

# THE CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY: *NASA v. NELSON*

RUSSELL T. GORKIN \*

## I. INTRODUCTION

Modern substantive due process<sup>1</sup> was borne in the landmark case *Griswold v. Connecticut*<sup>2</sup> when the Supreme Court recognized that “specific guarantees” within the Bill of Rights protect various “zones of privacy.”<sup>3</sup> Since then, the Court has guarded against interpretations of the Due Process Clause of the Fifth and Fourteenth Amendments that merely reflect the “policy preferences of the Members of [the Supreme] Court”<sup>4</sup> by limiting meaningful protection to those privacy interests so “deeply rooted in our Nation’s history and tradition” that they are deemed “fundamental.”<sup>5</sup>

*NASA v. Nelson*<sup>6</sup> presents the Supreme Court with the opportunity to recognize another, more general privacy interest—the right to informational privacy.<sup>7</sup> Due, however, to the evolving nature

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\* 2012 J.D. Candidate, Duke University School of Law.

1. This framework provides the foundation for the protection afforded to the “liberty” interest contained within the Due Process Clause of the Fifth Amendment.

2. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

3. *Id.* at 484. *See Roe v. Wade*, 410 U.S. 113, 153 (1973) (grounding the protection of these privacy interests in the Due Process Clause).

4. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

5. *Id.* at 721; of course, one may allege infringements of other liberty interests not deemed “fundamental rights,” but little real protection is afforded such interests since they are subject only to rational-basis review. *See* Francis S. Chlapowski, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 144–45 (1991) (stating that the finding of whether a right is fundamental is often outcome-determinative because alleged infringements of rights subjected to a strict scrutiny analysis are almost always found to be impermissible, while alleged infringements of rights subjected to a rational basis review are almost always found to be justifiable).

6. *Nelson v. NASA (Nelson I)*, 530 F.3d 865 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1755 (2010).

7. This term has come to represent the privacy interest in “avoiding disclosure of personal matters” first alluded to in *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *see infra* Section III (A).

of privacy,<sup>8</sup> as well as the government’s longstanding practice of collecting “personal” information,<sup>9</sup> a “history and tradition” analysis is unlikely to provide proof that such a right deserves constitutional protection. Thus, if the Court wishes to find the right to informational privacy constitutionally protected, it most likely will be forced to lend credence to the notion that the Due Process Clause protects not only fundamental rights deeply rooted in history and tradition, but also “unalienable rights” “endowed [in people] by their Creator.”<sup>10</sup> Whether the Court will choose to recognize such a right and significantly alter the approach it has taken to develop substantive due process doctrine, however, is far from certain.

## II. FACTS

The Jet Propulsion Laboratory (JPL) is a federal research facility owned by the National Aeronautics Space Agency (NASA) and is operated by the California Institute of Technology (Caltech) pursuant to a contract.<sup>11</sup> Since its inception, NASA, like all federal agencies, has conducted standard background investigations of its civil servant employees through the use of the National Agency Check with Inquiries (NACI) process.<sup>12</sup> The NACI process first requires the applicant to complete and submit Standard Form 85 (SF-85), which requests “(1) background information, including residential, educational, employment, and military histories; (2) the names of three references . . . ; and (3) disclosure of any illegal drug use, possession, supply, or manufacture within the past year, along with . . . any treatment or counseling received.”<sup>13</sup> Next, former employers, landlords and the three references identified by the applicant in SF-85 are sent an “Investigative Request for Personal Information” (Form 42) to verify the information provided in SF-85.<sup>14</sup> Form 42 asks the

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8. See Transcript of Oral Argument at 9, *NASA v. Nelson*, No. 09-530 (U.S. October 5, 2010) [hereinafter Transcript] (Acting Solicitor General Katyal explained that “privacy is something that is in flux in ways that other things aren’t, both in terms of our social understandings, technology, and legislation itself.”).

9. *Whalen*, 429 U.S. at 605 (“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 orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed.”)

10. *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting).

11. *Nelson I*, 530 F.3d at 870.

12. *Id.* at 871.

13. *Id.* at 870–71.

14. *Id.* at 871.

recipient to indicate whether they “have any adverse information about [the applicant’s] employment, residence, or activities concerning violations of law, financial integrity, abuse of alcohol and/or drugs, mental or emotional stability, general behavior or conduct, or other matters.”<sup>15</sup> The recipient is also provided an opportunity to disclose any information already noted and to provide any additional information that she feels “may have a bearing on this person’s suitability for government employment.”<sup>16</sup> Numerous safeguards exist (e.g., the Privacy Act) to prevent public dissemination of the information collected through the use of SF-85 and Form 42.<sup>17</sup> Finally, NASA and the Office for Personnel Management (OPM) review the information collected on these forms to determine suitability for access to NASA’s facilities.<sup>18</sup>

In 2005, NASA revised its Security Program Procedural Requirements to require all employees, regardless of whether they were civil servants or contractors, to undergo the same NACI investigation.<sup>19</sup> When NASA unilaterally modified its contract with Caltech in January of 2007, contract employees already working at Caltech became subject to these security clearance requirements.<sup>20</sup> Despite initially opposing the new requirements, Caltech subsequently adopted a policy that any JPL employee who did not successfully complete the NACI process would be deemed to have voluntarily resigned her Caltech employment.<sup>21</sup>

A group of twenty-eight JPL scientists, engineers, and administrative personnel (“respondents” or “employees”), all classified as “low-risk” employees,<sup>22</sup> filed suit in August 2007 alleging,

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15. *Id.* (internal quotation marks omitted).

16. *Id.* at 874.

