SMILE FOR THE CAMERA, THE WORLD IS GOING TO SEE THAT MUG: THE DILEMMA OF PRIVACY INTERESTS IN MUG SHOTS

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Under the Freedom of Information Act (FOIA), individuals can request certain agency records, including mug shots, from federal agencies. Until 1996, the policy of the United States Marshals Service (USMS) was to use FOIA's broad law enforcement exemption, Exemption 7(C), to deny requests for mug shots. However, in 1996, the Sixth Circuit in Detroit Free Press v. Department of Justice *found that a mug shot does not implicate an arrestee's privacy right and, consequently, Exemption 7(C) inapplicable. Due to FOIA's liberal venue provision,* Detroit Free Press *is in effect binding upon the entire nation: So long as a request for a mug shot originates within the Sixth Circuit, USMS releases the mug shot regardless of where USMS initially took the mug shot. Indeed, two recent contrary decisions in the Eleventh and Tenth Circuits,* Karantsalis v. Department of Justice *and* World Publishing v. Department of Justice*, have had no practical effect on the dispute—USMS must still release mug shots even within these jurisdictions in accordance with* Detroit Free Press.

The legacy of the legally impotent Karantsalis *and* World Publishing *has been to create a climate in which USMS will almost certainly try to provoke (and may be in the process of provoking) another dispute within the Sixth Circuit via controversial executive nonacquiesence to induce the Circuit to reconsider en banc the issues in* Detroit Free Press *and unilaterally refuse to disclose mug shots even within the Sixth Circuit. This dispute has emerged coincident to a growing national debate regarding the merits of mug shot disclosure in reaction to the rise of commercial mug shot databases—websites that obtain mug shots at both the federal and state levels, and publish them online for profit. This Note argues that this dispute should be resolved in favor of the Tenth and Eleventh Circuits: In the case of mug shot requests, courts should uphold agency invocations of Exemption 7(C) in favor of nondisclosure. Furthermore, in light of the current legal complications of resolving this dispute within the judiciary due to executive nonacquiesence, this Note suggests a comprehensive legislative solution that would address the mug shot issue at both the state and federal levels.*

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INTRODUCTION

On January 8, 2011, in Tucson, Arizona, Jared Lee Loughner opened fire on a crowded supermarket where Congresswoman Gabrielle Giffords was holding a constituent meeting, seriously injuring Giffords along with twelve others, and killing six, including an Arizona federal judge.[1] Two days later, the Pima County Sheriff's Department, a state law enforcement agency, released Loughner's mug shot to the public.[2] The mug shot—depicting Loughner's bizarre visage as he grinned and half-winked at the camera—became a cause célèbre as the public wondered what could have driven Loughner to such senseless violence.[3]

After Loughner was transferred to federal custody, requesters, including several major media outlets, sought the disclosure of the federal mug shot taken by the United States Marshals Service (USMS) under the Freedom of Information Act (FOIA);[4] Loughner sought an emergency injunction in the Ninth Circuit to bar disclosure of the unreleased mug shot.[5] The general policy of USMS outside the Sixth Circuit is to withhold publication of mug shots under Exemption 7(C) of FOIA unless there is a compelling reason to release the photo, such as if the arrestee escapes custody.[6] USMS applies an exception to this policy within the Sixth Circuit due to *Detroit Free Press, Inc. v. Department of Justice*, in which the Sixth Circuit found that an arrestee has no privacy interest in his mug shot so long as criminal proceedings are ongoing and, consequently, the federal government cannot deny a request for a mug shot.[7] In compliance with this ruling, since 1996, USMS denies mug shot requests *unless* those requests (involving arrestees whose criminal

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1. Dan Barry, Looking Behind the Mug-Shot Grin, N.Y. Times, Jan. 16, 2011, at A1.

2. Brief for the Reporters Committee for Freedom of the Press, as Amicus Curiae Supporting Plaintiff-Appellant's Petition for Rehearing En Banc at 4, Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497 (11th Cir. 2011) (per curiam) (No. 10-10229), cert. denied, 132 S. Ct. 1141 (2012).

3. See Barry, supra note 1 ("Mr. Loughner's spellbinding mug shot—that bald head, that bright-eyed gaze, that smile—yields no answer to why, why, why, why . . . ."); Paul Farhi, Arresting Images, Wash. Post, Jan. 12, 2011, at C1 ("The police booking photo . . . flashed around the world, at once haunting and fascinating. Dozens of newspapers placed the photo atop their front pages, burning Loughner's visage into the American consciousness.").

4. 5 U.S.C. § 552(a)(3)(A) (2012). USMS maintains mug shots pursuant to 28 C.F.R. § 0.111(j) (2012) (stating USMS duties include "[r]eceipt, processing and transportation of prisoners held in the custody of a marshal or transported by the U.S. Marshals Service"). The Department of Justice is the agency that oversees USMS—for purposes of this Note, the two are used interchangeably.

5. Emergency Motion to Bar Release of Post-Arrest Photographic Images of Defendant at 1, United States v. Loughner, 769 F. Supp. 2d 1188 (D. Ariz. 2011) (No. 11cr0187 TUC LAB), 2011 WL 479905.

6. *Karantsalis*, 635 F.3d at 501 ("[T]he Marshals Service policy is that the *only* law enforcement purpose for releasing a booking photograph is to address an issue involving a fugitive . . . .").

7. 73 F.3d 93, 97 (6th Cir. 1996).

proceedings are ongoing) originate inside the Sixth Circuit's jurisdiction, in which case USMS first releases the mug shot to the requester within the Sixth Circuit's jurisdiction, and then to any subsequent requester nationally.[8]

Of the eleven requests for Loughner's mug shot, four came from within the Sixth Circuit's jurisdiction, which obligated disclosure per USMS policy.[9] The Department of Justice (DOJ) actually supported Loughner's motion for an injunction;[10] however, the Court for the Southern District of California, located in the Ninth Circuit, denied the motion.[11] The experience of requesters seeking Loughner's mug shot is fairly emblematic of requests for mug shots nationally: State law enforcement agencies, under state analogues to FOIA, permissively release an arrestee's mug shot to any requester.[12] At the federal level, to circumvent USMS's nondisclosure policy, "[m]any national news organizations now employ stringers in Kentucky, Michigan, Ohio, [and] Tennessee to request such photos for nationwide use."[13]

This paradigm may be in the process of changing: In *World Publishing Co. v. U.S. Department of Justice* and *Karantsalis v. U.S. Department of Justice*, the Tenth and Eleventh Circuits held that an arrestee does have a privacy interest in his mug shot and that the countervailing public

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8. See U.S. Marshals Serv., U.S. Dep't of Justice, Policy Notice No. 94-006B, Media Policy supp. para. A (1997) [hereinafter 1997 Media Policy] (detailing USMS media policy in aftermath of *Detroit Free Press*). In compliance with *Detroit Free Press*, USMS releases mug shots in response to any request coming from within the Sixth Circuit's jurisdiction (regardless of residency) so long as "(i) The defendant has been publicly named; (ii) There is an indictment of the defendant; (iii) The defendant has made a court appearance in connection with the indictment; and (iv) There is an on-going trial or appeal related to the indictment." Id.

9. Government's Response to Defendant's Motion to Bar Release of Post-Arrest Photographic Images of Defendant at 5–6, *Loughner*, 769 F. Supp. 2d 1188 (No. 11cr0187 TUC LAB), 2011 WL 827230.

10. Id. at 13 ("[D]espite the *Detroit Free Press* ruling, . . . this Court could issue an order barring the USMS from releasing the photograph anywhere in the United States, due to this Court's jurisdiction over the original image . . . .").

11. See Minutes of Hearing on Motion to Bar Release of Mug Shots at 1, *Loughner*, 769 F. Supp. 2d 1188 (No. 11cr0187 TUC LAB) [hereinafter *Loughner* Motion Hearing] ("[This] [c]ourt finds it has no authority to overrule binding 6th Circuit precedent interpreting FOIA."). The court also rejected a Sixth Amendment argument for denying disclosure. Id.

12. See generally Reporters Comm. for Freedom of the Press, Police Records: A Reporter's State-by-State Access Guide to Law Enforcement Records (2008) [hereinafter State FOIA Guide] (providing overview of state-by-state disclosure practices regarding mug shots). State analogues to FOIA are often titled "Open Government Acts" or "Open Records Acts." As a general rule, even outside the mug shot context, state FOIAs tend to grant more disclosure than their federal counterpart. Id.

