No. 09-530

In the Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., PETITIONERS

v.

ROBERT M. NELSON, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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The court of appeals broadly held that any time the government collects information an individual would prefer to keep private, it implicates a constitutional privacy right that requires the government to satisfy an *ad hoc* balancing test. The court made no distinctions based on the type of information sought, why the government sought it, and whether it would ever be disclosed publicly. Having announced its sweeping rule, the court held that the government may not conduct basic background checks before granting individuals long-term access to NASA's Jet Propulsion Laboratory (JPL), one of the Nation's premier research and development centers. That was error.

The privacy interests implicated by the government's collection of information here are minimal. The government seeks only limited, employment-related information,

and the information provided is protected from public disclosure by the Privacy Act of 1974, 5 U.S.C. 552a, and by policies adopted by the relevant agencies. Moreover, the government has a substantial need for the information as employer and proprietor, and it has used forms like those at issue here for millions of individuals over the past 50 years. In light of these circumstances, the challenged inquiries on Standard Form 85 (SF-85) and Form 42 are plainly reasonable and should be upheld.

Contrary to respondents' contention, the government is not regulating private conduct or imposing unconstitutional conditions on employment; it is using minimally intrusive, tailored inquiries to secure information relevant to its interests as an employer and proprietor. And there is no support for respondents' speculation that the government will use the background-check process to pry into their private lives. Respondents do not possess a constitutional entitlement to work at JPL without having to undergo the same background checks as their civil service counterparts. The judgment should be reversed.

A. There Is A Fundamental Constitutional Difference Between The Government's Collection Of Information And Its Public Dissemination

1. Respondents acknowledge (Br. 36-38) that there are differences between government collection of information and government disclosure of that information, both because the former is "less intrusive on one's privacy interests" and because it is "more easily outweighed by the government's interest in obtaining the information." But they nonetheless defend the analytical approach of the court of appeals (Br. 38, 40), where it does not matter "how widely and to whom the information [collected] is later disseminated."

That approach cannot be squared with *Whalen* v. *Roe*, 429 U.S. 589 (1977), and *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), which defined protection against public disclosure as the core of the informational privacy right. Gov't Br. 47-57. In both cases, the first question the Court asked was whether the information the government collected would be disclosed publicly. *Whalen*, 429 U.S. at 600-601; *Nixon*, 433 U.S. at 458. The Court then examined the statutory and regulatory provisions that protected the confidentiality of the information collected and concluded that those measures fully answered any constitutional concerns. *Whalen*, 429 U.S. at 593-595 & n.12; *Nixon*, 433 U.S. at 458, 462-463. As the Court later explained, the essence of the informational privacy right is keeping certain facts "away from the public eye." *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 769 (1989).[1]

2. Respondents cannot credibly claim (Br. 40) that the government's collection of information causes the same "harm to personal dignity" as sharing the information with the public. The government's "right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." *Whalen*, 429 U.S. at 605. The very reason for these safeguards is to preserve the confidential character of the information, which is lost when the information is made public. See *Nixon*, 433 U.S. at 459.

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[1] *Reporters Committee* did not "reject[]" (Resp. Br. 39-40) a constitutional distinction between information collection and public dissemination; that case concerned the Freedom of Information Act, 5 U.S.C. 552. See 489 U.S. at 762-763 & n.13.

Attempting to place government collection of information on the same constitutional footing as public dissemination, respondents rely (Br. 36-37) on certain opinions cited in *Whalen*, but none concerned a freestanding informational privacy right. Instead, the opinions (several of which did not speak for the Court) observed that privacy interests are inherent in other enumerated constitutional rights.[2] The other cases respondents cite (Br. 42) either address other enumerated constitutional rights[3] or the distinct "interest in independence in making certain kinds of important decisions," *Whalen*, 429 U.S. at 599-600 & n.26.[4] None of the decisions addresses a freestanding constitutional right to informational privacy.

