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10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA  
12 WESTERN DIVISION

13 ALLAN J. FAVISH,

14 Plaintiff,

15 v.

16 OFFICE OF INDEPENDENT COUNSEL,

17 Defendant.

CASE NO. CV 97-1479-WDK

**DEFENDANTS-IN-INTERVENTION  
SHEILA FOSTER ANTHONY'S AND LISA  
FOSTER MOODY'S NOTICE OF JOINDER  
AND JOINDER IN SUPPORT OF THE  
OFFICE OF INDEPENDENT COUNSEL'S  
MOTION TO ALTER OR AMEND  
JUDGMENT; MEMORANDUM OF POINTS  
AND AUTHORITIES; DECLARATIONS OF  
SHEILA FOSTER ANTHONY AND LISA  
FOSTER MOODY**

[Fed. R. Civ. P. 24]

[Notice Of Motion And Motion To Intervene  
filed concurrently herewith]

Hearing:

Date: March 5, 2001  
Time: 3:00 p.m.  
Place: Courtroom 1600  
(Hon. William D. Keller)

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1 **TO THE COURT, ALL PARTIES, AND ALL COUNSEL OF RECORD:**


2 **PLEASE TAKE NOTICE THAT**, on March 5, 2001, at 3:00 p.m. in Courtroom  
3 1600 of the above-named Court located at 312 N. Spring Street, Los Angeles California, 90012-  
4 4793, before the Honorable William D. Keller, Sheila Foster Anthony and Lisa Foster Moody  
5 (the "Foster family") will and hereby do join in and adopt in full as though filing their own  
6 motion, the Motion to Alter or Amend the Judgment filed by Defendant Office Of Independent  
7 Counsel, scheduled for hearing on March 5, 2001, at 3:00 p.m., in the above-referenced Court  
8 before the Honorable William D. Keller and submit the attached Memorandum Of Points And  
9 Authorities, and the accompanying Declarations, in support thereof. The Foster family hereby  
10 request that they be permitted to appear at the hearing by telephone.

11 Dated: January 29, 2001

Respectfully submitted,

LATHAM & WATKINS  
G. Andrew Lundberg  
Belinda S Lee

SWIDLER BERLIN SHEREFF FRIEDMAN  
James Hamilton (*pro hac vice* pending)

By   
Belinda S Lee  
Attorneys for Defendants-in-Intervention  
Sheila Foster Anthony and Lisa Foster Moody

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 Pursuant to Federal Rule of Civil Procedure 59(e), the Office of Independent  
5 Counsel (“OIC”) has filed a motion to alter or amend this Court’s January 12, 2001 Order. That  
6 Order granted summary judgment in favor of the plaintiff with respect to five never-before-  
7 released post mortem photographs of the late Vincent Foster. Sheila Foster Anthony and Lisa  
8 Foster Moody (the “Foster family”) join in that motion and submit this Memorandum in support  
9 of the Government’s brief, which they rely on and adopt. They also submit their attached  
10 Declarations setting forth, in their own strongly-felt words, the devastating invasion of privacy  
11 that release of these photos would entail.

12 **II.**

13 **ANALYSIS**

14 The Foster family respectfully submits that the Court erred in its balancing of the  
15 compelling privacy interests of the Foster family against the purported public benefit in  
16 disclosure of the photographs.

17 The Court of Appeals, in its Order remanding the case to this Court for in camera  
18 review of the photos, recognized that, as a matter of law, that the Foster family has a privacy  
19 interest in preserving the surviving family’s memory of Mr. Foster. See Favish v. Office of  
20 Independent Counsel, 217 F.3d 1168, 1173 (9th Cir. 2000). This “zone of privacy” extends to “a  
21 spouse, a parent, a child, a brother or sister” who seek to “preserve the memory of the deceased  
22 loved one.” Id.

