Nelson v. NASA, No. 07-56424

WARDLAW, Circuit Judge, concurring in the denial of rehearing en banc, joined by PREGERSON, REINHARDT, W. FLETCHER, FISHER, PAEZ, and BERZON Circuit Judges:

Because the preliminary posture and the lack of an evidentiary record prevent us from fully reviewing the merits of this appeal, because the panel opinion creates no intra- or inter-circuit split, and because the narrow holding does not present an issue of exceptional importance, the active judges of our court, in a vote that was not close,[1] denied rehearing of this case en banc. I concur.

This is an interlocutory appeal from the denial of a preliminary injunction sought by a class[2] of long-term California Institute of Technology ("Caltech")

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[1] *Compare Cooper v. Brown*, No. 05-99004, 2009 WL 1272436, at *57 (9th Cir. May 11, 2009) (Reinhardt, J., dissenting from denial of rehearing en banc).

[2] The putative class consists of up to 9,000 employees—not merely the 28 class representatives referenced in Judge Callahan's dissent. Class representatives include preeminent research scientists who have coordinated the Mars Exploration Rover Mission, served on the Jet Propulsion Laboratory ("JPL") Senior Research Counsel, and led NASA's New Millennium Program and the Mars Pathfinder Mission. Class representatives also include leading engineers who have been at the forefront of many recent space missions, including the Mars Exploration Rovers Project, and the Galileo, Messenger (Mercury), and Magellan (Venus) missions, as well as JPL's chief engineer for flight dynamics, the project system engineer for the Kepler Space Observatory, and a lead principal engineer on the Constellation Program. Their research and findings have been published widely in scientific, peer-reviewed journals, and they have received hundreds of prestigious awards from NASA and the research community. The success of their scientific mission,

(continued...)

employees, including scientists, engineers, and administrative support personnel—all classified by the National Aeronautics and Space Administration ("NASA") as low risk employees.[3] They oppose implementation of a new, wide-ranging, and highly intrusive background check imposed as a condition of their continued employment at Jet Propulsion Laboratory ("JPL"). Caltech itself objected to the new requirement as "inappropriate." Reversing the district court's denial of the preliminary injunction, we concluded that, as to the constitutional right of privacy claim,[4] "serious questions going to the merits were raised and the balance of harms tips sharply in [the plaintiff-class's] favor," *Walczak v. EPL*

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[2](...continued)
which has been operating since 1958 without the new background checks, is renowned.

[3] Low risk employment positions do not involve policymaking, major program responsibility, public safety, duties demanding a significant degree of public trust, or access to financial records with significant risk of causing damage or realizing personal gain. *See* 5 C.F.R. § 731.106(b) (defining the characteristics of positions at the high or moderate risk levels). NASA itself designated members of the plaintiff class as low risk; low risk employees comprise ninety-seven percent of JPL employees. NASA's designation of every position subject to a suitability determination "as a high, moderate, or low risk level as determined by the position's potential for adverse impact to the efficiency or integrity of the service" is authorized by the U.S. Office of Personnel Management. *See* 5 C.F.R. § 731.106(a).

[4] We affirmed the district court's rejection of the class's Administrative Procedure Act and Fourth Amendment claims.

Prolong, Inc., 198 F.3d 725, 731 (9th Cir. 1999),[5] where the class faced the Hobson's choice of losing their jobs or submitting to an unprecedented intrusion into their private lives for which the government failed to advance a legitimate state interest. *Nelson v. NASA* (*Nelson II*), 530 F.3d 865, 883 (9th Cir. 2008). "[S]ubsumed in our analysis of the balance of hardship to the parties," *Golden Gate Rest. Ass'n v. City & County of S.F.*, 512 F.3d 1112, 1126 (9th Cir. 2008), was our determination that this "injunction is in the public interest," *Winter v. Natural Res. Def. Council, Inc.*, --- U.S. ---, 129 S. Ct. 365, 374 (2008), since it is indisputable that entry of the injunction "further[s] the public's interest in aiding the struggling local economy and preventing job loss," *The Lands Council v.*

