearance." In American Federation of Government Employees, the D.C. Circuit found a release form in a background investigation that authorized the government to collect "any information relating to my activities" sufficiently narrowly tailored because the Privacy Act limits the

collection to "relevant" information in order to determine the fitness of an individual. 118 F.3d at 789, 794. The court observed that "the Privacy Act requires that an agency 'maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President.'" Id. at 794 (quoting 5 U.S.C. § 552a(e)(1)). The scope of Form 42's questions asking for information "bearing on this person's suitability for government employment or a security clearance" is similar to the release form in American Federation of Government Employees.

Finally, the panel concludes that the SF-85's request for disclosure of "any treatment or counseling received for illegal drug use would presumably lessen the government's concerns regarding the underlying activity," and thus, does not sufficiently demonstrate a legitimate state interest. Nelson II, 530 F.3d at 879. As discussed above, a government worker's drug use history cannot be kept from the government. See Nat'l Treasury Employees Union, 25 F.3d at 243. If a government worker's illegal drug use history is not entitled to constitutional protection, as the panel agrees, I do not see how a question regarding whether the applicant has received any treatment or counseling does not concern a legitimate state interest, especially when it provides a more complete picture of an applicant's

acknowledged drug use history. Of course, successful counseling might alleviate security concerns, but this supports rather than detracts from the inquiry's relevance and legitimacy. Given that the government may legitimately inquire as to an employee's illegal drug use, it makes little sense to prohibit the government from asking about an employee's treatment or counseling for drug use, which is necessary for a complete evaluation of the effect of the employee's drug use. The panel's opinion draws an arbitrary line, one which severely hampers the government's ability to secure its facilities.

III. Conclusion

The panel's opinion sharply curtails the degree to which the government can protect the safety and security of federal facilities. It significantly expands the constitutional right to informational privacy and puts the Ninth Circuit at odds with other circuits that have considered the right to informational privacy with respect to personnel background investigations. For these reasons, I respectfully dissent from the denial of rehearing en banc.