No. 16-706

In the Supreme Court of the United States

DETROIT FREE PRESS, INC., PETITIONER

v.

DEPARTMENT OF JUSTICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an individual in criminal proceedings has a privacy interest in avoiding the public dissemination of his booking photograph under Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(C), when the photograph is not, and never has been, otherwise available to the public.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-34a) is reported at 829 F.3d 478. The opinion of a panel of the court of appeals (Pet. App. 42a-49a) is reported at 796 F.3d 649. The opinion of the district court (Pet. App. 50a-83a) is reported at 16 F. Supp. 3d 798.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2016. On September 19, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including November 26, 2016, and the petition was filed on November 22, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This action under the Freedom of Information Act (FOIA), 5 U.S.C. 552, concerns a FOIA request to the United States Marshals Service (Service or USMS) for the booking photographs of four Highland Park, Michigan police officers that the United States had, at the time of the request, indicted on bribery and drug-conspiracy charges. Pet. App. 62a. The question presented is whether such individuals retain a "personal privacy" interest in their booking photographs under FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), when the photographs are not, and never have been, otherwise available to the public.

1. a. When the Marshals Service processed the four non-federal officers into its custody at a USMS facility, it took booking photographs—colloquially known as "mug shots"—of them. Decl. of William E. Bordley (Bordley Decl.) ¶¶ 8, 24 (D. Ct. Doc. 18, Ex. A (Nov. 26, 2013)). The Service generates booking photographs to assist in the processing, safekeeping, and disposition of those in its custody. *Id.* ¶ 8. The Service maintains booking photographs, including the photographs at issue in this case, in a Privacy Act system of records. *Id.* ¶¶ 5, 26; 72 Fed. Reg. 33,519-33,520 (June 18, 2007) (describing USMS's Prisoner Processing and Population Management/Prisoner Tracking System).

The Privacy Act of 1974, 5 U.S.C. 552a, makes it unlawful for a federal agency to disclose such records without the prior written consent of the individual to whom the record pertains, unless a statutory exception applies. 5 U.S.C. 552a(b). One exception permits disclosures for a "routine use" published in the Federal Register. 5 U.S.C. 552a(a)(7), (b)(3), and (e)(4)(D). The Marshals Service has published routine uses

permitting disclosures of booking photographs, *inter alia*, to any federal, state, local, or foreign law-enforcement authority "where the information is relevant to the recipient entity's law enforcement responsibilities," and to the public—including the news media—when it would serve a law-enforcement function. 72 Fed. Reg. at 33,520 (routine uses (b) and (e)); 28 C.F.R. 50.2(b)(7) (adopted 1971) (generally forbidding Department of Justice officials from disclosing "photographs of a defendant unless a law enforcement function is served thereby"). Marshals Service policy accordingly directs that "[p]risoner bookings are confidential" and that "[b]ooking photographs may be released only for fugitives in order to aid in their capture." USMS Policy Directive 1.3, Media § D.8.c(2) (Feb. 23, 2011) (reproduced at Bordley Decl., Ex. 3); cf. 28 C.F.R. 50.2(b)(8) (information about fugitives); 72 Fed. Reg. 9777 (Mar. 5, 2007) (publishing routine uses for records about fugitives in Marshals Service's Warrant Information Network system of records).

b. Consistent with those privacy provisions, the Marshals Service has had a "long-standing policy of refusing [FOIA] requests for booking photos," pursuant to FOIA Exemption 7(C). Pet. App. 4a, 59a. Exemption 7(C) exempts from mandatory FOIA disclosure records or information "compiled for law enforcement purposes" if the production of such records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). To determine whether disclosure of the requested records could reasonably be expected to constitute an "unwarranted" invasion of privacy, agencies and the courts balance the affected "privacy interest" against the requester's asserted "public in-

terest in disclosure." *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 171 (2004).

