No. 02-954

IN THE

Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL,
Petitioner,

v.

ALLAN J. FAVISH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, SOCIETY OF PROFESSIONAL JOURNALISTS, ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES, NATIONAL PRESS CLUB, INVESTIGATIVE REPORTERS AND EDITORS, INC., AND NATIONAL FREEDOM OF INFORMATION COALITION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Exemption 7(C) of the Freedom of Information Act exempts from disclosure records or information compiled for law enforcement purposes to the extent that such records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

The question presented is whether the Office of Independent Counsel properly withheld, under Exemption 7(C), photographs of the body of former Deputy White House Counsel Vincent Foster taken at the scene of his death.

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MISCELLANEOUS

INTEREST OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media.[1] The Reporters Committee has provided representation, guidance, and research in First Amendment and Freedom of Information Act ("FOIA") litigation since 1970.

The Reporters Committee was a party in two important FOIA cases previously heard and decided by this Court, *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) – which is central to consideration of the issues presented by the case at hand – and *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980). It also has been a party or *amicus* in hundreds of other FOIA cases litigated all over the country. In addition, the Reporters Committee has played a role in virtually every significant press freedom case that has come before this Court in the last thirty years – from *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), to *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) – as well as in many similar cases in both the federal and the state courts.

The Reporters Committee also provides direct assistance to more than 2,000 working journalists every year with respect to free-speech issues and information-access problems. In a similar vein, the Reporters Committee serves as a major national and international resource on free speech and the FOIA, authoring a number of handbooks on media law issues and disseminating information and advice in a variety of other forms.

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[1] No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

The American Society of Newspaper Editors is a nonprofit organization founded in 1922. It has a nationwide membership of over 800 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Radio-Television News Directors Association ("RTNDA"), based in Washington, D.C., is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news directors and executives, news associates, educators and students in broadcasting, cable and other electronic media in over 30 countries. RTNDA is committed to encouraging excellence in electronic journalism, and upholding First Amendment freedoms.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Association of Alternative Newsweeklies ("AAN") is the not-for-profit trade association for 123 alternative newspapers in North America. Member publications have a total weekly circulation of over 7 million and a reach of 17 million readers.

The National Press Club, established in 1908, is an organization of journalists and communicators in Washington,

D.C., and around the world. It advocates on behalf of First Amendment, press freedom and press access issues, and works to advance the professional standards of journalists.

Investigative Reporters and Editors, Inc. ("IRE") is a not-for-profit organization dedicated to improving the quality of investigative reporting within the field of journalism. Its more than 4,500 members work for the nation's leading broadcasters, cable operators, newspapers, magazines, and new media companies, and are directly engaged in the day-to-day practice of acquiring and disseminating news to the public. IRE provides a broad range of educational services and resources to reporters, editors, and others interested in investigative reporting and works to maintain high professional standards.

The National Freedom of Information Coalition ("NFOIC") is an umbrella organization that supports freedom-of-information coalitions in more than 30 states. Those coalitions work primarily to foster open government in their respective states but they also support citizens and organizations in disputes with the federal government on FOIA issues.

Amici curiae's interest in this case is in preserving public access to federal government records under the FOIA, 5 U.S.C. § 552, which generally requires disclosure upon request of records held by an agency of the federal government. This case raises the issue of the proper scope of section 7(C) of the FOIA, which creates a narrow exemption from disclosure for "records or information compiled for law enforcement purposes, . . . to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) ("Exemption 7(C)").

This Court's discussion of the language of Exemption 7(C) and of the proper test for application of that exemption may well have far-reaching implications for the future use of the

FOIA by journalists and writers, as well as by the general public. *Amici* therefore respectfully submit this brief in support of respondent.

SUMMARY OF ARGUMENT

The government claims that the photographs at issue in this case are shielded from FOIA disclosure under Exemption 7(C), which exempts records or information compiled for law enforcement purposes to the extent that such records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy," and which requires a balancing of the public interest in disclosure against the countervailing interest in keeping the requested information private. The government takes an overly narrow view of the public interest and an overly expansive view of the privacy interest in the withheld photographs.

There is plainly a strong public interest in the photographs. They were an important part of a government investigation into the death of a public official who died in an unnatural (and public) manner while in possession of information involving ongoing investigations of high-level government officials. The photographs also were relied upon by the numerous government inquiries and reports that examined the conduct of the initial investigation and the circumstances of the death. The photographs therefore "shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *United States Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 497 (1994) ("*FLRA*") (internal quotation marks omitted).

To evade this evident conclusion, the government attempts to minimize unduly the public interest in the photographs and, more generally, to limit the scope of permissible FOIA disclosure. The government focuses on the alleged personal interests of the FOIA requester in this case, but this focus is

improper: the identity of the requesting party has no bearing on the merits of the request, and there are other members of the public, including journalists and writers, with a strong interest in using the photographs to "shed light on" the government's activities. The government also urges this Court to graft onto the FOIA an extraordinarily restrictive test for determining the existence of a public interest where the asserted interest is in discovering government misconduct. But this new test, which would require the requester to come up with solid evidence of misconduct *in advance of* receiving the requested information and would entitle the government to internally "refute" the requester's theory *in advance of* any disclosure, is completely inconsistent with the FOIA. Further, the government contends that the public interest in this case is nonexistent because other material relating to the Foster death has been released and a number of official government investigations have been completed – but this contention ignores the independent significance of the records in question here, and gives the government a perverse incentive to disclose voluminous but irrelevant material in order to withhold a smoking gun.

