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 *AMICI CURIAE* FOR THE RESPONDENTS

PETER J. ELIASBERG
PETER BIBRING
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-5228

ALAN SCHLOSSER
MICHAEL RISHER
ACLU FOUNDATION OF
NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, California 94111
(415) 621-2488

ADEN J. FINE
Counsel of Record
STEVEN R. SHAPIRO
JAMEEL JAFFER
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500
afine@aclu.org

DAVID BLAIR-LOY
SEAN RIORDAN
ACLU OF SAN DIEGO
AND IMPERIAL COUNTIES
P. O. Box 87131
San Diego, California 92138
(619) 232-2121

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTERESTS OF AMICI[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Southern California, the ACLU of Northern California, and the ACLU of San Diego and Imperial Counties are regional affiliates of the national ACLU. Founded in 1920, the ACLU has vigorously defended the right to privacy for almost 90 years and has appeared before this Court in numerous cases involving the right to privacy, both as direct counsel and as *amicus curiae*, including *Whalen v. Roe*, 429 U.S. 589 (1977).

STATEMENT OF THE CASE

Respondents are long-time employees of the California Institute of Technology ("Caltech") who work at the Jet Propulsion Laboratory ("JPL") pursuant to a contract between Caltech and NASA. Each of the Respondents works at what the government has characterized as "low-risk" and "non-sensitive" position.

After Respondents had been working without incident at JPL for varying lengths of time, NASA

---

[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Respondents have lodged a blanket consent; Petitioners' consent has been submitted to the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

adopted a new policy requiring all JPL personnel, including "low-risk" employees like Respondents, to undergo a National Agency Check with Inquiries ("NACI"). As part of the NACI investigation, each employee must complete Standard Form 85 ("SF 85"). Among other things, SF 85 asks for disclosure of any illegal drug use or possession within the past year, along with information about the details of any treatment or counseling received for such use. *See* Joint Appendix ("JA") 88-95.

SF 85 also requires each employee to sign an "Authorization for Release of Information," JA 95, permitting the government to obtain "any information relating to [the employee's] activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." *Id.* JPL then sends an "Investigative Request for Personal Information" ("Form 42") to the employee's references, past employers and landlords, which includes an open-ended request for any derogatory information that might affect the employee's suitability for employment. JA 96-97.

Based on the information it receives from the employee or obtains from other sources, NASA and the Office of Personnel Management determine whether the employee is suitable for employment. How suitability is determined is not clear from the record. Respondents have alleged that a document posted on JPL's internal website identified factors considered in the suitability determination. The factors include: "cohabitation," "carnal knowledge," "sodomy," "indecent proposals," "adultery,"

"illegitimate children," "voyeurism," "incest," "abusive language," "obscene telephone calls," "unlawful assembly," "attitude," "homosexuality ... when indications are present of possible susceptibility to coercion or blackmail," "physical health issues," "mental, emotional, psychological, or psychiatric issues," "issues ... that relate to an associate of the person under investigation," and "issues ... that relate to a relative of the person under investigation." JA 98-102.

Respondents brought an as-applied challenge to the constitutionality of this investigative process alleging, *inter alia*, that it violated their constitutional right to informational privacy. The district court denied Respondents' request for a preliminary injunction on the informational privacy claim, finding that they were unlikely to succeed on the merits and that there was no irreparable harm.

The Ninth Circuit reversed, concluding that Respondents had demonstrated "serious questions as to their informational privacy claim, and the balance of hardships tips sharply in their favor." *Nelson v. NASA*, 530 F.3d 865, 873 (9th Cir. 2008).[2] Given the limited record before it at this preliminary stage of the proceedings, the Ninth Circuit focused in particular on two aspects of the background

[2] The panel opinion was written before this Court clarified the standards for a preliminary injunction in *Winter v. National Resources Defense Council, Inc.*, 129 S.Ct. 365 (2008). However, in her opinion concurring in the denial of the petition for rehearing, Judge Wardlaw made clear that the panel would have reached the same result "under *Winter*." 568 F.3d 1028, 1030 n.30 (9th Cir. 2008).

investigation: (1) SF-85's inquiry into drug treatment and counseling; and (2) Form 42's unbounded request for information. It then directed the district court on remand to fashion an appropriate preliminary injunction.