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[5] Because our decision issued in December 2007, we did not have the benefit of the Supreme Court's most recent formulation of the preliminary injunction standard in *Winter v. Natural Resources Defense Council, Inc.*, --- U.S. ---, 129 S. Ct. 365, 374 (2008) (holding that a party requesting preliminary injunctive relief must demonstrate "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest"). Our result would be no different under *Winter*, however, because we did not apply the "possibility of irreparable injury" standard that the *Winter* Court found "too lenient." *Id.* at 375. Instead, we concluded that the employees "face[d] a stark choice—either violation of their constitutional rights or loss of their jobs." *Nelson II*, 530 F.3d at 881. "[C]onstitutional violations . . . generally constitute irreparable harm" and "the loss of one's job . . . carries emotional damages and stress, which cannot be compensated by mere back payment of wages." *Id.* at 882. Irreparable harm, therefore, was not only likely, but certain.

McNair, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc).[6] *See Nelson II*, 530 F.3d at 881–82. A prior three-judge panel of our court had ruled identically in issuing an injunction pending the merits hearing of this appeal. *Nelson v. NASA* (*Nelson I*), 506 F.3d 713, 715 (9th Cir. 2007).

Judge Callahan writes that, "[u]ntil now, no court has held that applicants have a constitutionally protected right to privacy in information disclosed by employment references." This is a misstatement of our panel's holding. No "applicants" are members of the putative class, only existing long-term employees. Each class member, when hired, underwent extensive background checks, including employment references. The employees challenge now a newly proposed, free-floating, wide-ranging inquiry with no standards, limits, or guarantee of non-disclosure to third parties, for which the government intends to

[6] Thus, the public interest requires consideration of the fact that the California unemployment rate reached 10.1 percent in January 2009 due to the loss of 79,300 jobs, the largest unemployment increase in any state for the month, *see Regional and State Employment and Unemployment Summary*, U.S. Bureau of Labor Statistics 1, 3 (Mar. 11, 2009). Clearly, the public interest in minimizing job loss in this difficult economic climate, *The Lands Council*, 537 F.3d at 1005, weighs in favor of the injunction pending a merits determination. The loss of up to 9,000 jobs from one of Pasadena's largest employers would be particularly devastating in this community, which has an estimated labor force of 77,200 people. *See Monthly Labor Force Data for Cities and Census Designated Places February 2009*, State of California Employment Development Department (Mar. 20, 2009).

coerce a "release" by threatening the loss of their jobs. Contrary to Judge Callahan's representation, the newly proposed investigation is not limited to information "voluntarily turn[ed] over to third parties."[7] Some of the information sought from neighbors, landlords, employment supervisors, and the like includes private sexual practices, sexual orientation, and physical and psychological health issues, and the government does not ask sources to limit their answers only to information voluntarily shared by the subject person. Judge Callahan also suggests that our opinion protects information about drug treatment "in the face of a legitimate need by the employer to protect the safety and security of a facility." The opinion does no such thing—rather, we specifically noted that *in this context*, open-ended inquiries and questions regarding drug treatment are not *narrowly tailored* to a legitimate need to protect the facility. *Nelson II*, 530 F.3d at 880–81.

Our opinion is actually much narrower than Judge Callahan would have her

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[7] Even if it was, Judge Callahan's contention misses the crucial point that the right to informational privacy and Fourth Amendment rights are not fully coextensive. *See Nelson II*, 530 F.3d at 880 n.5. In our opinion, we noted that although in the Fourth Amendment context there is a general principle "'that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties,'" *id.* (quoting *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979), and citing *United States v. Miller*, 425 U.S. 435, 443 (1976)), "the 'legitimate expectation of privacy' described in this context is a term of art used only to define a 'search' under the Fourth Amendment, and *Miller* and *Smith* do not preclude an *informational privacy* challenge to government questioning of third parties about highly personal matters," *id.*

