No. 09-530

IN THE

Supreme Court of the United States

NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION, ET AL.,

Petitioners,

– v. –

ROBERT M. NELSON, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Electronic Frontier Foundation ("EFF") is a nonprofit, member-supported civil liberties organization working to protect rights in the information society. EFF actively encourages and challenges government and the courts to support privacy and safeguard individual autonomy. As part of its mission, EFF has often served as counsel or *amicus* in key privacy cases, most recently in *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

The National Aeronautics and Space Administration's ("NASA") collection of personal information from low-risk contractor employees creates major privacy concerns that stem from the absence of clear law or policy regarding the purpose, scope, implementation, and security of these background checks. Overbroad inquiries into medical, sexual, and financial information like the ones presented here are unnecessary for verifying the identities and security risk of low-level contract employees who lack access to classified information or projects relating to national security. As technology advances and makes it easier to collect and aggregate vast amounts of information, we must be cautious to prevent misuse. EFF submits this brief *amicus*

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties' letter consenting to the filing of this brief has been filed with the Clerk.

curiae because a ruling overturning the Ninth Circuit's decision to enjoin the inquiries will have far-reaching negative consequences for individual rights.

INTRODUCTION

This case arises from NASA's decision in 2007 to institute background checks of contractor employees pursuant to the National Agency Check with Inquiries ("NACI") guidelines. Respondents are long-time employees of the California Institute of Technology ("CalTech") who work at the Jet Propulsion Lab ("JPL") housing NASA's robotic spacecraft laboratory. By NASA's own admission, respondents are "low-risk" employees and do not work on classified projects. (Br. for the Pet'r 36) [hereinafter "Pet'r's Br."].

The two NACI forms at issue are Standard Form 85 ("SF-85") and Form 42. These forms state that their purpose is to collect information to aid in determining Respondents' "suitability" for employment. SF-85 requires JPL employees to disclose, among other things, any information on past drug treatment or counseling. SF-85 also requires JPL employees to list three people who "know them well" as references, such as "good friends, peers, colleagues, college roommates, etc." Form 42 is then sent to these references, as well as any past employers and landlords. These third parties are asked to submit "any adverse information" about the employee's violations of law, financial integrity, general behavior and conduct, drug and/or alcohol abuse, mental or emotional stability, and "other matters" as well as any "derogatory" information that

they "feel may have a bearing on this person's suitability for government employment."

NASA's suitability matrix describes the specific types of information NASA will use to make the suitability determination. (Foster Decl. ¶ 3; Paradise Decl. ¶ 11.) Listed factors include homosexuality, sodomy, carnal knowledge, incest, bestiality, indecent exposure or proposals, illegitimate children, cohabitation, adultery, mental or emotional issues, minor traffic violations, displaying obscene material, acting drunk, and making obscene telephone calls.

SUMMARY OF ARGUMENT

This case presents the question of whether NASA's unbounded inquiry into respondents' personal lives in order to determine their "suitability" for continued employment can survive constitutional scrutiny. Because serious questions exist as to the inquiries' constitutionality under both the First and Fifth Amendments, the Ninth Circuit's decision to enjoin NASA's background checks of "low-risk," long-time contract employees should be upheld.

First, NASA's questionnaires are so broadly written as to ensure that information about respondents' group affiliations and memberships will be captured and recorded, thus violating respondents' right to associational privacy. This Court has a long history of protecting individuals from the chilling effects of broad associational information collection. Moreover, the questionnaires lack adequate safeguards and NASA has not explained how it will

use the responses to the questionnaires. Without further factual clarification, the program cannot be deemed to be narrowly tailored to achieve the government's stated interest in assessing respondents' suitability for employment. This Court should follow its long-standing associational privacy precedents, recognize that serious questions exist as to whether respondents' individual liberties are properly protected, and allow the preliminary injunction to stand.

Second, the right to information privacy is implicated when the government collects personal and intimate information from contract employees.[2] These questionnaires gather exactly the type of information this right protects. They solicit "any" adverse information about respondents, and thus are not narrowly tailored to solicit information relating to respondents' employment suitability. Moreover, the legal safeguards in place to protect information from government misuse contain gaping loopholes and systemic inadequacies. Serious questions therefore exist as to whether NASA's background checks unconstitutionally threaten respondents' privacy

[2] Information privacy is intimately linked with associational privacy. The individual interest in avoiding disclosure of personal matters is derived from the privacy protections of the First Amendment. *Whalen v. Roe*, 429 U.S. 589, 599 n.25 (1977) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965)) (arguing that the right to avoid disclosure of personal matters is founded upon the fact that the "First Amendment has a penumbra where privacy is protected from governmental intrusion").

rights even under the less exacting standard of review used in information privacy cases.

Given the hardships that would result from these inquiries into respondents' personal lives, as well as from the potential finding of employment unsuitability, this Court should uphold the decision below and permit assessment of NASA's stated interest in suitability on a more complex factual record.

ARGUMENT

I. SERIOUS QUESTIONS EXIST AS TO WHETHER NASA'S BACKGROUND CHECKS VIOLATE RESPONDENTS' RIGHTS TO ASSOCIATIONAL PRIVACY.

A. Form 42's Collection Of Membership Information, Even Without Subsequent Public Disclosure, Implicates the Right to Associational Privacy.