The government's request for rehearing *en banc* was denied. *Nelson v. NASA*, 568 F.3d 1028 (9th Cir. 2009). This Court subsequently granted *certiorari*.

SUMMARY OF ARGUMENT

The preliminary injunction ordered by the court of appeals in this case represents a tailored response to the serious constitutional issues raised by a program that requires private employees working with the federal government in "low-risk" and "non-sensitive" positions to disclose information about medical treatment and psychological counseling that they may have received in connection with illegal drug use, which they are also required to acknowledge. The government's interest in obtaining information about Respondents' medical treatment and psychological counseling is minimal and is not sufficient – under any standard of review – to overcome Respondents' right to keep this information private.

1. This Court has long recognized a constitutional right to informational privacy. *Whalen v. Roe*, 429 U.S. 589 (1977). Whatever the outer contours of that right, information about medical treatment and psychological counseling lies at its core. For more than three decades, lower courts interpreting *Whalen* have understood it to embrace

information that is highly personal and intimate. Medical treatment and psychological counseling easily meet that definition.

2. Contrary to the government's assertion, the right to information privacy is implicated whenever the government compels disclosure of highly personal and intimate information. The touchstones of the right to privacy are the right to be free from intrusion into one's private and personal affairs and the right to control one's personal information. Some information is so private and so personal that individuals should not be compelled to disclose it to anyone, including the government, absent an overriding governmental interest. Further disclosure by the government magnifies the privacy issue but it does not define it. Increasingly, moreover, the government is unable to preserve the confidentiality even of information that it is statutorily obligated to keep private. In a world of computer hackers, the safeguards of the Privacy Act have become substantially less secure.

3. Because the right to control one's personal information is central to the right to informational privacy, the right to privacy is not waived once information is shared with third parties. Indeed, the idea of control necessarily includes the right to make choices. Many people choose to share information about their medical or psychological treatment with close friends and relatives. That does not mean, and should not mean, that they forfeit the right to withhold the intimate details of their life from the government or anyone else.

4. On this preliminary injunction record, and applying any meaningful standard of review, the government has not justified its need to obtain details about the medical and psychological treatment of Respondents and those like them, who occupy "low risk" and "non-sensitive" positions at JPL. In particular, the government argues that employees with a history of illegal drug use are more likely to be deemed suitable for employment if the government knows they are undergoing medical treatment or psychological counseling. Even assuming that is so, the decision whether that benefit outweighs the loss of privacy should belong to the employee and not the government. In other words, this would be a very different case if the government offered employees an opportunity to share information about their medical treatment or psychological counseling, rather than demanding it.

ARGUMENT

I. THE CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY, WHICH THIS COURT HAS LONG RECOGNIZED, NECESSARILY INCLUDES HIGHLY PERSONAL AND INTIMATE DETAILS ABOUT MEDICAL TREATMENT AND PSYCHOLOGICAL COUNSELING.

A. The Right To Informational Privacy Is Well-Established.

This Court first articulated the right to informational privacy in *Whalen v. Roe*, 429 U.S. 589 (1977). As the Court explained in *Whalen*: "The

cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 598-600 (footnotes omitted).

The Court has reaffirmed that right on several occasions since. *See Nixon v. Adm'r of Gen. Services*, 433 U.S. 425, 457 (1977) (quoting *Whalen*'s description of the right to informational privacy); *U.S. Dept. of Justice v. Reporters Committee For Freedom of the Press*, 489 U.S. 749, 762 (1989) (same); *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982) (same). *See also H.L. v. Matheson*, 450 U.S. 398, 434-35 (1981) (Marshall, J., dissenting) (same).

As early as *Whalen,* moreover, this Court understood that the right to informational privacy is increasingly jeopardized by the rapid pace of technological change. More than three decades ago, the Court wrote: "We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files." 429 U.S. at 605. Justice Brennan was even more explicit, warning that "the central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information . . . ." *Id.* at 606. Twelve years later, the Court returned to this theme, noting that computer databases pose a threat to personal privacy that is qualitatively different than the "scattered disclosure" of personal

information in the pre-computer era. *See Reporters Committee*, 489 U.S. at 769-771.

