No. 11-342

In the Supreme Court of the United States

THEODORE KARANTSALIS, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the public disclosure under the Freedom of Information Act, 5 U.S.C. 552, of booking photographs of an individual who pleaded guilty to securities fraud "could reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(7)(C), because the privacy interest in such records outweighs a purported public interest in disclosure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 635 F.3d 497. The opinion of the district court (Pet. App. 22a-37a) is not published in the *Federal Supplement* but is available at 2009 WL 6058930.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2011. A petition for rehearing was denied on June 16, 2011 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on September 13, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In April 2003, a federal grand jury indicted Luis Giro on securities fraud charges. Giro fled the country and remained a fugitive until he was apprehended in 2009. In May 2009, Giro was processed into the custody of the United States Marshals Service (USMS or Service). On June 22, 2009, Giro pleaded guilty and, on October 23, 2009, a district court sentenced him to 26 months of imprisonment, to be followed by three years of supervised release. The district court also ordered Giro to pay $1.85 million in criminal restitution. Pet. 3 & n.1; see 635 F.3d 497, 499 (opinion of the court of appeals);[1] Decl. of William E. Bordley (Bordley Decl.) ¶ 3 (D. Ct. Doc. 4, Exh. 1); see also *United States* v. *Giro*, No. 1:03-CR-20283 (S.D. Fla.). In March 2011, Giro was released from imprisonment. See Federal Bureau of Prisons, Inmate Locator, http://www.bop.gov/iloc2/LocateInmate.jsp (inmate number 86124-004).

When the Marshals Service processed Giro into its custody in May 2009, the Service took booking photographs—colloquially known as "mug shots"—of Giro. 635 F.3d at 499. The Service maintains booking photographs, including the photographs of Giro, in a Privacy Act system of records. See Bordley Decl. ¶¶ 3-4; 72 Fed. Reg. 33,519-33,520 (2007) (describing the Service's Prisoner Processing and Population Management/Prisoner Tracking System).

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[1] The petition appendix does not accurately reproduce the opinion of the court of appeals. Compare 635 F.3d at 501-502 with Pet. App. 8a-11a (erroneously printing two paragraphs and one heading at *id.* at 9a-10a that appear later in the court's opinion). The petition appendix also includes other errors. See, *e.g.*, *id.* at 19a ("per comm" (curiam) and "en bang" (banc)). This brief therefore cites the *Federal Reporter* when citing the opinion of the court of appeals (635 F.3d 497).

The Privacy Act of 1974, 5 U.S.C. 552a, makes it unlawful for a federal agency to disclose such records without the prior written consent of the individual to whom the record pertains, unless a statutory exception applies. 5 U.S.C. 552a(b). One exception permits disclosures for a "routine use" published in the *Federal Register*. 5 U.S.C. 552a(a)(7), (b)(3) and (e)(4)(D). The Marshals Service has published routine uses permitting disclosures of booking photographs, *inter alia*, to any federal, state, local, or foreign law-enforcement authority "where the information is relevant to the recipient entity's law enforcement responsibilities," and to the public—including the news media—when it would serve a law-enforcement function. 72 Fed. Reg. at 33,520 (routine uses (b) and (e)); 28 C.F.R. 50.2(b)(7) (generally forbidding Department of Justice officials from disclosing "photographs of a defendant unless a law enforcement function is served thereby"). Marshals Service policy accordingly directs that "[p]risoner bookings are confidential" and that "[b]ooking photographs may be released only for fugitives in order to aid in their capture." USMS Policy Directive 1.3, Media § A.3.i (reproduced at Bordley Decl., Exh. F); cf. 28 C.F.R. 50.2(b)(8) (information about fugitives); 72 Fed. Reg. 9777 (2007) (publishing routine uses for records about fugitives in Marshals Service's Warrant Information Network system of records).

b. On July 11, 2009, after Giro had pleaded guilty but before he was sentenced, petitioner submitted a request for copies of Giro's "mug shot photos" to the Marshals Service under the Freedom of Information Act (FOIA), 5 U.S.C. 552. See 635 F.3d at 499.

FOIA generally requires that federal agencies make agency records available to "any person" who has sub-

mitted a "request for [such] records," unless a statutory exemption or exclusion applies. 5 U.S.C. 552(a)(3)(A); see 5 U.S.C. 552(b) (FOIA exemptions) and (c) (exclusions); *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754-755 (1989) (*Reporters Committee*). FOIA Exemption 7(C) is relevant to this case.

