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.

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

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

Respondents are contract employees working at the Jet Propulsion Laboratory, a multi-billion-dollar federal research facility. Like all federal contract employees requiring long-term access to federally controlled facilities and information systems, they are required to undergo background checks. Respondents object to these background checks because, in their view, the government's use of standard forms to collect employment-related information about them would violate their constitutional right to informational privacy. The court of appeals agreed with respect to two inquiries on the standard background-check forms. The questions presented are:

1. Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks in the course of a background investigation whether the employee has received counseling or treatment for illegal drug use that has occurred within the past year, and the employee's response is used only for employment purposes and is protected under the Privacy Act, 5 U.S.C. 552a.

2. Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks the employee's designated references for any adverse information that may have a bearing on the employee's suitability for employment at a federal facility, the reference's response is used only for employment purposes, and the information obtained is protected under the Privacy Act, 5 U.S.C. 552a.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 2
Summary of argument 17
Argument:
The government's collection of information through SF-85 and Form 42 for employment-related purposes is constitutional 20
A. This Court has made clear that constitutional privacy concerns are not triggered merely because the government collects information about an individual 21
B. This case involves only the routine collection of employment-related information by the government acting in its capacity as an employer and proprietor 26
1. This case concerns the government's collection of information, subject to the Privacy Act, not disclosure to the public 26
2. Any privacy interests implicated in this case are further limited because SF-85 and Form 42 seek information only for employment-related purposes 31
C. The use of SF-85 and Form 42 to conduct background checks of contract employees is constitutional 38
1. The government may ask contract employees who have used illegal drugs in the previous year whether they have sought treatment or counseling 38

Table of Contents—Continued: Page

2. The government may send Form 42 to a contract employee's designated references and contacts 44
D. The court of appeals' analysis ignored the *Whalen* and *Nixon* framework 47
Conclusion 57
Appendix 1a

TABLE OF AUTHORITIES

Cases:

AFGE v. *HUD*, 118 F.3d 786 (D.C. Cir. 1997) 29, 43, 53, 54
Board of County Comm'rs v. *Umbehr*, 518 U.S. 668 (1996) 34
Cafeteria & Restaurant Workers Union, Local 473 v. *McElroy*, 367 U.S. 886 (1961) 33
Connick v. *Myers*, 461 U.S. 138 (1983) 33, 34
Crawford, In re, 194 F.3d 954 (9th Cir. 1999), cert. denied, 528 U.S. 1189 (2000) 15, 48, 50
Detroit Edison Co. v. *NLRB*, 440 U.S. 301 (1979) 28
Doe v. *Attorney Gen. of the United States*, 941 F.2d 780 (9th Cir. 1991) 15, 50
Doe v. *Chao*, 540 U.S. 614 (2004) 28
Eastwood v. *Department of Corr.*, 846 F.2d 627 (10th Cir. 1988) 40
Engquist v. *Oregon Dep't of Agric.*, 128 S. Ct. 2146 (2008) 18, 33, 34, 43
Garcetti v. *Ceballos*, 547 U.S. 410 (2006) 34
Hoffa v. *United States*, 385 U.S. 293 (1966) 53

Cases—Continued: Page

Lane v. *Pena*, 518 U.S. 187 (1996) 15, 50
Lefkowitz v. *Turley*, 414 U.S. 70 (1973) 34
Mangels v. *Pena*, 789 F.2d 836 (10th Cir. 1986) 40
NTEU v. *United States Dep't of the Treasury*, 25 F.3d 237 (5th Cir. 1994) 29, 40, 43, 54
National Fed'n of Fed. Employees v. *Greenberg*, 983 F.2d 286 (D.C. Cir. 1993) 43
Nixon v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977) ..... *passim*
O'Connor v. *Ortega*, 480 U.S. 709 (1987) 33
Paul v. *Davis*, 424 U.S. 693 (1976) 39, 44
Planned Parenthood v. *Danforth*, 428 U.S. 52 (1976) 25
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 41
Smith v. *Maryland*, 442 U.S. 735 (1979) 53
Thorne v. *City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), cert. denied, 469 U.S. 979 (1984) 40
Tucson Woman's Clinic v. *Eden*, 379 F.3d 531 (9th Cir. 2004) 40
United States v. *Miller*, 425 U.S. 435 (1976) 14, 53
United States v. *Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980) 40
United States Dep't of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) 24, 30, 53
Washington v. *Glucksberg*, 521 U.S. 702 (1997) 47, 48, 49, 52
Waters v. *Churchill*, 511 U.S. 661 (1994) 33
Whalen v. *Roe*, 429 U.S. 589 (1977) ..... *passim*

Constitution, statutes and regulations: Page

U.S. Const.:
Amend. IV 11, 12, 13, 14, 47, 53
Amend. V 2, 43
Due Process Clause 2, 39, 48, 52
Amend. XIV 48
Administrative Procedure Act, 5 U.S.C. 706(2)(C) 12
Federal Information Security Management Act of 2002, 40 U.S.C. 11331 ..... 8, 30
Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, §§ 601-602, 116 Stat. 2408 7
National Aeronautics and Space Act of 1958, 42 U.S.C. 2451 *et seq.*:
42 U.S.C. 2455 11
42 U.S.C. 2456 11
42 U.S.C. 2456a 11
42 U.S.C. 2473 11
Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2111 note 22
Privacy Act, 5 U.S.C. 552a 2, 6, 27
5 U.S.C. 552a(a)(3) 7
5 U.S.C. 552a(b) 7, 28
5 U.S.C. 552a(d)(1) 7
5 U.S.C. 552a(d)(1)-(2) 28
5 U.S.C. 552a(d)(2) 7
5 U.S.C. 552a(e) 7
5 U.S.C. 552a(e)(1) 7, 28, 32, 45
5 U.S.C. 552a(g)(1) 28
5 U.S.C. 552a(i)(1) 28

Statutes and regulations—Continued: Page

Rehabilitation Act of 1973, 29 U.S.C. 705(20)(C)(ii) 43
Rev. Stat. § 1753 (1875) (5 U.S.C. 3301) 3
5 U.S.C. 2302(b)(10) 55
15 U.S.C. 278g-3 30
44 U.S.C. 3543-3544 30
5 C.F.R.:
Section 731.101 36
Section 731.106 36
48 C.F.R. 52.204-9 30
Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953 Comp.) 3, 35
Preamble, 3 C.F.R. 936 (1949-1953 Comp.) 3
§ 3(a), 3 C.F.R. 937 (1949-1953 Comp.) 3, 46
Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 Comp.) 55
Exec. Order No. 13,087, 3 C.F.R. 191 (1998 Comp.) 55

Miscellaneous:

Paul William Barada & J. Michael McLaughlin, *Reference Checking for Everyone: What You Need to Know to Protect Yourself, Your Business, and Your Family* (2004) 45
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Miscellaneous—Continued: Page

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75 Fed. Reg. 5359 (2010) 4, 6, 31, 32, 35, 45
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Jet Propulsion Laboratory Annual Report 08 (2009), www.jpl.nasa.gov/annualreport/2008-report.pdf 36
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Memorandum from Joshua B. Bolten, Director, OMB, to the Heads of All Departments and Agencies (Aug. 5, 2005) 9
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Miscellaneous—Continued: Page

National Inst. of Standards & Tech., U.S. Dep't of Commerce:

Archived Federal Information Processing Standards (FIPS) Publications (Feb. 25, 2010), http://csrc.nist.gov/publications/PubsFIPSArch.html 9

FIPS PUB 201-1, Personal Identity Verification (PIV) of Federal Employees and Contractors (Mar. 2006) 8

The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States (2004) 8

OPM:

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Standard Form 85P, Questionnaire for Public Trust Positions (Sept. 1995), http://www.opm.gov/Forms/pdf_fill/sf85p.pdf 4

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 530 F.3d 865. A prior opinion of the court of appeals (Pet. App. 30a-49a) is reported at 512 F.3d 1134. The order and opinions of the court of appeals on denial of rehearing en banc (Pet. App. 75a-130a) are reported at 568 F.3d 1028. The opinion of the district court (Pet. App. 54a-74a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2008. A petition for rehearing was denied on June 4, 2009 (Pet. App. 75a-130a). On August 25, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including Octo-

ber 2, 2009. On September 23, 2009, Justice Kennedy further extended the time to and including November 1, 2009 (a Sunday). The petition was filed on November 2, 2009, and was granted on March 8, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any person be * * * deprived of life, liberty, or property, without due process of law." Pertinent portions of the Privacy Act, 5 U.S.C. 552a, are reproduced in the appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

The federal government, like any responsible employer, conducts basic background checks of its employees. These routine investigations allow the government to verify the identities and histories of the individuals it employs and ensure that they are trustworthy. For over fifty years, background checks have been required by Executive Order for all civil service employees. Federal contractors also have conducted background checks of their employees when required as a condition of their contracts with the government. In 2005, in the implementation of a Presidential directive, the Commerce Department formally required that background checks be conducted for all contract employees seeking long-term access to federal facilities and information systems.

Respondents are 28 federal contract employees working at the Jet Propulsion Laboratory (JPL), a multi-billion-dollar research and development facility

owned by the National Aeronautics and Space Administration (NASA). They contend that the government's collection of certain job-related information violates a constitutional right to informational privacy. The court of appeals concluded that respondents were likely correct and ordered the entry of a preliminary injunction. In so doing, the Ninth Circuit called into question the most basic reference checks that government employers nationwide conduct every day.

1. Since 1871, the President has been authorized by statute to designate persons to ascertain the fitness of candidates for federal civil service employment. Rev. Stat. § 1753 (1875) (5 U.S.C. 3301). Since 1953, the federal government has conducted background investigations for all federal civil service employees. See Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953 Comp.). The purpose of the investigation is to ensure that the applicant is "reliable, trustworthy, of good conduct and character," and "loyal[] to the United States." Preamble, *id.* at 936. The investigation must include "a national agency check * * * and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the persons under investigation." § 3(a), *id.* at 937. The investigation utilizes standardized forms and procedures in order to ensure that all persons seeking government employment "receive fair, impartial, and equitable treatment." Preamble, *id.* at 936.