Following this Court's lead, the courts of appeals have also recognized a right to informational privacy on numerous occasions. *See, e.g., Denius v. Dunlap*, 209 F.3d 944, 955 (7th Cir. 2000) ("The 'concept of ordered liberty' protected by the Fourteenth Amendment's Due Process Clause has been interpreted to include 'the individual interest in avoiding disclosure of personal matters.'") (internal citations omitted); *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999) (stating that the right's "existence is firmly established"), *cert. denied, Ferm v. U.S. Trustee*, 528 U.S. 1189 (2000); *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) ("The Supreme Court has recognized that notions of substantive due process contained within the Fourteenth Amendment safeguard individuals from unwarranted governmental intrusions into their personal lives."); *James v. City of Douglas*, 941 F.2d 1539, 1543 (11th Cir. 1991) (rejecting qualified immunity defense because a reasonable official would have known about the clearly established constitutional right to keep personal matters private); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (recognizing existence of constitutional right to informational privacy); *Barry v. City of New York,* 712 F.2d 1554, 1558-59 (2d Cir.), *cert. denied*, 464 U.S. 1017 (1983) (same); *Nilson v. Layton City,* 45 F.3d 369, 371-72 (10th Cir. 1995) (same); *Fadjo v. Coon*, 633 F.2d 1172, 1175-76 (5th Cir. 1981) (same); *United States v. Hubbard*, 650 F.2d 293, 304-06 (D.C. Cir. 1980) (same); *United States v. Westinghouse*

Electric Corp., 638 F.2d 570, 577 (3d Cir. 1980) (same).[3]

Today, more than ever, the right to informational privacy is essential to our concept of human dignity and personal autonomy. In the Information Age, it protects the right of "individuals ... to determine for themselves when, how, and to what extent information about them is communicated to others". *Reporters Committee*, 489 U.S. at 764 n.16 (1989) (quoting Alan F. Westin, Privacy and Freedom 7 (Atheneum 1967)).[4]

B. The Information Sought By The Government In This Case Is Protected By The Right To Informational Privacy

The right to informational privacy is well-established; its outer boundaries are less so. Wherever those outer boundaries may lie, however,

---

[3] The only court of appeals to conclude that there is not a constitutional right to informational privacy is the Sixth Circuit, *see J.P. v. DeSanti*, 653 F.2d 1080, 1089-90 (6th Cir. 1981), in a case decided before this Court reiterated the right in *Reporters Committee* and *Ferber*, and before many of the appellate decisions cited above. The First Circuit has stated that the existence of the right is an open question, but has declined to resolve the issue. *Borucki v. Ryan*, 827 F.2d 836 (1st Cir. 1987).

[4] "Privacy, thus, is control over knowledge about oneself. But it is not simply control over the quantity of information abroad; there are modulations in the quality of the knowledge as well. We may not mind that a person knows a general fact about us, and yet feel our privacy invaded if he knows the details." Charles Fried, *Privacy*, 77 Yale L.J. 475, 483 (1968) (footnote omitted).

requiring individuals to disclose highly personal and intimate details about their medical history and psychological counseling undeniably strikes at the heart of the right to informational privacy. *See, e.g., Whalen*, 429 U.S. at 599 (holding that the right applies to "personal matters"); *Nixon*, 433 U.S. at 457 (same); *Eagle*, 88 F.3d at 625 (the "right to confidentiality . . . extends only to highly personal matters representing 'the most intimate aspects of human affairs'"); *Nilson*, 45 F.3d at 372 (10th Cir. 1995) (right extends to information that is "highly personal or intimate"); *Doe v. City of New York*, 15 F.3d 264, 269 (2d Cir. 1994) (extending the right to cover medical information because the plaintiff's medical condition "is a matter that he is normally entitled to keep private"); *Walls*, 895 F.2d at 192 ("Personal, private information in which an individual has a reasonable expectation of confidentiality is protected by one's constitutional right to privacy."); *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 112-13, 116 (3d Cir. 1987) (holding that the right covers information "within an individual's reasonable expectations of confidentiality"; the "more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny"; "[w]hen the information is inherently private, it is entitled to protection").