Form 42 casts so wide a net into respondents' lives that it will surely capture sensitive information about respondents' affiliations and memberships. The Form is given to respondents' friends, neighbors and even "college roommates" – people who would know intimate details of respondents' associations. The Form asks these references for "any" information about respondents' "employment, residence or activities concerning . . . general behavior or conduct [or] other matters." This plain language is broad enough to encompass all of respondents' associational ties.

Indeed, NASA's "Issue Characterization Chart," which is used to evaluate the reference's answers, takes note of whether a respondent "advocates or is a knowing member of an organization that advocates the overthrow of our constitutional form of government," or has ever "advocat[ed], abett[ed], advis[ed] or [taught]" the overthrow of the government.[3] NASA clearly uses this questionnaire to obtain information about respondents' memberships and associational ties.

This Court has "repeatedly found that compelled disclosure [of membership information to the government], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) [hereinafter *Patterson*], this Court held that associational privacy rights were implicated when the NAACP was required to disclose its membership lists to the State of Alabama. It was

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[3] Specific information about Respondents' associational ties with groups that "advocate the overthrow" or "strike[s] against" our government may be relevant, since participation in those groups could constitute statutory debarment from holding a position within NASA. *See* 5 U.S.C. § 7311; 18 U.S.C. § 2385. However, NASA's inquiry is so far-reaching that it will capture information about other associational ties that could *not* statutorily disqualify Respondents from government employment. That NASA seeks information about memberships in political groups, coupled with the broad questions on Form 42, establishes NASA's willingness to gather associational information.

irrelevant that "no direct action" had yet been taken to impair the members' associational rights. *Id.* at 461. Instead, the compelled disclosure itself "may constitute a[n] effective [] restraint on freedom of association." *Id.* at 462. "Even if there were no disclosure to the general public, the pressure upon [plaintiffs] to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure . . . would simply operate to widen and aggravate the impairment of constitutional liberty." *Shelton v. Tucker*, 364 U.S. 479, 486-87 (1960) (government collection of public school teachers' past membership information for employment purposes implicates the First Amendment).

Membership lists and associational information generally are protected from undue government collection because of the collection's likely chilling effect on individuals' freedom of speech and association. In *Patterson*, this Court was concerned that public disclosure of the plaintiffs' association with NAACP would expose the individuals to "public hostility" and "affect adversely the ability of . . . members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *Patterson*, 357 U.S. at 462-63. There is thus a "vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association." *Id.* at 462; *see also Fed. Elec. Comm'n v. Hall-Tyner Elec. Campaign Comm.*, 678 F.2d 416, 420 (2d Cir. 1982) (campaign committee supporting Communist Party exempt from Federal

Election Committee recordkeeping and disclosure requirements because "[p]rivacy is an essential element of the right of association and the ability to express dissent effectively").

NASA's inquiries are exactly the kind of collection that implicates the associational privacy right. The questions dig into respondents' private lives and unearth much information about their associational ties. These types of questionnaires essentially condition government employment on relinquishing the right to anonymous association. It is well settled that when the government collects this information, as NASA's inquiries do, judicial action is entirely proper to ensure that the collection does not chill respondents' expressive rights.

B. NASA's Questions Are Not Narrowly Tailored to Achieve Its Interest in Assessing Respondents' Employment Suitability.

"[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Patterson*, 357 U.S. at 460-61. Thus, regulations implicating this right must be narrowly tailored to achieve government interests in the least restrictive manner possible. *Nixon v. Shrink Missouri Govt. PAC*, 528 U.S. 377, 400 (2000) (strict scrutiny requires least restrictive means). In this case, NASA's forms state their interest in ensuring that respondents are "suitable for the job"; however, these background checks are not narrowly drawn to achieve this interest.

In *Shelton*, this Court considered a challenge to a state statute compelling public school teachers to submit to a hiring authority an unlimited list of every associational tie they had within the previous five years as a condition of employment. 364 U.S. at 480. Like NASA's forms, this list was used to ascertain "the fitness and competence" of the teachers. *Id.* at 485. Although the Court found this purpose to be legitimate, it nevertheless held that the questions were unconstitutionally broad. "The scope of the inquiry required by Act 10 is completely unlimited. . . . It requires [plaintiffs] to list, without number, every conceivable kind of associational tie — social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness." *Id.* at 488. The school board's interests could not "be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.*

This case is no different. Even if NASA does have a legitimate interest in inquiring into respondents' suitability for employment, which is unclear from the record,[4] it cannot ask questions seeking any adverse information that essentially encompasses "every conceivable kind of associational tie." *Id.*

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[4] *Amicus* assumes, but does not concede, that NASA has a legitimate interest in assessing Respondents' suitability for employment.

Other decisions support this conclusion. *Bates v. City of Little Rock* held that an ordinance requiring organizations to furnish city officials with membership lists for tax purposes violated associational privacy rights. 361 U.S. 516 (1960). This Court found "no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the membership lists," *id.* at 525, although it recognized that it was necessary to furnish some information to the government for tax purposes. *Id.* at 524.

