No. 02-954

In the Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL, PETITIONER,

v.

ALLAN J. FAVISH, RESPONDENT.

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

BRIEF OF *AMICUS CURIAE* SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW IN SUPPORT OF RESPONDENT ALLAN J. FAVISH

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INTEREST OF *AMICUS CURIAE*

Amicus is a research center located within the School of Journalism and Mass Communication at the University of Minnesota.[1] Its primary mission is to conduct research on, and promote understanding of, legal and ethical issues affecting the mass media. The Silha Center also sponsors an annual lecture series; hosts forums, conferences and symposia; produces the *Silha Bulletin*, a quarterly newsletter, and other publications; and provides information about media law and ethics to the public. Because *Amicus* believes that the Ninth Circuit's extension of "personal privacy" under Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552, to include "survivor privacy" interests threatens to undermine the purpose of the Act, *Amicus* respectfully submits this brief in support of Respondent Favish.

SUMMARY OF ARGUMENT

The privacy exemptions of the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(6) and (b)(7)(C), are limited exceptions to that statute's general presumption in favor of disclosure. Both exemptions, which protect "personal privacy," should be construed narrowly to apply only to those individuals mentioned or depicted in the records in question. To allow a broader interpretation of the term "personal privacy" would be to ignore the inherent purpose and clear intent of the statute, as well as the noteworthy Congressional silence on any possible privacy interest held by survivors of deceased persons who are mentioned in government records.

Although this Court has said in the past that the privacy interest created by FOIA is different from either common law or

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

Constitutional privacy interests, that statement was made in a case which did not address the question of third-party privacy rights. The instant case provides an opportunity for this Court to clarify its interpretation. Wherever the outer boundaries of statutory privacy under FOIA should fall, they should not encompass the type of survivor's interests that the Petitioner attempts to assert in this case.

"Survivor privacy" is not recognized in common law tort actions. Constitutional privacy interests likewise are not descendible, expiring at the death of the individual concerned. As even the Petitioner admits, there has never been a clear indication by Congress that a "survivor privacy" interest was intended to be recognized by the original FOIA or its subsequent amendments. Because the statute is based on a strong presumption that government records should be public, the exceptions contained in the statute must be specifically defined and narrowly construed. Viewing the exemptions in light of their place in the statutory structure, as well as common law and Constitutional parallels, efforts to read a "survivor privacy" interest into the language of the statute must fail.

Many of the cases cited by both the Petitioner and by Respondent Foster family that are purported to provide a foundation for assertions of "survivor privacy" are inapposite. Some do not interpret FOIA at all. Others deal with family members' first-person privacy rights as individuals mentioned in the records sought. Still others establish "survivor privacy" simply by concluding, without appropriate analysis of the statute, that such an interest *should* exist. In another case concerning access to the Foster death-scene photographs, the D.C. Circuit held that it is "not unnatural" to view as a "privacy" interest a family's desire to avoid disclosure and their own subsequent exposure to such material.[2] Although it can be argued that it would not, in fact,

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[2] *Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F.3d 120, 123 (D.C. Cir. 1999) ("While law enforcement sometimes necessitates the display of such

have been "unnatural" for Congress to explicitly create such a privacy interest in a disclosure statute, that does not alter the fact that Congress has neither explicitly nor implicitly created such an interest in the statutory language under consideration.

The legislatures of several states have acted affirmatively to exempt autopsy and, in some instances, death-scene photographs by amending state freedom of information laws. Amendment of the statute is the only appropriate method to create a new exemption to laws governing citizens' access to presumptively public government information.

For this Court to create, sua sponte, a "survivor privacy" exemption would encourage ambiguity and ultimately undermine the presumption of disclosure. Affirmation by this Court of Congress' stated intentions in establishing FOIA and its narrow privacy exemptions would help to delineate a clear line for both information requesters and government agencies to observe.

ARGUMENT

I. "SURVIVOR PRIVACY" DOES NOT EXIST UNDER THE STATUTORY LANGUAGE OF THE FREEDOM OF INFORMATION ACT.

The core question in the instant case is to determine what Congress meant by "personal privacy" in Exemptions 6 and 7(C). Nothing in the statutory language or legislative history suggests that the answer to this question includes individuals who are not themselves mentioned in a government record. By contrast, the legislative history, the common law, and Constitutional concepts of privacy all indicate that no such interest could reasonably have been intended by Congress when it enacted and amended the Freedom of Information Act.

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ghoulish materials, there seems nothing unnatural in saying that the interest asserted against it by spouse, parents and children of the deceased is one of privacy – even though the holders of the interest are distinct from the individual portrayed."), *cert. denied*, 529 U.S. 1111 (2000).

A. Exemption 7(C) extends only to individuals who are mentioned in government records.

As enacted in 1966, Exemption 7 of the Freedom of Information Act applied to "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." 5 U.S.C. § 552(b)(7). Exemption 6 created a personal privacy exemption for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

In 1974, Congress amended FOIA to create a personal privacy standard under Exemption 7(C), in part to address the serious problem of government agencies' and courts' expansive interpretation of Exemption 7 as justifying blanket withholding of law enforcement records. Sen. Philip Hart, who sponsored the amendment creating 7(C), said on the Senate floor that the amendment "simply make[s] clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." 120 Cong. Rec. 17,033 (1974).