13. Josh Gerstein, Court Ruling Keeps Federal Mugshots Secret, Politico: Under the Radar (Feb. 22, 2012, 1:04 PM) [hereinafter Gerstein, Court Ruling], http://www.politico.com/blogs/under-the-radar/2012/02/court-ruling-keeps-federal-mugshots-secret-115210.html (on file with the *Columbia Law Review*).

interest is not sufficient to justify the compelled disclosure of that mug shot.[14] The recently created circuit split presents an extraordinary situation because the Tenth and Eleventh Circuit decisions have had no practical legal effect on the release of mug shots.[15] Due to FOIA's venue rules, the ability of requesters to forum shop, and USMS's presence as a national agency, USMS must still under *Detroit Free Press* honor mug shot requests originating within the Sixth Circuit regardless of the photograph's point of origin.[16] In effect, *Detroit Free Press* represents a circuit court decision legally binding on the entire nation that will remain binding absent Supreme Court resolution of the dispute (the Court denied certiorari in *Karantsalis*) or an en banc rehearing of the mug shot issue by the Sixth Circuit itself.[17] To spur an en banc rehearing of the mug shot issue within the Sixth Circuit, USMS, buoyed by the Tenth and Eleventh Circuit decisions, appears poised to resort to controversial executive nonacquiescence and, contrary to the express ruling in *Detroit Free Press*, preemptively cease disclosing mug shots within the Sixth Circuit.[18] In fact, USMS may have already instituted a policy of selective nondisclosure in a rebuke of *Detroit Free Press*, although the depth and robustness of this new policy is currently unclear.[19] The larger mug shot dispute has emerged coincident to a growing national debate regarding the merits of mug shot disclosure in reaction to the rise of commercial mug shot databases—websites that obtain mug shots at both the federal and state levels, and publish them online for profit.[20]

There is currently little legal scholarship addressing the unusual issues surrounding the disclosure of mug shots, including the circuit split itself, the problems associated with its resolution, and the rise of commercial mug shot websites.[21] This Note seeks to fill that void, arguing

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14. 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, 502–04 (11th Cir. 2011) (per curiam), cert. denied, 132 S. Ct. 1141 (2012); see Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 479–82 (E.D. La. 1999) (holding same at district court level).

15. See infra Part II.C (dissecting impotence of *World Publishing* and *Karantsalis*).

16. See Gerstein, Court Ruling, supra note 13 ("The Sixth Circuit's decision has led to an odd practice which has somewhat swallowed the federal government's rule against disclosure. If a requester in a Sixth Circuit state asks for a mugshot, the Marshals service will release it and subsequently will release it to anyone."). For a discussion of FOIA, see infra Part I.A.

17. See infra Part II.C (analyzing *Detroit Free Press*'s national impact).

18. See infra notes 210–212 and accompanying text (discussing 2012 USMS policy memo and potential ramifications for mug shot disclosure).

19. See infra Part II.C (examining looming conflict between USMS and Sixth Circuit).

20. See infra Part I.C (discussing for-profit mug shot websites).

21. There are no scholarly sources discussing *World Publishing*, *Karantsalis*, or commercial mug shot websites. There is also little scholarship on *Detroit Free Press*. For an example of the limited work on the subject, however, see Christopher P. Beall, Note, The Exaltation of Privacy Doctrines over Public Information Law, 45 Duke L.J. 1249, 1282–84 (1996) (discussing *Detroit Free Press* in context of derivative use doctrine).

that an arrestee has a privacy interest in his mug shot, that this interest outweighs the public interest in disclosure, that the circuit split is untenable, and that accordingly the circuit split should be resolved in favor of the Tenth and Eleventh Circuits. This Note contains three parts. Part I provides an overview of the relevant provisions of FOIA—focusing on Exemption 7(C)—and the significant Supreme Court cases interpreting those provisions. Part I also analyzes the composition of mug shot requesters, including the exponential growth of commercial mug shot websites, to better frame the practical societal consequences of disclosure. Part II analyzes the approach of the Sixth Circuit on one side of the dispute, and the approach of the Tenth and Eleventh Circuits, the Eastern District of Louisiana, and the dissent in the Sixth Circuit on the other. Part II also anticipates the problems involved in resolving the dispute, suggests that USMS may already be attempting executive nonacquiescence, and concludes that USMS will have to resort to executive nonacquiescence if it wants to adjust its policy in the foreseeable future. Part III recommends, in light of the problems associated with a judicial resolution, a legislative solution following the approach of the Tenth and Eleventh Circuits.

I. FOIA, EXEMPTION 7(C), AND MUG SHOTS

Part I.A reviews FOIA statutory language relevant to the controversy; Part I.B discusses germane Supreme Court cases interpreting Exemption 7(C); Part I.C examines who files requests for mug shots as well as the rise of commercial mug shot websites.

A. *FOIA's Law Enforcement Exemption: Exemption 7(C)*

Congress originally passed FOIA[22] with the expectation that the Act would improve federal government transparency and accountability.[23] Under FOIA, any member of the public may request the release of certain records, such as mug shots, from an agency regardless of the purpose of that release.[24] If an agency denies a request, the requester

22. 5 U.S.C. § 552 (2012).

23. See S. Rep. No. 89-813, at 10 (1965) ("A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.").

24. § 552(a)(3)(A) ("Except . . . as provided . . . each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . shall make the records promptly available to any person."). See generally Dep't of Justice, Procedural Requirements, *in* Office of Info. Policy, Dep't of Justice, Department of Justice Guide to the Freedom of Information Act (2013) [hereinafter 2013 FOIA Guide], available at http://www.justice.gov/oip/foia-guide13/procedural-requirements.pdf (last updated Sept. 4, 2013) (detailing administrative procedures for requesting record). The DOJ FOIA Guide is a detailed, authoritative legal treatise on FOIA published by the Office of Information Policy. Traditionally a paper publication, the Office of Information Policy is currently in the

may challenge the refusal in court.[25] The requester's identity "has no bearing on the merits of his or her FOIA request."[26] To defend its decision, the agency must invoke one of FOIA's nine exemptions ("Exemptions"),[27] which are "generally . . . discretionary, not mandatory, in nature."[28]

To defend nondisclosure decisions, law enforcement agencies, including USMS, typically rely upon FOIA's law enforcement exemption, Exemption 7(C), which provides in pertinent part that FOIA "does not apply to matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy."[29] Amended in 1986 to contain the "could reasonably be expected to" language, Exemption 7(C) is considered the broadest of FOIA's exemptions.[30] To evaluate the invocation of Exemption 7(C), a court must (1) determine whether the information was gathered for a law enforcement purpose; (2) determine whether there is a personal privacy

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process of updating the manual to be exclusively available online so that the agency may "update the Guide with significant new developments as they occur." Office of Info. Policy, Department of Justice Guide to the Freedom of Information Act, Dep't of Justice (2013), http://www.justice.gov/oip/foia-guide.html (on file with the *Columbia Law Review*). While the Office of Information Policy has updated several sections of the FOIA Guide to the 2013 edition, as of writing, the agency has not updated its section on Exemption 7(C). Id. This Note cites the updated online 2013 version when able.

25. § 552(a)(4)(B) ("On complaint, the district court of the United States in the district in which the complainant resides . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.").

26. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989); see Dep't of Justice, Procedural Requirements, *in* 2013 FOIA Guide, supra note 24, at 20 (noting same).

27. These exemptions are enumerated in § 552(b). This Note focuses on Exemption 7(C), which USMS has invoked to defend its nondisclosure of mug shots. For a more detailed discussion of all nine exemptions, see generally Office of Info. Policy, Dep't of Justice, Department of Justice Guide to the Freedom of Information Act 141–669 (2009) [hereinafter 2009 FOIA Guide].

28. Dep't of Justice, Introduction to 2013 FOIA Guide, supra note 24, at 1, 6, available at http://www.justice.gov/oip/foia-guide13/intro-july-19-2013.pdf (on file with the *Columbia Law Review*) (last visited Oct. 2, 2013); see also S. Rep. No. 89-813, at 3 ("[When] a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files . . . .").

29. § 552(b)(7)(C).

30. Prior to amendment, Exemption 7(C) read "would . . . constitute an unwarranted invasion of personal privacy." Act of Nov. 21, 1974, Pub. L. No. 93-502, § 2(b), 88 Stat. 1561, 1563–64, amended by Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802(a), 100 Stat. 3207-48, 3207-48 to -49; 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, 540–41 (2006) (discussing extensive scope of Exemption 7(C)).

interest at stake; and (3) if there is one, balance the privacy interest against the public interest in disclosure.[31] The person whose privacy interest is implicated under Exemption 7(C) may surrender this interest and thereby authorize the release of the requested material.[32] FOIA's liberal venue provision allows a requester not only to file requests in the district in which the requester resides, but also to challenge nondisclosure decisions there.[33] This permits requesters to shop for the forum with the law most hospitable to disclosure, and explains why the vast majority of mug shot requests originate within the Sixth Circuit.[34]

B. *Important Court Cases Interpreting Exemption 7(C)*

The 1986 amendment to FOIA's Exemption 7(C), along with the Supreme Court cases interpreting the altered Exemption, dramatically expanded the scope of the Exemption's reach.[35] Part I.B.1 analyzes *U.S. Department of Justice v. Reporters Committee for Freedom of the Press* and the

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31. *Reporters Comm.*, 489 U.S. at 755–56, 762. According to the express language of FOIA, "the burden is on the agency to sustain its action." § 552(a)(4)(B). However, Supreme Court jurisprudence may have shifted this burden to the requester. See infra Part I.B.2.c.