The "privacy interests" protected by Exemption 7(C) cover a broad range of interests that "encompass[es] the individual's control of information concerning his or her person." *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763-764 & n.16 (1989) (*Reporters Committee*); see *Favish*, 541 U.S. at 165. The "only relevant 'public interest in disclosure,'" in turn, "is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government.'" *United States Dep't of Def.* v. *Federal Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (*DoD*) (quoting *Reporters Committee*, 489 U.S. at 775) (brackets in original; emphasis omitted); see *id.* at 497 n.6.

c. In 1996, the Sixth Circuit issued a divided opinion in *Detroit Free Press, Inc.* v. *Department of Justice*, 73 F.3d 93 (6th Cir. 1996) (*DFP I*), that affected the Service's longstanding policy of declining to release mug shots under FOIA. The *DFP I* majority held that Exemption 7(C) does not apply to a USMS mug shot of an individual who had appeared in open court and whose name had been released in ongoing criminal proceedings because "no privacy rights are implicated" by publicly disclosing the mug shot. *Id.* at 97; see *id.* at 96; cf. *id.* at 99 (dissenting opinion) (concluding that the majority "misconceives the true nature of a mug shot"). At the time, no other court of appeals had addressed whether the public release of a mug shot implicates any privacy interest protected by

Exemption 7(C). The United States did not seek certiorari in *DFP I*.

In light of the precedential force of *DFP I* within the Sixth Circuit, the Marshals Service adopted a "bifurcated policy" to govern FOIA requests for its booking photographs. Pet. App. 4a, 59a. Under that policy, the Service released booking photographs when the FOIA request originated within the Sixth Circuit but otherwise denied such requests. *Ibid.* FOIA authorizes a requester to bring a FOIA action in a federal district court in either the District of Columbia, the district in which the agency records are situated, or "the district in which the complainant resides, or has his principal place of business." 5 U.S.C. 552(a)(4)(B). National media outlets subsequently "exploited" the Service's post-*DFP I* disclosure policy and that jurisdictional provision by recruiting "straw man" requesters inside the Sixth Circuit to submit FOIA requests "to obtain photos maintained in other jurisdictions." Pet. App. 4a, 67a n.9.

With an exception not relevant here, that remained the status quo until 2012. See Pet. App. 59a-60a. Eventually, two requesters brought FOIA actions seeking USMS mug shots in district courts outside the Sixth Circuit, and both lost on appeal. See *World Publ'g Co.* v. *United States Dep't of Justice*, 672 F.3d 825 (10th Cir. 2012); *Karantsalis* v. *U.S. Dep't of Justice*, 635 F.3d 497 (11th Cir. 2011) (per curiam), cert. denied, 565 U.S. 1177 (2012). In the first case, the Eleventh Circuit expressly rejected *DFP I*'s holding, concluding that the individual depicted in a booking photograph has a legitimate "personal privacy interest in preventing [its] public dissemination." *Karantsalis*, 635 F.3d at 499, 503.

The government opposed certiorari in *Karantsalis* despite the newly created circuit split and the government's view that *DFP I* was wrongly decided. U.S. Br. in Opp. at 7-8, 14-16, *Karantsalis*, *supra* (No. 11-342). The government explained that the "recent division of authority has now supplied an appropriate reason for the Sixth Circuit to reconsider [*DFP I*] in an appropriate case" and that "[t]he justification for rehearing would increase" if "the Tenth Circuit in [the then-pending appeal in] *World Publishing Co.* were to agree with the [Eleventh Circuit's] decision in [*Karantsalis*]." *Id.* at 15. "[I]f the Sixth Circuit were to grant rehearing," the government concluded, "its decision could obviate any need for intervention by this Court" by eliminating the circuit split. *Ibid.* In 2012, the Court denied certiorari. 565 U.S. 1177.

Later that year, the Marshals Service rescinded its bifurcated policy and reestablished a uniform, national policy. Pet. App. 4a-5a, 61a-62a. Under that policy, the Service now will not disclose booking photographs under FOIA unless "the public interest in the requested booking photograph outweighs the privacy interest at stake." USMS, *Booking Photograph Disclosure Policy* 2-3 (Dec. 6, 2012) (reproduced at Bordley Decl., Ex. 1).

