

MUG SHOT DISCLOSURE UNDER FOIA: DOES PRIVACY OR PUBLIC INTEREST PREVAIL?

Kathryn Shephard

ABSTRACT—The United States Marshals Service (USMS) photographs every arrested suspect as part of the booking process. These photographs, called mug shots, are federal government records to which the Freedom of Information Act (FOIA) applies. Federal appellate courts have disagreed about whether FOIA requires disclosure of these mug shots or whether FOIA Exemption 7(C) applies, allowing the USMS to withhold them as law enforcement records that “could reasonably be expected to constitute an unwarranted invasion of personal privacy” if released. This Note argues that Exemption 7(C) should shield mug shots from disclosure to the public.

AUTHOR—J.D. Candidate, Northwestern University School of Law, 2014; B.A., Oberlin College, 2008. Many thanks to Professor Joshua A. Tepfer for his suggestions and support and to the *Northwestern University Law Review* editors and staff members for all of their hard work.

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INTRODUCTION344

I. THE HISTORY AND INTERPRETATION OF THE FREEDOM OF INFORMATION ACT347

 A. FOIA’s Purpose: Increasing Government Transparency 347

 B. Exemption 7: From Prosecution to Privacy..... 349

 C. FOIA Privacy Cases in the Supreme Court 352

II. THE CIRCUIT SPLIT360

 A. Factual Background 361

 B. The Balancing Test 362

 C. The Privacy Interest Implicated by Mug Shot Disclosure 363

 D. The Public Interest Served by Mug Shot Disclosure 365

 E. The Consequences of the Circuit Split 367

III. RESOLUTION OF THE CIRCUIT SPLIT369

 A. Mug Shot Disclosure Implicates a Privacy Interest 369

 B. Disclosure Serves Some Public Interest..... 374

CONCLUSION376

INTRODUCTION

From 1996 until late 2012, the United States Marshals Service (USMS) released arrestees’ mug shots in response to requests under the Freedom of Information Act (FOIA)¹ that came from the jurisdiction of the Sixth Circuit.² This policy accommodated the Sixth Circuit’s decision in *Detroit Free Press, Inc. v. Department of Justice*, which clearly required the USMS to disclose arrestees’ mug shots in response to FOIA requests.³ However, on December 12, 2012, the USMS General Counsel issued a memorandum stating that, effective immediately, the USMS would no longer release federal arrestees’ mug shots in response to FOIA requests unless doing so would serve a legitimate law enforcement purpose, such as apprehending a fugitive or alerting victims.⁴ The USMS justified its decision by relying on two more recent federal appellate court opinions that exempted mug shots from disclosure under FOIA.⁵ By implementing this

¹ 5 U.S.C. § 552 (2006 & Supp. II 2007–2009).

² See Memorandum from Gerald M. Auerbach, Gen. Counsel, U.S. Marshals Serv., to All U.S. Marshals et al. 2 (Dec. 12, 2012), http://www.justice.gov/marshals/foia/policy/booking_photos.pdf.

³ 73 F.3d 93, 97 (6th Cir. 1996).

⁴ See Memorandum from Gerald M. Auerbach, *supra* note 2, at 2–3. The new policy also allows for disclosure if the USMS Office of the General Counsel determines for itself that a FOIA “requester has made the requisite showing that the public interest in the requested booking photograph outweighs the privacy interest at stake.” *Id.* at 3.

⁵ See *id.* (citing *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825 (10th Cir. 2012); *Karantalis v. U.S. Dep’t of Justice*, 635 F.3d 497 (11th Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 1141 (2012)).

new policy, the USMS has taken it upon itself to disregard a federal appellate court's decision requiring the disclosure of mug shots.

Law enforcement officers take mug shots, formally known as booking photographs, after bringing an individual into custody. People curious about their neighbors' alleged wrongdoing can visit one of countless websites that publish these photographs. Mug shots depict people of all ages, races, socioeconomic groups, and celebrity statuses in one of the most humiliating moments of their lives.⁶ Although these websites include disclaimers reminding viewers that arrestees are innocent until proven guilty,⁷ the aura of guilt surrounding these photographs—with their stark, cinder-block backgrounds and the subjects' often sullen facial expressions—is unmistakable.

These websites and news organizations cannot publish mug shots unless law enforcement agencies release them. Whether and how websites and news organizations are able to obtain mug shots from state law enforcement agencies depends on each state's open records laws.⁸ But people charged with federal crimes typically have their mug shots taken by the USMS, a federal law enforcement agency. Therefore, a federal law—FOIA—applies to the disclosure of federal mug shots.

FOIA is a federal statute designed to increase government transparency by giving the public access to information about the government.⁹ But FOIA includes several exemptions that allow government agencies like the USMS to not disclose some information. Two of these exemptions provide some protection for individuals whose privacy may be invaded by the release of government records to the public.¹⁰ Exemption 6 allows the government to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”¹¹ Similarly, Exemption 7(C) allows the government to withhold “records or information compiled for law enforcement purposes” when the disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”¹² Because both exemptions relate to personal privacy, courts considering Exemption 7(C)

⁶ See, e.g., *Mugs in the News*, CHI. TRIB., <http://www.chicagotribune.com/news/local/chi-mug-photogallery,0,5488047,photogallery> (last visited Nov. 26, 2013); *Mug Shots*, TAMPA BAY TIMES, <http://www.tampabay.com/mugshots> (last visited Nov. 26, 2013); *Mug Shots*, THE SMOKING GUN, <http://www.thesmokinggun.com/mugshots> (last visited Nov. 26, 2013); *US Counties*, MUGSHOTS.COM, <http://www.mugshots.com/US-Counties> (last visited Nov. 26, 2013).

⁷ See, e.g., *Mugs in the News*, *supra* note 6.

⁸ See THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, POLICE RECORDS: A REPORTER'S STATE-BY-STATE ACCESS GUIDE TO LAW ENFORCEMENT RECORDS (2008).

⁹ U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989).

¹⁰ 5 U.S.C. § 552(b)(6), (b)(7)(C) (2006).

¹¹ *Id.* § 552(b)(6).

¹² *Id.* § 552(b)(7)(C).

have often relied on previous cases involving Exemption 6,¹³ despite differences between the two exemptions' applicability based on type of requested documents and level of privacy invasion.¹⁴

Exemptions 6 and 7(C) create some tension between competing interests: FOIA's purpose of increasing government transparency and the need to protect the personal privacy of individuals in some situations. As a result of this tension, courts apply a balancing test to determine whether the FOIA privacy exemptions apply.¹⁵ Courts weigh the invasion of an individual's privacy against the public interest served by disclosure to determine whether the FOIA privacy exemptions apply to the requested information.¹⁶

This Note examines the highly contentious application of Exemption 7(C) to federal criminal arrestees' mug shots. Three federal courts of appeals have considered this issue using the balancing test.¹⁷ The Sixth Circuit was the first to do so and found in favor of disclosure because it identified no privacy interest on the part of the arrestees depicted in the mug shots.¹⁸ The next two federal appellate courts to consider the question, the Tenth and Eleventh Circuits, created a circuit split by finding in favor of nondisclosure and exempting arrestees' mug shots from release under FOIA.¹⁹

Between 1996 and 2012, Exemption 7(C) did not apply when a FOIA request for a mug shot came from the Sixth Circuit but did apply to requests originating from all other jurisdictions.²⁰ Because the USMS policy considered the location of the FOIA requestor and not the location where law enforcement took the mug shot, FOIA requestors were able to easily circumvent the policy by making their requests from within the Sixth Circuit's jurisdiction. In practice, therefore, no federal arrestees enjoyed privacy protection for their mug shots despite two federal courts of appeals finding that their privacy interests were significant enough for Exemption 7(C) to apply. On December 12, 2012, the USMS suddenly changed its policy and no longer discloses mug shots in response to FOIA requests unless doing so would serve a legitimate law enforcement purpose.²¹ Now,

¹³ See, e.g., *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 96–97 (6th Cir. 1996).

¹⁴ Compare § 552(b)(6), with § 552(b)(7)(C).

¹⁵ See, e.g., *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372–73 (1976).

¹⁶ *Id.*

¹⁷ *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 830–32 (10th Cir. 2012); *Karantalis v. U.S. Dep't of Justice*, 635 F.3d 497, 502–04 (11th Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 1141 (2012); *Detroit Free Press*, 73 F.3d at 96–98.

¹⁸ *Detroit Free Press*, 73 F.3d at 97.

¹⁹ *World Publ'g Co.*, 672 F.3d at 826; *Karantalis*, 635 F.3d at 499, 504.

²⁰ This was the USMS policy until December 12, 2012. See Memorandum from Gerald M. Auerbach, *supra* note 2.

²¹ *Id.* at 2–3.

this government agency is blatantly ignoring the clear holding of a federal appellate court.

This Note argues that FOIA Exemption 7(C) should apply to arrestees' mug shots because their release constitutes a significant invasion of privacy that outweighs the limited information about the government provided by disclosure. Part I discusses the legislative history and Supreme Court interpretations of FOIA. These precedents provide the legal framework for analyzing the question of mug shot disclosure under Exemption 7(C). Part II explores the circuit split and analyzes the Sixth, Tenth, and Eleventh Circuits' applications of the balancing test. Part III examines the privacy and public interests at stake and concludes that federal mug shots should not be released in response to FOIA requests under Exemption 7(C).

I. THE HISTORY AND INTERPRETATION OF THE FREEDOM OF INFORMATION ACT

A. FOIA's Purpose: Increasing Government Transparency

In 1946, Congress enacted the Administrative Procedure Act (APA) to regulate administrative agencies.²² APA Section 3, the Public Information Section, required administrative agencies to publish their rules, opinions, and orders in the Federal Register.²³ This section also required administrative agencies to make official records “available to persons properly and directly concerned.”²⁴ But agencies could still withhold information from the public under the APA for three reasons. First, information could be withheld if the disclosure involved a “function of the United States requiring secrecy in the public interest.”²⁵ Second, “any matter relating solely to the internal management of an agency” need not be disclosed.²⁶ And third, opinions, orders, and official records could also be withheld if “required for good cause to be held confidential.”²⁷

According to the House Report on the subject, Congress intended the Public Information Section to give the public access to the operations and procedures of administrative agencies.²⁸ But in practice, the statute had the opposite effect. Rather than using the Public Information Section to provide information to the public, administrative agencies used it as authority to

²² See H.R. REP. NO. 89-1497, at 3 (1966).

²³ 5 U.S.C. § 1002 (1946).

²⁴ *Id.* § 1002(c).

²⁵ *Id.* § 1002.

²⁶ *Id.*

²⁷ *Id.* § 1002(b); see also *id.* § 1002(c) (requiring “matters of official record [to] be made available . . . except information held confidential for good cause found”).

²⁸ H.R. REP. NO. 89-1497, at 3 (1966).

withhold information by interpreting the exemptions broadly and invoking them often.²⁹

In response to agencies' abuse of the APA's exemptions, members of Congress sought to amend the Public Information Section.³⁰ After five years of proposed legislation, these efforts succeeded when Congress passed what is now known as the Freedom of Information Act, or FOIA, to close the loopholes in the APA's Public Information Section by "establish[ing] a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."³¹ Congress intended FOIA to transform the APA's Public Information Section from a withholding statute to a disclosure statute by replacing vague, easily abused phrases with workable standards to distinguish between disclosed and withheld records; by eliminating the requirement that the person requesting the records be directly concerned; and by providing a court remedy in the event of the government's wrongful nondisclosure.³²

The Supreme Court has considered FOIA's legislative history and remarked on the Act's purpose. In the first FOIA case to reach the Supreme Court, *EPA v. Mink*,³³ the Court recounted FOIA's legislative history and determined that FOIA is "broadly conceived . . . to permit access to *official* information."³⁴ Although the 1974 amendments to FOIA superseded *Mink*'s interpretation of the scope of appropriate judicial review of Exemption 1,³⁵ this opinion has remained influential on the Supreme Court's analysis of FOIA's purpose.³⁶ In particular, the *Mink* Court's qualification of the type

²⁹ See *id.* at 5–6; S. REP. NO. 89-813, at 5 (1965); Daniel Gorham Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 TEX. L. REV. 587, 596 (1977).