In 1986, Congress amended Exemption 7(C) to reaffirm the presumption of access unless disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

The nature of privacy interests mentioned in the two exemptions, however, is fundamentally the same. *See Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (holding that "identical words used in different parts of the same act are intended to have the same meaning"). Moreover, the 1986 change in 7(C) from "would constitute" to "could reasonably be expected to constitute" was intended merely to codify the approach that courts should take in determining the degree of risk that disclosure would produce. 132 Cong. Rec. S16,496 (1986) (statement of Sen. Patrick Leahy). Once a valid privacy interest has been identified, courts may use different standards in Exemption 6 and 7(C) to balance the risks associated with disclo-

sure against the public interest served by disclosure. But any effort to portray the privacy interest embodied in 7(C) as more expansive than the interest embodied in Exemption 6 is misplaced.

Exemption 6 was intended to prevent injury or embarrassment to those whose personal information is contained in government files. *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). By contrast, Exemption 7's primary aim is to protect the government's interest in keeping information secret. Exemption 7 protects paid informants, individuals mentioned in law enforcement files, and the identities of law enforcement personnel who could be subjected to harassment because of their roles in investigations. 5 U.S.C. § 552(b)(7)(A-D). *See Heller v. U.S. Marshals Serv.*, 655 F. Supp. 1088 (D.D.C. 1987) (holding that polygraph examinations of public official cleared of wrongdoing fell within Exemption 7(C) where redaction of that official's name would be insufficient to protect his privacy). *See, e.g., Powell v. Dep't of Justice*, 584 F. Supp. 1508, 1525 (N.D.Cal. 1984) (holding that identities of FBI agents may be withheld to spare the agents "annoyance and harassment," and that records concerning individuals being investigated or who are associated with investigations are also appropriate for exemption under 7(C)). Protecting individuals explicitly mentioned in law enforcement records from the embarrassment or humiliation of being associated with a criminal investigation is a far different matter from protecting third parties not mentioned in law enforcement records from discomfort or distress.

1. *The plain language of the statute makes clear that "privacy" is limited to those individuals mentioned in the records in question.*

When interpreting the meaning of a statute, analysis must begin with the plain meaning of the statutory language of the statute itself. *Bailey v. United States*, 516 U.S. 137, 144 (1995) (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). The dictionary definition of "personal" is "of or

peculiar to a *certain person*; private; *individual*." *Webster's New World Dictionary* 1008 (3d coll. ed. 1988) (emphasis added). "Private," according to *Webster's*, means "of, belonging to, or concerning a particular person or group." *Id.* at 1071. "Personal privacy," therefore, necessarily refers to a privacy interest that is limited to a specific individual. Under that interpretation, the inquiry, both as to the meaning of the statute and as to the legitimacy of "survivor privacy" under FOIA, comes to an end. *See Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990) (citing *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989)).[3]

2. *Petitioner's interpretation of "personal" privacy is contrary to the meaning compelled by statutory interpretation.*

Questions of statutory interpretation arise in the instant case only if one attempts to infer some hidden meaning beyond that clearly and plainly intended by the statutory language. The Petitioner proposes an implausible meaning for the word "personal" in Exemption 7(C) that is contrary both to the plain language of the statute and to the meaning compelled by interpretive tools laid down by this Court.

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[3] In *Tax Analysts*, this Court stated:

> In enacting the FOIA, Congress intended to curb this apparently unbridled discretion by clos[ing] the loopholes which allow agencies to deny legitimate information to the public. Toward this end, Congress formulated a system of clearly defined exemptions to the FOIA's otherwise mandatory disclosure requirements. An agency must disclose agency records to any person under § 552(a) unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b). Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass.

492 U.S. at 150-51 (internal quotation marks and citations omitted).

The Petitioner contends that the word "personal" serves merely to distinguish between "natural *persons* rather than corporations or other entities." Pet'r Br. at 18 (emphasis in original). This argument contradicts well-established principles laid down by this Court. As the Court noted in a recent opinion, written by the Chief Justice, unless Congress dictates otherwise, courts should begin their interpretation of statutory language with the presumption that a statutory term carries its common law meaning. *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393 (2003) (citing *Taylor v. United States*, 495 U.S. 575, 592 (1990); *Morissette v. United States*, 342 U.S. 246, 263 (1952)). For Congress to say that personal privacy refers only to privacy of "natural persons" and not corporations would be redundant, because no common law right of privacy for corporations exists. Restatement (Second) of Torts § 652I cmt. c (1977) ("A corporation, partnership or unincorporated association has no personal right of privacy."). Therefore, because Congress intends that every word in a statute should have meaning, the word "personal" must have been included for purposes other than to differentiate between a corporation's privacy interests and a natural person's privacy interests. *Bailey*, 516 U.S. at 145 (quoting *Platt v. Union Pac. R. Co.*, 99 U.S. 48, 58 (1879) ("[A] legislature is presumed to have used no superfluous words.")). The reasonable conclusion is that "personal" was used as a modifier to limit an otherwise ambiguous term to a narrow group of people – namely, those who are mentioned by name in the government records in question.