In short, the government's public-interest arguments are meritless and should be rejected. There is plainly a public interest here in knowing what the government is up to. Indeed, given the use of the photographs in the various official inquiries into Foster's death, it is difficult to see how the government can plausibly take the position that the disputed photographs do not meaningfully advance this public interest. The FOIA reflects Congress's judgment that the public – not the government itself – is in the best position to engage in the full and searching scrutiny of agency conduct that is critical to the success of a representative government.

If the Court nevertheless concludes that there is no public interest in the photographs under existing law, it should reexamine its statement in *United States Department of Justice*

v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), that the public interest weighed under Exemption 7(C) is that of learning about the government's own activities. In amending the FOIA in 1996, Congress made clear that the *Reporters Committee* decision, which is not grounded in the language of Exemption 7(C), is overly narrow, and that records may properly be requested for any public or private purpose.

Finally, the government's analysis of the privacy interests at stake is as skewed as its public-interest analysis. Without question, the Foster family has suffered a terrible tragedy. Nevertheless, even assuming that Exemption 7(C) protects the privacy of third parties, the Foster family's privacy interests are minimal under the circumstances here. The Foster family's privacy already has been affected by the multiple government investigations and the prior release of massive amounts of information regarding the death. The release of several more photographs will create at most a marginal additional intrusion on their privacy, but could be the key to revealing the flaw in the government's investigations of the death. Under these circumstances, the strong public interest in release of the photographs outweighs any remaining privacy interest in keeping the photographs out of the public view.

ARGUMENT

I. There Is A Public Interest In The Release Of The Withheld Photographs

A. The Court of Appeals Correctly Found A Public Interest In Disclosure Of The Withheld Photographs

Exemption 7(C), the basis for the government's withholding here, requires a balancing of the public interest in disclosure against the countervailing interest in keeping the requested information private. There is clearly a weighty public interest in the photographs at issue in this case. No other

conclusion is consistent with this Court's precedent, with the FOIA's presumption in favor of disclosure, and with the underlying purposes that animate the FOIA.

This Court has repeatedly stated that the public interest advanced by the FOIA includes disclosure of information that "would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *FLRA*, 510 U.S. at 497 (alteration in original) (internal quotation marks omitted); *see also Reporters Comm.*, 489 U.S. at 773-75 (stating that the "core purpose of the FOIA" is contributing "significantly to public understanding of the operations or activities of the government" and "ensur[ing] that the Government's activities be opened to the sharp eye of public scrutiny" (internal quotation marks omitted)). The FOIA promotes the public interest in learning about government activities in order "to ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also id.* (noting the need to "check against corruption and hold the governors accountable to the governed"); *Reporters Comm.*, 489 U.S. at 772-73 (explaining that a "democracy cannot function" unless the people have a right to disclosure of government information (internal quotation marks omitted)); H.R. Rep. No. 89-1497 (1966). This aspect of the FOIA is of particular importance to *amici*, because it is often investigators, journalists, and writers who obtain information through the FOIA that they then disseminate to the citizenry. As this Court has recognized, the news media have been "a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965).

Because of the paramount importance of its protections, the FOIA embodies a general presumption in favor of

disclosure. *See, e.g.*, *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). Accordingly, as this Court has repeatedly emphasized, FOIA exemptions such as Exemption 7(C) are to be "narrowly construed." *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988) (cautioning that the "mandate of the FOIA calls for broad disclosure of Government records" (internal quotation marks omitted)); *see also* 5 U.S.C. § 552(a)(4)(B) (stating that "the burden is on the agency to sustain its action" in withholding records).

There are multiple public interests at stake here: an interest in examining the suspicious circumstances of a government official's death, an interest in determining whether the initial government investigation of that death was properly carried out, and an interest in determining whether the subsequent government inquiries and the resulting reports were themselves proper and accurate. *See* Respondent's Br. at 18. These investigations and reports involved a matter of great public interest: the circumstances of the unnatural death of a high-level government official who, at the time of his death, possessed knowledge of the actions of other high-level government officials, including the President – actions that were then under serious scrutiny and a matter of major political controversy. The investigations and reports also relied in part upon the requested photographs, which are included in the government's official record but have nevertheless been kept from the public view.[2]

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[2] It is irrelevant that the Office of Independent Counsel, which has custody of the disputed photographs, was not involved at every stage of the government's activities relating to Foster's death. The public interest relevant to Exemption 7(C)'s balancing test includes the interest in monitoring not only the agency that possesses the data at issue, but also other agencies and even Congress. *See, e.g.*, *Reporters Comm.*, 489 U.S. at 773 (discussing whether information requested would "shed any light on the conduct of any Government agency or official"); *id.* at 774 (inquiring

Under these circumstances, the Ninth Circuit correctly found a strong public interest in the release of the withheld photographs. The photographs are being sought precisely to "shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *FLRA*, 510 U.S. at 497 (internal quotation marks omitted). As the Ninth Circuit recognized, "[t]he statute establishes a right to look, a right to speculate and argue again." *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1172-73 (9th Cir. 2000); *see also, e.g.*, *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984) ("[T]he public may have an interest in knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner."). The requested information is thus at the very heart of the public interest promoted by the FOIA.