³⁰ These amendment efforts began in earnest during the 85th Congress when Congressman John E. Moss and Senator Thomas E. Hennings introduced simultaneous bills to revise substantially the Public Information Section. See H.R. REP. NO. 89-1497, at 3–4. Although the 85th Congress took no action on these bills, the next three Congresses saw similar bills introduced with a correspondingly similar lack of final action. *Id.*

³¹ S. REP. NO. 89-813, at 3; Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250, 250. The Act of July 4, 1966, enacted Senate Bill 1160, which was a modified version of the Moss–Hennings bill first introduced during the 85th Congress. See H.R. REP. NO. 89-1497, at 3–4.

³² Act of July 4, 1966, § 3(c), (e)–(g), 80 Stat. at 251; S. REP. NO. 89-813, at 5–6.

³³ 410 U.S. 73 (1973), *superseded in part by statute*, 5 U.S.C. § 552(a)(4)(B), (b)(1) (Supp. V 1971–1976), *as recognized in* *CIA v. Sims*, 471 U.S. 159, 189 & n.5 (1985).

³⁴ *Id.* at 79–80 (emphasis added).

³⁵ See *Sims*, 471 U.S. at 189 & n.5; *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 226 (1978).

³⁶ Eleven FOIA Supreme Court opinions have favorably cited *EPA v. Mink* for its interpretation of FOIA's purpose and legislative history after it was superseded by the 1974 amendments. See *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1262 (2011); *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 494 (1994); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151–52 (1989); *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151, 153 (1989); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989); *FTC v. Grolier Inc.*, 462 U.S. 19, 23 (1983); *FBI v.*

of information—“official”—that Congress intended to be disclosed under FOIA proved significant in later developments of the law.³⁷

Despite wanting to eliminate agency abuse of loopholes, Congress recognized the continuing need for some exemptions to disclosure under FOIA.³⁸ Congress had found that agencies abused the Public Information Section’s exemptions “to deny legitimate information to the public.”³⁹ But, as Congress recognized, some legitimate reasons for withholding information from the public exist, and FOIA delineates those reasons in nine disclosure exemptions.⁴⁰ As originally enacted in 1966, only one of these exemptions, Exemption 6, related to privacy. It allowed the government to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”⁴¹ Congress was sensitive to the impact that increased public access to government records under FOIA could have on an individual’s privacy. And it sought to strike an appropriate balance between personal privacy and the overall goal of increased government transparency.⁴² By requiring a “clearly unwarranted invasion of personal privacy” for Exemption 6 to apply, Congress intended to “provide[] a proper balance between the protection of an individual’s right of privacy and the preservation of the public’s right to Government information by excluding those kinds of files the disclosure of which might harm the individual.”⁴³

Since its enactment in 1966, Exemption 6’s text has not changed.⁴⁴ However, Exemption 7 originally did not mention privacy.⁴⁵ That changed eight years later in 1974.

B. Exemption 7: From Prosecution to Privacy

The original language of Exemption 7 excluded from disclosure “investigatory files compiled for law enforcement purposes except to the

Abramson, 456 U.S. 615, 621 (1982); *id.* at 636 (O’Connor, J., dissenting); *Baldrige v. Shapiro*, 455 U.S. 345, 352 & n.7 (1982); *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 144 (1981); *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 384–85 (1980); *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 360 (1976).

³⁷ See *Mink*, 410 U.S. at 80; *infra* notes 77–79, 110 and accompanying text.

³⁸ See S. REP. NO. 89-813, at 8–10 (1965).

³⁹ *Id.* at 3.

⁴⁰ 5 U.S.C. § 552(b) (2006); S. REP. NO. 89-813, at 8–10.

⁴¹ Act of July 4, 1966, Pub. L. No. 89-487, § 3(e)(6), 80 Stat. 250, 251. The only other mention of privacy in FOIA as originally enacted allowed agencies publishing opinions and orders to delete identifying details “[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy.” *Id.* § 3(b), 80 Stat. at 250.

⁴² See H.R. REP. NO. 89-1497, at 11 (1966).

⁴³ See *id.*

⁴⁴ § 552(b)(6); Act of July 4, 1966, § 3(e)(6), 80 Stat. at 251.

⁴⁵ Act of July 4, 1966, § 3(e)(7), 80 Stat. at 251.

extent available by law to a private party.”⁴⁶ The legislative history indicates that Congress included Exemption 7 out of concern that disclosure could hurt government prosecutions⁴⁷ and to make sure that parties could not use FOIA to receive advance or expanded discovery.⁴⁸

Seven years after FOIA’s enactment, Congress expanded disclosure under FOIA and limited the scope of the exemptions.⁴⁹ Exemption 7 changed significantly due to an earlier congressional review that found that agencies were abusing Exemption 7 by comingling exempt and nonexempt documents and then claiming the entire file as exempt.⁵⁰ Additionally, courts were interpreting it as a nearly blanket exemption for all law enforcement files.⁵¹

To rectify these problems, Congress replaced the word “files” with “records”⁵² and rewrote Exemption 7 to allow the government to withhold investigatory records only when one of six specified situations applied.⁵³ Among these is Exemption 7(C), which allows the government to withhold “investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . constitute an unwarranted invasion of personal privacy.”⁵⁴

Although the overall goal of the Exemption 7 changes was to narrow its scope, Exemption 7(C) provided more privacy protection than FOIA’s other privacy exemption. Unlike Exemption 6, which required “a clearly unwarranted invasion of personal privacy”⁵⁵ for nondisclosure, Exemption 7(C) only required “an unwarranted invasion of personal privacy.”⁵⁶ Without the word “clearly,” Exemption 7(C) is more protective

⁴⁶ *Id.*

⁴⁷ S. REP. NO. 89-813, at 9 (1965).

⁴⁸ H.R. REP. NO. 89-1497, at 11.

⁴⁹ Act of Nov. 21, 1974, Pub. L. No. 93-502, § 2, 88 Stat. 1561, 1563–64.

⁵⁰ See H.R. REP. NO. 92-1419, at 7, 84 (1972); 120 CONG. REC. 36,629 (1974) (statement of Rep. Erlenborn).

⁵¹ 120 CONG. REC. 34,162 (1974) (statement of Rep. Moorhead).

⁵² The House Committee on Government Operations proposed this language change after conducting extensive hearings in 1971 and 1972 to evaluate how FOIA was working. See H.R. REP. NO. 92-1419, at 7, 84. The House Committee concluded that agencies were abusing the exemptions in the 1966 FOIA, *id.* at 84, much like agencies had abused the APA’s Public Information Section, which FOIA sought to amend. See *supra* notes 30–32 and accompanying text.

⁵³ Act of Nov. 21, 1974, § 2, 88 Stat. at 1563.

⁵⁴ *Id.* The other five situations that justified withholding investigatory records were when:

[P]roduction of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, . . . (D) disclose the identity of a confidential source and . . . confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

Id. § 2(b), 80 Stat. at 1563–64.

⁵⁵ Act of July 4, 1966, Pub. L. No. 89-487, § 3(e)(6), 80 Stat. 250, 251.

⁵⁶ Act of Nov. 21, 1974, § 2, 88 Stat. at 1563.

of privacy interests than Exemption 6 by establishing a lower bar for nondisclosure.⁵⁷

In 1986, Congress again amended Exemption 7 and provided greater privacy protection.⁵⁸ The Freedom of Information Reform Act of 1986 expanded Exemption 7(C) from “would . . . constitute an unwarranted invasion of personal privacy”⁵⁹ to “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”⁶⁰ The decision to relax the necessary level of privacy interest for nondisclosure from “would” to “could” was deliberate and the subject of debate.⁶¹ By changing the language of Exemption 7(C), Congress “broaden[ed] the reach of this exemption.”⁶²

Although Congress has amended FOIA four times since 1986,⁶³ Exemption 7(C)’s language as amended in 1986 is the same language that exists in the statute today.⁶⁴

⁵⁷ 120 CONG. REC. 36,878 (1974) (statement of Sen. Byrd); *see also* U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 (1989) (“Exemption 7(C)’s privacy language is broader than the comparable language in Exemption 6 [W]hereas Exemption 6 requires that the invasion of privacy be ‘clearly unwarranted,’ the adverb ‘clearly’ is omitted from Exemption 7(C). This omission is the product of a 1974 amendment adopted in response to concerns expressed by the President.”).

⁵⁸ Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 to -49.

⁵⁹ Act of Nov. 21, 1974, § 2, 88 Stat. at 1563.

⁶⁰ Freedom of Information Reform Act of 1986, § 1802, 100 Stat. at 3207-48.

⁶¹ In 1981, the Senate Subcommittee on the Constitution conducted extensive hearings on FOIA. *See Freedom of Information Act, Volume 1: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. (1982). Two Congresses later, the FOIA amendments proposed after the 1981 hearings and then modified by the next Congress were adopted. *See* S. REP. NO. 98-221, at 6 (1983); 132 CONG. REC. 27,189 (1986). Members of the House wanted to substitute “could reasonably be expected to” in Exemption 7(C) with the word “would” to match the privacy standard in Exemption 6. *See* 132 CONG. REC. 29,620 (1986) (statement of Rep. Kindness). But members of the Senate insisted on the language “could reasonably be expected to” as identical to the earlier Senate-passed bill. *See id.* at 31,423 (statement of Sen. Hatch). The House accepted the Senate’s preferred language without further debate. *See id.* at 32,728, 32,743; *see also* Freedom of Information Reform Act of 1986, § 1802, 100 Stat. at 3207-48 (adopting the “could reasonably be expected to” language in Exemption 7(C)).

⁶² 132 CONG. REC. 31,424 (1986) (statement of Sen. Hatch); *see also Reporters Comm.*, 489 U.S. at 756 (footnote omitted) (“[W]hereas Exemption 6 refers to disclosures that ‘would constitute’ an invasion of privacy, Exemption 7(C) encompasses any disclosure that ‘could reasonably be expected to constitute’ such an invasion. This difference is . . . the product of a specific amendment. Thus, the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes [under Exemption 7(C)] is somewhat broader than the standard applicable to personnel, medical, and similar files [under Exemption 6].”).

⁶³ *See* OPEN FOIA Act of 2009, Pub. L. No. 111-83, § 564, 123 Stat. 2142, 2184 (amending Exemption 3, which governs nondisclosure of information when so specified by statute); Openness Promotes Effectiveness in Our National Government Act of 2007, Pub. L. No. 110-175, § 12, 121 Stat. 2524, 2530–31 (requiring agencies to inform the person making the FOIA request of the amount of information deleted “and the exemption under which the deletion is made”); Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 312, 116 Stat. 2383, 2390–91 (2002) (adding an

C. FOIA Privacy Cases in the Supreme Court

Since Congress enacted FOIA in 1966, the Supreme Court has decided nine FOIA privacy cases arising under either Exemption 6 or Exemption 7(C).⁶⁵ Although Exemptions 6 and 7(C) are distinct exemptions, they both protect privacy,⁶⁶ and the Court when analyzing information withheld under one exemption has looked to previous cases decided under the other.⁶⁷ This Section discusses the doctrinal developments of the four Supreme Court cases that are relevant to the mug-shot-disclosure question.⁶⁸

exemption for disclosure by intelligence agencies to foreign governments); Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 3, 110 Stat. 3048, 3049 (expanding the definition of “record” to include information in an electronic format).