2. In January 2013, petitioner submitted its FOIA request for the booking photographs in this case. Pet. App. 62a. The Marshals Service denied that request and petitioner filed this FOIA action within the Sixth Circuit in the District Court for the Eastern District of Michigan. *Id.* at 50a, 62a-63a.

The district court granted summary judgment to petitioner on its FOIA claim. Pet. App. 50a-83a. The court agreed with the government's concession that it

was "bound by [*DFP I*] as the law of th[e] circuit." *Id.* at 65a-66a. The government appealed.

3. The court of appeals denied the government's petition for an initial en banc hearing. 8/18/2014 Order. In his concurring opinion, Judge Sutton stated that the government's petition had "considerable force" but that "the panel in this case will have another shot at either bolstering our holding in [*DFP I*], or explaining why it should be overruled by the full court." *Ibid.* "Either way," Judge Sutton added, "I, for one, would consider seriously a subsequent petition for rehearing en banc." *Ibid.*

The panel affirmed. Pet. App. 42a-49a. The panel concluded that it, like the district court, was "bound by [*DFP I*]." *Id.* at 43a-44a. The panel, however, "question[ed]" *DFP I*'s "conclusion that defendants have no interest in preventing the public release of their booking photographs" and explained that such photographs convey the type of "information protected by [Exemption 7(C)]. *Id.* at 46a-47a. The panel thus "urge[d] the full court to reconsider" the holding of *DFP I*. *Id.* at 46a.

The court of appeals granted en banc rehearing. Pet. App. 40a-41a.

4. The en banc court of appeals overruled *DFP I*, reversed the district court, and remanded for further proceedings. Pet. App. 1a-34a.

a. A nine-judge majority of the court of appeals (including the original panel and Judge Sutton) held that individuals have a "non-trivial privacy interest in their booking photos." Pet. App. 3a; see *id.* at 14a.

The court of appeals reasoned that the privacy interests protected under Exemption 7(C) encompass "'the individual's control of information concerning his

or her person,'" as well as interests in "avoiding 'disclosure of records concerning personal details about private citizens'" and in "'keeping personal facts away from the public eye.'" Pet. App. 5a-6a (quoting *Reporters Committee*, 489 U.S. at 763, 766, 769). "Booking photos," the court concluded, "fit squarely within th[e] realm of embarrassing and humiliating information" that implicate that personal-privacy interest, *id.* at 6a, and individuals therefore possess a "nontrivial privacy interest" in such photographs, *id.* at 12a. *DFP I*'s contrary view that "no privacy rights" at all are implicated, the court explained, was "untenable" and reflected an "impermissibly cramped notion of personal privacy." *Id.* at 3a, 12a; see *id.* at 14a (concluding that *DFP I* "wrongly set the privacy interest at zero").

Booking photographs, the court of appeals explained, are "snapped 'in the vulnerable and embarrassing moments immediately after an individual is accused, taken into custody, and deprived of most liberties.'" Pet. App. 6a (quoting *Karantsalis*, 635 F.3d at 503) (brackets omitted). The court stated that they "convey *guilt* to the viewer" and, for that reason, their presentation to criminal juries is "strongly disfavor[ed]." *Ibid.* Moreover, the court continued, booking photographs "cast[] a long, damaging shadow": They do not "disappear[]" in today's internet age, in which "[p]otential employers and other acquaintances may easily access" them on "mug-shot websites [that] collect and display booking photos from decades-old arrests," thereby "hampering the depicted individual's professional and personal prospects." *Id.* at 8a. The existence of a personal-privacy interest, the court explained, is reflected in "[t]he steps [that] many take

to squelch publicity of booking photographs": those individuals both "pay such sites to remove their pictures" and utilize the "online-reputation-management industry [that] now exists" to move back their photographs on "internet search results" so they are less likely to be seen by others. *Id.* at 8a-9a.

