No. 07-56424

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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,
Plaintiffs-Appellants,

vs.

National Aeronautics and Space Administration,
an Agency of the United States, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
For the Central District of California

OPPOSITION TO PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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INTRODUCTION AND SUMMARY

The federal defendants fail to justify their renewed request for rehearing *en banc*. Defendants' primary attack on the Ninth Circuit's decision is that the court has no right to "second-guess[] the executive branch's determinations about the need for – or method of asking about – personal information." (Defs. Brief, at 3.) But the Constitution and well-established case law stand in opposition to this proposition, counseling that the courts must require a close fit between the collection of private information from citizens and the government's need for such information. The decision of the Ninth Circuit panel in this case engages in this critical check on executive power by singling out those narrow aspects of the investigation at issue which invade protected privacy interests without any justification or recourse.

The panel's decision in no way undermines the government's ability to conduct *all* reference checks, as defendants sweepingly assert, but instead focuses narrowly on certain aspects of the challenged background investigation process which are excessively intrusive and unjustified for workers in non-sensitive or low risk positions. Relying on well-established precedent from this Circuit and the Supreme Court, the panel found constitutionally protected privacy interests threatened by several steps in the investigation process: the requirement that Caltech employees at JPL disclose drug counseling and treatment; and the requirement that all references, landlords and prior employers provide highly personal information about the individual's "financial integrity," "mental or emotional stability," "general

behavior or conduct, " or any other adverse information. Both of these aspects of the background investigation easily could be omitted for such employees without jeopardizing in anyway the government's legitimate need to conduct background investigations of *higher risk* employees. Moreover, even though the government may want to use these same forms for all agency employees, including those seeking security clearances, and may have done so for many years *without challenge* or review by the courts, does not render the process constitutional; the courts must continue to safeguard individual privacy rights even in the face of the government's assertion that it is simply engaging in "business as usual."

The fundamental rights at stake and the lack of legal or factual justification for encroaching upon them under the circumstances presented here fully support the panel's conclusion that plaintiffs are likely to prevail on their claims under the United States Constitution. Moreover, contrary to defendants' assertion, the panel's decision does not create any conflict with decisions in the D.C. and Fifth Circuit, as no circuit has examined the background investigation and forms at issue here.

FACTUAL STATEMENT

Defendant National Aeronautics and Space Administration ("NASA") was created by Congress in 1958 as a purely civilian agency, dedicated to the exploration of space for "peaceful purposes for the benefit of all mankind." Pub. L. 85-568, § 102, 72 Stat. 433. California Institute of Technology ("Caltech") is a non-profit

educational institution and one of the premier research institutes in the world. JPL is an operating division of Caltech, staffed entirely by Caltech employees. Excerpt of Record ("ER") 1210-1213. JPL's physical facilities are owned by NASA. (*Id.*)

The plaintiffs in this action are scientists, engineers and administrative support personnel employed by Caltech to work at the JPL facility on NASA programs, all of whom have been designated by NASA as "low risk" or "non sensitive" employees. ER 1248, 1444, Exh. 10; Exh. 11, at 266. None of them have security clearances nor do they work with classified material of any kind. (*See, e.g.* ER 1371.) The JPL facility does not operate in any way like a secure government facility but rather prides itself on the openness of its campus and the streams of visitors it hosts every day. ER 0145-0149. "As an extension of Caltech," one engineer notes:

> JPL is a unique combination of academia and government. JPL has always operated more as a university campus type environment than as a high security government facility and continues to do so to this day.. . . JPL has instituted [only] limited physical security precautions. For example, there are no metal detectors, no inspection of handbags, and vehicle inspectors are cursory and for cars, only conducted randomly. . . . Many [] personnel including students and others who work part-time or only on lab several months per year, are only required to submit to a NAC check before being granted unescorted access to the lab including computer access. This includes foreign nationals." ER 0145-0147.[1]

On August 27, 2004, President Bush signed Homeland Security Presidential Directive 12 (HSPD-12), entitled "Policy for a Common Identification Standard for

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[1] All low risk contractors at JPL, including plaintiffs, have submitted to a NAC check, which is minimally intrusive and not challenged here.