⁶⁴ Compare Freedom of Information Reform Act of 1986, § 1802, 100 Stat. at 3207-48 to -49, with 5 U.S.C. § 552(b)(7)(C) (2006).

⁶⁵ FCC v. AT & T Inc., 131 S. Ct. 1177 (2011) (Exemption 7(C)); Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004) (Exemption 7(C)); Bibles v. Or. Natural Desert Ass’n, 519 U.S. 355 (1997) (per curiam) (Exemption 6); U.S. Dep’t of Def. v. Fed. Labor Relations Auth., 510 U.S. 487 (1994) (Exemption 6); U.S. Dep’t of State v. Ray, 502 U.S. 164 (1991) (Exemption 6); *Reporters Comm.*, 489 U.S. 749 (Exemption 7(C)); FBI v. Abramson, 456 U.S. 615 (1982) (Exemption 7(C)); U.S. Dep’t of State v. Wash. Post Co., 456 U.S. 595 (1982) (Exemption 6); Dep’t of the Air Force v. Rose, 425 U.S. 352 (1976) (Exemption 6).

⁶⁶ Besides Exemptions 6 and 7(C), only one other FOIA provision mentions privacy. Section 552(a)(2)(E) permits “an agency [to] delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records” “[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy.”

⁶⁷ See, e.g., *Fed. Labor Relations Auth.*, 510 U.S. at 495–96 (an Exemption 6 case relying on Exemption 7(C) case *Reporters Committee*, 489 U.S. 749); *Reporters Comm.*, 489 U.S. at 767–68 (an Exemption 7(C) case discussing Exemption 6 case *Rose*, 425 U.S. 352).

⁶⁸ This Note does not discuss *Washington Post Co.*, 456 U.S. at 598, 602, or *Abramson*, 456 U.S. at 623, 631–32, because those cases only analyze the threshold requirements of Exemptions 6 and 7, respectively. In the context of mug shots, the government easily satisfies Exemption 7’s threshold requirement that the requested information was “compiled for law enforcement purposes.” § 552(b)(7); see, e.g., *Detroit Free Press, Inc. v. Dep’t of Justice*, 73 F.3d 93, 96 (6th Cir. 1996). The Supreme Court’s less than 400-word opinion in *Bibles*, 519 U.S. 355, did not add significantly to the developments of FOIA privacy jurisprudence. The Court simply reaffirmed two key doctrinal principles asserted clearly in earlier precedents and remanded the case for the appellate court to properly apply these principles. See *id.* at 355–56. The two most recent Supreme Court FOIA privacy cases, *AT & T Inc.*, 131 S. Ct. 1177, and *Favish*, 541 U.S. 157, do not contribute much to the mug-shot-disclosure question. In relation to the circuit split on the disclosure of mug shots, the Supreme Court decided these cases after the Sixth Circuit’s decision in *Detroit Free Press* and before the Tenth and Eleventh Circuits’ decisions. But neither the Tenth nor Eleventh Circuit mentioned *AT & T Inc.* or *Favish* in their opinions. See *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825 (10th Cir. 2012); *Karantsalis v. U.S. Dep’t of Justice*, 635 F.3d 497 (11th Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 1141 (2012). In *AT & T Inc.*, the Supreme Court held that the phrase “personal privacy” in Exemption 7(C) does not cover corporations. See 131 S. Ct. at 1184–85. Because mug shots involve the privacy interest of individuals and not corporations, the *AT & T Inc.* decision does not apply. In *Favish*, the Court held for the first time that FOIA’s “personal privacy” includes the privacy interests of family members. See *Favish*, 541 U.S. at 165; see also Martin E. Halstuk, *When Is an Invasion of Privacy Unwarranted Under the FOIA? An Analysis of the Supreme Court’s “Sufficient Reason” and “Presumption of Legitimacy” Standards*, 16 U. FLA. J.L. & PUB. POL’Y 361, 363 (2005) (footnote omitted) (“In so

I. Narrow Construction and the Balancing Test.—In *Department of the Air Force v. Rose*,⁶⁹ the Supreme Court made two important contributions to the interpretation of FOIA’s privacy exemptions. First, *Rose* explained that courts should narrowly construe those exemptions.⁷⁰ Second, *Rose* set forth the balancing test for disclosures involving privacy interests.⁷¹ *Rose* is also significant because it is the only one of the first six FOIA privacy cases in which the Supreme Court appeared to favor disclosure over privacy.⁷²

In *Rose*, editors of the *New York University Law Review* sought summaries of U.S. Air Force Academy honor and ethics disciplinary hearings to conduct a study on the disciplinary systems of military service academies.⁷³ Even with the cadets’ names and other identifying information deleted, the Air Force Academy denied the request, claiming that Exemption 6 justified nondisclosure.⁷⁴ FOIA places the burden of proof on the agency to justify its use of an exemption.⁷⁵

Before analyzing the specific application of the exemption, the Court discussed the general framework for approaching all FOIA requests.⁷⁶ Relying in part on its first FOIA decision in *EPA v. Mink*, which detailed FOIA’s legislative history,⁷⁷ the Court found that the congressional purpose

ruling, the [Favish] Court settled the question of family-privacy rights under the FOIA—an issue that lower courts have grappled with for more than a quarter-century.”). The privacy interest of family members might be relevant to the mug-shot-disclosure question, but neither circuit court that had the benefit of this additional Supreme Court FOIA privacy decision included that argument. *See World Publ’g Co.*, 672 F.3d 825; *Karantalis*, 635 F.3d 497.

⁶⁹ 425 U.S. 352.

⁷⁰ *Id.* at 361.

⁷¹ *Id.* at 372.

⁷² *See* Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government’s Up To*, 11 COMM. L. & POL’Y 511, 541 n.184 (2006).

⁷³ *Rose*, 425 U.S. at 354–55.

⁷⁴ *Id.* at 355 & n.2. The Supreme Court also considered whether Exemption 2 supported the Air Force Academy’s decision to withhold the summaries. *See id.* at 362. Exemption 2 applies to “matters . . . related solely to the internal personnel rules and practices of an agency.” *Id.* at 357 (quoting 5 U.S.C. § 552(b)(2) (1970)). The Supreme Court rejected this claim because Exemption 2 does not apply when there is “a genuine and significant public interest” in disclosure. *Id.* at 369. The public has a significant interest in discipline at the Air Force Academy because of the necessity of proper discipline in an effective military. *See id.* at 367–68.

⁷⁵ 5 U.S.C. § 552(a)(4)(B) (2006) (“[T]he [district] court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.”). A court might find that the government has waived exemptions not timely raised. For example, the Supreme Court acknowledged a district court’s finding that the Government had waived additional exemptions to justify nondisclosure when it only invoked those exemptions after the court denied its initial exemption claim. *See U.S. Dep’t of State v. Ray*, 502 U.S. 164, 171 (1991). However, the Court did not grant certiorari on that question. *Id.* at 172.

⁷⁶ *Rose*, 425 U.S. at 360–61.

⁷⁷ *See id.*; *supra* Part I.A.

behind FOIA was to establish a basic policy of agency disclosure.⁷⁸ Based on that purpose, courts should narrowly construe all exemptions.⁷⁹

Relying heavily on FOIA's legislative history, the Court found that Exemption 6 "require[s] a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'"⁸⁰ Although the Supreme Court itself did not apply this balancing test to the Academy's summaries,⁸¹ the Court implied that disclosure would likely be appropriate. First, the Court noted that withholding information under Exemption 6 requires a privacy invasion that was "clearly unwarranted," which is a heavier burden than the requirement of Exemption 7.⁸² Second, the Court found that the Air Force Academy's policy of keeping most of the cadets' identities confidential when it posted the summaries on Academy bulletin boards discounted the probability that disclosure of the redacted summaries would cause a clearly unwarranted invasion of personal privacy.⁸³

The Court was sympathetic to the privacy risk that disclosure created for the former cadets, especially those who continued working in the military,⁸⁴ and agreed with the description that the court of appeals gave of the privacy values at stake: "identification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends."⁸⁵ But the Court noted that Exemption 6 did not require a guarantee against invasion of personal privacy through the disclosure of information, and that redaction has been relied on in other contexts to protect privacy.⁸⁶ With the identifying information deleted, the Court strongly indicated that the summaries should be disclosed.⁸⁷

⁷⁸ *Rose*, 425 U.S. at 361.

⁷⁹ *Id.*

⁸⁰ *Id.* at 372 (quoting *Rose v. Dep't of the Air Force*, 495 F.2d 261, 263 (2d Cir. 1974), *aff'd*, 425 U.S. 352).

⁸¹ Instead, the Court affirmed the court of appeals's order to have the district court review the summaries in camera to determine if redacting the cadets' names and identifying information would sufficiently protect their privacy. *See id.* at 381.

⁸² *See id.* at 378–79, 378 n.16.

⁸³ *Id.* at 380. It was the practice of the Air Force Academy to post the summaries on forty bulletin boards around the Academy and disseminate them to faculty and administration officials, *id.* at 359, but to not include names except in cases where the cadet was found guilty, *id.* at 377. Despite this previous limited disclosure of the summaries, Chief Justice Burger in dissent argued that the majority's decision was unnecessarily complicated because he thought it "quite clear . . . that the disclosure of the material at issue here constitutes [a clearly unwarranted] invasion." *Id.* at 382–83 (Burger, C.J., dissenting).

⁸⁴ *Id.* at 381 (majority opinion).

⁸⁵ *Id.* at 377 (quoting *Rose*, 495 F.2d at 267).

⁸⁶ *Id.* at 381–82.

⁸⁷ The Court found that Exemption 6's limited protection "was directed at threats to privacy interests more palpable than mere possibilities," *id.* at 380 n.19, and "does not protect [from] disclosure

In *Rose*, the Supreme Court established that Exemption 6 requires courts to conduct a balancing test by weighing the invasion of personal privacy against the public interest in disclosure to determine whether that invasion is clearly unwarranted. Thirteen years later, the Court used a similar balancing test for Exemption 7(C).

2. *Personal Privacy and FOIA's Central Purpose.*—The Supreme Court in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press* squarely addressed for the first time the meaning of the phrase “unwarranted invasion of personal privacy” in Exemption 7(C).⁸⁸ Using the balancing test as articulated in *Rose*, the Court found that Exemption 7(C) applied to all requests for the FBI’s compilations of criminal records known as “rap sheets.”⁸⁹

To reach this conclusion, the Court compared the privacy language in Exemption 6 and Exemption 7(C).⁹⁰ As explained above,⁹¹ two differences made Exemption 7(C)’s privacy protection broader than Exemption 6’s protection.⁹² First, Congress deliberately omitted “clearly” from Exemption 7(C).⁹³ Second, Congress intentionally amended Exemption 7(C) to ease the burden of demonstrating a sufficient privacy interest by changing “would constitute,” as used in Exemption 6, to “could reasonably be expected to constitute.”⁹⁴

The particular FOIA request in *Reporters Committee* involved journalists seeking the rap sheet for Charles Medico, whose family company had been linked to organized crime and a corrupt congressman.⁹⁵ The FBI generally kept rap sheets confidential and typically only released copies to the media when trying to catch wanted fugitives or to the subject.⁹⁶ The Court noted that information in rap sheets is mostly a matter

every incidental invasion of privacy,” *id.* at 382. That the Court’s decision points toward disclosure is also supported by the dissenting opinion, which characterized the Court’s decision as “blandly ignor[ing] and thereby frustrat[ing] the congressional intent by refusing to weigh, realistically, the grave consequences implicit in release of this particular information, in any form, against the relatively inconsequential claim of ‘need’ for the material alleged in the complaint.” *Id.* at 383 (Burger, C.J., dissenting).

