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No. 09-530

IN THE
Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, *et al.*,
Petitioners,

v.

ROBERT M. NELSON, *et al.*,
Respondents.

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

BRIEF FOR THE RESPONDENTS

PAUL R.Q. WOLFSON
SHIRLEY CASSIN WOODWARD
SHIVAPRASAD NAGARAJ
ANNA MELAMUD
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

DAN STORMER
Counsel of Record
VIRGINIA KEENY
HADSELL STORMER KEENY
RICHARDSON & RENICK, LLP
128 North Fair Oaks Ave.
Pasadena, CA 91103
(626) 585-9600
dstormer@hadsellstormer.com

QUESTION PRESENTED

Whether the court of appeals correctly concluded that respondents have raised serious questions going to the merits of their informational privacy claim, based on NASA's decision to institute background investigations of low-risk, long-time employees of the California Institute of Technology (which operates the Jet Propulsion Laboratory under a contract with NASA), where that investigation could delve into (1) confidential details about medical treatment or counseling for past drug use, and (2) any "adverse" information about the employee, including private sexual matters.

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Executive Order No. 12986 (1995) 48

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OTHER AUTHORITIES

Barada, Paul William & Michael McLaughlin, *Reference Checking for Everyone: What You Need to Know to Protect Yourself, Your Business, and Your Family* (2004) 51

TABLE OF AUTHORITIES—Continued

Page(s)

Benn, Stanley I., *Privacy, Freedom and Respect for Persons* (1971), reprinted in *Philosophical Dimensions of Privacy: An Anthology* 231 (Schoeman ed. 1984) 41

Coles, Todd Robert, *Does the Privacy Act of 1975 Protect Your Right to Privacy?*, 40 Am. U.L. Rev. 957 (1991) 44

Defense Industrial Personnel Security Clearance Review Program (Jan. 2, 1992, updated Apr. 20, 1999) 48

Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992, updated Apr. 20, 1999) 48

Dickinson, Philip D., *Hiring Smart: How to Conduct Background Checks* (1997) 51

EEOC Notice No. 915.002, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* (July 2000) 27

Geppert, Cynthia M.A. & Michael P. Bogenschutz, *Ethics in Substance Use Disorder Treatment*, 32 Psychiatric Clinics of N. Am. 283 (2009) 21

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Page(s)

Homeland Security Presidential Directive/HSPD 12—Policy for a Common Identification Standard for Federal Employees and Contractors, 2 Pub. Papers 1765-1767 (Aug. 27, 2004) ... 4, 5

Kreek, Mary Jeanne & Marc Reisinger, *The Addict as a Patient*, in *Substance Abuse: A Comprehensive Textbook* 822 (Lowinson et al. eds., 1997) ... 21

McNamara, Robert M., Jr. & Joyce R. Starr, *Confidentiality of Narcotic Addict Treatment Records: A Legal and Statistical Analysis*, 73 Colum. L. Rev. 1579 (1973) ... 21

Miller, Arthur R., *Computers, Data Banks and Individual Privacy: An Overview*, 4 Colum. Hum. Rts. L. Rev. 1 (1972) ... 42

Muller, Max, *The Manager's Guide to HR: Hiring, Firing, Performance Evaluations, Documentation, Benefits, and Everything Else You Need to Know* (2009) ... 51

NASA Interim Directive, NPR-1600.1, "Office of Security and Program Protection: Personal Identification Verification (PIV) Policy and Procedure" (May 24, 2007) ... 8

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Parker, Katharine & Daniel Saperstein, 16 No. 4 HR Advisor: Legal & Practice Guideline (2010) ... 51

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Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971 (1975) 41

Rehnquist, William H., *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt. 1 (Sept. 26-27, 1974) 54

United States Government Accountability Office, GAO-10-4, *NASA Needs to Remedy Vulnerabilities in Key Networks* (2009) 45

United States Government Accountability Office, GAO-07-737, *Personal Information: Data Breaches are Frequent, but Evidence of Resulting Identity Theft Is Limited; However, the Full Extent Is Unknown* (2007) 45

Whitman, James Q., *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 Yale L.J. 1151 (2004) 41

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BRIEF FOR THE RESPONDENTS

STATEMENT

A. Respondents' Work At JPL

This case arises from the decision by the National Aeronautics and Space Administration ("NASA") to institute—for the first time in more than 50 years of operation—background investigations of long-time employees of the California Institute of Technology ("Caltech") who work at the Jet Propulsion Laboratory ("JPL"). Caltech is a non-profit educational institution and one of the premier research institutes in the world. Pet. App. 56a. JPL is an operating division of Caltech, staffed entirely by Caltech employees, whose compen-

sation and benefit policies are established by Caltech. J.A. 70. Since 1959, one year after Congress created NASA, Caltech has operated JPL as a Federally Funded Research and Development Center under a contract with NASA. *Id.* at 164. The laboratory's physical facilities are owned by NASA. *Id.*

Respondents are 28 scientists, engineers, and administrative personnel who work at JPL. Pet. App. 56a. They are not employees of the federal government, and they are not job applicants. They are employees of Caltech, and most have been employed by Caltech at JPL for more than 20 years. *Id.*; C.A. App. 812. They do not work on projects that are classified or related to national security, or otherwise restricted from the scientific community and the public. Pet. App. 3a, 24a; J.A. 59, 71. In fact, many of them chose to work at JPL precisely because it offers a research environment where their work is in the public domain. *E.g.*, C.A. App. 1391. Consequently, their work is largely theoretical or research-oriented, and they are part of the wider academic and scientific community, collaborating with other scientists and engineers around the world, publishing in peer-reviewed journals, and teaching at universities. *E.g.*, *id.* at 1359.

JPL has a distinct identity reflecting its mission and culture. Because it operates as a division of Caltech, which hires and provides all of JPL's employees (Pet. App. 56a), "JPL has always operated more as a university campus type environment than as a high-security government facility[.]" J.A. 227. Unlike the other nine NASA centers around the country, JPL has no NASA employees at all. *Id.* at 222; Pet. App. 3a.

Because of the nature of respondents' work, NASA has classified them as "low risk." Pet. App. 3a. That

means that, in NASA's own judgment, even if respondents "misused" their responsibilities or authorities at JPL, it would have "limited to no adverse impact on the Agency's mission." C.A. App. 587. Respondents are "low risk," according to criteria developed by NASA to evaluate the risk factor for each JPL employee, because they do not work on classified material, do not have root access to a mission ground data system, are not involved with the design of mission information technology system security, and do not have unsupervised ability to send commands to spacecraft. *Id.* at 735. Much of respondents' work involves mathematical analysis of data or theoretical calculations, using software in the public domain and requiring nothing more than "a desk, a computer, a pencil, a sheet of paper, and a calculator." *Id.* at 1434. Several respondents are pure research scientists, who have no direct contact with any of the vehicles or hardware created or operated by JPL. *Id.* at 812. For example, Dr. Peter Eisenhardt is an astrophysicist who studies the evolution of galaxies (*id.* at 1400-1401); Dr. Varoujan Gorjian is an astrophysicist who studies star formation history of the universe (*id.* at 1413); Dr. Konstantin Penanen is a physicist who studies quantum fluids (*id.* at 1287); Dr. Paul Weissman studies asteroids and comet orbits (*id.* at 1491); Dr. Amy Hale studies Mars atmospheric and polar studies (*id.* at 1423); and Dr. Josette Bellan conducts research in the field of chemically reactive turbulent flows (J.A. 188).

Respondents, like all those who work at JPL, were hired by Caltech and were vetted by Caltech for initial employment through standard criminal background checks and employment reference checks. *E.g.*, Pet. App. 79a; C.A. App. 1397. NASA has never previously required any additional background checks on

JPL employees. Pet. App. 5a. NASA has never suggested in this case that additional background investigations into Caltech employees at JPL were necessary because of any risk of harm to NASA's operations created by any JPL employee. Nor has NASA suggested in this case that the standard background check carried out by Caltech into applicants for employment at JPL had failed to identify any individual who posed a risk to NASA or was otherwise unsuitable.

B. NASA's New Background Investigations

NASA recently decided to institute a background investigation of its contractors' employees to determine their "suitability" to continue to work at JPL and other such facilities. NASA thus required all employees at JPL (including persons who had been employed there for decades) to undergo the National Agency Check with Inquiries ("NACI"), which is the background check used for federal civil service employees. Pet. App. 5a. NASA implemented the change at JPL in 2007, when it unilaterally modified its contract with Caltech—over Caltech's opposition—to require all JPL employees to undergo the NACI. *Id.* at 3a, 5a. Employees who do not complete the NACI "would be deemed to have voluntarily resigned their Caltech employment." *Id.* at 6a.

There is no legal requirement that NASA conduct background investigations into its contractors' employees. The government states (Pet. Br. 7-9) that NASA imposed the NACI on contractors' employees to comply with a presidential directive that requires federal agencies to adopt a uniform standard of identification for civil service and contract employees who have access to federal facilities. *See* Homeland Security Presidential Directive/HSPD 12—Policy for a Common Identifica-

tion Standard for Federal Employees and Contractors, 2 Pub. Papers 1765-1767 (Aug. 27, 2004) ("HSPD-12") (reprinted at J.A. 127-130). HSPD-12, however, directs agencies to ensure that the *identity* of employees and contractors at federal facilities can be reliably verified. *See id.*; Pet. 6; Pet. App. 82a n.9. Nowhere does HSPD-12 mention or authorize background investigations.

The NACI investigation to determine "suitability" for employment consists of three steps. First, the subject individual must complete a Standard Form 85 ("SF-85"). J.A. 88-95. In addition to requesting standard background information, such as employment and educational history, as well as three references, the SF-85 directs the respondent to provide "details" of any illegal drug use over the past year, including details of any drug-related treatment or counseling. *Id.* at 94. The form also requires the subject individual to sign a release authorizing the government to collect an expansive range of information from other sources. Based on the release, the government can "obtain any information" from schools, landlords, employers, businesses, "or other sources of information." *Id.* at 95. That information "may include, but is not limited to … academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information." *Id.* Although SF-85 states that the information will be covered by the federal Privacy Act, 5 U.S.C. § 552a, it also explains that any such information may be "routine[ly]" disclosed "without your consent" to the news media or the general public, Congress, the courts, and "any source or potential source from which information is requested in the course of [the background] investigation." J.A. 89. NASA submits the completed SF-85 to the Office of

Personnel Management (OPM), which conducts the background investigation. Pet. 8; J.A. 225.