Similarly, there is no relevant correlation between questions soliciting information about "any" affiliation that respondents have participated in and NASA's stated goals. Posing such sweeping questions to respondents' friends, family, and peers will likely lead to information about respondents' memberships in, for example, an LGBT group, a fraternity, a religious organization, the ACLU, NAACP, or any number of other organizations. NASA has not demonstrated that such information relates to respondents' suitability for employment at the JPL.

NASA cannot be given free rein to examine any and all aspects of their employee's private lives simply by asserting an interest in evaluating respondents' employment suitability. Open-ended questions may be the easiest way to obtain a wide swath of information that the government can sift through for relevant data, but the narrow-tailoring requirement prohibits such sweeping questioning. *Shelton*, 364 U.S. at 489 (quoting *Schneider v. State*, 308 U.S. 147, 161 (1931)) ("[m]ere legislative preferences or beliefs respecting matters of public convenience . . . [are] insufficient to

justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions"). Form 42 captures irrelevant associational information, disclosure of which threatens to chill respondents' willingness to participate in these organizations and express their views and beliefs. Thus, serious questions exist as to whether Form 42 is narrowly tailored to elicit relevant information by the least restrictive means possible.

II. SERIOUS QUESTIONS EXIST AS TO WHETHER NASA'S BACKGROUND CHECKS VIOLATE RESPONDENTS' RIGHT TO INFORMATION PRIVACY.

A. The Right to Information Privacy Protects Individuals from Dignitary Harm and Government Misuse of Personal Information.

NASA's employee background checks also implicate respondents' Fifth Amendment right to information privacy. This right encompasses "the individual interest in avoiding disclosure of personal matters," *Whalen v. Roe*, 429 U.S. 589, 599 (1977), and is meant to protect individuals against dignitary harms. Sara A. Needles, Comment, *The Data Game: Learning to Love the State-Based Approach to Data Breach Notification Law*, 88 N.C. L. Rev. 267, 281 (2009) ("the concept of information privacy deals with harm that is more dignitary in nature").

Such protection is especially important today, when technological advances have created an unparalleled power to harness and use aggregated

data for a variety of purposes. Aggregating tiny bits of information – useless on their own – into databanks and charts now makes up the foundation of entirely new business models and economic sectors. *Working the Crowd*, Economist, March 10, 2007, at 10 (wikis, crowd sourcing technologies and search engines are "unquestionably a huge market"). The very idea of privacy is being challenged as technology companies create new ways to aggregate and use information to track, identify, and influence people.[5]

These concerns, while amplified today, are not novel. This Court's *Whalen* decision, which first articulated the right to information privacy,[6] came on

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[5] *See generally* Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. Times, July 25, 2010, at MM30 *available at* http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=1&_r=1 ("avalanche of criticism" when Facebook reset privacy settings to make them more public and give partner sites access to personal information); Nick Wingfield, *Microsoft Quashed Effort to Boost Online Privacy*, Wall St. J., Aug. 1, 2010 *available at* http://online.wsj.com/article/SB1000142405274870346730457 5 383530439838568.html (online tracking and data aggregation is "pervasive and ever-more intrusive").

[6] *Whalen* derived the right to information privacy from the "right to be let alone," thus indicating that this right protects a broader swath of information than decisional privacy. *Whalen v. Roe*, 429 U.S. 589, 599 n.25 (1977). Another branch of privacy rights, often termed decisional privacy, protects only that information within the "zones of privacy," which includes activities associated with marriage, procreation, child-rearing and education, family relationships, and contraception. *Roe v. Wade*, 410

the heels of an era when many were concerned about the government's increasing aggregation of personal data aggregation in computer systems.[7] Alan F. Westin, Michael A. Baker, Project on Computer Databanks (National Academy of Sciences), *Databanks in a Free Society: Computers, Record-Keeping and Privacy* 4 (1st ed. 1973) ("[b]y the late

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U.S. 113, 152 (1973); *see also Whalen*, 429 U.S. at 599-600 (discussing two types of privacy rights).

[7] Circuit courts have also expressed unease with government information collection. For example, the Fourth Circuit discussed its discomfort with government information collection when considering an information privacy challenge to questions on a city police department's employee background check containing questions about marriage, divorce, children, homosexual relationships, arrest records and financial information:

> In the past few decades, technological advances have provided society with the ability to collect, store, organize, and recall vast amounts of information about individuals in sophisticated computer files. . . . Although some of this information can be useful and even necessary to maintain order and provide communication and convenience in a complex society, we need to be ever diligent to guard against misuse. Some information still needs to be private, disclosed to the public only if the person voluntarily chooses to disclose it.

Walls v. City of Petersburg, 895 F.2d 188, 194-95 (4th Cir. 1990).

1960s, the 'databank issue' had become one of the most widely discussed and emotionally laden civil-liberties questions facing American society"); *cf. Whalen*, 429 U.S. at 605 (noting "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files"). Soon thereafter, this Court clarified the right's scope as protecting information in which one has a "legitimate expectation of privacy," and subjected the collection of such information to a balancing test weighing the individual's privacy interest against the government's interest in disclosure.[8] *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 458 (1977).