Exemption 7(C) exempts from mandatory disclosure records or information compiled for law enforcement purposes if the production of such records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). To determine whether disclosure of the requested records could reasonably be expected to constitute an "unwarranted" invasion of privacy, agencies and the courts balance the affected "privacy interest" against the requester's asserted "public interest in disclosure." *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 171 (2004) (citing *Reporters Committee*, 489 U.S. at 762).

The "privacy interests" protected by Exemption 7(C) cover a broad range of interests that "encompass[es] the individual's control of information concerning his or her person." *Reporters Committee*, 489 U.S. at 763-764 & n.16; see *Favish*, 541 U.S. at 165. The "only relevant 'public interest in disclosure,'" in turn, "is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government.'" *Department of Defense* v. *Federal Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (*DoD*) (quoting *Reporters Committee*, 489 U.S. at 775) (brackets in original; emphasis omitted); see *id.* at 497 n.6.

2. After the Marshals Service denied petitioner's FOIA request, he filed this action in district court. The district court granted summary judgment to the government, holding that Exemption 7(C) exempted Giro's booking photographs from mandatory disclosure under FOIA. Pet. App. 22a-37a.

a. The district court determined that "the booking photographs sought by [petitioner] implicate Giro's personal privacy." 635 F.3d at 503.[2] The court concluded that "a booking photograph is a unique and powerful type of photograph that raises personal privacy interests distinct from normal photographs." *Ibid.* "A booking photograph," the court explained, "is a vivid symbol of criminal accusation, which, when released to the public, intimates, and is often equated with, guilt." *Ibid.* The court also emphasized that a booking photograph "does more than suggest guilt": it "raises a unique privacy interest" because it "captures the subject in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties," moments that otherwise normally are not "exposed to the public eye." *Ibid.*

The district court rejected petitioner's contention that Giro had no "continuing personal privacy interest in preventing public dissemination of his booking photographs" because, according to petitioner, the photographs had been published through INTERPOL when Giro was a fugitive and Giro had since appeared in open court to plead guilty. 635 F.3d at 503. First, the court concluded that Giro's booking photographs, which were

[2] The district court's opinion is reproduced as a part of the court of appeals' opinion. See 635 F.3d at 499-505. This brief cites to that reproduction in the *Federal Reporter* when citing the district court's opinion. Cf. note 1, *supra*.

taken in May 2009 after Giro's fugitive status ended, had not been released. *Ibid.* The court accepted the government's showing that the FBI had submitted Giro's driver's license (not booking) photograph to INTERPOL and concluded that "a driver's license is a substantially different type of photograph than a mug shot." *Ibid.*; cf. Bordley Decl. ¶ 13 (explaining that the FBI issued an INTERPOL red notice with Giro's driver's license photograph, which the FBI asked "not to be circulated to the media or published on INTERPOL's public internet site"). Second, the court determined that Giro's appearance in open court did not eliminate his "continuing personal privacy interest" in his booking photographs, which "do[] more than suggest guilt" and "capture[] an embarrassing moment that is not normally exposed to the public eye." 635 F.3d at 503.

b. Turning to petitioner's asserted "public interest" in disclosure, the district court held that there was no "public interest that would be served by releasing the booking photographs of Giro." 635 F.3d at 504. The court rejected petitioner's contention that the booking photographs "will reveal, by Giro's facial expressions, 'whether he received preferential treatment,'" explaining that a prisoner's facial expression at his booking is not "a sufficient proxy" for determining whether the prisoner is receiving preferential treatment. *Ibid.* The court further explained that "the general curiosity of the public in Giro's facial expression * * * is not a cognizable interest" under Exemption 7(C) because disclosure would not "'contribute significantly to public understanding of the operations or activities of the government.'" *Ibid.* (quoting *Reporters Committee*, 489 U.S. at 775).

For those reasons, the district court concluded that the Exemption 7(C) "balance weighs heavily against disclosure" because the court found no "discern[i]ble interest" in disclosure and concluded that Giro retained a "substantial personal privacy interest in preventing public dissemination of his non-public booking photographs." 635 F.3d at 504. The court accordingly held that the government appropriately denied petitioner's FOIA request under Exemption 7(C). *Ibid.*

3. The court of appeals affirmed. 635 F.3d 497. The court concluded that the district court's opinion was "a comprehensive and scholarly discussion of the issues and law." *Id.* at 499. The court of appeals therefore "adopt[ed]" the district court's opinion as its own and "attach[ed]" that decision to its own opinion. *Ibid.* The court noted the Sixth Circuit's contrary decision in *Detroit Free Press, Inc.* v. *Department of Justice*, 73 F.3d 93 (1996), but stated that it "respectfully reject[ed] its holding." 635 F.3d at 499.