B. The Government's Interpretation Of The Public Interest To Be Weighed Under Exemption 7(C) Is Inconsistent With Congress's Judgment, Reflected In The FOIA, That Disclosure Of Information In The Possession Of The Federal Government Is The Best Way To Ensure Governmental Accountability

The government attempts to minimize unduly the public interest at stake here and, more generally, to narrow the scope of permissible FOIA disclosure. *First*, the government improperly stresses the alleged personal interests of the FOIA requester in this case rather than the broader public interest in disclosure of the photographs. *Second*, the government urges this Court to adopt and apply a newly minted and highly

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whether information requested would reveal anything "about the character of [a] Congressman's behavior"); *FLRA*, 510 U.S. at 495-96.

restrictive test for determining the existence of a public interest. *Third*, the government insists that the public interest in this case is diminished to the vanishing point because a mass of information relating to the Foster death has already been released and because a number of official government investigations have been undertaken. These arguments are meritless and should be rejected.

1. In arguing that there is no cognizable public interest at stake in this case, both the government and the Foster family emphasize the purported motives of Allan Favish, the FOIA requester, accusing him variously of being a conspiracy theorist, of having a "personal interest" in various "morbid matters," Gov't Br. at 35, of making a "ghoulish" request, Foster Br. at 9, of attempting to "feed his curiosity," Gov't Br. at 40, and of attempting to "supplement his own shadow investigation and to buttress his personal interpretation of the evidence," *id.* at 45-46. In short, both the government and the Foster family focus tightly on Favish's specific interest in using the information at issue in advancing his own cause, and pretend that no other public interest can possibly be at stake here.

This focus is an inappropriately limited one. It is well established that "the identity of the requesting party has no bearing on the merits of his or her FOIA request," *Reporters Comm.*, 489 U.S. at 771, and there are other members of the public with a strong interest in using the withheld photographs to "shed light on" the government's activities. S*ee id.* at 771-72 ("[W]hether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny, . . . rather than on the particular purpose for which the document is being requested." (internal quotation marks omitted)). For instance, copies of the

photographs at issue in this case were previously (and unsuccessfully) requested by Accuracy in Media, a media watchdog organization. The role of journalists, writers, academics, researchers, historians, and other members of the public in monitoring and evaluating the federal government's conduct here – and in using the FOIA to gather information about the government's activities more generally – should not be overlooked or discounted. *See id.* at 772 (explaining that "[t]he Act's sole concern is with what must be made public or not made public" (internal quotation marks omitted)); *see also, e.g.*, *Stern*, 737 F.2d at 92.

2. The government insists that there is no public interest at all in the withheld photographs. To reach this conclusion, the government proposes a new test for cases in which the interest alleged is in ferreting out government illegality or misconduct. The government's test would require a FOIA requester in such a case to "identify new (as opposed to already refuted), credible, and objectively reasonable evidence of misfeasance before an allegation of governmental misconduct will rise to the level of a cognizable public interest in disclosure." Gov't Br. at 38.

This test has no grounding in the text of the statute or the language of this Court's prior FOIA opinions; indeed, the government appears to have made it up out of whole cloth and designed it to foreclose the specific disclosure sought in the instant case. In addition, adoption of this test would have negative and far-reaching implications for FOIA requesters seeking all kinds of information as to which the government can plausibly assert the protection of Exemption 7(C) (or the closely related Exemption 6). On a number of grounds, this Court should decline the government's invitation to radically expand the scope of Exemption 7(C) and radically narrow the

scope of government disclosure of information under the FOIA.[3]

a. Although the government suggests that its proposed test has some basis in this Court's case law, *see* Gov't Br. at 34-38, that is simply not so.

The government places primary reliance on *United States Department of State v. Ray*, 502 U.S. 164 (1991), in which this Court addressed the strength of an asserted public interest in "ascertaining the veracity" of government interview reports with Haitian refugees, which the requester proposed to do by re-interviewing the refugees or otherwise using the requested records to obtain information outside of government files. *Id.* at 179. But, although the Court's decision noted that the asserted public interest, unsupported by a "scintilla of evidence," did not outweigh what it described as a "serious privacy interest," it left entirely open the question of "[w]hat sort of evidence of official misconduct might be sufficient to identify a genuine public interest in disclosure." *Id.* The Court therefore in no way decided that "new . . . , credible, and objectively reasonable evidence of misfeasance," Gov't Br. at 38 – let alone "clear evidence," a phrase that the government also employs in discussing its test, *id.* at 37-38 – is required in order to establish the existence of a public interest.

The government's other sources of Supreme Court authority are similarly indeterminate in this case. The government claims that several cases discussing a general presumption of legitimacy for government conduct support the view that only "clear evidence" can overcome the presumption.

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[3] The Foster family argues in favor of an even stricter test that would require "compelling evidence" of "government malfeasance." Foster Br. at 14 (citing *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991)). For the reasons discussed below with respect to the government's proposed test, this stricter test is infirm and should be rejected.

See Gov't Br. at 37-38. But the cases all arise in contexts radically different from the FOIA, which embodies a presumption in favor of disclosure and which applies in every case to information about government activities. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456 (1996) (interpreting Fed. R. Crim. P. 16 and addressing selective-prosecution claim); *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) (addressing validity of orders relating to patents made by Alien Property Custodian); *United States v. Nix*, 189 U.S. 199 (1903) (addressing statute allowing reimbursement of marshals' costs); *see also supra* at 7-8.