3. The government does not contend that the informational privacy right "protects only against public dissemination of private information." Resp. Br. 36-38, 43. As we have explained (Br. 40 n.16), there may well be circumstances in which the collection of information raises constitutional concerns, such as when collection infringes other constitutional rights, or the government fails to put in place appropriate safeguards against public disclosure.[5] But this Court and the courts of appeals

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[2] See *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 78 (1974) (Powell, J., concurring); *id.* at 79 (Douglas, J., dissenting)

[3] See *Shelton* v. *Tucker*, 364 U.S. 479, 485-487 (1960).

[4] See *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

[5] Of the cases respondents cite (Br. 38-39 & n.18) to support a claim for protection against collection of information, three involved reproductive rights. *Planned Parenthood of S. Ariz.* v. *Lawall*, 307 F.3d 783, 789-790 (9th Cir. 2002); *Gruenke* v. *Seip*, 225 F.3d 290, 301, 303 (3d Cir.

(other than the Ninth Circuit in this case) have not accepted the broad claim that the mere collection of information necessarily triggers constitutional scrutiny.

There is good reason for that caution. The government routinely receives information about individuals for legitimate public purposes. "The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require" the government to collect certain information that would be "potentially embarrassing or harmful" if publicly disclosed. *Whalen*, 429 U.S. at 605. Respondents' view, which would subject those routine activities to constitutional scrutiny under an *ad hoc* balancing test, would seriously compromise the government's ability to carry out those duties. That is why protections against public disclosure of information obtained by the government generally "evidence a proper concern with, and protection of, the individual's interest in privacy." *Ibid.*

4. Like *Whalen* and *Nixon*, this case concerns only the obtaining of information by the government, not public disclosure. Numerous statutory and regulatory provisions (including the Privacy Act) protect the confidentiality of the information collected through the

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2000); *Eastwood* v. *Department of Corr.*, 846 F.2d 627, 630-631 (10th Cir. 1988). One case simply stated that minors have constitutional privacy rights. *Aid for Women* v. *Foulston*, 441 F.3d 1101, 1116-1117 (10th Cir. 2006). One addressed public disclosure, rather than the collection of information. *ACLU of Miss.* v. *Mississippi*, 911 F.2d 1066, 1069, 1074 (5th Cir. 1990). The final decision rested on the fact that the government failed to offer any justification for its actions and failed to take steps to keep the records confidential. *Denius* v. *Dunlap*, 209 F.3d 944, 955-958 & n.6 (7th Cir. 2000).

background-check process. See Gov't Br. 26-30. The Privacy Act "give[s] forceful recognition" to a person's "interest in preserving the confidentiality of sensitive information contained in his personnel file." *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 318 n.16 (1979).

Respondents contend (Br. 44-46) that the Privacy Act does not adequately protect against public disclosure of personnel records. That was not a basis for the court of appeals' decision, and it lacks merit in any event. The Privacy Act has protected information collected through the background-check process since 1975, Gov't Br. 29, yet respondents have not identified even a single instance in which such information was disseminated publicly. A "remote possibility" of public disclosure cannot invalidate widely-used background-check forms on their face. *Whalen*, 429 U.S. at 601-602.

Contrary to respondents' contention (Br. 43-44), the Privacy Act's "routine use" exception does not permit broad release of information. It only allows disclosure for uses "compatible with the purpose for which it was collected," 5 U.S.C. 552a(a)(7), and requires the agency to "inform each individual whom it asks to supply information" of its routine uses and to explain such uses in the *Federal Register*, 5 U.S.C. 552a(b)(3), (e)(3) and (4)(D). None of the routine uses identified by NASA and the Office of Personnel Management (OPM) authorize public disclosure of private background-check information. See 71 Fed. Reg. 45,859, 45,859-45,860, 45,862 (2006) (NASA); 60 Fed. Reg. 63,075, 63,084 (1995), amended by 75 Fed. Reg. 28,307 (2010) (OPM).