Different courts have, admittedly, used different formulations to describe the scope of the informational privacy right. But the government's argument does not rest on any of these linguistic differences, which are ultimately minor and have no

impact on this case. Instead, the government argues that the right to informational privacy should be limited to "core matters that themselves trigger constitutional protections," Pet. Br. at 52. The flaw in that approach was succinctly summarized by the Fourth Circuit: "There are . . . matters which fall within a protected zone of privacy simply because they are private . . . These private matters do not necessarily relate to the exercise of substantive rights, but may simply constitute areas of one's life where the government simply has no legitimate interest." *Walls,* 895 F.2d at 193 (internal citations omitted). *See also Fadjo*, 633 F.2d at 1176 (holding that the right to confidentiality extends beyond matters already separately protected).

Medical treatment and psychological counseling are undeniably private in this sense. The information revealed to one's doctor or therapist is, by definition, personal and intimate. It is up to the patient to determine how broadly that information is disseminated. For that reason, the information is protected by evidentiary privileges[5] and by professional ethics.[6]

---

[5] *See, e.g.,* Cal. Evid. Code § 994 (physician-patient communications privileged) and § 1014 (psychotherapist-patient communications privileged) *See also* 42 U.S.C. § 290dd-2 (drug treatment records maintained by any program or activity "conducted, regulated, or directly or indirectly assisted by any department or agency of the United States" shall be treated as confidential).

[6] The Hippocratic Oath states: "I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know." *See* Louis Lasagna, *The Hippocratic Oath:*

Recognizing how private and personal this information is, the courts of appeals have consistently held that medical information is covered by the informational privacy right. *See, e.g., Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up."); *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir. 1995) (extending privacy protection to medical information); *City of New York*, 15 F.3d 267 (same); *Alexander v. Peffer*, 993 F.2d 1348, 1351 (8th Cir. 1993) (same); *Schaill by Kross v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1322 n.19 (7th Cir. 1988) (same); *Westinghouse Elec. Corp.*, 638 F.2d at 577 (same).

Congress has likewise determined that medical information implicates significant privacy concerns. *See, e.g.,* 5 U.S.C. § 552(b)(6) (1976) (exempting "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" from the Freedom of Information Act); Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d-6 (establishing protections for medical records). Indeed, the Privacy Rule to HIPAA makes clear that individuals must be given access to all of their medical records, and that health care providers and insurance plans cannot use

---

Modern Version (1964), *available at* http://www.pbs.org/wgbh/nova/doctors/oath_modern.html.

or disclose information regarding treatment or health care operations absent consent from the individual patient, except in a few specified situations. HIPAA, Privacy Rule, 45 C.F.R. § 164.502.

II. THERE IS NO MERIT TO THE GOVERNMENT'S CLAIM THAT THE RIGHT TO INFORMATIONAL PRIVACY IS ONLY THREATENED IF THE GOVERNMENT FURTHER DISSEMINATES THE HIGHLY PERSONAL AND INTIMATE INFORMATION THAT IT IS SEEKING FROM RESPONDENTS IN THIS CASE.

The government contends that "[c]onstitutional [p]rivacy [c]oncerns [a]re [n]ot [t]riggered [m]erely [b]ecause [t]he [g]overnment [c]ollects [i]nformation [a]bout [a]n [i]ndividual." Pet. Br. at 21. To the extent the government is collecting information that is highly personal and intimate as a condition of employment, that claim should be rejected.

As previously noted, the right to informational privacy rests on the premise that individuals are entitled to control whether, how, and to whom their personal information is disclosed. *See* p.9, *supra*. By forcing Respondents to disclose details of their medical treatment and psychological counseling, the

government is depriving them of the right to make those determinations.[7]

Any later dissemination of that information by the government may constitute a further violation of the informational privacy right, but it is not a necessary ingredient of the claim. As the Eleventh Circuit observed: "This argument misses the point. The inquiry is whether there is a legitimate state interest in disclosure that outweighs the threat to the plaintiff's privacy interest. The answer to that inquiry does not depend upon whether the person to whom disclosure was made is a state official or a member of the general public." *James*, 941 F.2d at 1544.