The standard background check is called the National Agency Check with Inquiries (NACI). Pet. App. 3a-4a. The NACI begins after the completion of a questionnaire by the applicant. J.A. 217. Applicants for federal employment in non-sensitive positions complete

Standard Form 85, Questionnaire for Non-Sensitive Positions (SF-85). See J.A. 88-95 (blank SF-85).[1]

The applicant's responses on SF-85 are used to conduct the background investigation. J.A. 217-218. The first portion of the investigation—the "agency check"—consists of a check of records in four federal government databases. *Ibid.*; see Pet. App. 4a.[2] The second portion of the investigation—the "inquiries"—involves sending forms to employers, educational institutions, landlords, and references listed by the applicant on SF-85 to verify the information provided by the applicant. J.A. 217-218. One of the forms commonly used in that process is at issue here—Form 42, Investigative Request for Personal Information. Form 42 is sent to references, former landlords, and persons who can verify periods of self-employment and/or unemployment. See J.A. 96-97 (blank Form 42).[3]

a. SF-85 is a six-page form that seeks information relevant to whether the applicant is "suitable for the

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[1] Applicants for public trust positions and for national security positions complete forms that are like SF-85 but include more detailed questions. See OPM, *Standard Form 85P, Questionnaire for Public Trust Positions* (Sept. 1995), http://www.opm.gov/Forms/pdf_fill/sf85p.pdf (SF-85P); OPM, *Standard Form 86, Questionnaire for National Security Positions* (July 2008), http://www.opm.gov/Forms/pdf_fill/sf86.pdf (SF-86). Those forms are not at issue here.

[2] Those databases are the Security/Suitability Investigations Index, the Defense Clearance and Investigations Index, the FBI Name Check, and the FBI National Criminal History Fingerprint Check. J.A. 217-218.

[3] Similar forms are sent to educational institutions (Form 43) and former employers (Form 41) that the applicant identifies. See 75 Fed. Reg. 5359 (2010). In addition, record requests are made to record repositories (Form 40) and to law enforcement agencies (Form 44). See *ibid.* Those forms are not at issue here.

job." J.A. 88. The form requests basic biographical information such as where the applicant has lived, worked, and gone to school. J.A. 90-93. It also asks the applicant to provide contacts who can verify former residences, jobs, and schooling, and to provide the names of three persons who know the applicant well and can serve as references. J.A. 91-93. The form includes a few additional questions about Selective Service registration, military history, and drug use. J.A. 94. Finally, the form requests the applicant's authorization for the release of information, so that federal investigators may contact individuals listed on the form, verify the information provided, and inquire about the applicant's suitability for employment. J.A. 95.

As relevant here, SF-85 asks whether, in the past year, the applicant has "used, possessed, supplied, or manufactured illegal drugs." J.A. 94. If the applicant answers "yes," he or she is asked to "provide information relating to the types of substance(s), the nature of the activity, and any other details relating to your involvement with illegal drugs[,] [i]nclud[ing] any treatment or counseling received." *Ibid.* The form advises the applicant that "[n]either your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding." *Ibid.*

SF-85 notifies the applicant that "[g]iving us the information we ask for is voluntary," J.A. 88, and that the government "will protect [the information provided] from unauthorized disclosure," J.A. 89. In particular, SF-85 advises the applicant that "[t]he collection, maintenance, and disclosure of background investigative information is governed by the Privacy Act." *Ibid.*

b. Form 42 is a two-page form sent to the persons identified by the applicant on SF-85 as references, former landlords, or persons who can verify periods of self-employment or unemployment. 75 Fed. Reg. 3559 (2010). Approximately 1,882,000 of these forms are sent out annually. *Ibid.* The Office of Personnel Management (OPM) estimates that the form takes five minutes to complete. *Ibid.*

Form 42 informs its recipient that it is seeking information relevant to the applicant's "suitability for employment or security clearance." J.A. 96. It first asks how long the recipient has known the applicant and how often the recipient associates or has associated with the applicant. J.A. 97. It then asks a series of yes/no questions, including whether the recipient has "any reason to question [the applicant's] honesty or trustworthiness," *ibid.* (Item 6), 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," or "other matters," *ibid.* (Item 7). If the answer is "yes," Form 42 asks the recipient to "explain in Item 8." *Ibid.* In turn, Item 8 asks the recipient for "additional information which you feel may have a bearing on [the applicant's] suitability for government employment or a security clearance." *Ibid.* Item 8 provides a blank space and notes that "this space may be used for derogatory as well as positive information." *Ibid.* Form 42 concludes by asking whether the recipient would recommend the applicant for government employment or a security clearance. *Ibid.*

c. Form 42, like SF-85, states that the information it collects is protected by the Privacy Act, 5 U.S.C. 552a.

J.A. 89, 96. The Privacy Act permits a federal agency to collect and maintain in its records "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. 552a(e)(1).[4] The Act requires agencies to permit individuals to gain access to records that pertain to them, 5 U.S.C. 552a(d)(1), and to request amendments to their records, 5 U.S.C. 552a(d)(2). Subject to certain limited exceptions, the Act also prohibits agencies from disclosing any record about an individual maintained in a system of records without the written consent of that individual. 5 U.S.C. 552a(b).

2. The NACI background-check process that has long been used for federal civil service employees was recently made applicable to employees of federal contractors. Contract employees previously had been subject to background checks when provided for by contract. But in 2005, in response to a Presidential directive, the Department of Commerce formally required that background checks be conducted for all federal contract employees seeking long-term access to federal facilities or information systems.

a. Following the terrorist attacks of September 11, 2001, Congress created an independent, bipartisan commission to provide recommendations on how to prevent future attacks. See Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, §§ 601-602, 116 Stat. 2408. In its final report, the Commission recommended that the federal government develop a uniform standard for the issuance of secure identification docu-

[4] Although this limitation applies to information "maintain[ed]" in a system of records, 5 U.S.C. 552a(e), the Privacy Act defines "maintain" to include "collect," 5 U.S.C. 552a(a)(3).

ments and then ensure that those documents are required for entry into vulnerable federal facilities. *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 390 (2004).

In response to that recommendation, the President directed the Department of Commerce to develop a mandatory and uniform "Federal standard for secure and reliable forms of identification." J.A. 127-130 (*Homeland Security Presidential Directive/HSPD-12 —Policy for a Common Identification Standard for Federal Employees and Contractors*, Pub. Papers 1765 (2004) (*HSPD-12*)). In *HSPD-12*, the President recognized that there were "[w]ide variations in the quality and security" of the credentials used for access to federal facilities, and he decided that a new, uniform identification standard should be developed for all federal employees and contract employees. J.A. 127. The President determined that the uniform standard would "enhance security, increase Government efficiency, [and] reduce identity fraud," while protecting personal privacy. *Ibid*. The President charged the Office of Management and Budget (OMB) with ensuring compliance with the new standard. J.A. 128-129. The President also directed that the new standard be implemented consistent with the Privacy Act. J.A. 129.

b. In accordance with *HSPD-12*, and pursuant to its authority under the Federal Information Security Management Act of 2002, 40 U.S.C. 11331, the Department of Commerce developed a government-wide identity credentialing standard. J.A. 131-150 (National Inst. of Standards & Tech., U.S. Dep't of Commerce, *FIPS PUB 201-1, Personal Identity Verification (PIV) of Federal Employees and Contractors* at v (Mar. 2006) (*FIPS*

201-1)).[5] As relevant here, that standard requires that a NACI background check be completed as a condition for granting an individual long-term access to federal facilities or information systems. J.A. 144-145.[6] The NACI background-check process was selected because it is an established way to "confirm[] the person's trustworthiness and compliance with the law." J.A. 218; see J.A. 144-146.

The Commerce Department has taken affirmative steps to safeguard the privacy of information obtained during these background checks. *FIPS 201-1* directs agencies to implement the new credentialing system "in accordance with the spirit and letter of all privacy controls specified in this standard, as well as those specified in Federal privacy laws and policies," such as the Privacy Act, and it provides detailed requirements for agencies to follow to protect the information they receive. J.A. 147-150.

After the Commerce Department promulgated the new credentialing standard, OMB set an October 2007 deadline for federal agencies to begin the background-check process for all current employees and contract employees. J.A. 105-130 (Memorandum from Joshua B. Bolten, Director, OMB, to the Heads of All Departments and Agencies (Aug. 5, 2005)).

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[5] The Department of Commerce first released the government-wide standards in 2005 (*FIPS 201*); *FIPS 201* was incorporated into and superseded by *FIPS 201-1* in March 2006. See Nat'l Inst. of Standards & Tech., *Archived Federal Information Processing Standards (FIPS) Publications* (Feb. 25, 2010), http://csrc.nist.gov/publications/PubsFIPSArch.html.

[6] Although *FIPS 201-1* authorizes the use of either the NACI or a substantially similar alternative investigation approved by OPM, J.A. 144-145, NASA has not sought to utilize an alternative investigation.

3. JPL is a federal research and development facility owned by NASA. Pet. App. 3a. JPL is the leading NASA center for deep space robotics and communications missions, and it is renowned for its work in developing satellites, rockets, missiles, spacecraft, and telescopes. J.A. 206, 221; *NASA Facts: Jet Propulsion Laboratory* 1-2, 5-9, http://www.jpl.nasa.gov/news/fact_sheets/jpl.pdf (last visited May 13, 2010). The facility has been responsible for such projects as the Mars Explorer Rover Mission and the Cassini Mission to Saturn. J.A. 206.

JPL is operated by the California Institute of Technology (Caltech) pursuant to a long-running contract with NASA. Pet. App. 3a; J.A. 163. All positions at JPL are filled by contract employees, but JPL employees perform duties that are functionally equivalent to those performed by federal civil service employees at other NASA centers. Pet. App. 3a; J.A. 221-222. NASA therefore provides JPL employees with access to physical facilities and information technology systems similar to the access granted to their civil service counterparts. J.A. 221-222.

In 2001, even before *HSPD-12* was promulgated, NASA determined that it had a potential security vulnerability because contractors at some facilities were not carrying out any background checks of their employees. J.A. 222-223; see Pet. App. 5a. Accordingly, NASA began to revise its procedures, with the goal of imposing additional security requirements for its contractors' workers. J.A. 223. In 2005, NASA updated its agency-wide security policy to require that all contract employees undergo background checks before receiving identity credentials. Pet. App. 5a; J.A. 222, 224; see J.A. 154

(NASA Procedural Requirements: NPR 1600.1).[7] NASA decided that the background checks should be conducted using the NACI process, because that process has long been used for civil service employees, and "NASA contractors * * * perform equivalent functions to those performed by NASA's civil servant workforce." J.A. 224. That policy change helped bring NASA into compliance with *HSPD-12*, but it was also supported by NASA's independent judgment that requiring NACI background checks of contractors would improve system and facility security. *Ibid.*; see J.A. 170-183 (NASA Interim Directive (NPR 1600.1)) (adopting the identity credentialing standard set out in *FIPS 201-1*).