32. § 552a(b)(2) ("No agency shall disclose any record . . . except . . . with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be . . . required under section 552 of this title . . . ."); see also 2009 FOIA Guide, supra note 27, at 709 (noting right of waiver belongs to individual exclusively as opposed to agency); cf. Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 363–64 (5th Cir. 2001) (holding only individual may waive privacy right under Exemption 6).

33. § 552(a)(4)(B).

34. See Brief of Appellees at 30 n.6, World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825 (10th Cir. 2012) (No. 11-5063) [hereinafter Brief of Appellees, *World Publ'g*], 2011 WL 3881872, at *30 n.6 (acknowledging existence of mug shot forum shopping); cf. Thomas J. Long, Note, Administrative Law, 59 N.Y.U. L. Rev. 1150, 1156–57 (1984) (describing similar forum shopping problem in context of circuit split interpreting Haskell Amendment). In 2011, USMS invoked FOIA's exemptions 1,120 times; of those denials, 695 were under Exemption 7(C). U.S. Marshals Serv., 2011 Freedom of Information Act/Privacy Act Log [hereinafter 2011 FOIA Log], http://www.usmarshals.gov/readingroom/foia_logs/2011_foia_log.xls (on file with the *Columbia Law Review*) (last visited Oct. 1, 2013). The same year, USMS granted approximately 78% of all mug shot requests. Id.

35. Arguments abound that the Supreme Court undermined FOIA's purpose. E.g., Halstuk & Chamberlin, supra note 30, at 555–60; James T. O'Reilly, Expanding the Purpose of Federal Records Access: New Private Entitlement or New Threat to Privacy?, 50 Admin. L. Rev. 371, 379 (1998); Beall, supra note 21, at 1251–52; Lauren Bemis, Note, Balancing a Citizen's Right to Know with the Privacy of an Innocent Family: The Expansion of the Scope of Exemption 7(C) of the Freedom of Information Act Under *National Archives & Records Administration v. Favish*, 25 J. Nat'l Ass'n Admin. L. Judges 507, 507–08 (2005); Glenn Dickinson, Comment, The Supreme Court's Narrow Reading of the Public Interest Served by the Freedom of Information Act, 59 U. Cin. L. Rev. 191, 192–93 (1990). But cf. Fred H. Cate, D. Annette Fields & James K. McBain, 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, 51–55 (1994) (arguing modern Supreme Court doctrine stems FOIA abuse).

core purpose doctrine; Part I.B.2 discusses subsequent jurisprudence that extended the scope of Exemption 7(C), focusing on the "derivative use doctrine," the "compelling evidence test," and the apparent burden shift of sustaining agency action from the agency to the requester.

1. Reporters Committee for Freedom of the Press *and the Core Purpose Doctrine*. — Decided in 1989, *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, undoubtedly the seminal Supreme Court case interpreting Exemption 7(C) following the 1986 amendment, significantly expanded Exemption 7(C)'s reach.[36] The case promulgated the core purpose doctrine, the legal doctrine that the only viable public interest a FOIA request can advance under Exemption 7(C) is improving the public's understanding of the government.[37] *Reporters Committee* arose out of journalist requests for rap sheets—records containing certain personal information about arrestees including criminal history and descriptive physical characteristics.[38] The Federal Bureau of Investigation (FBI) declined disclosure in accordance with its policy of releasing rap sheets of living individuals only when that individual requested the release, when the release would further the apprehension of a fugitive, or when specifically statutorily ordered.[39]

Justice Stevens, writing for the Court, noted that, of the applicable exemptions the FBI could invoke, Exemption 7(C) was the broadest in scope.[40] According to Justice Stevens, this was the result of the 1986 amendment to FOIA, which altered the language of Exemption 7(C) from "*would* constitute a clearly unwarranted invasion of personal

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36. 489 U.S. 749; see, e.g., Cate, Fields & McBain, supra note 35, at 55 (discussing *Reporters Committee*'s "dramatic new expansion of FOIA privacy Exemption 7(C)").

37. *Reporters Comm.*, 489 U.S. at 775. Any scholarly discussion of Exemption 7(C) necessarily includes an analysis of *Reporters Committee* and the core purpose doctrine. For a more detailed discussion of the doctrine, see generally Cate, Fields & McBain, supra note 35; Beall, supra note 21; Dickinson, supra note 35.

38. *Reporters Comm.*, 489 U.S. at 749–52, 757.

39. Id. at 752. Congress, via statute, had authorized the dissemination of rap sheets to banks, local licensing officials, the securities industry, the nuclear power industry, and other law enforcement agencies. Id. at 753. The FBI also had an internal policy of exchanging rap sheet information with other state and federal agencies, but would discontinue that practice if the receiving agency publicly disseminated the information for a purpose other than law enforcement. Id. at 752. This policy is similar to USMS's preferred policy regarding the dissemination of mug shots. See supra note 6 and accompanying text.

40. *Reporters Comm.*, 489 U.S. at 755–56. The other two exemptions mentioned were Exemption 3, 5 U.S.C. § 552(b)(3) (1982) (current version at 5 U.S.C. § 552(b)(3) (2012)), applicable to documents specifically exempted by another statute, and Exemption 6, § 552(b)(6) (current version at 5 U.S.C. § 552(b)(6) (2012)), which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Reporters Comm.*, 489 U.S. at 755. For a critique of agencies invoking the panoply of exemptions rather than initially choosing the appropriate one, see James A. Goldston, Jennifer M. Granholm & Robert J. Robinson, A Nation Less Secure: Diminished Public Access to Information, 21 Harv. C.R.-C.L. L. Rev. 409, 461 (1986) (criticizing agencies "shopping" between exemptions).

privacy" to the modern "*could* reasonably be expected to constitute an unwarranted invasion of personal privacy," the latter being the more flexible standard.[41]

Justice Stevens stated the individual's privacy interest was "'in avoiding disclosure of personal matters.'"[42] He rejected arguments that this privacy interest vanished because the information amassed on a single rap sheet was publicly available elsewhere as individual pieces.[43] Applying a "practical obscurity" standard, Justice Stevens reasoned if the pieces of information "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to [them]."[44] Justice Stevens bolstered this conclusion by pointing to congressional and FBI policies specifically designed to limit disclosure of rap sheets,[45] to other provisions of FOIA referencing "privacy,"[46] to state practices, which largely conformed to those of the FBI,[47] and to the Court's precedent.[48]

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41. *Reporters Comm.*, 489 U.S. at 756 & n.9 (emphasis added). As Justice Stevens put it:

> [T]he move from the "would constitute" standard to the "could reasonably be expected to constitute" standard represents a considered congressional effort "to ease considerably a Federal law enforcement agency's burden in invoking [Exemption 7]" . . . . [T]he stricter standard of whether such disclosure "would" constitute an unwarranted invasion of such privacy gives way to the more flexible standard of whether such disclosure "could reasonably be expected to" constitute such an invasion.

Id. (second alteration in original); accord Edwin Meese III, Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act, U.S. Dep't of Justice (Dec. 1987), http://www.justice.gov/oip/86agmemo.htm (on file with the *Columbia Law Review*) (explaining FOIA amendments broadened Exemption 7(C)'s scope). Compare Act of Nov. 21, 1974, Pub. L. No. 93-502, § 2(b), 88 Stat. 1561, 1563–64 (amended 1986) (reading "would" prior to 1986 amendment), with Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802(a), 100 Stat. 3207-48, 3207-48 to -49 (codified at 5 U.S.C. § 552(b)(7)) (reading "could").

42. *Reporters Comm.*, 489 U.S. at 762 (quoting Whalen v. Roe, 429 U.S. 589, 599 (1977)). Justice Stevens concluded without analysis that the rap sheets were compiled for a law enforcement purpose. Id. at 762 n.12.

43. Id. at 762–64 ("We reject respondents' cramped notion of personal privacy."). According to Justice Stevens, "there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." Id. at 764.

44. Id. at 762–64. Justice Stevens relied on Webster's Dictionary, which defined "'private'" as things "'intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public.'" Id. at 763–64 (quoting Webster's Third New International Dictionary 1804 (1976)).

45. Id. at 764–65, 780; see supra note 39 and accompanying text (describing FBI and legislative rap sheet disclosure policies).

46. 489 U.S. at 765–67 (citing 5 U.S.C. § 552(a)(2), (b) (1982 & Supp. V 1988)).

47. Id. at 753–54, 767. Justice Stevens explained that while state policies do not control federal policies, it was noteworthy that forty-seven of fifty states followed a policy similar to that of the FBI. Id.

48. Id. at 762, 767–71 (citing Whalen v. Roe, 429 U.S. 589, 598–600 (1977); Dep't of the Air Force v. Rose, 425 U.S. 352, 373–77 (1976)).