17. See Brief for Petitioners at 28–30, *NASA v. Nelson*, No. 09-530 (U.S. May 20, 2010).

18. *Nelson I*, 530 F.3d at 871. The Ninth Circuit appears to have based its decision, at least in part, on the fact that a document entitled “Issue Characterization Chart” might be used by NASA to determine “suitability”; the document lists “sodomy, carnal knowledge, abusive language, personality conflict, bad check, credit history, physical health issues, and mental, emotional, psychological or psychiatric issues” as potential criteria. *Nelson v. NASA (Nelson II)*, 568 F.3d 1028, 1033 (9th Cir. 2008), denial for rehearing *en banc, cert. granted*, 130 S. Ct. 1755 (2010) (internal quotation marks omitted). The parties disagree over whether the “Issue Characterization Chart” will potentially be used by NASA to determine suitability, and whether this controversy is even properly before the Court. See *infra* Section V (B).

19. *Nelson I*, 530 F.3d at 871.

20. *Id.* at 871–72. Before these contract modifications, JPL employees had undergone background checks conducted by Caltech, but they had never been subjected to the NACI process.

21. *Id.* at 872.

22. Federal agencies classify positions as low, moderate, or high-risk, with the latter two

inter alia, that NASA's newly imposed NACI background investigation requirement violates its members' constitutional right to informational privacy.<sup>23</sup> In September, the employees moved for a preliminary injunction to prevent Caltech from implementing its policy requiring that they submit SF-85 by early October as a condition for continued employment.<sup>24</sup> The district court denied the employees' request, finding that although the right to informational privacy was implicated, SF-85 was narrowly tailored to further the government's legitimate security interests.<sup>25</sup> A motions panel of the Court of Appeals for the Ninth Circuit granted a temporary stay, finding that the "balance of hardships tips sharply in [employees'] favor" due to the consequences that would result from refusal to submit to the NACI process before an appeal on the merits could be heard.<sup>26</sup>

### III. LEGAL BACKGROUND

The Due Process Clause of the Fifth Amendment to the Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law."<sup>27</sup> The substantive aspects of this liberty interest initially were interpreted by the *Lochner* Court<sup>28</sup> to protect an individual's right to enter contracts without interference from the government, but this approach was later rejected.<sup>29</sup> The Court's holding in *Griswold v. Connecticut*<sup>30</sup> marked the birth of noneconomic substantive due process doctrine,<sup>31</sup> and *Roe v. Wade*<sup>32</sup> cemented the basis for the privacy interests

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groups normally designated as "public trust" positions. 5 C.F.R. §731.106(a)–(b) (2010).

23. *Nelson I*, 530 F.3d at 872.

24. *Id.*

25. *Id.*

26. *Nelson v. NASA (Nelson III)*, 506 F.3d 713, 716 (9th Cir. 2007).

27. U.S. CONST. amend. V. The Fourteenth Amendment contains a similar clause protecting these interests from State intrusion: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.* U.S. CONST. amend. XIV, § 1.

28. Named after the landmark case *Lochner v. New York*, the *Lochner* Court refers to the era stretching from the late nineteenth century through the early-mid-twentieth century characterized by judicial activism aimed at striking down statutes that interfered with liberty to contract. See Chaplowski, *supra* note 5, at 136.

29. See Chaplowski, *supra* note 5, at 136–39 (discussing the rise and fall of the economic liberty interest protected by the *Lochner* Court).

30. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating a state law which prohibited the use and dissemination of information relating to contraceptives).

31. Chaplowski, *supra* note 5, at 139 n.38.

32. *Roe v. Wade*, 410 U.S. 113 (1973).

recognized in *Griswold* in the Due Process Clause.<sup>33</sup> Careful to avoid a return to *Lochner*-era judicial activism,<sup>34</sup> “[t]he Supreme Court has since planted a set of ‘guideposts for responsible decisionmaking’ concerning limited fundamental rights ‘deeply rooted in this Nation’s history and tradition’ in an attempt ‘to rein in the subjective elements that are necessarily present in due-process judicial review.’”<sup>35</sup> According to the Court’s jurisprudence, these rights include “the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion.”<sup>36</sup> Yet, the Supreme Court “hinted” thirty-three years ago that the Due Process Clause might also protect the right to informational privacy but “has never said another word about it.”<sup>37</sup>

A. *The Hint(s): Whalen v. Roe (and Nixon v. Administrator of General Services)*

In *Whalen v. Roe*,<sup>38</sup> a group of doctors and patients alleged that a New York statute allowing the state to collect and store the name and address of any person receiving a specified class of drug prescription violated a constitutional right to informational privacy.<sup>39</sup> In a unanimous decision, the Supreme Court held that the statute was the “product of an orderly and rational legislative decision,” and that the means used were a “reasonable exercise of New York’s broad police powers.”<sup>40</sup> The Court refused to strike down the statute merely because its requirements were not proven to be completely necessary

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33. *See id.* at 153 (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of . . . liberty . . . as we feel it is . . .”) (referencing the Fourteenth Amendment and not the Fifth Amendment because the focus of the challenge was a state, and not a federal, law).

34. *See* *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“We must therefore ‘exercise the utmost care whenever we are asked to break new ground in this field,’ lest the liberty interest protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.”) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

35. *Nelson v. NASA (Nelson II)*, 568 F.3d 1028, 1044–45 (9th Cir. 2008), denial for rehearing *en banc*, cert. granted, 130 S. Ct. 1755 (2010) (Callahan, J., dissenting) (quoting *Washington*, 521 U.S. at 720–22).

36. *Washington*, 521 U.S. at 720 (internal citations omitted).

37. *Nelson II*, 568 F.3d at 1052 (Kozinski, J., dissenting) (arguing that *en banc* review should have been granted because the current state of the law is muddled, not because the court of appeals necessarily misapplied circuit law).

38. *Whalen v. Roe*, 429 U.S. 589 (1977).

39. *See id.* at 591.

