

No. _____

In The
Supreme Court of the United States

SHEILA FOSTER ANTHONY,
LISA FOSTER MOODY,
Petitioners,

v.

ALLAN J. FAVISH, et al.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT U.S.
POLICE DEPARTMENT

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QUESTIONS PRESENTED

This case involves the application of the Freedom of Information Act (FOIA) to photographs of the body of Vincent W. Foster, Jr., taken by the Park Police at the death scene shortly after he shot himself. Plaintiff asserts these photographs may demonstrate that the several investigations of Mr. Foster's death by the National Park Service, the FBI, Congressional Committees, and the Office of Independent Counsel -- all of which concluded that he took his own life -- were wrongfully conducted. Mr. Foster's widow and sister asserted a privacy interest, contending that release of the photographs will lead, among other things, to a repetition of the acute distress they experienced from widespread publication of a previously leaked photograph of Mr. Foster's dead hand holding the gun he used to commit suicide. Three questions are presented relating to FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), which protects law enforcement records when public disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy":

1. Whether the court of appeals correctly held that a FOIA requester need not offer evidence to support his assertion that release of law enforcement records is necessary to vindicate a public interest in determining whether there was government misconduct, and that, if the requester offers such evidence, the court does not have to weigh it.
2. Whether the court of appeals erred in ordering release of photographs without finding a nexus between the specific photographs and the public interest alleged to justify their release.
3. Whether the court of appeals correctly held that public release of law enforcement records that are not "graphic, explicit, and extremely upsetting" does not invade the survivors' privacy.

PARTIES TO THE PROCEEDING

Respondent Allen J. Favish brought this suit against the respondent Office of Independent Counsel. The petitioners, Sheila Foster Anthony and Lisa Foster Moody, intervened as defendants in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Sheila Foster Anthony and Lisa Foster Moody, sister and widow of the late Vincent W. Foster, Jr., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals on the first appeal (Pet. App. 8) are reported at Favish v. Office of Independent Counsel, 217 F.3d 1168 (9th Cir. 2000). The majority and dissenting opinions of the court of appeals on the second appeal (Pet. App. 1) are unreported. The order of the court of appeals denying petitions for rehearing, including the dissent of Judge Pregerson (Pet. App. 4), is unreported. The opinions of the district court (Pet. App. 5, 45) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 20, 2002. The court entered an order denying a timely petition for rehearing on August 16, 2002. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Freedom of Information Act ("FOIA") provides that:

- (b) This section does not apply to matters that are . . .
- (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . .

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b).

STATEMENT

1. Vincent W. Foster, Jr., was Deputy White House Counsel under President Clinton. Mr. Foster was found dead in Fort Marcy Park, a national park in northern Virginia, on July 20, 1993. The National Park Service and the FBI conducted investigations into his death, and later inquiries were performed by separate committees of the Senate and House of Representatives. Two separate investigations into his death also were conducted by the Office of Independent Counsel, under Robert B. Fiske, Jr., and Kenneth W. Starr, respectively. See *Favish*, 217 F.3d at 1179-80, Pet. App. 27-31 (Pregerson, J. dissenting) (summarizing investigations). The latter inquiry took place over three years and involved "interviews with more than thirty witnesses and analysis of hundreds of documents, forensic reports, the physical evidence, and death-scene and autopsy photographs." *Id.* at 1180, Pet. App. 30. All these investigations independently concluded that Mr. Foster committed suicide by a self-inflicted gunshot wound.

Plaintiff, a lawyer and conspiracy theorist, is unpersuaded and asserts that the numerous professional investigators and public officials who have studied Mr. Foster's death are guilty of wrongful conduct. In 1997, Plaintiff made a request under FOIA for copies of 150 photographs compiled during the investigations. Following litigation (and plaintiff's withdrawal of his request for 21 photographs), he now possesses copies of 119 of the photographs identified in his original request. *Id.* at 1170-71, Pet. App. 10. Also, he has been granted access to an abundance of other investigative materials that provide great detail about Mr. Foster's death and the subsequent

investigations into information concerning Foster's death.