23 The Court of Appeals also recognized that, under the FOIA, that the “expectable  
24 invasion of their privacy caused by the release of records made for law enforcement must be  
25 balanced against the public purpose to be served by disclosure.” Id. The Supreme Court in  
26 United States Dept. of Justice v. Reporters Committee for Freedom of the Press held that:  
27 “Whether disclosure of a private document under Exemption 7(c) is warranted must turn on the  
28 nature of the requested document and its relationship to ‘the basic purpose of the Freedom of

1 Information Act to open agency action to the light of public scrutiny.” 489 U.S. 749 (1989).

2 We submit with deference that this Court, in conducting the balancing test, erred  
3 in two respects. First, the Court erred in holding that, “[i]n this case, the appellate court appears  
4 to have defined the zone of privacy protection as those photographs that are ‘graphic, explicit  
5 and extremely upsetting.’” See January 12, 2001 Decision (citing Favish, 217 F.3d at 1174).  
6 Second, the Court erred by not determining what public benefit would be served by the release of  
7 these photos, as the Court of Appeals required.

8 The Court of Appeals, in referring to the OIC’s representations that the 10  
9 withheld photographs are “graphic, explicit, and extremely upsetting,” did not intend to set the  
10 exclusive standard for what type photos invade the Foster family’s legitimate privacy interests.  
11 Surely, the family has a privacy interest in avoiding release of photos that may not appear  
12 graphic or explicit to some, but nonetheless would disturb their memory of a deceased husband  
13 and brother. In any event, while Ms. Foster and Ms. Anthony have not seen the photos, they find  
14 the descriptions in this Court’s January Order and relayed to them to be “extremely upsetting,” as  
15 their Declarations forcefully attest. The feelings set forth in the pages of these Declarations is  
16 what this case truly is about.

17 The fact that our society has become desensitized to images of destruction and  
18 violence spread across the media does not change the fact that, to a parent, spouse, sibling, and  
19 child, a photo of loved one, lying on the ground dead from a gunshot wound, invades the most  
20 basic notions of privacy and brings much suffering. How true this would be in this case, where  
21 there is a virtual guarantee that the photos will be the subjects of intense media coverage, and  
22 will greet the Foster family at every turn, whether they pick up a newspaper, turn on the  
23 television or use the Internet. These images will be unavoidable; it will not just simply be a  
24 matter of averting eyes or ears. The Court of Appeals recognized that the family has a  
25 cognizable privacy interest in avoiding the foreseeable consequences that would flow from the  
26 release of the photos. See Favish, 217 F.3d at 1173.

27 Furthermore, plaintiff has shown no cognizable public interest or benefit from  
28 release of the photos. As the Court of Appeals said in this case, “[t]he purpose of the statute is to

1 'shed light on an agency's performance of its statutory duties' and to let the people 'know what  
2 their government is up to.'" Favish, 217 F.3d at 1171 (quoting Freedom of the Press, 489 U.S. at  
3 772-73). Certainly, plaintiff has produced no evidence of government wrongdoing, or shown  
4 that access to the photos is necessary to confirm or refute that evidence, as various courts have  
5 required. See Schiffer v. FBI, 78 F.3d 1405, 1410 (9th Cir. 1996); Hunt v. FBI, 972 F.2d 286,  
6 290 (9th Cir. 1992); Accuracy in Media v. National Park Service, 194 F.3d 120, 124 (D.C. Cir.  
7 1999) (involving facts largely identical to those in this case, including some of the same photos  
8 at issue here); Spirko v. United States Postal Service, 147 F.3d 992, 999 (D.C. Cir. 1998); Davis  
9 v. United States Dep't of Justice, 968 F.2d 1276, 1282 (D.C. Cir. 1992); Neely v. FBI, 208 F.3d  
10 461, 464 (4th Cir. 2000); Silets v. United States Dep't of Justice, 945 F.2d 227, 231 (7th Cir.  
11 1991)(en banc), cert. denied, 505 U.S. 1204 (1992).

12                   Indeed, five separate investigations – by the Park Police, two independent  
13 counsels, and Congressional committees of both houses of Congress – have all reached the same  
14 conclusion regarding the cause of Mr. Foster's death, and there can be no reasonable assertion  
15 that the photos will somehow point to government wrongdoing. The hollow claims of foul play  
16 by conspiracy theorists such as plaintiff have been refuted and rejected time and time again.

17                   What appears here is not a legitimate attempt to see what the government is up to,  
18 but rather a morbid curiosity into the circumstances of a tragic death. We respectfully submit,  
19 however, the FOIA was not intended to appease some twisted, ghoulish fascination that attempts  
20 to masquerade as the public interest.

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III.

CONCLUSION


For these reasons, the legitimate privacy interest of the Foster family in avoiding release of these photos should be upheld, and the Government's motion to alter or amend this Court's January 12, 2001 Order should be granted.