Next, Justice Stevens proceeded to "address what factors might warrant an invasion of the [privacy] interest."[49] Addressing the language of FOIA itself, Justice Stevens held that "Congress once again expressed the core purpose of the FOIA as 'contribut[ing] significantly to public understanding of the operations or activities of the government,'" and that this was the only viable interest that a requester could advance.[50] While a rap sheet might be of some public interest in that it is relevant "for writing a news story," that "is not the kind of public interest for which Congress enacted the FOIA."[51] Moreover, Justice Stevens, writing for the entire Court except for Justices Blackmun and Brennan,[52] ruled that categorical balancing (as opposed to ad hoc balancing), which could dispose of a wide swath of similar, generic future complaints in a single ruling, would be appropriate in the Exemption 7(C) context, noting in particular that an individual's privacy interest in his rap sheet would always be high.[53] As such, requests for "merely records that the Government happens to be storing," such as rap sheets, would always be "unwarranted."[54]

Commentators disagree as to the wisdom of *Reporters Committee*, a case that certainly made FOIA easier to administer; yet, there is consensus that narrowing FOIA requests to only those serving its "central purpose" greatly expanded the scope of Exemption 7(C) and, thus,

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49. Id. at 771 (emphasis omitted).

50. Id. at 775 (alteration in *Reporters Comm.*) (emphasis omitted) (quoting 5 U.S.C. § 552(a)(4)(A)(iii) (Supp. V 1988)). According to Justice Stevens, the decision to disclose "turn[ed] on the nature of the requested document and its relationship to 'the basic purpose of the [FOIA] "to open agency action to the light of public scrutiny."'" Id. at 772 (quoting *Rose*, 425 U.S. at 372).

51. Id. at 774–75.

52. Id. at 780–81 (Blackmun, J., concurring in the judgment) (rejecting use of categorical balancing in Exemption 7(C) context).

53. Id. at 777–80 (majority opinion) (citing FTC v. Grolier Inc., 462 U.S. 19, 22, 27–28 (1983)). In doing so, Justice Stevens contradicted previous Supreme Court language in NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223–24, 243–44, 249 (1978), which seemed to indicate that categorical balancing would be appropriate for Exemption 7(A) (the plural "'enforcement proceedings'" in § 552(b)(7)(A) implying Exemption amenability to categorical determinations) but not for Exemption 7(C) (the singular phrases "'a person,'" "'an unwarranted invasion,'" and "'a confidential source'" in § 552(b)(7)(B)–(D) implying the need for case-by-case determinations). *Reporters Comm.*, 489 U.S. at 777 (citing *Robbins*, 437 U.S. at 223–24). Justice Stevens, however, noted that *Robbins* addressed primarily Exemption 7(A), and advanced three additional justifications for Exemption 7(C) categorical balancing: First, he noted that provisions regarding segregability, in camera inspections, and the burden of proof in § 552(a)(4)(B) and § 552(b) did not mandate case-by-case balancing. Id. at 778. Second, he discounted *Robbins*'s reliance on the singular versus plural usage in FOIA as indicative of congressional intent. Id. at 778–79. Third, he placed emphasis on Congress's proclivity for workable rules. Id. at 779.

54. *Reporters Comm.*, 489 U.S. at 780 (internal quotation marks omitted).

made it substantially easier for agencies to withhold law enforcement documents.[55]

2. *Narrowing the Scope of the Public Interest: Derivative Use, Compelling Evidence, and Burden Shifting.* — Following *Reporters Committee*, the line of cases interpreting Exemption 7(C), both in the Supreme Court and lower courts, clearly favors nondisclosure.[56] Even where a slight privacy interest has been found to exist, jurisprudence subsequent to *Reporters Committee* has substantially reduced what constitutes applicable public interest sufficient to override that privacy interest. The moribund state of the "derivative use doctrine," discussed in Part I.B.2.a, the D.C., Fourth, and Tenth Circuits' adoption of the "compelling evidence test," analyzed in Part I.B.2.b, and the apparent shift of the burden to the requesters challenging agency nondisclosure decisions, evaluated in Part I.B.2.c, illustrate this trend.

a. *The Derivative Use Doctrine.* — The derivative use doctrine recognizes "the potential that additional, publicly valuable information may be generated by further investigative efforts that disclosure of the records will make possible."[57] If a court were to determine an arrestee has a privacy interest in his mug shot, it would be almost impossible to justify the release of the mug shot without use of the derivative use doctrine (unless there were, for example, strong supporting evidence of physical abuse of the arrestee by government officials).[58]

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55. See U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 505–06 (1994) (Ginsburg, J., concurring in the judgment) (arguing *Reporters Committee* changed "the FOIA calculus"). Compare Halstuk & Chamberlin, supra note 30, at 555–60 ("*Reporters Committee* precedent has dramatically reduced the scope of documents that agencies are required to disclose."), Beall, supra note 21, at 1253–54 (contending central purpose doctrine has effectively undermined disclosure in law enforcement context), and Dickinson, supra note 35, at 193 ("[T]he rule laid down in *Reporters Committee* undervalues FOIA's disclosure mandate . . . ."), with Cate, Fields & McBain, supra note 35, at 44–47 (advocating central purpose be expanded to cover all FOIA exemptions).

A group of senators sought to legislatively overrule the central purpose doctrine through the 1996 FOIA amendments. S. Rep. No. 104-272, at 26–27 (1996) (statement of Sen. Patrick Leahy) ("Effort by the courts to articulate a 'core purpose' for which information should be released imposes a limitation on the FOIA which Congress did not intend and which cannot be found in its language, and distorts the broader import of the Act in effectuating Government openness." (footnote omitted)). Although Senator Leahy's statement found no disagreement in the body of the Senate report, the courts have ignored such congressional condemnation and *Reporters Committee* remains good law. Catherine Cameron & Rebecca Daugherty, One Opinion Spoils Spirit of Federal Access Law, News Media & L., Spring 2001, at 40, 40.

56. See 2009 FOIA Guide, supra note 27, at 561–601 (showing overwhelming number of decisions upholding nondisclosure decisions).

57. U.S. Dep't of State v. Ray, 502 U.S. 164, 180 (1991) (Scalia, J., concurring in part and concurring in the judgment).

58. *Times Picayune* and *World Publishing* both rejected derivative use arguments that could have justified disclosure if the doctrine were viable. See infra notes 167–169, 192–196 and accompanying text.

The vitality of the derivative use doctrine, however, is tenuous at best.[59] A strict reading of the core purpose doctrine seems to indicate that the disclosure of the document itself must "shed light" on the government misconduct, precluding derivative uses.[60] While it has never explicitly ruled on the issue, two Supreme Court Exemption 6 cases decided soon after *Reporters Committee* adhere to the strict reading.[61] Although the two cases involved Exemption 7(C)'s sister (and less expansive) Exemption 6, which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,"[62] the decisions have had a substantial influence on Exemption 7(C) jurisprudence, and are cited as relevant authority by the courts involved in the dispute at issue in this Note.[63]

In *U.S. Department of State v. Ray*, the Supreme Court upheld the Department of State's redaction under Exemption 6 of the names of deported Haitian illegal immigrants whose witness interviews had been disclosed to requesters.[64] Significantly, the Court found that the potential for embarrassment of being associated with the interviews was a substantial privacy interest.[65] While the release of the summaries without names attached constituted a de miminis invasion of privacy because the risk of discovering the identity of the interviewee was minimal, the invasion "[became] significant when the personal information [was] linked to the particular interviewees."[66] Regarding the public interest at stake, the Court ruled that the release of witness interviews alone was

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59. See Beall, supra note 21, at 1283–85 (describing difference between core purpose and derivative use).

60. See id. at 1283 n.174 (discussing judicial precedents emphasizing appropriate FOIA disclosure evaluation should shed light on government activities).

61. U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 496–500 (1994); *Ray*, 502 U.S. at 179; see also Beall, supra note 21, at 1258–61 (analyzing *Ray* and *FLRA*); id. at 1283–84 (noting Supreme Court has expressed "hostility" toward derivative use doctrine).

62. 5 U.S.C. § 552(b)(6) (2012); see also 2009 FOIA Guide, supra note 27, at 561 ("[Exemption 7(C)] is the law enforcement counterpart to Exemption 6."). Exemption 6 contains the more restrictive "would clearly constitute" language found in Exemption 7(C) prior to the 1986 amendment. See supra note 41 and accompanying text (discussing statutory language change as noted in *Reporters Committee*).

63. See Cate, Fields & McBain, supra note 35, at 56–57 (discussing legacy of *Ray* and *FLRA*); Halstuk & Chamberlin, supra note 30, at 551–52 (noting Supreme Court reliance on *Ray* in subsequent Exemption 7(C) jurisprudence); see also 2009 FOIA Guide, supra note 27, at 473–75 (discussing derivative use doctrine). Three cases at issue in this note—*Detroit Free Press*, *Times Picayune*, and *World Publishing*—cite *Ray*. Two—*Detroit Free Press* and *Times Picayune*—cite *FLRA*. See infra Part II.A (analyzing *Detroit Free Press*), II.B.2 (*Times Picayune*), and II.B.4 (*World Publishing*).

64. 502 U.S. at 171–72, 177–78.

65. Id. at 176–77. Beyond embarrassment, the Court highlighted that the Haitians might be subject to violent reprisals in Haiti, and that the interviewees had thought their interviews would be confidential. Id.