ARGUMENT

The court of appeals correctly held that Exemption 7(C) protects from mandatory disclosure under FOIA the booking photographs of Luis Giro that were taken when the Marshals Service took him into custody. The court based that conclusion on two determinations: (1) Giro possesses a legitimate privacy interest under Exemption 7(C) in preventing the public disclosure of the photographs, and (2) no cognizable public interest favors mandatory FOIA disclosure. Although the decision below conflicts with that of one other court of appeals on the question whether booking photographs implicate any privacy interests of the individuals depicted, that division of authority concerning the first half of the

Exemption 7(C) inquiry applies only in the booking-photograph context; is of very recent vintage; and concerns an issue currently pending in another court of appeals. In the government's view, in these circumstances review by this Court would be premature at the present time.

1. Petitioner contends (Pet. 7-13) that an individual convicted of a federal felony has no privacy interest under Exemption 7(C) in the non-disclosure of his booking photographs. The court of appeals correctly rejected that contention.

a. Exemption 7(C) protects a "statutory privacy right" that "goes beyond the common law and the Constitution." *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 170 (2004). It embodies a broad "concept of personal privacy" that is inconsistent with a "limited or 'cramped notion' of that idea." *Id.* at 165 (quoting *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989)). The right to personal privacy in Exemption 7(C), for instance, "encompass[es] the individual's control of information concerning his or her person." *Reporters Committee*, 489 U.S. at 763-764; see *Favish*, 541 U.S. at 165 (protections extend beyond protecting the "right to control information about oneself") (citation omitted).

Moreover, "the fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information" about himself. *Reporters Committee*, 489 U.S. at 770 (citation and internal quotation marks omitted). Indeed, "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be avail-

able to the public in some form." *Department of Defense* v. *Federal Labor Relations Auth.*, 510 U.S. 487, 500 (1994). This Court has accordingly held that individuals' interest in "nondisclosure of their home addresses" is a "nontrivial privacy interest" under FOIA, even though "home addresses often are publicly available through sources such as telephone directories and voter registration lists." *Id.* at 500-501 (applying FOIA Exemption 6, 5 U.S.C. 552(b)(6)).[3]

An individual's interest in the non-disclosure of his own booking photographs that have not been disclosed publicly qualifies, at the very least, as a "nontrivial privacy interest." As the court of appeals explained, "a booking photograph is a unique and powerful type of photograph" that implicates "personal privacy interests distinct from normal photographs," not only because it is "a vivid symbol of criminal accusation" that is "often equated with[] guilt," but also because it reveals an otherwise private event in which the individual is captured "in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties." 635 F.3d at 503. The disclosure of such photographs—which normally are not "exposed to the public eye," *ibid.*—implicates a privacy in-

[3] Exemptions 6 and 7(C) protect the same personal privacy interests. Both exemptions use "the same term"—"personal privacy"—"in a nearly identical manner." *FCC* v. *AT&T Inc.*, 131 S. Ct. 1177, 1184 (2011). The exemptions, which apply to different categories of records, otherwise differ only in "the magnitude of the public interest" needed to override the privacy interests they protect. *DoD*, 510 U.S. at 497 n.6. "Exemption 7(C) is more protective of privacy than Exemption 6," because it applies to disclosures that "could reasonably be expected" to constitute an "unwarranted" invasion of personal privacy, not just to disclosures covered by Exemption 6 that "would" constitute a "clearly unwarranted" invasion. *Ibid.*

terest at least as strong as the disclosure of an individual's publicly available home address.

b. Petitioner's contrary position is incorrect. Petitioner, for instance, argues (Pet. 8-9) that Exemption 7(C) applies "only if disclosure would work an invasion of privacy that is significant and substantial." That contention cannot be squared with this Court's conclusion that a "very slight privacy interest" is sufficient to trigger FOIA's privacy protections (at least in contexts where there is only a "virtually nonexistent FOIA-related public interest in disclosure"). *DoD*, 510 U.S. at 500 (applying Exemption 6, which is less protective of "personal privacy" than Exemption 7(C)).