There is also no reason to believe that respondents' "personal information" will be improperly disclosed to Caltech. Resp. Br. 43. A JPL employee reviews each SF-85 to verify that all of the questions were answered,

but that person "do[es] not disclose any information contained on the form to anyone else," and Caltech keeps no record of the information collected. J.A. 211-212. NASA (not Caltech) decides whether to grant or deny access, and any adverse information learned during a background investigation "shall not be disclosed to the individual's employer." J.A. 207-208, 211-212; C.A. E.R. 519.[6]

Respondents assert (Br. 44) that the government may broadly disclose background-check information to "references, employers, neighbors, or any other source." But disclosure to sources is allowed only "to identify the individual [being investigated], inform the source of the nature and purpose of the investigation, and to identify the type of information requested." J.A. 89; see J.A. 96 (Form 42 disclosure). And these sources are individuals that the applicant himself listed on SF-85. Respondents also suggest (Br. 5, 43) that private information about them could be disclosed to the media, but any disclosures of the information received are sharply restricted by law. Such disclosures are only allowed in the rare case that they would be "in the public interest" and would not constitute an "unwarranted invasion of personal privacy." J.A. 89; see 5 U.S.C. 552(b)(7); see generally *Reporters' Comm.*, 489 U.S. at 762-765.

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[6] Respondents are wrong to assert (Br. 6) that NASA will decide whether they are suitable for employment under 5 C.F.R. Pt. 731; that regulation governs civil service employment, not credentialing. See Gov't Br. 36 n.15; pp. 15, *infra*.

Respondents also suggest (Br. 7, 47 n.21) that procedures for appealing denials of credentials are inadequate. They did not litigate that claim below, and it is not relevant to their facial challenge to the background-check forms.

Finally, respondents contend (Br. 45) that their personal information may be vulnerable to data breaches or unauthorized access. None of the reports they cite focus on background-check data; instead, they address malicious attacks on computer networks or they identify risks that cannot be absolutely eliminated when any information is stored electronically. Such remote possibilities do not undermine the force of the Privacy Act's protections as a constitutional matter.

Respondents also ignore the fact that in applying the background-check process to federal contract employees, both the Commerce Department and the Office of Management and Budget (OMB) adopted specific procedures and requirements for maintaining the confidentiality of information obtained. See Gov't Br. 29-30. Those concrete measures reinforce the Privacy Act's protections and further reduce any risk of public disclosure.

B. The Government Seeks Only Employment-Related Information In Its Role As A Proprietor And Employer

1. The only reason the government makes the inquiries at issue is because respondents seek long-term access to federal facilities and information systems as contract employees. The government is not conducting free-ranging inquiries into citizens' private lives as a regulator. Gov't Br. 33-34. As this Court has explained, the government has "far broader powers" when acting as an employer and proprietor than as a regulator. *Engquist* v. *Oregon Dep't of Agric.*, 128 S. Ct. 2146, 2151 (2008) (quoting *Waters* v. *Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)).

Respondents point out (Br. 46) that they are not civil servants but contract employees. This Court has never

restricted the deference due to the government in the employment context to actions affecting civil servants. Instead, it has afforded deference when the government acts "as proprietor, to manage [its] internal operation," *Engquist*, 128 S. Ct. at 2151 (internal quotation marks omitted; alteration in original), and it has specifically held that deference is "due to the government's reasonable assessments of its interests *as contractor*." *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 678 (1996); see *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 714 (1996) ("[T]he government has broad discretion in formulating its contracting policies.").

