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5 Plaintiff/Appellant, in pro per
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8 UNITED STATES COURT OF APPEALS
9 FOR THE NINTH CIRCUIT
10

11 ALLAN J. FAVISH,) No. 98-55594
12 Plaintiff/Appellant,) CV-97-1479 WDK (Ex)
13 vs.)
14 OFFICE OF INDEPENDENT COUNSEL,)
15 Defendant/Appellee)
16)
17)

18 APPELLANT’S OPPOSITION MEMORANDUM OF AUTHORITIES REGARDING
19 COLLATERAL ESTOPPEL; DECLARATION OF ALLAN J. FAVISH

20 The Office of Independent Counsel argues that I am collaterally estopped from
21 challenging its withholding of the subject photographs because I helped write the briefs for
22 Accuracy in Media as an attorney for its counsel of record in *Accuracy in Media v. National*
23 *Park Service*, No. 98-5535 (D.C. Cir. 1999). But the facts and the law demonstrate that the OIC
24 is wrong.

25 According to a leading treatise: "Under the doctrine of issue preclusion, or collateral
26 estoppel, once an issue is actually and necessarily determined by a court of competent
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1 jurisdiction, that determination is conclusive in subsequent suits based on a different cause of
2 action involving a party (or privy) to the prior litigation."¹

3 "Because issue preclusion requires identity of issues, it follows that issue preclusion does
4 not apply with respect to the determination of a legal issue if the issue presented in the first
5 proceeding differs from that presented in the subsequent proceeding."² To a large degree,
6 identity of issues does not exist here because in *AIM*, the D.C. Circuit apparently based its
7 holding on the survival of Foster's right of privacy. But the NPS did not make that claim and
8 expressly disavowed it in the oral argument.³ Moreover, in our case, the OIC is not claiming that
9 Foster's right of privacy survives his death.

10 "Issues of fact are not identical if the legal standards governing their resolution are
11 significantly different."⁴ In *AIM*, the D.C. Circuit used an improper standard in determining
12 whether there would be an "unwarranted" invasion of privacy should the photos be released, as
13 explained below. Thus, any finding in *AIM* against the public's predominant interest in release of
14 the photos cannot preclude relitigation of that issue in our case.

15 "For issue preclusion to apply, the issue must have actually been litigated."⁵ "If the court
16 in the former action assumed to adjudicate an issue or question not submitted by the parties in
17 their pleadings nor drawn into controversy by them in the course of the evidence, and bases its
18 judgment on that adjudication, the judgment is not conclusive in a subsequent proceeding under
19 the doctrine of issue preclusion."⁶

20 As mentioned above, in *AIM*, the D.C. Circuit apparently based its holding on the
21 survival of Foster's right of privacy. But the NPS did not make that claim and expressly
22 disavowed it in the oral argument.⁷ Therefore, that issue was not "actually litigated" in *AIM* and
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25 ¹ James Wm. Moore, Moore's Federal Practice § 132.01[1], at 132-10 (3d ed. 1999).

26 ² *Id.* at § 132.02[2][g], at 132-33.

27 ³ See attached Declaration of Allan J. Favish.

28 ⁴ Moore's at § 132.02[2][h], at 132-34, citing *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291,
1292 (9th Cir. 1971).

⁵ *Id.* at § 132.03[a], at 132-77.

⁶ *Id.* at § 132.03[c], at 132-81.

⁷ See attached Declaration of Allan J. Favish.

1 AIM did not have an opportunity to fully address that issue, except for a few citations to case law
2 and the Restatement of Torts (Second) establishing that one right of privacy does not survive
3 one's death. Moreover, in our case, the OIC is not claiming that Foster's right of privacy
4 survives his death.