The ten re shortly after Mr. corpse lying in F sister intervened in of these photog unnecessary invas their memory of harassment from leaving them a profoundly tran photographs obs their family. Di by 5 U.S.C. § agencies to deny disclosure "con unwarranted inv

2. FOIA suit in organization, death scene, photographs at district court sufficient publi family's priv Media, Inc. v. 1999).

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¹ The D.C. photographs, 217 F.3d at 1177

investigations into it, including extensive, detailed information concerning the gunshot wound that caused Mr. Foster's death.

The ten remaining photographs, which were taken shortly after Mr. Foster's body was discovered, depict his corpse lying in Fort Marcy Park. Mr. Foster's widow and sister intervened in this case because they believe that release of these photographs would constitute a severe and unnecessary invasion of their family's privacy. By invading their memory of a loved one, by subjecting them to harassment from any number of media outlets, and by leaving them vulnerable to the unwitting viewing of profoundly traumatic images, the disclosure of these photographs clearly would implicate a privacy interest of their family. Disclosure of these photographs is precluded by 5 U.S.C. § 552(b)(7)(C), which permits government agencies to deny the release of investigatory materials where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Plaintiff also participated as counsel in a FOIA suit in the District of Columbia brought by an organization seeking photographs of Foster's body at the death scene and the autopsy, including the same photographs at issue here.¹ The D.C. Circuit affirmed the district court's ruling that plaintiff had not shown a sufficient public interest in disclosure to outweigh the Foster family's privacy interest in the photographs. Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120 (D.C. Cir. 1999).

3. Plaintiff brought this action in the Central District of California against the Office of Independent Counsel ("OIC"), seeking numerous photographs relating to Mr. Foster's suicide. The district court ordered disclosure of

¹ The D.C. Circuit case involved black-and-white copies of the photographs. The present case involves color Polaroid originals. Favish, 217 F.3d at 1177, Pet. App. 24.

some photographs, but refused disclosure of photographs of the death scene that showed Mr. Foster's body or face. The court held that the compelling privacy interest implicated by these photographs outweighed any public interest in their disclosure. Pet. App. 45. The OIC had submitted a declaration of Mr. Foster's widow, recounting her "shock" at "seeing the [already-leaked] picture of Vince on the television with the gun in his hand," Pet. App. 59, and a declaration from his sister describing her "nightmares and heart-pounding insomnia" after seeing that photograph in national media and recounting her elderly mother's fear that she will see "photographs in the tabloids on the grocery store racks where she shops." Pet. App. 61.

Plaintiff appealed, and the panel reversed and remanded, directing the district court to examine the photographs in camera to weigh the privacy interests of the Foster family against the claimed public interest in disclosure. Favish, 217 F.3d 1174, Pet. App. 17. Judge Pregerson dissented in part, finding that the Vaughn index submitted by the OIC was sufficiently detailed to obviate the need for in camera review and that the compelling privacy interest possessed by the Foster family clearly outweighed any public interest in disclosure with respect to nine photographs of Mr. Foster's body and face, except as to the photographs of Mr. Foster's right hand clutching the gun he used to kill himself, which Judge Pregerson would release. Id. at 1186-87, Pet. App. 43-44.²

Plaintiff asserted that the photographs of Foster's face and body were needed to explain purported deficiencies and inconsistencies in the Starr Report concerning the nature and location of Mr. Foster's entrance and exit wounds --- deficiencies and inconsistencies that, plaintiff contended, supported his overall contention that the OIC's investigation was "grossly incomplete and untrustworthy."

² The Vaughn index's description of the photographs appears at Favish, 217 F.3d at 1176-77, Pet. App. 22-23.