Petitioner similarly errs in his contention (Pet. 9-11) that booking photographs implicate no personal privacy interests, because, in petitioner's view, they reveal "'[n]o *new* information'" beyond the fact of an individual's "arrest and conviction" and any embarrassment produced by the photographs' publication would flow only from the fact of "arrest and conviction." Pet. 10 (quoting *Detroit Free Press, Inc.* v. *Department of Justice*, 73 F.3d 93, 97 (6th Cir. 1996)). Disclosing a booking photograph of an individual who has yet to appear and be convicted in court undoubtedly would produce a more significant invasion of personal privacy. But that does not mean that an individual who has pleaded guilty in open court has no continuing interest in the non-disclosure of his booking photographs. Even if booking photographs merely conveyed the fact of arrest (and, by implication, guilt), the individual's privacy interest—*i.e.*, his interest in the "control of information concerning his or her person," *Reporters Committee*, 489 U.S. at 763—"does not dissolve simply because that information may [already] be available to the public in some form."

DoD, 510 U.S. at 500. More importantly, mug shots reveal much more than the sterile fact of arrest (or later conviction). They graphically depict individuals in the embarrassing, nonpublic moment of their processing into the criminal justice system. The adage that one picture is worth a thousand words is apt in this context: the visual depiction of the individual's appearance at booking reflects a uniquely powerful and lasting image of what can be one of the most difficult episodes in an individual's life. See *Times Picayune Publ'g Corp.* v. *United States Dep't of Justice*, 37 F. Supp. 2d 472, 477-478 (E.D. La. 1999) (discussing mug shots and finding privacy interest under Exemption 7(C)).

Petitioner incorrectly suggests (Pet. 11-12) that the court of appeals' decision conflicts with this Court's precedent. Petitioner relies on the Court's conclusion in *Paul* v. *Davis*, 424 U.S. 693 (1976), that the Constitution does not "protect[] against the disclosure of the fact of [an individual's] arrest." *Id.* at 713 (concluding that law-enforcement officials did not violate constitutional privacy rights by circulating a flyer identifying by name and by photograph an individual who had been arrested for shoplifting). But it is well settled that the "statutory privacy right protected by Exemption 7(C) goes beyond * * * the Constitution." *Favish*, 541 U.S. at 170. Indeed, this Court has specifically cited *Paul* to illustrate that "the statutory meaning of privacy under the FOIA" is "not the same as * * * the question whether an individual's interest in privacy is protected by the Constitution." *Reporters Committee*, 489 U.S. at 762 n.13.

Petitioner's observation (Pet. 12) that the Marshals Service displays the photographs of fugitives (and sometimes continues to display such photographs after their capture) does not advance his cause. Exemption 7(C),

when applicable, exempts agency records only from *mandatory* disclosure *under FOIA*. FOIA does not preclude agencies from exercising their own "discretion to disclose information," even when the records at issue fall within a FOIA exemption. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 292-294 (1979). It is the Privacy Act that regulates disclosure of certain agency records about individuals, and the Marshals Service is authorized under that Act to release the booking photographs of fugitives. See p. 3, *supra*. Once the Marshals Service publicly disseminates such photographs, nothing prevents the continued presence of the fugitive photographs on the Service's website. In any event, the Service's treatment of fugitive photographs has no bearing on this case. The booking photographs at issue here, which were taken only after Giro was captured, have never been publicly disseminated.[4]

Finally, petitioner errs in his suggestion (Pet. 10-11) that the court of appeals' decision would "preclude the disclosure of a variety of records" that have been ordered disclosed in other cases. Petitioner cites no decision outside the booking-photograph context that would be materially affected by the court of appeals' holding. And even if the court of appeals' analysis of the relevant privacy interest might be applied in other contexts, the application of Exemption 7(C) would ultimately turn on a balancing of the privacy interest against the public interest in disclosure. Because no public interest supports the disclosure of Giro's booking photographs, the court of appeals correctly concluded that the photo-

[4] Petitioner asserts (Pet. 12) that certain state open-records statutes require disclosure of state booking photos. State statutes, however, cannot properly determine the scope of a federal provision like Exemption 7(C).

graphs were exempt from mandatory disclosure under Exemption 7(C). See *DoD*, 510 U.S. at 500 (a "very slight privacy interest" will outweigh a "virtually nonexistent" public interest); *National Ass'n of Retired Fed. Employees* v. *Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989) (concluding that a modest privacy interest outweighs a nonexistent public interest because "something * * * outweighs nothing every time"), cert. denied, 494 U.S. 1078 (1990).