5 "The party seeking to preclude relitigation of an issue has the burden of showing that the
6 same issue was actually and necessarily determined in a prior litigation."⁸ "The determination of
7 an issue in the prior action is given preclusive effect only with regard to those matters in issue or
8 points controverted, and only if the finding or verdict rests on the determination."⁹ Accordingly:

9 Issue preclusion operates to preclude the relitigation of only those issues
10 necessary to support the judgment entered in the first action. Relitigation of
11 an issue presented and decided in a prior case is therefore not foreclosed if
12 the decision of the issue was not necessary to the judgment reached in the
13 prior litigation. ... For issue preclusion to apply, the issue must have been
14 actually litigated and have been essential to the prior decision.¹⁰

15 The D.C. Circuit's decision in *AIM* supposedly rests on the determination that Foster's
16 right of privacy survives his death. The D.C. Circuit's brief discussion of *United States*
17 *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989),
18 was not a basis for its decision. Thus, the issue of whether Foster's survivors have any privacy
19 interest in the photos was not necessary to its decision and no collateral estoppel effect can be
20 applied on that issue. Indeed, the D.C. Circuit expressly stated:

21 We need not here explore whether the interest belongs to living close
22 survivors (in which case it might end at their deaths), or alternatively may
23 inhere posthumously in the subject himself (in which case it would seem to
24 be of indefinite duration), or both.¹¹

25 Therefore, the D.C. Circuit says that its decision does not decide whether Foster's survivors or
26 even Foster himself have a privacy interest in the photos! So even the issue of whether Foster
27 had a privacy interest that survives his death was not necessarily decided, and cannot be given

28 ⁸ Moore's at § 132.03[3][a], at 132-96.

⁹ *Id.*

¹⁰ *Id.* at § 132.03[4][a], at 132-105.

¹¹ *AIM*, slip. op. at 6.

1 any collateral estoppel effect. In any event, the only issue that may have been necessarily
2 decided in *AIM*, is an issue that is not present in our case because in our case, the OIC is not
3 claiming that Foster's right of privacy survives his death.

4 Any ambiguity about what was actually litigated and necessarily decided works against
5 the OIC:

6 When a court cannot ascertain what was litigated and decided, issue
7 preclusion cannot operate. The burden of persuasion to establish the
8 prerequisites of issue preclusion is on the party seeking preclusion. Hence, if
9 the party seeking preclusion cannot produce evidence that an issue was
actually litigated and decided in a prior litigation, that party will not have met
its burden and issue preclusion should be denied.¹²

10 "If the basis of a decision is unclear, and it is therefore uncertain whether the issue was
11 actually and necessarily decided in that litigation, then relitigation of the issue is not
12 precluded."¹³ The basis of the D.C. Circuit's decision in *AIM* is so unclear that there cannot be
13 an issue preclusive effect on our case.

14 "A determination can have issue preclusive (or collateral estoppel) effect only if the
15 proceeding in which it was made afforded the party against whom estoppel is asserted a hearing
16 on that issue that comports with due process."¹⁴ Thus, "issue preclusion can only be applied
17 against parties who have had a prior or 'full and fair' opportunity to litigate their claims."¹⁵ A
18 nonparty to the first litigation may be bound by the result if the nonparty was sufficiently close to
19 the actual party in the first litigation so that "the nonparty has in effect had its day in court."¹⁶

20 I was not a party in the *AIM* case. The *AIM* case was already being litigated in the D.C.
21 district court when I first joined *AIM*'s counsel of record, Judicial Watch, Inc, as an employee,
22 with no power to exercise final control over the litigation. I was not in charge of the litigation
23 because I was not the General Counsel of Judicial Watch. I was merely an associate attorney
24 who worked on the case preparing briefs. I did not have final control over the amount of time I
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26 ¹² Moore's at § 132.03[2][g], at 132-83.

27 ¹³ *Id.* at § 132.03[3][d], at 132-98.

28 ¹⁴ *Id.* at § 132.04[1][a][i], at 132-139.

¹⁵ *Id.* at § 132.04[1][a][ii], at 132-141.

1 could devote to the briefs or final control over the content of the briefs. By the time the *AIM*
2 case was orally argued before the D.C. Circuit, I had already resigned and departed from Judicial
3 Watch. I did not participate in, or have any control over the oral argument.¹⁷

4 The briefs in the two cases are significantly different. In the present case I have
5 explained important facts, that were not presented to the D.C. Circuit in the *AIM* case, showing
6 why the public interest in obtaining the photographs is so high as a result of the proven
7 deceptions in the government's reports about the death.