The reasons for that deference are plainly applicable here: NASA must be able to ensure the hiring of individuals who will fulfill the mission of JPL safely and effectively, see *Engquist*, 128 S. Ct. at 2151; NASA, not the federal judiciary, is best positioned to decide how to fulfill JPL's mission, *id.* at 2151-2152; and NASA "could not function" if every personnel decision "became a constitutional matter," *Connick* v. *Myers*, 461 U.S. 138, 143 (1983). Although constitutional analysis must "accommodate the differences between employees and independent contractors" when those differences are material, *Umbehr*, 518 U.S. 768, here they are not. At JPL, contract employees perform duties functionally equivalent to—and have the same access to facilities and systems as—their civil service counterparts. J.A. 221-222.

This is not a case in which the government has imposed an unconstitutional condition on federal employment. In the decisions respondents cite (Br. 47-50), the conditions imposed lacked the requisite nexus to job duties. Here, by contrast, the very purpose of the background check inquiries is to determine whether individuals are sufficiently reliable and trustworthy to gain

long-term access to federal facilities and information systems. See *Shelton* v. *Tucker*, 364 U.S. 479, 485 (1960) ("There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires.").

2. The government's need to conduct background checks of contract employees is compelling. After the terrorist attacks of September 11, 2001, revealed security vulnerabilities in federal facilities, the President directed the Commerce Department to develop a mandatory and uniform standard for access to federal facilities and information systems. See Gov't Br. 7-8; J.A. 127-130 (*HSPD-12*). The Commerce Department determined that individuals seeking long-term access to federal facilities and systems should undergo background checks, in order to confirm their identities and ensure that they are reliable and trustworthy. J.A. 131-150 *(FIPS 201-1)*; see J.A. 217-218, 222-223, 225. That requirement makes sense in the modern federal workforce, where contract employees perform many of the same functions as civil service employees. J.A. 221-222.

Respondents' assertion (Br. 48) that *HSPD-12* does not authorize background checks ignores (1) the President's decision to have the Commerce Department determine how to best fulfill its goals; (2) the Commerce Department's judgment that background checks are necessary to ensure facility and system security; and (3) the Executive's continued implementation of that judgment, despite the considerable commitment of resources involved. Gov't Br. 8. Respondents also ignore NASA's separate decision to conduct background checks of contract employees after determining that the failure to conduct such checks posed a security vulnerability. *Id.* at 10-11. And respondents' contention (Br. 47-48) that

NASA lacks the authority to conduct background checks was properly rejected by the courts below. Pet. App. 11a-13a (the Space Act of 1958, 42 U.S.C. 2455(a), "grant[s] NASA the statutory authority to require the investigations here"); *id.* at 65a-66a (same).[7]

As the government has established (Br. 34-35), public and private employers routinely conduct background checks. Respondents contend (Br. 52-53) that such checks are unnecessary because Caltech investigated them. But respondents' own declarations refute that assertion. *E.g.*, C.A. E.R. 1397 ("I have never been required to undergo any type of background investigation to maintain my position with JPL other than * * * [one] which required that I provide my name, social security number[,] and current address."); *id.* at 1289, 1346-1347, 1361, 1367 (similar). Respondents are likewise wrong to contend (Br. 50) that the government cannot conduct background checks of individuals already working at government facilities. Especially where, as here, the individuals have never completed the government's standard background check, it is surely reasonable for the government to conduct that basic investigation.[8]

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[7] Contrary to the contention of respondents' amicus (UCS Br. 6-8, 12-13), the fact that the government has delegated day-to-day management of Federally Funded Research and Development Centers does not preclude the government from placing conditions on long-term access to those facilities. See 48 C.F.R. 52.204-9; J.A. 225.

[8] Respondents incorrectly assert (Br. 4) that NASA has required that Caltech discharge any JPL employees who do not complete a background check; the decision whether to continue employing such individuals in positions that do not require long-term access to federal facilities and systems is Caltech's. Pet. App. 28a.

The government's interest in controlling access to its facilities and information systems is particularly strong at JPL. JPL is "one of the premier research institutes in the world," with an annual budget of over $1.5 billion. Resp. Br. 1; Gov't Br. 10, 35-36. All positions at JPL are filled by contract employees, and they perform the same functions and enjoy the same access to facilities and information systems as their civil service counterparts at other NASA centers. J.A. 221-222. Respondents themselves work on a variety of mission-critical projects. See Gov't Br. 36-37.