audience believe. Adhering to our precedent in *In re Crawford*, 194 F.3d 954 (9th Cir. 1999) (holding that public disclosure of Social Security numbers implicates the right to informational privacy), *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998) (holding that unauthorized employer testing for sensitive medical information violates employees' right to informational privacy), *Doe v. Attorney General*, 941 F.2d 780 (9th Cir. 1991) (holding that an individual's HIV-status is afforded informational privacy protection and that the government may seek and use such information only if its actions are narrowly tailored to meet legitimate interests), and *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (holding that a potential employee of the state may not be required to disclose personal sexual matters to gain the benefits of state employment), we concluded that only two aspects[8] of the government inquiries in the challenged Standard Form 85 ("SF 85") questionnaire and Investigative Request for Personal Information ("Form 42") raised serious informational privacy concerns. *Nelson II*, 530 F.3d at 879–81. After engaging in the requisite delicate balancing, we reasoned that although the government asserted several legitimate

[8] The class also challenged the investigation as lacking in statutory authority under the Administrative Procedure Act, and argued that all aspects of the investigation, including the Form 42 request and the entire SF 85 questionnaire, were unconstitutional under the Fourth Amendment.

interests in investigating its contract employees, it had failed to demonstrate that its inquiry was narrowly tailored to meet those interests; further, the government asserted no legitimate interest to justify inquiries regarding drug treatment, as opposed to drug use. *Id.* We reversed the district court *only* to the extent that the government sought disclosure of "any treatment or counseling received" at *any* time for drug problems, *id.* at 879, and planned to engage in a free-ranging investigation of the most private aspects of class members' lives, *id.* at 880–81.

I.

The class challenges the limitless nature of the private information the government now seeks and the potential uses for this information. The newly instated NASA Procedural Requirements incorporate the Personal Identity Verification ("PIV") standard promulgated by the Department of Commerce under Homeland Security Presidential Directive 12 ("HSPD-12").[9] These requirements mandate that every JPL contract employee undergo a National Agency Check with Inquiries ("NACI") before he can obtain the new identification badge required for access to JPL facilities. As part of a NACI, JPL employees must submit SF 85,

[9] HSPD-12 was issued in response to identity fraud concerns raised by the 9/11 Commission. It directed the U.S. Secretary of Commerce to develop a uniform "standard for secure and reliable forms of identification." Directive on Policy for a Common Identification Standard for Federal Employees and Contractors, 2004 Pub. Papers 1765, 1765 (Aug. 27, 2004).

which seeks a host of information subsequently checked against four government databases, and sign an Authorization for Release of Information which permits the government to collect information about the employee. *Nelson II*, 530 F.3d at 870–71. The government collects information through Form 42.[10] *Id.* at 871. Once the information has been collected, NASA determines whether an employee is "suitable" for continued access to its facilities. *See* 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."). Because Caltech established a policy that JPL employees who fail to obtain new identification badges will be terminated, a negative suitability determination results in the loss of employment with attendant harm to the employee's career.

There is nothing in the record to support Judge Callahan's statement that the government inquiry in Form 42 is limited in any way to information that class members "voluntarily turn over to third parties." The record demonstrates the contrary: the Authorization for Release of Information authorizes any investigator conducting a background check using Form 42 to obtain information not only from past employers, landlords, and educational institutions, but also from any other

[10] The information requested in SF 85 and Form 42 and the scope of the Authorization for Release of Information are described in our opinion. *See Nelson II*, 530 F.3d at 871.

sources of information that the investigator wants to consider. And, contrary to Judge Kleinfeld's suggestion, the release specifically states that the investigation is *not* limited to these sources. "[T]he form invites the recipient to reveal *any* negative information of which he or she is aware," no matter how that "information" fell into the hands of the source. *Nelson II*, 530 F.3d at 881. Judge Kleinfeld also belabors the usefulness of open-ended questions when an employer interviews a potential employee, but misses the distinction between that necessary practice and the standardless and limitless mining of highly personal and employment-irrelevant data from third parties at issue here. There are serious questions as to whether such open-ended inquiries are invasive of privacy rights; reasonable reference checks and interviewing techniques, on the other hand, remain within the government's prerogative.