Id. at 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 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Id. at 1184, 1185-86, Pet. App. 39-42. Judge Pregerson rejected plaintiff's assertion, agreeing with the D.C. Circuit's conclusion that the claimed deficiencies and inconsistencies were not sufficient to establish a public interest in disclosure of the photographs that outweighed the Foster family's privacy interest. Favish, 217 F.3d at 1185-86, Pet. App. 41-43 (citing Accuracy in Media, 194 F.3d at 124). Judge Pregerson also concluded that in camera inspection was not needed, agreeing with the D.C. Circuit's observation that "we cannot imagine any photos that could both elucidate the true nature of Foster's wounds and yet not be disturbingly graphic." Id. at 1177, Pet. App. 25 (quoting Accuracy in Media, 194 F.3d at 125).

In contrast, the Ninth Circuit majority stated that a FOIA requester is not required to have knowledge or evidence of agency misfeasance. Id. at 1172, Pet. App. 14. The court did note that plaintiff had offered evidence and arguments that the OIC had engaged in misfeasance in its investigation of Foster's death, but concluded that "it is not the function of the court in a FOIA proceeding to weigh such evidence or adjudicate such arguments." Id. at 1173, Pet. App. 14.

In this case the OIC had represented that the withheld photographs are "graphic, explicit, and extremely upsetting." Id. at 1174, Pet. App. 17. The court, however, concluded that this description "is not true of the photo already published in *Time* and on television, showing a hand holding a gun," adding that: "It may be true of the remaining 9 photos. But no court has ever seen them." Id. The court of appeals then directed the district court on remand to examine the photos and balance the public benefit to be obtained by their release against the effect on the privacy of the Foster family. Id.

4. On remand, the district court, observing that the panel decision limited the Foster family's privacy interest to "graphic, explicit, and extremely upsetting" material, concluded that five of the photographs fit this description

and therefore were precluded from disclosure under FOIA Exemption 7(C). 5 U.S.C. § 552(b)(7)(C). However, it granted disclosure with respect to the remaining five photographs that it found did not meet this test. Pet. App. 5. The district court made no finding as to how photographs that were not "graphic, explicit, and extremely upsetting" might nevertheless contain sufficient detail to elucidate the true nature of Mr. Foster's wounds and thus advance the alleged public interest.

Sheila Foster Anthony and Lisa Foster Moody then intervened as defendants, submitted additional declarations in support of their motion for reconsideration (Pet. App. 59, 61) and, when that motion was denied, joined in the OIC's appeal. Plaintiff also appealed.

After *in camera* review of the photographs, the panel summarily affirmed the district court's judgment, except as to one of the photographs that the district court had ordered released, which the panel concluded should be withheld. Judge Pregerson dissented, reiterating his position that nine of the photographs implicate a privacy interest that outweighs any interest that the public possesses in their release. Pet. App. 3.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision raises three issues under the FOIA privacy exemption, all of which have considerable national importance and are the subject of a Circuit conflict, including a conflict with the D.C. Circuit *as to the same photographs* of Mr. Foster's body at the death scene.

One issue is the preliminary showing a FOIA requester must make to demonstrate that public disclosure of law enforcement records implicating privacy concerns is needed to establish whether the agency involved engaged in improper conduct. The D.C. and Fourth Circuits have held that the requester must submit compelling evidence of governmental misconduct to warrant overriding privacy

interests implicated. Circuits have in conflict with the that the requester present evidence not required to he may offer.

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interests implicated by such records; the Seventh and Tenth Circuits have taken similar positions. These decisions conflict with the holding of the Ninth Circuit in this case that the requester is not required to have knowledge or present evidence of agency misfeasance and that the court is not required to assess any evidence of agency misfeasance he may offer.

The second issue is whether the requester must show a nexus between the claimed public interest and the specific records sought. Other Circuits have insisted that such a nexus be found. The Ninth Circuit's failure to require such a nexus is particularly glaring in this case, because the claimed public interest focuses on alleged inconsistencies in different accounts of Mr. Foster's entrance and exit wounds. While the Ninth Circuit decided to release only photographs it found not to be "graphic, explicit, and extremely disturbing," it failed to explain how such photographs would resolve the alleged inconsistencies in various accounts of Mr. Foster's wounds, or otherwise have any nexus to the claimed public interest.