⁸⁸ 489 U.S. 749 (1989).

⁸⁹ *Id.* at 751, 780. This adoption of a bright-line rule caused the only split in what otherwise would have been a unanimous opinion. Justice Blackmun, joined by Justice Brennan, concurred in the judgment because he disagreed with the majority’s categorical rule despite agreeing with the majority’s outcome in this particular case. *Id.* at 780 (Blackmun, J., concurring in the judgment).

⁹⁰ *Id.* at 756 (majority opinion).

⁹¹ See *supra* notes 55–62 and accompanying text.

⁹² *Reporters Comm.*, 489 U.S. at 756.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 757.

⁹⁶ *Id.* at 752.

of public record in court documents.⁹⁷ In only three states were the compilations of the scattered public records made available to the public.⁹⁸

The Court held that Medico's privacy interest was sufficient to warrant nondisclosure under Exemption 7(C).⁹⁹ In analyzing the privacy interest at stake, the Court rejected the FOIA requestors' "cramped notion of personal privacy": the reporters had argued that Medico's privacy interest approached zero because the information contained in the rap sheets had previously been disclosed to the public.¹⁰⁰ The Court found it significant that it would take considerable effort to locate criminal history information from nationwide public records in court files or newspaper archives.¹⁰¹

The Court also considered the possibility that disclosure would compromise the subjects' privacy interest in being forgotten.¹⁰² In discussing this aspect of privacy, the Court relied on *Rose*, where the cadets had "a privacy interest in past discipline that was once public but may have been 'wholly forgotten.'"¹⁰³ Likewise, individuals generally have a privacy interest in their criminal histories that may have been forgotten.¹⁰⁴ The Court also found that technology made this privacy concern greater: "The privacy interest in a rap sheet is substantial" and "affected by the fact that in today's society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains age 80, when the FBI's rap sheets are discarded."¹⁰⁵ Because the rap sheets compiled obscure or scattered, albeit public, information and disclosure could cause long-forgotten crimes to resurface, the Court found that disclosure implicated a substantial privacy interest within the meaning of Exemption 7(C).¹⁰⁶

Because Exemption 7(C) only applies to disclosures that would constitute an "unwarranted" privacy invasion, the Court next discussed what factors would warrant an invasion of privacy.¹⁰⁷ The identity of the FOIA requestor is not a factor.¹⁰⁸ Instead, the answer depends "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

⁹⁷ *Id.* at 753–54, 764.

⁹⁸ *Id.*

⁹⁹ *See id.* at 771, 775.

¹⁰⁰ *Id.* at 762–63.

¹⁰¹ *Id.* at 764.

¹⁰² *Id.* at 769.

¹⁰³ *Id.* (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 381 (1976)).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 771.

¹⁰⁶ *Id.* at 764, 769, 771.

¹⁰⁷ *Id.* at 771.

¹⁰⁸ *Id.*

public scrutiny.”¹⁰⁹ Referring to *EPA v. Mink*, the Court noted that “[i]n our leading case on the FOIA, we declared that the Act was designed to create a broad right of access to ‘official information.’”¹¹⁰ To warrant an invasion of privacy, the disclosure of the requested document must inform citizens about “what their government is up to” by “shed[ding] . . . light on the conduct of a[] Government agency or official.”¹¹¹

In cases like *Reporters Committee*, where private citizens have requested information about another private citizen, the Court has found that there is no significant public interest in disclosure.¹¹² The privacy invasion is “unwarranted” when the request “seeks no ‘official information’ about a Government agency, but merely records that the Government happens to be storing.”¹¹³

In addition to providing the first Supreme Court analysis of the meaning of “personal privacy” and “unwarranted” in Exemption 7(C), *Reporters Committee* articulated the central purpose of FOIA: “to ensure that the *Government’s* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.”¹¹⁴ This definition is significant because it means that when courts balance the privacy interest at stake against the public interest served by disclosure, only those disclosures that contribute to FOIA’s central purpose can outweigh an invasion of personal privacy. Five years after *Reporters Committee*, the Court showed its firm commitment to the central purpose test.

3. *The Central Purpose Test: Disclosure Must Shed Light on Government Action.*—In the 1994 case of *U.S. Department of Defense v. Federal Labor Relations Authority*, the Supreme Court remained committed to the doctrine that the public interest side of the balancing test includes only how the disclosure would shed light on what the “government is up to.”¹¹⁵ In response to a union’s request for the home

¹⁰⁹ *Id.* at 772 (quoting *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)) (internal quotation marks omitted).

¹¹⁰ *Id.* (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973), *superseded in part by statute*, 5 U.S.C. § 552(a)(4)(B), (b)(1) (Supp. V 1971–1976), *as recognized in* *CIA v. Sims*, 471 U.S. 159, 189 & n.5 (1985)).

¹¹¹ *Id.* at 773 (quoting *Mink*, 410 U.S. at 105 (Douglas, J., dissenting)).

¹¹² *Id.*

¹¹³ *Id.* at 780.

¹¹⁴ *Id.* at 774. Justice Blackmun’s concurrence did not criticize the central purpose test. *Id.* at 780–81 (Blackmun, J., concurring in the judgment). His only complaint was regarding the majority’s use of a bright-line rule. *Id.*

¹¹⁵ 510 U.S. 487, 497 (1994) (quoting *Reporters Comm.*, 489 U.S. at 773). The Court was unanimous on the outcome in this case with Justice Souter concurring and Justice Ginsburg concurring in the judgment. Justice Souter wrote a very brief concurrence to emphasize the limited nature of the majority’s opinion. *Id.* at 504 (Souter, J., concurring). Justice Ginsburg found that the majority opinion correctly applied the Court’s precedent from *Reporters Committee* but argued that the central purpose

addresses of federal employees, the Court found essentially no relevant public interest to weigh against the invasion of privacy.¹¹⁶

Even though *Reporters Committee* involved Exemption 7(C) and *Federal Labor Relations Authority* dealt with Exemption 6, the Court found *Reporters Committee* squarely on point.¹¹⁷ The only difference between Exemptions 6 and 7(C) is “the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions,” but the parameters for identifying the public interest under either exemption are identical.¹¹⁸ Under *Reporters Committee*, the public interest is only relevant when it furthers FOIA’s central purpose to shed light on government conduct.¹¹⁹ Therefore, the public interest in *Federal Labor Relations Authority* was “negligible, at best” because the disclosure of employees’ addresses would reveal little if anything about the employer–agencies’ conduct.¹²⁰

Considering the privacy interest, the Supreme Court noted that even “a very slight privacy interest” would outweigh “the virtually nonexistent FOIA-related public interest in disclosure.”¹²¹ Following again in *Reporters Committee*’s footsteps, the Supreme Court found that the employees had a “not insubstantial” privacy interest in their home addresses despite public availability in telephone books.¹²² Especially because the home has special privacy protections, employees have at least some privacy interest in their addresses.¹²³

The Supreme Court in this case also reaffirmed the principle that the purpose for requesting the information under FOIA is irrelevant.¹²⁴ *Reporters Committee* and *Federal Labor Relations Authority* limited the public interest side of the balancing test by requiring a connection between the request’s disclosure and FOIA’s central purpose. Two other doctrines, partial disclosure and the presumption of legitimacy, also restrict the public interest side of the balance.

test established in that case does not come from FOIA’s text. *Id.* at 506–07 (Ginsburg, J., concurring in the judgment).

¹¹⁶ *Id.* at 497 (majority opinion).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 496 n.6.

¹¹⁹ *Id.* at 497 (citing *Reporters Comm.*, 489 U.S. at 773).

¹²⁰ *Id.*

¹²¹ *Id.* at 500.

¹²² *Id.*

¹²³ *Id.* at 501.

¹²⁴ *Id.* at 496. Because “all FOIA requesters have an equal, and equally qualified, right to information,” *id.* at 499, the consequence of finding in favor of the unions and requiring disclosure would be that commercial solicitors would have the same access to the employees’ home addresses as the unions would, *id.* at 501.

4. *Partial Disclosure and the Presumption of Legitimacy.*—In between *Reporters Committee* and *Federal Labor Relations Authority*, the Supreme Court in 1991 considered a request by Haitian asylum seekers and their lawyer for the State Department’s records of interviews with Haitians who had unsuccessfully sought entry to the United States and were forced to return to their home country.¹²⁵ The Court’s opinion in *U.S. Department of State v. Ray* yielded two significant doctrinal developments. First, it indicated that the government might be able to tip the FOIA balancing test in favor of nondisclosure by decreasing the weight of the public interest through partial disclosure of the requested documents.¹²⁶ Second, it expressed for the first time in the FOIA context that government records and conduct enjoy a presumption of legitimacy.¹²⁷

In response to a FOIA request, the State Department released redacted versions of the requested interviews, but the asylum seekers wanted the interviewees’ names.¹²⁸ The Court applied the *Rose* balancing test to determine whether the privacy interest in the returned Haitians’ names outweighed the public interest in disclosure.¹²⁹ Because the State Department justified its redaction of the names under Exemption 6, it had to meet the higher burden of a “clearly unwarranted invasion of personal privacy,” while the Justice Department in *Reporters Committee* had only been required to satisfy Exemption 7(C)’s lower burden of an “unwarranted invasion.”¹³⁰

The Supreme Court found a substantial privacy interest because disclosing the interviewees’ names would link particular individuals to highly personal details and the individuals could be subject to embarrassment or retaliatory action if exposed as cooperating with the State Department.¹³¹ Moreover, the State Department had promised the interviewees confidentiality, and the requestors intended to contact the interviewees.¹³²

¹²⁵ U.S. Dep’t of State v. Ray, 502 U.S. 164, 166, 168 (1991).

¹²⁶ See *id.* at 178.

¹²⁷ *Id.* at 179; Michael Hoefges et al., *Privacy Rights Versus FOIA Disclosure Policy: The “Uses and Effects” Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 WM. & MARY BILL RTS. J. 1, 30 (2003). But see Halstuk, *supra* note 68, at 397 (arguing that this presumption of legitimacy is at odds with the very purpose of FOIA as a disclosure statute).

¹²⁸ *Ray*, 502 U.S. at 168–69.

¹²⁹ See *id.* at 175.

¹³⁰ See *id.* at 172 (citing U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 (1989)).

¹³¹ *Id.* at 175–77.

¹³² *Id.* at 177. Justice Scalia would have found it sufficient to protect the information from disclosure by balancing no public interest served by the requested disclosure with the fact that the disclosure would reveal “that a particular person had agreed, under a pledge of confidentiality, to report to a foreign power concerning the conduct of his own government.” *Id.* at 181 (Scalia, J., concurring in part and concurring in the judgment).

The Court identified only one relevant public interest in disclosure: “knowing whether the State Department has adequately monitored Haiti’s compliance with its promise not to prosecute returnees.”¹³³ However, this public interest was insufficient to outweigh the individuals’ substantial privacy interest because the redacted documents already served this interest and additional information would not shed further light on the government’s conduct.¹³⁴ Moreover, the Court found the asserted public interest of assessing the honesty of the interviews’ content to be unworthy of any weight absent some evidence to overcome the presumption of legitimacy for government records and conduct.¹³⁵ The Court explained the need for a presumption of legitimacy as follows: “If a totally unsupported suggestion that the interest in finding out whether Government agents have been telling the truth justified disclosure of private materials, Government agencies would have no defense against requests for production of private information.”¹³⁶ Finding “not a scintilla of evidence . . . that tends to impugn the integrity of the reports,” the Court found in favor of nondisclosure.¹³⁷

As developed in *Ray*, the public interest side of the balancing test suffered two more restrictions: the government can decrease the weight of the public interest in particular information through partial disclosure, and the government enjoys a presumption of legitimacy in its records and conduct. To overcome this presumption of legitimacy, the FOIA requestor must provide some support for the allegation of government misconduct.