This interpretation of the privacy interest was recognized by this Court in *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*). In that case, this Court noted that "both the common law and literal understandings of privacy encompass the *individual's control of information concerning his or her person*." 489 U.S. at 763 (emphasis added). Although the Court stated that the privacy interest identified by FOIA differs from both com-

mon law tort privacy and Constitutional privacy, it is clear that those definitions inform the statutory meaning.[4]

Under common law, "the right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded. The cause of action is not assignable, and it cannot be maintained by other persons such as members of the individual's family, unless their own privacy is invaded along with his." Restatement (Second) of Torts § 652I, cmt. a (1977). The Restatement also makes clear that no action may be maintained by family members of a deceased individual whose privacy was invaded, unless such action is *specifically* authorized by statute. *Id.* cmt. b (emphasis added); *see, e.g.*, *Swickard v. Wayne County Med. Exam'r*, 475 N.W.2d 304 (Mich. 1991); *Cordell v. Detective Publ'ns*, 419 F.2d 989 (6th Cir. 1969);[5] *but see Cox Broad. Corp. v. Cohn*, 200 S.E.2d

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[4] The Court, after a brief discussion of the dictionary definition of privacy, provided a footnote supporting definitions of privacy that were limited to an individual's control over information about himself. Three definitions were drawn from secondary sources: "Privacy . . . is the rightful claim *of the individual* to determine the extent to which he wishes to share of himself with others. . .;" "Privacy is the claim *of individuals* . . . to determine for themselves when, how, and to what extent information *about them* is communicated to others;" "[T]he right of privacy is the right to control the flow of information concerning the details *of one's individuality*." 489 U.S. at 764 n.16 (citations omitted) (emphasis added).

[5] In *Cordell*, the defendant wrote an article concerning the murder of the plaintiff's daughter. The Sixth Circuit ruled that the plaintiff could not bring an action for public disclosure of private matters, emphasizing that such a cause of action can only be asserted by subjects of the publication. The court stated that "the right lapses with the death of the person who enjoyed it, and one cannot recover for this kind of invasion of the privacy of a relative, no matter how close the relationship." 419 F.2d at 990-91. The court went on to discuss the policy behind the rule:

> The policy underlying these limitations is not hard to discern. The law is not unwisely wary of actions for injury which is purely emotional; the danger of spurious claims is too great. As one court put it, "if the right asserted here were sustained, it would be difficult to fix its boundaries. How distant a rela-

127 (Ga. 1973) (allowing father of deceased rape victim to bring common law tort claim against company that broadcast the victim's name), *rev'd on other grounds*, 420 U.S. 469 (1975).[6]

Similarly, the Constitutional right of privacy does not extend beyond death and does not descend to the heirs of the deceased. *United States v. Amalgamated Life Ins. Co.*, 534 F. Supp. 676, 679 (S.D.N.Y. 1982); *Helmer v. Middaugh*, 191 F. Supp.2d 283, 285 (N.D.N.Y. 2002) ("Even assuming all of the facts in favor of the plaintiff, a dead man does not have any constitutional rights."); *Estate of Conner v. Ambrose*, 990 F. Supp. 606, 618 (N.D.Ind. 1997) ("After death, one is no longer a 'person' within our constitutional and statutory framework and has no rights of which he may be deprived.").

No natural reading of the statutory language, without additional indications either in the statute or in the legislative history, allows the conclusion that "personal privacy" was meant to extend beyond those individuals whose personal information is contained in government records.

B. The FOIA Exemptions must be construed narrowly to exclude "survivor privacy" interests.

1. *The statute's fundamental presumption of disclosure compels a narrow interpretation of exemptions.*

The statutory language of FOIA carves out nine specifically delineated exemptions to mandatory disclosure of government

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> tive could sue? At what relational distance does the danger of feigned claims overcome the likelihood of real emotional distress?"

Id. (citations omitted).

[6] This Court in *Cox* did not consider the validity of the father's claim that his own privacy was violated through the publication of his daughter's name as the victim of a rape that ended in murder. Instead, this Court deferred to the finder of fact on that question.

records. Those exemptions, like all of the statute's provisions, should be interpreted in light of the fundamental goal of the statute, which is to provide the fullest possible disclosure. *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976) (quoting S. Rep. No. 813, at 3 (1965), which states that FOIA carries a "basic philosophy of full agency disclosure"); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989).

The idea that statutory provisions should be interpreted in light of the statute's fundamental policy is not unique to FOIA. It is a widely accepted tenet of statutory interpretation. *See*, *e.g.*, *Crandon v. United States*, 494 U.S. 152, 158 (1990) (holding that statutory provisions should be interpreted in light of the "design of the statute and to its object and policy"); *Richards v. United States*, 369 U.S. 1, 10 (1962); *SEC v. Joiner*, 320 U.S. 344, 350 (1943). Based on that interpretive guidance, it is clear that, given multiple possible interpretations of the term "personal privacy," this Court should select the meaning that best furthers the goal of the fullest possible public access to government records.