In 2007, NASA modified its contract with Caltech to require that all JPL employees undergo background checks using the NACI process. Pet. App. 5a; J.A. 225; see J.A. 157-162 (contracts).

4. The individual respondents are 28 Caltech employees working at JPL. Pet. App. 55a. They sued NASA, the Department of Commerce, Caltech, and others, seeking to bar implementation of the background-check process at JPL. *Ibid.*; J.A. 58-87 (complaint).[8] In respondents' view, the government's collection of information through the background-check process would violate, *inter alia*, the Fourth Amendment, the Privacy

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[7] NASA promulgated the policy pursuant to its authority under the National Aeronautics and Space Act of 1958, 42 U.S.C. 2455, 2456, 2456a, and 2473. Pet. App. 11a-13a.

[8] Although respondents seek to represent a class of similarly-situated JPL employees, J.A. 79-80, this case has not been certified as a class action.

Act, and an asserted constitutional right to informational privacy. J.A. 81-82, 84-85.[9]

The district court denied respondents' motion for a preliminary injunction. Pet. App. 54a-74a. The court divided respondents' claims into two categories: challenges to the collection of information through SF-85 and Form 42, and challenges to use of that information to make credentialing decisions. *Id.* at 62a. As to the latter challenge, the court concluded that respondents lacked standing and that their claim was not ripe for review. *Id.* at 63a. The court explained that because no background checks had been conducted for respondents, there was "not an imminent injury" and respondents' claim that credentialing decisions would be made using improper criteria was "strictly speculative." *Ibid.*

The court then rejected respondents' Fourth Amendment challenge to the collection of information through SF-85 and Form 42, explaining that respondents "make no argument that a questionnaire, background check, or authorization to release records constitutes a 'search.'" Pet. App. 64a. The court similarly rejected respondents' contention that the collection of information violates the Privacy Act, because "SF-85 specifically states that it complies with the Privacy Act" and respondents failed to

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[9] Respondents also alleged that the background-check process violated the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(C), and the California Constitution. Pet. App. 55a; J.A. 83, 85-86. The district court rejected the APA claim, Pet. App. 65a-66a, and accepted respondents' concession that their state-law claims were barred on intergovernmental immunity and sovereign immunity grounds, 07-CV-5669 Order 12 (C.D. Cal. Jan. 16, 2008) (Docket entry No. 71). Respondents appealed on the APA claim, but the court of appeals rejected it. Pet. App. 11a-13a.

"show that the information collected" would not be "properly maintained or gathered." *Id.* at 67a.

Finally, the district court held that the background-check process does not violate a constitutional right to informational privacy. Pet. App. 68a-72a. The court observed that SF-85 "is relatively non-intrusive" and "does not seek extensive or overly-sensitive information," and that the "very high-tech and sensitive devices at JPL * * * warrant strict security measures." *Id.* at 70a, 72a. The court found that "there are adequate safeguards in place when dealing with sensitive questions," and identified, as one example, SF-85's query about illegal drug use in the past year, which is followed by an assurance that any response will not be used in any subsequent criminal proceeding. *Id.* at 70a.

5. Respondents appealed, challenging the district court's rulings on the Fourth Amendment and informational privacy. Respondents did not renew on appeal their claim that the background-check process violates the Privacy Act. Resp. C.A. Br. 17-59. A motions panel of the court of appeals granted respondents an injunction pending appeal, and that injunction remains in effect today. Pet. App. 50a-53a. Specifically, the court enjoined the government "from requiring [respondents] to submit the [SF-85] questionnaires for non-sensitive positions, including the authorization forms for release of information." 07-56424 Docket entry No. 5 (9th Cir. Oct. 5, 2007); see Pet. App. 53a.

A merits panel then reversed the district court's decision, Pet. App. 30a-49a, and remanded with instructions to fashion preliminary injunctive relief consistent

with its opinion, *id.* at 49a.[10] In response to the government's petition for rehearing en banc, the merits panel withdrew its initial opinion and issued a revised opinion, again finding portions of SF-85 and Form 42 likely unconstitutional and ordering preliminary injunctive relief. *Id.* at 1a-29a.

In its revised opinion, the court first determined that the only claims properly before it were those related to the collection of information through SF-85 and Form 42. Pet. App. 8a-10a. The court "agree[d] with the district court" that respondents' challenges to how the information collected would be used to make credentialing decisions "are unripe and unfit for judicial review." *Id.* at 8a.

The court of appeals then rejected respondents' Fourth Amendment claim. Pet. App. 13a-17a. The court explained that the disclosure of information through "direct questioning" of the applicant is not a Fourth Amendment search, *id.* at 16a-17a, and that "[t]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities," *id.* at 15a (quoting *United States* v. *Miller*, 425 U.S. 435, 443 (1976)).

The court determined, however, that respondents were likely to succeed on the merits of their claim that the use of the forms violates a distinct constitutional right to informational privacy. Pet. App. 17a-26a. The

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[10] After the court of appeals' first decision in this case but before that court's second decision, the district court entered an order directing the government "to cease any further investigations of [JPL] employees" but determined that the government "may issue I.D. cards to those employees who have already cleared their background investigations." 07-CV-05669 Minute Order 1 (C.D. Cal. Mar. 13, 2008) (Docket entry No. 99).

court stated that "the Constitution protects an 'individual interest in avoiding disclosure of personal matters.'" *Id.* at 17a (quoting *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999), cert. denied, 528 U.S. 1189 (2000)). In the court's view, that right is implicated whenever the government seeks information that "is not generally disclosed by individuals to the public." *Id.* at 22a (quoting *Crawford*, 194 F.3d at 958). In such a situation, the court continued, the government must establish "that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Id.* at 18a (quoting *Crawford*, 194 F.3d at 959). The court described this inquiry as a balancing of "the government's interest in having or using the information against the individual's interest in denying access." *Ibid.* (quoting *Doe* v. *Attorney Gen. of the United States*, 941 F.2d 780, 796 (9th Cir. 1991), disapproved on other grounds by *Lane* v. *Pena*, 518 U.S. 187 (1996)).

The court noted respondents' concession that "most of the questions" on SF-85 "are unproblematic and do not implicate the constitutional right to informational privacy." Pet. App. 19a. And the court determined that the question asking the applicant to disclose recent illegal drug activity is permissible because it is "designed to limit the disclosure of personal information to that * * * necessary to further the government's legitimate interest" in preventing its strong stance in its war against illegal drugs from being undermined as a result of drug use by its employees and contractors. *Id.* at 20a-21a. But the court decided that the government cannot ask an applicant who has acknowledged using drugs the follow-up question whether he or she has obtained treatment or counseling, because "treatment or

counseling * * * would presumably *lessen* the government's concerns regarding the underlying activity." *Id.* at 22a.

With respect to Form 42, the court acknowledged that the government "has several legitimate reasons for investigating its contractors," including the interest in "verifying its contractors' identities" and "ensuring the security of the JPL facility." Pet. App. 24a. The court also recognized that the request on Form 42 for "'any adverse information about this person's employment, residence, or activities'" "may solicit some information relevant to the applicant's identity or security risk." *Id.* at 25a (emphasis omitted). But the court believed that Form 42's questions are too "broad" and "open-ended" and therefore, under the standard the court propounded, are not narrowly tailored to advance the government's legitimate interests. *Id.* at 24a-25a.

6. The government filed a second petition for rehearing en banc, which was denied. Judge Wardlaw issued an opinion concurring in the denial of rehearing en banc. Pet. App. 76a-95a. Five judges joined three published dissents from denial of rehearing en banc. *Id.* at 96a-130a.

Judge Callahan's dissent (Pet. App. 96a-120a) regarded the panel's opinion as "an unprecedented expansion of the constitutional right to informational privacy" that could "undermine personnel background investigations performed daily by federal, state, and local governments" and "sharply curtail[] the degree to which the government can protect the safety and security of federal facilities." *Id.* at 97a, 120a.

Judge Kleinfeld's dissent (Pet. App. 120a-124a) concluded that the panel's opinion called into question the most basic investigation of an applicant by a prospective

employer, such as when a federal judge about to "hire law clerks and secretaries * * * talk[s] to professors and past employers and ask[s] some general questions about what they are like." *Id.* at 124a.

Chief Judge Kozinski also dissented. Pet. App. 125a-130a. He faulted the court for failing to distinguish between collection and disclosure of information, *id.* at 125a-126a; between voluntary disclosures and compelled disclosures, *id.* at 126a-127a; between information "pertain[ing] to a fundamental right" and "a free-standing right not to have the world know bad things about you," *id.* at 127a-128a; between collection of information from its source and collection of information from third parties, *id.* at 128a; and between the government's "functions as enforcer of the laws and as employer," *id.* at 128a-129a.

SUMMARY OF ARGUMENT

The government's collection of employment-related information through routine background checks of federal contract employees does not violate a constitutional right to informational privacy.

A. As the Court explained in *Whalen* v. *Roe*, 429 U.S. 589 (1977), the constitutional right to privacy encompasses at least two different kinds of interests: "the individual interest in avoiding disclosure of personal matters," and "the interest in independence in making certain kinds of important decisions." *Id.* at 598-600. This Court addressed the former in two longstanding decisions: *Whalen* and *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). Those decisions set important limits on the informational privacy right. They recognize that the government, in a variety of roles, routinely collects personal information, and that constitutional privacy concerns are generally satisfied

by safeguards against unauthorized disclosure by the government.

B. The informational privacy interests in this case are limited. This case concerns only the government's collection of information, and not any interest in avoiding public disclosure of intimate information, because information gathered in the background-check process is protected by the Privacy Act and other safeguards. Moreover, the government is acting to further its substantial interests as employer and proprietor. "[T]he government as employer * * * has far broader powers than does the government as sovereign." *Engquist* v. *Oregon Dep't of Agric.*, 128 S. Ct. 2146, 2151 (2008) (citation omitted). Any constitutional assessment therefore must account for the government's paramount interests as an employer and as a proprietor of facilities it owns. Here, it is clear from the face of SF-85 and Form 42 that they seek information only for employment-related purposes. Further, the government's need for that information is substantial, especially with respect to JPL, a key federal research and development facility.

C. The court of appeals erred in concluding that certain portions of the NACI background-check process likely violate a constitutional right to informational privacy.