The broad acceptance of this right in lower courts demonstrates judicial recognition that the potential for government misuse is greatly increased when information is organized in accessible databases.[9] Indeed, government misuse has occurred

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[8] *Nixon* specifically balanced "public figure [status,] his lack of any expectation of privacy in the overwhelming majority of the materials, [] the important public interest in preservation of the materials . . . the virtual impossibility of segregating the small quantity of private materials [from non-private materials]. . . . the Act's sensitivity to . . . legitimate privacy interests . . . [and] the unblemished record of the archivists for discretion." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 465 (1977); *see also Denius v. Dunlap*, 209 F.3d 944, 956 n.7 (7th Cir. 2002) (*Whalen* and *Nixon* employed a balancing test when analyzing information privacy rights).

[9] Currently, a majority of Circuits recognize the right to information privacy. *Aid for Women v. Foulston*,

in the past. The right to information privacy is thus necessary to ensure that the government treats individuals and their personal information with respect.

Perhaps the most notorious example of misuse is the McCarthy era personnel investigations used to

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441 F.3d 1101, 1116 (10th Cir. 2006) (recognizing informational privacy right protecting disclosure of personal information); *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995) (recognizing constitutional right to privacy of medical information); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (recognizing "privacy in personal information"); *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993) (recognizing a "confidentiality interest"); *James v. City of Douglas*, 941 F.3d 1539, 1543 (11th Cir. 1991) (recognizing the confidentiality branch of the right to privacy); *Borucki v. Ryan*, 827 F.2d 836, 840-42 (1st Cir. 1984) (suggesting a right to confidentiality exists, but stating it was unclear if disclosure of information implicated this right); *Taylor v. Best*, 746 F.2d 220, 225 (4th Cir. 1984) ("the right to privacy includes an individual interest in disclosing personal matters") (citation and internal quotations omitted); *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577-580 (3d Cir. 1980) (there is a constitutional right to privacy of medical records); *Plante v. Gonzalez*, 575 F.2d 1119, 1132 (5th Cir. 1978) (recognizing "the right to confidentiality"); *but see Am. Fed'n of Gov't Employees, AFL-CIO v. Dep't of Housing and Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997) (expressing "grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information"); *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994) (no general right to nondisclosure of private information).

ferret out alleged communist supporters. Federal employees during the 1950s were forced to disclose personal facts via personnel forms as part of an employee loyalty program. *See* Seth W. Richardson, *The Federal Employee Loyalty Program*, 51 Colum. L. Rev. 546, 546 (1951). The personnel forms, like the background checks at issue here, applied "only to employees, and [were] initiated by the Government as an employer solely for the purpose of ascertaining employability." *Id.* As a result of these inquiries, hundreds of people lost their jobs due to mere suspicions that they sympathized with the Communist Party. William W. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 Sup. Ct. Rev. 375, 421-22 (2001).

More recently, members of the Utah Department of Workforce Services ("DWS") used information contained in DWS's database to compile a list allegedly identifying thousands of illegal immigrants. James Nelson, *Utah widens probe into immigration list scandal*, L.A. Times, July 19, 2010.[10] The list was sent to law enforcement agencies and state lawmakers, along with a letter demanding that the named individuals be deported. *Id.* No specific information on the list has been released to the public. Nevertheless, the dissemination of private information from government databases to other government employees in order to demand deportation is a grave dignitary harm.

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[10] *Available at* http://www.latimes.com/news/nationworld/politics/wire/sns-utah-immigration,0,6581818.story.

The right to information privacy is meant to mitigate and prevent incidents like the ones described above.[11] Private information need not be publicly disclosed to cause dignitary harm; government misuse is sufficient. The right to information privacy is necessary to check the government's powers to collect personal information by balancing the risk of misuse against the government's legitimate need to collect this information.

B. The Right to Information Privacy Protects the Type of Information Sought By the Background Checks, Including Information Disclosed to Third Parties.

NASA seeks exactly the type of information protected by the right to information privacy. The questionnaires collect information about respondents' medical treatment for drug dependencies and abuse, financial integrity, mental or emotional stability, general behavior or conduct, excessive alcohol consumption, and "other matters." It is well settled among circuit courts that the Fifth Amendment protects this information from indiscriminate government collection. *See, e.g., Denius v. Dunlap*, 209 F.3d 944, 956 (7th Cir. 2000) (medical

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[11] The information released was not associational information, nor was the list based on information traditionally protected by "zones of privacy." Thus, it is unlikely that those targeted could claim violations of the right of associational privacy or the right of decisional privacy. The right of information privacy fills in this gap.

information); *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995) (same); *Walls v. City of Petersburg*, 895 F.2d 188, 194 (4th Cir. 1990) (financial information); *Eastwood v. Dep't of Corr. of State of Okl.*, 846 F.2d 627, 631 (10th Cir. 1988) (sexual information); *Fraternal Order of Police, Lodge No. 5 v. City of Phila.*, 812 F.2d 105, 116 (3d Cir. 1987) [hereinafter "*FOP*"] (citing *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983)) ("financial information . . . is covered by the right to privacy" and behavioral information like "private drinking habits and more secretive gambling. . . . is inherently private [and] is entitled to protection"); *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981) (citing *Plante v. Gonzales*, 575 F.2d 1119, 1132-33 (5th Cir. 1978)) ("financial disclosure laws raised issues within the scope of the confidentiality branch of the privacy right"); *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577-80 (3d Cir. 1980) (medical records).