8 I showed this court that Kenneth Starr's OIC failed to explain why Lisa Foster, as she
9 was supposedly being shown the black official death gun, simultaneously described it as a silver
10 gun, according to the FBI. Starr also failed to explain why Fiske used this invalid gun
11 identification as if it were valid. I have shown that Starr's deceptive discussion of the gun
12 identification issue obscures the real possibility that in May 1994, Lisa was shown the wrong
13 gun, a silver gun it was known she would recognize, in order to get her to identify a gun.¹⁸

14 I showed that Starr relied on Dr. Henry Lee's finding that Foster's body was not dragged
15 despite the fact that the Park Police said that the body was dragged. Starr deceptively failed to
16 mention this key evidence that shows Lee's finding to be worthless.¹⁹

17 I showed that Starr failed to tell the public that the first person to officially find the body,
18 who said that Foster's hands were palms-up and empty, testified that when he previously said it
19 was possible he could have missed seeing the gun in Foster's hand, he made that statement
20 because of false conditions posited by the FBI, according to the witness.²⁰

21 I showed that four post-death witnesses who should have seen Foster's car in the parking
22 lot of the park if it were there between 4:30 p.m. and just before 6:00 pm., did not see Foster's
23 gray car and instead reported seeing a brown car. Starr failed to tell the public what three of
24 these witnesses saw regarding car color and he still concluded that Foster's car was in the park
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26 ¹⁶ *Id.* at § 132.04[1][a][iv], at 132-149.

27 ¹⁷ *See* attached Declaration of Allan J. Favish.

28 ¹⁸ Appellant's Opening Brief at 35-45.

¹⁹ *Id.* At 45-48.

²⁰ Appellant's Reply Brief at 16-19.

1 for these witnesses to see during this time. Starr never explained why he concluded that Foster's
2 car was in the parking lot during this time given the witness statements.²¹

3 I attended the oral argument in *AIM* as a spectator and heard significant differences
4 between what was argued on behalf of AIM and what I argued in our case.²²

5 First, during the *AIM* oral argument, when a judge asked about the case of *Campbell v.*
6 *United States Department of Justice*, 164 F.3d 20 (D.C. Cir. 1998), the response given on behalf
7 of *AIM* failed to mention what I explained to this court: That *Campbell's* reliance on the attorney-
8 client privilege analogy is erroneous because the Supreme Court's rationale for its attorney-client
9 privilege ruling in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), was that without post-
10 mortem survival of the privilege, people would be less likely to fully confide in their attorneys.
11 But that rationale does not apply in the privacy context because people have enough incentive to
12 keep things private if they choose to do so. Moreover, the law has always been that the right of
13 privacy ends at death and people have still kept things private. Additionally, there is even less
14 reason to extend privacy rights beyond death when the information at stake is information that
15 did not even exist until after the death, like photos of one's corpse. By disclosing Foster's
16 pictures, will the court be discouraging people from getting themselves shot? Of course not,
17 people already have enough of an incentive to avoid that fate. Unlike the attorney-client
18 privilege context, the court would not be endangering any socially useful activity by saying that
19 privacy ends at death, especially regarding photos of one's own dead body.

20 Second, the oral argument on behalf of AIM did not explain how the D.C. Circuit uses an
21 improper standard for determining whether a privacy invasion is unwarranted. In our case, I
22 explained at oral argument that the FOIA only says "unwarranted" invasions of personal privacy
23 and does not say that the person asserting the public's interest in disclosure must provide
24 "compelling evidence" of "illegal activity" by the government, as required by the D.C. Circuit. I
25 further explained that the Supreme Court says the FOIA's exemptions must be narrowly
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28 ²¹ *Id.* at 20-25.

²² See attached Declaration of Allan J. Favish.

1 construed to promote the FOIA's purpose of government disclosure and that the D.C. Circuit's
2 improper standard amounts to an impermissible broad construction of the privacy exemption.

