No. 16-706

IN THE

Supreme Court of the United States

DETROIT FREE PRESS, INC.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Barbara W. Wall
Thomas Curley
GANNETT CO., INC.
7950 Jones Branch Drive
McLean, VA 22107

Herschel P. Fink
DETROIT FREE PRESS, INC.
160 W. Fort Street
Detroit, MI 48226

Robert M. Loeb
Counsel of Record
Thomas M. Bondy
Andrew D. Silverman
Benjamin F. Aiken
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street
Washington, DC 20005
(202) 339-8400
rloeb@orrick.com

Counsel for Petitioner

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INTRODUCTION

The government does not hide from the Sixth Circuit en banc majority's reliance on judicial notions of subjective "embarrassment" as the basis for a statutorily protected privacy right. Opp. 8, 15. Instead, the government acknowledges that this case presents a crucial junction for how FOIA should be read and applied going forward: Will courts assess whether privacy interests are cognizable under FOIA against the backdrop of the Constitution, state law, common law, history, and tradition, as dictated by this Court's decisions? Or will courts embrace a subjective embarrassment-based privacy standard unmoored from the text, congressional intent, and purposes of FOIA? This Court's review is required to set the lower courts on the right path.

The government selected this FOIA request as a test case to cement its embarrassment-based privacy standard as the law of the land—and narrowly prevailed over the dissent of *seven* judges. Although that deeply divided en banc decision eliminated a three-circuit split, that is not a reason to decline review. Rather, it is a sign that the government's deeply flawed approach to privacy in FOIA cases is now entrenched. Absent this Court's immediate intervention, the public's right to information and to monitor public officials will be diminished going forward—not just as it relates to booking photos, but for all law enforcement records that could be subjectively viewed as embarrassing. This Court should grant the petition to prevent a threatened expansion of material exempt from FOIA's mandatory disclosure obligation.

ARGUMENT

I. The Petition Presents An Issue Of Exceptional Importance Warranting This Court's Intervention.

The decision below upended 20 years of nationwide practice and represents a significant shift in the interpretation and application of FOIA that will have far-reaching consequences across the country.

As we explained in the petition (at 7), the Sixth Circuit's decision in *Detroit Free Press, Inc. v. United States Department of Justice*, 73 F.3d 93 (6th Cir. 1996) ("*Free Press I*") was for 15 years "the only circuit-level decision to address whether Exemption 7(C) applied to booking photographs." Pet. App. 45a. Following that decision, the Marshals Service required its offices within the Sixth Circuit, and all other offices receiving requests from residents in the Sixth Circuit, to release booking photos of federal indictees who had already appeared in court. *Id.* The practical effect of this policy was that the press or any citizen nationwide had a means to request and receive federal booking photos. Pet. App. 4a.

That practice remained in place even after the Tenth and Eleventh Circuits erroneously held that Exemption 7(C) protects booking photos from mandatory disclosure. Indeed, that status quo prevailed until the government instigated this case to convince the en banc Sixth Circuit, over the dissent of seven judges, to overturn *Free Press I*. In so doing, the government and the court below upended a rule that news organizations, like Petitioner Detroit Free Press

("DFP"), had relied upon for two decades. Under the new state of affairs created by the divided en banc ruling, the press and public have no realistic access to booking photographs of those charged with the most serious federal crimes, and thus are deprived of their ability to see what their government is up to, "to check against corruption[,] and to hold the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

And make no mistake: There is nothing "modest" or "narrow," Opp. 11, 20, about the analysis in that decision. The court below believed its own subjective notions of "embarrass[ment]," Pet. App. 6a, sufficed to override the lack of any cognizable privacy interest in booking photos rooted in the "background of law, scholarship, and history when [Congress] enacted FOIA and … Exemption 7(C)," *National Archives & Records Administration v. Favish*, 541 U.S. 157, 169 (2004). *See* Pet. App. 10a-11a. Reliance on judicial hunches and intuitions unmoored from statutory text and ungrounded in any of the sources identified by this Court is fundamentally improper.