The government's reliance on *Armstrong* is particularly misplaced, and illustrates the basic fallacy of the government's attempt to translate these cases into the FOIA context. To be sure, *Armstrong* did decide that in order to "*prove* a selective-prosecution claim" a claimant must present "clear evidence" of discriminatory treatment. *Armstrong*, 517 U.S. at 464, 468 (emphasis added). But the Court settled on a quite different, and less stringent, standard as establishing the "requisite showing to establish entitlement to discovery": "some evidence tending to show the existence" of discrimination. *Id.* at 468-69; *see also id.* at 463-64, 468 (applying a presumption against discovery because discovery might "divert prosecutors' resources and . . . disclose the Government's prosecutorial strategy").

In a FOIA case, of course, the requester's immediate goal is not to establish liability or otherwise to *prove* anything. He is merely attempting to extract information from the government that will shed light on the government's activities, and that may or may not indicate a government coverup, or the success of some government policy, or an official's abuse of his position, or an agency's successful implementation of its mandate – all matters in which the public has an interest. As this Court has recognized, the hurdle for obtaining information

in the first instance cannot be so high as to permit only those with no need for the information to actually obtain it. *See generally United States Dep't of Justice v. Landano*, 508 U.S. 165, 176-77 (1993); *Rose*, 425 U.S. at 361 (discussing presumption in favor of disclosure). This Court has not adopted or even suggested endorsement of the government's proposed test.

b. The government's proposed test would create what is effectively an irrebuttable presumption against disclosure – the opposite of the disclosure-friendly presumption that the FOIA commands. Accordingly, the government's test is not only unsupported by this Court's FOIA precedent, but flies in the face of the basic principles established by that precedent and by the statute itself.

Under the government's approach, a FOIA requester would have to present "new (as opposed to already refuted)" evidence of government misconduct in order to establish even the most minimal public interest for purposes of an Exemption 7(C) analysis. Gov't Br. at 38. The government apparently believes that evidence has been "refuted" when it has been rejected by an official government body such as the Office of Independent Counsel – in other words, that the government can justify its refusal to turn over information on the sole ground that the government has previously announced that the information is not significant or probative. This approach is nonsensical. The government always has an incentive to protect itself from allegations of misconduct, and the purpose of the FOIA is to allow the public to see for itself what underlies the government's pronouncements.

Indeed, in light of the important use that has already been made of the photographs at issue by various official investigators in iterative investigations, the government's position cannot plausibly be that the withheld information does

not advance the public interest by shedding light on the government's activities. Rather, the government seeks a decision from this Court that allows an agency to choose who – if anyone – shines the light. But the FOIA rejects that scenario. Congress was well aware of the "[i]nnumerable times" that agencies had withheld information under prior law "only to cover up embarrassing mistakes or irregularities," S. Rep. No. 89-813, at 3 (1965), and chose to write a statute that opened government files to the public at large and made "disclosure, not secrecy, . . . the dominant objective," *Rose*, 425 U.S. at 360-61.

The government's proposed test would also require the FOIA requester to somehow advance "credible[] and objectively reasonable evidence of misfeasance before an allegation of governmental misconduct will rise to the level of a cognizable public interest in disclosure." Gov't Br. at 38; *see also SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991) (requiring "compelling evidence"). But obvious "[c]onsiderations of 'fairness' . . . counsel against the Government's rule." *Landano*, 508 U.S. at 176. It will quite frequently be the case that the only material that would yield credible evidence of government misconduct is precisely the material that has been requested under the FOIA because it is locked away inside the government's own files. Thus, the requester will rarely be in a position to offer evidence that meets the government's criteria, and the government would then nearly always be able to shield requested information – and its own acts – from public view. *See id.* at 177 (rejecting the government's argument for exemption from disclosure for FBI criminal investigative sources and noting that "the requester . . . very rarely will be in a position to offer persuasive evidence that the source in fact had no interest in confidentiality").

As in *Landano*, therefore, the government's "proposed presumption, though rebuttable in theory, is in practice all but irrebuttable." *Id.* Indeed, this is illustrated by experience under the similar (although somewhat stricter) rule set forth by the D.C. Circuit in *SafeCard*, 926 F.2d 1197, which requires "compelling evidence that the agency denying the FOIA request is engaged in illegal activity" in order to establish a cognizable public interest. *Id.* at 1205-06. *SafeCard*, like the government's test here, creates a categorical rule based not on the type of record sought, as this Court has suggested might be proper, *see Reporters Comm.*, 489 U.S. at 778, but rather on the kind of public interest that has been asserted – an interest in exposing government misconduct. The *SafeCard* rule has been applied in a number of Circuits and has almost always resulted in withholding of the disputed information. *See, e.g.*, *Oguaju v. United States*, 288 F.3d 448, 451 (D.C. Cir. 2002); *Neely v. FBI*, 208 F.3d 461, 464-65 (4th Cir. 2000). Thus, the kind of categorical approach the government espouses is equivalent to a blanket exemption, not a balancing test. This is hardly consistent with the FOIA's mandate, as repeatedly explicated in this Court's opinions, which "calls for broad disclosure of Government records," and with the well-established rule that the exemptions are given a narrow construction. *CIA v. Sims*, 471 U.S. 159, 166 (1985). It also shifts the burden to the FOIA requester to justify the need for disclosure, in contravention of the statutory language placing the burden on the government to justify withholding of requested records. *See* 5 U.S.C. § 552(a)(4)(B).