Federal Employees and Contractors," applicable to all Executive Branch departments and agencies. HSPD-12's stated purpose is to ensure that "secure and reliable forms of identification" are used by government employees and contractors.

In response to HSPD-12, in March 2006, the Department of Commerce promulgated a standard entitled "Personal Identify Verification (PIV) of Federal Employees and Contractors," codified at FIPS PUB 201-1. The PIV standard explained that its sole authority was based on HSPD-12. The standard further specifies that the background investigation required will be a "National Agency Check with Inquiries," or its equivalent, for which each applicant will be required to complete Standard Form (SF) 85. ER 0856, 0903.

Working separately to respond to HSPD-12, in 2006 NASA had instituted an identification badge system (the OneNASA badge), which could be used at all NASA facilities. ER 0969-0970, 0974-0977, 1004-1014. To obtain this badge, JPL employees were required to provide basic personal information, submit two forms of approved identification, and undergo fingerprinting. *Id.* None of the forms required that JPL employees waive their privacy rights in any way. *Id.* Plaintiffs had no objection to this process, which fully met the objectives of HSPD-12.

Nonetheless, NASA ultimately rejected the OneNASA badge and instead imposed the NACI background investigation on all low risk personnel. The first form at issue here, SF 85, requires various background information to which

plaintiffs do not object, e.g., name, date of birth, place of birth, social security number, etc. The form also requests information regarding the applicant's drug use history, as well as "treatment and counseling" for the same. (A 57.) Applicants are also required to sign, as part of SF 85, an extremely broad "Authorization for Release of Information," which authorizes the agency to collect "any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." (A58.)

Each of the applicant's references, employers and landlords are then sent an "Investigative Request for Personal Information," Form 42, which asks whether the recipient has "any reason to question [the applicant's] honesty or trustworthiness" or has "any adverse information about [the applicant's] employment, residence, or activities" concerning "violations of the law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," and "other matters." (A 59-60.)

This information is then analyzed as part of a suitability adjudication to determine the individual's eligibility for access to the facility (and thus for employment). ER 0518-0519. The evaluative criteria include, *inter alia*: "delinquency in meeting financial obligations," "sexual misconduct with impact on job," "carnal knowledge," "sodomy," "attitude," "homosexuality," "judgment, reliability and dependability issues," "physical health issues," and "mental,

emotional, psychological or psychiatric issues." ER 1332-1342.

After a panel of this court (B. Fletcher, Reinhardt, Berzon) granted a temporary injunction pending appeal (A 46-50), the merits panel issued a temporary injunction finding that the background investigation violated plaintiffs' informational privacy rights and the Administrative Procedure Act. (A 27-45.) The government sought rehearing *en banc*, which resulted in an amended opinion. The panel found the background investigation unconstitutional because it asked whether an individual had obtained drug treatment or counseling in the prior year. (A 20.) Further, the panel found that Form 42 constituted an unconstitutional invasion of plaintiffs' informational privacy interests. (A22-24.)

LEGAL ARGUMENT

I. The Panel Properly Found Plaintiffs Likely to Prevail on their Informational Constitutional Challenge to The Background Investigation

The district court below, the emergency motion panel which issued an injunction pending an appeal, and the regular panel which ordered a preliminary injunction all found that serious privacy concerns were raised by the breadth of the background investigation imposed by NASA. (A 22; A38-39; A48.) Defendants basically raise three arguments in seeking *en banc* review, each of which was properly rejected by the panels below: 1) that the information sought here is not of a fundamental nature akin to marriage, procreation and contraception and so is not entitled to protection from government inquiry; 2) that privacy protections only come

into play when information is disclosed *by* the government, as distinct from situations where individuals are compelled to disclose information *to* the government; and 3) that "the government necessarily seeks and receives much personal information of varying degrees of sensitivity" and should not have to withstand "ad hoc" judgments by the courts "on the precise extent of the government's need," particularly in the employment context (Defs. Brief. At 3).