And the repercussions are not limited to booking photos. From now on, in seeking to invoke Exemption 7(C) regarding any law enforcement record, the government will no longer need to show that its asserted privacy interest was one that Congress intended to protect—as gauged against the backdrop of interests recognized under the Constitution, state law, common law, history, and tradition. Instead, it will now suffice if the judge subjectively believes the information sought might cause embarrassment. That open-ended and unconstrained standard flies in the face of the

standards this Court has established for identifying cognizable privacy interests, as well as its admonition that FOIA exemptions should be "narrowly constructed," *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976).

An earlier panel of the Sixth Circuit and seven of its current judges agree that the decision below is incorrect. That level of disagreement illustrates the importance of the issue and warrants this Court's review.

II. The En Banc Decision Transforms This Court's Statutory-Based Approach to Exemption 7(C).

A. The government's embarrassment standard is contrary to this Court's approach to cognizable FOIA privacy interests.

1. The government does not disagree that the court below found a privacy interest based on the risk of "embarrass[ment]." Pet. App. 6a. In fact, the government describes the decision in precisely those terms, Opp. 8, and then doubles down by relying on the same supposedly "embarrassing" nature of booking photos to justify hiding them from public view, *see, e.g.*, Opp. 15. The adoption of an embarrassment standard for finding cognizable privacy interests under FOIA is no minor technical error; it is a fundamentally flawed approach that substantially diminishes the press's and public's right to obtain law enforcement records.

The government argues that the legal and historical backdrop against which Congress enacted FOIA is not relevant—at least not when it favors disclosure. Pet. 16-17. The government concedes, as it must, that this "Court has looked to common-law and cultural traditions" in assessing privacy interests. Opp. 16 (discussing *Favish*, 541 U.S. at 167-69). It then tries to recast *Favish* as creating an unannounced, two-pronged approach, where the "background of law, scholarship, and history" against which Congress legislated is relevant only in determining whether family members' privacy rights are implicated, not in determining the privacy rights of the direct subject of the information. Opp. 16-17.

That is not what this Court held—and cannot be squared with this Court's other Exemption 7(C) authority. *Favish* looked to those background sources to interpret what "Congress's use of the term 'personal privacy'" was "intended to permit" Exemption 7(C) to cover. 541 U.S. at 167. And *Reporter's Committee* confirms that this is exactly how the analysis should proceed, no matter whose privacy interest is asserted. *Reporters Committee* considered "the common law," "statutory and regulatory provisions," and "State policies" to conclude that rap sheets fell within the scope of Exemption 7(C). *U.S. Dep't of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 763-66 (1989). *See* Pet. 22-24 (discussing *Reporters Committee* and *Favish*).

Moreover, the government ignores the legislative history cited in the petition (at 21-22) showing that Congress adopted Exemption 7(C) knowing that it

would not prevent the disclosure of potentially embarrassing information. Rather, the government's opposition simply asserts, without any support from the text, history, or common law, that if information might be embarrassing then there must be a cognizable privacy interest in withholding it. Opp. 15-16.

We demonstrated in the petition (at 13-25), however, that embarrassment alone (much less the mere possibility of it) does not create a cognizable privacy interest justifying nondisclosure under FOIA. Without exceptions for embarrassment, humiliation, stigma, or otherwise, all facets of criminal proceedings from arrest through sentencing have been open to the public since before the country's founding. The police have publicly displayed booking photos of arrestees for more than 150 years, and newspapers have a long and unbroken tradition of printing pictures of defendants during criminal proceedings—all without any cognizable invasion of privacy. Pet. 17-19 (collecting authorities). Under the Constitution, the common law, and the vast majority of state laws, there is no legally recognized privacy interest in one's booking photo. Pet. 18-19 (collecting authorities).

The government does not disagree with any of that, except to restate the court of appeals' conclusion that today "state laws are 'decidedly mixed.'" Opp. 18 (quoting Pet. App. 11a-12a). They are not. "[B]ooking photographs are available or presumptively available to the public under the open records laws of at least 40 states." Brief of Amici Curiae the Reporters Committee for Freedom of the Press and 36 Media Organizations in Support of Appellee, at 7, *Detroit Free Press, Inc. v. U. S. Dep't of Justice*, No. 14-1670 (6th

Cir. Jan. 16, 2015), Dkt. 29; *see also id.* at 23-26 (Appx. B) ("State Laws, Cases, and Legal Guidance Regarding Public Access to Booking Photographs"). Indeed, the only reason that DFP could not obtain the booking photos of the police-officer-defendants in this case is because the officers were indicted under federal—rather than Michigan—law. *See Detroit Free Press, Inc. v. Oakland Cty. Sheriff*, 418 N.W.2d 124, 127 (Mich. Ct. App. 1987).