40. *Id.* at 597–98.

to satisfy the state's interests.<sup>41</sup>

The Court continued its analysis by recognizing “at least two different kinds of [privacy] 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.”<sup>42</sup> The Court concluded that because the statute contained sufficient protections to prevent public dissemination of the information collected, the statute did not, “on its face, pose a sufficiently grievous threat to either [privacy] interest to establish a constitutional violation.”<sup>43</sup> It is important to note the Court's implicit suggestion that the mere collection of information by the government could result in informational privacy right violations, even if the government does not intend to publicly disseminate that information.<sup>44</sup>

Finally, it is “strange” that the Court engaged in this privacy analysis at all<sup>45</sup> considering that it concluded its opinion with a disclaimer stating that it had declined to decide whether the Constitution actually protects a right to informational privacy.<sup>46</sup> Apparently, the Court found the analysis warranted because such a right “*arguably* has its roots in the Constitution.”<sup>47</sup>

*Nixon v. Administrator of General Services*,<sup>48</sup> decided during the same year, is the only other case in which the Supreme Court has addressed an informational privacy claim. There, former President Nixon challenged the constitutionality of the recently enacted Presidential Recordings and Materials Preservation Act (the Act).<sup>49</sup> The Act stipulated that the Administrator of General Services take

41. *Id.* at 598.

42. *Id.* at 599–600.

43. *Id.* at 600.

44. Brief for Respondents at 36, *NASA v. Nelson*, No. 09-530 (U.S. August 2, 2010) (arguing that in *Whalen*, the Court stated that “[e]ven without public disclosure, it is, of course, true that private information must be disclosed to the authorized employees of the New York Department of Health . . . . Requiring such disclosures to representatives of the State . . . does not *automatically* amount to an impermissible invasion of privacy.” 429 U.S. at 602 (emphasis added). This statement therefore implies that although requiring one to make a disclosure to the state may not be an automatic violation, violations may, given different circumstances, still be found). *Id.*

45. Transcript, *supra* note 8, at 8 (General Katyal: “It’s just like in *Whalen*, because in *Whalen* this Court assumed the existence of some sort of constitutional right and then said: Is that right violated here?” Justice Scalia: “It’s a strange way to proceed. We normally don’t do that, see? If there was a constitutional right, would it cover this?”).

46. *Whalen*, 429 U.S. at 605–06.

47. *Id.* at 605 (emphasis added).

48. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

49. *Id.* at 429.

custody of all presidential papers and tape recordings for screening by Executive Branch archivists for the purpose of returning to the President any materials that were “personal and private in nature,” with the government retaining the remaining materials for historical preservation.<sup>50</sup> The Court employed a balancing test to analyze Nixon’s claim, and found that it was without merit

[in light] of the limited intrusion of the screening process, of [his] status as a public figure, of his lack of any expectation of privacy in the overwhelming majority of the materials, of the important public interest in preservation of the materials, and of the virtual impossibility of segregating the small quantity of private materials without comprehensive screening.<sup>51</sup>

The very fact that the Court considered whether Nixon’s informational privacy rights had been violated, when public dissemination was not an issue, lends strong support to the notion that informational privacy concerns may be triggered by the mere collection of information.<sup>52</sup>

However, the precedential value of *Nixon* is mitigated by the Court’s conflated analysis of the President’s Fourth and Fifth Amendment privacy-violation claims.<sup>53</sup> Because the materials in which Nixon potentially had a legitimate expectation of privacy were comingled with those in which he did not, the Court found the screening process to be constitutionally permissible—it reflected the least intrusive means to collect information in which the government had a legitimate interest.<sup>54</sup> Thus, the Court never independently addressed Nixon’s informational privacy claim (i.e., what information an individual can prohibit the government from collecting, and when, if at all, this prohibition can be overcome); instead it focused on his Fourth Amendment claim (i.e., whether the manner in which the government collected the information to which it was entitled was constitutionally permissible given any potential collateral consequences).<sup>55</sup>

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50. *Id.*

51. *Id.* at 465.

52. See Brief for Respondents, *supra* note 44, at 37.

53. See *Nixon*, 433 U.S. at 455–66. The Court addressed Nixon’s First Amendment privacy challenge separately. See *id.* at 455 n.18.

54. *Id.* at 464.

55. See *id.* at 455–66.

*B. Lower courts recognize a constitutional right to informational privacy*

Despite the ambiguous nature of the decisions in both *Whalen* and *Nixon*, most circuit courts have interpreted the holdings of these cases as establishing a constitutional right to informational privacy.<sup>56</sup> In analyzing potential infringements, courts have relied on a balancing test that weighs “the government’s interest in having or using the information against the individual’s interest in denying access.”<sup>57</sup> Factors courts have considered in weighing these interests include:

[T]he 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 interest militating toward access.<sup>58</sup>

Other factors that may be relevant include whether the disclosure is voluntary or compelled, whether the disclosure implicates a fundamental right, whether the requested information has been kept private or has been disclosed to third parties, and whether the government is seeking and using the information in its role as sovereign or as employer.<sup>59</sup>

*American Federation of Government Employees v. HUD*<sup>60</sup> and *National Treasury Employees Union v. U.S. Department of Treasury*<sup>61</sup>

56. See *Stathros v. New York City Taxi & Limousine Comm’n*, 198 F.3d 317, 322–23 (2d Cir. 1999) (citing *Whalen* for proceeding with an analysis of whether financial disclosure requirements violated *Stathros*’ right to privacy); see also *Fraternal Order of Police, Lodge No. 5 v. City of Phila.*, 812 F.2d 105, 109 (3d Cir. 1987); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990); *Plante v. Gonzalez*, 575 F.2d 1119, 1132–33 (5th Cir. 1978); *Denius v. Dunlap*, 209 F.3d 944, 955 (7th Cir. 2000); *Eagle v. Morgan*, 88 F. 3d 620, 625 (8th Cir. 1996); *Tuscon Woman’s Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986); *Hester v. City of Milledgeville*, 777 F.2d 1492, 1497 (11th Cir. 1985). *But see* *Borucki v. Ryan*, 827 F.2d 836, 841–42 (1st Cir. 1987) (expressing concern regarding the existence of such a right, but declining to address the issue); *Lambert v. Hartman*, 517 F.3d 433, 442 (recognizing a privacy interest only when a fundamental right is implicated); *Am. Fed’n of Gov’t Emps. v. HUD*, 118 F.3d 786, 791 (D.C. Cir. 1997) (expressing “grave doubts” as to the existence of such a right, but proceeding to analyze and reject the claim anyway).