The third issue is whether law enforcement records must be "graphic, explicit, and extremely disturbing" to implicate privacy interests. The Ninth Circuit stands alone in its holding that records not meeting this test do not warrant privacy protection. The Ninth Circuit's decision conflicts with the D.C. Circuit, which accorded privacy protection under Exemption 7(C) to the same photographs that the Ninth Circuit has held must be released. The Ninth Circuit has cited nothing in the record or arguments before it to justify its disagreement with the D.C. Circuit over the same photographs. Moreover, other Circuits have adopted interpretations of the FOIA's privacy protection that preclude disclosure that would result in annoyance, embarrassment or harassment, even though the records would not meet the Ninth Circuit test.

The Foster family already has experienced acute distress associated with the previous release of a leaked

photograph showing Foster's dead hand holding the gun he used to shoot himself and the family reasonably fears similar consequences if the photographs involved in this case are released and widely distributed.³ The family's privacy interest should not depend on whether the photographs are "graphic, explicit, and extremely disturbing."

These issues have assumed a particular importance in recent times, as the increasingly ubiquitous use of tape recordings and video cameras has led to increasingly frequent instances in which law enforcement agencies possess tapes containing oral or visual images of the immediate circumstances of violent death. Federal law enforcement agencies in possession of this kind of material need to know how to respond to requests for public disclosure, given the very real privacy concerns of surviving families. The conflict between the decision below and the D.C. Circuit's decision as to the same photographs underscores the need for uniform standards.⁴

³ Previous photographs released to plaintiff have appeared on his web site, which presently contains 13 photographs relating to the Foster death, including photographs of his car, his eyeglasses, and the gun involved. <http://www.allanfavish.com/photoix.htm> (visited August 19, 2002).

⁴ On September 3, 2002, the United States filed a petition for certiorari in a case from the Seventh Circuit involving related but different aspects of FOIA Exemption 7(C). City of Chicago v. United States Dep't of Treasury, 287 F.3d 628 (7th Cir. 2002), petition for cert. filed (Sept. 3, 2002) (No. 02-322). That case and the present case offer an appropriate occasion for this Court to consider the scope of FOIA Exemption 7(C).

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1. **The Decision Below Conflicts with Four Other Circuits as to the Showing a FOIA Requester Must Make To Establish a Public Interest Sufficient to Override Privacy Concerns Implicated by Law Enforcement Records.**

FOIA Exemption 7(C) permits federal law enforcement agencies to withhold public release of records where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In United State Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989), this Court held that invasion of personal privacy may be "warranted" where disclosure of "[o]fficial information . . . sheds light on an agency's performance of its statutory duties." Id. at 773. Several Circuits have addressed the issue of the showing a FOIA requester must make under Reporters Committee to support an assertion that public disclosure of law enforcement records implicating privacy concerns is needed to shed light on the conduct of a federal law enforcement agency.

In finding that the public interest outweighed the Foster family's privacy interest, the Ninth Circuit concluded that a requester is not required to have knowledge or present evidence of agency misfeasance, and that if he tenders such evidence "it is not the function of the court in a FOIA proceeding to weigh such evidence or adjudicate such arguments." Favish, 217 F.3d at 1173, Pet. App. 14.

This test is manifestly different from the test adopted by the D.C. Circuit in deciding that the public interest did not demand disclosure of the same photographs at issue in the Ninth Circuit case. The D.C. Circuit concluded the Foster family's privacy interest in the photographs could be overcome only by "compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access . . . is necessary in order to confirm or refute that

evidence.” Accuracy in Media, 194 F.3d at 124. Commenting on plaintiff’s allegations of investigatory inconsistencies in assessment of the Foster death scene, the D.C. Circuit observed: “When multiple agencies and personnel converge on a complex scene and offer their hurried assessments of details, some variation among all the reports is hardly so shocking as to suggest illegality or deliberate government falsification.” Id. The D.C. Circuit concluded that “there is no persuasive evidence of [the falsification plaintiff alleged], much less compelling evidence.” Id.