The court of appeals further explained that the statutory interest in personal privacy protected by Exemption 7(C) is broader than "a constitutional right to privacy," Pet. App. 9a (emphasis omitted), and is not controlled by the "common law and legal tradition[]" asserted by petitioner, *id.* at 10a. Nonetheless, the court explained, the common law differentiates between facts in the public record accessible to the public and information—like booking photographs—that are "not open to public inspection." *Ibid.* (citation omitted). The "historic use of 'rogues' galleries,'" the court added, reflects the public's desire to view such photographs but does not itself suggest that those depicted wholly lacked a "privacy interest" in preventing such disclosure. *Id.* at 10a-11a.

The court of appeals also noted that state open-records statutes are "[d]ecidedly mixed" and neither favor "wholesale disclosure nor nondisclosure" of booking photographs: some require disclosure; others "require FOIA-like balancing of public and private interests"; and yet others wholly "exempt booking photos." Pet. App. 11a-12a. The Department of Justice's "*federal* regulations and policies" that "prevent mug-shot disclosure absent a law-enforcement purpose," the court reasoned, are "[m]ore important to the FOIA analysis." *Id.* at 12a.

Finally, the court of appeals emphasized that its recognition of a nontrivial privacy interest does not

mean that all booking photographs will be exempt from disclosure under Exemption 7(C). Pet. App. 12a-13a. Rather, "the court must balance that interest against the public's interest in disclosure." *Ibid.* The court rejected the dissent's "categorical rule" that mug shots should always be disclosed based on the "possibility of mistaken identity, impermissible profiling, and arrestee abuse," explaining that those possibilities are "phantoms" and that arrestees in such circumstances can simply "waive" their privacy interest to allow disclosure. *Id.* at 13a-14a. The court accordingly concluded that "a case-by-case approach" was warranted, under which the FOIA requester could identify whether any relevant public interest in disclosure exists. *Id.* at 13a. The court accordingly remanded to the district court for further proceedings under that balancing approach. *Id.* at 14a.

b. Chief Judge Cole concurred. Pet. App. 14a-16a. He emphasized that "[m]ugshots now present an acute problem in the digital age" in that they "preserve the indignity of a deprivation of liberty," never disappear from the "internet and social media," and may be "instantaneously disseminated for malevolent purposes," "often at the (literal) expense of the most vulnerable among us." *Id.* at 15a. Chief Judge Cole spotlighted the existence of the "online mugshot-extortion business"[1] and explained that the court had provided a

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[1] See Pet. App. 8a (discussing mugshot businesses); David Segal, *Mugged by a Mug Shot Online*, N.Y. Times, Oct. 5, 2013 (reporting on businesses that "monetize humiliation" and "reputational damage" by obtaining mug shots from state agencies, posting them on websites that "routinely show up high in Google searches," and charging individuals to remove them), http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html.

"'workable formula'" that balances all relevant interests and contemplates disclosure when a sufficient "'public interest'" in disclosure exists. *Id.* at 15a-16a (citations omitted).

c. Judge Boggs, joined by six other judges, dissented. Pet. App. 17a-34a. Judge Boggs concluded that the historical practice of rogues galleries, the common-law tradition of facilitating public access to criminal proceedings, and a majority of state-open records laws supported his view that "[a]n individual who has already been indicted, and who has already appeared in open court, has no cognizable privacy interest in his booking photograph." *Id.* at 29a; see *id.* at 19a-29a. Judge Boggs further concluded that, even if a relevant privacy interest were to exist, any such interest would be outweighed by the "weighty public interest[]" in "knowing whom the government is prosecuting." *Id.* at 29a-30a.