3 Thus, the OIC seeks to bind me with the outcome of litigation over which I did not have
4 final control over the content of the briefs, I did not have any control over the oral argument, and
5 I have no control over any post-decision petitions or appeals. Clearly, while AIM had its day in
6 court in *AIM v. NPS*²³, I did not. My day in court is in the present case where I am in control of
7 all aspects of the litigation.

8 "Issue preclusion does not preclude relitigation if there is reason to doubt the quality,
9 extensiveness, or fairness of procedures followed in prior litigation."²⁴ Clearly, by deciding the
10 case on its finding that Foster has a post-mortem privacy interest, when the NPS did not make
11 that claim and expressly disavowed it, and AIM did not have an opportunity to fully brief that
12 issue, the D.C. Circuit's procedures were low-quality and unfair. Thus, I should not be subject to
13 issue preclusion arising from the *AIM* litigation.

14 The OIC has failed to cite a single case holding that a plaintiff is collaterally estopped
15 under such circumstances. The cases cited by the OIC do not permit collateral estoppel in our
16 case. The OIC cites *United States v. Geophysical Corp.*, 732 F.2d 693, 697 (9th Cir. 1984).²⁵
17 That opinion held that a limited partnership and the limited partners were collaterally estopped
18 by a prior judgment against the general partner, which was a corporation. The opinion was
19 partly based on the fact that some of the limited partners were officers of the corporation. No
20 such situation exists here. I am not in partnership with AIM and I am not an officer of AIM.²⁶
21 The limited partners in *Geophysical Corp.*, who were officers of *Geophysical Corp.*, had direct
22 legal control over that corporation and I have no final legal control over AIM and never have.
23 Moreover, in *Geophysical Corp.*, the defendant was the same in both cases. In our case, the
24 defendant is the OIC; in *AIM* the defendant was the NPS. Additionally, in *Geophysical Corp.*,

26 ²³ To the extent that the D.C. Circuit erred, AIM also was denied its day in court.

27 ²⁴ Moore's at § 132.03[5][a], at 132-127, citing *Kremer v. Chemical Constr. Corp.*, 454 U.S.
28 461, 481 (1982).

²⁵ OIC Supp. Memorandum of Authorities at 2.

²⁶ See attached Declaration of Allan J. Favish.

1 the limited partnership and the limited partners maintained their relationship with Geophysical
2 Corp. during the entire time that Geophysical Corp.'s lawsuit was litigated. In our case, I ceased
3 being an attorney at Judicial Watch before the oral argument in *AIM* and had no control over that
4 argument.²⁷ Finally, there was no showing in *Geophysical Corp.* that the limited partners and the
5 limited partnership were presenting facts and legal arguments that were not presented by
6 Geophysical Corp. in the first lawsuit. In our case, I have presented this court with facts and
7 legal argument that were not presented to the D.C. Circuit in *AIM*.

8 The OIC also cites *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir.
9 1980).²⁸ That opinion held that the federal Environmental Protection Agency was collaterally
10 estopped by a prior judgment against the Washington state Department of Ecology. The opinion
11 was partly based on the fact that the "EPA does not contend that DOE failed to assert vigorously
12 its position in the state proceedings."²⁹ In our case, as described above, significant facts and
13 legal argument that I presented in our case were not presented in the briefs and oral argument in
14 *AIM*. Moreover, in *ITT Rayonier*, the EPA had control over the DOE's litigation because it had
15 the power to "revoke permit-issuing authority or bring an independent action in federal court"
16 that could have ended the DOE's litigation before it could create any preclusive effect on the
17 EPA.³⁰ In our case, I never had the power to terminate the *AIM v. NPS* litigation.

18 The OIC cites *Jackson v. Hayakawa*, 605 F.2d 1121, 1126 (9th Cir. 1979).³¹ That
19 opinion held that students and student organizations who were adversely affected by mass arrests
20 at San Francisco State University in 1968-69 were prevented by principles of res judicata from
21 pursuing their lawsuit alleging that the statutes under which the arrests were made were
22 unconstitutional and that the statutes were applied in an unconstitutional manner.³² The opinion
23 was based on the fact that there was a prior lawsuit that arose out of the same incident that ended
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26 ²⁷ *Id.*

27 ²⁸ OIC Supp. Memorandum of Authorities at 2.