This Court, therefore, is confronted with the unique situation where two courts of appeals, dealing with the same factual situation, have reached totally opposite results by adopting two radically different rules of law.

In requiring compelling evidence of governmental misconduct, the D.C. Circuit followed a position it first enunciated in SafeCard Serv., Inc. v. SEC, 926 F.2d 1197, 1205-6 (D.C. Cir. 1991) that “unless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [law enforcement records] is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest in such information would ever be significant.” At least three other circuits have taken the same or similar positions. Neely v. FBI, 208 F.3d 461, 464 (4th Cir. 2000) (public interest in law enforcement records naming individual FBI agents, suspects and other persons interviewed is “negligible,” “there being no compelling allegation of agency corruption or illegality”); Miller v. Bell, 661 F.2d 623, 630 (7th Cir. 1981) (“plaintiff’s broad unsupported hints of a government coverup” are insufficient to overcome privacy interests implicated by law enforcement

records);⁵ KTVY-TV v. U.S. Postal Service, 10th Cir. 1990 (“broad neglect” in Postal Service workers insufficient to); Halloran v. Veterans Affairs, 1989 (“merely stating the abstract is not enough; how that interest would be of information implicated”; Ex parte Rice v. United States, 1987 D.C. Cir. 1987 (“merely in getting to the search privacy interest”; The position of the court in Neely v. FBI is similar to that in Miller v. Bell and Ex parte Rice.)

records);⁵ KTVY-TV v. United States, 919 F.2d 1465, 1470 (10th Cir. 1990) ("broad unsupported statement of possible neglect" in Postal Service investigation of shooting of postal workers insufficient to overcome privacy concerns). Cf. Halloran v. Veterans Admin., 874 F.2d 315, 323 (5th Cir. 1989) ("merely stating that [a public] interest exists in the abstract is not enough; rather, the court should . . . analyze[] how that interest would be served by compelling disclosure" of information implicating privacy interests); Senate of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574, 588 (D.C. Cir. 1987)(R.B. Ginsburg, J.) (requester's "general interest in 'getting to the bottom' of" a controversy did not outweigh privacy interest in law enforcement records).

The position of the D.C. Circuit and other Circuits that require a searching judicial assessment of a FOIA requester's assertion of public interest is consistent with United States Dep't of State v. Ray, 502 U.S. 164, 179 (1991), which held that under FOIA Exemption 6 "[m]ere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy."

The Ninth Circuit stands alone in its interpretation, which could open the floodgates and expose vast amounts of law enforcement records implicating privacy concerns to public release without a showing of governmental misconduct.⁶

⁵ But see City of Chicago v. United States Dep't of Treasury, 287 F.3d 628, 637 (7th Cir. 2002), pet. for cert. filed, (Sept. 3, 2002) (No. 02-322).

⁶ The potential consequences of the Ninth Circuit's decision are illustrated by Oguaju v. United States, 288 F.3d 448 (D.C. Cir. 2002), petition for cert. filed, (Aug. 2, 2002) (No. 02-5651), involving an inmate's FOIA request for the Marshal's Service file on another convict whose testimony helped secure his conviction. The requester argued that the file was necessary to show whether the government violated its Brady obligations. The D.C. Circuit, applying its SafeCard test, upheld denial of the request. The inmate has filed a petition for certiorari, claiming a conflict with the Ninth Circuit's decision on the Foster death scene photographs. Id.

2. **The Decision Below Conflicts with Other Circuits in Failing to Require a Nexus Between the Alleged Public Interest and the Specific Documents Sought.**

The majority opinion in the first appeal contains no finding concerning the nexus between the death scene photographs and the claimed public interest. It simply states that, if the requester seeks to know what "the government is up to," the requester needs to have no knowledge or to present evidence of agency misfeasance and, if he offers evidence and arguments on this issue, the court is not required to "weigh such evidence or adjudicate such arguments." Favish, 217 F.3d at 1173, Pet. App. 14. On remand, the district court proceeded to make only a determination as to whether the photographs were "graphic, explicit, and extremely disturbing," without making any determination as to the nexus between photographs that do not meet this test and the claimed public interest. Pet. App. 5. The Ninth Circuit's summary affirmance of the second appeal did not illuminate this issue. Pet. App. 1. Thus, this Court and others are left in the dark as to how photographs that are not "graphic, explicit, and extremely disturbing" could shed light on the alleged inadequacy of the Starr Report concerning the location of Mr. Foster's entrance and exit wounds.