Moreover, the record suggests that the government will seek private information unrelated to employment and use such information to determine suitability for employment. At multiple meetings about the new procedures, class members specifically asked about the investigation's scope and the criteria analyzed to make the suitability determination. The program directors refused to answer questions about scope and criteria. The only information class members were able to glean about the proposed use of SF 85 and Form 42 and the suitability

determination came from a document accidentally posted on the JPL internal HSPD-12 website between about August 2, 2007, and September 11, 2007.

The document, entitled "Issue Characterization Chart," listed "sodomy," "carnal knowledge," "abusive language," "personality conflict," "bad check," "credit history," "physical health issues," and "mental, emotional, psychological or psychiatric issues" as suitability issues. The Issue Characterization Chart further indicates that "[h]omosexuality, in and of itself, while not a suitability issue, may be a security issue and *must be addressed completely*, when indications are present of possible susceptibility to coercion or blackmail" (emphasis added). Far from the minimally intrusive questions to former employers and named references that Judges Callahan and Kleinfeld portray, the record shows the very real potential for intrusions into undisclosed private sexual, financial, and health matters and the use of those private matters to determine job suitability. As our opinion states, "[t]he record is vague as to the exact extent to and manner in which the government will seek this information." *Id.* at 871.

Judge Callahan represents that the safety and security of federal facilities is implicated by enjoining the government from a limitless investigation into the class members' private lives. In a similar vein, Judge Kleinfeld suggests that our opinion "enjoin[ed] reasonable reference checks on applicants for federal

government functions" in a manner "likely to impair national security." In addition to the fact that this accusation again mistakenly focuses on applicants, whereas our opinion addressed existing employees, Judge Kleinfeld's and Judge Callahan's claims are simply unsupportable. Our opinion did not issue a blanket injunction against the use of Form 42—we held only that the use of this Form to investigate low risk, existing contract employees raises serious legal questions. The government is obviously free to continue reasonable reference checks, and is even free to utilize Form 42 when the government's legitimate interests in investigation are sufficiently great and when the government adheres to proper limiting standards that narrowly tailor its quest for information. The fact that this Form may be frequently and appropriately used in other contexts does not mean that it would be proper here. Further, the opinion does not "forbid[] the government from making inquiries," as Judge Kleinfeld suggests. Nor does it affect the government's ability to confirm identity, take fingerprints, run criminal records checks, or compel individuals to disclose prior drug use. It preliminarily enjoins the government only from compelling the disclosure of any and all drug counseling and treatment information and from investigating without limits into areas of class members' lives unrelated to employment.

Judge Kleinfeld's complaint that we failed to consider the public interest in national security is similarly misguided. Our explanation of the nature of plaintiffs' low risk positions which do not involve public safety or a significant risk for causing damage, *id.* at 880–81, our careful analysis of the non-sensitive nature of their work, *id.*, our admonition that our decision "would not affect NASA's ability to investigate [employees] in 'high risk' or 'moderate risk' positions," *id.* at 882, and the notation that many successful years passed before NASA decided to implement NACI,[11] *id.*, reflect our reasoned decision that national security is not implicated by the grant of a preliminary injunction. It is also worth noting that throughout this litigation the government itself has never argued the public interest in national security as a justification for its proposed background investigation.

The JPL, a research laboratory run jointly by NASA and Caltech, is not a vulnerable facility desperately in need of stronger security measures. JPL is located approximately five minutes to the north of our Pasadena courthouse off Interstate 210, and a large freeway sign directs the traveling public to the facility.

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[11] Judge Kleinfeld misreads the record when he asserts that our injunction "stops the government from making the inquiries it has been making for decades"—the government concedes that it sought to impose the wide-ranging background check only as of 2007.

JPL operates as a university campus rather than as a high-security government facility, encouraging students, visiting scientists (often foreign nationals), and other members of the public to enter and tour the facilities. JPL regularly opens its doors to all members of the public. Tens of thousands of visitors have unrestricted access to the lab with no requirement that they present identification.