57. *Doe v. Att’y Gen.*, 941 F.2d 780, 796 (9th Cir. 1991).

58. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980).

59. *Nelson v. NASA (Nelson II)*, 568 F.3d 1028, 1052–54 (9th Cir. 2008), denial for rehearing *en banc*, cert. granted, 130 S. Ct. 1755 (2010) (Kozinski, J., dissenting).

60. *Am. Fed’n*, 118 F.3d. 786 (D.C. Cir. 1997).

61. *Nat’l Treasury Employees Union (NTEU) v. U.S. Dep’t of Treasury*, 25 F.3d 237 (5th

are the only two cases that involve privacy challenges by employees to requests for information on standardized government forms similar to those used in the NACI process.<sup>62</sup> Neither court found the informational privacy challenges to have merit.<sup>63</sup> Central to both courts' reasoning were the measures put in place specifically to prevent the public dissemination of the information disclosed.<sup>64</sup>

#### IV. HOLDING

In *Nelson v. NASA*, the Ninth Circuit held that it was possible that the JPL employees could succeed on the merits of their informational privacy claim, and that the denial of a preliminary injunction against the NACI process would force the employees into the Hobson's choice of suffering a potential infringement of their constitutional rights or, due to Caltech's new policy, resigning from their jobs.<sup>65</sup> Therefore, the Ninth Circuit reversed the district court's denial of a preliminary injunction against the use of the NACI process.<sup>66</sup>

Although the JPL employees conceded that many of the questions contained within SF-85 are "unproblematic," they challenged the constitutionality of the following question:

In the last year, have you used, possessed, supplied, or manufactured illegal drugs? . . . If you answered "Yes," provide information relating to the types of substance(s), the nature of the activity, and any other details relating to

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Cir. 1994).

62. The challenges in both cases pertained to questions on SF-85P (used for "public trust" officials), which is the slightly more intrusive equivalent to SF-85 (used for federal civil service and contract employees). See *Nelson II*, 568 F.3d at 1047–48 (Callahan, J., dissenting). Compare Questionnaire for Non-Sensitive Positions, OFFICE OF PERSONNEL MANAGEMENT, [http://opm.gov/Forms/pdf\\_fill/sf85.pdf](http://opm.gov/Forms/pdf_fill/sf85.pdf) (last visited Nov. 29, 2010) (SF-85 requests information pertaining to drug use, etc. over the last year.) with Questionnaire for Public Trust Positions, OFFICE OF PERSONNEL MANAGEMENT, [http://opm.gov/Forms/pdf\\_fill/sf85p.pdf](http://opm.gov/Forms/pdf_fill/sf85p.pdf) (last visited Nov. 29, 2010) (SF-85P requests information pertaining to drug use, etc. over the past five years.).

63. *Am. Fed'n*, 118 F.3d at 795; *NTEU*, 25 F.3d at 244.

64. See *Am. Fed'n*, 118 F.3d at 793–94; *NTEU*, 25 F.3d at 244. Additionally, the court in *NTEU* perhaps based its holding in greater part on the fact that the employees held positions of "public trust," and therefore were found to have reduced expectations of privacy. See *NTEU*, 25 F.3d at 243–44. The employees in *Am. Fed'n* were also "public trust" employees, but the court only mentioned this fact in passing. See *Am. Fed'n*, 118 F.3d at 794.

65. *Nelson v. NASA (Nelson I)*, 530 F.3d 865, 883 (9th Cir. 2008), cert. granted, 130 S. Ct. 1755 (2010) The Ninth Circuit affirmed the district court's ruling that the JPL employees were unlikely to succeed on their Administrative Procedure Act and Fourth Amendment claims. *Id.* at 877.

66. *Id.* at 878.

your involvement with illegal drugs. Include any treatment or counseling received.<sup>67</sup>

The Ninth Circuit held that while the employees' informational privacy rights potentially are implicated by the question requiring the disclosure of any "use, possession, supply, and manufacture" of drugs, the question is narrowly tailored to a legitimate government interest.<sup>68</sup> The Ninth Circuit explained that "the federal government has taken a strong stance in its war on illegal drugs, and this stance would be significantly undermined if its own employees and contractors freely ignored its laws."<sup>69</sup> The Ninth Circuit also held, however, that requiring the disclosure of "any treatment or counseling received" likely infringes the employees' informational privacy rights.<sup>70</sup> The Ninth Circuit provided two reasons for its holding. First, it held that "[i]nformation relating to medical treatment and psychological counseling fall squarely within the domain protected by the constitutional right to informational privacy."<sup>71</sup> Second, the Ninth Circuit reasoned that such treatment or counseling "would presumably *lessen* the government's concerns regarding the underlying activity," and therefore the government had failed to demonstrate any legitimate state interest to "*compel*," rather than make *voluntary*, such disclosures.<sup>72</sup> Thus, in reversing the lower court the Ninth Circuit held that constitutional questions remained regarding this albeit narrow portion of the challenged question.