Accordingly, the government's rule would turn the FOIA on its head, transforming a statute that is supposed to ensure disclosure subject to limited exceptions into a statute that, in a significant category of cases, ensures government secrecy and public ignorance. Such a rule, with consequences reaching far beyond the facts of this case, would prevent journalists from

exposing government waste or fraud; it would prevent writers and historians from exposing and anatomizing past government wrongdoing; it would prevent analysts from assessing the success or failure of the government's initiatives; and it would prevent the public in general from finding out what its government is up to. *See generally* H.R. Rep. No. 104-795, at 7 (1996) ("FOIA access to unpublished agency records has resulted in many disclosures of waste and fraud in the Federal Government . . . . Exposures resulting from FOIA disclosures, and the reactions they produce, are critical to maintaining a free society."). Neither the agencies nor the courts are "free to engraft that policy choice onto the statute that Congress passed." *Landano*, 508 U.S. at 180-81.

c. Moreover, it is important to recognize that this Court's public-interest standard encompasses far more than an interest merely in exposing government misconduct.

The government states that its proposed test is intended to apply "only when . . . the public interest asserted is an interest in exposing alleged missteps by governmental actors in the . . . execution of their duties." Gov't Br. at 38-39. But the Court of Appeals cases on which the government relies are not all limited in this way. Most notably, the D.C. Circuit's decision in *SafeCard*, which has been adopted by some other Circuits, can be read to presume that the *only* cognizable public interest that might weigh into the Exemption 7(C) balance is an interest in exposing government misconduct (assuming, that is, that the requester can come up with "compelling evidence" of that misconduct). *SafeCard*, 926 F.2d at 1205-06 ("[U]nless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the names of private individuals appearing in the agency's law enforcement files 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."); *see also* Gov't Br. at 34 n.19; Foster Br. at 14.

This Court should not adopt such a cramped view of the public interest as its general rule of decision – even though the public interest that respondent has asserted in *this* case can indeed be categorized as an interest in "exposing alleged missteps by governmental actors." Gov't Br. at 39. Ferreting out illegalities or missteps is only a small subset of the larger public interest in monitoring and assessing the government's conduct. Indeed, this Court has previously noted that broader assertions of public interest may be relevant, stating that "matters of substantive law enforcement policy . . . are properly the subject of public concern." *Reporters Comm.*, 489 U.S. at 766 n.18. Limiting the public interest to discovery of governmental misconduct, or implying that such a limitation exists, would negatively affect a broad range of socially useful FOIA requests – requests for government data demonstrating the success or failure of a particular policy choice, for example – that fall well within the ambit of the *Reporters Committee* public-interest standard.

3. The government also suggests that the sheer mass of material about the Foster case that has already been released necessarily diminishes the public interest in the disclosure of the withheld photographs. This suggestion is deeply misguided. Mere release of information – even a great deal of it – relating to the same subject matter as a FOIA request does not necessarily, or even likely, indicate that the material covered by the request will not itself illumine the government's activities and policies. The issue is whether the record in question itself is meaningful, not whether there has been a voluminous disclosure of other records.

To be sure, as the government points out, courts have sometimes noted the existence of previously released

information in determining the applicability of Exemption 7(C). But in these cases the deciding factor is always the quality and significance of the undisclosed material. For instance, this Court's decision in *Ray*, upon which the government relies, describes the unredacted, already released portions of the documents at issue and discusses how the released information serves the public interest. *See Ray*, 502 U.S. at 178-79. But the decision to permit continued withholding of the redacted names of Haitian refugees turned not on the volume of the unredacted material, but rather on the fact that "the redacted identifying information" would not itself "shed any additional light on the Government's conduct of its obligation"; any public benefit depended on using the names to track down and interview the refugees, an enterprise that this Court found to be of dubious worth, and "[m]ere speculation about hypothetical public benefits" did not "outweigh [the] demonstrably significant invasion of privacy" involved in the record release. *Id.*

Nor is the government aided by the additional cases upon which it relies. *See* Gov't Br. at 42 n.25; *see also* Foster Br. at 21. In *Bast v. United States Department of Justice*, 665 F.2d 1251 (D.C. Cir. 1981), for example, the court found that some of the requested documents were protected from disclosure because they contained only "minor details of the FBI and Justice Department investigations" – but the court did release one portion of the materials with independent significance, despite the fact that a "substantial release of information" had already been made in the case. *Id.* at 1255-56 (releasing a section of an FBI report that suggested judicial bias because of the "public importance of judicial impartiality").[4]

[4] The other cited cases are similar, explaining that it is the public interest in the specific records requested that must be weighed in the balance and then evaluating the independent relevance or irrelevance of the specific information sought. *See, e.g.*, *Halloran v. Veterans Admin.*, 874 F.2d 315,

In this case, the materials sought are not merely names or minute details that are unrelated to the relevant public interest. Rather, they are pieces of additional, nonduplicative evidence that are capable, due to the angle from which they were taken or the area of the scene that they reveal, of bringing entirely new facts to light or of generating new and different evaluations of the evidence. And even if the photographs are inconclusive, or lead only to the conclusion that the official investigations reached the correct judgment about the circumstances of Foster's death, the disclosed records will have contributed significantly to the public's understanding of the government's activities.[5]