A. *The Information at Issue Falls Within the Protections Afforded Informational Privacy*

Defendants' argument that the Constitution does not protect any information which does not fall within the narrow confines of material related to an individual's sexual or procreative activities ignores well established law. As the panel below found, the requirement that applicants disclose drug treatment or psychological counseling invades reasonable expectations of privacy in medical history, citing *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1983)("the constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality).

The court distinguished questions about illegal drug *use*, following other circuits which have found such questions not violative of informational privacy rights. (A18-20.) The panel did not decide the issue of whether illegal drug use was constitutionally protected personal information. (A19.) Rather, the court concluded that it did not need to reach that issue because it found that questions "requiring

disclosure of prior drug use, possession, supply and manufacture" were "narrowly tailored to achieve the government's legitimate interest" of ending illegal drug use. (A19-20.) But the court properly found that the same could not be said about "treatment or counseling," because "information related to medical treatment and psychological counseling falls squarely within the domain protected by the constitutional right to informational privacy." (A20.)

This conclusion is unquestionably correct. "Many courts and commentators have concluded that, because of the uniquely personal nature of mental and emotional therapy, accurate diagnosis and effective treatment require a patient's total willingness to reveal the most intimate personal matters, a willingness that can exist only under conditions of the strictest confidentiality." *Hawaii Psychiatric Soc., Dist. Branch of American Psychiatric Assoc. v. Ariyoshi*, 481 F. Supp. 1028 (D.Haw. 1979)(collecting scientific publications and reviewing case law)(constitutionally protected right of privacy extends to an individual's liberty to make decisions regarding psychiatric care without unjustified governmental interference); *Caesar v. Mountanos*, 542 F.2d 1064, 1067 n. 9 (9th Cir. 1976)("the right of privacy encompassing the doctor patient relationship identified and explained in *Griswold*, *Roe*, and *Doe* goes beyond the factual context of those cases, i.e., intimate marital and sexual problems, and extends to psychotherapist-patient communications").

Similarly, the panel correctly found that the information sought by Form 42 also invades upon informational privacy rights – questions soliciting any "adverse

information" about financial integrity, abuse of alcohol, mental or emotional stability, etc. (A20.) Such information is highly personal, the court found, and therefore constitutionally protected.[2]

Of course, both with respect to questions regarding drug counseling and the private information ought by Form 42, the rule against disclose invoked by the panel is not absolute. Rather, applying *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999), the panel held that such information could be compelled to be disclosed to the government if the government could demonstrate a legitimate government interest and that the questions were "narrowly tailored to meet the legitimate interest." (A17, citing *Crawford*, at 959.)

The panel also properly found that the government had not sufficiently justified the intrusive aspects of the background investigation: questions regarding drug counseling or treatment; and the questions posed to all references, landlords and prior employers on Form 42. In its petition for rehearing *en banc*, the government still refuses to offer any concrete justification for seeking information about drug counseling and treatment, or the various intrusive questions posed by Form 42 beyond asserting that it has the unfettered right to do so. (Defs. Brief at

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[2]This decision is supported by many cases expanding the right to privacy beyond the realms of sexual and health matters. *See, e.g. Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) (right to privacy extends to social security numbers; *Barry v. City of New York*, 712 F.2d 1554, 1562-63 (2d Cir. 1983) (financial reports); *Plante v. Gonzalez,* 575 F.2d 1119 (5th Cir. 1978) (officials' privacy interest in their financial affairs).

16.) For example, defendants do not give a shred of argument or evidence to justify asking about drug counseling or treatment, despite entitling one section, "Asking JPL employees who have Acknowledged Illegal drug use in the Past Year Whether they Have Sought Counseling Furthers a Legitimate Government Interest." However, no argument is even advanced in this section as to why the government needs information about such psychological treatment or counseling. (Defs. Brief, at 14-16.)