2. *Petitioner has not provided evidence of Congressional intent to expand privacy interests beyond those of individuals specifically mentioned in government records.*

As the Petitioner asserts, this Court has held that FOIA's exemptions "are intended to have meaningful reach and application." Pet'r Br. at 14 (quoting *John Doe Agency*, 493 U.S. at 152). Such "meaningful reach" is provided by an interpretation given by Senator Hart, who sponsored the 1974 amendment that created Exemption 7(C). During Senate floor debate, Sen. Hart specifically described the personal privacy exemption as "intended to protect the privacy of any person *mentioned* in the requested files, and not only the person who is the subject of the investigation." 120 Cong. Rec. 17,033-34 (1974) (emphasis added).

Once a valid privacy interest is found under Exemption 7(C), personal information contained in law enforcement records cannot be disclosed unless the privacy interest is outweighed by a public interest in what the government "is up to." *Reporters Committee*, 489 U.S. at 774. As *Reporters Committee* and subsequent cases have shown, that public interest requirement represents a significant hurdle for requesters. To erect an even higher barrier for requesters by extending privacy interests to those not mentioned or portrayed in government records would undermine the basic philosophy and underlying aims of FOIA.

Had the exemption been intended to extend beyond those individuals explicitly mentioned in law enforcement records, Sen. Hart's remarks would have been likely to include some mention of that. To infer that legislative intent, without more, would be to disregard traditional common law and Constitutional notions of privacy, and adopt a greatly expanded statutory definition of privacy which is without support in either the plain language of the statute or in the legislative history.

The Petitioner asserts that Congress' failure specifically to exclude "survivor privacy" from the statute provides evidence of intent to include it. Pet'r Br. at 18. This assertion disregards the role of the exemptions in the overall statutory scheme. The mandatory disclosure of government information under FOIA can be overcome only by an exemption created by "clearly delineated statutory language." *Rose*, 425 U.S. at 360-361 (citation omitted). Failing to exclude an interest can hardly be seen as embracing that interest, especially when it is one that Congress, looking to the common law, would not expect to be included in the notion of "privacy." Congress also failed to specifically exclude potential privacy interests of former bowling league teammates or grammar school friends, but it scarcely could be argued that such exclusions compel the judicial acknowledgment of those interests.

Second, the Petitioner points to two memoranda from Attorneys General which appear to support an interpretation of Exemption 7(C) that extends to family members or descendants. Pet'r Br. at 18. Although it is not surprising that the Attorney General would attempt to minimize the burden on the Justice Department by narrowing the range of records that must be disclosed under the statute, these administrative interpretations have no bearing on the legislative intent behind the statute. Nor should they control this Court's determination of the proper reach of the statute's exemptions. Agencies' interpretations of statutes – even those they are charged to enforce – are not controlling, and agency decisions should not be "rubber-stamp[ed]" if they run counter to the stated purposes of those statutes. *Dep't of Navy v. FLRA*, 840 F.2d 1131, 1134 (3d Cir. 1988) ("[N]o deference is owed an agency's interpretation of a general statute.").

II. THE CASE LAW CITED IN SUPPORT OF "SURVIVOR PRIVACY" IS INAPPOSITE OR FLAWED, AND SHOULD NOT BE REGARDED AS BINDING PRECEDENT IN THE INSTANT CASE.

Several cases that Petitioner contends recognize a familial or "survivor privacy" interest under FOIA in fact merely affirm the stated Congressional intention that FOIA's privacy protections extend to individuals who are named or depicted in records but are not themselves the subject of the records. *See Dep't of State v. Ray*, 502 U.S. 164 (1991); *Marzen v. Dep't of Health & Human Servs.*, 825 F.2d 1148 (7th Cir. 1987); *Lesar v. Dep't of Justice*, 636 F.2d 472 (D.C. Cir. 1980). Other cases, such as *Katz v. Nat'l Archives & Records Admin.*, 862 F. Supp. 476 (D.D.C. 1994), are inapposite because FOIA and its exemptions are not applicable to the requested materials. Another case frequently cited by the Petitioner and others who seek a pedigree for "survivor privacy" is *New York Times v. NASA*, 920 F.2d 1002, 1010 (D.C. Cir. 1990). The *NASA* opinion was the product of a court that split 6-5 and stands as an ex-

ample of tragic facts making bad law, a trait that is a hallmark of many cases where courts have recognized "survivor privacy."

A. Cases where the personal privacy interest belongs to individuals named or depicted in the records sought are inapposite.

In *Dep't of State v. Ray*, the Court upheld the redaction of individuals' names from summaries of interviews of returned Haitian emigrants conducted by the State Department. These records were requested by a Florida lawyer and his three clients, Haitian nationals seeking political asylum in the United States. 502 U.S. at 168. As part of immigration proceedings, the records were sought in order to show that Haitians who attempted to immigrate to the United States illegally and were subsequently returned to Haiti would "face a well-founded fear of persecution." *Id.*

Many of the interview summaries contained "personal details about particular interviewees" including "highly personal information regarding marital and employment status [and] children." *Id.* at 175-176. Family members were named as a part of the record and therefore had privacy interests independent from the privacy interests of the interviewees. Read broadly, as Petitioner urges, *Ray* would protect from disclosure any record that could subject any family member – whether named in the record or not – to "embarrassment in their social and community relationships." *Id.* at 176 (citation omitted). This would create not a "survivor privacy" interest, but a familial privacy interest for family members of the living. Such an interest would undercut FOIA's purpose by stretching the meaning of "personal privacy" to encompass anyone who has a family member who has exposed them to potential embarrassment.