Second, OPM sends each of the subject individual's references, employers, and landlords a Form 42 ("Investigative Request for Personal Information") or similar form. Pet. 8; J.A. 96-97. Form 42 on its face is intended to be used "in completing a background investigation to help [the government] determine [a] person's suitability for employment or security clearance"—neither of which is at issue here (since respondents are not government employees and do not work with classified information requiring security clearances). *Id.* at 97. The form asks the reference unbounded questions about the subject individual's character. Specifically, the form requests whether the reference has "any adverse information about this person's employment, residence, or activities concerning" violations of law, financial integrity, abuse of alcohol and/or drugs, mental or emotional stability, general behavior or conduct, "or other matters." The reference may "discuss the adverse information I have." Alternatively, the form provides space for the reference to write any information "which you feel may have a bearing on this person's suitability for government employment," including "derogatory as well as positive information." *Id.*

Third, NASA will examine the information collected in OPM's investigation, and NASA will then determine whether the individual is "suitable" for access to NASA facilities, and therefore for continued employment at JPL. Pet. App. 4a-5a. The assessment of "suitability" is left to NASA's discretion. *See id.* at 82a (citing 5 C.F.R. § 731.103(a) ("[OPM] delegates to the heads of agencies authority for making suitability determinations and taking suitability actions.")).

After concerned JPL employees asked what criteria NASA would use to determine their "suitability," NASA management posted a "suitability matrix" on its website. Pet. App. 5a n.2; J.A. 235; C.A. App. 1487; *see* J.A. 98-104. This matrix is titled "Issue Characterization Chart" and lists various factors, reflecting criteria to be used by NASA in determining suitability. Those factors include, among others, carnal knowledge, sodomy, indecent exposure, voyeurism, obscene telephone calls, indecent proposals, incest, bestiality, homosexuality, cohabitation, adultery, illegitimate children, and mental, emotional, psychological, or psychiatric issues. *Id.*; Pet. App. 5a n.2.

In the lower courts, NASA consistently refused to deny that it will use the factors in the suitability matrix as part of the background investigations to determine suitability. Pet. App. 5a n.2 ("NASA neither concedes nor denies that these factors are considered as part of its suitability analysis[.]"). At an informational meeting on implementation of the NACI, the director of JPL stated that NASA would use the matrix as part of the NACI background investigations to determine suitability. J.A. 203, 234-235.

Finally, in the event that NASA, as a result of this process, deems any Caltech employee "unsuitable"—meaning in effect that the employee would be denied a badge for access to JPL and would therefore lose his position at Caltech—the employee has very limited procedural rights. Persons who are deemed unsuitable to have a badge permitting access to JPL do not receive a statement of reasons for that determination, are not entitled to any form of adversarial hearing before an adjudicative officer, have no right to discovery, cannot confront or cross-examine witnesses, have no right to a public tribunal to resolve their case, and have no

right of appeal outside the decisionmaking body. *See* NASA Interim Directive, NPR-1600.1, "Office of Security and Program Protection: Personal Identification Verification (PIV) Policy and Procedure" (May 24, 2007) (J.A. 180-183).

C. Proceedings Below

Respondents sued NASA, arguing, as relevant here, that NASA's recently adopted requirement that individuals like themselves—current Caltech employees in low-risk positions at JPL—submit to NACI background investigations violated their constitutional right to informational privacy. The district court denied a preliminary injunction. Viewing the privacy claim in two parts, one part challenging SF-85 and the other challenging NASA's suitability matrix (Pet. App. 62a), the district court first determined that the challenge to SF-85 was ripe because it was "undisputed" that if respondents did not complete SF-85, they would "be deemed to have voluntarily resigned." *Id.* at 63a. However, the court determined that the challenge to the suitability matrix, which had not yet been used to find any specific individual "unsuitable," was unripe. *Id.*

The court then concluded that respondents were unlikely to succeed on their claim that SF-85, by itself, was unconstitutional. The court held that SF-85's questions were "relatively non-intrusive." Pet. App. 70a. The court also held that SF-85's release was narrowly tailored to two legitimate interests: "'enhancing security' at federal facilities" and "[v]erifying the identity of federal contractors." *Id.* at 71a. The district court did not address respondents' argument that the background investigation as a whole—the SF-85, with its release authorizing the government to collect "any in-

formation," together with Form 42's broad and open-ended questions and the "suitability matrix" that apparently informs all those inquiries—is unconstitutional. *Id.* at 10a, 26a.

The court of appeals reversed and granted a preliminary injunction. The court concluded that a preliminary injunction was warranted because respondents had "raised serious questions as to the merits of their informational privacy claim and the balance of hardships tips sharply in their favor." Pet. App. 29a.

The court first made clear that the district court had erred in construing respondents' challenge. The district court had erroneously "limit[ed] its analysis to the SF-85 questionnaire," and had thus "failed to consider the most problematic aspect of the government's investigation—the open-ended Form 42 inquiries," which are posed against the backdrop of the suitability matrix. Pet. App. 17a, 25a.

The court of appeals then described the legal framework for assessing the informational privacy claim. The court recognized that the right to informational privacy, as developed in the lower courts following this Court's decisions in *Whalen* v. *Roe*, 429 U.S. 589 (1977), and *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), "protects an individual interest in avoiding disclosure of personal matters" such as sexual activity, medical information, and financial matters. Pet. App. 17a-18a (internal quotation marks and citations omitted). Under those decisions, the government may "compel disclosure of [such] information" if it establishes "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 (internal quotation marks omitted).

Applying this framework, the court first concluded that most of SF-85 was "unproblematic" (Pet. App. 19a), including the question about the subject individual's illegal drug use over the past year, which the court found narrowly tailored to the government's "strong stance in its war on illegal drugs" (*id.* at 21a). But the court determined that there were "serious questions" about two aspects of the investigation: SF-85's inquiry into details of drug treatment or counseling, and Form 42's unbounded scope. The court observed that SF-85's question requiring subject individuals to disclose details of drug treatment or counseling fell "squarely within the domain protected by the constitutional right to informational privacy." *Id.* at 22a. Yet "the government ha[d] not suggested any legitimate interest in requiring the disclosure of such information." *Id.* Thus, the court concluded that, at this early stage of the litigation, there was a serious question whether this "narrow" aspect of SF-85 could survive respondents' constitutional challenge. *Id.*

With respect to Form 42, the court similarly concluded that the government had thus far, at the initial stage of litigation, failed to justify the broad scope of inquiry. Form 42's "broad, open-ended questions" and its solicitation of "*any* adverse information" appeared "designed to elicit a wide range" of information, potentially including information about private sexual matters, such as to "seemingly implicate the right to informational privacy." Pet. App. 22a, 25a. The information sought "range[d] far beyond" the scope of the government's posited "legitimate reasons for investigating its contractors" (including "verifying" their identities and "ensuring the security" of JPL's facilities (*id.* at 24a-25a)). Moreover, the court observed that the government had "steadfastly refused to provide any standards

narrowly tailoring the investigations to the[se] legitimate interests" (*id.* at 26a), including refusing to disavow that the background investigation would involve inquiry into private sexual matters, as reflected in the suitability matrix (*id.* at 5a n.2, 25a).

The court of appeals recognized that the record in this case (which has not even entered the discovery phase) is still undeveloped on several key points, including the extent to which and manner in which the government would gather information, the exact role of the suitability matrix, the nature of any security risk thought to be posed by respondents, the standards governing the Form 42 inquiries, and the extent to which the information collected would be disclosed to anyone, including respondents' employer, Caltech. *See* Pet. App. 4a, 5a n.2, 22a, 24a, 25a. The court concluded, nonetheless, that the balance of hardships "tips sharply toward [respondents], who face a stark choice—either violation of their constitutional rights or loss of their jobs." *Id.* at 26a. By contrast, NASA had not demonstrated any irreparable harm that would flow from retaining respondents in their current positions (without the additional background check) during the pendency of the litigation, given that "JPL has successfully functioned without any background investigations since the first contract between NASA and JPL in 1958." *Id.* at 27a.

SUMMARY OF ARGUMENT

I. The court of appeals correctly concluded that a preliminary injunction was warranted here because two aspects of NASA's background investigation for low-risk employees at JPL raised serious questions going to the merits of respondents' informational privacy claim: SF-85's requirement that respondents disclose

detailed information about drug treatment or counseling, and the investigation's potentially overbroad scope. This Court recognized more than 30 years ago that the constitutional right to informational privacy encompasses "the individual interest in avoiding disclosure of personal matters." *Whalen* v. *Roe*, 429 U.S. 589, 599 (1977); *accord Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 457 (1977). Since those cases were decided, a broad consensus has developed in the lower courts as to both the scope of the right and the level of scrutiny required: the right protects sensitive personal information, including medical information, personal financial information and information about private sexual matters; and informational privacy claims merit heightened scrutiny.

The court of appeals, in keeping with this broad consensus among the lower courts, concluded that compelled disclosure of confidential medical or psychotherapy information, such as the SF-85's requirement that respondents disclose the details of drug treatment or counseling, implicated their informational privacy rights. As such, the government must show that its interest in obtaining the information is sufficiently weighty to justify that intrusion on respondents' rights. However, the government did not offer the lower courts *any* legitimate interest for requiring respondents to disclose this information (despite ample opportunity to do so) and the government therefore failed to show that its interest outweighed the intrusion on respondents' rights. Accordingly, the court of appeals correctly concluded that serious questions were raised whether this aspect of the SF-85 could survive respondents' constitutional challenge.

The court of appeals also correctly concluded that the government's unbounded inquiries could delve into

respondents' private sexual matters and that the government has shown no legitimate reason for doing so. Although the government contends that its inquiries are limited to routine, employment-related matters, the record refutes that assertion. NASA uses the SF-85 and Form 42 for purposes of determining respondents' "suitability" for access to JPL facilities. In response to questions from JPL employees as to how NASA would determine "suitability," NASA posted a "suitability matrix" on its website. This matrix listed various factors apparently reflecting criteria that NASA would use in determining "suitability," including carnal knowledge, sodomy, homosexuality, cohabitation, adultery, illegitimate children, and mental, emotional, psychological, or psychiatric issues. Prying into such personal matters would clearly implicate respondents' privacy interests. The government, however, steadfastly refused to deny that it will use the factors in the suitability matrix as part of the background investigations to determine suitability. Pet. App. 5a n.2. Because the government failed to provide any legitimate justification for inquiries that could pry into private sexual matters, the court of appeals correctly concluded that serious questions had been raised whether NASA's background investigation violates respondents' constitutional rights and that the investigations should be preliminarily enjoined pending resolution of the merits of the case.