28 ²⁹ *ITT Rayonier*, 627 F.2d at 1003.

29 ³⁰ *Id.* at 1002.

30 ³¹ OIC Supp. Memorandum of Authorities at 2.

31 ³² *Jackson*, 605 F.2d at 1124-25.

1 with a judgment upholding the constitutionality of the statutes and their application.
2 Additionally, the res judicata finding was based on the fact that the prior lawsuit was brought on
3 behalf of all those who were arrested and brought as a class action and treated by the court as a
4 class action.³³ Moreover, virtually all of those arrested were represented by counsel in the prior
5 lawsuit.³⁴ In our case, the *AIM* case was not brought on behalf of anybody other than AIM and
6 was not treated by the court as a class action. Moreover, I was not represented by counsel in the
7 *AIM* case, especially prior to my arrival at Judicial Watch and after my departure from Judicial
8 Watch before the oral argument.

9 The OIC cites *Gonzales v. Banco Central Corp.*, 27 F.3d 751 (1st Cir. 1994) for the
10 proposition that "[c]ourts have applied the 'virtual representation' doctrine when 'courts have
11 detected tactical maneuvering designed unfairly to exploit technical nonparty status in order to
12 obtain multiple bites of the litigatory apple."³⁵ But the OIC does not accuse me of engaging in
13 any such tactical maneuvering. The OIC then concludes that I was "'virtually represented' by the
14 Accuracy in Media plaintiff which he himself represented."³⁶ But in so concluding, the OIC
15 ignores *Gonzalez*' holding that "virtual representation will not serve to bar a nonparty's claim
16 unless . . . the balance of the relevant equities tips in favor of preclusion."³⁷ In our case the
17 equities dictate against the application of any virtual representation. I have never been a director
18 or officer of AIM and have never had any control over AIM.³⁸ I did not begin working on AIM's
19 litigation until I became an employee of its counsel of record, Judicial Watch.³⁹ As an employee
20 of Judicial Watch I did not have final control over the amount of time I could devote to the briefs
21 or final control over the content of the briefs.⁴⁰ I resigned from Judicial Watch before the oral
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24 ³³ *Id.* at 1126.

25 ³⁴ *Id.*

26 ³⁵ OIC Supp. Memorandum of Authorities at 4.

27 ³⁶ *Id.* at 5.

28 ³⁷ *Gonzalez*, 27 F.3d at 761.

³⁸ See attached Declaration of Allan J. Favish.

³⁹ *Id.*

⁴⁰ *Id.*

1 argument in *AIM* and had no control over that argument.⁴¹ As explained above, significant facts
2 and legal argument I presented to this court were not presented to the D.C. Circuit in *AIM*.
3 Moreover, I never entered into any express, tacit or implicit agreement to be bound in my own
4 personal case by any judgment in *AIM*.⁴² The OIC's case for issue preclusion would be stronger
5 if the plaintiff against whom it was asserting such preclusion was *Judicial Watch*. But the case
6 for issue preclusion against me is completely without merit.

7 The OIC also cites *National Treasury Employees Union v. Internal Revenue Service*, 765
8 F.2d 1174 (D.C. Cir. 1985), where the exact same person made two successive FOIA requests
9 for similar documents. That case is not applicable here because *AIM* is a separate entity from
10 me. I did not make the FOIA request in *AIM* and did not begin that litigation.⁴³

11 The OIC states that the photographs at issue in our case "were the subject of a request in"
12 *AIM*.⁴⁴ The OIC is wrong. The photographs at issue here are the original Polaroid photographs
13 taken of the body at the park. These originals were copied, either by a photocopier or by taking a
14 Polaroid photo of them, and those copies were among the photos at issue in the *AIM* case.⁴⁵
15 Presumably, the originals are much higher in quality than the copies and therefore able to show
16 much more detail. This makes the public's interest greater in obtaining these photos than the
17 photos at issue in *AIM*, especially because we are concerned with small details like blood and
18 neck wounds. Therefore, when the OIC states that the difference between the originals and the
19 copies is "non-existent,"⁴⁶ the OIC is wrong again.