ARGUMENT

Petitioner argues (Pet. 13-33) that the court of appeals erred in recognizing that individuals possess a privacy interest in preventing public dissemination of their booking photograph under FOIA Exemption 7(C). Petitioner further argues (Pet. 35) that a categorical rule should always require disclosure of such photographs. The court of appeals' modest decision merely recognizes that an individual has some privacy interest in his booking photograph that is not otherwise publicly available. That interlocutory ruling is correct and does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. The court of appeals held that, under FOIA Exemption 7(C), individuals possess a "non-trivial priva-

cy interest in their booking photos." Pet. App. 3a, 14a. That conclusion, with which every other court of appeals to have addressed the questions agrees, is correct. See *World Publ'g Co.* v. *United States Dep't of Justice*, 672 F.3d 825, 827-830 (10th Cir. 2012); *Karantsalis* v. *U.S. Dep't of Justice*, 635 F.3d 497, 499, 503 (11th Cir. 2011) (per curiam), cert. denied, 565 U.S. 1177 (2012).

a. The "disclosure of records regarding private citizens, identifiable by name, is *not* what the framers of the FOIA had in mind." *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 765 (1989) (emphasis added). The "core purpose" of FOIA is to require disclosure of agency records that can "contribut[e] significantly to public understanding of the operations or activities of the government" and thereby "inform[] [citizens] about what their government is up to." *United States Dep't of Def.* v. *Federal Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (quoting *Reporters Committee*, 489 U.S. at 773, 775) (emphasis omitted). "That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Id.* at 496 (quoting *Reporters Committee*, 489 U.S. at 773).

Congress therefore tempered FOIA's general policy of public disclosure by enacting Exemptions 6 and 7(C) to protect the "equally important" right of personal privacy. See S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); see also *DoD*, 510 U.S. at 497 n.6 ("Exemption 7(C) is more protective of privacy than

Exemption 6.").[2] To that end, Exemption 7(C) exempts from mandatory disclosure under FOIA records or information "compiled for law enforcement purposes" if their public disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).

This Court has repeatedly emphasized that the "concept of personal privacy" in Exemption 7(C) does not reflect a "limited or 'cramped notion' of that idea." *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 165 (2004) (quoting *Reporters Committee*, 489 U.S. at 763). Rather, Exemption 7(C) affords broad protection to a wide range of privacy interests that includes "'the individual's control of information concerning his or her person'" as well as "other personal privacy interests," *ibid.* (quoting *Reporters Committee*, 489 U.S. at 763), that extend well beyond an interest is preventing disclosure of "intimate" or "highly personal" details, see *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 600 (1982). Such a privacy interest, moreover, must be considered against the rule that a release of records under FOIA grants access to the public generally. See *DoD*, 510 U.S. at 501; accord *Favish*, 541 U.S. at 174 (finding "extensive" invasion of privacy because information disclosed under FOIA "belongs to the general public").

In light of those teachings, this Court has held that FOIA's protection for "personal privacy" even protects information as commonplace as an individual's

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[2] See also *FCC* v. *AT&T, Inc.*, 562 U.S. 397, 407-408 (2011) (Exemption 7(C)'s protection for "personal privacy" employs "the same [statutory] term" as, and was adopted against the backdrop of, Exemption 6.).

home address, because the "privacy interest protected by Exemption[s] 6" and 7(C) "'encompass[es] the individual's control of information concerning his or her person.'" *DoD*, 510 U.S. at 500 (quoting *Reporters Committee*, 489 U.S. at 763, which construed Exemption 7(C)) (second set of brackets in original). The Court reasoned that, even though "home addresses often are publicly available through sources such as telephone directories and voter registration lists," an individual's "interest in controlling the dissemination of [such] information * * * does not dissolve simply because that information may be available to the public in some form." *Ibid.* Indeed, the Court found it "clear that [individuals] have *some* nontrivial privacy interest in nondisclosure" of their home addresses, adding that many "do not want to be disturbed at home" and that disclosure of the addresses to the union requesters in that case would also require disclosure to the public generally, including "commercial advertisers and solicitors." *Id.* at 501.

It follows that the disclosure of the Marshals Service mug shots here would also implicate a nontrivial privacy interest. Although other information is available about the individuals in the mug shots, none of the federal booking photographs at issue here have ever been publicly released, and they are not otherwise available to the public. That is why petitioner and other media companies resort to FOIA in an attempt to obtain copies of such mug shots. Petitioner acknowledged below that its interest in obtaining and publishing mug shots from the Marshals Service is grounded in the fact that mug shots "generate reader interest" and "are useful in relaying the human element of arrest and booking" because they accurately

depict "'a person's emotional condition'" during such events. Pet. C.A. Supp. Br. 21-22 (Jan. 28, 2016) (citation omitted). But petitioner's observation merely underscores why individuals depicted in mug shots have a nontrivial privacy interest in avoiding public dissemination of such photographs.