The court erred in invalidating SF-85's drug-treatment question. The court mistakenly assumed that all questions regarding medical treatment implicate significant privacy concerns, and it gave short shrift to the government's interests in knowing whether an individual who has recently used illegal drugs has rehabilitated himself. As an employer, the federal government is legitimately concerned not only with recent illegal drug

use, but also with the steps that an employee or applicant has taken to ameliorate any potential problems.

The court of appeals likewise erred in concluding that the use of Form 42 likely violates respondents' constitutional rights. The court's analysis was untethered to any recognized private area; the court found constitutional fault because in its view the form's questions are too "open-ended." Contrary to the court's understanding, however, an applicant for federal contract employment has no constitutionally protected interest in preventing the government from asking designated references for information about or impressions of him. Moreover, to the extent that an applicant has disclosed certain facts to others, it is only in the rare case that he would continue to retain a constitutionally cognizable privacy interest in them. And it is plainly reasonable for the government to ask designated references and contracts about whether it should employ a particular individual.

D. The court's contrary conclusion is serious error. The court first failed to distinguish between the government's collection of information and public disclosure of information that it receives. The court then compounded its error by failing to account for the fact that this case arises in the employment context. And the court saw no constitutional difference between inquiries to the applicant and inquiries to third parties. Not surprisingly, the other courts of appeals that have considered similar challenges have rejected them. Respondents do not attempt to defend the reasoning of the court of appeals, instead focusing on a claim that both courts below found unripe and unsuitable for judicial review. The judgment of the court of appeals should be reversed.

ARGUMENT

THE GOVERNMENT'S COLLECTION OF INFORMATION THROUGH SF-85 AND FORM 42 FOR EMPLOYMENT-RELATED PURPOSES IS CONSTITUTIONAL

The Ninth Circuit has enjoined the government from conducting basic background checks of contract employees at the Nation's premier deep space and robotics facility. In the court's view, the government's use of a background check to collect information the contract employee would not normally make public implicates a constitutional privacy right. That is so, the court determined, regardless of whether the information is collected from the contract employee or from third parties, and regardless of whether the government protects the information collected from public disclosure. And when the privacy right is implicated, the court held, the government's justification must be balanced on an *ad hoc* basis against the individual's asserted privacy interest.

The Constitution, however, does not forbid the government from performing basic background checks like the ones at issue here. To be sure, the government, like any employer, is restricted from adopting abusive employment practices—and this case does not call for the Court to define the precise limits of constitutional protections concerning the government's gathering of information in various contexts. Rather, in this case, respondents' challenge is foreclosed in light of the reduced expectations of privacy in the employment context, the longstanding and widespread use of SF-85 and Form 42, the reasonableness of the challenged inquiries, and the Privacy Act's protections regarding the maintenance and dissemination of the information collected.

A. This Court Has Made Clear That Constitutional Privacy Concerns Are Not Triggered Merely Because The Government Collects Information About An Individual

1. As the Court explained in *Whalen* v. *Roe*, 429 U.S. 589 (1977), "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests": "the individual interest in avoiding disclosure of personal matters," and "the interest in independence in making certain kinds of important decisions." *Id.* at 598-600. Although the Court has discussed the latter interest on several occasions, it has addressed the constitutional protection against disclosure of personal matters in only two cases: *Whalen* and *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). In both of these longstanding opinions, the Court concluded that the challenged practice did not violate an asserted constitutional right concerning the privacy of information.

a. In *Whalen*, the Court considered a privacy-based constitutional challenge to a New York statute requiring doctors to report prescriptions for certain narcotics to the state health department. 429 U.S. at 591, 593. The state agency collected that information in order to identify stolen or altered prescriptions and uncover abuse of prescription narcotics. *Id.* at 592-593. The information was stored in a computer database. *Id.* at 593. Only a limited number of state employees had access to the database; records were destroyed after five years; and public disclosure of the patients' identities was prohibited by state law. *Id.* at 593-595 & n.12.

The Court rejected the argument that the State's collection of prescription information violated a constitutional informational privacy right. *Whalen*, 429 U.S. at 600, 604. The Court distinguished between the collec-

tion of information for governmental purposes and the government's disclosure of that information to the public. The Court determined that there was no realistic threat of public disclosure in light of the numerous steps taken to safeguard the information and the statutory and regulatory prohibitions on disclosure. *Id.* at 600-601. A "remote possibility" of public disclosure, the Court explained, "is surely not a sufficient reason for invalidating the entire patient-identification program." *Id.* at 601-602.

The Court then determined that the reporting of prescription information to health department employees did not itself violate a constitutional privacy right. *Whalen*, 429 U.S. at 602. Although "some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention," the Court explained, "disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies" are a necessary feature of modern medical practice. *Ibid.* The Court concluded that the required reporting of narcotics prescription information to the state health department was not "meaningfully distinguishable" from such disclosures. *Ibid.*

b. Relying on *Whalen*, the Court in *Nixon* v. *Administrator of General Services*, *supra*, rejected a facial challenge to provisions of the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2111 note, that directed government archivists to obtain and preserve certain Presidential papers and tape-recorded conversations. 433 U.S. at 429. Former President Nixon contended that it would violate his constitutional right to privacy to allow government archivists to review his papers to determine which ones concerned official

business (and therefore would be archived) and which concerned personal matters (and would be returned to him). *Id.* at 434, 454-455, 459.

The Court assumed that the former President had a legitimate expectation of privacy in his personal materials, *Nixon*, 433 U.S. at 457-458, although it noted that this expectation was reduced by his status as a public figure, *id.* at 465. The Court concluded, however, that the limited review of private materials contemplated by the statute was permissible. The Court explained that the "overwhelming bulk" of the materials pertained to official Presidential business, and that in fact many of the items "were prepared and seen by others and were widely circulated within the Government." *Id.* at 459. For materials that the former president "ha[d] already disclosed to the public," the Court determined that the former President "cannot assert any privacy claim." *Ibid.*

As in *Whalen*, the Court focused on whether there was a realistic probability of public disclosure of private matters. *Nixon*, 433 U.S. at 458-460. The Court found the "privacy interest asserted" to be even "weaker" than in *Whalen*, because the statute "mandate[d] regulations * * * aimed at preventing undue dissemination of private materials" and the government did "not even retain long-term control over" those materials because the records would be returned to the former President. *Id.* at 458-459, 462. The Court noted that the parties agreed that the only way to identify which materials were subject to archival as official materials was "by screening all of the materials," and that screening would be conducted by government archivists with "an unblemished record for discretion." *Id.* at 460, 462, 465 (citation omitted). The Court further noted that such screening of papers

had been conducted in establishing Presidential libraries for a number of former Presidents. *Id.* at 462. In light of the President's "lack of any expectation of privacy in the overwhelming majority of materials," the numerous protections against public disclosure of private papers, and the significant public interest in preserving official materials, the Court rejected the privacy-based challenge to the Act. *Id.* at 465.

2. *Whalen* and *Nixon* identify several commonsense principles that govern constitutional analysis of privacy interests when the government collects information about an individual. First, the Court recognized that there is a significant difference between the collection of information by the government for legitimate governmental purposes, and the subsequent disclosure of that information to the public. The essence of the privacy interest, the Court has explained, is "keeping personal facts away from *the public eye*." *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 769 (1989) (emphasis added). Accordingly, when measures have been taken to protect personal information from public disclosure, the Court found that basic privacy concerns have been satisfied. *Nixon*, 433 U.S. at 458-460; *Whalen*, 429 U.S. at 601-602. A "remote possibility" of public disclosure, the Court explained, is not enough to invalidate a statutory or regulatory scheme, especially one that includes specific protections against such disclosure. *Whalen*, 429 U.S. at 601-602.

Second, the Court did not perceive a significant constitutional issue in the government's mere collection or review of the information for a legitimate purpose. To the contrary, in *Whalen*, the Court noted that the government often must collect personal information in or-

der to fulfill basic government functions, observing that "[t]he collection of taxes, the distribution of welfare, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require" the government to collect certain information that would be "potentially embarrassing or harmful" if publicly disclosed. 429 U.S. at 605. Because collection of the information thus fell within an established norm, there was not a significant interference with the individual's privacy interest. *Id.* at 602. Indeed, the Court observed in *Whalen* that it had upheld reporting requirements even where the information concerned the exercise of a recognized constitutional right, such as the right to "mak[e] the abortion decision free of governmental intrusion." *Id.* at 602 n.29 (citing *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 79-81 (1976)).

Moreover, in *Nixon* the Court cautioned against considering privacy-based claims "in the abstract," without a careful consideration "of the specific provisions" of the government's program. 433 U.S. at 458. And in *Whalen*, the Court pointed out that "[t]he [government's] right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." 429 U.S. at 605. "Recognizing that in some circumstances that duty arguably has roots in the Constitution," the Court concluded that the statutory and regulatory scheme in that case "evidence[d] a proper concern with, and protection of, the individual's interest in privacy." *Ibid.* The Court did not second-guess the government's need for the information or its methods of obtaining it, instead noting that the statute was "the product of an orderly and rational legislative decision." *Id.* at 597.

Finally, the Court suggested in *Nixon* that privacy interests are substantially lessened when the individual has not kept the information private. The Court observed that "of course" the former President "cannot assert any privacy claim as to the documents and tape recordings that he has already disclosed to the public." *Nixon*, 433 U.S. at 459.

B. This Case Involves Only The Routine Collection Of Employment-Related Information By The Government Acting In Its Capacity As An Employer And Proprietor

This case concerns a challenge to the government's routine request for and receipt of employment-related information concerning its contract employees. The information received in the background-check process is protected from public disclosure by the Privacy Act and by additional procedures adopted by the relevant agencies. And the government requests this information not as a regulator of private conduct, but as an employer and proprietor, to protect the security of its facilities and information systems. This routine and longstanding practice does not trigger significant constitutional concerns.

1. This case concerns the government's collection of information, subject to the Privacy Act, not disclosure to the public

Respondents challenge the government's request for and receipt of certain information through the NACI process. J.A. 59-60. In their complaint, they made no allegation that the information would be disclosed publicly. The sole question is whether the Constitution prevents the government from requesting information about contract employees who seek access to its own facilities or information systems.

a. Like *Whalen* and *Nixon*, this case presents no realistic threat of public disclosure of information that comes into the government's possession. All of the information received through the NACI background-check process is protected against public disclosure by a panoply of reinforcing measures. Chief among them is the Privacy Act, 5 U.S.C. 552a. SF-85 states at the outset that the government will "protect [the information provided] from unauthorized disclosure" and that, in particular, "[t]he collection, maintenance, and disclosure of background investigative information is governed by the Privacy Act." J.A. 89. Form 42 similarly states that the government's "investigative inquiry is in full compliance with the Privacy Act of 1974 and other laws protecting the civil rights of the person we are investigating." J.A. 96.