The *only* factual basis for requiring this background investigation, as stated by defendants, is that contractors can "walk right up to any building on JPL's entire facility" and may get "very close to facilities where sensitive . . . work is conducted." (Defs. Pet., at 18.) Defendants admit that plaintiffs and other non-sensitive employee at JPL cannot "actually enter the buildings where sensitive or classified work is conducted." (ER 766.) Yet thousands of visitors regularly have access to JPL *without any type of background investigation* and can get just as "close" to buildings as the long-term JPL employees involved in this case. (ER 0145-0149.) If the government could justify requiring an intrusive background investigation of anyone who can get "close" to a federal facility, it would reduce the requirement that the government establish a legitimate need to a nullity. On this slim evidentiary showing, the panel properly found that defendants had not established a legitimate need for the private information sought as part of the background investigation.

There is also no conflict between the panel's decision and decisions from the

D.C. and Fifth Circuits. *American Fed. of Gov't Employees, AFL-CIO v. Dept. of Housing & Urban Devel.,* 118 F.3d 786 (D.C.Cir. 1997), considered whether employees in *sensitive public trust* positions, as distinguished from the low risk, non-sensitive positions here, could be required to disclose drug use on their employment application.[3] The D.C. Circuit's decision that the government can require such disclosure creates no conflict with the panel's decision, as the latter involves only *low risk* employees. Similarly, *Nat'l Treasury Employees Union v. U.S. Dept. of the Treasury*, 25 F.3d 237 (5th Cir. 1994), only considered the limited question whether employees in public trust positions could be required to disclose prior drug use.

B. *The Government's Collection of Private Data Implicates Informational Privacy Rights Even if there is no Public Dissemination*

Defendants argue that *en banc* review is required because it is only the disclosure of personal information by the government to third parties that triggers constitutional concerns, not the "mere" collection of personal data about job applicants. (A15.) While the panel noted that the "risk of public disclosure is undoubtedly an important consideration in" analyzing the constitutionality of a government investigation, "it is only one of many factors that we should consider." (A21.) The court properly held that the right to informational privacy safeguards personal information from government collection even when the government grants

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[3] "A public trust position is one 'involving policy making, major program responsibility, law enforcement duties, or other duties demanding the highest degree of public trust.'" *American Fed of Gov't Employees*, 118 F.3d, at 788.

assurance that it will not be publicly disclosed. (A22.) In so ruling, the court relied on a long line of cases. *E.g. Planned Parenthood of S.Ariz v. Lawall*, 307 F.3d 783, 790 (9th Cir 2002)("[T]he right to 'informational privacy'. . . applies both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public"); *Norman-Bloodshaw,* 135 F.3d at 1269 (noting that government action can violate the right to privacy without disclosure to third parties).

In addition to the cases cited by the panel, numerous federal decisions have recognized that individuals have a privacy right in not disclosing information to the government separate and apart from the right to not have such information further disclosed to the public. *E.g.*, *McKenna v. Fargo*, 451 F.Supp. 1355, 1381 (D.N.J. 1978) ("While, in this case, as in *Whalen*, the facts show there has not been any public disclosure, the character and amount of information given to the Government alone is itself an intrusion on the privacy interest in nondisclosure of personal information to government employees recognized in Whalen"); *Thorne v. City of El Segundo,* 726 F.2d 459, 471 (9th Cir.1983) (pre-employment questions into the applicants' private, off-duty personal activities violated constitutional guarantees of privacy; it was irrelevant to the court's analysis that the information remained internal to the agency); *Nat'l Treasury Employees Union v. U.S. Dept. of Treasury,* 838 F. Supp. 631, 637-38 (D.D.C. 1993) (plaintiffs demonstrated the likelihood of prevailing on the merits of their claim that requiring them to fill out a very similar

form (SF-85P) violated their right to privacy, regardless of whether the information would subsequently be disclosed to any third party). The concern was aptly described in *Nat'l Treasury Employees Union*:

> there is an obvious threat of significant harm if the plaintiffs are forced to disclose this information to the Customs Services. Obviously, *once this type of highly personal information is disclosed to the government, the revelation cannot be undone.* As plaintiffs correctly point out, "the injury is the threatened loss of constitutional rights. That injury occurs when plaintiffs are forced to choose between revealing their constitutionally protected information by submitting completed forms and preserving their rights at the cost of possible further discipline or discharge." *Id.* at 640.