Contrary to the government's assertion, neither *Whalen* nor *Nixon* suggest that the right to informational privacy is limited to the government's dissemination of highly personal and intimate

---

[7] That employees are not literally compelled to provide their private information – i.e., that they have the alternative of finding a new job – does not mean that they have waived their informational privacy rights. "Tests applied as a prerequisite for continued employment are hardly to be considered voluntary." *Fraternal Order*, 812 F.2d at 111-12. Government employees cannot be forced to choose between their job and their constitutional rights. *See, e.g., Pesce v. J. Sterling Morton High Sch.*, 830 F.2d 789, 797 (7th Cir. 1987) ("[T]he federal right of confidentiality might in some circumstances be implicated when a state conditions continued employment on the disclosure of private information."); *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983) ("A potential employee of the state may not be required to forego his or her constitutionally protected rights simply to gain the benefits of state employment.").

information. Although the Court found in those cases that the collection of information by the government did not violate the right to informational privacy, the Court reached that conclusion not because the only disclosure was to the government, but because the government's interests were sufficient to outweigh the privacy interests. *Whalen* makes clear that the informational privacy right involves "the individual interest in avoiding disclosure of personal matters." *Whalen*, 429 U.S. at 599. It does not say "the individual interest in avoiding *governmental* disclosure," which is how the government would like it read. If it did, *Whalen* and *Nixon* would have been much shorter decisions because the fact that there was no governmental disclosure would have been determinative.

The government's narrow reading of *Whalen* and *Nixon* is unsupported by the case law. *See, e.g., Denius*, 209 F.3d at 956-57 (finding a violation of the right to informational privacy in the context of a background check where the government was merely collecting information); *Norman-Bloodsaw*, 135 F.3d at 1269 (sustaining informational privacy claim without any allegation that the government might ultimately publish the collected private information); *Eagle*, 88 F.3d at 627 ("Years ago, at what might now be considered the dawn of the technological revolution, the Supreme Court foresaw on the horizon abuses that might emanate from governmental collection of vast amounts of personal data."); *ACLU of Mississippi v. State of Mississippi*, 911 F.2d 1066, 1069-70 (5th Cir. 1990) (holding that the right includes the "right to be free" both from

"the government disclosing private facts about its citizens" and from "the government inquiring into matters in which it does not have a legitimate and proper concern") (internal quotation omitted) (emphasis omitted); *Thorne*, 726 F.2d 459, 469-72 (holding that the questioning of a police job applicant violated her right to privacy); *Hubbard*, 650 F.2d at 305 (stating that protection from both the collection of private information by the government and subsequent disclosure by the government are necessary to preserve fundamental privacy interests).

More fundamentally, the government's assertion that the right to informational privacy is not implicated by compelled disclosure to the government is really an argument against the very concept of a right to privacy. Under the government's theory, it would be permissible for the government to collect all sorts of private and highly sensitive information, even in the absence of any proven need, so long as the government did not subsequently disclose the information publicly. That is clearly not the law. Regardless of how widely it is shared, for many people there is some information – like information about their medical treatment and counseling – that is so profoundly private, intimate and sensitive that they do not want to be compelled to disclose it to anyone, including the government. The right to informational privacy is

about control over personal information, not its misuse.[8]

The government's reliance on the Privacy Act is therefore misplaced. The Privacy Act only limits disclosure by the government; it does nothing to mitigate the privacy concerns raised by collection of the information in the first place. Thus, it is not coextensive with the right to informational privacy. Additionally, the Privacy Act has numerous exceptions, including one that permits disclosure for "routine use," 5 U.S.C. § 552a(b)(3), broadly defined to mean any use that is "compatible with the purpose for which it was collected," 5 U.S.C. § 552a(a)(7).

Notwithstanding the Privacy Act, moreover, there have recently been numerous high-profile incidents in which, despite government's best efforts and best intentions, highly personal and sensitive information collected by the government has been disclosed. *See, e.g.,* Peter P. Swire, *Peeping*, 24 Berkeley Tech. L.J. 1167 (2009) (discussing numerous examples of recent disclosures of confidential information, including accidental data leaks, improper access or fraud by insiders, and other

---

[8] In any event, this Court has been properly skeptical of government claims that constitutional rights should be left to the government's good intentions. *See United States v. Stevens*, 130 S.Ct. 1577, 1591 (2010) ("But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the government promised to use it responsibly.") (citing *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001) (involving a non-First Amendment constitutional challenge).

failures of security within government and the private sector); Privacy Rights Clearinghouse, *Chronology of Data Breaches*, http://www.privacyrights.org/ar/ChronDataBreaches.htm (last modified July 25, 2010) (compiling a list of incidents of insider theft, fraud, hacking, break-ins, lost hard drives, and accidental disclosures of personal information from governmental institutions and the private sector from January 2005-present; as of July 2010, this list details 494 million records that have been lost).