There is a reason the government wants this Court to disregard every relevant background source here: Those same sources, held in *Reporters Committee* and *Favish* to be the touchstones for finding a cognizable privacy interest under FOIA, point in one direction: Booking photos of federal indictees who have appeared in open court implicate no cognizable privacy interest. Unable to win under the standard established by this Court, the government wants to play by its own rules, advocating for a wholly subjective embarrassment standard that revamps FOIA to make it more difficult for the press and public to obtain law enforcement records. This Court should intervene to reject this unprincipled approach and restore the proper 7(C) standards.

2. The government places great weight on *U.S. Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994) ("*DoD*"), where this Court held that federal employees had a privacy interest in their home addresses. But the nature of the requested information there is a far cry from the booking photos here.

First, with regard to federal indictees, the government concedes that any "privacy interest may well be diminished when the individual has appeared in open court in criminal proceedings." Opp. 20. Indeed, those individuals have exposed themselves to public scrutiny and thus are situated differently than employees who have simply "decided not to reveal their addresses to" labor organizations and have not participated in an otherwise public process. *DoD*, 510 U.S. at 500. Employees do not expose their personal details to the public merely by accepting a federal job. Federal indictees, by contrast, stand before the world at every step of their prosecution in a criminal justice system with an entrenched—and constitutionally imposed—tradition of openness. Defendants appear in open court for arraignments, bail hearings, trials, verdicts, and sentencing proceedings. These moments are undoubtedly some "of the most difficult episodes in an individual's life," Opp. 15, but defendants have no right to proceed in private in federal felony criminal proceedings, *see Reporters Comm.*, 489 U.S. at 753.

Second, in finding that employees have a nontrivial privacy right in their home addresses, this Court emphasized the "special consideration" that "the privacy of the home" has "in our Constitution, laws, and traditions." *DoD*, 510 U.S. at 501. The historical sanctity of privacy in the home stands in stark contrast to the lack of any historical protection of booking photos of federal indictees who have appeared in open court. That distinction is significant, for the reasons we have explained.

3. Finally, the government suggests that Petitioner's failure to obtain "[a] privacy waiver" from the subjects of the booking photos makes it "obvious" that those persons have a privacy interest in their mugshots. Opp. 19-20. This argument confirms that the government's misguided focus is on subjective perceptions, feelings, and emotions rather than the background legal history against which Congress legislated. Federal indictees, even those who have already appeared in open court, may prefer that access to their booking photos be constricted for any number of reasons. *See* Pet. 19 (quoting Restatement (Second) of Torts § 652D, cmt. f (1977)). That does not mean, however, that Congress intended to exempt those law enforcement records from FOIA's mandatory disclosure obligation.

B. Limiting the "public interest" to cases where the requester can demonstrate government misconduct undercuts the ability to obtain law enforcement records.

As the Sixth Circuit held 20 years ago, because booking photos of federal indictees who have appeared in court implicate no cognizable privacy interest, there is no need to engage in any balancing against the public interest in disclosure. *Free Press I*, 73 F.3d at 97-98. In any event, the public's robust and legitimate interest in those photos categorically outweighs whatever minimal privacy right might plausibly exist for a person who has been indicted on federal felony charges and already appeared in open court. Booking photos convey important information to the

public and play a critical role in its oversight of government: Release of such records enhances the appearance of fairness that is necessary to the legitimacy and functioning of the criminal justice system, allows the public to monitor whom the government is prosecuting and for what crimes in a way that words alone cannot convey, and reveals how the government has treated those it has arrested. Pet. 26-33; *see also* Reporters Committee S. Ct. Amicus Br. at 11-13.