Although respondents have been classified as low-risk under NASA's particular internal system, even low-risk employees "have access to the entire facility" and can "get very close to facilities where sensitive or classified work is conducted." J.A. 207. Such individuals also have broad access to "Government and supplier data, including sensitive and proprietary data." J.A. 164. Indeed, any individual granted long-term access to JPL has the "potential" to "cause serious damage to [its] publicly funded missions." J.A. 207.

NASA may protect its investment by requiring routine background checks for all individuals seeking long-term access to JPL. It is likewise reasonable for the Commerce Department to implement *HSPD-12* by uniformly requiring background checks for all contract employees who will access federal facilities and information systems.

3. The background-check forms respondents challenge seek only employment-related information. That is clear from the forms themselves: SF-85 informs the applicant that it is used to "conduct[] [a] background investigation[]" to determine whether he is "reliable, trustworthy, and of good conduct and character," J.A.

88-89; and Form 42 informs references that they are asked to "assist in completing a background investigation" of an applicant by verifying data he has provided and answering questions about activity that "ha[s] a bearing on [his] suitability for government employment or a security clearance," J.A. 96-97. Those forms are used only for personnel background investigations and not for any other purpose. 75 Fed. Reg. at 5358-5359.

Respondents contend (Br. 28-31) that the government will use these forms to obtain information about their private lives. But respondents challenge the forms on their face, and the forms on their face only request information relevant to fitness for employment. Gov't Br. 31-33. The only individuals from whom these forms seek information are the applicant and individuals he designates on SF-85 as references or individuals who can verify residences and periods of self-employment or unemployment. J.A. 96, 210, 218; 75 Fed. Reg. at 5359.[9] Moreover, the Privacy Act furnishes independent protection for the information collected: it permits a federal agency to collect and maintain "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by [E]xecutive [O]rder." 5 U.S.C. 552a(e)(1); see Gov't Br. 7 n.4, 32-33.

4. Unable to find fault with the forms on their face, respondents speculate (Br. 28-33) that the government might use the forms to "intrude into highly personal matters unrelated to their job performance." In support

[9] Respondents suggest (Br. 30, 33-34) that the government will rely on the release contained on SF-85 to engage in a fishing expedition for personal information. But Form 42 is sent only to individuals designated on SF-85 as described above, and the court of appeals did not address any claim about other uses of the release.

of that assertion, they rely on an "issue characterization chart." This claim is not properly before the Court. As previously explained (Gov't Br. 54-55; Cert. Reply 9-10), respondents made two arguments below: that the forms on their face sought impermissible information, and that the government would use the information from the forms to make credentialing decisions on improper grounds. Both the district court and the court of appeals found the latter claim "unripe and unfit for judicial review" and concluded that the record "does not sufficiently establish" how the government will make credentialing decisions. Pet. App. 8a-9a; see *id.* at 61a-63a. Respondents nevertheless attempt to revive that claim (Br. 31) by contending that the chart affects what information the government will receive on the forms in the first place. But the court of appeals found the chart irrelevant to the claim at issue here, instead judging the constitutionality of SF-85 and Form 42 on their face. Pet. App. 4a-5a, 19a-26a.