Petitioner does not meaningfully attempt to establish a cognizable public interest in disclosure. Petitioner asserts in the margin (Pet. 8 n.6) that a "public interest" in disclosure would outweigh any privacy interest, suggesting that mug shots have the potential to disclose abuse by law-enforcement officials by "reveal[ing] the circumstances surrounding an arrest and initial incarceration" (quoting dictum in *Detroit Free Press*, 73 F.3d at 98). In some contexts, a FOIA requester might be able to carry his burden of "establish[ing] a sufficient reason for the disclosure" by showing that disclosure "is likely to advance" a "significant" public interest. *Favish*, 541 U.S. at 172. Documenting physical abuse by law-enforcement officials, for instance, would constitute a significant public interest. The bare possibility of official misconduct, however, is insufficient. When "the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion" by providing a "meaningful evidentiary showing" of actual misconduct. *Id*. at 174-175. Petitioner has made no allegation of impropriety, much less one supported by a meaningful evidentiary showing.

2. Petitioner correctly observes (Pet. 13-15) that the court of appeals' decision conflicts with the Sixth Circuit's decision in *Detroit Free Press*. That division of authority reflects disuniformity in the application of Exemption 7(C) to FOIA requests for prisoner booking photographs.[5] In the government's view, however, the question presented does not warrant review by this Court at the present time.

In *Detroit Free Press*, a divided panel of the Sixth Circuit held that "no privacy rights are implicated" by the public disclosure of a defendant's mug shot when a FOIA request concerns (at the time it is submitted) "ongoing criminal proceeding[s], in which the names of the defendants have already been divulged and in which the defendants themselves have already appeared in open court." *Detroit Free Press*, 73 F.3d at 97; see *id.* at 95; cf. *id.* at 99-100 (Norris, J., dissenting) (concluding that the majority had "misconceive[d] the true nature of a mug shot"). Having found that disclosure would not invade any privacy interest protected by Exemption 7(C), the Sixth Circuit had no occasion to (and did not) "determine whether such an invasion would be *warranted*" by analyzing whether there would be a sufficient "public interest" to justify disclosure. *Id.* at 97-98.

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[5] The Marshals Service has implemented its policy of not disclosing booking photographs with an exception that has accounted for the precedential weight of the Sixth Circuit's decision in *Detroit Free Press*. Although the government disagrees with that decision, the Service has applied *Detroit Free Press* as binding precedent when processing FOIA requests from within the Sixth Circuit. See 635 F.3d at 501 (noting this practice). In light of the recently developed division of authority and the associated potential for rehearing en banc in the Sixth Circuit, the Service will be able to reconsider its prior practice of granting mug-shot FOIA requests in the Sixth Circuit to facilitate further review by that court.

The court of appeals' analysis of the privacy interest in this case conflicts with *Detroit Free Press*'s conclusion that there is no privacy interest in the non-disclosure of booking photographs. That division of authority reflects a dispute between two courts of appeals over the privacy interest implicated in the specific context of FOIA requests for booking photographs. Although a division of authority on the question presented may warrant this Court's review in the future, the government does not believe that the Court's intervention is necessary at the present time.

The conflict between the Sixth and Eleventh Circuits arose only recently, with the Eleventh Circuit's decision in this case. At least one other case raising the same Exemption 7(C) question is now pending, and the Tenth Circuit can be expected to issue a decision analyzing the newly developed conflict in the near future. See *World Publ'g Co.* v. *United States Dep't of Justice*, No. 09-CV-574, 2011 WL 1238383, at *11-*16 (N.D. Okla. Mar. 28, 2011) (following the court of appeals' decision in this case and rejecting the analysis in *Detroit Free Press*), appeal pending, No. 11-5063 (10th Cir.) (oral argument scheduled for Jan. 18, 2012).

Moreover, the recent division of authority has now supplied an appropriate reason for the Sixth Circuit to reconsider *Detroit Free Press* in an appropriate case. See Fed. R. App. P. 35(b)(1)(B) (en banc rehearing is warranted to resolve a conflict with another court of appeals). The justification for rehearing would increase if, for instance, the Tenth Circuit in *World Publishing Co.* were to agree with the court of appeals' decision in this case. And if the Sixth Circuit were to grant rehearing, its decision could obviate any need for intervention by this Court.

In short, given the recent nature and scope of the disagreement between the Sixth and Eleventh Circuits and the potential for resolving that conflict in the lower courts, review by this Court would be premature at the present time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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