II. THE CIRCUIT SPLIT

This legislative history and these Supreme Court precedents provide the following framework to apply to the issue of whether Exemption 7(C) protects federal arrestees’ mug shots from disclosure under FOIA. First, this privacy exemption should be narrowly construed.¹³⁸ Second, whether an invasion of privacy from a FOIA disclosure is warranted requires a balancing of the privacy interests at stake against the public interests served by disclosure.¹³⁹ Third, previous public disclosure does not mean that the privacy exemptions do not apply.¹⁴⁰ Fourth, the public interest side of this

¹³³ *Id.* at 178 (majority opinion).

¹³⁴ *Id.* The Supreme Court in *Ray* was unanimous in its approval of the partial disclosure doctrine, with Justice Scalia writing in his concurring opinion that the majority found “quite correctly[] that the public interests here have been ‘adequately served by disclosure of the redacted interview summaries.’” *Id.* at 181 (Scalia, J., concurring in part and concurring in the judgment) (quoting *id.* at 178 (majority opinion)).

¹³⁵ *Id.* at 179 (majority opinion).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *See supra* Part I.C.1.

¹³⁹ *See supra* Part I.C.1–2.

¹⁴⁰ *See supra* Part I.C.2.

balancing test includes only those interests that serve FOIA's central purpose of informing the public about what the government is up to.¹⁴¹ And finally, partial disclosure and the presumption of legitimacy of government records and conduct, if applicable, further diminish the weight of any public interest served by disclosure.¹⁴²

The specific issue of whether individuals have a sufficient privacy interest in their mug shots such that disclosure could reasonably be expected to constitute an invasion of privacy that outweighs the public interest served by disclosure is unsettled. In 1996, after the four Supreme Court FOIA privacy cases discussed in Part I, the Sixth Circuit became the first federal court of appeals to consider this question.¹⁴³ Finding no privacy interest, the court required disclosure of the mug shots.¹⁴⁴ Fifteen years later, the Eleventh Circuit and then the Tenth Circuit disagreed.¹⁴⁵ This Part begins with the factual background of these three cases. Then, it discusses the balancing test used by each court. Finally, this Part compares the courts' discussions of the privacy and public interests at stake and their conclusions.

A. Factual Background

The three federal appellate court cases that have addressed whether Exemption 7(C) applies to mug shots all concerned FOIA requests filed by members of the press.¹⁴⁶ The legal status of the mug shot subjects differed, but all of the arrestees had appeared in court before the FOIA request was made,¹⁴⁷ which arguably diminishes the arrestees' privacy interest. In the Sixth Circuit case, the eight mug shot subjects had been indicted and were awaiting trial.¹⁴⁸ Their names had been released to the public, and they had appeared in court.¹⁴⁹ In the Eleventh Circuit case, the mug shot subject was Luis Giro, the former president of Giro Investments Group, Inc., who had

¹⁴¹ See *supra* Part I.C.2–3.

¹⁴² See *supra* Part I.C.4.

¹⁴³ See *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 96–97 (6th Cir. 1996).

¹⁴⁴ *Id.* at 97–98 (concluding that “no privacy rights are implicated” by the release of mug shots depicting defendants involved “in an ongoing criminal proceeding, in which the names of the defendants have already been divulged and in which the defendants themselves have already appeared in open court”).

¹⁴⁵ *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 831–32 (10th Cir. 2012); *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497, 499 (11th Cir. 2011) (*per curiam*), *cert. denied*, 132 S. Ct. 1141 (2012).

¹⁴⁶ *World Publ'g Co.*, 672 F.3d at 826; *Karantsalis*, 635 F.3d at 499; *Detroit Free Press*, 73 F.3d at 95.

¹⁴⁷ See *World Publ'g Co.*, 672 F.3d at 826; *Karantsalis*, 635 F.3d at 499; *Detroit Free Press*, 73 F.3d at 95.

¹⁴⁸ *Detroit Free Press*, 73 F.3d at 95.

¹⁴⁹ *Id.*

appeared in court to plead guilty to securities fraud.¹⁵⁰ The mug shot subjects in the Tenth Circuit case were six pretrial detainees who had been indicted and arraigned, and were awaiting trial.¹⁵¹

B. *The Balancing Test*

The Sixth, Tenth, and Eleventh Circuits fashioned slightly different balancing tests for determining whether Exemption 7(C) applied to the requested mug shots.¹⁵² The Sixth Circuit's test consisted of two steps: the information's disclosure "must *reasonably* be expected to constitute an invasion of personal privacy" and "that intrusion into private matters must be deemed 'unwarranted' after balancing the need for protection of private information against the benefit to be obtained by disclosure of information concerning the workings of components of our federal government."¹⁵³ The Eleventh Circuit's test included three steps: "an invasion is unwarranted where (1) the information sought implicates someone's personal privacy, (2) no legitimate public interest outweighs infringing the individual's personal privacy interest, and (3) disclosing the information 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'"¹⁵⁴ The Tenth Circuit's test had two steps: "determine whether there is a personal privacy interest at stake; and if there is[,] balance the privacy interest against the public interest in disclosure."¹⁵⁵

Despite some differences, the courts' tests break down into the same three stages. First, the court identifies the privacy interests at stake. Second, the court identifies the public interests served by disclosure. And third, the court employs the balancing test consistently with Supreme Court precedents by weighing the privacy interests against the public interests to determine whether the invasion of privacy is unwarranted. If so, Exemption 7(C) applies and allows the government to withhold the information.

¹⁵⁰ *Karantsalis*, 635 F.3d at 499.

¹⁵¹ *World Publ'g Co.*, 672 F.3d at 826; Complaint at 1, *World Publ'g Co. v. U.S. Dep't of Justice*, No. 09-CV-00574-TCK-TLW (N.D. Okla. 2011), 2009 WL 8182100.

¹⁵² As an initial matter, the courts considered the threshold question of whether the information was compiled for law enforcement purposes. Exemption 7(C) cannot apply unless that condition is met. *See* 5 U.S.C. § 552(b)(7)(C) (2006); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989); *FBI v. Abramson*, 456 U.S. 615, 630 (1982). The FOIA requestors only contested this threshold question in the Sixth Circuit case, but the court easily resolved it in favor of the government. *Detroit Free Press*, 73 F.3d at 96. In the Tenth and Eleventh Circuit cases, the FOIA requestors conceded that mug shots were compiled for law enforcement purposes. *World Publ'g Co.*, 672 F.3d at 827; *Karantsalis*, 635 F.3d at 502.

¹⁵³ *Detroit Free Press*, 73 F.3d at 96 (quoting § 552(b)(7)(C)).

¹⁵⁴ *Karantsalis*, 635 F.3d at 502 (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989)).

¹⁵⁵ *World Publ'g Co.*, 672 F.3d at 827.

C. *The Privacy Interest Implicated by Mug Shot Disclosure*

Although the courts used similar approaches, they diverged in their outcomes. One explanation for the circuit split on mug shot disclosure is the courts' differing opinions on the privacy interest at stake. In *Detroit Free Press*, the Sixth Circuit did not find any privacy interest in the requested mug shots. To reach that conclusion, it distinguished two Supreme Court cases that found a sufficient privacy interest to justify nondisclosure.¹⁵⁶ Unlike the names of the returned Haitians in *Ray*, which the Government had not previously disclosed, the Government had released the names associated with the mug shots, and the arrestees' faces had been revealed in public court appearances.¹⁵⁷ Unlike the FBI rap sheets in *Reporters Committee*, which offered a compilation of information unrelated to active prosecution, the mug shots were a single piece of information related to an ongoing prosecution, which "drastically lessened" the need to shield the individual defendant from public knowledge that he or she was facing criminal charges.¹⁵⁸ The Sixth Circuit concluded that the mug shots' release would not disclose any "new information that the indictees would not wish to divulge" because "their visages had already been revealed during prior judicial appearances."¹⁵⁹ This court appearance provided the public with access to the indictees' image. In high profile cases, at least, this provides the media with an opportunity to photograph the indictee. The court rejected the Government's argument that a mug shot "conveys an extremely unflattering view of the subject, with strong connotations of guilt" and held that the disclosure of indicted arrestees' mug shots invaded no privacy interest when they had previously appeared in court, and criminal proceedings were ongoing.¹⁶⁰

The Tenth and Eleventh Circuits disagreed with the Sixth Circuit and instead found a significant privacy interest in mug shots because what they depict is unique. In *Karantsalis v. U.S. Department of Justice*, the Eleventh Circuit found that mug shots are not like other photographs. Instead, mug shots are "a vivid symbol of criminal accusation . . . often equated with . . . guilt" that "captures the subject in [a] vulnerable and embarrassing moment[]." ¹⁶¹ Moreover, the Eleventh Circuit emphasized that mug shots are not freely available to the public.¹⁶² Unlike the Sixth Circuit, the Eleventh Circuit found that the arrestee had a continuing privacy interest in

¹⁵⁶ *Detroit Free Press*, 73 F.3d at 96–97.

¹⁵⁷ *Id.* at 97.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ 635 F.3d 497, 503 (11th Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 1141 (2012).

¹⁶² *Id.*

his mug shot even after he had appeared in open court to plead guilty due to the mug shot's unique characteristics.¹⁶³

The Tenth Circuit in *World Publishing Co. v. U.S. Department of Justice* agreed with the Eleventh Circuit's finding of a privacy interest. Instead of distinguishing *Reporters Committee* like the Sixth Circuit did, the Tenth Circuit relied on *Reporters Committee* as standing for the notion that the previous public disclosure of the requested information did not bar the application of Exemption 7(C).¹⁶⁴ Finally, the court quoted heavily from a district court decision, *Times Picayune Publishing Corp. v. U.S. Department of Justice*, which had found that Exemption 7(C) applied to mug shots.¹⁶⁵ The Tenth Circuit emphasized the *Times Picayune* court's description of mug shots as "notorious for their visual association of the person with criminal activity" and the disclosure's effect of preserving the mug shot's impact "for posterity."¹⁶⁶ The Tenth Circuit also noted that it had found mug shots inadmissible as unduly prejudicial in a different case.¹⁶⁷

The newspaper requesting the mug shots argued that the Tenth Circuit should consider the practice of most state law enforcement agencies to make mug shots available to the public as evidence that mug shots are generally available.¹⁶⁸ The Tenth Circuit found this argument unpersuasive, though, as state practices are irrelevant to USMS practices.¹⁶⁹ The newspaper also argued that the USMS's practice after *Detroit Free Press* of disclosing mug shots in the Sixth Circuit meant that mug shots were

¹⁶³ See *id.*

¹⁶⁴ See *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 827 (10th Cir. 2012). The court also mentioned a Tenth Circuit case in which previous disclosure of autopsy photographs and a video to a jury in open court also didn't bar the application of Exemption 7(C). *Id.* (citing *Prison Legal News v. Exec. Office for U.S. Attorneys*, 628 F.3d 1243, 1252–53 (10th Cir. 2011)).

¹⁶⁵ 37 F. Supp. 2d 472, 477, 479 (E.D. La. 1999). Decided three years after *Detroit Free Press*, the district court rejected the Sixth Circuit's holding as contrary to *Reporters Committee* and the modification to Exemption 7(C)'s statutory language from "would constitute" to "could reasonably be expected to constitute," which had the effect of broadening the scope of the relevant privacy interest. *Id.* at 476–77. The FOIA request in the case involved the mug shot of a prominent businessman, Edward J. DeBartolo, Jr., who owned the San Francisco Forty-Niners. *Id.* at 473. The USMS took his mug shot after he entered his guilty plea to the charge of misprision of a felony, which arose from the criminal investigation of former Louisiana Governor Edwin W. Edwards. *Id.* at 473–74.