The Internal Revenue Service, which possesses a significant amount of sensitive data, vividly illustrates this problem.[9] The General Accounting Office has chronicled continuing privacy and security problems at the IRS over the last decade, despite the IRS's strict rules regarding the confidentiality of taxpayer information and its best efforts at securing the information. *See, e.g.,* U.S. General Accounting Office, *Information Security: IRS Electronic Filing Systems*, GAO-01-306 (Feb. 2001), *available at* http://www.gao.gov/new.items/d01306.pdf (finding that in 2001, the agency's computer systems were highly insecure and vulnerable); GAO, *Information Security: IRS Needs to Address Pervasive Weaknesses*, GAO-08-211 (Jan. 8, 2008),

[9] *Amici* do not suggest that the IRS's collection of personal financial information violates the right to informational privacy, as the need for that information is clear. *Amici* discuss the IRS solely to illustrate the potential privacy problems that can arise when government entities collect highly personal information, despite their best efforts to safeguard the information.

available at http://www.gao.gov/cgi-bin/getrpt?GAO-08-211 (finding that as of 2008, "significant weaknesses in various controls continue to threaten the confidentiality and availability of IRS's financial processing systems and information . . . about 70 percent of the previously identified information security weaknesses remain unresolved."); GAO, *Information Security: IRS Needs to Continue to Address Significant Weaknesses*, GAO-10-355 (Mar. 2010), *available at* http://www.gao.gov/new.items/d10355.pdf (finding that as of 2010, 69 percent of the previously identified security weaknesses in key systems had still not been addressed). The Treasury Department's Inspector General similarly found that the IRS had lost or misplaced 2,332 laptop computers, desktop computers and servers containing sensitive information over a three-year period. Declan McCullagh, *IRS' Case of the Missing Laptops*, Wired Magazine, Jan. 10, 2002, *available at* http://www.wired.com/politics/law/news/2002/01/49615.

The IRS is not alone. Just last month, it was revealed that information from a database maintained by the State of Utah regarding the alleged immigration status of thousands of individuals was improperly accessed and publicly disclosed. *See, e.g.,* Press Release, Utah Governor Gary Herbert, Investigation Into Alleged Immigrant List Complete (July 20, 2010), *available at* http://www.utah.gov/governor/news_media/article.html?article=3321. In another highly publicized incident, two contract workers at the State Department were fired in 2008 for reading passport

information belonging to then-presidential candidates Barack Obama, John McCain, and Hillary Clinton. *Passport files of candidates breached*, Associated Press, March 21, 2008, *available at* http://www.msnbc.msn.com/id/23736254/. Samuel Joseph Wurzelbacher, aka "Joe the Plumber," similarly had his government records improperly accessed by employees at several Ohio state agencies. Randy Ludlow, *Checks on 'Joe' More Extensive Than First Acknowledged*, Columbus Dispatch, Oct. 29, 2008, *available at* http://www.dispatch.com/live/content/local_news/stories/2008/10/29/joe30.html.

Medical information has also been improperly accessed and disclosed from government databases on numerous occasions. *See, e.g.,* Wendy Thermos, *Officer Fired for Computer-Snooping on VIPs*, Los Angeles Times, Nov. 6, 2003, *available at* http://articles.latimes.com/2003/nov/06/local/mechriman6 (discussing the firing of a California police officer for obtaining confidential information from police databases on a variety of celebrities); *Maria Shriver's Medical Records Leaked*, CBS News, April 7, 2008, *available at* http://www.cbsnews.com/stories/2008/04/07/health/main3999244.shtml (detailing how an employee at the UCLA Medical Center improperly accessed medical information about California First Lady Maria Shriver and over thirty other prominent people and celebrities, some of which was later leaked to the media).

At a minimum, this troubling history of unauthorized disclosures highlights the importance of requiring the government to demonstrate its need

for the sort of highly personal and intimate information it is requesting from Respondents in this case.

III. THE RIGHT TO INFORMATIONAL PRIVACY IS NOT WAIVED MERELY BECAUSE AN INDIVIDUAL CHOOSES TO SHARE SOME HIGHLY PERSONAL AND INTIMATE INFORMATION WITH SELECTED THIRD PARTIES.