In any event, there is no evidence in the record showing that NASA would use the chart for credentialing decisions. The evidence respondents cite (Br. 29-30, 32) is their own affidavits, which state that a JPL employee (not a federal employee) posted the chart on JPL's intranet site, and that the director of JPL (not a federal employee) suggested that credentialing decisions would be made using this chart. J.A. 203, 234-235; C.A. E.R. 1471, 1487. Those statements do not establish that "*NASA* posted a 'suitability matrix' on its website" or

that "*NASA* will use [this matrix] in determining suit ability." Resp. Br. 7, 29 (emphasis added).[10]

Moreover, the government has repeatedly disavowed use of respondents' chart. See Gov't Br. 55; Cert. Reply 10. OPM has issued standards that all agencies must use in credentialing federal contract employees, and those standards do not consider private sexual activity or any other improper factor. Cert. Reply 10-11. OPM recently issued additional guidance to all agencies, reminding them that these standards—which do not include respondents' chart—are the exclusive standards for making credentialing decisions. See Gov't Br. 55 (citing guidance).[11]

Respondents ignore OPM's exclusive credentialing standards. They also ignore the numerous federal prohibitions on employment discrimination that protect federal contract employees. Gov't Br. 55. And although NASA has completed background checks for over 39,000 contract employees, respondents have not identified any instance in which the government has sought improper information or denied access to federal facilities or systems based on improper grounds. See *id.* at 56 (citing J.A. 213, 224). Respondents' baseless speculation

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[10] Respondents cite the *Suitability Desk Guide* (Br. 32 n.16), but that document (which is not in the record) is used for hiring civil service employees, not credentialing contract employees.

[11] Taking note of OPM's guidance is not improperly supplementing the appellate record (Resp. Br. 32); this Court may take judicial notice of such agency actions, see, *e.g.*, *Tucker* v. *Texas*, 326 U.S. 517, 519 n.1 (1946), and the fact that OPM's notice was issued after the commencement of this litigation and addresses administrative concerns arising from it does not detract from its legal force, see *United States* v. *Morton*, 467 U.S. 822, 835 n.21 (1984).

cannot facially invalidate the longstanding and widely-used forms at issue here.

C. The Government May Ask Acknowledged Drug Users About Treatment And May Ask Designated References For Employment-Related Information

The court of appeals erred in invalidating the drug-treatment question on SF-85 and the questions on Form 42.

1. SF-85

Respondents conceded below that "most of the questions" on SF-85 "are unproblematic and do not implicate the constitutional right to informational privacy." Pet. App. 19a. They do not contest the court of appeals' holding that the government has a strong interest "in uncovering and addressing illegal substance abuse among its employees and contractors" and that the questions on SF-85 asking whether and how often an applicant has used illegal drugs in the past year are "narrowly tailored" to further that interest. *Id.* at 19a-21a. But they contend (Br. 21) that the government cannot make the natural follow-up request to include "any treatment or counseling received." Respondents are wrong for two reasons. First, the follow-up question does not broadly seek "medical information," Resp. Br. 22; it seeks limited information about whether an individual has ceased engaging in illegal activity that would affect job performance. Second, any privacy interests implicated by the question are easily outweighed by the government's need for the information.

a. Respondents minimize altogether the fact that the challenged request is not a freestanding inquiry about treatment and counseling, but a follow-on question relevant only to an applicant who already has ac-

knowledged using illegal drugs in the past year and identified the types of drugs and nature of his use. J.A. 94; see Pet. App. 22a. This narrow question does not implicate significant informational privacy concerns. As the court of appeals noted, the drug laws "put citizens on notice" that illegal drug use is not a "private" area. Pet. App. 19a-20a (quoting *Mangels* v. *Pena*, 789 F.2d 836, 839 (10th Cir. 1986)). The follow-up question asks only whether there has been treatment or counseling; it does not ask about medical treatment generally, seek medical records, or require that the applicant disclose confidential conversations with a therapist. Resp. Br. 21. Indeed, the request does not specify any particular level of detail in the response.