II. The government argues that, even if NASA's background investigation intrudes into sensitive personal information to a degree not sufficiently justified by the government's legitimate interests, respondents' constitutional rights are nonetheless not implicated. The government offers several reasons for this position, all of which are flawed. First, the government ar-

gues that the right to privacy is only implicated by public dissemination of private information, not compelled disclosure of private information to the government. Contrary to the government's argument, however, neither *Whalen* nor *Nixon* drew such bright-line rules. Indeed, although both cases recognized that the distinction between collection and public dissemination is relevant to assessing the invasion of privacy caused by the government's actions, neither case held that the right to privacy could be implicated only by public dissemination. And the lower courts have understood the right to privacy articulated in *Whalen* and *Nixon* as implicated by intrusive government collection of sensitive private information, even without subsequent public dissemination. The government next argues that respondents' rights are not implicated because the Privacy Act sufficiently guards against dissemination. Not only does the Privacy Act have numerous broad exemptions, but the government fails to mention the serious problem of data breaches of sensitive information held by the government—and by NASA in particular.

The government's argument that its status as employer makes constitutional scrutiny unnecessary is also flawed. Respondents are not government employees—they are employees of Caltech. In any event, government employees do not lose the protections of the Constitution when they take a federal job. The government also argues that respondents have no privacy interest in information shared with another person. This Court has already rejected that argument. *Nixon*, 433 U.S. at 465; *see also United States Dep't of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989). Finally, the government contends that respondents relinquish their rights by seek-

ing to retain their positions. The idea that respondents are voluntarily disclosing information is incorrect—respondents, many of whom have worked at JPL for decades, will lose their jobs if they do not complete the investigation process. Respondents "are entitled, like all other persons, to the benefit of the Constitution," and the government may not force them to choose "between surrendering their constitutional rights or their jobs." *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 284-285 (1968).

ARGUMENT

I. RESPONDENTS HAVE RAISED SERIOUS QUESTIONS WHETHER NASA'S BACKGROUND INVESTIGATION VIOLATES THEIR CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY

This Court has recognized—and the government does not dispute—that the Constitution protects a right to informational privacy: "the individual interest in avoiding disclosure of personal matters." *Whalen* v. *Roe*, 429 U.S. 589, 599 (1977); *accord Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 457 (1977). That right is not unlimited; the government's interests must be balanced against the individual's. The court of appeals issued a preliminary injunction because "serious questions" going to the merits of respondents' informational privacy claim were raised by two aspects of NASA's background investigation for low-risk employees at JPL: SF-85's requirement that respondents disclose detailed information about drug treatment or counseling, and the investigation's potentially overbroad scope. That decision was correct, given that NASA failed to provide any justification for requiring disclosure of drug treatment information or for delving

into other unquestionably private matters when assessing respondents' "suitability."

A. The Right To Avoid Disclosure Of Highly Personal Matters Is Well Established

The government does not dispute that the Constitution protects the right to informational privacy. This Court recognized that right more than thirty years ago in *Whalen*, where the Court explained that the constitutional right to privacy includes "at least two different kinds of interests." 429 U.S. at 599. One is "the interest in independence in making certain kinds of important decisions." *Id.* at 599-600. The other strand of privacy—at issue here—is "the individual interest in avoiding disclosure of personal matters." *Id.* at 599. Soon after *Whalen*, the Court again addressed the right to informational privacy in *Nixon*, reiterating that "[o]ne element of privacy has been characterized as the individual interest in avoiding disclosure of personal matters." 433 U.S. at 457 (internal quotation marks omitted).

In the years following *Whalen* and *Nixon*, every federal court of appeals to have decided the issue has concluded that the Constitution protects a right to informational privacy. *See Borucki* v. *Ryan*, 827 F.2d 836, 839 (1st Cir. 1987); *Statharos* v. *New York City Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999); *Fraternal Order of Police, Lodge 5* v. *City of Philadelphia*, 812 F.2d 105, 109 (3d Cir. 1987); *Walls* v. *City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990); *Plante* v. *Gonzalez*, 575 F.2d 1119, 1132 (5th Cir. 1978); *Lambert* v. *Hartman*, 517 F.3d 433, 440 (6th Cir. 2008); *Denius* v. *Dunlap*, 209 F.3d 944, 955 (7th Cir. 2000); *Eagle* v. *Morgan*, 88 F.3d 620, 625 (8th Cir. 1996); *Tucson Woman's Clinic* v. *Eden*, 379 F.3d 531, 551 (9th Cir.

2004); *Mangels* v. *Pena*, 789 F.2d 836, 839 (10th Cir. 1986); *Hester* v. *City of Milledgeville*, 777 F.2d 1492, 1497 (11th Cir. 1985); *cf. American Fed'n of Gov't Emps.* v. *HUD*, 118 F.3d 786, 793 (D.C. Cir. 1997) ("AFGE") (assuming without deciding that the right exists). Likewise, state courts have acknowledged the right, under either the federal constitution or their own state constitutions. *See, e.g.*, *Alpha Med. Clinic* v. *Anderson*, 128 P.3d 364, 376 (Kan. 2006) (federal constitution); *Peninsula Counseling Ctr.* v. *Rahm*, 719 P.2d 926, 929 (Wash. 1986) (same); *Martinelli* v. *District Ct.*, 612 P.2d 1083, 1091 (Colo. 1980) (same); *In re Inquiry Concerning Honorable Lawrence Agerter*, 353 N.W.2d 908, 913 (Minn. 1984) (same); *Montana Shooting Sports Ass'n* v. *State*, 224 P.3d 1240, 1244 (Mont. 2010) (state constitution); *Shaktman* v. *State*, 553 So. 2d 148, 150 (Fla. 1989) (same); *Painting Indus. of Haw. Mkt. Recovery Fund* v. *Alm*, 746 P.2d 79, 82 (Haw. 1987) (same).

Since *Whalen* and *Nixon*, this Court has not further elaborated on the scope of the informational privacy right or the appropriate level of scrutiny for evaluating alleged violations of that right. In the thirty years since those cases were decided, however, a broad consensus has developed in the lower courts on both points. On the scope of the right, there is broad agreement in the federal circuit courts that the constitutional right to informational privacy protects sensitive personal information, including medical information,[1] per-

[1] *See United States* v. *Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980); *Denius*, 209 F.3d at 956; *Alexander* v. *Peffer*, 993 F.2d 1348, 1351 (8th Cir. 1993); *Fraternal Order of Police, Lodge 5*, 812 F.2d at 113; *Norman-Bloodsaw* v. *Lawrence Berkeley*

sonal financial information,[2] and information about private sexual matters.[3] There is also broad consensus that informational privacy claims merit heightened scrutiny.[4] This process calls for the "delicate task of weighing competing interests," *United States* v. *Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980). Thus, "courts balance the government's interest in having or using the information against the individual's interest in denying access." *Doe* v. *Attorney General*, 941 F.2d 780, 796 (9th Cir. 1991); *see also Nixon*, 433 U.S. at 459 (finding the invasion of President Nixon's right to privacy to be potentially troubling but balancing the competing interests and concluding that the required intrusion was justified).

Accordingly, the courts of appeals broadly agree that, when sensitive personal information within the

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Lab., 135 F.3d 1260, 1269 (9th Cir. 1998); *Tucson Woman's Clinic*, 379 F.3d at 551.

[2] *See Statharos*, 198 F.3d at 322-323; *Walls*, 895 F.2d at 194; *Plante*, 575 F.2d at 1135; *Denius*, 209 F.3d at 958; *Alexander*, 993 F.2d at 1351; *cf. California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring) ("Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy.").

[3] *See Eastwood* v. *Department of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988); *Mangels*, 789 F.2d at 839; *Thorne* v. *City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983); *Westinghouse*, 638 F.2d at 577. The Sixth Circuit examines whether the information at issue implicates a "fundamental liberty interest," including the "fundamental right of privacy in one's sexual life." *Bloch* v. *Ribar*, 156 F.3d 673, 684 (6th Cir. 1998); *Lambert*, 517 F.3d at 441.

[4] *See, e.g., Eisenbud* v. *Suffolk County*, 841 F.2d 42, 45 (2d Cir. 1988); *Fraternal Order of Police, Lodge 5*, 812 F.2d at 110.

scope of the right is implicated, the government must establish that its interest in obtaining or disclosing the information is sufficiently weighty to justify the intrusion into that personal sphere.[5] The government must also establish that its use of the information will actually further that purpose, such that its intrusion into the personal sphere does not reach beyond the scope necessary to accomplish its legitimate interests.[6] In sum, the circuit courts have long accepted that, when the government seeks to intrude into sensitive personal spheres such as medical, financial, or sexual information, that intrusion requires a heightened justification.

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[5] *See AFGE*, 118 F.3d at 793 (government must demonstrate "sufficiently weighty interests in obtaining the information sought … to justify the intrusions into their employees' privacy"); *Denius*, 209 F.3d at 956-957 (government employer's interest in obtaining employees' medical information must be sufficiently strong to overcome the intrusion on privacy); *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) (government has the burden of showing that its use of private information would advance a legitimate state interest and that its actions are narrowly tailored to meet that interest).

[6] *See Statharos*, 198 F.3d at 323; *Eisenbud*, 841 F.2d at 46 (intrusion on privacy must further a substantial government interest); *DuPlantier* v. *United States*, 606 F.2d 654, 670 (5th Cir. 1979) (government's interest must be "important" and must be "substantially furthered" by the privacy intrusion); *Mangels*, 789 F.2d at 839 (disclosure of protected information is valid only if it "advance[s] a compelling state interest which, in addition, must be accomplished in the least intrusive manner"); *cf. AFGE*, 118 F.3d at 793 (governmental intrusion on privacy is permissible when the government "present[s] sufficiently weighty interests for obtaining the information").