In contrast, Judge Pregerson's dissent in the first appeal analyzes in detail plaintiff's contentions that disclosure of the death scene photographs would serve the public interest, concluding that, with one exception, the photographs would shed no light on any of the claimed inconsistencies in the Report. Favish, 217 F.3d at 1185, Pet. App. 40-41.⁷ With respect to plaintiff's contention that the

⁷ For example, Judge Pregerson points out that photographs of Mr. Foster's body at the death scene would shed no light on alleged inconsistent statements in the Starr Report concerning who was present at the autopsy. 217 F.3d at 1185, Pet. App. 40.

Starr Report failed to disclose concerning the location of Judge Pregerson, agreeing that these purported inconsistencies to implicate the public clear privacy invasion would implicate. *Id.* at 1185. In failing to require the ordered released and location of the court of Judge Pregerson, the court's decision to deny the request for the Starr Report is not supported by the law. The court's decision is not supported by the law. The court's decision is not supported by the law.

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Starr Report failed to explain purported inconsistencies concerning the location of the entrance and exit wounds, Judge Pregerson, agreeing with the D.C. Circuit, concluded that these purported inconsistencies did not raise a sufficient issue to implicate the public interest and thus override the clear privacy invasion that release of such photographs would implicate. *Id.* at 1185-86, Pet. App. 41-43.

In failing to require a nexus between the photographs it ordered released and the alleged public interest, the decision of the court of appeals squarely conflicts with Senate of Puerto Rico, which held that Exemption 7(C) protected certain law enforcement records implicating privacy concerns despite an indisputable public interest in the investigation involved, because the requester "has not adequately supported its 'public interest' claim with respect to the *specific* information being withheld." 823 F.2d at 588 (emphasis in original). See also Kimberlin v. Dep't of Treasury, 774 F.2d 204, 208 (7th Cir. 1985) ("[t]he record fails to reflect any benefit which would accrue to the public from disclosure of this document . . .").⁸

The Ninth Circuit's failure to require a nexus between the photographs it ordered released and the public interest has particular importance in this case. It is difficult to understand how any photograph "could both elucidate the true nature of Mr. Foster's wounds and yet not be disturbingly graphic." Accuracy in Media, 194 F.3d at 125. Because the Ninth Circuit limited its release to photographs it found to be *not* "graphic, explicit and extremely disturbing," the question is raised as to how such photographs could bear any nexus to the alleged public interest in the Starr Report's purported inconsistencies concerning Mr. Foster's wounds. The Ninth Circuit's failure to make any finding on this issue is not only at odds with the

⁸ But see City of Chicago v. United States Dep't of Treasury, 287 F.3d at 637, *supra*.

case law, but also renders its decision virtually incomprehensible.

3. **The Decision Below Conflicts with the D.C. Circuit's Decision on the Same Photographs and the Tests Applied by this Court and Other Circuits as to the Nature of Privacy Interests Needed to Protect Law Enforcement Records.**

In its first decision, the court of appeals held that in camera inspection was necessary for the district court to determine whether the withheld photographs are "graphic, explicit, and extremely upsetting." Favish, 217 F.3d at 1174, Pet. App. 17. On remand, the district court ordered five photographs released, on the ground that they did not meet that test. Pet. App. 5. The court of appeals summarily affirmed with respect to four of these photographs. Pet. App. 1.