Respondent Foster family cites *Lesar* as an example of judicial recognition of "survivor privacy" to protect the privacy of family members. Resp't Br. at 24. It is true that, in *Lesar*, the D.C. Circuit upheld the withholding of "information allegedly of

a personal nature concerning Dr. [Martin Luther] King [Jr.]'s family and associates." 636 F.2d at 487. However, the privacy interests being weighed were not, as is often stated, "survivor privacy" interests.[7] Instead, the interests were those of family members and associates who were themselves named in the records. The same is true of *Marzen v. Dep't of Health & Human Servs.*, 825 F.2d 1148, where the Seventh Circuit recognized that the parents of a deceased baby could assert a privacy interest when their own actions and decisions to withhold medical treatment were part of the record.

B. The court in *Katz* recognized a proprietary interest, not a "survivor privacy" interest, in protecting autopsy photos from disclosure.

Katz v. Nat'l Archives & Records Admin., 862 F. Supp. 476, has been cited frequently and erroneously, including by Petitioner, as an example of judicial recognition of a "survivor privacy" interest. In *Katz*, the district court denied access to the autopsy materials of President Kennedy out of concern for the privacy of the Kennedy family. *Id.* But because of the unique legal status of the Kennedy autopsy materials, the case cannot be seen as precedent for judicial or Congressional recognition of a broad "survivor privacy" interest under FOIA.

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[7] In *Lesar*, the D.C. Circuit made clear that it was protecting family members and associates from direct invasions of their own personal privacy interest:

> [W]e must consider whether the district court correctly found that the materials in question fell within the scope of Exemption 7(C). To recall briefly, these materials are of two types: the names and other identifying data of FBI agents and informants involved in the FBI's investigations of Dr. King and information allegedly of a personal nature concerning Dr. King's family and associates.

636 F.2d at 487. Although the D.C. Circuit did recognize a privacy interest in avoiding "annoyance or harassment," as the Petitioner asserts, the court made clear that this interest was held by the FBI agents named in the files, not by King's family and associates. *Id.* at 487; Pet'r Br. at 23.

The Kennedy family donated the autopsy materials to the National Archives by deed of gift under the Presidential Libraries Act, placing restrictions on their access and disclosure as allowed by the Act. *Id.* at 478; 44 U.S.C. § 397 (1964). In 1992, Congress recognized the validity of this deed of gift in the President John F. Kennedy Assassination Records Collection Act. *Katz*, 862 F. Supp at 482; Pub. L. No. 102-526, 106 Stat. 3443 (1992). The deference that Congress paid to the Kennedy family was tied to a specific law, and cannot be read as an endorsement of a general "survivor privacy" right granted by Congress under some other statute. Indeed, Congress' need to specially codify the Kennedy family's privacy interest indicates that Congress did not recognize an established "survivor privacy" interest inherent in FOIA.

Although the district court in *Katz* held, in the alternative, that the privacy interest of the Kennedy family outweighed the public interest in disclosure of the autopsy materials, the decision to withhold the autopsy materials was affirmed on other grounds by the D.C. Circuit. *Katz*, 862 F. Supp. 485-86, *aff'd on other grounds*, 68 F.3d 1438, 1442 (D.C. Cir. 1995) (holding that the autopsy materials are not and never were "agency records" subject to FOIA).

Both Congress and the courts have recognized that the deed of gift under the Presidential Libraries Act, not FOIA, governs access to the Kennedy autopsy materials. Because access to these materials is controlled by the Kennedy family, not the government, *Katz* cannot be seen as useful precedent for the development of "survivor privacy" as a basis for government withholding of material under FOIA.

C. *New York Times v. NASA* illustrates why Congressional, not judicial, action is required to create a "survivor privacy" interest under FOIA.

The Challenger disaster was an example of tragic facts making bad law. *See Favish v. Office of Indep. Counsel*, 217 F.3d

1168, 1173 (9th Cir. 1999) ("It could, no doubt, be suggested that the . . . astronauts so tragically destroyed were special cases, leading to special solicitude for the feelings of their families"). The five dissenting judges in *New York Times v. NASA* correctly argued that the majority erred when it held that the Challenger tape was a "similar file" under Exemption 6. 920 F.2d at 1010. The words of the dissent, although written in the context of the threshold question of Exemption 6 (whether the tape was a medical file, personnel file, or similar file), are equally applicable to the issue of recognizing "survivor privacy" here: "The result reached today defies the will of Congress as expressed in the statute. We dissent because we believe that we are constrained to enforce the statute as it was written by Congress." *Id.* at 1011.[8] The dissent noted that the majority opinion found that "the withheld tape contains no information about the personal lives of the Challenger astronauts or any of their family," and concluded "[W]e are not at liberty to rewrite FOIA to defeat an unseemly request. . . . Any needed repairs to the way in which privacy concerns are protected . . . must be undertaken by Congress, not by the courts." *Id.* at 1018 n.10.

