IN THE

Supreme Court of the United States

National Aeronautics and Space Administration, et al., $Pe\ i\ ioner\ ,$

—v.—

ROBERT M. NELSON, ET AL.,

Re ponden .

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

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INTERESTS OF AMICI¹

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

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, government permitting the to obtain information relating to [the employee's] activities schools, residential management 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,"

investigation: (1) SF-85's inquiry into drug treatment and counseling; and (2) Form 42's

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 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 counseling. treatment psychological or 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 computer72 Tw ." f6036ing thatmpli infos

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.

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 private information ("Personal, in which individual has а reasonable expectation 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'scause the p98ntiff's hh6 (3dCp98nt personal

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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 privileges⁵ 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. 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

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 \mathbf{IF} THE GOVERNMENT **FURTHER DISSEM-INATES** 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

information. Although the Court found in those cases that the collection of information by the

"the government disclosing private facts about its citizens" and from "the government inquiring into matters in which it does not have a legitimate and concern") (internal quotation (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 fundamental preserve privacy interests).

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 2009)[r()]uss, mo008 Tc.3764 Tw[(dis4eley.p5)5.7(t)0le

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

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/

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

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 legitima

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 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 record requested, the of information it does or might contain, the potential for harm in 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 request ed 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.

government asserts two purported interests in obtaining this information. First, it claims the information is necessary to determine if 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 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 fact that disclosure to the the government. 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

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CONCLUSION

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

Respectfully submitted,

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