Dated: January 29, 2001

Respectfully submitted,

LATHAM & WATKINS  
G. Andrew Lundberg  
Belinda S Lee

SWIDLER BERLIN SHEREFF FRIEDMAN  
James Hamilton (*pro hac vice* pending)

By   
Belinda S Lee  
Attorneys for Defendants-in-Intervention  
Sheila Foster Anthony and Lisa Foster Moody

## **DECLARATION OF SHEILA FOSTER ANTHONY**

I am the sister of Vincent Foster who took his life on July 20, 1993. I have read the Court's January 12, 2001 decision and order in Allan J. Favish v. Office of Independent Counsel, CV 97-1478-WDK, listing the photographs it intends to release. More than ever before, I fervently believe that releasing any photographs depicting Vince's body post-mortem would constitute a painful unwarranted invasion of my privacy, my mother's privacy, my sister's privacy, and the privacy of Lisa Foster Moody (Vince's widow), her three children, and other members of the Foster family.

Our family has suffered a great loss under extremely tragic circumstances, compounded by the barrage of newspaper, magazine, and Internet articles, books, and television programs and reports that followed Vince's death. An intensely private matter drew national attention. Reporters, as well as simply curious individuals, harassed my grieving family in unbelievably insensitive ways. Conspiracy theorists imagined and caused to be printed and published all sorts of wild and unsubstantiated stories, alleging murder, treason, Swiss Bank accounts, high-level and widespread cover-up of government wrongdoing, and other such ravings. Political and commercial opportunists used Vince's death to publish films and articles through media of tabloids, video, and on the Internet to speculate about and sensationalize his tragic suicide and to profit from it. Seemingly countless official investigations of his death ensued, and my sister and I, as well as Vince's wife and children, were called before government agents to be interviewed and to testify about, and painfully re-live, the events surrounding his death. My now 86 year old mother and my sister received middle-of-the-night calls from authors pretending to be Vince's friend and seeking any personal tidbit of information about Vince from them. We found flowers on his grave with handwritten notes from strangers asserting

that he had been murdered. I was sent a book authored by a conspiracy theorist who stated that Vince had been murdered and warned that my life could be in danger.

Our family was horrified and devastated by the photograph leaked to the press and published on a national television network and in newspapers of Vince's dear dead hand holding the gun he used to kill himself. That photograph has been shown in national media again and again, and every time I see it I have nightmares and heart-pounding insomnia as I visualize how he must have spent his last few minutes and seconds of his life. My mother has suffered unimaginable sorrow and depression in losing her only son, but her grief (and ours) has been compounded by the fear that she will see upsetting reports, about him on her television set or see headlines and photographs in the tabloids on the grocery store racks where she shops. It is my ardent desire to protect my family as well as myself from additional torment which would result from the release of these graphic photographs.

I fear that the release of these photographs certainly would set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. Once again my family would be the focus of conceivably unsavory and distasteful media coverage. I cannot adequately express how truly unjust, unfair and cruel it would be to subject my family to more public scrutiny and the dissemination of these photographs via the Internet or by other print and electronic media. Although I have struggled to read the description of the photographs at issue here, I could not bring myself to view them. The horror of actually seeing Vince's dead body and bloody face and shirt would undoubtedly cause me extreme mental

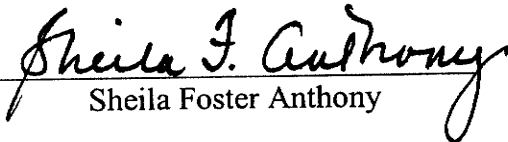
anguish. No member of my family should ever be concerned with the possible exposure of photographs of this nature.

The death of my brother has been more than adequately investigated. Five separate government inquiries have determined that Vince's death was a result of a self-inflicted gun wound. Therefore, I cannot fathom a legitimate or rational reason why these photographs should be released. The mere suggestion that these photographs would be released is unconscionable. Their release would only bring more agony to my family.

We have endured enough pain and personal invasion by the media and by those who investigated the death of my brother. While I have tried here, I have no adequate words to express the anguish the release of these photographs would bring to me and the entire Foster family.