20 The OIC states that "[a]s Mr. Favish acknowledged at oral argument, he was co-counsel
21 in the Accuracy in Media appeal and was on the briefs for appellant Accuracy in Media, which
22 relationship is also set forth in the reported decision."⁴⁷ The OIC is wrong. I did not
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24 ⁴¹ *Id.*

25 ⁴² *Id.*

26 ⁴³ *Id.*

27 ⁴⁴ OIC Supp. Memorandum of Authorities at 1.

28 ⁴⁵ This is my understanding and the OIC's attorney did not dispute this at the oral argument in
our case. See attached Declaration of Allan J. Favish.

⁴⁶ OIC Supp. Memorandum of Authorities at 2.

⁴⁷ *Id.* at 1.

1 acknowledge at oral argument that I was co-counsel in the AIM appeal. I said that I was an
2 attorney employed by AIM's counsel of record, Judicial Watch. I never had "co-counsel" status
3 with Judicial Watch. I never had final control over the amount of time I could devote to the
4 briefs, the content of the briefs, or the oral argument because I was not the General Counsel of
5 Judicial Watch. In fact, I resigned and departed from Judicial Watch before the oral argument in
6 *AIM*.

7 The OIC states that "whether or not Mr. Favish was a party to, in privity with, or
8 consented to be bound by the Accuracy in Media case is not a bar to application of collateral
9 estoppel in this case."⁴⁸ The OIC is wrong. In order to hold me collaterally estopped in this
10 case, the law requires that I have been a party to the *AIM* case, in privity with AIM or have
11 consented to be bound by the decision in that case. The OIC has failed to cite any law to the
12 contrary and has failed to establish that any of these conditions exist in our case.

13 The OIC states that my interests in our litigation were "virtually represented" by AIM in
14 its case because "there is no question that Mr. Favish represented the plaintiffs in *Accuracy in*
15 *Media* before the D.C. Circuit."⁴⁹ But I simply helped write the briefs in *AIM* as an employee of
16 AIM's counsel of record, Judicial Watch.⁵⁰ As explained above, I did not run Judicial Watch and
17 Judicial Watch, not me, had final control over the time I could devote to the briefs and the
18 content of the briefs. I left Judicial Watch before the oral argument in *AIM* and had no control
19 over that argument.

20 The OIC cites *United States v. Geophysical Corp.*, 732 F.2d 693, 697-98 (9th Cir. 1984),
21 for the proposition that all that is required for the "virtual representation" rule to apply is that a
22 person against whom issue preclusion is sought have interests sufficiently similar to those of the
23 party in the prior litigation or that there be a legal relationship between the person and the party
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28 ⁴⁸ *Id.* at 2.

⁴⁹ *Id.* at 2-3.

⁵⁰ See attached Declaration of Allan J. Favish.

1 in the prior litigation that makes that party accountable to that person..⁵¹ But the law has evolved
2 since 1984. As stated in the *Gonzalez* case, cited by the OIC:⁵²

3 The courts that first rode the warhorse of virtual representation into battle on
4 the res judicata front invested their steed with near-magical properties. They
5 suggested that mere identity of interests between party and nonparty
6 warranted application of the theory and, hence, authorized nonparty
7 preclusion. . . . Despite such sweeping generalities, courts soon came to
8 realize that, though virtual representation was not the old gray mare, neither
9 should it be confused with Pegasus; finding virtual representation based
10 solely on identity of interests, and then deploying the theory to justify
11 nonparty preclusion in a broad spectrum of cases, would threaten the core
12 principles underpinning the due process equation. . . . For this reason,
13 contemporary case law has placed the theory of virtual representation on a
14 short tether, significantly restricting its range. . . . ¶ The upshot is that, today,
15 while identity of interests remains a necessary condition for triggering virtual
16 representation, it is not alone a sufficient condition. More is required to bring
17 the theory to bear.⁵³