In so doing, the court of appeals brushed aside the claim by the Foster family that it 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." Pet. App. 62. The court of appeals specifically found that photograph was *not* "graphic, explicit, and extremely upsetting." Favish, 217 F.3d at 1174, Pet. App. 17. Yet despite the Foster family's devastation at previous publication of a photograph not

meeting the court's test,⁹ the court of appeals concluded that additional death scene photographs of Foster's body must be released where they do not meet that test and affirmed the district court's decision to release those death scene photographs that the court of appeals did not find to be "graphic, explicit, and extremely upsetting."

The D.C. Circuit came to the opposite conclusion with regard to the same photographs, concluding that "the release of photos of the decedent at the scene of his death . . . qualifies as . . . an invasion" of the privacy rights of close survivors. Accuracy in Media, 194 F.3d at 123. The D.C. Circuit's decision was in accord with its prior decision that the test for release of autopsy reports is whether they would

⁹ The declaration of Mr. Foster's widow stated:

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....
Pet. App. 60.

The declaration of Mr. Foster's sister stated:

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....
Pet. App. 62.

"shock the sensibilities of surviving kin." Badhwar v. United States Dep't of Air Force, 829 F.2d 182, 185-6 (D.C. Cir. 1987). This test conflicts with the Ninth Circuit's test, which appears to require that the photographs be "graphic, explicit, and extremely upsetting" to the ordinary viewer, who has not suffered the loss that makes indiscriminate publication of photographs of their loved one's body at the death scene so painful.

The decision below is also inconsistent with Reporters Comm. for Freedom of the Press, 489 U.S. 749, which held that public release of FBI rap sheets would violate the privacy exemption. Rap sheets are not "graphic, explicit, and extremely upsetting," but implicate privacy concerns for other reasons. Similarly, photographs of a loved one's corpse may implicate privacy concerns even if they are not considered "graphic, explicit, and extremely upsetting." See also United States Dep't of State v. Washington Post Co., 456 U.S. 595, 600 (1982) (privacy exemption not limited to "intimate" or "highly personal" information).

No other circuit has adopted the Ninth Circuit's interpretation. To the contrary, other circuits have interpreted privacy protection to extend to a variety of situations where disclosure of law enforcement records may result in annoyance, embarrassment or harassment, although the records are not otherwise "graphic, explicit, and extremely upsetting." New England Apple Council v. Donovan, 725 F.2d 139, 142-44 (1st Cir. 1984) (names of investigators protected although no "intimate detail or extremely compromising fact" is involved, because publicity would subject them to "harassment and annoyance"); Manna v. United States Dep't of Justice, 51 F.3d 1158, 1166 (3d Cir. 1995) (disclosure of names of law enforcement officers, interviewees and witnesses "may result in embarrassment and harassment"); Halloran, 874 F.2d at 321-22 and n. 10 (suspects and other persons interviewed in investigation of contractor fraud have privacy interest in not being

"associated with a crime
their comments about
released to the public);
(6th Cir. 1994) (identity
protection); Maroscia v.
1977) (identity of person
"public exposure or possi
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755, 767 (D.C. Cir. 1990)
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Co. v. NASA, 782 F.Supp.
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4. **There Is An
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As the use of tape r
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"associated with a criminal investigation" and in not having their comments about co-workers, clients and friends released to the public); Jones v. FBI, 41 F.3d 238, 246-47 (6th Cir. 1994) (identity of investigators subject to privacy protection); Maroscia v. Levi, 569 F.2d 1000, 1002 (7th Cir. 1977) (identity of persons interviewed protected because of "public exposure or possible harassment"); KTVY-TV, 919 F.2d at 1469 ("legitimate privacy interest in not being harassed or embarrassed by other persons" outweighs public's interest in learning identities of those interviewed in federal homicide investigation); Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990) (mention of person's name in law enforcement file "carries a stigmatizing connotation").