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324 (5th Cir. 1989) (explaining that disclosure of redacted names "will add little to the public's understanding" but stating that "[w]e do not mean to belittle the fact that redactions – particularly of names and identifying information – may nonetheless impede knowledge and understanding of the government's actions"); *Marzen v. Department of Health & Human Servs.*, 825 F.2d 1148, 1153 (7th Cir. 1987) (determining that the specific material sought simply would not contribute to public debate); *Stone v. FBI*, 727 F. Supp. 662, 667-68 (D.D.C. 1990) (stating that the redacted names of law enforcement officers would not "be anything other than an insignificant detail in terms of the public interest" and that the benefits from interviewing those officers were purely speculative), *aff'd*, No. 90-5064, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990).

[5] The government somewhat inexplicably contends that the proposed use of the photographs is nothing more than a derivative one because "the photographs themselves reveal nothing directly about the Office of Independent Counsel's activities." Gov't Br. at 45-46 & n.26. But there is no call in this case for this Court to address whether derivative use is ever permissible, a question that this Court has previously left open and as to which the Circuits are in disagreement. *See Ray*, 502 U.S. at 179; *Sheet Metal Workers Int'l Ass'n, Local No. 9 v. United States Air Force*, 63 F.3d 994, 998 (10th Cir. 1995); *see also* Gov't Br. at 46 (erroneously suggesting that this Court's *FLRA* decision, which was based on the conclusion that there was no public interest in the requested materials and the interaction between the FOIA and the labor laws, *see FLRA*, 510 U.S. at 497-98, stated that derivative use was not proper). Here, there is no necessity for an extra

In fact, although the government cites the number of official investigations of Foster's death as evidence that there is nothing more to be discovered here, the obviously felt need to repeatedly investigate and re-investigate the Foster case actually leads to quite the opposite conclusion – that there has been a level of suspicion on the part of even government officials that the whole truth has not been uncovered, and that something further remains to be ferreted out. *See* Gov't Br. at 35-36 ("[E]ach subsequent investigation was undertaken for the express purpose of addressing and resolving doubts that had been posited both about Foster's death and the predecessor inquiries."); *see also id.* at 45 (noting continuing public interest in Foster death as reflected in published books and websites). Respondent's exhaustive discussion of the various inconsistencies in the existing investigative reports helps to demonstrate why that suspicion is justified. *See* Respondent's Br. at 18-40.

In addition, according the sheer tonnage of already-released information, great weight in the 7(C) public-interest analysis, as the government proposes, would give the government a very perverse incentive indeed – to release large quantities of relevant (or even not particularly relevant) information while holding back the most embarrassing or damaging material. This scenario is not a far-fetched one, especially in a case that is premised on the existence of some government wrongdoing or coverup in the first instance. After all, the FOIA was enacted – replacing a statute that exempted

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step or resort to additional sources of information in order for the photographs to advance the public interest; the photographs themselves are likely to shed light on whether or not the Office of Independent Counsel and other federal government actors have adequately investigated the Foster death. *See supra* note 2 (explaining that requested records need not shed light on the specific activities of the agency that happens to be the record custodian).

from disclosure "any matter relating solely to the internal management of an agency," *Rose*, 425 U.S. at 362 (quoting 5 U.S.C. § 1002 (1964 ed.)) – in recognition of the fact that government agencies are naturally inclined to be protective of the information within their possession and to release it only under a certain amount of legal duress. *See EPA v. Mink*, 410 U.S. 73, 80 (1973) (stating that the FOIA "attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands"); *Reporters Comm. for Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987) (acknowledging "the understandable reluctance of government agencies to part with [requested] information" due to their "institutional interests"), *rev'd on other grounds*, 489 U.S. 749 (1989); *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 259 (D.C. Cir. 1977); H.R. Rep. No. 92-1419, at 8-10 (1972).

Indeed, the government's argument would resurrect a problem analogous to that resolved by Congress in favor of the requester in its 1974 amendment to Exemption 7. Congress was concerned that the original language of Exemption 7, which allowed withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party," was resulting in "[e]vasional commingling" – *i.e.*, the placement of "otherwise nonexempt materials with exempt materials in a law enforcement investigatory file" in order to "claim protection from disclosure for all the contents." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155-57 (1989) (quoting Pub. L. 89-487, § 3(e)(7), 80 Stat. 251) (internal quotation marks omitted). Congress thus amended Exemption 7 to "require[] the Government to demonstrate that a record is 'compiled for law enforcement purposes' and that disclosure would effectuate one or more of . . . six specified harms." *Id.*

Here, the government seeks permission from this Court to engage in evasional document release – the release of nonexempt materials that may be innocuous, duplicative, or only tangentially relevant to the request in order to claim protection from disclosure of whatever small number of records have been withheld, regardless of those documents' independent significance in serving the public interest. This standard would be inconsistent with Congress's intent and with the purpose of the FOIA, and this Court should not adopt it. Rather, the withheld records in this case should be independently assessed in order to determine whether they contribute to the public's understanding of the government's activities regarding Foster's death. *Cf. United States v. Nixon*, 418 U.S. 683, 710 (1974) ("[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

* * *

In the end, it is plain that there is a public interest in this case in the release of the withheld photographs. Whatever the ultimate results of the Exemption 7(C) balancing process, this Court should recognize the existence of that public interest in knowing what the government is up to and should reject the government's attempt to create an insurmountable public interest hurdle.