Respondents' contention (Br. 21) that individuals would be stigmatized for acknowledging drug treatment ignores the fact that they have already reported both the fact and nature of their recent illegal drug use. See J.A. 94. At that point, the additional fact of treatment generally lessens concerns about drug abuse. These circumstances distinguish the inquiry here from general medical inquiries, where the individual's privacy interest stems from his desire to keep his underlying condition private. See *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). As in *Whalen*, which also concerned information about drugs, the information is provided only to certain government officials for limited purposes and there is no appreciable risk "that the information will become publicly known." 429 U.S. at 600; see Gov't Br. 41-42.

b. Any privacy interests implicated by the drug-treatment question are greatly outweighed by the government's need for the information. The court of appeals itself recognized why the government requests it:

the fact that an acknowledged drug user has sought treatment "*lessen[s]* the government's concerns" that the drug use will affect job performance. Pet. App. 22a. Indeed, the government has explained that it seeks such information in order to identify situations "in which, despite counseling and rehabilitation programs, there is little chance for effective rehabilitation." 38 Fed. Reg. 33,315 (1973).

Respondents do not take issue with this common-sense explanation of the question's purpose, but instead claim that the government waived the argument below. That is wrong: the government argued to the court of appeals that the government has a strong interest in determining whether an individual will be a safe and reliable employee despite recent drug use. Gov't C.A. Br. 29-30, 38-41. Respondents never distinguished below between the government's need for information about drug treatment as opposed to drug use, Resp. C.A. Br. 40-47; Resp. C.A. Reply Br. 17-21, but when the court did so at oral argument, the government gave the explanation advanced here, 07-56424 Oral Arg. 33:49-34:40 (9th Cir. Dec. 5, 2007). The court of appeals then noted this significance of drug treatment in its opinion. Pet. App. 22a.[12]

The drug-treatment question is appropriately tailored to further the government's interests. It allows an applicant who has specified that he recently has used drugs to ameliorate concerns about his ability to do the job, and it does not specify any required level of detail. Respondents suggest (Br. 26) that the government

[12] Respondent's citation (Br. 26 n.13) to the district court record (C.A. E.R. 56-57) is inapposite; that exchange addresses when separate releases might be required for medical records, not the drug-treatment question on SF-85.

should make the question optional. But that would materially reduce the question's effectiveness in determining which acknowledged drug users are able to do the job, and such second-guessing runs contrary to this Court's admonition that the government has broad authority as employer and proprietor to match the best workers to each task it needs to perform. *Engquist*, 128 S. Ct. at 2152. With limited exceptions, all Executive branch employees requiring long-term access to federally-controlled facilities and information systems must have completed an investigation that includes questions about drug use and treatment. The federal government is properly within its duties as an employer and proprietor to ask the same questions of its contract employees.

Significantly, respondents do not engage in any balancing of interests, instead simply contending (Br. 28) that no "legitimate interest" supports the drug-treatment question. Because the fact of treatment is plainly relevant to the applicant's ability to do the job, and because the privacy interests implicated by disclosure of this limited information (which is never made public) are minimal, any necessary balancing of interests tips sharply in favor of the government.

2. Form 42

The court of appeals erred in invalidating use of Form 42, both because the form seeks a third-party's impressions of a person rather than private facts, and because the form is a necessary and effective way to further JPL's mission and protect its investments.

a. Respondents all but ignore the specific questions contained on Form 42, instead focusing on the chart that is not at issue here. See pp. 14-16, *supra*. When the inquiry is properly focused on the face of Form 42, it is

clear that the government seeks only information that is employment-related and of a type that is not normally considered private. The form asks the reference how long and in what capacity he has known the applicant, and then asks for the reference's opinion, based on his interactions with the applicant, whether he "ha[s] any reason to question this person's honesty or trustworthiness" or knows of any behavior that "may have a bearing on this person's suitability for government employment or a security clearance." J.A. 97.