Mug shots reveal much more than the sterile fact of arrest and booking. They graphically depict individuals in the embarrassing, nonpublic moment of their processing into the criminal justice system. The adage that one picture is worth a thousand words is apt in this context: The visual depiction of the individual's appearance at booking in a law-enforcement facility reflects a uniquely powerful and lasting image of what can be one of the most difficult episodes in an individual's life. See *Times Picayune Publ'g Corp.* v. *United States Dep't of Justice*, 37 F. Supp. 2d 472, 477-478 (E.D. La. 1999) (discussing mug shots and finding privacy interest under Exemption 7(C)). As the court of appeals explained, mug shots are "snapped 'in the vulnerable and embarrassing moments immediately after an individual is accused, taken into custody, and deprived of most liberties.'" Pet. App. 6a (quoting *Karantsalis*, 635 F.3d at 503) (brackets omitted). And as the court correctly observed, mug shots "cast[] a long, damaging shadow" that does not disappear in today's internet age. *Id.* at 8a. The mere existence of "mug-shot websites [that] collect and display booking photos from decades-old arrests," *ibid.*, underscores why individuals have at least some personal-privacy interest in this context. The easy availability of such photos on the internet obviously risks "hampering the depicted individual's professional and personal prospects" long after their encounter with the law is over,

ibid., and individuals therefore predictably attempt to remove their mug shots from the internet by paying money to what Chief Judge Cole labeled the "online mugshot-extortion business," *id.* at 15a. See *id.* at 8a-9a; p. 10 n.1, *supra*.

Given that FOIA protects a personal-privacy interest in non-disclosure of one's home address—even though that address may already be publicly available in a phone book or voter registration roll, see pp. 13-14, *supra*—FOIA surely also protects an individual's personal-privacy interest in preventing public dissemination of his mug shot. All the court of appeals in this case concluded was that individuals have a nontrivial privacy interest in their mug shots, and that it is therefore "untenable" to contend that "zero" privacy interests are implicated. Pet. App. 3a, 14a. That modest ruling thus properly leaves it to courts under Exemption 7(C) to balance that privacy interest against any public interest in disclosure. *Id.* at 14a.

b. Petitioner's contrary contentions lack merit. Relying on *Favish* and *Reporters Committee*, petitioner asserts (Pet. 16-17) that Exemption 7(C)'s protection for personal privacy is limited to previously recognized "privacy interests reflected in our laws and traditions." That is incorrect. This Court has made clear that "the statutory privacy right protected by Exemption 7(C) *goes beyond* the common law and the Constitution." *Favish*, 541 U.S. at 170 (citing *Reporters Committee*, 489 U.S. at 762 n.13) (emphasis added). And although the Court has looked to common-law and cultural traditions to determine whether a deceased individual's *family members* have a personal-privacy right in death-scene photographs of their close relative, *id.* at 167-169, the Court did so not

because the common law and traditions marked the outer bounds of "personal privacy" under FOIA, but because "[i]t would be anomalous" to construe Exemption 7(C) to "provide[] even less protection than does the common law." *Id.* at 170. FOIA's protection of the personal-privacy interest in nondisclosure of one's home address (see pp. 13-14, *supra*) itself dispels petitioner's notion that FOIA's personal-privacy protections do not extend beyond privacy interests established at common law.