C. If The Court Does Not Find A Public Interest Under Existing Law, The Court Should Revisit Its *Reporters Committee* "Public Interest" Standard In Light Of The 1996 Amendments To The FOIA

If the Court does not find a cognizable public interest in this case under existing law despite the clear significance of the withheld photographs in shedding light on the government's activities, the Court should revisit *Reporters Committee's*

articulation of the "public interest" standard in light of recent congressional action that this Court has not previously considered. In 1996, Congress amended the FOIA by enacting the Electronic Freedom of Information Act ("EFOIA"). *See* Pub. L. No. 104-231, § 3, 110 Stat. 3048 (1996) (amending 5 U.S.C. § 552). Through this amendment, Congress made clear that the public-purpose inquiry set forth in *Reporters Committee*, which asks only whether the requested information would shed light on the government's activities, is overly narrow. These views of a subsequent Congress on the meaning of the earlier-enacted Exemption 7(C) have persuasive force. *See, e.g.*, *Bell v. New Jersey*, 461 U.S. 773, 784-86 (1983). If necessary, therefore, the Court should clarify that the relevant public interest under the FOIA encompasses other types of government information in which the public has a legitimate interest.

In the "Findings and Purposes" section of the EFOIA, Congress found:

> [T]he purpose of section 552 of title 5, United States Code, popularly known as the Freedom of Information Act, is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for *any public or private purpose.*

Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048 (1996) (emphasis added). As this Court has repeatedly made clear, such Congressional findings and purposes in the text of a statute are entitled to interpretative weight. *See, e.g., Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197-98 (2002); *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990).

Moreover, as the sponsor of the legislation explained in an accompanying Senate Report, this language was intended to express the view that "[t]he reasoning of the Supreme Court in *Department of Justice v. Reporters Committee* and the *United States Department of Defense v. Federal Labor Relations Authority* analyzed the purpose of the FOIA too narrowly. The purpose of the FOIA is not limited to making agency records and information available to the public only in cases where such material would shed light on the activities and operations of Government." S. Rep. No. 104-272, at 23-32 (1996) ("Additional Views of Senator Leahy") (footnote omitted). The *Reporters Committee* decision and subsequent "[e]fforts by the courts to articulate a 'central purpose' for which information should be released," the sponsor stated, "impose[] a limitation on the FOIA which Congress did not intend and which cannot be found in its language, and distorts the broader import of the Act in effectuating Government openness." *Id.*; *see also* Patrick J. Leahy, *The Electronic FOIA Amendments of 1996: Reformatting the FOIA for On-Line Access*, 50 Admin. L. Rev. 339, 340 (1998). These clearly expressed views of the sponsor of the EFOIA legislation are entitled to particular weight. *See, e.g.*, *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982); *Will EFOIA Amendments Affect Reporters Committee?*, 22 Access Reports: Freedom of Information 1, 2-3 (Oct. 9, 1996).

In criticizing *Reporters Committee* and discussing the purpose of the language in the "Findings" section of the legislation, the sponsor cited and relied upon the analysis in Justice Ginsburg's concurring opinion in *FLRA*, which acceded to the precedential force of *Reporters Committee* while disagreeing with its analysis. *FLRA*, 510 U.S. at 507-508 (Ginsburg, J., concurring). As Justice Ginsburg explained:

> The *Reporters Committee* "core purpose" limitation is not found in FOIA's language. A FOIA requester need not

> show in the first instance that disclosure would serve any public purpose, let alone a "core purpose" of "open[ing] agency action to the light of public scrutiny" or advancing "public understanding of the operations or activities of the government." Instead, "[a]n agency must disclose agency records to any person . . . 'unless [the records] may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b).'"

Id. (citations omitted) (alteration in original).

Indeed, as Congress plainly recognized in 1996, the *Reporters Committee* limitation may be interpreted in such a way as to keep from public view a wide variety of important public records, contrary to the basic purposes for which the FOIA was enacted. For instance, "Federal Aviation Administration airline maintenance records, results of Food and Drug Administration clinical trials . . . [, or] economic data compiled by the Department of Commerce" all shed light on matters of public interest but may be found by courts not to shed direct light on government activities. Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the* Reporters Committee *"Central Purpose" Reformulation,* 54 Admin. L. Rev. 984, 990 (2002); *see also* S. Rep. No. 104-272, at 2 (1996), and H.R. Rep. No. 104-795, at 2 (1996) (stating that the FOIA "has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards"). The *Reporters Committee* standard may therefore potentially block access to many government records that happen to contain individuals' names or other personal information – and "[w]hen the public can learn nothing about how government affects or is affected by individuals, it can learn very little from its FOI[A] requests." *Electronic Freedom of Information Act of 1996: Hearings Before the Subcomm. on Gov't Mgmt., Info. & Tech. of the House Comm. on Gov't Reform & Oversight*, 105th Cong.

(June 9, 1998) (testimony of Jane E. Kirtley, then-Executive Director of the Reporters Committee for Freedom of the Press) (discussing effect of EFOIA findings and explaining limitations *Reporters Committee* standard places on investigative journalism), *available at* www.rcfp.org/news/documents/efoia_testimony.html.