In requiring background checks for contract employees, the President, the Commerce Department, and OMB took great care to stress that information obtained would be protected by the Privacy Act. See J.A. 129 (*HSPD-12*) (the directive "shall be implemented in a manner consistent with * * * the Privacy Act"); J.A. 147 (*FIPS 201-1*) (new credentialing standard should be implemented "in accordance with * * * Federal privacy laws and policies including but not limited to * * * the Privacy Act of 1974"); J.A. 120 (OMB memo) (background-check information must be "handled consistent with the Privacy Act"). And when NASA independently decided to require background checks for its contract employees, it emphasized that "[a]ny and all individuals" involved in the process "must adhere strictly to the requirements of the * * * Privacy Act." J.A. 178-179; see J.A. 172.

b. The Privacy Act reflects the longstanding judgment by Congress as to the best means of protecting personal information from improper disclosure without unduly impairing the effective operation of government. The Act governs both what information may be collected by the government and how that information will be protected from unwarranted disclosure. It permits a federal agency to collect and maintain in a system of records only information that is "relevant and necessary" to accomplish the agency's purposes, 5 U.S.C. 552a(e)(1), and it bars the agency from disclosing to any person or other agency "any record which is contained in a system of records" maintained by the agency, unless the individual to whom the record pertains has provided written consent, or disclosure is authorized by a statutory exception. 5 U.S.C. 552a(b). The Act allows an individual to gain access to the records that pertain to him and to seek amendment of those records if they are "not accurate, relevant, timely, or complete." 5 U.S.C. 552a(d)(1)-(2). Finally, the Act provides a civil remedy for individuals whose files are not maintained consistent with the Act, 5 U.S.C. 552a(g)(1); see *Doe* v. *Chao*, 540 U.S. 614 (2004), as well as criminal liability for federal employees who willfully violate certain provisions of the Act, 5 U.S.C. 552a(i)(1).

As this Court has stated, the Privacy Act "give[s] forceful recognition" to a person's "interest in preserving the confidentiality of sensitive information contained in his personnel file." *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 318 n.16 (1979). Respondents abandoned on appeal any claim that the background-check process or the forms used in it violate the Privacy Act, and it therefore must be assumed for present purposes that the

background-check process is conducted in a manner that complies with the Privacy Act.

The government has employed the NACI process for over 50 years, and the Privacy Act has been in place since 1975, yet there is no suggestion that the Privacy Act's protections have proven inadequate to protect information obtained through background checks. Cf. *Whalen*, 429 U.S. at 601 (crediting program's experience in protecting privacy). To the contrary, the courts have recognized that the Privacy Act provides an important and effective source of protection for that information. See, *e.g.*, *AFGE* v. *HUD*, 118 F.3d 786, 793 (D.C. Cir. 1997) (relying on Privacy Act protections in finding no realistic prospect of public disclosure of information gathered in background investigations); see also *NTEU* v. *United States Dep't of the Treasury*, 25 F.3d 237, 244 (5th Cir. 1994). And there is no reason to assume that the Privacy Act is ineffectual where (as here) respondents have challenged the use of SF-85 and Form 42 on their face.

c. In addition to the Privacy Act, there are other protections for information collected through the NACI background-check process. In requiring that background checks be conducted for federal contract employees, the Commerce Department provided detailed requirements for protecting the information collected, including access controls and technological standards. J.A. 147-150. Similarly, OMB has issued specific guidance regarding agencies' privacy-related responsibilities in the background-check process. OMB has directed each agency to ensure compliance with the Privacy Act, to assign an individual to oversee privacy-related matters, to prepare and make publicly available a comprehensive privacy impact assessment, and to develop and

implement sanctions for any violations of privacy policies. J.A. 120-122. This Commerce Department and OMB guidance is binding on federal agencies (under *HSPD-12*, 15 U.S.C. 278g-3, 40 U.S.C. 11331, and 44 U.S.C. 3543-3544) and on government contractors (through the Federal Acquisition Regulation, 48 C.F.R. 52.204-9).[11]

The numerous statutory and regulatory protections for information obtained through the background-check process make plain that respondents are not challenging a program that implicates the principal concern for the privacy of personal information, *viz*, the right to "keep[] personal facts away from the public eye." *Reporters Comm. for Freedom of the Press*, 489 U.S. at 769.

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[11] NASA has carefully guarded the privacy of JPL employees, including as against Caltech, their employer. NASA's public notices implementing the Privacy Act for *HSPD-12* limit disclosures to agency contractors to instances in which the contractors "need to have access to the records in order to perform their activity." 71 Fed. Reg. 45,859-45,860 (2006). In accordance with that guidance, JPL plays a very limited role in the background checks at issue here: after a JPL employee completes an SF-85, one of a small number of JPL "approvers" checks to see that all questions have been answered, and then forwards the SF-85 form on to OPM. J.A. 207-208, 211-212. JPL maintains "no record of the SF 85 the applicants complete" and plays no further role in the background-check process. J.A. 212.

Once OPM receives the SF-85 form, it sends written inquiries, including Form 42, to verify the information provided on SF-85. Pet. App. 4a. OPM provides a report of the investigation to NASA, and NASA decides whether to grant credentials, deny credentials, or investigate further. J.A. 225. If an employee is denied credentials, he or she is informed of the reasons for NASA's decision and has an opportunity to appeal. J.A. 181-183, 212.

2. Any privacy interests implicated in this case are further limited because SF-85 and Form 42 seek information only for employment-related purposes

The context of the background-check inquiries at issue in this case further demonstrates that they do not entail any substantial intrusion into personal privacy.

a. Commerce Department and OMB standards require that a background check be conducted for all contract employees who require long-term access to federal facilities and information systems, in order to verify the individuals' identities and ensure that they are sufficiently reliable and trustworthy to be granted such access. J.A. 143-147, 217-218, 222-223, 225. The government first seeks information from the applicant, including biographical data and educational and work history, as well as information about compliance with the law and activities that could interfere with the applicant's ability to perform safely and productively. See J.A. 88, 90-94. The government then verifies that information by checking government databases and by sending written inquiries to the references and other contacts provided by the applicant on SF-85. 75 Fed. Reg. at 5359; see J.A. 96-97. Once the government gathers that information, the relevant contracting agency decides whether to grant the individual an identity credential. See J.A. 89. The information collected is not to be used for any other purpose. See, *e.g.*, 75 Fed. Reg. at 5359.

The government conducts NACI background checks using standard forms, such as SF-85 and Form 42. SF-85 states that its purpose is to collect information in order to "conduct [a] background investigation[]" to determine whether the individual is "suitable for the job," meaning "reliable, trustworthy, and of good conduct and character." J.A. 88; see J.A. 89. Form 42 similarly

informs the recipient that "[y]our name has been provided by the person identified below to assist in completing a background investigation," and it limits its inquiry to matters that "have a bearing on this person's suitability for government employment or a security clearance." J.A. 96-97.

Respondents speculate (Br. in Opp. 19-20) that the government might use these forms to obtain non-employment-related information. But that conjecture is belied by the forms' express statement of their purpose and scope, which is particularly pertinent because the court of appeals' decision was based on a reading of the forms on their face. Moreover, the only sources from which the government seeks information on these forms are the applicant himself and those references and contacts he identifies. J.A. 96, 210, 218; 75 Fed. Reg. at 5359. A person does not have a privacy interest protected by the Constitution in information that is in the possession of third parties such as employers, educational institutions, and landlords, and that is relevant to suitability for employment. See pp. 52-53, *infra*. Finally, as discussed above, the background checks are governed by the Privacy Act, which permits a federal agency to collect and maintain in its records "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. 552a(e)(1). There is accordingly no reason to doubt in this broad-based challenge that the forms legitimately seek and elicit information that is

relevant to respondents' employment and access to federal facilities and information systems.[12]

b. In conducting the challenged background checks, the government is acting as an employer and a proprietor of federally owned facilities and information systems, not as a regulator of private conduct. This Court has long recognized that there is a "crucial" constitutional difference between "the government exercising 'the power to regulate * * * as a lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist* v. *Oregon Dep't of Agric.*, 128 S. Ct. 2146, 2151 (2008) (quoting *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 896 (1961)) (brackets in original). In the public employment context, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Ibid.* (quoting *Waters* v. *Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion)). The government must have "far broader powers" when acting as employer than as sovereign, *ibid.* (quoting *Waters*, 511 U.S. at 671 (plurality opinion)), because the government could not function effectively if "every employment decision became a constitutional matter," *ibid.* (quoting *Connick* v. *Myers*, 461 U.S. 138, 143 (1983)). Further, "[t]he employee's expectation of privacy must be assessed in the context of the employment relation." *O'Connor* v. *Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion); see *Engquist*, 128 S. Ct. at 2151. Accordingly, "'absent the most unusual cir-

[12] If respondents have concerns about their own individual records, they may invoke their rights under the Privacy Act to gain access to records pertaining to them to ensure that those records are maintained in accordance with the Act.

cumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision'" made by the government. *Id.* at 2152 (quoting *Connick*, 461 U.S. at 147); see also *Garcetti* v. *Ceballos*, 547 U.S. 410, 418-419, 422-423 (2006).

These principles are particularly applicable here. Respondents are contract employees who work at a facility owned by NASA, and their duties are similar to those performed by their civil service counterparts at other NASA centers. J.A. 221.[13] The government conducts background checks before entrusting them with access to federal facilities and information systems for essentially the same reasons that it conducts background checks of civil service employees. J.A. 218, 222-223, 225. The government is not conducting free-ranging inquiries into citizens' private affairs; it is requesting employment-related information from persons who wish to work for the government as contract employees and seek access to federal facilities to do so.