D. Surviving family members who are not named or depicted in the records sought do not have a personal privacy interest under FOIA.

Courts have held that the survivors of individuals who are the subjects of a government record have no "survivor privacy" interest whatsoever that would justify withholding the records. In *Diamond v. FBI*, a university professor sought disclosure of FBI documents relating to government surveillance of academics, including himself, during the McCarthy era. 532 F. Supp. 216,

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[8] The D.C. Circuit in *Accuracy in Media, Inc. v. Nat'l Park Serv.* declined to settle the dispute of whether the "survivor privacy" language of *New York Times v. NASA* was holding or dictum. 194 F.3d at 123. Instead, the court found "survivor privacy" via *Campbell v. Dep't of Justice*, 164 F.3d 20, 33-34 (D.C. Cir. 1998). *Id.*

219 (S.D.N.Y. 1981), *aff'd*, 707 F.2d 75 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984). The Second Circuit found that the death of those persons mentioned in the requested files had so diminished their privacy interests as to amount to waiver. *Diamond*, 707 F.2d at 77. In finding that death essentially destroyed the privacy interest of these named individuals, the court did not weigh the privacy interest of the survivors of these individuals at all. *Id.* Because the court ordered the disclosure of these records without placing "survivor privacy" interests in the balance between personal privacy interests and public interest, one can reasonably infer that the court assigned no weight to these interests.

In *Rabbitt v. Dep't of Air Force*, the court held that under Exemption 6, the plaintiff was entitled to the medical records of a ground crew member who was killed in an accident that also killed plaintiff's husband, but that she was not entitled to the records of an airman who survived the accident. 383 F. Supp. 1065 (S.D.N.Y. 1974). The court reasoned as follows: "[W]e fail to perceive any invasion of privacy in releasing the medical report of the deceased ground crew member. Release of the medical information relating to the surviving occupant falls in a different category. . . . [S]uch reports may contain embarrassing information." *Id.* at 1070. Similarly, in *Kyle v. United States*, the plaintiff, the widow of an Air National Guard pilot killed in a crash, was entitled to the autopsy report of the weapons officer who was also killed in the crash. 1987 WL 13874 (W.D.N.Y.). The court found no part of the autopsy report was protected from disclosure under Exemption 6. *Id.* at 1.

III. LEGISLATURES HAVE THE POWER TO AMEND OPEN-RECORDS STATUTES TO EXEMPT MATERIAL FROM DISCLOSURE IF THEY DETERMINE THAT PUBLIC POLICY SO REQUIRES, BUT IT IS NOT THE ROLE OF THE COURTS TO DO SO.

The issue of public access to autopsy photographs became a topic of national interest in early 2001, following NASCAR driver

Dale Earnhardt's death resulting from a crash during the Daytona 500. Under Florida public records laws in place at the time, autopsy photographs were considered public documents not subject to privacy exemptions. *See, e.g.*, *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. Dist. Ct. App. 1991). Four days after her husband's death, and one day before the first public records request for autopsy photographs was made by the *Orlando Sentinel*, Teresa Earnhardt petitioned for a temporary restraining order barring release of the photographs pending consideration of the family's right to privacy under the Florida and U.S. Constitutions. *See Earnhardt v. Volusia County Office of Med. Exam'r*, 2001 WL 992068 (Fla. Cir. Ct. 2001).

The Florida legislature quickly amended the state's public records law to create Chapter 2001-1 expressly exempting autopsy photographs from disclosure. Fla. Stat. Ann. § 406.135 (West 2002). In *Earnhardt*, the court praised the legislature for its wisdom "in recognizing that autopsy photographs, of all things, should be presumptively private; that is, they will not be shared with the public, even though they were in the very public hands of the government, unless it can be established that good cause exists" for their review. 2001 WL 992068 at 5. Although the Petitioner relies heavily on the words of the Florida court, they are little more than dicta supporting the actions of the state legislature. *See* Pet'r Br. at 29.

The Florida court's holding in *Earnhardt* offers no support for the Petitioner's contention that it is appropriate for this Court to find a "survivor privacy" interest in the federal FOIA. To the contrary, *Earnhardt* demonstrates that the only way in which such an interest should be established is through an act of the legislature.[9]

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[9] The Florida statute created to protect Dale Earnhardt's autopsy photographs from public disclosure was upheld as Constitutional in *Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. Dist. Ct. App. 2002), *rev. denied*, 848 So. 2d 1153 (Fla. 2003) (table no. SC02-1635).

Although the Earnhardt case is the most-publicized example of a state legislature exempting autopsy photographs or reports from open-records laws, other states have acted similarly. *See, e.g.*, 2002 S.C. Acts 350; Ind. Code Ann. § 5-14-3-4(a)(11) (2003); Wyo. Stat. Ann. § 16-4-203(d)(i) (1977).[10]

Legislatures have the authority to restrict public access to materials such as autopsy or death scene photographs if they determine that public policy so requires. Presumably, if courts are compelled to order the disclosure of material that some find disturbing because of a legislature's failure to foresee the consequences of its open-records laws, the legislature will act to change the law. But it is not the role of the courts to do so, sua sponte. *E.g.*, *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985) ("[E]ven where a legislative choice of policy is perceived to have been unwise or simply not the optimum choice . . . federal courts must defer to that legislative judgment.").