66. Id. at 175–76.

sufficient to monitor the government.[67] The Court rejected requesters' claim that the release of names would help the requesters verify the accuracy of the summaries, noting that granting purely speculative requests of this nature could swallow the Exemption, and that the Court "generally accord[s] Government records . . . a presumption of legitimacy."[68] While merely speculative requests are clearly outside any acceptable derivative use, the Court expressly declined to rule as to the doctrine's overall validity.[69]

In *U.S. Department of Defense v. Federal Labor Relations Authority* (*FLRA*), the Supreme Court upheld the Department of Defense's nondisclosure of home addresses of federal civil service employees under Exemption 6.[70] Although the addresses could be obtained from readily available telephone directories, the Court ruled this did not negate the employees' privacy interest in nondisclosure.[71] In finding that the requesters had asserted no viable public interest, the Court affirmed the core purpose doctrine as the sole viable interest under Exemptions 6 and 7(C) while failing to mention any application of the derivative use doctrine.[72]

At least one commentator has interpreted this omission as the death knell for the derivative use doctrine.[73] Lower court application of the doctrine has been more mixed: While several circuit courts have expressed skepticism as to the doctrine's viability,[74] several district courts

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67. See id. at 177–78 ("The unredacted portions of the documents that have already been released to respondents inform the reader about the State Department's performance of its duty to monitor Haitian compliance with the promise not to prosecute the returnees.").

68. Id. at 178–79.

69. Justice Stevens, the author of the opinion, went to great lengths to avoid ruling on derivative uses of FOIA requests designed to uncover government misconduct. Id.; see also id. at 180 (Scalia, J., concurring in part and concurring in the judgment) ("The majority does not, in my view, refute the persuasive contention that consideration of derivative uses, whether to establish a public interest or to establish an invasion of privacy, is impermissible.").

70. 510 U.S. 487, 489 (1994).

71. Id. at 500.

72. See id. at 495 ("[T]he only relevant 'public interest in disclosure' to be weighed in this balance is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government.'" (second alteration in *FLRA*) (emphasis omitted) (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 775 (1989))).

73. See Beall, supra note 21, at 1259–60 (arguing *FLRA* ended viability of derivative use doctrine). A 2004 Supreme Court case, National Archives and Records Administration v. Favish, 541 U.S. 157 (2004), discussed infra Part I.B.2.c, also failed to mention the derivative use doctrine.

74. See, e.g., Associated Press v. U.S. Dep't of Def., 554 F.3d 274, 290 (2d Cir. 2009) ("Although this Court has not addressed the issue of whether a derivative use theory is cognizable under FOIA as a valid way by which to assert that a public interest is furthered, we have indicated that it may not be."); Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1027–28 (9th Cir. 2008) ("We have previously expressed skepticism at

have used the doctrine to justify the release of records.[75] These district court decisions likely represent aberrations—the general tenor of case law and legal scholarship on the core purpose doctrine indicates that the derivative use doctrine is moribund.

b. *The Compelling Evidence Test.* — *Reporters Committee* indicated that categorical rules in the Exemption 7(C) context would be appropriate for addressing a wide array of cases.[76] With that in mind, the D.C. Circuit in *SafeCard v. SEC* promulgated the "compelling evidence test" for evaluating the weight of the public interest in the exceptional case where a categorical exemption otherwise applied:

> [U]nless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to . . . enforcement files is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest in such information would ever be significant.[77]

In practice, the compelling evidence test is an almost insurmountable standard.[78] In addition to the D.C Circuit, two other circuits, including the Tenth in *World Publishing*, have adopted the compelling evidence test.[79]

c. *The Burden of Challenging Nondisclosure.* — Under the express language of FOIA, "the burden is on the agency to sustain its [nondisclosure] action."[80] However, a 2004 Supreme Court decision upholding the nondisclosure of autopsy reports under Exemption 7(C), *National Archives and Records Administration v. Favish*,[81] seems to have

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the notion that such derivative use of information can justify disclosure under Exemption 6."); cf. Hertzberg v. Veneman, 273 F. Supp. 2d 67, 86–87 (D.D.C. 2003) (noting court "does not understand the FOIA to encompass such a concept" as "derivative theory of public interest").

75. See 2009 FOIA Guide, supra note 27, at 474–75 (listing seven occasions district courts used derivative use doctrine to justify disclosure).

76. See supra note 53 and accompanying text (discussing general applicability of categorical balancing).

77. SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1205–06 (D.C. Cir. 1991); see also Bemis, supra note 35, at 530–31 (discussing compelling evidence test).

78. See 2009 FOIA Guide, supra note 27, at 561 (recognizing *SafeCard* as proper implementation of *Reporters Committee*); 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, 999–1000 & n.95 (2002) (highlighting *SafeCard* as example of narrow interpretation of public interest).

79. See World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 831 n.1 (10th Cir. 2012) (adopting compelling evidence test in context of mug shot disclosure); Neely v. FBI, 208 F.3d 461, 464–66 (4th Cir. 2000) (adopting compelling evidence as proper interpretation of *Reporters Committee*). In general, the D.C. Circuit, which hears the vast majority of claims involving administrative law nationwide, has a strong influence on its sister circuits in this area of the law. E.g., Richard J. Pierce, Jr., The Special Contributions of the D.C. Circuit to Administrative Law, 90 Geo. L.J. 779, 779–80 (2002) (comparing D.C. Circuit to Supreme Court in terms of contribution to administrative law doctrine).

80. 5 U.S.C. § 552(a)(4)(B) (2012).

81. 541 U.S. 157, 174 (2004).

shifted this burden to the requester.[82] *Favish* clarified that, under the core purpose doctrine, to demonstrate the public interest in disclosure, (1) "the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake," and (2) "the citizen must show the information is likely to advance that interest."[83] Echoing *SafeCard*, the Court explained that where a requester alleges government misconduct, the requester must produce evidence that a reasonable person would conclude is indicative of that misconduct.[84]

Favish created what one commentator has referred to as "a catch-22 for requestors": To advance the public interest, the requester must demonstrate that putting the information in the hands of the requester is likely to advance the public interest; however, the requester, in the usual case, does not have prior access to that information.[85] *Favish* has significantly strengthened an agency's ability to resist disclosure requests for law enforcement documents.[86]

C. *Who Requests Mug Shots?*

Unfortunately, there are no empirical studies addressing who requests mug shots under FOIA (or state analogues to FOIA). That said, there appear to be two prominent groups of requesters who make the bulk of these requests: journalists, and the owners of commercial websites hosting online searchable mug shot databases for profit.

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82. See 2009 FOIA Guide, supra note 27, at 454 ("The burden of establishing that disclosure would serve the public interest is on the requester."). For a full account and analysis of *Favish*, see, for example, Bemis, supra note 35, at 541 (arguing purpose of FOIA is controverted by burden shift); Autumn M. Montague, Note, Do Not Disturb: Defining the Meaning of Privacy Under the Freedom of Information Act, 49 How. L.J. 643, 655, 666 (2006) (contending burden shifting and hardline rules are appropriate in FOIA context).

83. *Favish*, 541 U.S. at 172.

84. Id. at 174. The Supreme Court has never considered the compelling evidence test. However, the reasonable person standard articulated in *Favish*, combined with the fact that uncovering government misconduct is the only apparent viable interest under *Reporters Committee*, seems to be at least an implicit endorsement of the test. For a discussion of *SafeCard*, see supra Part I.B.2.b.

85. Bemis, supra note 35, at 540; see also Montague, supra note 82, at 654 ("It creates a process of circular reasoning by requiring individuals to prove government wrongdoing in order to gain access to the very documents that they believe will show government wrongdoing."). If the requester did possess the information, under Justice Stevens's logic in *Reporters Committee*, there would be no reason to make the request in the first place. See supra note 44 and accompanying text (reasoning readily available information would obviate demand for FOIA requests).

86. See Bemis, supra note 35, at 508 ("*National Archives* changed the way Exemption 7(C) is interpreted, and has turned Exemption 7(C) into a withholding statute."). But cf. Montague, supra note 82, at 664–67 (arguing *Favish* is advancing toward proper interpretation of FOIA). In camera inspection of records may alleviate the concerns associated with burden shifting. See 5 U.S.C. § 552(a)(4)(B) (2012) (granting judges power to review records in camera to determine Exemption applicability).

Journalists use mug shots to put a face to the story.[87] They also purport to use mug shots to monitor government misconduct, including police mistreatment of arrestees.[88] The media's interest in mug shots is evidenced by the legal battles over mug shots: The petitioners fighting USMS nondisclosure are news organizations.[89] Moreover, USMS's FOIA logs—tables that contain data about FOIA requests, including the name of the requester and a brief description of the request—provided the requester's organizational affiliation from 2006 until 2008.[90] Of the 544 mug shot requests during that time period, 91.5% came from individuals with some sort of affiliation with a media outlet.[91] Of those that did not, three came from a penitentiary, three from attorneys, one from a bail

87. See supra note 3 and accompanying text (noting public consumption of mug shot in high-profile shooting case). When asked why he was litigating *Karantsalis* in an interview, Theo Karantsalis, a freelance journalist, responded, "I need this information to be able to tell stories." Tim Elfrink, *Miami New Times* Writer Fights for Freedom of the Press, Miami New Times (Jan. 12, 2012), http://www.miaminewtimes.com/2012-01-12/news/miami-new-times-writer-fights-for-freedom-of-the-press (on file with the *Columbia Law Review*).