¹⁶⁶ *World Publ'g Co.*, 672 F.3d at 827–28 (emphasis omitted) (quoting *Times Picayune Publ'g Corp.*, 37 F. Supp. 2d at 477).

¹⁶⁷ See *id.* at 829 (citing *United States v. Romero-Rojo*, 67 F. App'x 570, 572 (10th Cir. 2003)). So has the Sixth Circuit. In *United States v. Lopez-Medina*, the court held that the district court abused its discretion when it admitted two mug shots. 461 F.3d 724, 742 (6th Cir. 2006). The court noted that "[m]ug shots, in particular, are highly prejudicial, and their visual impact can leave a lasting impression on a jury." *Id.* at 749.

¹⁶⁸ See *World Publ'g Co.*, 672 F.3d at 829.

¹⁶⁹ *Id.* The *Times Picayune* court also found state FOIA practices irrelevant to federal FOIA interpretations: "Obviously, a state court's interpretation of a state's FOIA also is irrelevant to the meaning of the federal statute." *Times Picayune Publ'g Corp.*, 37 F. Supp. 2d at 476.

generally available.¹⁷⁰ The Tenth Circuit found this similarly unpersuasive because the Sixth Circuit's decision is not binding in other circuits.¹⁷¹ "Persons arrested on federal charges outside of the Sixth Circuit maintain some expectation of privacy in their booking photos."¹⁷² However, at the time of this case, release actually depended on the location of the requestor, not the location of the arrestee, with the USMS making a special exception to its policy for requests coming from the Sixth Circuit.¹⁷³ Today, the USMS no longer releases any mug shots except when the release would further a legitimate law enforcement purpose.¹⁷⁴ As such, mug shots are not widely available.

The courts of appeals differed on the privacy interest at stake. The Sixth Circuit found none.¹⁷⁵ After the arrestees appeared in court and law enforcement released their names, disclosure of mug shots in response to FOIA requests provided no new information. The Tenth and Eleventh Circuits, however, found significant privacy interests despite arrestees' court appearances because of the unique image that mug shots portray.

D. *The Public Interest Served by Mug Shot Disclosure*

In addition to differing views with respect to the privacy side of the balancing test, another cause of the circuit split was the courts' different takes on the public interest served by disclosure of the mug shots. All three courts agreed that the *Reporters Committee* central purpose test applied, meaning that the only relevant public interests are those that further FOIA's purpose.¹⁷⁶ But the courts split on whether disclosure of mug shots serves any relevant public interest.

The Sixth Circuit in *Detroit Free Press* considered the public interests served by disclosure, even though its finding of no privacy interest meant that Exemption 7(C) could not apply.¹⁷⁷ Unlike federal employees' home addresses in *Federal Labor Relations Authority*, which would not shed any light on government activity, disclosing mug shots would provide "documentary evidence of the designated responsibilities of an agency of the federal government."¹⁷⁸ The Sixth Circuit provided two examples of

¹⁷⁰ *World Publ'g Co.*, 672 F.3d at 829.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See Memorandum from Gerald M. Auerbach, *supra* note 2 ("Until now, the USMS has employed an exception for FOIA requests originating within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit . . .").

¹⁷⁴ *Id.* at 2–3.

¹⁷⁵ *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 97 (6th Cir. 1996).

¹⁷⁶ *World Publ'g Co.*, 672 F.3d at 830; *Karantalis v. U.S. Dep't of Justice*, 635 F.3d 497, 504 (11th Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 1141 (2012); *Detroit Free Press*, 73 F.3d at 98.

¹⁷⁷ *Detroit Free Press*, 73 F.3d at 97–98.

¹⁷⁸ *Id.* at 96 (citing *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994)).

how the disclosure of mug shots could serve FOIA's purpose: (1) by revealing that the government detained the wrong person and (2) by revealing the government's treatment of the arrestee.¹⁷⁹ The court speculated that mug shots would serve both of these purposes much more effectively than mere words could.¹⁸⁰ By way of example, the court hypothesized that had the video of the Rodney King beating not been made public, the disclosure of his mug shot showing his severe injuries "would have alerted the world that the arrestee had been subjected to much more than a routine traffic stop and that the actions and practices of the arresting officers should be scrutinized."¹⁸¹

According to the Eleventh Circuit in *Karantsalis*, disclosure would serve no public interest.¹⁸² *Karantsalis* had argued that Giro's facial expression would reveal if he had received preferential treatment.¹⁸³ But the court rejected this argument by explaining that facial expressions were a poor proxy for preferential treatment and that the public's curiosity about prisoners' facial expressions does not further FOIA's central purpose as stated in *Reporters Committee*.¹⁸⁴

In *World Publishing Co.*, the Tenth Circuit rejected all nine of the newspaper's public interest arguments in favor of disclosure, including the two mentioned approvingly by the Sixth Circuit.¹⁸⁵ Like the Eleventh Circuit, the Tenth Circuit found that disclosure would serve no public interest related to FOIA's central purpose of informing citizens about "a government agency's adequate performance of its function."¹⁸⁶

¹⁷⁹ *Id.* at 98.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497, 504 (11th Cir. 2011) (per curiam) ("[T]he public obtains no discernable interest from viewing the booking photographs, except perhaps the negligible value of satisfying voyeuristic curiosities."), *cert. denied*, 132 S. Ct. 1141 (2012).

¹⁸³ *Id.* According to *Karantsalis*, the smirks and smiles of arrestees Bernie Madoff and Joe Nacchio in their mug shots showed this preferential treatment. *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 831–32 (10th Cir. 2012). The nine public interests were:

- (1) determining the arrest of the correct detainee
- (2) detecting favorable or unfavorable or abusive treatment
- (3) detecting fair versus disparate treatment
- (4) racial, sexual, or ethnic profiling in arrests
- (5) the outward appearance of the detainee; whether they may be competent or incompetent or impaired
- (6) a comparison in a detainee's appearance at arrest and at the time of trial
- (7) allowing witnesses to come forward and assist in other arrests and solving crimes
- (8) capturing a fugitive
- (9) to show whether the indictee took the charges seriously.

Id. at 831.

¹⁸⁶ *Id.*

After identifying the privacy and public interests at stake, the ultimate balancing for all three courts was easy. In *Detroit Free Press*, weighing no privacy interest against at least two public interests meant that Exemption 7(C) did not apply.¹⁸⁷ For the Tenth and Eleventh Circuits, weighing substantial privacy interests against no public interest meant that Exemption 7(C) did apply.¹⁸⁸

E. The Consequences of the Circuit Split

Until recently, the effective consequence of the circuit split was that no federal arrestees' mug shots were protected from disclosure. As mentioned in *Karantsalis*, the split caused the USMS's disclosure policy for mug shots to hinge on the jurisdiction of the request's origin.¹⁸⁹ As a general rule, the USMS did not release mug shots in response to FOIA requests.¹⁹⁰ But if the USMS received a FOIA request from the jurisdiction of the Sixth Circuit, the USMS followed *Detroit Free Press* and released the mug shot.¹⁹¹ Any media outlet could easily exploit this exception by, for example, setting up a post office box within the Sixth Circuit.¹⁹² Once the USMS had released a mug shot to a FOIA requestor within the Sixth Circuit, it would then release that mug shot to any FOIA requestor since the information entered the public domain with the initial release.¹⁹³

A recent example of this 1996–2012 policy at work is in the case of Jared Lee Loughner, who attempted to assassinate Congresswoman Gabrielle Giffords, killing six people, and shooting twelve others on January 8, 2011, in Tucson, Arizona.¹⁹⁴ Loughner's defense counsel sought a court order prohibiting the release of his mug shots.¹⁹⁵ The Government responded to this motion by explaining that it agreed that FOIA did not require disclosure and did not oppose the defendant's motion, but without a

¹⁸⁷ *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 97–98 (6th Cir. 1996).

¹⁸⁸ *World Publ'g Co.*, 672 F.3d at 831–32; *Karantsalis*, 635 F.3d at 504.

¹⁸⁹ *Karantsalis*, 635 F.3d at 501.

¹⁹⁰ *Id.*; Brief for the Respondents in Opposition at 14 n.5, *Karantsalis v. Dep't of Justice*, 132 S. Ct. 1141 (2012) (No. 11-342) (cert. denied); Emergency Motion to Bar Release of Post-Arrest Photographic Images of Defendant at 2, *United States v. Loughner*, No. 11CR00187-LAB (D. Ariz. Feb. 10, 2011), 2011 WL 479905 (noting that USMS policy “generally prohibits public release of prisoner mug shots . . . except in the Sixth Circuit” (quoting Exhibit A, Memorandum from Gerald M. Auerbach, Gen. Counsel, U.S. Marshals Serv., to All U.S. Marshals et al. (Aug. 22, 2007))).

¹⁹¹ Brief for the Respondents in Opposition, *supra* note 190, at 14 n.5; Letter from Lucy A. Dalglish, Exec. Dir., Reporters Comm. for Freedom of the Press, to William E. Bordley, Assoc. Gen. Counsel, U.S. Marshals Serv. 1 (Jan. 4, 2012) (on file with author).

¹⁹² See *Karantsalis*, 635 F.3d at 501 n.1.

¹⁹³ Letter from Lucy A. Dalglish to William E. Bordley, *supra* note 191, at 1–2.

¹⁹⁴ See Plea Agreement at 12–13, *United States v. Loughner*, No. CR 11-187-TUC-LABU (D. Ariz. Aug. 7, 2012), 2012 WL 3231075.

¹⁹⁵ Emergency Motion to Bar Release of Post-Arrest Photographic Images of Defendant, *supra* note 190, at 1.

contrary court order, the USMS “must release the photograph to requesters within the jurisdiction of the Sixth Circuit pursuant to *Detroit Free Press*.”¹⁹⁶ The USMS had received eleven FOIA requests for Loughner’s mug shots, four of which came from within the Sixth Circuit’s jurisdiction.¹⁹⁷ Apparently, the district court denied the defendant’s motion because the USMS released Loughner’s mug shot on February 22, 2011, twelve days after his motion to prohibit its release.¹⁹⁸ Despite the fact that Loughner’s arrest and mug shots took place in Arizona within the Ninth Circuit, where USMS policy was and still is not to disclose mug shots as an invasion of personal privacy, FOIA requestors were able to circumvent this policy by simply making their requests from within the Sixth Circuit. Even though one federal district court and two federal appellate courts have found that the subjects of mug shots have significant privacy interests at stake that outweigh the public’s interest in disclosure,¹⁹⁹ Loughner and other arrestees nationwide had effectively no privacy protection for their mug shots against a determined FOIA requestor.

As of December 12, 2012, however, the USMS abandoned its long-standing policy of adhering to *Detroit Free Press* within the Sixth Circuit.²⁰⁰ Now, the USMS will not release any mug shots except for legitimate law enforcement purposes like apprehending a fugitive.²⁰¹ The result is that despite the Sixth Circuit’s decision still being in full force within its jurisdiction, the USMS has decided to blatantly disregard the circuit court’s clear holding in its new mug-shot-disclosure policy. An executive agency has taken it upon itself to resolve the circuit split and ignore the Sixth Circuit’s holding.

¹⁹⁶ Government’s Response to Defendant’s Motion to Bar Release of Post-Arrest Photographic Images of Defendant at 1–2, *United States v. Loughner*, No. CR 11-0187-TUC-LAB (D. Ariz. Feb. 14, 2011), 2011 WL 827230.

¹⁹⁷ *Id.* at 5.