B. The SF-85's Demand For Details About Drug Treatment Or Counseling Implicates Sensitive Personal Matters Protected By The Right To Informational Privacy

The SF-85 asks respondents whether they have "used, possessed, supplied, or manufactured illegal drugs" within the last year. If the respondent answers in the affirmative, he is then required 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." J.A. 94. The Ninth Circuit found that such questions are supported by sufficiently weighty government interests. Pet. App. 21a. The SF-85 goes on, however, to require respondents to provide "details" of "any treatment or counseling received" for such drug use. J.A. 94. The requirement that respondents disclose details of drug treatment or counseling implicates their informational privacy rights both because it relates to intimate health information and because it undermines the confidentiality that such treatment requires. Because the government failed to offer *any* justification to the lower courts for requiring disclosure of such information, the court of appeals correctly concluded that a preliminary injunction against this aspect of NASA's background investigation was warranted.

1. Details about drug treatment or counseling are highly sensitive personal matters normally treated as private

The Ninth Circuit correctly concluded that the information about treatment or counseling for illegal drug use demanded by the SF-85 "falls squarely within the domain protected by the right to informational privacy." Pet. App. 22a. Courts generally agree that in-

formation about medical treatment or psychotherapy is protected by the right to informational privacy. "There can be no question that … medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection." *Westinghouse*, 638 F.2d at 577.[7]

Medical information is inherently private: it relates to intimate facts about one's body and health. And information regarding treatment or counseling for drug use is particularly sensitive because drug abuse carries a unique stigma in society that—absent confidentiality—could discourage drug abusers from seeking help from a doctor or psychotherapist. *See* Geppert & Bogenschutz, *Ethics in Substance Use Disorder Treatment*, 32 Psychiatric Clinics of N. Am. 283, 284 (2009). Indeed, confidentiality protections for drug-abuse treatment must be "stricter and more protective" than in other areas of medicine and psychiatry. *See id*. Accordingly, the medical and therapy professions have long understood that confidentiality is essential to effective drug-abuse treatment. *See* Kreek & Reisinger, *The Addict as a Patient*, in *Substance Abuse: A Comprehensive Textbook* 822, 830 (Lowinson et al. eds., 1997) (stressing the "fundamental importance to this group of patients" of "the appropriate maintenance of confidentiality"); McNamara & Starr,

[7] *See also Doe* v. *City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) ("there are few matters that are quite so personal as the status of one's health"); *Fraternal Order of Police, Lodge 5*, 812 F.2d at 113 ("we have repeatedly held that medical information," such as information about drug use or psychological counseling, " is entitled to privacy protection"); *Denius*, 209 F.3d at 956-957 (the right to informational privacy protects confidential medical records).

Confidentiality of Narcotic Addict Treatment Records: A Legal and Statistical Analysis, 73 Colum. L. Rev. 1579, 1585 (1973) ("Without the confidence and trust established by insuring confidentiality, those [drug abusers] who need help most will not ask for it."). Confidentiality is particularly important in the employment context, since discovery of employees' drug-abuse treatment carries a risk of lost job opportunities, in addition to stigmatization and embarrassment.

This Court has also recognized—when determining that the Federal Rules of Evidence include a psychotherapist-patient privilege—that privacy is fundamentally important to psychotherapy:

> Effective psychotherapy … depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Jaffee v. *Redmond*, 518 U.S. 1, 10 (1996). That logic applies with particular force in the context of drug treatment and counseling because of the added stigma associated with drug abuse and addiction.[8]

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[8] For similar reasons, several states have expressly extended the psychotherapist-patient and physician-patient privileges to drug-treatment information. *See, e.g.*, Ark. R. Evid. 503(b); Del. R.

Congress has recognized the importance of privacy in the drug-therapy setting by broadly prohibiting the disclosure of patient information relating to substance abuse treatment or rehabilitation from any federally funded drug-treatment facility. *See* 42 U.S.C. § 290dd-2(a).[9] Congress enacted this restriction because it understood that "the strictest adherence" to confidentiality is "absolutely essential to the success of all drug abuse prevention programs." H.R. Conf. Rep. No. 92-920, at 33 (1972). As Congress explained, patients "must be assured that [their] right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse … will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome." *Id.*[10] The courts, in

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Evid. 503(b); Me. R. Evid. 503(b); N.M. R. Evid. 11-504(B); S.D. Codified Laws § 19-13-7. As one court explained, "[i]f patients—former, present, and prospective—are not assured [that] their treatment for drug … dependency will be confidential, the effectiveness of such rehabilitation will be uncertain. Without the assurance of confidentiality a number of individuals may hesitate to seek treatment in … drug-treatment programs." *Heartview Found.* v. *Glaser*, 361 N.W.2d 232, 235 (N.D. 1985).

[9] Such records may be disclosed only in very limited circumstances. *See, e.g.*, 42 U.S.C. § 290dd-2(b)(1) (written consent); *id.* § 290dd-2(b)(2)(C) (good cause). Although respondents are required to sign a blanket release as part of the background investigation, such a release cannot constitute voluntary consent to disclosure, given that respondents are required to submit to the investigation, including signing the release, or lose their jobs. *See infra* p. 56.

[10] The Department of Health and Human Services, which has issued regulations implementing this disclosure prohibition, has echoed Congress' privacy concerns: a "drug abuse patient in a federally assisted … drug abuse program [should not be] made more vulnerable by reason of the availability of his or her patient record

interpreting Section 290dd-2, have recognized that preserving confidentiality of drug-abuse treatment information is important because it will encourage individuals to seek drug therapy; by contrast, allowing unfettered access by government officials to such records will deter those who would otherwise seek treatment.[11]

The Ninth Circuit correctly concluded, therefore, that information regarding drug treatment and counseling falls squarely within the scope of the right to informational privacy. Because NASA's background investigation requires respondents to disclose the "de-

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than an individual who has a[] … drug problem and who does not seek treatment." 42 C.F.R. § 2.3(b)(2). States also have analogous prohibitions against disclosure of drug-treatment records. *See, e.g.*, Cal. Health & Safety Code § 11845.5(a).

[11] *See Doe* v. *Broderick*, 225 F.3d 440, 450-451 (4th Cir. 2000) (concluding, under a Fourth Amendment analysis, that Section 290dd-2 is "a fitting indication that society is willing to recognize [a person's] expectation of privacy [in drug treatment or counseling records] as objectively reasonable" because "medical treatment records contain intimate and private details that people do not wish to have disclosed, expect will remain private, and, as a result, believe are entitled to some measure of protection from unfettered access by government officials"); *see also United States ex rel. Chandler* v. *Cook County*, 277 F.3d 969, 981 (7th Cir. 2002) ("Patients will be less willing to seek treatment if patient confidentiality is not strictly protected."); *Ellison* v. *Cocke County*, 63 F.3d 467, 471 (6th Cir. 1995) ("confidentiality of medical records maintained in conjunction with drug treatment programs [i]s essential"); *United States* v. *Eide*, 875 F.2d 1429, 1437 (9th Cir. 1989) (allowing disclosure of drug treatment information would "discourage people from seeking professional help for their … drug problems"); *United States* v. *Cresta*, 825 F.2d 538, 552 (1st Cir. 1987) ("The express purpose of this provision is to encourage patients to seek treatment for substance abuse without fear that by so doing, their privacy will be compromised.").

tails" of such protected information, this aspect of the background investigation implicates the constitutional right to informational privacy. Accordingly, the government must show that its interest in obtaining the information is sufficiently weighty to justify the intrusion on that right.

2. NASA has provided no justification for compelling respondents to disclose "details" of medical treatment or counseling for past drug abuse

Despite ample opportunity to do so, the government did not offer the lower courts *any* legitimate interest for requiring respondents to disclose the "details" of drug treatment or counseling. *See* Pet. App. 22a. The court of appeals therefore correctly concluded that, with no competing government interest to balance against respondents' privacy interest, there was a serious question on the merits of respondents' informational privacy claim. Although the government now proffers three possible reasons for the drug-treatment inquiry to this Court, that effort comes too late.[12]

In any event, each of the government's three purported reasons fails on its own merit. First, the government suggests that it needs information on drug treatment or counseling to confirm the scope of an applicant's illegal drug use. *See* Pet. Br. 40 ("the government's reason for seeking the information is to determine whether the illegal drug use is ongoing and

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[12] Because the government's newly offered justifications for this inquiry were "neither pressed nor passed upon below," they should not be considered here. *See FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990).

whether it would affect the applicant's work performance"); *id.* at 41 (the question "seeks information directly pertinent to recent illegal drug use"). However, the government never explains how information about drug *treatment* or *counseling* could serve this purpose. Information about drug *use* falls separately within the portion of the SF-85 that requires respondents, if they answer yes to the question regarding drug use, to explain the "nature of the activity" and "any other details relating to [the applicant's] involvement with illegal drugs"—an inquiry that the Ninth Circuit found to be justified. Pet. App. 21a.

Second, the government suggests (Pet. Br. 43) that requiring disclosure of information about drug treatment or counseling is necessary to *mitigate* evidence of illegal drug use. In the lower courts, however, the government took the exact opposite position.[13] In any event, the drug treatment inquiry is much more intrusive than necessary to satisfy the government's objective. If the government wishes to give the benefit of the doubt to applicants who have sought treatment or counseling for illegal drug abuse, it could easily do so by allowing them to *voluntarily* provide such information;

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[13] The government first raised this point at oral argument in the court of appeals (*see* Oral Argument 34:20-40), and under Ninth Circuit precedent, that argument was waived. *Butler* v. *Curry*, 528 F.3d 624, 642 (9th Cir. 2008). In the district court, the government admitted that it sought medical records, not to "mitigate" evidence of drug use, but to delve into respondents' mental health history: "to the extent that you have somebody whose mental health may be unstable, you'd want to know that with respect to a person working in the facility." C.A. App. 57. Then, in the court of appeals, the government claimed that "treatment for an addiction to illegal drugs does not make the use of those drugs less illegal." Gov't C.A. Br. 30-31 n.5.

compelled disclosure of the "details" of such treatment is not necessary to serve the government's claimed interest.