The government concedes—as it must—that "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." Opp. 20 (quoting *Reporters Comm.*, 489 U.S. at 776). But citing *Favish*, 541 U.S. at 171-75, it claims that this approach is inappropriate where the requester seeks information that "might possibly reveal government misconduct." Opp. 20. As just discussed, however, government misconduct is but one of several reasons why the public is vitally interested in booking photos—and it is not the only reason Petitioner seeks them in this case. *Favish*, in which the Court held that a conspiracy theorist could not access a person's death-scene photographs without some plausible support for his outlandish theory that the government was involved in the individual's death, did not concern "weighty public interests," such as "oversight" of "criminal proceedings," "knowing whom the government is prosecuting," "reveal[ing] what populations the government prosecutes," and "learn[ing] about what the government does to those it detains." Pet. App. 29a-31a (en banc dissent).

As this Court has explained, "construing the Exemption to provide a categorical rule" implements "the congressional intent to provide 'workable rules'" that fulfill "the Act's purpose of expediting disclosure." *Reporter's Committee*, 489 U.S. at 779 (quoting *F.T.C. v. Grolier Inc.*, 462 U.S. 19, 28 (1983)). Besides circumstances like those in *Favish*, where the asserted public interests reflected a conspiracy theorist's wild suppositions, this Court has never approved—and should not approve here—an approach to disclosure under FOIA that requires the requester to present evidence of government malfeasance to overcome an exemption to mandatory disclosure. *See* Pet. 29-32 (collecting authorities).

This Court has cautioned against "assigning federal judges the task of striking a proper case-by-case, or ad hoc, balance between individual privacy interests and the public interest … without providing those judges standards to assist in performing that task," *Reporter's Committee*, 489 U.S. at 776. That approach is particularly untenable where, as here, the requested information is highly newsworthy and time-sensitive. When the government gets that balancing wrong, there is little recourse for members of the public, including news organizations like DFP. Years may pass while the requester exhausts its administrative remedies, initiates litigation, proceeds in district court, and awaits an appellate decision. In the meantime, hundreds of news cycles come and go, the story is forgotten, and the booking photos have lost much of their relevance. To adopt this individualized approach would at best invite constant litigation and at worst be tantamount in many cases to exempting the requested information.

III. The Government Chose This As The Test Case To Resolve These Important Issues.

This case is an ideal vehicle to consider the question presented. It was the government, after all, that chose this as a test case to resolve these issues. Because Respondent handpicked this case, the arguments and record have been fully developed and are in all relevant respects suited for this Court's review.

The underlying facts also make this case a suitable vehicle to decide this important issue. Here, four police officers with common-sounding names faced federal public corruption felony charges. *See Four Highland Park Police Officers Arrested And Charged With Taking Bribes And Conspiring To Protect And Deliver Six Kilograms Of Cocaine*, U.S. Department of Justice (Jan. 25, 2013), https://tinyurl.com/k3jahfb. Area residents were surely left wondering: "Is this the officer who patrols my neighborhood?" or "Is he the one who pulled me over last year?" Others may have asked: "Were these officers treated similarly upon arrest to everyday citizens or given special treatment?" The officers' booking photos could help answer these questions, allowing the press and public to learn "what their Government is up to" in its exercise of its awesome police powers. *Reporters Comm.*, 489 U.S. at 773.

The government nonetheless contends that its own curated vehicle is inapt for this Court's review because of the case's "interlocutory posture." Opp. 21. This assertion collapses into its merits argument that the Sixth Circuit was correct in both finding a cognizable privacy interest and favoring a prolonged,

case-by-case approach with respect to each and every request for booking photos instead of adopting a categorical rule that the public interest will always outweigh any hypothetical privacy interests in this context. The en banc Court of Appeals fully considered both issues and generated thorough opinions on each. Thus, the legal issues are fully developed and properly teed up for this Court's review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Barbara W. Wall
Thomas Curley
GANNETT CO., INC.
7950 Jones Branch Drive
McLean, VA 22107

Herschel P. Fink
DETROIT FREE PRESS, INC.
160 W. Fort Street
Detroit, MI 48226

Robert M. Loeb
Counsel of Record
Thomas M. Bondy
Andrew D. Silverman
Benjamin F. Aiken
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street
Washington, DC 20005
(202) 339-8400
rloeb@orrick.com

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