When visitors arrive at the campus, they encounter only cursory random inspections of cars. Guards wave passenger cars through and take a quick peek inside trucks and busses. Drivers of trucks with chemicals and equipment park on campus while their identity is verified by presentation of a driver's license. Once a driver's identity is checked, the truck driver pulls right up to the buildings, a privilege enjoyed by less than thirty percent of the permanently badged employees. There are no metal detectors and no inspections of handbags.

While there are millions of dollars in taxpayer money invested in this facility and its operations, any risk that may exist derives from the complexity and unknown character of the subjects of JPL's exploration, not security concerns. JPL protects expensive government equipment with Flight Project Practices that govern every aspect of a mission's design, development, testing, and operations. These Practices require all critical activities to be peer-reviewed and independently validated. They are not affected by the issuance of new identification badges.

While the preliminary injunction remains in effect, the public may rest assured that the class members, many of whom have worked at JPL and Caltech for twenty to thirty years, have undergone serious security checks, which the government found sufficient to safeguard our national space effort up until two years ago when it first decided to impose its proposed limitless inquiry. A temporary restriction against a standardless investigation of employment-irrelevant data will have little to no impact on JPL, in part because of the security measures already in effect.

JPL currently uses secure and reliable forms of identification that comply with HSPD-12. HSPD-12 defines "secure and reliable forms of identification" as identification that "(a) is issued based on sound criteria for verifying an individual employee's identity; (b) is strongly resistant to identity fraud, tampering, counterfeiting, and terrorist exploitation; (c) can be rapidly authenticated electronically; and (d) is issued only by providers whose reliability has been established by an official accreditation process." 2004 Pub. Papers at 1766. Every contract employee entering the JPL facility must wear an appropriate badge that includes his photograph, an employee number, and a bar code. The "One NASA" badge, which NASA began issuing in response to HSPD-12, requires personal information, two forms of approved identification, and fingerprinting. The class

does not challenge uniform identification measures or the requirements for obtaining a "One NASA" badge.

Judges Callahan and Kleinfeld fail to articulate how the two narrow aspects of the additional investigation sought by the government and temporarily enjoined impair national security. Surely, whether a Caltech scientist had "carnal knowledge," a personality conflict, or used abusive language at home would not impact our national security. Put another way, the dissenters (other than Judge Kozinski) seem to be suggesting that the government has an unlimited right to violate the most fundamental privacy interests of its contract employees because almost anything might affect national security. At a minimum, this is a serious legal question. That NASA has existed for more than fifty years without these inquiries, *see Nelson II*, 530 F.3d at 871, that the challenged program was implemented almost eight years after the government determined it should have more complete screening of contract employees, *id.*, and that class members are long-term employees of JPL who have previously undergone significant security checks, suggest that remand was appropriate to develop the record further and to allow class members to pursue their claim on an orderly basis.

II.

Judge Callahan asserts that our opinion diverges from the reasoning of two decisions by our sister circuits, *National Treasury Employees Union v. U.S. Department of Treasury*, 25 F.3d 237 (5th Cir. 1994), and *American Federation of Government Employees v. Department of Housing and Urban Development*, 118 F.3d 786 (D.C. Cir. 1997). Judge Callahan is incorrect. Both decisions are specifically grounded in the diminished privacy interests of individuals in public trust positions—positions not held by the low risk contract employees here.