The questionnaires also solicit information about respondents from third party references. The government argues that this information is not protected because information disclosed to third parties is not private. (Pet'r's Br. 32.) This is untrue. The right to information privacy protects personal information in which one has a "legitimate expectation of privacy,"[12] *Nixon*, 433 U.S. at 458, even if that information is known to third parties.

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[12] Circuit courts have similarly interpreted the right's coverage, creating a general consensus that the constitution protects matters reasonably expected to be private and confidential. *See Aid for Women v. Foulston*,

For example, in *Whalen*, a patient's medical information was deemed constitutionally protected, even though this information had been communicated to third party doctors. *Whalen*, 429 U.S. at 589.

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441 F.3d 1101, 1116 (10th Cir. 2006) (quoting *Sheets v. Salt Lake County*, 45 F.3d 1383, 1387 (10th Cir. 1995)) ("an individual is [] protected from disclosure of information where the individual has a legitimate expectation . . . that it will remain confidential"); *Denius*, 209 F.3d at 957-58 (courts must evaluate "the existence and extent of constitutional protection for confidential information in terms of the type of information involved") (citation omitted); *Doe*, 15 F.3d at 269 (information privacy protect information that one is "normally entitled to keep private"); *Walls v. City of Petersburg*, 895 F.2d 188, 192-93 (4th Cir. 1990) ("personal, private information . . . is protected by one's constitutional right to privacy"); *Eastwood v. Dep't of Corr. of State of Okl.*, 846 F.2d 627, 631 (10th Cir. 1988) (interest in avoiding disclosure of personal matters protects "individual[s] from government inquiry into matters in which it does not have a legitimate and proper interest"). The Sixth Circuit is the sole Circuit that interprets the right as only protecting fundamental rights. *Lambert v. Hartman*, 517 F.3d 433, 442 (6th Cir. 2008) (citing *Bloch v. Riber*, 156 F.3d 673, 684 (6th Cir. 1998)) (holding that although plaintiff had an expectation of privacy in her social security number, she failed to show a fundamental right was at issue; court thus declined to apply balancing test to determine whether informational privacy rights had been violated). The Eight Circuit has hinted at adopting a stricter construction of privacy rights, but it is unclear whether they have done so. *See Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (right to privacy protects only "highly personal matters representing the most intimate aspects of human affairs").

Similarly, the presidential papers at issue in *Nixon* included communications by the President to third parties, including "extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files." *Nixon*, 433 U.S. at 430 (citation omitted).

The risks inherent in government data collection do not disappear merely because the personal information is known to some third parties. Medical, sexual, and financial issues are often disclosed to doctors, family members, or friends; this does not rob that information of its personal nature. Therefore, in the Fifth Amendment context, one's expectation of privacy depends on the "nature" of the matter, and an individual can maintain a legitimate expectation of privacy despite a limited disclosure to others.

In *Sheets v. Salt Lake County*, 45 F.3d 1383 (10th Cir. 1995), information about the plaintiff written in his wife's diary was constitutionally protected because of the personal nature of the information it contained, even though this private information was known to and gathered from his wife. The court's analysis turned on the "intimate and personal nature" of the statements in the diary, and the fact that the plaintiff "legitimately expected his wife's diary to remain confidential." *Id.* at 1388 ("that Mr. Sheets did not author the information does not prohibit him from having a distinct privacy interest in the dissemination of information written about the personal aspects of his life").

In *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000), a teenage boy and his friend were arrested for underage drinking and the boy was forced to reveal his sexual orientation to a police officer. The boy had clearly disclosed this information to his friend, with whom the police officer suspected the boy was having sexual relations. *Id.* at 192. Despite this disclosure, the information remained sufficiently personal to the boy that the officer's threats to disclose his homosexuality to his grandfather drove him commit suicide. *Id.* at 193.

"In an organized society, there are few facts that are not at one time or another divulged to another." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989). The mere fact that others know respondents' private information does not remove their legitimate expectations of privacy. It is integral to our dignity and identity to retain control over who receives our personal information. *Id.* at 763 ("privacy encompass[es] the individual's control of information"). The right to information privacy therefore covers government questionnaires soliciting personal information from third parties.

C. Government Collection of Information Implicates the Right to Information Privacy.

The "interest in avoiding disclosure of personal matters" encompasses direct disclosure *to* the government as well as disclosure *by* the government to the public. *Walls*, 895 F.2d at 188 (considering government employee's challenge to background

check); *Eastwood*, 846 F.2d at 631 ("constitutionally protected right [to informational privacy] is implicated when an individual is forced to disclose information regarding personal sexual matters" to government employer); *FOP*, 812 F.2d at 110 ("constitutional protection against disclosure of personal matters [] is at issue" in Fifth Amendment challenge to police department employee background check). Even without actual or potential public disclosure, employment conditioned on respondents' disclosure of personal information to the government – which *amicus* will refer to as the government's collection of personal information – implicates respondents' information privacy rights. Recognition of the risk of disclosure "implicit" in government aggregation of personal data led to the creation of the information privacy right. *Whalen*, 429 U.S. at 605-606 (information collection "by a system that did not contain comparable security provisions [to the ones at issue]" could violate the information privacy right).