The government's third purported interest—raised for the first time in this case—is that it needs to know the details of drug treatment or counseling so it can avoid engaging in disability discrimination. Pet. Br. 43. That submission is wholly unpersuasive. The government never explains how that information will help it avoid such discrimination; indeed, inquiring about drug treatment or counseling under these circumstances could only *increase* the government's potential liability for disability discrimination. Because past drug addiction is a disability, 29 C.F.R. § 1630.3(b), employers are generally prohibited from asking current employees about treatment for drug addiction or abuse unless the inquiry is "job-related and consistent with business necessity"—which means that the employer must have a "reasonable belief, based on objective evidence" that the employee is either impaired in his job performance or poses a direct threat as a result of the disability.[14] NASA has never claimed to have any such evidence or concerns in this case. Moreover, NASA could be found to have engaged in disability discrimination against an employee only if it had *knowledge* of the employee's dis-

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[14] *See* 29 C.F.R. §§ 1630.13(a)-(c), 1630.2(r); EEOC Notice No. 915.002, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA)* (July 2000); *Sullivan* v. *River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999) (for post-hire medical exam to be valid under ADA, "there must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job").

ability, such as her past drug addiction.[15] If NASA does not inquire into the details of an individual's drug treatment, it will likely not learn whether that person was formerly addicted.

Because the government has thus far failed to offer a legitimate interest for requiring disclosure of the details of drug treatment or counseling, it has also failed to show that its interest outweighs the intrusion on respondents' privacy rights. The Ninth Circuit correctly concluded, therefore, that there was a serious question whether this aspect of the SF-85 could survive respondents' constitutional challenge.

C. NASA's Unbounded Inquiry Into Respondents' "Suitability" Also Potentially Implicates Sensitive Personal Matters

NASA uses the SF-85 and Form 42 for the purpose of determining respondents' "suitability" for access to JPL facilities. Taken together, those forms would allow NASA to inquire into all manner of highly sensitive personal information pertaining to respondents' private lives. Moreover, the government refused, on the record created in the lower courts, to disavow consideration of private sexual matters in making that suitability determination. The court of appeals therefore correctly concluded that NASA's unbounded inquiries potentially implicated respondents' privacy rights. And because the government has not offered any legitimate interest that would justify such an intrusion, the court of appeals also correctly concluded that a preliminary in-

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[15] *See James* v. *Potter*, 488 F.3d 397, 404 (6th Cir. 2007); *Collings* v. *Longview Fibre Co.*, 63 F.3d 828, 833 (9th Cir. 1995).

junction was warranted pending resolution of these issues on the merits.

1. Respondents' right to informational privacy is implicated because NASA has refused to disavow consideration of private sexual matters as part of its suitability determination

The government asserts that NASA's background investigation involves only the "routine collection of employment-related information" (Pet. Br. 26) and that "the only sources from which the government seeks information on these forms are the applicant himself and those references and contacts he identifies" (*id.* at 32). Such "routine and longstanding" practice, according to the government, does not "trigger significant constitutional concerns." *Id.* at 26. But the government's newly minted characterization of its background investigations of respondents does not accurately describe the record in this case. That record persuasively establishes that respondents had good reasons to be concerned that NASA's investigation would intrude into highly personal matters unrelated to their job performances—concerns that NASA did nothing to dispel.

First, when NASA announced that it would require respondents to undergo background investigations to determine their "suitability," concerned JPL employees inquired as to what criteria NASA would use to make that determination. In response, NASA posted a "suitability matrix" on its website. Pet. App. 5a n.2; J.A. 235; C.A. App. 1487; *see* J.A. 98-104. This matrix is titled "Issue Characterization Chart" and lists various factors, apparently reflecting criteria NASA will use in determining suitability. These factors include, among others, carnal knowledge, sodomy, indecent proposals,

homosexuality, cohabitation, adultery, illegitimate children, and mental, emotional, psychological, or psychiatric issues. *Id.*; Pet. App. 5a n.2. Delving into such highly personal matters represents anything but the "routine collection of employment-related information." Pet. Br. 26; *see also infra* pp. 50-51 (discussing prohibitions against intrusive background investigations for private-sector employment).

Second, the investigation is not limited to collecting information from the respondents themselves or from their references. The SF-85 requires respondents to sign a broad release authorizing the government to collect an expansive range of information from *any* source. Based on the release, the government may "*obtain any information*" from schools, landlords, employers, business, "*or other sources of information.*" J.A. 95 (emphasis added). Similarly, Form 42 asks respondents' references to provide "*any* adverse information" about respondents and to provide details regarding any issue that might bear on their "suitability" for government employment or a security clearance (even though respondents are not government employees and do not work with classified information requiring a security clearance). *Id.* at 97.

NASA's own description of the factors weighing on suitability—including respondents' sexual practices, sexual orientation, and intimate relationships—at a minimum suggests that NASA will seek to obtain information on these matters as part of the investigation into respondents' suitability. There can be little question that government collection of such information, which involves the most private and intimate aspects of respondents' lives, falls at the heart of the right to informational privacy. *Carey* v. *Population Servs., Int'l*, 431 U.S. 678, 685 (1977) (noting that sexual activity

"concerns the most intimate of human activities and relationships"); *Bloch* v. *Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) ("Our sexuality and choices about sex … are interests of an intimate nature which define significant portions of our personhood. Public[ly] revealing information regarding these interests exposes an aspect of our lives that we regard as highly personal and private."); *Eastwood* v. *Department of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988) (the right to informational privacy "is implicated when an individual is forced to disclose information regarding personal sexual matters").

The government attempts to avoid the implications of the suitability matrix by arguing that the court of appeals excluded it from the case. That argument misapprehends the court of appeals' ruling. Although the court concluded that respondents' direct challenge to the constitutionality of NASA's suitability determinations was unripe because no respondent had yet been found "unsuitable" based on the factors in the matrix (Pet. App. 9a), it never suggested that the suitability matrix was irrelevant to respondents' challenge to NASA's background investigation. The purpose of the SF-85 release and Form 42, and of the investigation overall, is to determine respondents' suitability. The matrix sets forth specific factors regarding NASA's standards for suitability. The matrix, and NASA's refusal to deny that it will use the matrix to make respondents' suitability determination, are therefore highly relevant to assessing whether the information collected during the investigation is likely to implicate respondents' privacy rights.

The government also seeks to assure this Court that NASA does not rely on the matrix when it conducts investigations into contract employees. *See* Pet. Br. 55-56. But the only evidence in the record on

this point establishes that the matrix *would be used*. Not only did NASA post the matrix on its website in response to queries from JPL employees as to how the background investigation would be used to assess their suitability, but the JPL director informed JPL employees at an informational meeting on the investigation process that they would be subjected to inquiries concerning the factors listed in the matrix. J.A. 203, 234-235.[16] The government does not argue that the record is otherwise, and all it offers is an assertion in its brief that it "does not use" the matrix (not even that it "will not" do so). *See* Pet. Br. 55. As this Court has noted, however, "supplementing the record at the appellate level" is an "extraordinary step." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 482 (1990). This Court should turn aside the government's belated attempt to "mak[e] factual representations as to matters not in the record," for "[i]t is elementary that the rights of the parties are, for purposes [of an] appeal, determined on that basis of the materials that constitute the record on appeal." *Rosen* v. *Lawson-Hemphill, Inc.*, 549 F.2d 205, 206 (1st Cir. 1976). That is especially the case here, for the government has long been on notice about re-

[16] NASA confirmed that the matrix would be used by including the chart in its "Desk Guide for Suitability and Security Clearance," which was published in January 2008 (after the government refused to tell the court of appeals whether it would use the matrix to determine suitability) and which repeatedly refers to the matrix when describing the suitability-determination process. That guide was posted on NASA's website until a few days before the government filed its reply brief in support of its petition for certiorari. It was then taken off the website, which now states that the guide "is no longer available for viewing." *See* http://nasapeople.nasa.gov/references/SuitabilitySecurityDeskGuide.pdf (last visited July 28, 2010).

spondents' allegations and evidence regarding the matrix but passed up numerous opportunities in the lower courts to respond.

Finally, the government dismisses respondents' concern about the matrix as "baseless speculation" that NASA will delve into private sexual matters to make suitability determinations. Pet. Br. 56. But the government could easily have eliminated any "speculation" by disavowing the suitability matrix on the record before the lower courts. The government steadfastly refused to do so. Having so refused, the government cannot convincingly argue that the background investigation—which is designed to assess suitability, and which measures suitability in part by private sexual conduct—does not trigger significant constitutional concerns. On the contrary, the collection of information relating to the factors in the suitability matrix clearly implicates respondents' informational privacy rights, and the government must offer a sufficiently weighty interest that would justify that intrusion.

2. NASA has failed to provide a legitimate government interest that would justify delving into sensitive private matters

As the Ninth Circuit correctly recognized, NASA has a legitimate interest in "verifying its contractors' identities" and "ensuring the security of the JPL facility." Pet. App. 24a. On the current record, however, the government has failed to offer any explanation as to how the factors in the matrix relate to, or would further, those interests. Nor has the government offered any other rationale for delving into the highly personal matters reflected in the matrix. Instead, NASA's background investigation—which includes the SF-85 release authorizing the government to "obtain any in-

formation," the Form 42 requesting "any adverse information," and the matrix informing those inquiries—goes far beyond any legitimate employment- or security-related concerns. The government has never tried to explain, for example, why it needs to know whether respondents have illegitimate children before approving them for a badge for access to JPL—let alone has it justified inquiring into "carnal knowledge," "sodomy," or "cohabitation." This information is simply "irrelevant and embarrassing," *Eastwood*, 846 F.2d at 631, and in no way advances—or is even relevant to—the government's stated justifications for the background investigation.

Moreover, there are "no standards, guidelines, definitions, or limitations" to the government's inquires in this regard that would in any way limit the information gathered to employment- or security-related information. *Thorne* v. *City of El Segundo*, 726 F.2d 459, 470 (9th Cir. 1983). As lower courts have recognized, "[w]hen the [government's] questions directly intrude on the core of a person's constitutionally protected privacy and associational interests, … an unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the heightened scrutiny with which [a court] must view the [government's] action." *Id.*; *see also Denius*, 209 F.3d at 958 (the right to informational privacy can be infringed by a "sweeping disclosure requirement" that allows for "the release of a virtually limitless range of confidential … information").