In *National Treasury*, the Fifth Circuit recognized the constitutional right to privacy, stating that "[t]he extent to which an individual's expectation of privacy in the employment context is reasonable depends, in significant part, upon the employee's position and duties." 25 F.3d at 243–44. The Fifth Circuit emphasized that the plaintiffs, all of whom held positions at the high and moderate risk levels, were "public trust employees." *Id.* at 244. Public trust positions "involve policymaking, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities or other duties demanding a significant degree of public trust, and positions involving access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain." 5 C.F.R. § 731.106(b). Because "public trust employees know that

they have diminished rights to withhold personal information that compromises the right of the public to repose trust and confidence in them," the Fifth Circuit concluded that they must complete the Standard Form 85P, Questionnaire for Public Trust Positions ("SF 85P"). *Nat'l Treasury*, 25 F.3d at 244. The Fifth Circuit also stated, "[w]e take pains to underscore the obvious: we are determining rights of [plaintiffs] in their capacity as public trust employees and certainly not in their role as ordinary private citizens." *Id.*

In *American Federation*, the D.C. Circuit also considered informational privacy in the context of public trust employees. 118 F.3d at 788. There, employees were found to be in public trust positions because of their access to a database that controlled $10 billion in annual government disbursements. *Id.* The D.C. Circuit analyzed each of the challenged questions, as we did in our opinion, and concluded that the agency provided "sufficiently important justifications for each item on the questionnaires" in light of the employees' diminished expectation of privacy as public trust employees. *Id.* at 793.

The class members here are low risk and thus do not have the diminished expectation of privacy of public trust employees. The class expressly excludes employees who have been designated as moderate or high risk. Many class members agreed to work for NASA with the understanding that they would not be

required to work on classified materials or to obtain security clearances—precisely because they desired that their work remain in the public domain. Avoiding classified materials allows these scientists to subject their work to peer review, to collaborate with the best scientists worldwide, and to publish their results.

Although the Fifth and D.C. Circuits recognized that one factor that can diminish an individual's privacy interest is whether the information collected by the government is disseminated publicly, *Nat'l Treasury*, 25 F.3d at 244; *Am. Fed'n*, 118 F.3d at 793, neither one found that to be the dispositive factor. Each court held that constitutional interests were not violated because the protections against the disclosure of private information were combined with other important factors, such as the diminished expectation of privacy by individuals holding public trust positions. *Nat'l Treasury*, 25 F.3d at 244; *Am. Fed'n*, 118 F.3d at 794. Our opinion also recognizes that "[a]lthough the risk of public disclosure is undoubtedly an important consideration in our analysis, it is only one of many factors that we should consider." *Nelson II*, 530 F.3d at 880 (citation omitted). Moreover, plaintiffs have been informed that the information will be disclosed to Caltech, raising serious questions as to whether their privacy interest is diminished by this factor.

Finally, both *National Treasury* and *American Federation* were decided on a fully developed factual record that included a reasoned decision of the district court. The evidentiary record was critical to the courts' decisions. For example, after the district court held that an authorization similar to that in SF 85 violated the plaintiffs' constitutional right to informational privacy in *American Federation*, the D.C. Circuit reversed based on a government representation "that the legitimate use of the release form is limited to verifying information solicited by other parts of the form," and a finding that "the release authorizes the government to collect only information 'relevant' to determining the fitness of an individual for a public trust position." *Am. Fed'n*, 118 F.3d at 794. In contrast, here, the government "steadfastly refused to provide any standards narrowly tailoring the investigation to the legitimate interests they offer as justification," failing to limit the investigation to relevant information or the verification of responses. *Nelson II*, 530 F.3d at 881.

III.

Chief Judge Kozinski's dissent thoughtfully raises a number of considerations to be taken into account in shaping the right of informational privacy. By asking a series of provocative questions about the doctrine, however, he only underscores our panel's conclusions that serious questions were raised

justifying the preliminary injunction. *See Walczak*, 198 F.3d at 731. Ultimately, I disagree with his conclusion that we should have taken this case en banc to provide further guideposts towards resolving those questions. Erecting guideposts on a moving playing field would prove futile. Only a fully developed factual record, such as the one in *National Treasury* or *American Federation*, will allow us to thoroughly consider the nature of the privacy rights at issue and provide the clarity Judge Kozinski seeks.