This Court reiterated this point in *Nixon* by recognizing that privacy rights could be infringed by giving government employees – *not* the public – access to Nixon's presidential papers for the purpose of separating his personal papers from public documents. *Nixon*, 433 U.S at 425. Nixon had "a legitimate expectation of privacy in his personal communications" against government intrusion, even though there would be no subsequent disclosure to the public. *Id.* at 459, 465 ("purely private papers and recordings will be returned" to the President). Disclosure of his personal papers to government employees implicated his information privacy right and triggered use of a balancing test to weigh the

competing interests. *Nixon*, 433 U.S. at 465 (balancing the privacy interest against a variety of factors, including presidential status, public interest, and the limited intrusiveness of the screening process).

Other courts have since recognized that "the federal right of confidentiality might in some circumstances be implicated when a state conditions continued employment on the disclosure of private information" to employers. *Denius*, 209 F.3d at 955 (citing *Pesce v. J. Sterling Morton High Sch.*, 830 F.2d 789, 797 (7th Cir. 1987)). In *FOP*, the Third Circuit held that questions on employee applications for the City of Philadelphia Police Department's Special Investigation Unit, which were viewed only by government officials, impermissibly infringed the right to privacy. 812 F.2d at 105. In *Denius*, requiring the plaintiff to report financial information to the state via an authorization form needed to renew the plaintiff's employment contract with the government "infringe[d] Denius's right of privacy in confidential information."[13] 209 F.3d at 958. Additionally, in *Shuman v. City of Philadelphia*, the court concluded that the right to information privacy protected a police officer's compelled disclosure of extramarital affairs to his employers by analogizing to associational privacy cases holding that collection of private information is, in itself, harmful. 470 F. Supp. 449, 458

[13] Nevertheless, because a person's privacy interest in financial information was not clearly established prior to the instant case, the defendant was entitled to qualified immunity on that narrow issue. *Denius*, 209 F.3d at 958.

(E.D. Pa. 1979) ("[i]f there is a constitutionally protected 'zone-of-privacy,' [sic] compelled disclosure in and of itself may be an invasion of that zone, and therefore, a violation of protected rights").

Subjecting government collection of information to judicial scrutiny protects individuals from misuse of sensitive information. Private matters, once known by government employers, can be used in improper and retaliatory ways even in the absence of actual or potential public disclosure. The information could be widely distributed to other government agencies, such as the IRS or FBI. It can also be used to harass and intimidate employees. These risks severely burden the "right to be let alone." *Whalen*, 429 U.S. at 599 n.25 (quoting *Olmstead v. U.S.*, 277 U. S. 438, 478 (1928)) (right to information privacy is derived from the "right to be let alone").

A prime example is *Eastwood*, in which the court considered whether qualified immunity applied to a departmental investigator who assessed an employee's sexual harassment claim by interrogating the employee about her sexual history. 846 F.2d at 631. Not only was this information's forced disclosure an affront to the plaintiff's dignity, but there was a danger that the government would use the information "to harass plaintiff into dismissing her complaint and quitting her job." *Id.* The court thus held that the "constitutionally protected right [to informational privacy] is implicated when an individual is forced to disclose information regarding personal [] matters" to government employers. *Id.* at 630-31.

In another case the government sought to question low-level government employees – similarly situated to respondents – about any and all past illegal drug use, indicating that this information may be used to terminate the employee. *Am. Fed'n of Gov't Employees v. U.S. R.R. Retirement Bd.*, 742 F. Supp. 450, 454 (N.D. Ill. 1990) [hereinafter "*R.R. Retirement Bd.*"] (questions about illegal drug use "do implicate 'the federal right of confidentiality'" because they "seek highly personal information" and drug use would "disqualify" the employee). Concerns about government misuse permeated the opinion, with the court emphasizing that the Fifth Amendment imparts a "right to keep certain information from the government, particularly when the government has expressed an intent to use that information as a basis for taking some adverse action against the individual." *Id.* at 455. These concerns, combined with the fact that "it is not at all clear to this court how a computer operator working for the Railroad Retirement Board could jeopardize national security," led the court to hold that the government could not "require its employees to divulge their most intimate secrets." *Id.*

NASA's questionnaires seek similarly sensitive information. SF-85 requires employees to divulge information related to illegal drug use, including the dates of the use, the type of drugs and an explanation of the use. Form 42 expressly solicits "derogatory" information about respondents.[14] NASA's "Issue Characterization Chart" lists the type of information

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[14] Form 42 states that references may use the form to convey "derogatory as well as positive information."

that the questionnaires seek, including such general and potentially embarrassing behavioral information such as carnal knowledge, obscene phone calls, indecent exposure and acting drunk. NASA could easily use this information to intimidate, harass, embarrass or even terminate respondents for no legitimate employment reason. The right to information privacy is designed to prevent these effects.