Finally, NASA's unbounded inquiries into "suitability" are particularly difficult to justify with respect to respondents, each of whom is a long-time employee at JPL and many of whom have worked there for more than twenty years. Respondents are not *applicants* for

employment whose "suitability" to work at JPL is unknown. To the contrary, respondents have had long and distinguished careers at JPL. They have worked on important spacecraft missions, made valuable contributions to the scholarly community, and been distinguished for their service. The government has never suggested that respondents pose any "suitability" or security risks to JPL. Because the government has not provided any legitimate reason for its unbounded inquiries which could pry into respondents' private sexual matters, nor any reason why such inquiries would serve the government's stated interests in verifying respondents' identities and ensuring the security of the JPL facility, the court of appeals correctly determined that serious questions had been raised regarding whether NASA's background investigation violates respondents' right to informational privacy and that those investigations should be preliminarily enjoined pending resolution of the case on the merits.

II. The Government's Remaining Arguments Lack Merit

In a series of arguments, the government maintains that, even if NASA's background investigation intrudes into sensitive personal information to a degree not sufficiently justified by the government's legitimate interests, respondents' constitutional rights are nonetheless not implicated because (1) the right to privacy implicates only public dissemination, not disclosure of information; (2) the Privacy Act sufficiently guards against dissemination; (3) the government's status as employer makes constitutional scrutiny unnecessary; (4) respondents have no privacy interest in information shared with another person; and (5) respondents relinquish

their rights by seeking to retain their positions. Each of these contentions is flawed.

A. The Right To Privacy Is Implicated By Government Collection, As Well As Dissemination, Of Sensitive Personal Information

1. Neither *Whalen* nor *Nixon* limited the informational privacy right to public dissemination of private matters

The government suggests (Pet. Br. 21-25) that the privacy concerns articulated in *Whalen* and *Nixon* are not implicated by compelled disclosure of personal information to the government, but only by further dissemination of such information to the public. Neither *Whalen* nor *Nixon* drew such bright lines, however.

To the contrary, in articulating the privacy interest in "avoiding disclosure of personal matters," the *Whalen* Court traced the source of that right to cases involving governmental intrusions into personal privacy without any subsequent public disclosure. *See Whalen*, 429 U.S. at 599 & n.25 (citing *Olmstead* v. *United States*, 277 U.S. 438 (1928) (challenge to police wiretap of defendant's private telephone conversations); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (challenge to state statute forbidding use of contraceptives); *Stanley* v. *Georgia*, 394 U.S. 557 (1969) (challenge to state statute prohibiting private possession of obscene material)). Moreover, *Whalen* recognized that compelled disclosure to the government of sensitive personal information, even without subsequent public dissemination, could constitute an impermissible invasion of privacy. 429 U.S. at 602 ("Requiring such disclosures to representatives of the State … does not *automatically* amount to an impermissible invasion of

privacy." (emphasis added)). While disclosure of private information to the government alone might be less intrusive on one's privacy interests than compelled disclosure to the public—and the intrusion might also be more easily outweighed by the government's interest in obtaining the information—compelled disclosure of sensitive personal information to the government nonetheless implicates constitutionally protected privacy interests.

Similarly, this Court in *Nixon* did not limit the right to informational privacy to instances of public dissemination of private matters. The Court there considered whether former President Nixon's constitutional rights were violated when his private papers were subjected to archival screening—that is, when he was forced to reveal his private papers *to the government*. *Nixon*, 433 U.S. at 456. This Court concluded that requiring such disclosure implicated Nixon's privacy rights, but that the government's access to the information was permissible because the "public interest in preserving materials touching [Nixon's] performance of his official duties" outweighed the "invasion of [Nixon's] privacy that archival screening necessarily entails." *Id.*; *see also id.* at 465 (recognizing "legitimate expectation of privacy" in Nixon's personal communications). In other words, Nixon's constitutional privacy rights were implicated by disclosure to the government—*i.e.*, government collection of information—even though the intrusion on that privacy interest was ultimately outweighed by the government's interest in reviewing the information.[17]

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[17] This Court went on to conclude that allowing government archivists to screen out and return all personal records to the

The distinction between government collection and dissemination of private information is not irrelevant to the analysis whether the government's actions are constitutional. Rather, as in other areas of constitutional analysis, competing interests must be weighed, and the degree of intrusion on the privacy right must be balanced against the state's justification for the intrusion. *See Nixon*, 433 U.S. at 456. The risk of public disclosure is a relevant factor in assessing the intrusion on privacy interests, as the court of appeals recognized. *See* Pet. App. 23a. Other factors are relevant as well, such as the expectation of privacy in the materials in question, the strength of the governmental interest in access, harms that might be caused by compelled disclosure to the government or the public, and the feasibility of realizing the government's interest in a less intrusive manner. *See, e.g.*, *Nixon*, 433 U.S. at 465; *Denius*, 209 F.3d at 956 n.7 (surveying factors that have been considered relevant by the courts of appeals). *Whalen* and *Nixon* suggest, therefore, that the distinction between collection and public dissemination is relevant to assessing the invasion of privacy caused by the government's actions, but neither case held that the right to privacy could be implicated only by public dissemination. And the lower courts have understood the right to privacy articulated in *Whalen* and *Nixon* as implicated by intrusive government collection of sensi-

President was the least intrusive means of realizing the government's "important national interests" in preserving the official records. *Nixon*, 433 U.S. at 458-465.

tive private information, even without subsequent public dissemination.[18]

The government also relies (Pet. Br. 24) on *United States Department of Justice* v. *Reporters Committee for Freedom of Press*, 489 U.S. 749 (1989), but that case affords it no help. *Reporters Committee* did not involve the constitutional right to privacy; it presented only the statutory question whether disclosing the contents of an FBI rap sheet to a third party falls within the Freedom of Information Act's law enforcement exception. *See id.* at 763 n.13 (recognizing that "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether … an in-

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[18] *See Aid for Women* v. *Foulston*, 441 F.3d 1101, 1116 (10th Cir. 2006); *Planned Parenthood of S. Ariz.* v. *Lawall*, 307 F.3d 783, 789-790 (9th Cir. 2002); *ACLU of Miss.* v. *Mississippi*, 911 F.2d 1066, 1069-1070 (5th Cir. 1990); *see also Denius*, 209 F.3d at 956-957 (teacher stated claim where federal employer conditioned teacher's employment contract on employee authorizing employer's collection of his confidential medical records); *Gruenke* v. *Seip*, 225 F.3d 290, 301 (3d Cir. 2000) (plaintiff stated claim based on allegation that high school coach compelled her to take a pregnancy test); *Eastwood*, 846 F.2d at 630 (former prison employee stated claim that she was improperly forced to reveal personal facts about her sexual history to prison officials); *American Fed'n of Gov't Employees* v. *United States R.R. Retirement Bd.*, 742 F. Supp. 450, 456 (N.D. Ill. 1990) (government questionnaire asking job applicants to disclose whether they "ever had medical treatment for a mental condition" constituted "an impermissible violation of their constitutional right to privacy"); *Hawaii Psychiatric Soc'y* v. *Ariyoshi*, 481 F. Supp. 1028, 1044 (D. Haw. 1979) (compelled disclosure of psychiatric records to government was "itself an intrusion on the privacy interest in non-disclosure of personal information to government employees recognized in *Whalen*," irrespective of whether the information was to be disclosed to the public (internal quotation marks omitted)).

dividual's interest in privacy is protected by the Constitution."). Moreover, the Court's conception of privacy in that decision was clearly not limited to an interest against general public dissemination; rather, the Court referred to privacy as the "individual's control of information concerning his or her person," *id.* at 763, which is plainly implicated by the compelled relinquishment of sensitive information to the state. Indeed, the Court rejected the bright-line distinctions—and resulting "cramped notion of personal privacy"—that the government advances here. *Id.* The Court explained that even information that has previously been disclosed to the public can still be "private" because the notion of personal privacy entails "the individual's *control*" of personal information. *Id.* (emphasis added). In short, this Court's decisions lend no support to the government's argument that the right to informational privacy is implicated only when private information is publicly disseminated.

2. A bright line between collection of private information and its public dissemination would ignore significant harms to important privacy interests

Not only does drawing the line for constitutional protection of informational privacy at public dissemination lack basis in precedent, but to do so is to ignore the very real harm that governmental collection and retention of highly personal information can effect. When the government compels individuals to relinquish control of sensitive personal information, the harm to personal dignity can be profound, regardless of how widely and to whom the information is later disseminated.

"Privacy of personal matters is an interest in and of itself." *Plante*, 575 F.2d at 1134. The interest in "con-

trol[ling] the flow of information concerning the details of one's individuality" is an important aspect of privacy that can be compromised by forced disclosure to the government. *Project, Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1225 (1975). In other words, "to treat the collection of private information about [a person] as if it raised purely technical problems of safeguards against abuse," as the government proposes, "is to disregard [a person's] claim to consideration and respect as a person." Benn, *Privacy, Freedom and Respect for Persons* (1971), reprinted in *Philosophical Dimensions of Privacy: An Anthology* 231 (Schoeman ed. 1984).

This aspect of the privacy right has deep roots in the American constitutional tradition, which has regarded intrusion by *the state* into private affairs as the ultimate threat to individual liberty. As this Court has said, "the most comprehensive of rights and the rights most valued by civilized man" is the right the Founders conferred "*as against the Government*, to be let alone." *Stanley*, 394 U.S. at 564 (emphasis added); *see also* Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 Yale L.J. 1151, 1211 (2004) ("Suspicion of the state has always stood at the foundation of American privacy thinking, and American scholarly writing and court doctrine continue to take it for granted that the state is the prime enemy of our privacy.").

This privacy tradition sees expression in numerous aspects of constitutional law. It is of course reflected in the Court's Fourth Amendment "search and seizure" jurisprudence, *see* Whitman, 113 Yale L.J. at 1212 (citing *Boyd* v. *United States*, 116 U.S. 616, 625-626 (1886) (holding government seizure of documents to be an unconstitutional invasion on the part of the government

into "the sanctity of a man's home and the privacies of his life")). It has evolved to a broader right against government intervention into the private lives of individuals. *See, e.g.*, *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003) (holding that the "right to liberty under the Due Process Clause" protects the right to engage in private, consensual sexual conduct "without intervention of the government").

It is also reflected in this Court's recognition that government collection of private information can significantly harm other constitutional rights, particularly free expression and association. For example, in *Shelton* v. *Tucker*, 364 U.S. 479 (1960), this Court invalidated an Arkansas statute requiring teachers to file affidavits listing every organization to which they belonged or contributed. That statute neither required nor prohibited public dissemination of the affidavits, but the Court made clear that the compelled disclosure to the state alone would "interfere[] with personal freedom," and that "[e]ven if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy." *Id.* at 486.