Accordingly, in light of the 1996 EFOIA and concerns raised by Justice Ginsburg and others, the Court should – assuming that it does not find an adequate public interest in this case under current law – revisit and reform the "central purpose" test set forth in *Reporters Committee*, which is not grounded in the language of the FOIA and is inconsistent with the statute's important goals. This Court should make clear the FOIA encompasses information requested for *any* public or private purpose, including a purpose distinct from "shed[ding] light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773.

II. Any Applicable Privacy Interests In The Withheld Photographs Are Entitled To Only Limited Weight

The government not only unduly minimizes the public interest at stake in this case; it also gives undue weight to the relevant privacy interests. It is undeniable that the Foster family has experienced a tragic loss, and that the publicity surrounding Foster's death has magnified their suffering. However, even assuming that Foster's family members have any statutorily cognizable privacy interest in the photographs at issue in this case – a proposition that is far from certain – that interest is diminished by the extensive release of information about his death that has already taken place, as well as by his status as a high-level government official whose unnatural death occurred at a time when he had knowledge of important political matters.

As the government points out, this is a case in which the Foster family has already been subjected to a great deal of probing and publicity about the death of their loved one. There have been numerous official investigations, countless stories in the news media, several books published, and a number of websites devoted to discussing the controversy over the death and the resulting government inquiries. These public discussions of the Foster death have been fed by official reports, along with government disclosure of thousands of pages of evidence and more than one hundred photographs associated with the death. *See, e.g.*, Gov't Br. at 15, 41-42, 49-50. One of the photographs at issue here – a picture of Foster's hand holding a gun – has already been published by *Time* magazine. *See id.* at 8. This kind of publicity – and a strong public interest in the case – is ongoing; the websites remain active, the books are in print, and the government reports are available for general consumption.

In these circumstances, any zone of privacy around the Foster family with respect to the death has already been irreversibly invaded, and the release of a handful of additional photographs will not impose meaningful additional harm under Exemption 7(C). *See, e.g.*, *Fund for Constitutional Gov't v. National Archives & Records Serv.*, 656 F.2d 856, 865 & n.22 (D.C. Cir. 1981); *Grove v. CIA*, 752 F. Supp. 28, 32 (D.D.C. 1990). *Compare, e.g.*, *Reporters Comm.*, 489 U.S. at 763-64 (explaining that information that was already in the public record was cloaked in "practical obscurity" and thus did not diminish privacy interest); *FLRA*, 510 U.S. at 500-01 (finding at least some privacy interest in list of home addresses where it was possible that some of the addresses might "be available to the public in some form"); *Bast*, 665 F.2d at 1254-55 (stating that prior "journalistic speculation" does not diminish privacy interest and that in such a case renewed publicity with

"imprimatur of an official investigation" can harm privacy interest).[6]

The Foster family's privacy interest is also diminished by Foster's particular circumstances. Not only was Foster a high-level government official, but he died in an unnatural (and very public) manner at a time in which he was embroiled in a high-profile political controversy. Foster's own privacy interests were clearly lessened under these circumstances, although not entirely erased. *See, e.g.*, *Quinon v. FBI*, 86 F.3d 1222, 1230 (D.C. Cir. 1996); *Fund for Constitutional Gov't*, 656 F.2d at 865 & n.22; *Common Cause v. National Archives & Records Serv.*, 628 F.2d 179, 184 (D.C. Cir. 1980). To the extent that his family's interests are based solely on disclosures about Foster, their interests are similarly diminished; they can have had no expectation that Foster would be free from highly public scrutiny, and therefore they necessarily sacrificed some of their own privacy as to disclosures *about him* when he took up his Deputy Counsel position. And, contrary to the government's assertion, *see* Gov't Br. at 21 n.10, it is possible that release of the photographs at issue would actually have the result of quieting or even settling the ongoing controversy about Foster's death, thus increasing the family's privacy over the long term.

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[6] In particular, there can be no privacy interest to speak of in the requested photograph that has already been published in a national magazine. Although the government, if indeed it was not responsible for the release of this photograph in the first instance, may not have formally waived its Exemption 7(C) arguments with respect to the photograph, re-release of the photograph can cause no conceivable harm to the Foster family. Anyone with an interest in seeing the photograph, in publishing it in a medium in which the Foster family might see it again, or in using it as the basis to ask the family questions or write about Foster's death, can do all of those things now using the copy that has already received wide circulation. In addition, the photograph does not appear to be in any way graphic or lurid.

Most importantly, the multiple government inquiries and the massive amount of previously released information diminish the Foster family's privacy interest but in no way reduce the public interest in disclosure of the withheld photographs. Each photograph here can individually contribute to the advancement of the public interest; indeed, one of the photographs may be a smoking gun that strongly demonstrates the government's misconduct or proves the government's good faith. On the other hand, given the tremendous amount of intimate detail about Foster and his death that already has been made public, the impact on the Foster family's privacy of the release of additional photographs is muted.

In short, although the Foster family has undoubtedly endured terrible suffering, under the circumstances here, the powerful public interest in release of the photographs outweighs any privacy interest that may be at stake.

CONCLUSION

The portion of the judgment below ordering release of the photographs should be affirmed.

Respectfully submitted,

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