When a person voluntarily triggers a background investigation and names references for the government to contact, that person does not have a constitutional right to control what those references say about him. Respondents cite no decision recognizing a constitutional privacy right that extends so far, and such a rule would be far afield of the interest in "personal autonomy" the right is intended to protect. *Washington* v. *Glucksberg*, 521 U.S. 702, 727 (1997). Moreover, to the extent that the applicant already has disclosed information to the reference in a school, work, or neighborhood setting, it can hardly be considered private. This Court has determined in the Fourth Amendment context that a person who discloses information to another assumes the risk that it will not remain private, see Gov't Br. 52-53 (citing cases); Pet. App. 13a-17a, and it has relied upon that theory in determining the scope of the informational privacy right, see *Nixon*, 433 U.S. at 455-461. That is not to say that obtaining information from third parties could never implicate constitutional privacy interests, but only that such instances are rare and likely would involve requests for information that infringe on interests or relationships that are independently of constitutional dimension. Gov't Br. 52. Here, the purpose

of Form 42 is to seek information about whether a person would be a good employee, based on the reference's interactions with the person. Such queries are far removed from the core of the informational privacy right.

b. Even assuming that Form 42 requests information in which respondents have a constitutionally protected privacy interest, the government's strong interests justify its use. The court of appeals determined (and respondents do not contest) that Form 42 is supported by the government's need to "verify[] * * * contractors' identities" and "ensur[e] the security of the JPL facility so as not to jeopardize the costly investments housed therein." Pet. App. 24a. The court of appeals invalidated the use of Form 42, however, because it believed the form sought non-employment-related information and thus was insufficiently tailored to meet those needs. *Id.* at 25a.

The court of appeals was mistaken. By its terms, Form 42 seeks only information that "ha[s] a bearing on [the applicant's] suitability for government employment or a security clearance." J.A. 96-97. The fact that these questions, coming as they are in the employment setting, are somewhat open-ended is not a constitutional infirmity. "Without open-ended questions, it is hard to know what potential problems might need an explanation," and an employer would "get[] stuck with people who should not have been hired, and even, occasionally, people who are dangerous." Pet. App. 124a (Kleinfeld, J., dissenting from denial of rehearing). Such questions are commonly used by private employers. Gov't Br. 46; CDIA *Amicus* Br. 4-8. Form 42 has been used for decades and more than 1.8 million such forms are sent out each year. Gov't Br. 6. That pervasive practice fatally undermines respondents' position that their use in the

background-check process here results in an unconstitutional infringement of personal privacy interests. See, *e.g.*, *Whalen*, 429 U.S. at 602, 605.

D. The Court Of Appeals' Judgment Cannot Stand

In ordering injunctive relief, the court of appeals entirely ignored this Court's seminal decisions in *Whalen* and *Nixon.* Rather than follow the approach set out in those cases, it extended the informational privacy right far beyond anything ever suggested by this Court, holding that constitutional scrutiny is required any time the government seeks any information an individual generally would not disclose to the public, regardless of the nature of the information, why the government seeks it, and whether there are protections against public disclosure. Pet. App. 18a-21a. The court did not tether that broad privacy right to any particular provision of the Constitution or ask whether the interests involved are "fundamental" and "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-722 (internal quotation marks and citations omitted).

Respondents' position, at bottom, is the same. They ask this Court to recognize a broad informational privacy right to invalidate a longstanding system of background checks, without even citing any provision of the Constitution in their brief. They subscribe to the court of appeals' broad conception of what information is considered private, and they too would require *ad hoc* balancing without regard to context or statutory privacy protections. Resp. Br. 15-19. Respondents suggest few limits to their position, and their broad-based attack makes it difficult to see which inquiries their approach would allow government employers to make before

granting an individual long-term access to important federal facilities and information systems.

This case does not require the Court to define the contours of the informational privacy right, because respondents' claims are so far afield of the core of what the right protects. Here, respondents' facial challenge can easily be rejected in light of the limited nature of the information sought, the Privacy Act's protections regarding the maintenance and dissemination of the information, the familiar employment-related context of the inquiry, the government's broad authority in acting as an employer and proprietor, and the longstanding and widely-accepted use of SF-85 and Form 42.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Acting Solicitor General

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