In sum, "[w]hen a citizen knows that his conduct and associations are being put *on file* and that the information might be used to harass or injure him, he may become more concerned about the possible content of that file and less willing to risk asserting his expressional rights." Miller, *Computers, Data Banks and In-*

dividual Privacy: An Overview, 4 Colum. Hum. Rts. L. Rev. 1, 5-6 (1972) (emphasis added). The government's notion that the right to privacy protects only against public dissemination of private information is at odds with this understanding.

B. The Privacy Act Does Not Sufficiently Protect Respondents' Sensitive Personal Information

The government argues that the Privacy Act—which as relevant here limits only dissemination, and not collection, of personal information—is sufficient to protect respondents' privacy interests in their sensitive personal information. Pet. Br. 27-29. That argument is unpersuasive.

First, the Privacy Act contains numerous exemptions under which the government may release information. 5 U.S.C. § 552a(b)(1)-(12). The broadest exemption is for "routine use[s]," *id.* § 552a(b)(3), which include any use of a record that is "compatible with the purpose for which it was collected," *id.* § 552a(a)(7). The SF-85 itself notes several "routine use[s]" for which NASA can publicly release information it collects on respondents. For example, NASA can share information with "contractors … when necessary to perform a function or service related to th[e] record for which they have been engaged." And the government acknowledges (Pet. Br. 30 n.11) that the information on the completed SF-85 will be reviewed not only by NASA but by Caltech employees at JPL, who must review and "approve" the completed background investigation forms before forwarding them to OPM. Respondents' personal information, therefore, will be disclosed to their employer, Caltech.

Second, NASA may release information to "*any source or potential source* from which information is requested in the course of [the background] investigation … to identify the individual, inform the source of the nature and purpose of the investigation, and to identify the type of information requested." J.A. 89 (emphasis added). In other words, NASA can release information it obtains about respondents to third-party references, employers, neighbors, or any other source that it pursues during the background investigation. These broad routine uses confirm what scholars have noted: "[t]he routine use exemption has threatened to emasculate the Privacy Act's protection of individual privacy." Coles, *Does the Privacy Act of 1975 Protect Your Right to Privacy?*, 40 Am. U.L. Rev. 957, 959 (1991).

Third, any deterrent effect against releasing private information is undermined by the limited remedies available to individuals under the Privacy Act. The Act provides individuals with no means to enjoin the government from disclosing the highly personal information it collects about them. *See Doe* v. *Chao*, 540 U.S. 614, 635 (2004) (Ginsburg, J., dissenting); *Cell Assocs., Inc.* v. *NIH*, 579 F.2d 1155, 1160 (9th Cir. 1978). The Act provides only for an *ex post* money-damages action. 5 U.S.C. § 552a(g)(4). And even in such actions, recovery is severely limited because it is available only when there are "actual damages sustained by the individual." *Id.* Some courts have held that a person can show "actual damages" only if he suffers "pecuniary losses" but not if he suffers "generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries." *Fitzpatrick* v. *IRS*, 665 F.2d 327, 331 (11th Cir. 1982); *see also Hudson* v. *Reno*, 130 F.3d 1193, 1207 (6th Cir. 1997); *Pope* v. *Bond*, 641 F. Supp. 489, 501

(D.D.C. 1986); *DiMura* v. *FBI*, 823 F. Supp. 45, 48 (D. Mass. 1993).[19] Thus, even if respondents suffered severe embarrassment from the disclosure of details about their private sexual life or sensitive drug-treatment information, they might not be able to recover anything from the government.

Finally, the government does not even address the serious and increasing problem of data breaches of sensitive information held by the government. According to the Government Accountability Office (GAO), such breaches "have occurred frequently and under widely varying circumstances." United States Gov't Accountability Office, GAO 07-737, *Personal Information: Data Breaches are Frequent, but Evidence of Resulting Identity Theft Is Limited; However, the Full Extent Is Unknown* 5 (2007). Between January 2003 and July 2006, there were 788 data breaches at 17 agencies—the worst of which affected 26.5 million records. *Id.* at 5, 20. GAO has also reported that NASA's data security is particularly vulnerable. United States Gov't Accountability Office, GAO 10-4, *NASA Needs to Remedy Vulnerabilities in Key Networks* (2009).

The government's argument that respondents' personal information will be fully protected from public disclosure by the Privacy Act is therefore unconvincing. The lack of stringent protection against public disclosure here stands in contrast to *Whalen* and *Nixon*,

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[19] Courts are split on this issue, and some courts—including the Ninth Circuit—have concluded that non-pecuniary harms such as emotional damages are compensable under the Privacy Act. *See, e.g.*, *Cooper* v. *FAA*, 596 F.3d 538, 549 (9th Cir. 2010) (holding that the Act "encompass[es] both pecuniary *and* nonpecuniary injuries").

both of which involved rigorous safeguards. *See Whalen*, 429 U.S. at 594 (computer database containing protected information was "surrounded by a locked wire fence and protected by an alarm system" and was made available only to a small number of officials); *Nixon*, 433 U.S. at 465 (archivists handling presidential materials had an "unblemished record"). At a minimum, the court of appeals correctly concluded that the government's arguments on this point were not so convincing as to render an injunction unnecessary.

C. The Government's Interests As Employer And Proprietor Do Not Automatically Outweigh Respondents' Privacy Rights

1. The government cannot justify its background investigation based on its interests as an employer

The government places great weight on the argument that it has "far broader powers" to intrude on respondents' privacy interests here because the government is acting as an employer and not as a regulator of private conduct. Pet. Br. 18, 33. But the government's premise is incorrect.

First, respondents are not government employees. They are employees of Caltech. While the government attempts to elide that distinction (Pet. Br. 34 n.13), this Court has recognized that government contractors maintain a status "somewhere between" government employees and private individuals. *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 680 (1996). In fact, "the distinction between [government] employees and … contractors has deep roots in our legal tradition … [and serves as a basis for the] differential treatment of individuals who otherwise may be situated in similar positions." *O'Hare Truck Serv., Inc.* v. *City of North-*

lake, 518 U.S. 712, 721-722 (1996). It is therefore not enough to say, as the government does here, that the courts should not question the government's "personnel decision[s]." Pet. Br. 33-34.[20]

This Court has stressed the need for particularly explicit congressional authorization whenever the government would take action against a contractor that would seriously impair the contractor's "right to hold specific private employment and to follow a chosen profession." *Greene* v. *McElroy*, 360 U.S. 474, 492 (1959).[21]

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[20] The government's reliance (Br. 53-54) on *American Federation of Government Employees* v. *HUD*, 118 F.3d 786 (D.C. Cir. 1997) ("*AFGE*") and *National Treasury Employees Union* v. *United States Department of Treasury*, 25 F.3d 237 (5th Cir. 1994) ("*NTEU*") is misplaced. In those cases, the government employees had "a diminished expectation of privacy" (*NTEU*, 25 F.3d at 244), not because they were federal employees, but because they were federal employees in *positions of public trust* (*id.* at 239; *AFGE*, 118 F.3d at 788). Both courts took "pains to underscore the obvious"—that they were "determining the rights of [government employees] in their capacity as public trust employees[.]" *NTEU*, 25 F.3d at 244; *see also AFGE*, 118 F.3d at 794. Not only are respondents not federal employees, but they are "low risk" employees of Caltech who do not hold positions of public trust. Pet. App. 3a.

[21] *Greene* also highlights another serious problem with the government's assertion of authority to investigate highly personal facts as bearing on respondents' "suitability": the lack of due process protection should the government determine on the basis of those private facts that someone is not "suitable." Persons deemed unsuitable to have a badge permitting access to JPL do not receive a statement of reasons, are not entitled to a hearing before an adjudicative officer, have no right to discovery, cannot confront or cross-examine witnesses, have no right to a public tribunal to resolve their case, and have no right of appeal outside NASA. *See supra* pp. 7-8. By contrast, *Greene* held that robust due process protections were necessary when an individual was

The government's assertion that it has the legal authority to impose background checks on these persons stretches that purported authority to, and beyond, its outer limit. The government invokes (Pet. Br. 8) the Federal Information Security Management Act of 2002, 40 U.S.C. § 11331, and certain executive agency actions promulgated under its authority, including HSPD-12, *see supra* pp. 4-5. Those provisions, however, speak only to verification of *identity* and technical requirements for a uniform badge system for access to federal facilities, not a background investigation into the suitability of contractors' employees.[22] Nor does the National Aeronautics and Space Act of 1958 ("Space Act"), 42 U.S.C. §§ 2455 *et seq.*, clearly grant NASA the authority to investigate the private lives of its low-risk contractors' employees. Although that Act allows the Administrator of NASA to conduct certain security and personnel investigations, *id.* § 2455(a), it is best read as authorizing investigations only into matters related to national security, *i.e.*, the requirements for a security clearance, and not as permitting generalized and unbounded investigations into sensitive private matters in the lives of contractors' employees.[23]

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threatened with loss of a security clearance. 360 U.S. at 496-505; *see also* Exec. Order No. 10865 (1960); Exec. Order No. 12986 (1995), implemented in Department of Def. Reg. 5200.2-R (1987, updated 2006); Department of Def. Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992, updated Apr. 20, 1999).

[22] *See* J.A. 127-130, 131-150.

[23] *Cf. Cole* v. *Young*, 351 U.S. 536 (1956) (holding that a food and drug inspector's position did not require a security clearance because statute in question authorized only full security investigations for positions that affect national security). The court of ap-

But in any event, even government employees do not give up their constitutional rights when they join the government. As this Court recently explained, "a citizen who works for the government is nonetheless a citizen.… The [Constitution] limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti* v. *Ceballos*, 547 U.S. 410, 419 (2006); *see also O'Connor* v. *Ortega*, 480 U.S. 709, 717 (1987) ("Individuals do not lose [constitutional] rights merely because they work for the government instead of a private employer."); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967) ("The theory that public employment … may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."); *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952) ("Constitutional protection does extend to the public servant[.]").