Background checks are familiar and broadly accepted in our society. Private employers commonly conduct background checks before making hiring decisions. See, *e.g.*, Society for Human Res. Mgmt., *Background Checking: Conducting Reference Background Checks* 4 (Jan. 22, 2010), http://www.shrm.org/Research/SurveyFindings/Articles/Documents/Background%20Check_Reference.pptx (76% of surveyed employers conduct background checks for all job

[13] The fact that respondents are employees of contractors hired by the government, rather than civil service employees hired directly by the government, does not lessen the government's broad authority to ensure secure and effective government operations. See, *e.g.*, *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 677-678 (1996); *Lefkowitz* v. *Turley*, 414 U.S. 70, 82-83 (1973).

candidates). Conducting background checks "makes good sense" because it allows an employer "to verify the accuracy of information in a prospective employee's job application form and potentially prevents future * * * lawsuits" that could result from hiring an unqualified or untrustworthy employee. Max Muller, *The Manager's Guide to HR: Hiring, Firing, Performance Evaluations, Documentation, Benefits, and Everything Else You Need to Know* 203 (2009). Many States have statutes requiring that background checks be conducted for applicants for certain state positions, including positions in schools, mental health facilities, hospitals, and social services organizations. Philip D. Dickinson, *Hiring Smart: How to Conduct Background Checks* 13-18 (1997) (surveying state laws) (*Hiring Smart*); Barbara A. Lee, *Who Are You? Fraudulent Credentials and Background Checks in Academe*, 32 J.C. & U.L. 655, 663 n.83 (2006) (same); Barry J. Nadell, *Sleuthing 101, Background Checks and the Law* 49-130 (2004) (same). And the federal government has conducted background checks for millions of civil service employees over the past 50 years, using the process at issue here. See Exec. Order No. 10,450, *supra*; 75 Fed. Reg. at 5359. This pervasive and longstanding practice throughout society fatally undermines respondents' contention that the government's use of routine forms such as SF-85 and Form 42 to conduct background checks for contract employees, subject to protection of the Privacy Act and the additional measures described above, raises privacy concerns of a constitutional dimension.

c. It is particularly important for the government to conduct background checks at key federal research facilities like JPL. JPL is one of the Nation's premier space and robotics research and development facilities,

and it is staffed exclusively with contract employees. See Pet. App. 96a, 98a-99a (Callahan, J., dissenting from denial of rehearing en banc); J.A. 206, 221-222. Its annual operating budget is over $1.5 billion, representing a significant investment by American taxpayers. Pet. App. 24a; JPL, NASA, *Jet Propulsion Laboratory Annual Report 08*, at 33 (2009), www.jpl.nasa.gov/annualreport/2008-report.pdf. The government may legitimately conduct background investigations of individuals with access to JPL facilities and information systems in order to protect those investments.[14]

The court of appeals believed that the government's interests are lessened by the fact that respondents are classified as "low risk" employees. Pet. App. 24a-25a.[15] But "low risk" is not "no risk." Many of JPL's projects "require broad access to many NASA physical and logical facilities," J.A. 221, and low risk employees work on a wide variety of mission-critical and technologically

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[14] Respondents suggest (Br. in Opp. 3) that JPL operates as an "open campus" with minimal security. That is wrong. Access to JPL's 175-acre campus is controlled through a number of security checkpoints. J.A. 206-207. The three main entrances are controlled by security gates, and employees must scan their badges in order to enter. J.A. 206. There are also turnstiles at parking areas, which require a badge for entry. J.A. 206-207. Every person who seeks unescorted access to JPL, including Caltech faculty, must apply for and receive a badge from NASA. J.A. 213.

[15] Contrary to the suggestion in Judge Wardlaw's concurrence in the denial of rehearing en banc, Pet. App. 77a n.3, NASA did not designate the positions as "low risk" pursuant to 5 C.F.R. 731.106, a regulation applicable only to Federal employees. See 5 C.F.R. 731.101 (defining positions covered by the regulation). Rather, Caltech designated the positions as "low risk" using criteria issued by NASA pursuant to its authority under the National Aeronautics and Space Act of 1958. See J.A. 208-209; C.A. E.R. 513-516.

advanced projects. Respondents' own submissions prove the point. Although all of the respondents are classified as low risk employees, they are responsible for such tasks as:

- ensuring "compliance with * * * International Traffic and Arms Regulations (ITAR) and Export Administration Regulations (EAR)," C.A. E.R. 968;
- conducting laboratory tests to "assess the characteristics" of spacecraft materials, including analyzing material failures, C.A. E.R. 1439;
- reviewing the "technical work" of all engineers involved in flight dynamics, including work on "mission design, trajectory optimization, navigation and guidance[,] and control," C.A. E.R. 1220;
- managing a group of twenty senior engineers and being "formally accountable as NASA's Technical Authority for th[e] $568 [million]" Kepler space observatory, C.A. E.R. 1396;
- leading the team of 40 engineers who "design, validate, and compile all of the command sequences used to operate the rovers on Mars," C.A. E.R. 1444; and
- managing JPL's Data System Standards Program, which works to develop "space communications and navigation standards" that are "critical to the success and the science data return of the JPL missions," C.A. E.R. 1480.

Respondents are properly proud of the responsibilities they assume as JPL employees. But the very nature of those responsibilities underscores the legitimacy of the

government's decision to conduct the routine background checks that respondents challenge.

C. The Use Of SF-85 And Form 42 To Conduct Background Checks Of Contract Employees Is Constitutional

The court of appeals erred in holding that it likely violates the Constitution for the government to ask a contract employee and his designated references certain questions on SF-85 and Form 42. One question on SF-85 addresses illegal drug use, an area in which the court of appeals recognized that an individual has minimal (if any) privacy rights. For that question, any privacy interests implicated are greatly outweighed by the government's need for the information in order to ensure the safety and security of its facilities and information systems. The routine inquiries contained on Form 42 likewise do not implicate significant privacy concerns. The form seeks information and opinions about the applicant from third-party references, and the applicant generally does not have cognizable privacy interests in such information. Moreover, the types of questions contained on Form 42 are commonplace and are an effective way to identify reasons why an applicant should not be granted access to federal facilities and information systems. It would be extraordinary to invalidate such inquiries on constitutional grounds, particularity with respect to an important federal research facility like JPL.

1. The government may ask contract employees who have used illegal drugs in the previous year whether they have sought treatment or counseling

Respondents "concede that most of the questions on SF-85 are unproblematic and do not implicate" constitutional concerns. Pet. App. 19a. But they challenged one of the questions on SF-85, which asks about treatment

or counseling for illegal drug use, and the court of appeals held that part of the question likely violates respondents' constitutional rights. Significantly, the court recognized that the government has a strong interest "in uncovering and addressing illegal substance abuse among its employees and contractors," and that the question asking an applicant whether he has used illegal drugs in the past year is "narrowly tailored" to "limit the disclosure of personal information to that * * * necessary to further" that interest. *Id.* at 19a-21a. But the court decided that the government may not ask the applicant— as part of a follow-up question asking for the details of the applicant's involvement with illegal drugs—to "[i]nclude any treatment or counseling received." J.A. 94; see Pet. App. 22a. The court gave two reasons. First, it stated that "[i]nformation relating to medical treatment and psychological counseling falls within the domain protected by the constitutional right to informational privacy." Pet. App. 22a. Second, it determined that the government does not have "any legitimate interest" in seeking such information, because "any treatment or counseling would presumably lessen the government's concerns regarding the underlying activity." *Ibid.* The court's reasoning was seriously flawed.

a. The court of appeals erred in assuming that the request to include treatment or counseling among the information requested in an otherwise constitutionally permissible question about illegal drug use raises any significant constitutional privacy concerns in this specific context. Drug treatment has not been recognized as one of the "fundamental" matters protected by the privacy guarantee in the Due Process Clause. See, *e.g.*, *Paul* v. *Davis*, 424 U.S. 693, 713 (1976) (defining as "fun-

damental" matters "relating to marriage, procreation, contraception, family relationships, and child rearing and education").[16] As the court of appeals itself noted, several courts "have been skeptical that questions concerning illegal drugs * * * would even implicate the right to informational privacy," because the drug laws "put citizens on notice this realm is not a private one." Pet. App. 19a-20a (quoting *Mangels* v. *Pena*, 789 F.2d 836, 839 (10th Cir. 1986)); see *NTEU*, 25 F.3d at 243 & n.3 ("[A]nyone who works for the government has a diminished expectation that his drug * * * abuse history can be kept secret, given that he works for the very government that has declared war on substance abuse."). While it is true that the government seeks not only information about illegal drug use but about treatment or counseling, that additional inquiry is not constitutionally objectionable. The inquiry is limited to treatment for illegal drug use, and the government's reason for seeking the information is to determine whether the illegal drug use is ongoing and whether it would affect the applicant's work performance.

The court of appeals assumed that all "medical information" is "squarely within" the constitutional right to

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[16] The few court of appeals decisions that have suggested that the government's mere collection of information can implicate constitutional privacy concerns generally have involved core concerns such as "contraception, abortion, marriage, and family life." *Thorne* v. *City of El Segundo*, 726 F.2d 459, 462 & n.1, 468 (9th Cir. 1983), cert. denied, 469 U.S. 979 (1984); see, *e.g.*, *Tucson Woman's Clinic* v. *Eden*, 379 F.3d 531, 551-552 (9th Cir. 2004); *Eastwood* v. *Department of Corr.*, 846 F.2d 627, 630-631 (10th Cir. 1988); but see *United States* v. *Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (privacy interest implicated by disclosure of subpoenaed medical records to the government, where the records were "more extensive than the mere fact of prescription drug usage by identified patients considered in *Whalen* v. *Roe*").

informational privacy. Pet. App. 22a. That was error. SF-85 does not request even general medical information, let alone medical records or information relating to matters such as procreation.[17] And a person seeking access to federal facilities as a federal contract employee has no constitutional shield from tailored questions about her use of illegal narcotics. The drug-treatment question specifies no level of required detail, and seeks information directly pertinent to recent illegal drug use —a matter that the court of appeals held is a proper subject of inquiry in this employment-related context. Such a question does not raise the same constitutional concerns as questions having no relationship to unlawful activity or questions intruding into the core interests identified in this Court's jurisprudence.

b. In any event, any intrusion on a contract employee's privacy interests must be balanced against the government's need, in its role as a public employer, to obtain drug-treatment information. The impact on privacy in this case is limited. This case concerns only the collection of information by the government, not public disclosure. This case therefore does not implicate the key concern addressed by the interest in informational privacy—that "the information will become publicly known." *Whalen*, 429 U.S. at 600; see pp. 24-25, *supra*. Moreover, the Privacy Act and various agency regulations ensure that the information collected will be used only for appropriate employment-related and credentialing purposes and will not be disclosed publicly. See pp. 27-30, *supra*; cf. *Skinner* v. *Railway Labor Execu-*

[17] Although SF-85 requests the applicant's authorization for the release of information, that release does not extend to medical records. J.A. 95. The government must request a separate waiver in order to obtain medical records. *Ibid.*; see C.A. E.R. 45.

tives' Ass'n, 489 U.S. 602, 626 n.7 (1989) (government's collection of information about an employee's legal drug use, acquired to aid the government in testing for illegal drugs, was not a "significant invasion of privacy" where there was "no indication that the government does not treat this information as confidential, or that it uses the information for any other purpose").