Additionally, the Ninth Circuit held that since SF-85 contains a waiver authorizing the government to distribute Form 42, the district court erred by also failing to address the employees' informational privacy claim with respect to Form 42.<sup>73</sup> The Ninth Circuit held that the open-ended inquiries within Form 42 are "much more problematic" than SF-85. Although the government has legitimate interests in ensuring JPL employees "are who they say they are" and in securing the facility, the questions on Form 42 are too broad to be considered "narrowly tailored" to achieving these interests.<sup>74</sup> Finally, the Ninth Circuit reasoned that the authorization waiver contained

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67. *Id.*

68. *Id.* at 879.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 873–74.

74. *Id.* at 879–80.

within SF-85, which allows the government “to obtain *any* information from any source, subject to other releases being necessary only in some vague and unspecified contexts,” lacked sufficient standards to support a finding that such inquiries are, in fact, narrowly tailored.<sup>75</sup>

## V. ARGUMENTS AND ANALYSIS

### A. *The Government (Petitioners)*

Perhaps because of the muddled framework for analyzing informational privacy claims,<sup>76</sup> the government first makes two general arguments militating against a finding of a violation of the employees’ privacy rights before couching its argument within the Ninth Circuit’s “legitimate interest/narrowly tailored” standard.

First, the government points out that it “often must collect personal information to fulfill basic government functions,”<sup>77</sup> and that “constitutional privacy concerns are generally satisfied by safeguards against [the] unauthorized” public dissemination of the information collected.<sup>78</sup> The government argues that the numerous protections in place to prevent public dissemination, including the Privacy Act,<sup>79</sup> significantly reduce the strength of the employees’ claim.<sup>80</sup>

Second, the government argues that the employees’ claim must be analyzed in light of the fact that the government is collecting the information in its role as employer, rather than as enforcer of the laws.<sup>81</sup> The Supreme Court has recognized that “the government could not function effectively if ‘every employment decision became a constitutional matter’,”<sup>82</sup> and that “the employee’s expectation of privacy must be assessed in the context of the employment relation.”<sup>83</sup> The government concludes by arguing that conducting employment-related background checks is a reasonable and accepted practice in

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75. *Id.* at 881.

76. *See supra* Section III.

77. Brief for Petitioners, *supra* note 17, at 24–25; *see supra* note 9.

78. *Id.* at 17–18.

79. *Id.* at 27–29 (explaining the protections afforded by the Privacy Act).

80. *Id.* at 27–30 (detailing the various protections against public dissemination in the present case).

81. *Id.* at 41–42.

82. *Id.* at 33 (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

83. *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987) (O’Connor, J., plurality opinion).

our society.<sup>84</sup>

The government attacks both lines of the Ninth Circuit’s reasoning that led it to conclude that SF-85 violates the employees’ informational privacy rights. First, the government argues that the information it seeks pertains not to a fundamental right but to recent drug use, and that drug laws “put citizens on notice that this realm is not a private one.”<sup>85</sup> Thus, the government concludes that the contested question “does not raise the same constitutional concerns as questions having no relationship to unlawful activity or questions intruding into” fundamental rights.<sup>86</sup> Second, as an employer, the government has a “legitimate interest” in knowing the extent to which any employee is involved with illegal drugs, and the “treatment and counseling” question, which is only used for the employee’s benefit,<sup>87</sup> aids the government in its assessment of whether the employee is suitable for employment.<sup>88</sup>

The government also attacks the Ninth Circuit’s finding that the open-ended inquiries contained within Form 42 likely infringe employees’ informational privacy rights, primarily on three grounds. First, the government argues that Form 42 “is neither designed nor used for unanchored inquiries into an individual’s personal affairs” because the information requested is solicited expressly for the purpose of determining suitability for government employment, and the Privacy Act limits the collection of information by NASA to that which is “relevant and necessary” to accomplish its purpose.<sup>89</sup> Second, the government argues that the mere fact that the inquiries made on Form 42 are open-ended does not by itself raise constitutional concerns,<sup>90</sup> especially when the government is acting in a manner consistent with “what any sensible private employer would do.”<sup>91</sup> Finally, relying primarily on Fourth Amendment precedent,<sup>92</sup> the government argues that information solicited from third-parties does

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84. Brief for Petitioners, *supra* note 17, at 35–38.

85. *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986).

86. Brief for Petitioners, *supra* note 17, at 41.

87. Transcript, *supra* note 8, at 16.

88. See Brief for Petitioners, *supra* note 17, at 42–44;

89. *Id.* at 45.

90. *Id.* at 45–46.

91. *Id.* at 46 (quoting *Nelson v. NASA (Nelson II)*, 568 F.3d 1028, 1050 (9th Cir. 2008), denial for rehearing *en banc*, cert. granted, 130 S. Ct. 1755 (2010) (Kleinfeld, J., dissenting) (arguing that open-ended questions are commonplace and necessary in the employment context)).

92. See *id.* at 53.

not usually warrant constitutional protection “because once the individual voluntarily discloses information to another, she necessarily assumes the risk that the other person will disclose the information to the government.”<sup>93</sup>

### *B. JPL Employees (Respondents)*

The employees’ strongest arguments are grounded in the Ninth Circuit’s grant of a *preliminary* injunction. Unfortunately for the employees, their substantive arguments are unconvincing or easily rebutted, and the technicalities and interlocutory status of this litigation on which they rely are unlikely to be availing given the practical consequences of the Ninth Circuit’s holding.<sup>94</sup>

Regarding SF-85, the employees first argue that the question pertaining to “treatment or counseling” for drug use implicates employees’ constitutional right to informational privacy because it “relates to intimate health information”<sup>95</sup> and because “discovery . . . carries a risk of lost job opportunities, in addition to stigmatization and embarrassment.”<sup>96</sup> This argument, however, ignores the question’s nature as a follow-up inquiry posed to an employee who has already admitted to recent drug use.<sup>97</sup> Thus, the “health information” sought is not a “freestanding inquiry about treatment or counseling,” but is limited to a subject about which the Ninth Circuit already found constitutionally permissible to ask about.<sup>98</sup> Further, responding to the “treatment or counseling” question does not pose any material additional risk to lost job opportunities, stigmatization, or embarrassment considering the employee has “already reported both the fact and nature of [his] illegal drug use.”<sup>99</sup>

The employees then argue that because their informational privacy rights have been implicated, under the Ninth Circuit’s intermediate-scrutiny standard, the government must show a “legitimate interest” for intruding on these rights.<sup>100</sup> The employees claim that the government failed to assert any such legitimate interest

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93. *Id.* at 53.