We recognized in our opinion the distinction Judge Kozinski proposes between government collection and disclosure of information. As previously noted, we stated that "[a]lthough the risk of public disclosure is undoubtedly an important consideration in our analysis, it is only one of many factors that we should consider." *Nelson II*, 530 F.3d at 880 (citation omitted). It is not yet clear on this record, however, whether the government intends to disclose the information it collects. The class has specifically alleged that NASA will share the information collected with Caltech and possibly with other government agencies. Sharing this information with Caltech and other agencies is a potential violation of the Privacy Act. *See* 5 U.S.C. § 552a(b) (forbidding agency disclosure of records "to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains").

Moreover, if the information is shared, Caltech is not precluded by the Privacy Act from further disseminating it.

Judge Kozinski also distinguishes between disclosures that the target may refuse and those imposed regardless of his consent. I agree that during the application process for a new job, disclosures may be refused simply by seeking other employment. In that context, requested disclosures may be inherently less invasive. Here, however, we have long-term employees suddenly forced to sign releases authorizing investigation into every aspect of their private lives or lose their jobs. As a practical matter, given the current economic environment, the unique nature of the work conducted at JPL, and the age and seniority of the plaintiff-employees, this is tantamount to a deprivation of the ability to obtain any future employment.

Judge Kozinski's third distinction—the difference between protecting fundamental rights and protecting a free-standing right not to have the world know bad things about you—would also be addressed more precisely with further record development. It appears, although it has yet to be conclusively proven, that the government intends to pry into constitutionally protected private matters. The Issue Characterization Chart suggests that sexual preference, sexual activity,

medical treatment, counseling, and personal financial matters are at issue in the government's investigation. The Supreme Court has recognized a constitutional "interest in avoiding disclosure of personal matters," *Whalen v. Roe*, 429 U.S. 589, 591–93 (1977), and we and our sister circuits have defined this right to include the very types of matters implicated by the Issue Characterization Chart, *see, e.g.*, *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 n.4 (3d Cir. 2000) ("While we have not previously confronted whether forced disclosure of one's sexual orientation would be protected by the right to privacy, we agree with other courts concluding that such information is intrinsically private."); *Statharos v. N.Y. City Taxi & Limousine Comm'n*, 198 F.3d 317, 322–23 (2d Cir. 1999) ("[T]his Court has recognized the existence of a constitutionally protected interest in the confidentiality of personal financial information."); *Norman-Bloodsaw*, 135 F.3d at 1269 ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality."); *Eastwood v. Dep't of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988) ("This constitutionally protected right [to privacy] is implicated when an individual is forced to disclose information regarding personal sexual matters."); *Thorne*, 726

F.2d at 468 ("The interest [the plaintiff] raises in the privacy of her sexual activities are within the zone protected by the constitution.").[12]

Similarly, the parties have yet to develop an evidentiary record as to whether the government intends to "dig into records" or simply to contact third parties. The government states that it would need another release to obtain medical records. However, the Authorization for Release of Information allows the government "to obtain any information relating to [a class member's] activities from . . . other sources of information" and to seek information that "is not limited to" job-related activities. The Issue Characterization Chart suggests that the government may pursue the more invasive of these two approaches. There is no evidence of what standards, if any, the government intends to apply.

Further record development is also required to determine whether the government is in fact acting as any other "private" employer. By unilaterally imposing the new requirements upon Caltech in the interest of securing federal facilities, the government is using special powers that are available to it only in its sovereign capacity. Private contracting parties would not have the ability to insist

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[12] *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998), the case cited by Judge Kozinski to illustrate this third distinction, suggests that intimate details about sexuality and choices about sex are the type of private matters which implicate the constitutional right to privacy. *Id.* at 685. How these private matters play into this dispute requires further factual development.

upon one-sided contract modifications that result in termination of a partner's employees of twenty or thirty years. Moreover, it appears that NASA—not Caltech—will make the suitability determination, but again, the class has not yet had the opportunity to submit evidence on this point.

We must rule on the record we have before us. Our ability to "clear the brush" will be enhanced when the record is fully developed. Even the Supreme Court would find it a much surer task to outline the contours of the doctrine of informational privacy with some of Judge Kozinski's questions actually answered. Therefore, I concur in the denial of en banc rehearing, and await the next round.