IV. RECOGNIZING "SURVIVOR PRIVACY" UNDER FOIA WOULD CREATE PRECEDENT FOR FURTHER EXPANSION OF STATUTORY EXEMPTIONS THAT WOULD FRUSTRATE THE FUNDAMENTAL PURPOSE OF THE STATUTE.

The finding of a "survivor privacy" interest under FOIA would do more than slightly adjust the calculus of disclosure. It would completely reverse the underlying presumptions of the Act in situations where first-person privacy interests have been waived, diminished by public-official status, or extinguished by death.

FOIA is founded upon a presumption of disclosure of government records. *Rose*, 425 U.S. at 360-36; *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973). If no valid personal privacy interest exists (in the absence of other applicable exemp-

[10] Some states, however, have declined to exempt autopsy records and/or photographs from open-records laws. *See, e.g.*, A.B. 604, 2001-2002 Assembly (Wis. 2002); H.B. 77, 2002 Leg., Reg. Sess. (Ky. 2002).

tions), the government must disclose the records. Where a valid privacy interest is found, however, the dynamic is reversed. The requester must then show not only that the documents will serve a public interest, but that they will serve the narrowly-drawn public interest defined by this Court in *Reporters Committee* as revealing "what the government is up to." 489 U.S. at 773. Such a radical change should not be made without a showing of Congressional intent to do so.

A. "Survivor privacy" easily could evolve into a generalized "family privacy" interest.

A "survivor privacy" right could significantly alter the disclosure equation in cases involving public officials or cases in which the subject of the records somehow has waived his privacy interest. *See, e.g.*, *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977); *Lesar*, 636 F.2d 472; *Diamond*, 707 F.2d 75. If family members who survive a deceased individual who is the subject of a government record also have a valid privacy interest in preventing disclosure of that record, it is only logical that family members of a still-living subject of government records would have an interest in preventing disclosure. Thus, even in situations where an individual has waived his privacy interest, the government could withhold documents on the basis of family members' privacy rights, unless the requester could provide evidence of a strong public interest as defined by this Court in *Reporters Committee*.

The circuit courts whose decisions are implicated in the instant case tailored their "survivor privacy" exemption to address only the interests of family members in avoiding graphic or emotionally disturbing images of a deceased loved one. *Accuracy in Media*, 194 F.3d 120; *Favish*, 217 F.3d 1168. That does not mean, however, that future courts would continue to limit application of family privacy interests to such a situation. Indeed, the disclosure of records, such as photos, videotape or audiotape of a loved one engaged in illegal or immoral acts would almost

certainly cause pain and humiliation to family members, whether or not the subject of the record was alive.

The dangers of such a broad application are particularly significant in the context of the privacy interests of public officials.[11] In such cases, a requester ordinarily would have to show only a modest public interest to overcome an official's diminished privacy interest. If, however, family members of these public officials could claim privacy interests in avoiding embarrassment or humiliation that could result from disclosure of records concerning their loved ones, the requester would be forced to present clear evidence of a *Reporters Committee* public interest strong enough to overcome the family members' undiluted privacy interests in order to compel disclosure. As a result, the general presumption of disclosure under FOIA would be dramatically curtailed.

Moreover, as a result of such an interpretation, FOIA would treat records concerning individuals who were married or had living relatives differently from records concerning individuals who were unmarried or had no living family members. Such an inequality in application is neither sensible nor appropriate in light of the Act's fundamental policy of full disclosure.

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[11] Despite the Petitioner's assertions to the contrary, it is well accepted that public officials' privacy interests are reduced by virtue of their positions. *See, e.g.*, *Lesar*, 636 F.2d 472 (holding that FBI agents' privacy interests related to their work activities are diminished); *New York Times v. Sullivan*, 376 U.S. 254 (1964). Judge Starr also advocated such an approach in his dissent in *Reporters Comm. for Freedom of the Press v. Dep't of Justice*, 831 F.2d 1124, 1129 (D.C. Cir. 1987) (stating that, for guidance in fleshing out the balance between privacy interests and public interest "it seems sensible . . . to draw upon the substantial body of defamation law dealing with public personages").

B. The recognition of "survivor privacy" would greatly increase the government's burden under FOIA and could lead to unjustified withholding of records that should be disclosed.

Under FOIA, the burden is on the agency to justify withholding. If this Court recognizes a "survivor privacy" interest, the burden of determining whether the survivors of deceased individuals are themselves alive or dead would fall on the government. *Schrecker v. Dep't of Justice*, 217 F. Supp.2d 29, 36 (D.C. Cir. 2002) ("An agency must make a reasonable effort to account for the death of a person on whose behalf the FBI invokes exemption 7(C).") (internal quotation marks omitted).