The government also attempts to limit the informational privacy right by claiming 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. That argument cannot be accepted without eviscerating the right to informational privacy.

Information that is already known by third-parties can still merit constitutional protection from compelled disclosure to the government. *See, e.g., McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995) (holding that leafletter had constitutional right to engage in anonymous speech, even though her printer and other third-parties knew her identity); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459-60 (1958) (holding that membership lists are constitutionally protected regardless of fact that third-parties knew the members' "private" information). If not, there would be almost no information that would be protected by the right to privacy and, thus, no such right.

For example, there would be no right of privacy in any medical information, including the

most personal and sensitive information imaginable, because someone else – the doctor – would know that information. There would be no right of privacy protecting one's sexual activities or proclivities, because someone else – one's sexual partner – would be privy to that information. Indeed, if the privacy right did not cover any information that others know about – which is what the government asserts – then there would have been no right to privacy in President Nixon's personal communications, because third-parties – the people he communicated with – were privy to the contents of those communications. The Court reached the opposite conclusion in *Nixon*, holding that President Nixon had a legitimate expectation of privacy in those communications. *Nixon*, 433 U.S. at 457-58.

The court of appeals properly recognized these principles, rejecting the government's argument and holding that the third-party doctrine applies only in the Fourth Amendment context, where the focus is on the reasonableness of the manner in which information is sought, not on the particular nature of the information itself. *Nelson*, 530 F.3d at 880 n.5 ("[T]he right to informational privacy differs from the Fourth Amendment which, as a bright-line rule, 'does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities' . . . We think it is clear, however, that the 'legitimate expectation of privacy' described in this context is a term of art used only to define a 'search' under the Fourth Amendment, and [*United States v. Miller*, 425 U.S. 435 (1976)] and [*Smith v. Maryland*, 442 U.S. 735 (1979)] do not

preclude an *informational privacy* challenge to government questioning of third parties about highly personal matters.") (internal citations omitted) (emphasis in original).

In *Reporters Committee*, the Court rejected a similar argument that the fact that information has been previously disclosed means that no privacy rights exist. 489 U.S. at 762-63 ("We reject respondents' cramped notion of personal privacy."). The Court reached that conclusion, in part, from its recognition that, "in an organized society, there are few facts that are not at one time or another divulged to another." *Id.* at 763. As the Court explained, the key to privacy is not whether the information has previously been revealed; the focus is on how sensitive and personal the information itself is. *Id.* at 770 ("In sum, 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.'") (quoting 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, p. 13 (Sept. 26-27, 1974)).[10]

---

[10] *See also U.S. Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 500 (1994) ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."). Although *Reporters Committee* was a FOIA case, a distinction the Court noted might matter in some situations, 489 U.S. at 762 n. 13, its insights into privacy are equally relevant in the constitutional context when, as here, the information being sought was never in the public record.

As in *Reporters Committee*, the government's attempt to expand the third-party doctrine to limit the informational privacy right represents a "cramped notion of personal privacy." *Reporters Comm.*, 489 U.S. at 762-63. It was properly rejected by the court below and should likewise be rejected by this Court.

IV. THE PRELIMINARY INJUNCTION SHOULD BE UPHELD.

Because this case involves matters clearly embraced by the right to informational privacy, the government's interest in requiring disclosure of the private information must be balanced against Respondents' interest in confidentiality. *See Nixon*, 433 U.S. at 457-58 (balancing the former President's privacy interest in his personal papers against the public interest in subjecting all of his papers to archival screening).

In conducting that balancing, the majority of courts have applied a form of intermediate scrutiny, similar to the test used by the Ninth Circuit in this case. *See, e.g., Nelson*, 530 F.3d at 877 ("If the government's actions compel disclosure of private information, it 'has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest.' We must 'balance the government's interest in having or using the information against the individual's interest in denying access.'") (citations omitted); *Fraternal Order*, 812 F.2d at 110 ("Most circuits appear to apply an 'intermediate standard of review' for the

majority of confidentiality violations.") (citation omitted); *Barry*, 712 F.2d at 1559 (same).