D. The Questionnaires Are Not Narrowly Tailored to NASA's Interest In Assessing Respondents' Employment Suitability.

Information privacy is generally reviewed under an intermediate scrutiny standard.[15] *FOP*, 812 F.2d at 110 (citing *Barry*, 712 F.2d at 1559). Thus, for narrow tailoring purposes, questions must be substantially related to legitimate government

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[15] Form 42's breadth also may capture information about abortions, birth control, marriage, etc., which implicates fundamental liberties. The Third Circuit has observed that "[i]f [the] exercise of rights protected by the autonomy interest might be deterred, a more stringent scrutiny would be appropriate." *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 114 n.5 (3d Cir. 1987). Therefore, some kind of heightened form of scrutiny may be appropriate. Moreover, "the federal courts also apply stricter scrutiny when there is unguarded public disclosure of confidential information." *Id.* at 111. As *amicus* argues, *infra*, there are serious concerns about the adequacy of safeguards here, providing another reason for more stringent review.

interests. *Craig v. Boren*, 429 U.S. 190, 197-99 (1976) (describing intermediate scrutiny in the context of equal protection and gender classifications). The government's interest in conducting employee background checks does not confer free license to mine employee's lives for any adverse information that may or may not relate to the employee's security risk and on the job performance. *R.R. Retirement Bd.*, 742 F. Supp. at 454 (the government does not have "unbridled license to require anything it wants of its employees").

For example, in *Eastwood*, the Tenth Circuit held that the questions posed to a state employee about her sexual history in order to assess the legitimacy of her sexual harassment claim were so broad that they violated her information privacy rights. 846 F.2d at 631. Even assuming the questions were intended to advance a legitimate state interest in confirming her complaint, "there exists little correlation between plaintiff's sexual history" and the stated government interest. *Id.* The questioner "might establish carefully tailored questions regarding an applicant's sexual past . . . but it could not justify an 'unbounded, standardless inquiry' into the plaintiff's personal life." *Id.* (citing *Thorne v. City of El Segundo*, 726 F.2d 459, 470 (9th Cir. 1983)).

Similarly, the plaintiff in *Shuman* was dismissed from his position as an officer in the Philadelphia Police Department after refusing to answer questions about an adulterous affair in violation of Philadelphia's Home Rule Charter § 10-110. 470 F. Supp. at 443-44. Like Form 42, these policies allowed the police department to inquire into

"any and all aspects" of the officers' personal lives. *Id.* at 460. There were no standards in place to ensure the questions were targeted towards eliciting job-related information, and the officers were required to answer on penalty of losing their jobs. *Id.* "The Police Department simply cannot have a *carte blanche* to investigate all aspects of a police officer's personal life" and the government's legitimate interest in investigating an officer's personal life only extended to information related to the plaintiffs on the job performance. *Id.* at 460. The overbroad inquiries led the court to conclude: "[w]e have no doubt that such a policy is unconstitutional." *Id.*

Form 42 is similarly overbroad; in fact, it is unclear exactly what information NASA hopes to gain from this inquiry. The form itself offers no guidance as to what particular information it seeks. The only hint we have is NASA's suitability matrix, which lists information such as sexual orientation, obscene telephone calls, cohabitation, illegitimate children, and carnal knowledge as considerations for suitability.

Petitioners argue that because Form 42 states that it seeks information relevant to the applicant's suitability for employment, it is narrowly tailored. (Pet'r's Br. 32.) This is a tautology. NASA cannot claim that its form is narrowly drawn to elicit information regarding suitability simply by stating that it intended to elicit information regarding suitability. NASA must make clear what types of information relate to suitability and narrowly tailor its questions accordingly.

The Ninth Circuit correctly found that NASA has "steadfastly refused to provide any standards narrowly tailoring the investigations to the legitimate interests they offer as justification." *Nelson v. NASA*, 530 F.3d 865, 881 (9th Cir. 2008). There are thus serious questions as to the constitutionality of Form 42's requests for information unrelated to any legitimate government interest.

E. Proper Safeguards Are Not In Place to Protect the Information From Dissemination Within the Government or Disclosure to the Public.

The likelihood of unauthorized disclosure is a "crucial factor[]" in the information privacy balancing test, *FOP*, 812 F.2d at 105, because when information is aggregated, the risk of unauthorized dissemination naturally increases. Contrary to the government's assertions, the Privacy Act does not provide meaningful protection because of systemic problems allowing for the widespread, indiscriminate dissemination of information throughout the federal government.

i. The Privacy Act Contains Multiple Loopholes Which Allow Dissemination of Information Within the Government.

As *amicus* discussed *supra*, the right to information privacy encompasses disclosure to the government. The Privacy Act, however, does not adequately protect respondents' information from disclosure within the federal government. In fact, the

Act contains *twelve* exceptions that effectively allow widespread dissemination of personal information throughout the government. 5 U.S.C. § 552a(b).

For example, information can be disclosed to "another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity" upon written request, § 552a(b)(7), to "either House of Congress," § 552a(b)(9), to the Comptroller General, § 552a(b)(10), or to a court of competent jurisdiction, § 552a(b)(11). These exceptions would allow respondents' private information to be disclosed to a variety of government officials. The Privacy Act's history reveals that such intra-government disclosures are a pervasive problem. For example, in 2000, close to 33% of agencies had disclosed personal information to other agencies. Harold C. Relyea, CRS Report for Congress, *The Privacy Act: Emerging Issues and Related Legislation* 8 (2002) [hereinafter "CRS Report"].