88. See infra note 195 and accompanying text (discussing arguments presented in favor of mug shot disclosure to uncover government misconduct).

89. E.g., 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); Detroit Free Press, Inc. v. U.S. Dep't of Justice, 73 F.3d 93 (6th Cir. 1996); Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472 (E.D. La. 1999); see Letter from Bruce D. Brown, Exec. Dir., Reporters Comm. for Freedom of the Press, to Eric H. Holder, Jr., Att'y Gen. (Jan. 30, 2013) [hereinafter 2013 Brown Ltr. to Holder] (on file with the *Columbia Law Review*) (indicating thirty-eight media organizations' displeasure with USMS consideration of change of disclosure policy in Sixth Circuit).

90. U.S. Marshals Serv., 2006 Freedom of Information Act/Privacy Act Log [hereinafter 2006 FOIA Log], http://www.usmarshals.gov/readingroom/foia_logs/2006_foia_log.xls (on file with the *Columbia Law Review*) (last visited Oct. 1, 2013); U.S. Marshals Serv., 2007 Freedom of Information Act/Privacy Act Log [hereinafter 2007 FOIA Log], http://www.usmarshals.gov/readingroom/foia_logs/2007_foia_log.xls (on file with the *Columbia Law Review*) (last visited Oct. 1, 2013); U.S. Marshals Serv., 2008 Freedom of Information Act/Privacy Act Log [hereinafter 2008 FOIA Log], http://www.usmarshals.gov/readingroom/foia_logs/2008_foia_log.xls (on file with the *Columbia Law Review*) (last visited Oct. 1, 2013). Note that USMS's data may be somewhat inaccurate, as the 2011 Department of Justice FOIA Report shows that USMS processed 2,276 requests for mug shots in 2011. U.S. Dep't of Justice, Freedom of Information Act Annual Report: Fiscal Year 2011, at tbl.V.A, available at http://www.justice.gov/oip/annual_report/2011/oip-foia-fy11.pdf (on file with the *Columbia Law Review*). This Note relies upon the FOIA logs because they provide substantive information regarding requesters and for the sake of consistency.

91. 2006 FOIA Log, supra note 90; 2007 FOIA Log, supra note 90; 2008 FOIA Log, supra note 90. A note on methodology: Names provided with no affiliation but duplicative with another name on that list were counted as though they had the affiliation listed. Even assuming the highly unlikely possibility that, for instance, "MIKE TOBIN" was a different requester than "Tobin, Mike — The Plain Dealer," who appeared on the list ten times, members of the media still accounted for 87% of all mug shot requests.

bonds company, and one from a marketing research firm, while the rest contained no information regarding affiliation.[92]

Owners of commercial websites post mug shots online to draw internet traffic for profit. There are innumerable online hosts of searchable mug shot databases as well as related "unpublishing vendors."[93] The databases are massive: Florida.arrests.org, which hosts only mug shots taken by Florida state agencies, claimed to host in excess of four million mug shots as of 2011.[94] Some owners claim that they make most of their profits via advertising fees;[95] however, many sites link to unpublishing vendors who offer to remove mug shots for a fee from as low as $99 to as high as $400 per photo.[96] Bustedmugshots.com, a mug shot website, purports to voluntarily remove mugs shots for free (in lieu of the typical minimum $98 administrative cost) if the arrestee is found not guilty or cleared of charges.[97] The process of removing the mug shot's presence from the Internet is a Kafkaesque ordeal: The former arrestee must have his mug shot removed from each website, including those that remove

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92. 2006 FOIA Log, supra note 90; 2007 FOIA Log, supra 90; 2008 FOIA Log, supra note 90.

93. E.g., Mugshots.com, http://mugshots.com (on file with the *Columbia Law Review*) (last visited Sept. 30, 2013) (hosting large mug shot database); UnpublishArrest.com, http://unpublisharrest.com (on file with the *Columbia Law Review*) (last visited Sept. 30, 2013) (charging $399 to remove mug shot from Mugshots.com up until August 29, 2013, and currently offering to "permanent[ly] unpublish[]" mug shots from Mugshots.com for consultatory fee). For an argument that this practice amounts to legal extortion, see infra notes 252–253 and accompanying text. UnpublishArrest.com's removal of official price quotes from its site may be the result of recent negative publicity. See David Segal, Mugged by a Mug Shot Online, N.Y. Times (Oct. 5, 2013), http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html (on file with the *Columbia Law Review*) (criticizing online commercial mug shot industry for damaging reputations of those depicted in mug shots).

94. David Kravets, Mug-Shot Industry Will Dig Up Your Past, Charge You to Bury It Again, Wired (Aug. 2, 2011, 1:52 PM), http://www.wired.com/threatlevel/2011/08/mugshots (on file with the *Columbia Law Review*); see also Arrests.org, http://www.arrests.org (on file with the *Columbia Law Review*) (last visited Sept. 30, 2013) (hosting online mug shot database).

95. One claimed to make at least $25 a week per advertiser on his website. Stephanie Francis Ward, Hoist Your Mug: Websites Will Post Your Name and Photo; Others Will Charge You to Remove Them, A.B.A. J., Aug. 2012, at 17, 18.

96. See Mugshots.com, supra note 93 (providing link to unpublishing vendor UnpublishArrest.com); UnpublishArrest.com, supra note 93 (providing rates for mug shot removal on Mugshots.com up until August 29, 2013). As of August 29, 2013, UnpublishArrest.com offered a special bulk rate: four mug shots for $1,479.00. UnpublishArrest.com, supra note 93.

97. Andrea Noble, Mugs Seen as Crime Solvers, Wash. Times (Jan. 23, 2013), http://www.washingtontimes.com/news/2013/jan/23/mugs-seen-as-crime-solvers/?page=all (on file with the *Columbia Law Review*); About Us, Busted! Mugshots, http://www.bustedmugshots.com/about (on file with the *Columbia Law Review*) (last visited Sept. 30, 2013).

for "free" or "a nominal charge," and those that charge a fee.[98] Even if the former arrestee has already paid to remove his mug shot from one website, unpublishing vendors cannot alter a mug shot's status as a public record subject to future FOIA requests, meaning there is no mechanism to stop another website, newspaper, or entity from accessing and reposting the same mug shot.[99] One unpublishing vendor, RemoveSlander.com, admits that it cannot remove mug shots from some websites despite the rates it charges.[100] The owner of the site claims to employ a legal team to effect removals; however, there is speculation that the removal process involves simple, automated, one-time payments to the mug shot website that anyone could make—one mug shot website owner claimed to receive $19.90 of the unpublishing vendor removal fee.[101]

Mug shot websites purport to serve the public interest by publishing the photos in accessible databases.[102] Some reputable newspapers, such as the *Tampa Bay Times*, host mug shot databases "as a public service" that also happens to be highly profitable.[103] Mug shot websites often contain

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98. See Michael Sandler, Mugshot Web Sites a Dirty but Legal Business, Progress Ill. (Sept. 6, 2012, 11:45 AM), http://www.progressillinois.com/quick-hits/content/2012/08/24/mugshot-web-sites-dirty-legal-business (on file with the *Columbia Law Review*) (describing mazelike procedures for removing mug shot from websites); see also Segal, supra note 93 ("'[The lawyer] was able to get a few of the photos removed from one site, related to charges that were expunged . . . but they wanted $300 apiece to remove the other shots. And that was just one site. I don't have that kind of money.'").

99. See Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174 (2004) (noting no judicial mechanism to prevent dissemination once requester gains information sought); see also supra Part I.A (discussing mechanics of FOIA).

100. Frequently Asked Questions & Answers!, RemoveSlander.com, http://www.removeslander.com/Frequently-Asked-Questions.html (on file with the *Columbia Law Review*) (last visited Sept. 30, 2013) (publicizing inability to remove information from at least six websites).

101. Kravets, supra note 94. Given that RemoveSlander.com claimed, as of August 29, 2013, to be capable of removing mug shots within sixty minutes of payment, the speculation seems more likely. See RemoveSlander.com, http://www.removeslander.com (last visited Aug. 29, 2013) (advertising "Gone In 60 minutes" service).

102. E.g., Mugshots: Legitimate Public Interest, Mugshots.com, http://mugshots.com/Blog/Mugshots-Legitimate-Public-Interest.4302613.html (June 22, 2013) (on file with the *Columbia Law Review*). In an interview with the *New York Times*, the founder of JustMugshots.com reasoned, "'No one should have to go to the courthouse to find out if their kid's baseball coach . . . , or . . . the person they're going on a date with tonight has been arrested . . . . Our goal is to make that information available online, without having to jump through any hoops.'" Segal, supra note 93.