An inquiry into the common law was necessary in *Favish* only because the requester argued that, while FOIA protects privacy interests that "encompass the *individual's* control of information concerning *his or her person*," the relevant individual in *Favish* was deceased and, in the requester's view, the surviving family members lacked any privacy interest protected by FOIA. 541 U.S. at 165 (quoting *Reporters Committee*, 489 U.S. at 763) (emphases added). Where, as here, each relevant individual is alive, his personal-privacy interest in the "control of information concerning his or her person," *ibid.* (citation omitted), includes an interest in preventing public dissemination of his mug shot.[3]

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[3] Petitioner notes (Pet. 10-11) the dissent's conclusion that "not every personal privacy interest counts [under FOIA], and the mere possibility that information might embarrass is not sufficient." Pet. App. 18a. The dissent, however, erroneously relied on decades-old appellate decisions to support that view. The court in *Sims* v. *CIA*, 642 F.2d 562 (D.C. Cir. 1980), for instance, stated that "'embarrassment' alone" is insufficient outside the context of "intimate and personal" matters because "Exemption 6 was developed to protect intimate details of personal and family life." *Id.* at 575. That reasoning, however, did not survive *Washington Post Co.*, 456 U.S. at 600, which made clear that FOIA's privacy protec-

For the same reasons, petitioner's reliance (Pet. 17-19) on the public nature of trials and the long-defunct historical practice of posting mug shots in public rogues' galleries is misplaced. Furthermore, the mug shots here are not part of any criminal court proceeding and have never been available to the public. Rogues galleries, in turn, do not suggest that individuals lacked any privacy interest in their mug shots. They at best reflected a judgment that other purposes warranted public dissemination in that context. The court of appeals' decision here similarly recognizes that a relevant FOIA public interest in disclosure might warrant disclosure in certain contexts. See Pet. App. 14a.

Petitioner correctly observes (Pet. 19-20) that many States have enacted open records laws that require public disclosure of mug shots. But petitioner ignores the court of appeal's explanation that state laws are "[d]ecidedly mixed," Pet. App. 11a-12a; see p. 9, *supra*. And such laws do not speak to the scope of the federal protections for personal privacy in FOIA Exemption 7(C). Moreover, the public disclosure of mug shots under state laws and the media's publication of those photographs—which depict both ordinary citizens[4] and public servants in the executive,

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tions are not limited to interests in preventing dis-closure of "intimate" or "highly personal" details. The dissent's reliance on a 1988 Sixth Circuit decision is likewise misplaced. That panel decision is inapposite because it merely concluded that a particular disclosure would not be a "clearly unwarranted" invasion of privacy, *Schell* v. *United States Dep't of Health & Human Servs.*, 843 F.2d 933, 939 (6th Cir. 1988), and it could not, in any event, undermine the en banc Sixth Circuit's decision in this case.

[4] See, *e.g.*, Kyle Munzenrieder, *How Florida's Proud Open Government Laws Lead to the Shame of "Florida Man" News Stories*,

legislative, and judicial branches [5] alike—illustrate that an individual depicted in a mug shot reasonably has at least some privacy interest in avoiding such public dissemination.

Petitioner could, of course, attempt to obtain from the individual depicted in a federal mug shot a "waive[r]" of the individual's personal-privacy interest, which would entirely foreclose application of Exemption 7(C). See *Reporters Committee*, 489 U.S. at 771. But petitioner's failure to provide any such privacy waiver from any individual in any mug shot underscores the obvious: Subjects in booking photographs will quite reasonably opt to preserve their

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Miami New Times, May 12, 2015, http://www.miaminewtimes.com/news/how-floridas-proud-open-government-laws-lead-to-the-shame-of-florida-man-news-stories-7608595.