¹⁹⁸ See, e.g., Jacques Billeaud, *Jared Loughner to Be Sentenced After Pleading Guilty to Tuscon Mass Shooting*, CHRISTIAN SCI. MONITOR, Nov. 8, 2012, available at <http://www.csmonitor.com/USA/Latest-News-Wires/2012/1108/Jared-Loughner-to-be-sentenced-after-pleading-guilty-to-Tuscon-mass-shooting>. The district court entered a protective order on March 23, 2011, which “directed the [Pima County] Sheriff not to release ‘any investigative reports, files or materials relating to the investigation of this case.’” *United States v. Loughner*, 807 F. Supp. 2d 828, 829 (D. Ariz. 2011). The district court later modified the protective order to give the Sheriff the option of releasing investigative materials that did “not implicate . . . privacy, fair-trial rights, and publicity concerns.” *Id.* at 836.

¹⁹⁹ See *supra* notes 165, 188 and accompanying text.

²⁰⁰ Memorandum from Gerald M. Auerbach, *supra* note 2, at 2–3.

²⁰¹ *Id.* at 1–3. The new policy also allows for disclosure if the USMS Office of the General Counsel determines for itself that a FOIA “requester has made the requisite showing that the public interest in the requested booking photograph outweighs the privacy interest at stake.” *Id.* at 3. It seems unlikely that the USMS will find a sufficient showing very often. See Letter from Bruce D. Brown, Exec. Dir., Reporters Comm. for Freedom of the Press et al., to Eric H. Holder, Jr., Attorney Gen., U.S. Dep’t of Justice 4–5 (Jan. 30, 2013) (on file with author) (describing “but two examples of what is now the routine Marshals Service practice of denying any and all FOIA requests for federal booking photographs”).

III. RESOLUTION OF THE CIRCUIT SPLIT

The contrary decisions of the Sixth Circuit and the Tenth and Eleventh Circuits on whether Exemption 7(C) applies to mug shots cannot be reconciled. Without a clear answer from the courts, USMS policy on the disclosure of mug shots is unstable and must either severely undermine the privacy interest identified by the Tenth and Eleventh Circuits or ignore the holding of the Sixth Circuit.²⁰² This Part analyzes the privacy and public interests at stake in the disclosure of mug shots and concludes that the Sixth Circuit should be overruled because arrestees' privacy interest outweighs the negligible public interest served by disclosure.

A. Mug Shot Disclosure Implicates a Privacy Interest

Arrestees have a significant privacy interest in their mug shots. Three factors contribute to this privacy interest: the fact that the photographs convey a unique, humiliating image; FOIA's legislative history and Supreme Court precedents; and technology that gives disclosed mug shots staying power well beyond the initial news of the subject's arrest.

I. Uniqueness of Mug Shots.—Mug shots are unique in what they portray: a particularly embarrassing moment in someone's life that is shrouded in an aura of guilt.²⁰³ The Sixth Circuit, in reaching its conclusion that arrestees have no privacy interest in their mug shots, treated mug shots as just another photograph.²⁰⁴ The court failed to appreciate the uniqueness of mug shots. As the other federal courts to consider the mug-shot-disclosure question acknowledged, mug shots represent “a vivid symbol of criminal accusation”²⁰⁵ and “are notorious for their visual association of the person with criminal activity.”²⁰⁶

FOIA requestors' and courts' treatment of mug shots further illustrates their unique nature. FOIA requestors continue to pursue mug shots even after the suspect has appeared in court, and the media has other pictures of the suspect to publish.²⁰⁷ This behavior demonstrates the special nature of a mug shot because it shows that FOIA requestors themselves do not treat mug shots as just another photograph.²⁰⁸ Judges, too, recognize that mug shots are special. As the *World Publishing Co.* decision noted, some courts

²⁰² See *supra* Part II.E.

²⁰³ *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 827–28 (10th Cir. 2012); *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497, 503 (11th Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 1141 (2012); *Times Picayune Publ'g Corp. v. U.S. Dep't of Justice*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999).

²⁰⁴ See *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 97 (6th Cir. 1996) (noting that the mug shot subjects' “visages had already been revealed during prior judicial appearances”).

²⁰⁵ *Karantsalis*, 635 F.3d at 503.

²⁰⁶ *World Publ'g Co.*, 672 F.3d at 827–28 (emphasis omitted) (quoting *Times Picayune Publ'g Corp.*, 37 F. Supp. 2d at 477).

²⁰⁷ See *Times Picayune Publ'g Corp.*, 37 F. Supp. 2d at 477–78.

²⁰⁸ *Id.*

have found that the admission of mug shots is unduly prejudicial.²⁰⁹ Because mug shots have unique characteristics, their disclosure invades arrestees' privacy.

2. *Legislative History and Precedents Support Finding a Significant Privacy Interest.*—In addition to the uniqueness of mug shots supporting the conclusion of a significant privacy interest, FOIA's legislative history and Supreme Court precedents support that finding. Although Congress designed FOIA as a disclosure statute rather than a withholding statute, it always included a caveat related to privacy.²¹⁰ Moreover, the legislative history indicates that subsequent FOIA amendments intended to broaden the scope of Exemption 7(C).²¹¹

Supreme Court precedents also support the idea that mug shot disclosure implicates a significant privacy interest. The Court's FOIA privacy cases indicate a clear commitment to protecting privacy. In only one FOIA privacy case did the Supreme Court appear to favor disclosure.²¹² And that one case involved Exemption 6,²¹³ which sets a higher bar for the necessary privacy interest than Exemption 7(C) does.²¹⁴ Despite its continued commitment to the legislative intent that FOIA exemptions be narrowly construed,²¹⁵ the Supreme Court has shown a willingness to interpret the privacy protections broadly.²¹⁶ Even the Tenth and Eleventh Circuits, which found a significant privacy interest, did not consider the aggregate effect of Supreme Court authority from FOIA privacy cases pointing toward nondisclosure.

Moreover, the Supreme Court has found a sufficient privacy interest justifying the government's withholding under the FOIA privacy exemptions even when the exact same information is already available to the public through court records or telephone books.²¹⁷ In contrast, mug shots do not provide the exact same information that is already available to the public. The public has access to some of the information disclosed through a mug shot, such as the arrestee's name, the fact of arrest, and

²⁰⁹ *World Publ'g Co.*, 672 F.3d at 829 (citing *United States v. Romero-Rojo*, 67 F. App'x 570, 572 (10th Cir. 2003)); *see, e.g.*, *United States v. Lopez-Medina*, 461 F.3d 724, 742 (6th Cir. 2006) (holding that the district court abused its discretion in admitting two mug shots).

²¹⁰ *See supra* notes 38–43 and accompanying text.

²¹¹ *See supra* notes 55–62 and accompanying text.

²¹² *See Dep't of the Air Force v. Rose*, 425 U.S. 352, 381–82 (1976).

²¹³ *Id.*

²¹⁴ *See supra* notes 55–57 and accompanying text.

²¹⁵ *See, e.g.*, *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1262 (2011).

²¹⁶ *Halstuk & Chamberlin, supra* note 72, at 514 (arguing that “the Court has tipped the scales significantly in favor of a broadly construed and vaguely framed right to privacy over the public's right of access to government-held information”).

²¹⁷ *See U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500 (1994); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 753 (1989).

other photographs depicting the subject of the mug shot through court appearances or, if a celebrity, through other public appearances. But the precise depiction of the subject in the mug shot is not available to the public. If the Supreme Court is willing to allow an agency to rely on a privacy exemption to withhold identical information already available to the public, the Supreme Court should find a relevant privacy interest in the different information conveyed in an arrestee's mug shot. The Sixth Circuit's finding of no privacy interest contradicts these precedents.

To distinguish *Reporters Committee*, the Sixth Circuit drew a distinction between a single piece of information and the compilation of information.²¹⁸ That is, while a mug shot is just one picture, the rap sheets at issue in *Reporters Committee* contained lots of information.²¹⁹ Although the Supreme Court did consider the quantity of information contained in the rap sheets important,²²⁰ other decisions indicate that whether the invasion of personal privacy is unwarranted turns more on the nature of the information—no matter how small—rather than on the quantity of information revealed about a person. For example, in *Federal Labor Relations Authority*, nowhere did the Supreme Court indicate that the length of the list of government employees' home addresses was significant. Instead, the personal nature of the information made the invasion of privacy unwarranted, despite the fact that most of those addresses would be available in public telephone books.²²¹ Similarly, in *Ray* the Government had already disclosed substantial amounts of information about the returned Haitian interviewees, but the additional disclosure of one more piece of information—their names—constituted an unwarranted invasion of personal privacy under the higher “clearly unwarranted” standard of Exemption 6.²²² While the Tenth and Eleventh Circuits discussed the unique characteristics of mug shots, even those courts, like the Sixth Circuit, did not consider the Supreme Court precedents from *Federal Labor Relations Authority* and *Ray*. The Eleventh Circuit never discussed *Ray*,²²³ and the Tenth Circuit only mentioned *Ray* in the context of the public interest.²²⁴ Neither court mentioned *Federal Labor Relations Authority* at all.

²¹⁸ See *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 97 (6th Cir. 1996).

²¹⁹ See *id.*

²²⁰ *Reporters Comm.*, 489 U.S. at 749–50, 764.

²²¹ *Fed. Labor Relations Auth.*, 510 U.S. at 500–01.

²²² See *U.S. Dep't of State v. Ray*, 502 U.S. 164, 168–69, 179 (1991).

²²³ See *Karantalis v. U.S. Dep't of Justice*, 635 F.3d 497, 500–01, 504 (11th Cir. 2011) (*per curiam*) (discussing only the Eleventh Circuit's opinion in the *Ray* case on the limited issue of whether the USMS “conducted a search reasonably calculated to uncover all relevant documents” (quoting *Ray v. U.S. Dep't of Justice*, 908 F.2d 1549, 1558 (11th Cir. 1990), *rev'd*, 502 U.S. 164)), *cert. denied*, 132 S. Ct. 1141 (2012).

²²⁴ *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 831 (10th Cir. 2012).

In another departure from Supreme Court precedents, the Sixth Circuit emphasized the reasonableness language in Exemption 7(C).²²⁵ In doing so, the Sixth Circuit seems to have restricted the weight of the privacy interest relevant to its analysis. Its restatement of the balancing test raised the bar for the privacy interest by requiring that the information's disclosure "*must reasonably* be expected to constitute an invasion of personal privacy."²²⁶ Instead of the word "reasonably," the Supreme Court has focused on interpreting the entire phrase "could reasonably be expected to" as indicating the legislative intent to relax the necessary privacy interest to justify withholding information.²²⁷ The Sixth Circuit's use of "must" suggests a higher burden on the government than the Supreme Court has used and that the statutory language supports. Although the Sixth Circuit was correct that the burden is on the government agency to show that the FOIA exemption applies,²²⁸ what the agency must show is that disclosure "*could* reasonably be expected to constitute,"²²⁹ not that the disclosure "*must* reasonably be expected to constitute an invasion of personal privacy."²³⁰

3. *Technology Magnifies the Privacy Interest.*—By allowing for the publication of mug shots on the Internet, technology increases the privacy interest implicated by the disclosure of mug shots. The Sixth Circuit failed to consider the impact of technology. Although the Internet's pervasiveness is more prominent today than in 1996, the Sixth Circuit had the benefit of the Supreme Court's 1989 decision in *Reporters Committee*, which made clear that technology increased the privacy interest at stake by giving otherwise forgotten information staying power.²³¹ Technology today, especially with the advent of social media, may have caused some people to have a lower expectation of privacy.²³² But the Supreme Court has insisted that technology increases the weight of the privacy interest under FOIA because disclosure would allow long-forgotten information to resurface.²³³

This conclusion remains valid with respect to mug shots, even if the depicted arrestees are users of social media who voluntarily expose a great

²²⁵ *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 96 (6th Cir. 1996).

²²⁶ *Id.* (first emphasis added).

²²⁷ *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989).