Moreover, the waiver required to be signed by each individual expressly states that any information collected may be released to:

> the news media or the general public, [provided the] disclosure of which would be in the public interest and . . . would not constitute an unwarranted invasion of personal privacy [all to be determined by the federal government]; to contractors, grantees, experts, consultants or volunteers when necessary to perform a function or service related to this record for which they have been engaged; . . . to the National Archives and Records Administration for records management inspections; [and to a court] or adjudicative body in a proceeding when (a) the agency or any component thereto or (d) the United States is a party to litigation or has interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation. (A52)

Thus, defendants cannot claim that the information obtained will never be publicly disclosed as the government expressly warns each applicant that their private information can be released to multiple source (including the press and the public) at the government's election. This potential disclosure is yet another factor

supporting the panel's conclusion that the government has not justified its collection of this data on low risk employees.

C. *The Government's Assertion of A Special Privilege in the Employment Context is Unsupported by Decisional Law*

Finally, Defendants' reliance on *Enquist v. Oregon Dept. of Agr.*, 128 S.C. 2146, 2151 (2008), for the proposition that the government may collect private information on its employees without establishing necessity or justification, is seriously misplaced. While it is true that *Enquist* and other cases have noted that the government has greater powers to manage its own internal operations than it may have to "regulate or license" the public, none of those cases have granted the government carte blanche to disregard constitutional principles in its dealings with its employees. On the contrary, the case law is replete with decisions requiring constitutional review of the government's treatment of its own employees. *See, e.g. Garrity v. New Jersey*, 385 U.S. 493 (1967)(government employees "are not relegated to a watered-down version of constitutional rights"); *Quon v. Arch Wireless Operating Co.*, 2529 F.3d 892 (9th Cir. 2008)(government employees have constitutionally protected privacy interest in text messages sent on government-issued cell phone where supervisors allowed employees to have an expectation of privacy); *AFGE Local 1 v. Stone*, 502 F.3d 1027 (9th Cir. 2007)(rejecting the government's argument that by excluding TSA screeners from the protections of the Civil Service Reform Act of 1978 ("CSRA") or the FAA personnel management

system, and by granting the TSA unfettered discretion to determine screeners' employment terms, Congress intended to preclude judicial review of screeners' claims that they had been terminated in violation of the First Amendment).[4]

Enquist stands for the narrow proposition that a solitary employee cannot bring a claim for denial of equal protection based on a "class of one," where the employee is not part of a protected suspect class. In that case, the state employee alleged her employer was singling her out for arbitrary discipline, not associated with any protected class or trait. The court concluded that in the employment context, the employee could not raise a claim of arbitrary discrimination unless she was a member of a protected class. This decision bears no relation to the systemic use by the government of a background investigation which seeks private information on a host of issues.

DATED: September 8, 2008

Respectfully Submitted,
HADSELL STORMER KEENY
RICHARDSON & RENICK LLP

By _____
Virginia Keeny

[4]In the related area of drug screening, the courts only allow drug testing of public employees in "safety sensitive" positions. *See, e.g. Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (upholding testing of employees in positions directly involving the interdiction of drugs, or positions that require the incumbent to carry a firearm but questioning reasonableness of testing for employees in non-sensitive positions.) *See also Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) (individual's reasonable expectations of privacy in their medical history includes information about drug use).

CERTIFICATION OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

No. 07-56424

Appellant certifies that this brief complies with the type-volume limitation pursuant to the Circuit Rule 35-4 and 40-1, because it uses a proportionally spaced font with a typeface of 14 points and contains 3,740 words, as calculated by WordPerfect 11, the word-processing system used to prepare the brief.

DATED: September 8, 2008

Respectfully submitted,
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By _____
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(FRAP 25(a)(2)(B))
(Circuit Rule 30-1)

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Bianca Ramirez
Declarant

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OPPOSITION TO PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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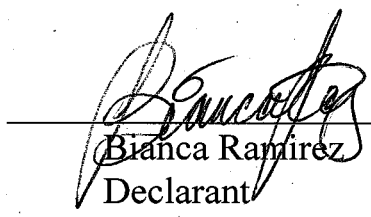

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