The Government has asked the Court to uphold its position that the release of the photographs would be an unwarranted invasion of my personal privacy and that of Vince's family. I implore the Court to do all it can to protect our family, but particularly Vince's children and his 86 year old mother, from further invasion and the distressing events that surely would result from the release of these photographs. Indeed, I beg the Court to place these photographs under permanent seal so that we will not continually, in forum after forum, be required to hire legal counsel and make these requests to the courts.

I declare that the foregoing is true.

  
Sheila Foster Anthony

Executed in Washington, D.C., this 24<sup>th</sup> day of January, 2001.

DECLARATION OF LISA FOSTER MOODY

My name is Lisa Foster Moody. I was married to Vincent W. Foster, Jr. for 25 years until he committed suicide on July 20, 1993.

His death and the manner in which he died totally devastated our family. Having to deal with all the media attention was incredibly difficult. Indeed, there have been telephone calls from the press and reporters knocking on my door as recently as last summer. If these photographs are released, we will again be thrust in the public eye and forced to endure the pain and invasion of privacy all over again.

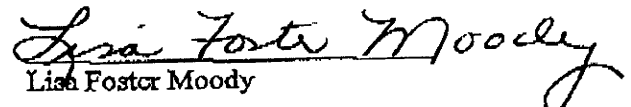
There have been five major investigations of Vince's death -- by the Park Police, by two independent counsels, Robert Fiske and Kenneth Starr, and by two congressional committees chaired by Rep. Clinger and Sen. D'Amato. I personally appeared for interviews in Washington D. C. for three of these investigations. My children, Vincent III, Laura and Brugh, also flew to Washington from Little Rock to be questioned individually by Kenneth Starr, his team of investigators and several FBI agents. All of these investigations ended with the same conclusion -- that Vince committed suicide. The family cooperated fully with these investigations. From the moment I was told that he had killed himself, I have never had any doubts about his suicide.

Now that the investigations are concluded, my family is in the process of healing and restoring our lives to some degree of normalcy. I have remarried and my husband and I are seeking to meld our families into one. We do not need the set back that release of the photos would cause and frankly we do not deserve it. We have generally dealt with our grief in private and have declined all of the many requests for television interviews. The privacy we have sought to maintain has been our salvation. I beg the Court not to destroy what we have worked so hard to accomplish by releasing graphic

photographs of Vince in response to what we consider a cruel, insensitive request that we believe is unsupported by any valid public interest.

I did not even open Vince's casket for fear of seeing him distorted by the autopsy. I surely cannot bear seeing him lying on the ground in Fort Marcy Park with blood stains on him, coupled with the indignity of the whole world's viewing these pictures in tabloids or on the Internet. My understanding of the photographs is that all of them would be extremely upsetting to the family and cause us no end of pain and sorrow. The shock of seeing the picture of Vince on the television with the gun in his hand is still a horrifying memory for me. It is inconceivable to me how the misguided, twisted curiosity of a stranger could justify my children having to see pictures of their dead father on the nightly news, on the Internet and on the supermarket shelves.

I respectfully implore the Court to be sensitive to the wishes of the members of our family and our wholly-legitimate privacy concerns and to reconsider releasing these photographs.

  
Lisa Foster Moody

Executed in Little Rock, Arkansas, this 26<sup>th</sup> day of January, 2001.

1 **PROOF OF SERVICE BY MAIL**

2  
3 I am a resident of the State of California, over the age of eighteen years, and not a  
4 party to the within action. My business address is Latham & Watkins, 633 West Fifth Street,  
5 Suite 4000, Los Angeles, California 90071-2007. On January 29, 2001, I served the within  
6 document:

7 **DEFENDANTS -IN-INTERVENTION**  
8 **SHEILA FOSTER ANTHONY'S AND LISA FOSTER MOODY'S**  
9 **NOTICE OF JOINDER AND JOINDER IN SUPPORT OF THE**  
10 **OFFICE OF INDEPENDENT COUNSEL'S**  
11 **MOTION TO ALTER OR AMEND JUDGMENT;**  
12 **MEMORANDUM OF POINTS AND AUTHORITIES;**  
13 **DECLARATIONS OF SHEILA FOSTER ANTHONY**  
14 **AND LISA FOSTER MOODY**

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Asst. United States Attorney  
Office of the United States Attorney  
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I declare that I am employed in the office of a member of the Bar of or permitted to practice before this Court at whose direction the service was made. Executed on January 29, 2001, at Los Angeles, California.

\_\_\_\_\_  
Cynthia Marie Aros