Particularly problematic is the "routine use" exception, under which the government may disclose personal information for "a purpose which is compatible with the purpose for which it was collected." § 552a(a)(7), (b)(3). The routine use exception has been interpreted broadly. *U.S. Postal Serv. v. Nat'l Assoc. of Letter Carriers, AFL-CIO*, 9 F.3d 138, 143 (D.C. Cir. 1993) ("routine use exception to the Privacy Act . . . is in the control of the government agency"). The exception essentially allows "disclosure of information collected by one agency for a specific program, to another agency for

eligibility verification in an unrelated program, [to] be considered a routine use."[16] CRS Report 12 (quoting President's Council on Integrity and Efficiency, Ad Hoc Committee on Benefit Eligibility Verification, *Eligibility Verification Needed to Deter and Detect Fraud in Federal Government Benefit and Credit Programs* (1998), at p. 3). Inter-agency disclosures are thus widespread, and compromise respondents' privacy interests.

SF-85 outlines a variety of questionable routine uses. Routine Use ("RU") 2 states that personal information may be disclosed to the Department of Justice, courts, or other adjudicative bodies if it is deemed "relevant and necessary" for use in litigation, essentially opening respondents' lives to law enforcement authorities for investigation. RU 7 states that information can also be publicly disclosed to "the news media or the general public" if the disclosure is in the "public interest" and would "not constitute an unwarranted invasion of personal privacy."

The determination that a public disclosure to the media would "not constitute an unwarranted invasion of personal privacy" or that information is "relevant and necessary" to litigation is left completely up to NASA's discretion. Because NASA

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[16] For example, in *Pippinger v. Rubin*, an employee's romantic affair was disclosed during the deposition of a third party for a completely unrelated administrative proceeding. 129 F.3d 519 (10th Cir. 1997). Nevertheless, the court upheld this disclosure as a "routine use" under the Privacy Act. *Id.* at 532.

can release private information upon these discretionary determinations, the Privacy Act at best gives respondents an optional measure of protection.

The Privacy Act's exceptions and listed routine uses constitute "gaping holes" that put respondents at risk of having their information disclosed to an unlimited number of people within the government. *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health and Env't Control*, 317 F.3d 357, 375 (4th Cir. 2002) (King, J. dissenting) (exceptions allowing collected information to be revealed during licensure procedures and inspection render safeguards inadequate). In light of the importance of security measures preventing the aggravation of the "impairment of liberty" inherent in the information's collection, this Court should hold that the safeguards at issue are patently inadequate.

ii. The Privacy Act Provides No Reasonable Remedy for Non-Compliance.

It is well known that Privacy Act compliance and enforcement are weak. *See* U.S. General Accounting Office, *Privacy Act: OMB Leadership Needed to Improve Agency Compliance* 2 (2003) ("[i]f these implementation issues and the overall uneven compliance are not addressed, the government will not be able to provide the public with sufficient assurance that all legislated individual privacy rights are adequately protected"). Moreover, when the Privacy Act is violated, there are significant obstacles to obtaining a reasonable judicial remedy.

For example, respondents cannot be made whole if information is negligently released; the Privacy Act allows for statutory damages only if the agency that released the information "acted in a manner which was intentional or willful." 5 U.S.C. § 552a(g)(4). In *Andrews v. Veterans Administration of the United States*, plaintiff's private personnel files were released to a union representative without being properly sanitized. 838 F.2d 418 (10th Cir. 1988). The court found that because the release of the information was merely negligent, there could be no liability under the Privacy Act's civil remedies provisions. *Id.* at 425.

Even if respondents could show that the disclosure was made intentionally or willfully, they cannot receive statutory damages unless they can show the privacy breach resulted in actual damage. *Doe v. Chao*, 540 U.S. 614 (2004). Although the right to information privacy recognizes the dignitary harm from disclosure of private information, under the Privacy Act, disclosure itself is not enough to merit a damages award. *Id.*

The Privacy Act's requirements that plaintiffs show intentional release and actual damages do not sufficiently protect them against the dignitary harms implicit in the government's collection of their personal information. Francesca Bignami, *European versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining*, 48 B.C. L. Rev. 609, 633 (2007) ("individuals have a very difficult time establishing the injury necessary to recover for most violations of the [Privacy Act] — what court would award damages because a

government agency asked . . . too many irrelevant questions?"). The Privacy Act's inadequacies raise serious questions as to the adequacy of safeguards protecting respondents' constitutional right to information privacy.

CONCLUSION

The government background checks at issue compromise respondents' rights to privacy under both the First and Fifth Amendments. Their liberty is threatened by broad questions that can capture all associational ties, and their dignity is put at risk by NASA's collection and inadequate protection of vast amounts of personal information. For the reasons stated above, this Court should affirm the Ninth Circuit's decision to preliminarily enjoin NASA's background investigations, and permit the parties to develop a more complete factual record.

Respectfully Submitted.

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