103. E.g., Mug Shots, http://www.tampabay.com/mugshots (on file with the *Columbia Law Review*) (last visited Sept. 30, 2013) (hosting online mug shot database for state of Florida); see also Tracie Powell, Mug-Shot Websites Move Beyond Journalism to Mainstream Profiteers, Poynter. (Sept. 12, 2012, 9:22 AM), http://www.poynter.org/latest-news/making-sense-of-news/186127/mug-shot-websites-move-beyond-journalism-to-mainstream-profiteers (on file with the *Columbia Law Review*) (criticizing *Tampa Bay Times* "because the sleek interface seemed to provide more entertainment than journalistic value").

elaborate statements addressing their own legality—Mugshots.com defends its business practices under the First and Sixth Amendments, copyright laws, and FOIA.[104]

At the state level, mug shot websites routinely acquire mug shots under state FOIAs.[105] At the federal level, while the number of mug shot requests these websites make to USMS is unclear, it is possible to make an educated estimate. The first mug shot websites were created in 2009.[106] According to USMS's FOIA logs, from 2006 to 2009, of 1,936 requests sent to the agency, 840 were for mug shot photos, an average of 210 a year.[107] In 2010, the number of FOIA requests for that year alone skyrocketed to 1,049, of which 708 were for mug shots.[108] In 2011, the number of FOIA requests continued to increase, climbing to 1,317, of which 995 were for mug shots.[109] Between 2006 and 2009, 43% of total FOIA requests sent to USMS were for mug shots;[110] in 2011, 75%.[111] The increase in total volume of all FOIA requests corresponds directly to the increase in requests for mug shots. Unfortunately, as mentioned above, USMS stopped including requester affiliation in its FOIA logs in 2009;[112] nevertheless, the rise of the mug shot website cottage industry beginning in 2009 provides a strong explanation for the corresponding marked increase in FOIA requests for mug shots over the same period of time.[113]

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104. About Us, Mugshots.com, http://mugshots.com/about.html (on file with the *Columbia Law Review*) (last visited Oct. 20, 2013).

105. See Kravets, supra note 94 (discussing website practice of "siphon[ing] booking photos out of county-sheriff databases").

106. See Powell, supra note 103 ("In 2009, Matt Waite helped develop one of the first mug-shot websites for Poynter's Tampa Bay (Fla.) Times."); cf. Segal, supra note 93 ("M[ug] shots have been online for years, but they appear to have become the basis for businesses in 2010 . . . ."); Steve Osunsami, Mug Shot Websites: Profiting off People in Booking Photos?, ABC News (Mar. 7, 2013), http://abcnews.go.com/Technology/mug-shot-websites-profiting-off-people-booking-photos/story?id=18669703#.UXa-KbVzJOg (on file with the *Columbia Law Review*) (noting mug shot website industry largely emerged in two years prior to 2013).

107. 2006 FOIA Log, supra note 90; 2007 FOIA Log, supra note 90; 2008 FOIA Log, supra note 90; U.S. Marshals Serv., 2009 Freedom of Information Act/Privacy Act Log [hereinafter 2009 FOIA Log], http://www.usmarshals.gov/readingroom/foia_logs/2009_foia_log.xls (on file with the *Columbia Law Review*) (last visited Oct. 1, 2013).

108. U.S. Marshals Serv., 2010 Freedom of Information Act/Privacy Act Log, http://www.usmarshals.gov/readingroom/foia_logs/2010_foia_log.xls (on file with the *Columbia Law Review*) (last visited Oct. 1, 2013).

109. 2011 FOIA Log, supra note 34.

110. 2006 FOIA Log, supra note 90; 2007 FOIA Log, supra note 90; 2008 FOIA Log, supra note 90; 2009 FOIA Log, supra note 107.

111. 2011 FOIA Log, supra note 34.

112. See supra note 90 and accompanying text.

113. If this hypothesis is correct, based upon the 2006–2008 data, assuming the average number of requests made by journalists remained consistent through 2011 (as they had from 2006–2008), then requests on behalf of mug shot websites in 2011 approximately tripled those made by journalists (755 versus 240). 2006 FOIA Log, supra note 90; 2007 FOIA Log, supra note 90; 2008 FOIA Log, supra note 90; 2011 FOIA Log,

Because the identity of the requester is inconsequential, the categorical rules endorsed in *Reporters Committee* provide little middle ground: A decisive judicial ruling would render mug shots available or unavailable both to journalists and to mug shot websites.[114]

II. PRIVACY RIGHTS IN MUG SHOTS AND THE SPECTER OF AGENCY NONACQUIESCENCE

USMS practices a national policy of mug shot nondisclosure outside the Sixth Circuit, invoking Exemption 7(C) when it can to deny disclosure.[115] Since the 1996 *Detroit Free Press* ruling, courts that have confronted the mug shot issue outside the Sixth Circuit have agreed with the agency: An arrestee has a privacy interest in his mug shot. Nonetheless, the Sixth Circuit ruling continues to bind the nation in practice due to forum shopping. Part II.A analyzes the Sixth Circuit's ruling in *Detroit Free Press*; Part II.B discusses the dissent in *Detroit Free Press*, the Eastern District of Louisiana's ruling in *Times Picayune*, the Eleventh Circuit's ruling in *Karantsalis*, and the Tenth Circuit's ruling in *World Publishing*; Part II.C addresses the challenges of resolving the dispute, and the likelihood of USMS engaging in executive nonacquiescence.

A. Detroit Free Press*: No Privacy Interest in Mug Shots*

Prior to 1996, mug shots of federal arrestees were generally unavailable to the public unless disclosure served a specific law enforcement purpose, such as apprehending a fugitive.[116] In accordance with this policy, in 1993, USMS rejected under Exemption 7(C) the *Detroit Free Press*'s request for the mug shots of a group indicted on eighty-two counts related to illegal gambling, sports bookmaking activities, and money laundering; the *Detroit Free Press* challenged the nondisclosure.[117] In *Detroit Free Press, Inc. v. Department of Justice*, the Sixth Circuit, in a 2-1

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supra note 34. A note on methodology: The names with affiliations in the 2006–2008 logs were compared against the names in the 2011 log. Any names duplicative in the two lists were counted as one media contact. This, of course, undervalues media requests in 2011 since it assumes no new media contacts made requests in 2011. Alternative explanations for the increase in mug shot requests would rely on a sudden uptick in journalistic demand for mug shots, improved agency access, increased public demand due to the Internet, or sheer coincidence.

114. See supra note 26 and accompanying text (noting irrelevance of identity of requester as to disclosure decision); supra note 53 and accompanying text (discussing judicial preference for categorical rules in FOIA disclosure).

115. See supra notes 6–8 and accompanying text (describing current mug shot disclosure regime).

116. 1997 Media Policy, supra note 8.

117. Judge Orders Justice Department to Release Mug Shots, but Stays Order to Allow Appeal, Reporters Comm. for Freedom of the Press (May. 31, 1994), http://www.rcfp.org/browse-media-law-resources/news/judge-orders-justice-department-release-mug-shots-stays-order-allow- (on file with the *Columbia Law Review*).

decision, affirmed the district court's ruling in favor of the requester, holding agencies cannot invoke Exemption 7(C) to deny a disclosure request for a mug shot so long as the request "concerns ongoing criminal proceedings in which the names of the indicted suspects have already been made public and in which the defendants have already appeared publicly in court."[118]

The court could not identify a privacy interest inherent in the mug shots.[119] It found that Supreme Court cases upholding agency nondisclosure—*FLRA*,[120] *Ray*,[121] and *Reporters Committee*[122]—"actually emphasize[d] the *public* nature of the information sought in this case."[123] The court distinguished *FLRA* by arguing that mug shots revealed information relevant to the "daily work of [USMS]" while the release of the home addresses in *FLRA* "shed no light on the workings of the government."[124] Likewise, the court stressed that the interviewees' privacy interest in *Ray* safeguarded the initial disclosure of their names while that protection would have been unnecessary had those names already been publicly known.[125] In the case of mug shots, arrestees have already been identified by name and had their visages revealed during prior public judicial proceedings; according to the Sixth Circuit, the mug shots publicize "[n]o *new* information."[126]

Furthermore, the court asserted three ways in which *Reporters Committee*'s nondisclosure ruling was not dispositive on the present issue: First, in *Reporters Committee*, the rap sheets were not germane "to any

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118. 73 F.3d 93, 99 (6th Cir. 1996); see also Detroit Free Press, Inc. v. U.S. Dep't of Justice, No. 93 CV 74692 DT, slip op. at 2 (E.D. Mich. Apr. 29, 1994) ("[O]ur faces, for better or for worse, are not private matters."). Regarding whether the mug shots were compiled for a law enforcement purpose, the Sixth Circuit had "a *per se* rule 'under which records compiled *by* a law enforcement agency qualify as "records compiled *for* law enforcement purposes" under FOIA.'" *Detroit Free Press*, 73 F.3d at 96 (quoting Jones v. FBI, 41 F.3d 238, 245–46 (6th Cir. 1994)).