Finally, the question about recent illegal drug use and counseling is not meaningfully distinguishable from the type of legitimate inquiry that might be posed by a responsible private employer. That is especially true in light of the routine and longstanding nature of this inquiry in the federal sector: OPM reports that over one hundred thousand individuals complete SF-85 annually, and that the form has included a question soliciting information about applicants' drug use since 1987.

The minimal interference with privacy interests in these circumstances is far outweighed by the government's interests in the question concerning illegal drug use, including treatment or counseling. The government must be able to ensure the safety and security of important federal facilities like JPL. See pp. 33-38, *supra*. As the court of appeals recognized, the government asks subjects of a background investigation whether they have used illegal drugs in the previous year in order to establish whether they would be reliable, law-abiding, and trustworthy contract employees. Pet. App. 21a; see *id*. at 13a n.3 (noting that government has the authority to conduct drug testing of certain contract employees); see generally, *e.g.*, Gerald-Mark Breen & Jonathan Matusitz, *An Updated Examination of the Effects of Illegal Drug Use in the Workplace*, 19 J. Hum. Behavior in the Soc. Env't 434 (2009) (finding that illicit drug use was negatively correlated with various measures of

workplace productivity). Not surprisingly, courts have routinely upheld the government's questioning of potential employees about recent drug use. See, *e.g.*, *AFGE*, 118 F.3d at 792-794; *NTEU*, 25 F.3d at 243; cf. *National Fed'n of Fed. Employees* v. *Greenberg*, 983 F.2d 286, 291-293 (D.C. Cir. 1993) (rejecting Fifth Amendment challenge).

As an employer or prospective employer, either directly or through contractors having access to federal facilities, the government's interest is not merely in learning about recent illegal drug use, but in knowing whether that drug use makes an individual unsuitable for employment or access. When the former Civil Service Commission first decided to examine drug use as part of its assessment of employee suitability, it stressed its interest in identifying cases "in which, *despite counseling and rehabilitation programs*, there is little chance for effective rehabilitation." 38 Fed. Reg. 33,315 (1973) (emphasis added). In fact, although the court of appeals here said that the government lacked "any legitimate interest" in that inquiry, in doing so it stated the very reason for the question: "treatment or counseling received for illegal drug use * * * *lessen*[*s*] the government's concerns regarding the underlying activity." Pet. App. 22a. Knowing about an employee's drug treatment also may help the government avoid disability discrimination, because under the Rehabilitation Act of 1973, an individual who was once addicted to illegal drugs but successfully underwent treatment may qualify as "disabled." 29 U.S.C. 705(20)(C)(ii); *EEOC Compl. Man. (CCH)* § 902.6, at 5322 (Mar. 1995). And because this inquiry is made in the public employment context, where the government has "far broader powers" than when acting as sovereign, *Engquist,* 128 S. Ct. at 2151

(citation omitted), the courts should not second-guess the government's judgment about the need for information about recent drug use. The court of appeals therefore erred in holding that the inclusion of the treatment inquiry as part of the question concerning use of illegal drugs likely violates the Constitution.

2. The government may send Form 42 to a contract employee's designated references and contacts

The court of appeals found Form 42 "much more problematic" than the drug-treatment question on SF-85, because in its view, that form's "open-ended questions are designed to elicit a wide range of adverse, private information." Pet. App. 22a. Although the court "agree[d] with the government that it has several legitimate interests in investigating its contractors," the court determined that "Form 42's broad, open-ended questions appear to range far beyond" those interests. *Id.* at 24a-25a. The court therefore concluded that use of the form likely violates the Constitution. *Id.* at 26a.

a. The use of Form 42 in this context does not implicate privacy interests of a constitutional dimension. None of its questions requests information that infringes on recognized constitutional interests, see, *e.g.*, *Paul*, 424 U.S. at 713, and the court of appeals did not suggest otherwise.

Most of the questions on the form are related to the government's efforts to verify the information submitted by the applicant. The form asks how long the reference has known the applicant, the context of that association, and whether the recipient can verify particular information provided by the applicant, among other questions. J.A. 97. This helps the government verify that its contract employees are who they claim to be, and also helps

the government verify that they have not misrepresented their backgrounds.

The other questions are geared toward the applicant's suitability for access to federal facilities and are the same types of inquires that a similarly situated private employer would ask. The form asks designated references if they have "any reason to question [the applicant's] honesty or trustworthiness," whether the reference would recommend the applicant for government employment, and whether the reference has "adverse information" about the applicant concerning violations of the law, financial integrity, or mental or emotional stability. J.A. 97 (Question 7). The request for an explanation of any such "adverse information" makes clear that the request is for information that "may have a bearing on [the subject's] suitability for government employment." *Ibid.* (Question 8). And Form 42 is sent only to references and former landlords that the applicant lists on SF-85. J.A. 96, 210, 218; 75 Fed. Reg. at 5359. Moreover, Form 42 must comply with the Privacy Act, which permits a federal agency to collect and maintain only the information that is "relevant and necessary" to accomplish its purposes. 5 U.S.C. 552a(e)(1). Form 42 thus is neither designed nor used for unanchored inquiries into an individual's personal affairs.

b. That the request for information is in some respects "open-ended," Pet. App. 25a, does not raise constitutional concerns. Open-ended questions are commonly used by public and private employers. Many employers consider such questions essential to an effective background or reference check. See, *e.g.*, Paul William Barada & J. Michael McLaughlin, *Reference Checking for Everyone: What You Need to Know to Protect Yourself, Your Business, and Your Family* 52, 203 (2004);

Hiring Smart 66-67. As Judge Kleinfeld noted below, "Most of us do not hire law clerks and secretaries without talking to professors and past employers and asking some general questions about what they are like," because "[w]ithout open-ended questions, it is hard to know what potential problems might need an explanation." Pet. App. 124a (dissenting from denial of rehearing en banc). Since 1953, the government has sent "written inquiries to * * * former employers and supervisors, references, and schools attended" by prospective federal employees. See Exec. Order 10,450, § 3(a), 3 C.F.R. 937 (1949-1953 Comp.). The court of appeals had no basis for calling into question that longstanding practice and preventing the government from "doing what any sensible private employer would do." Pet. App. 121a (Kleinfeld, J., dissenting from denial of rehearing en banc).

c. Aside from asking the reference to verify certain information furnished by the applicant, Form 42 generally seeks information concerning a third-party reference's observations or impressions of an applicant. A reference may say that an applicant worked well with others, or describe him as trustworthy, or observe that he often arrived late to work, or note that he was a problematic tenant, or say he was seen dealing in drugs. An applicant does not have a constitutional right to preclude the government from posing such inquiries to landlords, former employers, educational institutions, or other third parties identified by the applicant as references or contacts. Such information in the possession of third parties in the ordinary course of their dealings with the applicant is not protected by any constitutional right to privacy or a fundamental interest in "personal auton-

omy." *Washington* v. *Glucksberg*, 521 U.S. 702, 727 (1997).

Even if Form 42 might lead a third-party reference to report information that an applicant disclosed to the third party and would not want made public, the simple act of asking a reference about an applicant for plainly legitimate governmental purposes, subject to the protections of the Privacy Act, does not violate the Constitution. Questions to third parties rarely raise constitutional privacy concerns, because the applicant has not kept the information private. See pp. 52-53, *infra*. The court of appeals recognized the Fourth Amendment precedent to that effect, Pet. App. 14a-16a, but stated that the inquiry should turn on "the nature of the information sought—in particular, whether it is sufficiently 'personal' to merit protection—rather than on the manner in which the information is sought," *id.* at 22a-23a n.5 (citation omitted). But the fact that an individual has already disclosed certain information to third parties surely must diminish any privacy interest in that information.

If a constitutionally cognizable privacy interest were implicated in this context, the government's interests in requesting the information would outweigh any intrusion on private affairs. Because the Form 42 inquiries are so clearly related to identity verification and employment suitability, a government agency acts reasonably in sending such inquiries.

D. The Court Of Appeals' Analysis Ignored The *Whalen* And *Nixon* Framework

In concluding that the background-check inquiries at issue in this case likely violate the Constitution, the court of appeals strayed far afield of this Court's guid-

ance in *Whalen* and *Nixon*. The court of appeals broadly defined what must be regarded as "private," requiring constitutional scrutiny any time the government seeks information that an individual would not generally disclose to the public. And the court utilized a one-size-fits-all test that equated the government's collection of information with the public disclosure of that information, failed to distinguish between the government's role as employer or proprietor and its role as sovereign, and assumed that the same privacy interests are implicated when information is sought from the source as when it is sought from third parties.

1. The Ninth Circuit recognized a broad constitutional right to informational privacy, one that goes well beyond the limits this Court set out in *Whalen* and *Nixon*. The court stated that a constitutional privacy right is implicated by the collection or dissemination of any information an individual would "not generally disclose[] * * * to the public." Pet. App. 21a (quoting *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999)). And applying that standard, the court determined that "[b]oth the SF 85 questionnaire and the Form 42 written inquiries require the disclosure of personal information." *Id*. at 18a.

The court did not tether that broad privacy right to any particular provisions of the Constitution. Assuming that such a right is grounded in the Due Process Clause, see, *e.g.*, *Glucksberg*, 521 U.S. at 719-720,[18] the court of

[18] In the district court, respondents asserted that their informational privacy claim arose under the Fourteenth Amendment. J.A. 82. The district court rejected that view because the Fourteenth Amendment does not apply to the federal government. Pet. App. 64a-65a. On appeal, respondents suggested that an informational privacy right could be "grounded * * * in various provisions of the Constitution" but did

appeals should have employed this Court's "established method of substantive-due-process analysis," which requires "a careful description of the asserted fundamental liberty interest" and an inquiry into whether that interest is "fundamental" and "deeply rooted in this Nation's history and tradition." *Id.* at 720-722 (internal quotation marks and citations omitted). That is not to say that a constitutionally cognizable privacy interest is limited only to information that pertains to an already-established private sphere—such as "marriage, procreation, contraception, family relationships, child rearing, and education," *id.* at 726 (citation omitted)—but simply that the court should have anchored its analysis in an assessment of whether the interests at stake are of comparable magnitude and sensitivity as to trigger constitutional scrutiny. The failure to conduct such an analysis would enmesh the courts in a "subjective" and "complex balancing of competing interests," *id.* at 722, every time the government seeks information the individual would choose not to disclose publicly.