94. *See infra* Section VI (A).

95. Brief for Respondents, *supra* note 44, at 20.

96. *Id.* at 22.

97. Reply Brief for Petitioners at 16–17, *NASA v. Nelson*, No. 09-530 (Sept. 1, 2010).

98. *Id.*

99. *Id.* at 17.

100. Brief for Respondents, *supra* note 44, at 25.

in the lower courts,<sup>101</sup> and therefore the Ninth Circuit correctly concluded that there are serious questions regarding the merits of the employees' informational privacy claim.<sup>102</sup> Despite the employees' assertion that this argument is dispositive, they respond to the primary-legitimate interest that the government now asserts:<sup>103</sup> “[i]f the government wishes to give the benefit of the doubt to applicants who have sought treatment or counseling for illegal drug abuse, it could easily do so by allowing them to *voluntarily* provide such information.”<sup>104</sup> As the Court noted in *Whalen*,<sup>105</sup> however, courts should avoid “policing” forms in a “Lochnerian” manner and finding them unconstitutional merely because the way in which a question is worded may be unnecessary to achieve a legitimate purpose.<sup>106</sup>

The employees also argue that the Ninth Circuit correctly concluded that Form 42 raises serious questions as to the merits of their informational privacy claim because the potential use of the “Issue Characterization Chart”<sup>107</sup> by NASA to determine suitability for employment indicates that information relating to employees' private sexual matters may be the target of its inquiries.<sup>108</sup> The employees then point out that the government has failed to offer a legitimate interest to justify “delving” into such matters.<sup>109</sup> This argument is unconvincing for three reasons.

First, the lower courts have already found that any claim relating to how NASA would determine suitability for access to NASA's facilities was “unripe and unfit for judicial review.”<sup>110</sup> Second, the employees challenge Form 42 on its face, as “[b]y its [very] terms, [it] seeks only information that has a bearing on the applicant's suitability

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101. *Id.* *Contra* Reply Brief for Petitioners, *supra* note 97, at 18.

102. Brief for Respondents, *supra* note 44, at 25.

103. The government's legitimate interest is in providing a benefit to the employee after the government determines whether his drug use affects his suitability for employment or access. Transcript, *supra* note 8, at 16.

104. Brief for Respondents, *supra* note 44, at 26.

105. *See Whalen v. Roe*, 429 U.S. 589, 597 (1977).

106. Transcript, *supra* note 8, at 18.

107. *See Nelson v. NASA (Nelson I)*, 530 F.3d 865, 871 n.2 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1755 (2010); *see also supra* note 18.

108. Brief for the Respondents, *supra* note 44, at 33–35.

109. *Id.*

110. *Nelson I*, 530 F.3d at 873; *see ERWIN CHERMERINKSY, CONSTITUTIONAL LAW* 92 (3d ed. 2009) (“[R]ipeness doctrine seeks to separate matters that are premature for review because the injury is speculative and never may occur, from those cases that are appropriate for federal court action.”).

for government employment or a security clearance.”<sup>111</sup> Finally, the government has asserted that it will not use the “chart” to make suitability determinations.<sup>112</sup> The employees argue that these assertions should be disregarded because “supplementing the record at the appellate level is an extraordinary step.”<sup>113</sup> However, such assertions surely will be relevant during any proceedings for a permanent injunction, which would likely follow if the Supreme Court affirmed and would further the interests of justice and judicial economy.<sup>114</sup> Finally, as the government noted during oral arguments, an as-applied challenge would be more appropriate to confront any situation in which the government asks for or uses information generally deemed inappropriate for determining suitability for employment and/or access to JPL’s facilities.<sup>115</sup>

Finally, the employees make numerous arguments that refute those proffered by the government, but all are unconvincing. First, the employees argue that the protections against the public dissemination of the information collected, including the Privacy Act, are insufficient.<sup>116</sup> However, the Privacy Act has protected the personal information collected through the NACI process for more than three decades, and there is no evidence that it has ever been publicly disseminated. Moreover, it would be an extreme measure to facially invalidate “widely-used background-check forms” merely because the public dissemination of information collected is remotely possible.<sup>117</sup>

Second, the employees point out that although the government argues that it has greater discretion when acting as an employer, JPL employees are not government employees—they are contractors employed by Caltech.<sup>118</sup> Further, “[b]y unilaterally imposing the new requirements upon Caltech . . . the government is using special powers that are available to it only in its sovereign capacity.”<sup>119</sup> As the

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111. Reply Brief for Petitioners, *supra* note 97, at 21 (internal quotation marks omitted).

112. Brief for Petitioners, *supra* note 17, at 55; Transcript, *supra* note 8, at 21–22.

113. Brief for Respondents, *supra* note 44, at 32 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 482 (1990) (internal quotation marks omitted)).

114. In fact, during oral argument both Justices Sotomayor and Ginsburg explicitly asked about the role the Issue Characterization Chart plays in determinations for suitability, and appeared satisfied with the government’s representation that the chart has not, and will not, be used to determine suitability. See Transcript, *supra* note 8, at 21–22.

115. *Id.* at 25.