18 The OIC states that "Mr. Favish had every reason to put forward in a vigorous manner
19 arguments in favor of disclosure of the post-mortem death scene photographs in the Accuracy in
20 Media case as in the case before this Court." The OIC is wrong. I had no control over the oral
21 argument in *AIM* since I left Judicial Watch before that argument. I was incapable of putting
22 forward anything at that oral argument, including the refutation of the *Campbell* case that I
23 presented orally in our case. Moreover, I did not have final control over the amount of time I
24 could devote to helping write the briefs in *AIM* and did not have final control over the content of
25 the briefs. My briefs in our case contain significantly more facts demonstrating why the public's
26 interest in disclosure outweighs any privacy interest that may be held to exist.

27 The OIC states that "presumably Mr. Favish had an express relationship or certainly a
28 relationship can be implied between Mr. Favish and Accuracy in Media."⁵⁴ But the OIC omits a
29 key allegation necessary for a finding of "virtual representation" as put forward in *Geophysical*

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51 OIC Supp. Memorandum of Authorities at 3.

52 OIC Supp. Memorandum of Authorities at 4.

53 *Gonzalez*, 27 F.3d at 760 (citations omitted).

54 OIC Supp. Memorandum of Authorities at 3.

1 *Corp.*: That my relationship with AIM have made AIM "accountable" to me. Since AIM was
2 never accountable to me,⁵⁵ the OIC's point is meritless.

3 The OIC states that "Mr. Favish has represented Accuracy in Media before the D.C.
4 Circuit and before this Court and has presented the same factual and legal arguments in both the
5 Accuracy in Media appeal and in the appeal before this Court as to the post-mortem death scene
6 photographs requested in each case."⁵⁶ The OIC is wrong. I only represented AIM before the
7 D.C. Circuit in a limited way by helping to write the briefs. I did not represent AIM at the oral
8 argument before the D.C. Circuit. Moreover, I have never represented AIM before the Ninth
9 Circuit. Additionally, as explained above, I presented additional factual and legal arguments to
10 the Ninth Circuit that were not presented to the D.C. Circuit in *AIM*.

11 The OIC states that "presumably Favish does not argue that the positions which he
12 articulated in the D.C. Circuit were not adequately represented or litigated by himself there."⁵⁷
13 As explained above, I did not have final control over the amount of time I could devote to the
14 briefs while an employee of Judicial Watch, where I was not the boss. In our case, where I am
15 the boss, I have presented significant additional facts in the briefs. Moreover, I had no control
16 over the oral argument in *AIM* and in our oral argument I explained why the D.C. Circuit's
17 *Campbell* opinion was erroneous and that explanation was not provided in the oral argument in
18 *AIM*.

19 CONCLUSION

20 The OIC's claim of issue or claim preclusion should be rejected and the photos should be
21 released.

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23 Dated: November 16, 1999

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Allan J. Favish
Appellant

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28 ⁵⁵ See attached Declaration of Allan J. Favish.

⁵⁶ OIC Supp. Memorandum of Authorities at 4.

⁵⁷ *Id.* at 4.

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PROOF OF SERVICE

I am an attorney licensed to practice before all the courts in California. I am over the age of 18 and my address is 2813 S. Bentley Ave., Los Angeles, CA 90064-4003.

On November 16, 1999, I served the document entitled APPELLANT’S OPPOSITION MEMORANDUM OF AUTHORITIES REGARDING COLLATERAL ESTOPPEL; DECLARATION OF ALLAN J. FAVISH, by placing a true copy thereof enclosed in a sealed envelope addressed to each of those identified in the service list, below.

I deposited such envelope(s) in the mail at Los Angeles, California. The envelope(s) were mailed via U.S.P.S. first class mail, with postage thereon fully prepaid.

Executed on November 16, 1999, at Los Angeles, California. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Allan J. Favish

SERVICE LIST

Ms. Jan L. Luymes Assistant U.S. Attorney U.S. Department of Justice 411 W. 4th St., 9th Floor Santa Ana, CA 92701	Attorney for defendant/appellee Office of Independent Counsel
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