Other courts have applied a form of strict scrutiny, requiring the government to demonstrate a compelling interest. *See, e.g., Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (noting that a compelling interest analysis is applied for informational privacy claims); *Nilson*, 45 F.3d at 371 (analyzing whether disclosure of information can be done in the "least intrusive manner"); *Thorne*, 726 F.2d at 469 (stating that a compelling interest analysis should be used for severe intrusions on confidentiality). *See also Whalen*, 429 U.S. at 607 (Brennan, J., concurring) ("a statute that did effect such a [serious] deprivation would only be consistent with the Constitution if it were necessary to promote a compelling state interest").

As in this case, the courts applying intermediate scrutiny have looked to a number of factors to determine if the right was violated:

> The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate,

> articulated public policy, or other recognizable public interest militating toward access.

Westinghouse Elec. Corp., 638 F.2d at 578; *see also Doe v. Att'y Gen.*, 941 F.2d 780, 796 (9th Cir. 1991) (quoting *Westinghouse*). The government does not address these cases or the standards of review applied by the various courts of appeal. Instead, the government suggests that courts should defer to its determination that it needs the requested information. Pet. Br., 44 ("the courts should not second-guess the government's judgment about the need for information about recent drug use"); *id.* at 49 (the court of appeals "erred in articulating an *ad hoc* balancing test for determining if the Constitution is violated by particular inquiries"). There is no basis for that position.

Because constitutional rights are at stake, heightened scrutiny should be applied to determine whether an individual's constitutional right to informational privacy has been violated. *See, e.g., Barry*, 712 F.2d at 1559 (stating that the Supreme Court has recognized "that some form of scrutiny beyond rational relation is necessary to safeguard the confidentiality interest"); *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979) ("The Supreme Court has clearly recognized that the privacy of one's personal affairs is protected by the Constitution. Something more than mere rationality must be demonstrated.").

The Court need not now determine whether intermediate scrutiny or strict scrutiny should be applied, however. Under either standard, the

government has failed to justify its requirement that Respondents provide details of any drug treatment and counseling they may have received.

The government asserts two purported interests in obtaining this information. First, it claims the information is necessary to determine if the Caltech employees are not suitable for employment or not safe to access its facilities. Pet. Br., 42-43. Second, the government claims that "[k]nowing about an employee's drug treatment also may help the government avoid disability discrimination." *Id.* at 43. Neither of these interests is sufficient to force individuals to relinquish their right to privacy.

With regard to the first asserted interest, the government's only argument is that knowing about Respondents' "'treatment or counseling received for illegal drug use * * * *lessen[s]* the government's concerns regarding the underlying activity.'" Pet. Br., 43 (quoting the Ninth Circuit decision) (emphasis in original). If that is true, then there is no reason to deny Respondents their constitutional right to decide whether to reveal that information to the government. The fact that disclosure to the government may be helpful to some employees in some circumstances does not mean that the government can compel disclosure from all employees in all circumstances.

The government's second asserted interest is equally empty. Arguing that it needs to know about Respondents' treatment and counseling to avoid engaging in disability discrimination is the equivalent of the government saying that it needs to

ask about a job applicant's religion so that it can avoid a religious discrimination lawsuit. That is obviously not permissible, and reveals just how thin the government's interests are in obtaining this information.

Because the government has not articulated any legitimate interests that will actually be furthered by forcing Respondents to disclose their highly sensitive medical treatment and counseling information, the government's demand for that information was properly enjoined.[11]

[11] The court of appeals also concluded that the government had failed to justify the broad and open-ended questions set forth in Form 42, or provide any standards that might limit their reach. We agree. In addition, we share Respondents' concern about the breadth of the blanket authorization and release of information required by SF 85, but do not brief that issue here.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Aden J. Fine
Counsel of Record
Steven R. Shapiro
Jameel Jaffer
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
afine @aclu.org

David Blair-Loy
Sean Riordan
ACLU of San Diego
and Imperial Counties
P.O. Box 87131
San Diego, CA 92138
(619) 232-2121

Peter J. Eliasberg
Peter Bibring
ACLU Foundation of
Southern California
1616 Beverly Blvd.
Los Angeles, CA 90026
(213) 977-5228

Alan Schlosser
Michael Risher
ACLU Foundation of
Northern California
39 Drumm Street
San Francisco, CA 94111
(415) 621-2488

Dated: August 6, 2010