116. Brief for Respondents, *supra* note 44, at 43–46.

117. *Id.* (quoting *Whalen v. Roe*, 429 U.S. 589, 601–02 (internal quotation marks omitted)).

118. Brief for Respondents, *supra* note 44, at 46.

119. *Nelson v. NASA (Nelson II)*, 568 F.3d 1028, 1038 (9th Cir. 2008), denial for rehearing *en banc*, cert. granted, 130 S. Ct. 1755 (2010) (Wardlaw, J., concurring).

government notes, however, “[the Supreme] Court has never restricted the deference due to the government in the employment context to actions affecting civil servants.”<sup>120</sup> Instead it has held that

“[d]eference is . . . due to the government’s reasonable assessments of its interests *as contractor*.”<sup>121</sup>

Finally, the employees counter the government’s argument that the information collected through the use of Form 42 is not subject to privacy protections because it has been collected from third parties. They argue “[t]he Fourth Amendment is concerned with *how* the government obtains information, while the right to informational privacy is concerned with *what* information the government obtains, regardless of how or from whom the information is obtained.”<sup>122</sup> Here, both the employees and the government have a solid basis for their positions because lower court judges have disagreed over this very point.<sup>123</sup>

## VI. DISPOSITION

When deciding this case it is unclear whether the Supreme Court will employ a traditional substantive due process framework or depart from this established doctrine. Regardless of the approach the Court takes, several signals and practical considerations indicate that it is almost certain to rule in the government’s favor.

### A. *The Outcome*

At first glance, it might seem that the Supreme Court granted the petition for writ of certiorari because the Ninth Circuit’s decision appears to create a circuit split with both the Fifth and D.C. Circuits.<sup>124</sup>

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120. Reply Brief for Petitioners, *supra* note 97, at 8–9.

121. *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 678 (1996).

122. Brief for Respondents, *supra* note 44, at 54.

123. *Compare* *Nelson v. NASA (Nelson I)*, 530 F.3d 880 n.5 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1755 (2010) (noting that although in the Fourth Amendment context there is a general principle “that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties . . . the legitimate expectation of privacy described in this context is a term of art used only to define a search under the Fourth Amendment”) (internal citations and quotation marks omitted) *with* *Nat’l Treasury Employees Union (NTEU) v. U.S. Dept. of Treasury*, 25 F.3d 237, 243 n.3 (noting that “[t]he constitutional right of [informational] privacy . . . like the right of privacy protected directly by the Fourth Amendment, is defined by (and extends only to) a person’s ‘reasonable expectations’”) (internal citations omitted).

124. *See supra* Section III (B).

This conclusion is flawed for two reasons. First, it is disputable whether a circuit split exists, since the basis for the decisions in both circuits was arguably the fact that the employees in those cases had a reduced expectation of privacy due to their status as “public trust” employees. The employees involved in this litigation are “low-risk” independent contractors.<sup>125</sup> Second, the Ninth Circuit’s decision is merely an interlocutory decision that “made no legal conclusions or factual findings that are binding in further proceedings on the merits.”<sup>126</sup> It is possible that upon review of a full factual record the Ninth Circuit would reach a decision in accord with the D.C. and Fifth Circuits’ holdings.

Moreover, the interlocutory nature of the Ninth Circuit’s decision is critical to predicting the outcome of this case. The Supreme Court has stated that it “generally await[s] final judgment in the lower courts before exercising . . . certiorari jurisdiction,”<sup>127</sup> and only reviews decisions granting preliminary injunctions in situations where the grant was “clearly erroneous.”<sup>128</sup> Thus, the grant of the petition for certiorari itself provides strong support for the notion that the Court will rule in favor of the government.

Two practical considerations might have led the Supreme Court to intervene at this early stage and both weigh heavily in the government’s favor. First, the government has conducted background checks for government employees for over fifty years.<sup>129</sup> Each year SF-85 is used more than 100,000 times,<sup>130</sup> and Form 42 is sent to over 1,000,000 recipients.<sup>131</sup> These forms are an integral part of the way the government does business. The Supreme Court likely did not want to risk the possibility of a permanent injunction that would significantly disrupt government activities until the Supreme Court could consider

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125. Compare *Nelson v. NASA (Nelson II)*, 568 F.3d 1028, 1035–36 (9th Cir. 2008), denial for rehearing *en banc, cert. granted*, 130 S. Ct. 1755 (2010) (discussing key factual differences between the case at bar and *NTEU* and *Am. Fed’n* leading to divergent outcomes) with *Nelson II*, 568 F.3d at 1047 (Callahan, J., dissenting) (noting that the panel’s opinion “diverges from the reasoning of the D.C. and Fifth Circuits”); see also *Am. Fed’n, NTEU supra* note 64 (briefly explaining the relevant factual difference between the case at bar, and *NTEU* and *Am. Fed’n*, that perhaps accounts for the divergent outcomes).

126. Brief for Respondents in Opposition at 12, *NASA v. Nelson*, No. 09-530 (Feb. 3, 2010).

127. *VA Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (explaining the decision to deny the petition for writ of certiorari).

128. *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam).

129. Brief for Petitioners, *supra* note 17, at 3.

130. *Id.* at 42.

131. *Nelson v. NASA (Nelson II)*, 568 F.3d 1028, 1050 (9th Cir. 2008), denial for rehearing *en banc, cert. granted*, 130 S. Ct. 1755 (2010) (Kleinfeld, J., dissenting).

the matter itself.<sup>132</sup> Reviewing the Ninth Circuit's decision at this interlocutory stage appears to be the more prudent course of action.