This Court has taken particular care to protect government employees from conditions on employment that do not relate to job performance or functions. *See, e.g.*, *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 457, 465 (1995) (striking down a provision of the Ethics in Government Act that prohibited low-risk executive branch employees from receiving honoraria because it extended to speeches and articles for which "neither the character of the authors, the subject matter of their expression … nor the kind of

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peals initially agreed with respondents that the Space Act did not authorize the background investigations challenged in this case (Pet. App. 40a-42a) but reversed that ruling on rehearing (*id.* at 11a-13a).

audiences they address ha[d] any relevance to their employment"); *Shelton* v. *Tucker*, 364 U.S. at 480-481, 490 (striking down Arkansas statute requiring teachers to list all affiliated organizations as a "comprehensive interference [that] goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers"); *see also Rankin* v. *McPherson*, 483 U.S. 378, 390-391 (1987) (protecting a government employee's freedom of expression where the employee "serve[d] no confidential, policymaking, or public contact role"). Under these precedents, NASA's intrusion into non-job-related suitability factors goes "far beyond what might be justified" even if respondents were government employees. *Shelton*, 364 U.S. at 490.

Finally, petitioner suggests that NASA's background investigation must not be objectionable because private sector companies commonly conduct pre-employment checks to guard against hiring "unqualified" or "untrustworthy" employees (Pet. Br. 34-35). But respondents are not job applicants who need to be screened before hiring; they are long-time employees of Caltech—they have worked at Caltech for years if not decades—whose "qualifications" and "trustworthiness" are known quantities. The government has not offered any evidence that private employers commonly screen their employees' background even after they have been on the job for years. In any event, it is wrong to suggest that private sector companies conduct the kind of intrusive inquiry into "suitability factors" that NASA has imposed here.

Even aside from the suitability matrix, the broad inquires on Form 42 into respondents' "mental or emotional stability," "financial integrity," and "general behavior and conduct" exceed the scope of generally ac-

ceptable questioning in the private sector. For example, the authorities cited by the government (Pet. Br. 35) advise employers *not* to inquire about mental health issues. *See* Dickinson, *Hiring Smart: How to Conduct Background Checks* 63 (1997); Muller, *The Manager's Guide to HR: Hiring, Firing, Performance Evaluations, Documentation, Benefits, and Everything Else You Need to Know* 154 (2009). Similarly, employer inquiries into sensitive financial information such as credit history, bankruptcies, civil judgments, and tax liens are often restricted by law.[24] With respect to "general conduct" inquiries, some states restrict employers from inquiring about, or discriminating on the basis of, employees' outside-of-work activities that do not affect work performance.[25] The government is simply wrong in suggesting that background checks in the

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[24] *See, e.g.*, 2009 Wash. Rev. Code § 19.182.020(c) (barring employers from obtaining information about an employee's credit history, unless such information is substantially related to the job or required by statute); Haw. Rev. Stat. § 378-2.7 (similar); 15 U.S.C. § 1681(c) (prohibiting reporting for employment purposes of bankruptcy information that is more than ten years old or adverse financial information that is more than seven years old for positions within certain salary limits).

[25] *See, e.g.*, Alaska Stat. § 39.26.010(a); N.Y. Lab. Law § 201-d; 830 Ill. Comp. Stat. 55/1-20; Barada & McLaughlin, *Reference Checking for Everyone: What You Need to Know to Protect Yourself, Your Business, and Your Family* 46 (2004) (questions put to references should be tailored to "the candidate's ability to do the job, and nothing more"); Parker & Saperstein, 16 No. 4 HR Advisor: Legal & Practice Guideline 2 (2010) (advising that "best practice" is for employers to tailor the employee-screening process "so that it can be justified as job-related and consistent with business necessity").

private sector are similar to the sweeping inquiry that NASA claims to have the power to undertake.

2. The government also cannot justify its background investigation based on its ownership of JPL facilities

Nor is NASA's ownership of the JPL facilities sufficient to justify the background check at issue here. JPL functions as "an operating division of Caltech staffed with regular Caltech employees," and it must "conduct its business, administrative, and personnel affairs in a manner consistent with its role as an operating division of Caltech." J.A. 164, 169. In fact, "NASA encourages a high degree of interaction between the Caltech Campus and JPL at all levels." *Id.* at 165. Thus, Caltech hires JPL employees, permits JPL employees to teach at the university, and allows Caltech faculty to work at JPL and contribute to its research. *Id.* at 164, 166; *see also id.* at 187-188. Caltech's board of trustees even has a committee that supervises JPL. Unsurprisingly, therefore, NASA itself "recognizes the special character of JPL within the NASA family." *Id.* at 169; *see also* NASA, *JPL 101*, at 82 (2002), http://www.jpl.nasa.gov/about_JPL/jpl101.pdf ("As a human organization, [JPL] exists as a division of Caltech, which manages the Lab[.]").

The government argues, however, that it is "particularly important" for the government, as proprietor, to conduct background checks at "key federal research facilities like JPL" in order to protect the taxpayers' investment in this facility (Pet. Br. 35-36). But this argument rings hollow. Respondents, like all those who work at JPL, were hired by Caltech and were vetted for employment by Caltech through standard criminal background checks and employment reference checks.

E.g., Pet. App. 79a; C.A. App. 1397. And for the more than 50 years that Caltech has operated JPL, NASA has never required any additional background checks on JPL employees such as the ones that respondents challenge here. Pet. App. 5a. NASA has never suggested in this case that additional background investigations into Caltech employees at JPL were necessary because of any risk of harm to NASA's operations created by any JPL employee. Nor has NASA suggested in this case that the standard background check carried out by Caltech into applicants for employment at JPL had failed to identify any individual who posed a risk to NASA or was otherwise unsuitable. NASA's role as "proprietor" of JPL therefore does not justify the potentially intrusive investigation of long-time JPL employees like respondents.

D. Respondents Do Not Lose All Privacy Interests In Information Shared With Third Parties

The government argues that respondents have no cognizable privacy interest in "any adverse information" that the government might gather about them from third parties during the investigation because, according to the government, "[i]n 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." Pet. Br. 52-53. For this proposition, the government relies on this Court's decision in *Reporters Committee* and on this Court's Fourth Amendment jurisprudence. Neither supports the government's position.

Reporters Committee points directly in the opposite direction. In that case, the Court—citing *Whalen*—described the individual's interest in privacy as encompassing "the individual's right to control" pri-

vate information, not simply as encompassing the binary choice between revealing the information to someone or keeping it "private." 489 U.S. at 763, 764 n.16. Indeed, the Court recognized that "[i]n an organized society, there are few facts that are not at one time or another divulged to another." *Id.* As such, this Court rejected the same argument that the government makes here: that there was no privacy interest in information from police rap sheets because those rap sheets had previously been disclosed to the public. *Id.*; *see also id.* at 770 ("the fact that 'an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information'") (citing Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt. 1, at 13 (Sept. 26-27, 1974)).

The government's Fourth Amendment argument is also unavailing. The government argues that, in the Fourth Amendment context, an individual has no expectation of privacy in information "she voluntarily reveals to a third party," and that the same principle applies here to deprive respondents of any privacy interest in personal information they might have revealed to others. Pet. Br. 53. The government's analogy is inapt, however, because the Fourth Amendment is different in kind from the right to informational privacy. The Fourth Amendment is concerned with *how* the government obtains information, while the right to informational privacy is concerned with *what* information the government obtains, regardless of how or from whom the information is obtained. The court of appeals recognized this important distinction, explaining that the right to informational privacy depends on "the *na-*

ture of the information sought … rather than on the manner in which the information is sought." Pet. App. 22a-23a n.5.

Moreover, this Court has already rejected the premise of the government's argument. In *Nixon*, the Court recognized that the constitutional privacy interest encompassed information that President Nixon had disclosed to third parties. 433 U.S. at 465. By specifically holding that the right to informational privacy protects "personal communications" with third parties (*id.*), this Court has already rejected the government's argument here that "the fact that an individual has already revealed information to others means that it is no longer 'private' in the constitutional sense." Pet. Br. 52-53.

Indeed, under the government's reasoning, information would automatically be deemed *not* private precisely because it was shared in a setting where individuals normally have significant expectations of privacy—to a spouse, partner, or family member, or to a doctor or therapist. According to the government, the zone of privacy protected by the Constitution extends only around each individual alone and only so far as each individual keeps his thoughts to himself, but offers no shield to information shared in a relationship with another person. This Court has never adopted this impoverished concept of privacy. To the contrary, the Constitution protects *relationships* as well. *See Lawrence*, 539 U.S. at 567 (condemning statutes that "seek to control a relationship that … is within the liberty of persons to choose"); *Griswold*, 381 U.S. at 485.

E. Respondents Are Not Voluntarily Surrendering Their Private Information

Finally, the government suggests that NASA's background investigation should not be objectionable to respondents because the disclosure of their personal information would be "voluntary." *See, e.g.*, Pet. Br. 5, 17, 53. This Court rejected this line of argument long ago, which is reminiscent of Justice Holmes' repudiated dictum that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *See O'Hare Truck Serv.*, 518 U.S. at 716-717. Respondents would not be disclosing information "voluntarily" during the NACI process. They have all been working at JPL for years, and if they do not complete the investigation process, they will lose their jobs. Pet. App. 6a. This leaves respondents with "a stark choice—either violation of their constitutional rights or loss of their jobs." *Id.* at 26a; *cf. Lefkowitz* v. *Turley*, 414 U.S. 70, 84 (1973) ("[T]he State must recognize what our cases hold: that answers elicited upon the threat of the loss of employment are compelled[.]").

A background investigation that is imposed as a condition of keeping one's job is no more "voluntary" than is a demand that a government contractor support a particular political party, *see Umbehr*, 518 U.S. 668, or a requirement that a government employee lose his job unless he takes a loyalty oath, *see Wieman*, 344 U.S. 183. Respondents "are entitled, like all other persons, to the benefit of the Constitution," and the government may not force them to choose "between surrendering their constitutional rights or their jobs." *Uniformed Sanitation Men Ass'n*, 392 U.S. at 284-285.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL R.Q. WOLFSON
SHIRLEY CASSIN WOODWARD
SHIVAPRASAD NAGARAJ
ANNA MELAMUD
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

DAN STORMER
Counsel of Record
VIRGINIA KEENY
HADSELL STORMER KEENY
RICHARDSON & RENICK, LLP
128 North Fair Oaks Ave.
Pasadena, CA 91103
(626) 585-9600
dstormer@hadsellstormer.com

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