It requires a considerable expenditure of resources to determine whether named parties in requested files are alive or dead. *See, e.g.*, *Diamond*, 532 F. Supp. at 77 n.2 (finding that the FBI, as part of "extensive search," reviewed nearly 200,000 pages of documents to determine whether named parties had waived privacy interests through death, public disclosure, or consent); *Campbell v. Dep't of Justice*, 193 F. Supp.2d 29, 40 (D.D.C. 2001) (finding that the FBI employed 100-year test,[12] a publication entitled *Who Was Who*, and "general institutional knowledge" to determine whether individuals were dead or alive); *Schrecker*, 217 F. Supp.2d at 37 (using *Campbell* methodologies as well as Social Security Death Index when social security number of person was known).

Recognizing "survivor privacy" means taking an exponentially more costly step. Once a named party is found to be dead, the government will be forced to determine whether "those tied closely to the deceased by blood and love" are themselves alive or dead. *Favish*, 217 F.3d at 1173. This task is not as simple as merely reading an obituary. At a minimum, for example, if an individual

[12] The 100-year test assumes that individuals who would be more than 100 years old are dead for the purposes of balancing private versus public interests. *Campbell*, 193 F. Supp.2d at 40.

who was the subject of a record died, an agency would be faced with first determining who that person's loved ones and close relations were. Second, the agency would need to determine which of these individuals were tied closely enough to the deceased to have a "survivor privacy" interest. Third, the agency would need to determine if these individuals were still alive and, if so, whether they object or consent to release of the records.

Rather than undertaking such exhaustive searches, agencies would instead be likely to err on the side of caution and to withhold all records concerning deceased individuals, whether identifiable surviving relatives existed at all. The case of *Outlaw v. Dep't of the Army*, 815 F. Supp. 505 (D.D.C. 1993), illustrates this problem. In *Outlaw*, a former army sergeant convicted by court-martial of murder and who had served his sentence sought to clear his name through analysis of death scene photographs of the victim.[13] The Department of the Army denied the sergeant access to the pictures on the basis of Exemptions 6 and 7(C). The district court ordered release of the photographs, finding that the government's "concern for the privacy of the decedent's surviving relatives has not extended to an effort to locate them to determine whether they object to the release." *Id.* at 505. And, as the court noted, "Most important, there is no showing by defendant that, as of now, there are any surviving relatives of the deceased, or if there are, that they would be offended by the disclosure." *Id.* Nevertheless, costly and time-consuming litigation resulted from the government's decision to withhold this information.

If this Court recognizes a "survivor privacy" exemption to FOIA, such scenarios would become commonplace. An agency

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[13] The Petitioner's Brief raises the specter of "child molesters, rapists, murderers, and other violent felons" requesting images of their victims. Pet'r Br. at 29. Congress considered providing authority to the Attorney General to limit requests by felons, but failed to pass such an amendment. S. Rep. No. 221, at 29 (1983).

would withhold records, even from a requester seeking to uncover government illegality, fraud, or waste. Although FOIA places the burden "on the agency to sustain its action," 5 U.S.C. § 552(a)(4)(B), an agency could always claim that its search for survivors continues in perpetuity, delaying disclosure indefinitely lest it disclose information that implicates the "survivor privacy" interest of an overlooked relative or loved one. In such a case, the requester, for all practical purposes, would bear the burden of disproving the existence of some hypothetical third-party survivor's privacy interest. Such a result directly contradicts the language and intent of the statute.

If this Court recognizes "survivor privacy," government agencies will require guidance far beyond a holding that the personal privacy of 7(C) "extends to the memory of the deceased held by those tied closely to the deceased by blood or love." *Favish*, 217 F.3d at 1173. In determining the breadth of "survivor privacy," these agencies will need to be not only historians and genealogists, but sociologists as well. How "close" does "tied closely" mean? How is "family" defined? Does a deadbeat dad have a "survivor privacy" interest because he is "tied by blood" to the deceased? Does a domestic partner have this interest because she is "tied by love"? Would a fiancée? Would an ex-husband? Do the biological parents of an adopted child have a "survivor privacy" interest? The Court would spur massive litigation because the government would wish to sound the depths of "survivor privacy." If public policy dictates the creation of such a privacy interest, it should be undertaken only through informed, carefully-drafted and explicit legislation.

CONCLUSION

"Survivor privacy" is a legal concept without support in the plain meaning of FOIA's statutory text, in the legislative history, or in common law or Constitutional notions of privacy. That has not prevented some lower courts from creating an independent privacy interest for survivors of deceased individuals mentioned

or depicted in government records. The impetus for such rulings is obvious. Cases where "survivor privacy" arises often are freighted with emotion, and it is difficult to fault the judicial instinct to shield innocents from emotional distress. However, courts have long resisted allowing claims based purely on emotional harm. Moreover, the potential emotional harm that might be caused by adhering to the language and intent of a statute is not a sufficient basis for this Court to create exemptions for family members or loved ones where Congress did not provide them.

This Court has the opportunity in this case to reaffirm FOIA's fundamental presumption that government records must be available to the public, and to revitalize the central idea that any exemptions must be both specifically drawn and narrowly construed.

This Court should rule that no such thing as "survivor privacy" exists under the federal Freedom of Information Act. To that end, this Court should affirm the decision of the Ninth Circuit ordering disclosure of four photographs, and reverse that court's decision to withhold six others.

Respectfully submitted,

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