²²⁸ *See U.S. Dep't of State v. Ray*, 502 U.S. 164, 172 (1991); *Reporters Comm.*, 489 U.S. at 755.

²²⁹ 5 U.S.C. § 552(b)(7)(C) (2006) (emphasis added).

²³⁰ *Detroit Free Press*, 73 F.3d at 96 (emphasis added and omitted).

²³¹ *See Reporters Comm.*, 489 U.S. at 771.

²³² *See Samuel Mark Borowski et al., Evolving Technology & Privacy Law: Can the Fourth Amendment Catch Up?*, A.B.A. SCITECH LAW., Spring 2012, at 14, 14 ("Some would say [social media] has eviscerated [our privacy], in part because what one shares openly with the world no longer can be reasonably considered private.").

²³³ *See Reporters Comm.*, 489 U.S. at 771.

deal of seemingly private information to the public. The Internet gives a mug shot staying power by providing public access to this humiliating photograph forever. When mug shots were printed in newspapers and not plastered on the Internet, the public would only have easy access to the photograph near the time of the arrest and disclosure. The humiliation for the subject, then, was limited to a short period of time. After discarding the newspaper, one would have to mine the archives of a library's newspaper collection in order for the mug shot to resurface. Today, however, the Internet allows any curious person, such as a potential employer reviewing job applicants, to enter a query into a search engine and instantly retrieve a mug shot that would have otherwise been forgotten. This easy access continues even after charges have been dropped, the subject of the photograph has been acquitted, or the arrestee has been exonerated after a long struggle to clear his name after a wrongful conviction.

Consider the example of Terrill Swift. He was one of the Englewood Four, a group of four teenagers who were wrongfully convicted of a rape and murder in the Englewood neighborhood of Chicago, Illinois.²³⁴ Through DNA testing, the four men were exonerated.²³⁵ Swift spent fifteen years in prison for a crime that he did not commit.²³⁶ Despite his exoneration, the public continues to have access to his mug shot through the Internet.²³⁷ Although Swift's ordeal has been widely publicized and he chooses to share his story at some public events, he does not have any choice when it comes to his mug shot, which serves as a painful reminder of his wrongful arrest and conviction.²³⁸ Swift's story provides one example of how technology works to magnify the privacy interest at stake in the disclosure of mug shots.

The interest on the privacy side of the Exemption 7(C) balancing test is significant. Mug shots portray a unique image of the arrestee. The uniqueness of the mug shot means that disclosure invades the subject's privacy even more than in other FOIA privacy cases that involved previous disclosure of the exact same information. Moreover, technology increases the weight of the privacy interest by giving released mug shots staying power.

²³⁴ Steve Mills, *U.S. Looking at Englewood 4 Case: Teens Convicted in 1994 Rape, Murder Later Were Cleared*, CHI. TRIB., Dec. 9, 2012, at 13.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See *Terrill Swift Mugshot*, MUGSHOTS.COM, <http://mugshots.com/Blog/Terrill-Swift.282735.html> (last visited Nov. 26, 2013).

²³⁸ Jon Yates, *Problem Solver: Exonerated Man Feels Mugged by Website*, CHI. TRIB. (Mar. 3, 2012), http://articles.chicagotribune.com/2012-03-03/business/ct-biz-0304-problem-swift-20120303_1_mug-shot-website-joshua-tepfer.

B. Disclosure Serves Some Public Interest

Although the Tenth and Eleventh Circuits reached an appropriate conclusion with respect to finding a privacy interest at stake in the context of mug shot disclosure, those courts did not properly consider the public interest side of the balancing test. Under the central purpose test, which all three courts used, mug shot disclosure would reveal information about “a government agency’s adequate performance of its function”²³⁹ because the USMS is a government agency and taking mug shots is one of the USMS functions when booking its arrestees. However, the Tenth and Eleventh Circuits could have reached the same result under the balancing test even if they had properly considered the Supreme Court’s FOIA doctrines of presumption of legitimacy and partial disclosure.

The Sixth Circuit’s analysis of the public interest served by disclosure was not essential to its holding because its finding of no privacy interest meant that Exemption 7(C) did not apply.²⁴⁰ However, the discussion of the public interest indicates further flaws in the court’s reasoning. The Sixth Circuit mentioned the central purpose test in its analysis of the public interest in order to factually distinguish *Reporters Committee*, where the Supreme Court found in favor of withholding the information.²⁴¹ But the Sixth Circuit’s conclusion that disclosure of mug shots would reveal information about how the USMS performs its functions failed to mention the presumption of legitimacy afforded to government conduct.²⁴² The Eleventh Circuit in *Karantalis* and the Tenth Circuit in *World Publishing Co.* also did not mention the presumption of legitimacy articulated in *Ray*.

The Supreme Court made clear in *Ray* that this presumption of legitimacy is relevant to the FOIA calculus.²⁴³ Although some have challenged the presumption of legitimacy in FOIA jurisprudence as circular,²⁴⁴ *Ray* nevertheless was binding precedent on the federal courts facing the mug-shot-disclosure question, and those courts should have considered it.²⁴⁵ The FOIA requestors in *Karantalis* tried to argue that

²³⁹ *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 831 (10th Cir. 2012).

²⁴⁰ *See Detroit Free Press, Inc. v. Dep’t of Justice*, 73 F.3d 93, 97 (6th Cir. 1996).

²⁴¹ *See id.* at 97–98.

²⁴² *See id.* at 100 (Norris, J., dissenting) (“Especially in view of the presumption of legitimacy that we accord to agency conduct, this asserted interest is utterly speculative and therefore not entitled to weight in the FOIA privacy exemption balancing.”).

²⁴³ *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 179 (1991).

²⁴⁴ *See, e.g., Halstuk, supra* note 68, at 396 (arguing that the presumption of legitimacy doctrine “requires a FOIA requester to show evidence of wrongdoing in advance to justify getting access to a document sought for the purpose of investigating wrongdoing”).

²⁴⁵ Only the Tenth Circuit came close to mentioning *Ray*’s presumption of legitimacy in its analysis of the relevant public interest served by disclosure of the mug shots but failed to do so directly. *See World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 831 & n.1 (10th Cir. 2012) (concluding that “[t]here is . . . little to indicate that the release of booking photos would allow the public to detect racial or ethnic profiling without more information, and profiling has not been alleged here”).

smirks and smiles on the faces of high-profile arrestees would indicate preferential treatment.²⁴⁶ That allegation would not overcome the presumption of legitimacy because, as the Eleventh Circuit recognized, the connection between a smirk and favorable treatment is a stretch.²⁴⁷ However, arrestees accusing law enforcement of physically abusing them could overcome the presumption of legitimacy because bruises or welts on a suspect's face could be evidence of mistreatment. Absent this second type of allegation, proper consideration of the presumption of legitimacy would diminish the weight given to any public interest that passed the central purpose test.

Moreover, none of the three circuit courts mentioned *Ray*'s finding that partial disclosure could lessen the public interest served by further disclosure. Applying *Ray* undermines both of the public interests identified by the Sixth Circuit. In *Detroit Free Press*, the government had already released the name of the arrestee.²⁴⁸ The arrestee's court appearances also constituted a "partial disclosure" that lessens the public interest in revealing the government's treatment of the arrestee. When an arrestee appears in court, a judge sees the arrestee and has an opportunity to address any alleged misconduct. Although this appearance does not occur as close in time to the arrest as the mug shot, this partial disclosure of the arrestees' identity through a public court appearance combined with the presumption of legitimacy causes the balancing test to tip in favor of privacy.

By applying the presumption of legitimacy and partial disclosure doctrines, the public interest side of the Exemption 7(C) balancing test is less significant than what the Sixth Circuit found. The public interest is not zero because mug shots provide some information about a government agency's conduct in arresting suspects. But with the significant privacy interest on the other side of the balance, Exemption 7(C) should apply to mug shots.

FOIA's text, legislative history, and purpose support the Supreme Court's interpretation of the privacy exemptions. While the text does not explicitly provide for the central purpose test,²⁴⁹ FOIA's exemptions invite balancing. The legislative history also reveals that Congress intended for the privacy exemptions to strike a balance between "protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information."²⁵⁰ Without

²⁴⁶ *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497, 504 (11th Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 1141 (2012).

²⁴⁷ *See id.*

²⁴⁸ *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 97 (6th Cir. 1996).

²⁴⁹ *See U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 507–08 (1994) (Ginsburg, J., concurring in the judgment) ("The *Reporters Committee* 'core purpose' limitation is not found in FOIA's language. . . . [Likewise], no such limitation appears in the text of any FOIA exemption.")

²⁵⁰ *See S. REP. NO. 89-813*, at 9 (1965) (explaining the meaning of "clearly unwarranted invasion of personal privacy" in Exemption 6).

some limits on the public interest side of the balance, a purely speculative accusation of government wrongdoing could trump legitimate privacy concerns. Simply because the government happens to have records in its possession does not mean that the public should have access to those records when they do not shed light on the government's action. The central purpose test is consistent with FOIA's purpose²⁵¹ by emphasizing the public's right to know about what the government is up to without allowing the public interest to eliminate the privacy exemptions.²⁵² Moreover, the Supreme Court has indicated its firm commitment to this test as the appropriate inquiry for determining the strength and relevance of the public interest served by disclosure.²⁵³

While the decisions in *Karantalis* and *World Publishing Co.* more faithfully followed FOIA legislative history and Supreme Court precedents than *Detroit Free Press* did in analyzing the privacy interest, *Detroit Free Press* correctly identified public interests served by disclosure that pass the central purpose test. However, the presumption of legitimacy and partial disclosure diminish the weight of these public interests. The presumption of legitimacy means that courts evaluating FOIA requests for mug shots should presume that the government's conduct in arresting the suspects was legitimate. With partial disclosure, the arrestees' appearance in court provides the public with access to some of the information that disclosing a mug shot would also reveal. Therefore, the public interest side of the balancing test to evaluate government conduct in arresting suspects is slight. Although *Karantalis* and *World Publishing Co.* did not consider these doctrines, they still reached the right result under the balancing test by finding that the significant privacy interest of arrestees outweighs the public interest served by the disclosure of mug shots.

CONCLUSION

None of the three federal appellate courts considering the issue of mug shot disclosure under FOIA was completely correct in its analysis. The Sixth Circuit failed to find any privacy interest despite Supreme Court precedents strongly supporting the Tenth and Eleventh Circuits' contrary

²⁵¹ *But see* 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. 983, 991 (2002) (arguing that *Reporters Committee* "seemingly contravenes the legislative intent of the FOIA by narrowly defining a disclosable record as only official information that reflects an agency's performance and conduct").

²⁵² *See* Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 69–71 (1994).

²⁵³ *See, e.g.*, Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171 (2004); *Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355, 355–56 (1997) (per curiam); *Fed. Labor Relations Auth.*, 510 U.S. at 509 (Ginsburg, J., concurring in the judgment) ("I am mindful, however, that the preservation of *Reporters Committee*, unmodified, is the position solidly approved by my colleagues, and I am also mindful that the pull of precedent is strongest in statutory cases.").

conclusions on that point. But even those courts did not fully consider the impact of the Supreme Court's FOIA privacy cases on the issue of mug shot disclosure. On the public interest side of the balancing test, none of the courts considered the presumption of legitimacy or partial disclosure doctrines from *Ray*, which both cast doubt on public interests that the Sixth Circuit identified.

While the USMS has recently changed its mind on its mug-shot-disclosure policy, that change is unstable so long as the Sixth Circuit's decision in *Detroit Free Press* remains. Short of the Supreme Court weighing in to settle the issue, the Sixth Circuit should reconsider its position to make sure that federal mug shot subjects get the privacy protection under FOIA Exemption 7(C) that they deserve. Ultimately, privacy should prevail over the public interest when it comes to the disclosure of mug shots.