[5] See, *e.g.*, *Broward Judges in the Hot Seat*, Daily Bus. Review, June 5, 2014, http://www.dailybusinessreview.com/id=1202657790276; Joshua Fechter, *Police: Travis County Judge Arrested for DWI Had Empty Alcohol Bottle in Car*, mySanAntonio.com, Mar. 23, 2015, http://www.mysanantonio.com/news/local/article/Police-Travis-County-judge-arrested-for-DWI-had-6152954.php; Mitch Mitchell, *DWI Trial Starts for Former Top Fort Worth Police Officer*, Fort Worth Star-Telegram, Dec. 7, 2015, http://www.star-telegram.com/news/local/community/fort-worth/article48422580.html; Keli Stiglich, *Former Eutaw Mayor Arrested, Charged with Interfering with Government Operations*, WVUA 23, Jan. 23, 2017, http://wvua23.com/former-eutaw-mayor-arrested-charged-with-interfering-with-government-operations; Samantha Vicent, *Oklahoma State Senator Arrested in Texas on Drunken Driving Complaint*, Tulsa World, May 18, 2014, http://www.tulsaworld.com/news/government/oklahoma-state-senator-arrested-in-texas-on-drunken-driving-complaint/article_caf48bbe-a705-5abd-a4f4-7ca1e1d64847.html; Andre Walker, *Georgia Legislators Want to Keep Their Mugshots Hidden from the Public*, Georgia Unfiltered, Jan. 27, 2014, http://www.georgiaunfiltered.com/2014/01/georgia-legislators-want-to-keep-their.html.

personal privacy. That privacy interest may well be diminished when the individual has appeared in open court in criminal proceedings, but nothing petitioner identifies demonstrates that that "no privacy rights" at all are implicated, Pet. 20.

Petitioner additionally contends (Pet. 35) that a categorical approach is warranted in this Exemption 7(C) context to avoid a case-by-case balancing. That is incorrect. Although "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," *Reporters Committee*, 489 U.S. at 776, where, as here, the public interest asserted is that the photographs might possibly reveal government misconduct (see Pet. 27-28), this Court has applied a case-by-case balancing approach. See *Favish*, 541 U.S. at 171-175.[6]

2. In any event, the question presented does not warrant this Court's review for multiple reasons.

a. As petitioner itself argued below, the question presented is "a narrow, less than monumental [FOIA] question" that "does not rise to the level of being 'of exceptional importance'" so as to warrant further

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[6] Petitioner's suggestion (Pet. 28) that disclosure of the mug shots might possibly lead citizens to "provide[] additional information supporting the [non-federal] officer's conviction" does not implicate a relevant public interest in disclosure under FOIA. "[T]he *only* relevant 'public interest in disclosure' to be weighed in th[e] balance is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding *of the operations or activities of the government*.'" *DoD*, 510 U.S. at 495 (quoting *Reporters Committee*, 489 U.S. at 775) (first emphasis added; third set of brackets in original); accord *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-356 (1997) (per curiam).

review. Pet. C.A. Resp. in Opp. to Initial En Banc Hearing 1 (July 12, 2014); accord Pet. C.A. Br. 1 (Jan. 12, 2015). Indeed, the government did not seek certiorari in *Detroit Free Press, Inc.* v. *Department of Justice*, 73 F.3d 93 (6th Cir. 1996), and it subsequently opposed certiorari when a division of authority first emerged in this context because of the prospect that the circuit conflict would be eliminated. See pp. 4-6, *supra*. The question presented now is even *less* certworthy than when the Court denied review in *Karantsalis* v. *Department of Justice*, 565 U.S. 1177 (2012), because the court of appeals has eliminated the previous conflict of authority.

Petitioner and other media organizations are free to assert their zero-privacy-interest contentions in the D.C. Circuit and the eight other regional circuits that have yet to address the question. They may also argue in every court of appeals—including the Sixth Circuit—that a public interest in disclosure warrants releasing any particular mug shot under Exemption 7(C). If and when a division of authority develops, the Court will be able to assess at that time whether review is warranted.

b. Review is unwarranted for the additional reason that the court of appeals remanded the matter for the district court to conduct the relevant balancing of interests under Exemption 7(C). Pet. App. 14a. The interlocutory posture of the case thus "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court");

see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari).

That is particularly true here because the court of appeals merely held that a non-"zero" privacy interest exists, without deciding whether the balance of interests makes the mug shots at issue exempt from disclosure under Exemption 7(C). Pet. App. 14a. Thus, even if the question presented otherwise warranted review in the absence of any division of authority (and it does not), this Court should grant review only after a record is developed in which the lower courts complete a full analysis of the Exemption 7(C) question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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