Second, the Ninth Circuit's decision sets no minimum standard for alleging an infringement of one's informational privacy rights. Thus, under the Ninth Circuit's decision, "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."<sup>133</sup> By not defining when privacy interests may be constitutionally protected (e.g., when there is a sufficient threat of public dissemination, or when a fundamental right is implicated), the Ninth Circuit's decision puts an enormous burden on the government's ability to operate.<sup>134</sup> The Court is likely concerned that this ruling will result in a flood of frivolous lawsuits, wasting significant government time and resources.<sup>135</sup> By granting certiorari at this stage, the Court can set a standard that limits the potential for frivolous suits.

### *B. The Reasoning: Three Approaches*

There are three approaches the Supreme Court could take to justify a ruling in favor of the government: (1) declare that there is no constitutional right to informational privacy; (2) declare that there might be a constitutional right to informational privacy, but hold that even if there is such a right, it is not violated here; or (3) declare that there is in fact a constitutional right to informational privacy, define the scope and contours of the right, and apply those standards to the facts presented. The Supreme Court most likely will take the second approach for two reasons.

First, compared to the first approach, the second approach more faithfully respects prior Supreme Court precedent.<sup>136</sup> Second, taking the third approach will most likely require the Court to broaden the protection the Due Process Clause currently affords (i.e., by holding that the Clause protects not only those rights deeply rooted in history

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132. See Transcript, *supra* note 8, at 7 (Justice Roberts confirmed that if the Court sustained the preliminary injunction the government would be enjoined from using SF-85 and Form 42 as they are currently written throughout the Ninth Circuit's jurisdiction. Presumably the Court would rather find the forms unconstitutional, and invalidate them nationwide, or constitutional, and allow the government to continue operating under the status quo.).

133. Reply Brief for Petitioners, *supra* note 97, at 1.

134. See Transcript, *supra* note 8, at 54–55.

135. See *id.* at 34.

136. See *supra* Section III (A).

and tradition, but also certain “unalienable” rights).<sup>137</sup> Such a holding likely would result in an onslaught of new challenges to various government practices and laws allegedly violating a host of claimed “unalienable” rights. The Supreme Court might prefer not to broaden the protections afforded by the Due Process Clause and/or to avoid the difficult task of establishing a framework to decide which rights are, in fact, “unalienable.” Thus, the second approach allows the Supreme Court to decide the matter at hand while keeping the door open to the alterations to substantive due process analysis inherent in the third approach, which might be more properly implemented upon a different set of facts when no other viable adjudicative approaches are available.

*1. There is no constitutional right to informational privacy.*

Although there likely will be some support for declaring that the Constitution does not protect any right to informational privacy,<sup>138</sup> it is unlikely that a majority (or even a plurality) of the Court will support this view given its holdings in *Whalen* and *Nixon*,<sup>139</sup> and the recognition of such a right by the vast majority of circuits.<sup>140</sup>

*2. There might be a right, but it is not violated here.*

Creating bright-line rules for novel and unforeseeable factual situations is especially challenging in this context given the continuously evolving nature of the concept of privacy itself.<sup>141</sup> Thus, the Court may find it tempting to rely on *Whalen*, and decline to address whether a constitutional right to informational privacy actually exists.<sup>142</sup> However, this approach will not prevent the Court from holding that such a right is not violated here. This is the

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137. *See supra* Section I.

138. *See id.* at 14–15 (in which Justice Scalia noted that he cannot find where in the Constitution it protects such a right, and the legislature is the appropriate branch of government to address such issues). Further, it is interesting to note that Justice Stewart expressed a similar view in *Whalen*. *Whalen v. Roe*, 429 U.S. 589, 607–08 (1977) (“[t]here is no general constitutional right to privacy . . . . [T]he protection of a person’s general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.”) (quoting *Katz v. United States*, 389 U.S. 347, 350–51 (1967)); *Nixon v. Admin’r of Gen. Serv.*, 429 U.S. 589, 455 n.18 (1977) (noting that Justice Stewart still adhered to the views he expressed in *Whalen*).

139. *See supra* Section III (A).

140. *See supra* Section III (B).

141. *See* Transcript, *supra* note 8, at 9 (Acting Solicitor General Katyal explained that “privacy is something that is in flux in ways that other things aren’t, both in terms of our social understandings, technology, and legislation itself.”).

142. *See supra* Section III (A).

approach the government urges the Court to take.<sup>143</sup> Thus, the Court could hold that the employees' rights were not violated in light of the "reduced expectations of privacy in the employment context, the longstanding and widespread use of SF-85 and Form 42, and the Privacy Act's protections regarding the maintenance and dissemination of the information,"<sup>144</sup> regardless of whether the Constitution protects a right to informational privacy.

*3. The Constitution protects an individual's right to informational privacy.*

Of course, it is also possible that the Supreme Court will take on the Herculean task of defining a right to informational privacy. To provide meaningful guideposts for the future, the Court should address the following questions: (1) Is there a threshold requirement that must be satisfied before the infringement of such a right may be challenged? (E.g., Is an "individual interest in avoiding [the] disclosure of personal matters" enough to bring a claim for infringement, or must a "fundamental right" or the public dissemination of the information be implicated?); (2) What is the appropriate level of scrutiny when analyzing a potential infringement? (E.g., Intermediate scrutiny or rational-basis review?); (3) Does the level of scrutiny vary based on other considerations? (E.g., Whether the government is acting as an employer or as enforcer of the laws?); (4) Is a right to informational privacy implicated when the information is sought from third parties? If the Supreme Court chooses to answer these difficult questions, it will recognize for the first time that the Constitution protects "unalienable rights" in addition to those "deeply rooted" in "history and tradition," and will have charted a new course for substantive due process analysis. Such a holding seems unlikely because this case could be adjudicated without making such sweeping changes. .

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143. Petition for a Writ of Certiorari at 15, *NASA v. Nelson*, No. 09-530 (Nov. 2, 2009) ("There is no need in this case to determine the scope of a constitutionally-based right to privacy for certain information or the range of governmental actions that may impermissibly interfere with such a right.").

144. *Id.*