In a case factually similar to this case, a district court, applying the D.C. Circuit's test of whether disclosure would "shock the sensibilities of surviving kin," refused disclosure of tapes of conversations among the crew of the space shuttle Challenger moments before it exploded. New York Times Co. v. NASA, 782 F.Supp. 628, 631 (D.D.C. 1991) (quoting Badhwar, supra). Similarly, the same district court refused to disclose x-rays of President Kennedy's body, although the government conceded that the x-rays "are not graphic." Katz v. Nat'l Archives & Records Admin., 862 F.Supp. 476, 483, 484 (D.D.C. 1994), aff'd on other grounds, 68 F.3d 1438 (D.C. Cir. 1995).

4. **There Is An Overriding Need To Establish Uniform Standards for Assessing FOIA Requests for Investigatory Material Implicating Privacy Concerns.**

As the use of tape recordings and video cameras becomes increasingly frequent, law enforcement agencies obtain records containing oral and visual images of the events surrounding violent death. Recent examples include the tape of the last moments of Flight 93, voice mails left by individuals trapped in the World Trade Center, and the

videotape of the murder of Wall Street Journal reporter Daniel Pearl.¹⁰ Public requests for this kind of material are likely.¹¹ Indeed, the City of New York, citing the surviving families' privacy concerns, has refused to release radio transmissions from the World Trade Center and consequently has been sued under the State's Freedom of Information Law.¹² The lack of a clear and uniform standard to govern this situation as it pertains to the FOIA is pointedly demonstrated by the disagreement between the court below and the D.C. Circuit over the photographs involved in this case. Accuracy in Media Inc., supra. This Court should grant certiorari to resolve the conflicts raised by the decision

¹⁰ For a summary of the controversy over the tapes of Flight 93, see Sward, The Voice of the Survivors: Flight 93, Fight to Hear Tape Transformed Her Life, S.F. Chron., Apr. 21, 2002, at A1; Phillips & Eggen, Pilots Assail Plan to Play Flight 93 Voice Recording; Precedent Feared in FBI Decision to Let Victims' Families Listen, Wash. Post., Apr. 16, 2002, at A03. For telephone calls made from the World Trade Center, see Veale, Word for Word/Last Words: Voices From Above: 'I Love You, Mommy, Goodbye.' New York Times, Sept. 16, 2001, § 4, at 7. For CBS News's decision to broadcast non-graphic portions of the videotape showing Pearl's murder, and the video's circulation on the Internet, see El-Ghobashy & Hutchinson, Terrorist-Linked Video Showing Reporter's Execution Is Circulating on Internet, Pittsburgh Post-Gazette, May 16, 2002, at A-4; Morago & Weiss, Did CBS Make the Right Call on Pearl Video?, Hartford Courant, May 16, 2002, at D1.

¹¹ Another example is the recent controversy over proposed public disclosure of the autopsy photographs of race car driver Dale Earnhardt. Earnhardt v. Volusia County, 2001 WL 992068 (Fla. Cir. Ct., July, 10, 2001)

¹² New York Times Co. v. City of New York Fire Dep't, No. 110753/02 (Sup. Ct. N.Y. County filed June 14, 2002). See Records of 9/11 Response Not for Public, City Says, New York Times, July 23, 2002, at B3. The City asserts that in some transmissions "[v]ictims were recorded as they were experiencing life-threatening circumstances, in some instances as they were dying." Id.

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below and establish uniform guidelines on an issue of unquestioned public importance.¹³

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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¹³ The fact that the court of appeals' opinion on the second appeal is unpublished does not bar the grant of certiorari. The court of appeals' prior published decision initially set forth the "graphic, explicit and extremely upsetting" test for privacy protection and refused to impose any significant factual burden on plaintiff's assertion that there was evidence of official wrongdoing sufficient to establish a public interest. Thus the published decision established the circuit conflicts that our petition for certiorari addresses. Moreover, this Court frequently has granted certiorari to review unpublished decisions. "A Closer Look at Unpublished Opinions in the United States Courts of Appeals," 3 J.App. Prac & Process 199, 227-28 (Spring, 2001) (since 1974, shortly after nonpublication rules were enacted, the Supreme Court has granted certiorari to review 57 unpublished opinions). See also, Comm'r of Internal Revenue v. McCoy, 484 U.S. 3, 7 (1987) ("We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case.").