The court of appeals then further erred in articulating an *ad hoc* balancing test for determining if the Constitution is violated by particular inquiries. The court set out a non-exclusive list of factors that may be relevant to this inquiry, including "the type of [information] requested," "the potential for harm in any subsequent nonconsensual disclosure," "the adequacy of safeguards to prevent unauthorized disclosure," "the degree of need for access" to the information, "and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest" justifying that ac-

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not rely upon or discuss any specific provisions of the Constitution. Resp. C.A. Br. 23 n.16, 25 n.18.

cess. Pet. App. 18a (quoting *Doe* v. *Attorney Gen. of the United States*, 941 F.2d 780, 796 (9th Cir. 1991), disapproved on other grounds by *Lane* v. *Pena*, 518 U.S. 187 (1996)) (brackets in original). But the court did not provide additional detail about how these factors would affect the analysis. Instead, it stated that in every case, the government would be required to "show[] that its use of the information would advance a legitimate state interest" and that "its actions are narrowly tailored to meet [that] interest." *Ibid.* (quoting *Crawford*, 194 F.3d at 959).

Whalen and *Nixon* draw much clearer lines. In both cases, the Court distinguished between the collection of information by the government and the dissemination of that information to the public at large, suggesting that any constitutional right to the privacy of information focuses on the latter, not the former. See *Nixon*, 433 U.S. at 456-457; *Whalen*, 429 U.S. at 600-601. Yet the court of appeals stated that it would apply the same balancing test any time the "government's actions compel disclosure of private information," regardless of whether the information was provided to the government or disseminated publicly. Pet. App. 17a-18a.

Further, both *Whalen* and *Nixon* determined that any informational privacy concerns would be substantially lessened by statutory and regulatory protections limiting the public dissemination of information provided to the government. *Nixon*, 433 U.S. at 458-460; *Whalen*, 429 U.S. at 601-602. Here, although the court of appeals stated that "the adequacy of safeguards to prevent unauthorized disclosure" is a factor relevant to the constitutional analysis, Pet. App. 18a (quoting *Doe*, 941 F.2d at 796), the court did not analyze the numerous protections that would protect background-check infor-

mation from public disclosure. Strikingly, the court never so much as mentioned the Privacy Act, even though both SF-85 and Form 42 note its applicability. Nor did the court of appeals address the specific procedures adopted by the Commerce Department and OMB in their guidance on credentialing contract employees. See pp. 29-30, *supra*. Instead, the court dismissively observed that even if "safeguards exist to help prevent disclosure" of the information collected, the government's burden remained the same. Pet. App. 24a. That was error. The distinction between the government's collection of information and public disclosure of information "is critical to this case because the government has provided adequate safeguards to ensure that the information is not disseminated to the public." *Id*. at 117a-118a (Callahan, J., dissenting from denial of rehearing en banc).

The court of appeals also erred by not assessing respondents' claim in light of the special and limited purpose for which the information is collected. Here, the government seeks information not in its regulatory capacity, but in its employment and proprietary capacity. The court of appeals ignored that distinction. See Pet. App. 110a-111a (Callahan, J., dissenting from denial of rehearing en banc); *id*. at 129a (Kozinski, J., dissenting from denial of rehearing en banc). Even assuming that the forms' requests for information might in other circumstances implicate respondents' privacy interests, the court's scrutiny should have taken into account the subject of the inquiries—federal contract employees seeking access to federal facilities.

Similarly, the court of appeals erred in describing the inquiries at issue as "compel[ling]" disclosure of personal information. Pet. App. 22a (emphasis omitted).

Neither an applicant seeking access to federal facilities as a contract employee nor the references the applicant identifies is required to respond to the government's inquiries in the manner that information might be compelled from private persons under regulatory programs. That makes the inquiries much less intrusive than those that are "imposed regardless of * * * consent." *Id.* at 126a-127a (Kozinski, J., dissenting from denial of rehearing en banc).

Finally, the court of appeals should not have equated information obtained directly from the applicant with information obtained from third parties. Pet. App. 17a-18a. When information is obtained from the applicant, and that information concerns core matters that themselves trigger constitutional protections, then a balancing of interests (tailored to the particular context) might in some circumstances be appropriate. See *Nixon*, 433 U.S. at 456. But when information is sought from third parties, it is only the rare case in which a constitutional privacy right would be implicated. As Judge Callahan noted below, until the Ninth Circuit's decision in this case, no court of appeals had held "that individuals have a constitutionally protected right to privacy in information disclosed to [third parties]." Pet. App. 107a (dissenting from denial of rehearing en banc). The everyday interactions that would lead a boss or a landlord to have a view on an applicant's trustworthiness are not the types of "personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected" by the Due Process Clause. *Glucksberg*, 521 U.S. at 727.

In the ordinary course, the fact that an individual has already revealed information to others means that it is

no longer "private" in the constitutional sense. "[B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his person"; "the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact." *Reporters Comm. for Freedom of the Press*, 489 U.S. at 763. As this Court has recognized in the Fourth Amendment context, an individual has no expectation of privacy in information she voluntarily reveals to a third party. See, *e.g.*, *Smith* v. *Maryland*, 442 U.S. 735, 743-744 (1979); *United States* v. *Miller*, 425 U.S. 435, 443 (1976); *Hoffa* v. *United States*, 385 U.S. 293, 302-303 (1966). That is because once the individual voluntarily discloses information to another, she necessarily assumes the risk that the other person will disclose the information to the government. *Smith*, 442 U.S. at 744-745. That principle applies even when information is revealed to the third party "on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Miller*, 425 U.S. at 443.

2. In light of the very narrow privacy interests at issue here, as well as the government's substantial needs as a public employer, it is not surprising that the Ninth Circuit stands alone in suggesting constitutional infirmity with the NACI background-check process.

Both the D.C. Circuit and the Fifth Circuit have rejected privacy-based challenges to SF-85P and SF-86, even though those forms are more extensive than the one at issue here. In *AFGE* v. *HUD*, *supra*, the D.C. Circuit upheld the questions on SF-85P (the form for public-trust employees) and SF-86 (the form for national security positions) concerning prior illegal activity, drug

use, and bankruptcies; delinquent financial obligations; and mental health treatment. 118 F.3d at 788-790. The court did not decide whether the Constitution protected the information, but held that even assuming that it did, a public employee's interest "is significantly less important where the information is collected by the government but not disseminated publicly," and where the government had "presented sufficiently weighty interests in obtaining the information sought by the questionnaires to justify the intrusions into [its] employees' privacy." *Id.* at 793-794.

In *NTEU* v. *United States Dep't of the Treasury*, *supra*, the Fifth Circuit similarly rejected a challenge to the question on SF-85P about illegal drug use within the past five years, including its inquiry about "any treatment or counseling received." 25 F.3d at 239-240. The court held that the plaintiffs "ha[d] no reasonable expectation that they can keep [this information] confidential from their government employer." *Id.* at 244. The court also noted that the information collected was never disclosed publicly, and that collecting the information furthered the government's interests in ensuring the trustworthiness of its employees. *Id.* at 243-244.

3. In opposing certiorari, respondents made little attempt to defend the court of appeals' analysis, instead speculating that the government might use the information it receives in the background-check process to make credentialing decisions based on improper criteria, such as private sexual activity. The principal basis for that claim was an "issue characterization chart," allegedly downloaded from a JPL intranet site, which respondents assert was used to identify criteria for employment decisions. Br. in Opp. 7, 16, 19-20; see Br. in Opp. App. 4a-10a (chart).

Both the district court and the court of appeals held that this challenge was "unripe and unfit for judicial review," because the government had not even begun the background checks of respondents and the record "does not sufficiently establish" how the government makes credentialing decisions. Pet. App. 8a-9a, 61a-63a. Respondents have not challenged that determination before this Court, and therefore the issue is not before the Court.

Nonetheless, because respondents pressed the point in opposing certiorari, the government notes that it has never claimed the authority to make credentialing determinations on criteria unrelated to employment, Pet. 9 n.5, and that NASA does not use the "issue characterization chart" to decide whether to provide credentials to federal contract employees, Cert. Reply 10. Further, OPM has recently issued a notice to all federal agencies, including NASA, reiterating that OPM has promulgated the exclusive standards for agencies to use in credentialing contract employees—standards that do not include respondents' "issue characterization chart." See OPM, *Federal Investigations Notice No. 10-05, Reminder to Agencies of the Standards for Issuing Identity Credentials Under HSPD-12* (May 17, 2010), http://www.opm.gov/investigate/fins/2010/ fin10-05.pdf. Finally, there are federal prohibitions on employment discrimination that preclude decisionmaking on the bases that respondents suggest. See, *e.g.*, Exec. Order No. 13,087, 3 C.F.R. 191 (1998 Comp.) (amending Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 Comp.)); see also 5 U.S.C. 2302(b)(10) (prohibiting the federal government from discriminating against employees or applicants on the basis of conduct that does not affect their work performance or the performance of others).

NASA's actual experience with its background checks belies any contention that it will make credentialing decisions based on improper factors. Although approximately 39,000 NASA contract employees had completed the requisite background investigations as of September 21, 2007, J.A. 224, respondents have not identified any example of an investigator seeking improper information, nor have they shown that anyone was denied a credential based on the use of improper criteria. See J.A. 213 (although over 46,000 individuals have applied for identity credentials, there have been no "reports * * * of any of the types of improper investigative techniques [respondents] suggest"). Respondents' baseless speculation on an issue not before this Court cannot justify the injunction issued by the court of appeals. The Constitution does not prohibit the federal government from making routine, employment-related inquiries regarding persons who wish to work as contract employees at the Nation's leading space and robotics research center.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 2010

APPENDIX

The Privacy Act, 5 U.S.C. 552a, provides, in pertinent part:

Records maintained on individuals

(a) DEFINITIONS.—For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e)[1] of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or

[1] See References in Text note below.

other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

* * * * *

(b) CONDITIONS OF DISCLOSURE.—No agency shall disclose any record which is contained in a system of records by any means of communication 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, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) 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 if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) ACCOUNTING OF CERTAIN DISCLOSURES.—Each agency, with respect to each system of records under its control, shall—

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency

in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) ACCESS TO RECORDS.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency

or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) AGENCY REQUIREMENTS.—Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon

establishment or revision a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any indi-

vidual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against

any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) AGENCY RULES.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the

agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) CIVIL REMEDIES.— Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the

production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause

of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

* * * * *

(i)(1) CRIMINAL PENALTIES.—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

* * * * *