119. *Detroit Free Press*, 73 F.3d at 96. The court acknowledged that Exemption 7(C) was indeed the broadest exemption available to USMS but that, despite its breadth, it was inapplicable here. Id. at 95–98 ("'[D]isclosure, not secrecy, is the dominant objective of the Act,' and any exemptions to that disclosure requirement 'must be narrowly construed.'" (quoting Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976))).

120. 510 U.S. 487 (1994). For a discussion of this case, see supra notes 70–72 and accompanying text.

121. 502 U.S. 164 (1991). For a discussion of this case, see supra notes 64–69 and accompanying text.

122. 489 U.S. 749 (1989). For a discussion of this case, see supra Part I.B.1.

123. *Detroit Free Press*, 73 F.3d at 96.

124. Id. *FLRA* is usually viewed as a case promoting nondisclosure. See, e.g., Halstuk & Davis, supra note 78, at 1020 (noting lower courts use *FLRA* to support nondisclosure decisions); O'Reilly, supra note 35, at 379–80 (same).

125. *Detroit Free Press*, 73 F.3d at 97. *Ray* is usually viewed as a case promoting nondisclosure. See, e.g., Cate, Fields & McBain, supra note 35, at 57 (noting lower courts use *Ray* to justify nondisclosure).

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

active prosecution"; on the other hand, where the investigation is ongoing, "the need or desire to suppress the fact that the individual depicted in a mug shot has been booked on criminal charges is drastically lessened."[127] Second, rap sheets are simply different from mug shots.[128] Whereas mug shots are single pieces of information depicting a distinct event (how the arrestee looked at the time of booking), rap sheets are "compilations of many facts that may not otherwise be readily available from a single source. Thus, rap sheets both disclose information that extends beyond a particular, ongoing proceeding and recreate information that . . . may have been lost or forgotten."[129] Third, relying on Sixth Circuit precedent, the court concluded that the mere possibility of "ridicule" or "embarrassment" resulting from the disclosure does not implicate a privacy interest.[130]

Because it found no privacy interest in the mug shots, the court declined to engage in a balancing test and thereby required USMS to disclose the mug shots to the *Detroit Free Press*.[131] Nevertheless, the court asserted that, even had there been a privacy interest, the "significant" public interest in scrutinizing the inner workings of government could justify disclosure.[132] The court highlighted two specific ways in which mug shots could subject the government to public oversight: First, in the case of an erroneous arrest, the release of a mug shot could more expeditiously reveal the error than the mere release of a faceless name.[133] Second, mug shots, as photographic records, have the ability to shine light upon potential police misconduct in ways written information cannot.[134] In the court's hypothetical,

> Had the now-famous videotape of the Rodney King beating in Los Angeles never been made, a mug shot of Mr. King released to the media 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.[135]

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127. Id.

128. Id.

129. Id.

130. Id. (citing Schell v. U.S. Dep't of Health & Human Servs., 843 F.2d 933, 938–39 (6th Cir. 1988)).

131. Id.

132. Id. at 97–98.

133. Id. at 98.

134. Id.

135. Id. This justification would rely upon the derivative use doctrine. See Beall, supra note 21, at 1282–84 (arguing *Detroit Free Press* endorsed derivative application of core purpose doctrine). For more on the derivative use doctrine, see supra Part I.B.2.a. However, as noted above, the Sixth Circuit did not need to rely on any derivative public interest found in the mug shots because those indicted did not have a privacy interest in the mug shots in the first place. See supra note 131 and accompanying text.

Despite the reach of this categorical ruling, the court couched its decision in limiting terms, stating:

> We need not decide today whether the release of a mug shot by a government agency would constitute an invasion of privacy in situations involving dismissed charges, acquittals, or completed criminal proceedings. Instead, we need resolve only the single issue of whether such disclosure 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, "could reasonably be expected to constitute an . . . invasion of personal privacy."[136]

The Sixth Circuit has never considered any of the aforementioned issues.[137] *Detroit Free Press*, a decision in effect binding on the rest of the nation due to forum shopping,[138] has been rejected by every subsequent court to consider the issue and currently sits on a legal island.[139]

B. Detroit Free Press *Dissent,* Times Picayune*,* Karantsalis*, and* World Publishing*: The Privacy Interest in Mug Shots Outweighs the Public Interest in Disclosure*

Every other court to consider the mug shot issue has authoritatively disagreed with the Sixth Circuit, each acknowledging the Sixth Circuit's decision and each finding that an arrestee has a privacy interest in his mug shot that the corresponding public interest does not override. The dissent in *Detroit Free Press*[140] and the Eastern District of Louisiana's subsequent decision in *Times Picayune Publishing Corp. v. U.S. Department of Justice*[141] elaborate the intellectual basis for nondisclosure undergirding the reasoning behind the Tenth and Eleventh Circuit decisions handed down more than a decade later. Still, these decisions have not altered *Detroit Free Press*'s reach over the rest of the nation. Part II.B.1 analyzes the dissenting opinion in *Detroit Free Press*, Part II.B.2 the Eastern District of Louisiana's opinion in *Times Picayune*, Part II.B.3 the Eleventh Circuit's

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136. *Detroit Free Press*, 73 F.3d at 97 (quoting 5 U.S.C. § 552(b)(7)(C) (1994)); see Beall, supra note 21, at 1283–84 (noting limited reach of holding).

137. For a discussion of DOJ's efforts to induce reconsideration of *Detroit Free Press*, see infra Part II.C.

138. FOIA's venue rules make forum shopping possible. See supra note 33–34 and accompanying text.

139. See Beall, supra note 21, at 1282–84 (describing aberrational nature of *Detroit Free Press*). Although the issue before it was purely procedural (whether Sixth Circuit law applied), there might be an attenuated argument that the Court for the Southern District of California endorsed *Detroit Free Press* when it ruled, "[This] [c]ourt finds it has no authority to overrule binding 6th Circuit precedent interpreting FOIA." *Loughner* Motion Hearing, supra note 11, at 1. The better interpretation is that the district court was respecting the Sixth Circuit's authority without adopting a position on the merits.

140. 73 F.3d at 99–100 (Norris, J., dissenting).

141. 37 F. Supp. 2d 472 (E.D. La. 1999).

decision in *Karantsalis*, and Part II.B.4 the Tenth Circuit's ruling in *World Publishing*.

1. *Sixth Circuit Dissent:* Detroit Free Press. — Unlike the majority in *Detroit Free Press*, which emphasized that FOIA's underlying purpose was to encourage government transparency,[142] the dissent quoted favorably *Reporters Committee* and Second Circuit precedent stressing the presence of exemptions in relation to the privacy interest of the individual.[143] In particular, the dissent took issue with the majority's contention that an arrestee's notoriety diminished his privacy interest in his mug shot, noting that *Reporters Committee* had considered and rejected similar arguments as reflecting a "'cramped notion of personal privacy.'"[144] Analogizing a mug shot to a rap sheet, the dissent argued:

> [A] mug shot conveys much more than the appearance of the pictured individual . . . including his expression at a humiliating moment and the fact that he has been booked on criminal charges. Furthermore, as this court has recognized, mug shots are widely viewed by members of the public as signifying that the person in the photo has committed a crime.[145]

The dissent further argued that, because there was no evidence of USMS misconduct, in line with Supreme Court and Sixth Circuit precedent, the request—one of mere speculation—served no applicable public interest.[146] Specifically in the Exemption 7(C) context, the dissent maintained that the privacy interest at stake was particularly delicate, necessitating specific allegations of misconduct.[147] The dissent's viewpoint corresponds to the body of Supreme Court jurisprudence rejecting a derivative application of FOIA.[148] It also corresponds to the subsequent views of courts that have considered the issue.

2. *Eastern District of Louisiana:* Times Picayune. — While the Sixth Circuit has not had occasion to consider whether it would enforce the

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142. See supra note 119 (noting *Detroit Free Press* majority's discussion on importance of government transparency despite presence of exemptions).

143. *Detroit Free Press*, 73 F.3d at 99 (Norris, J., dissenting) ("Protected interests 'encompass the individual's control of information concerning his or her person.'" (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989))); id. ("'Congress intended to afford broad protection against the release of information about individual citizens.'" (quoting Hopkins v. U.S. Dep't of Hous. & Urban Dev., 929 F.2d 81, 86–87 (2d Cir. 1991))).

144. Id. (quoting *Reporters Comm.*, 489 U.S. at 763).

145. Id. (citing Eberhardt v. Bordenkircher, 605 F.2d 275, 280 (6th Cir. 1979)).

146. Id. at 99–100 (citing U.S. Dep't of State v. Ray, 502 U.S. 164, 179 (1991); *Reporters Comm.*, 489 U.S. at 780; Heights Cmty. Cong. v. Veterans Admin., 732 F.2d 526, 530 (6th Cir. 1984)).

147. Id. at 100 (citing *Reporters Comm.*, 489 U.S. at 780).

148. See Beall, supra note 21, at 1282–83 ("[M]ost other courts have been opposed, if not hostile, to applying a derivative-use rationale as a justification for disclosure." (citing U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 496–500 (1994))). For more on derivative use doctrine, see supra Part I.B.2.a.

release of mug shots after completed criminal proceedings, the Eastern District of Louisiana addressed such a situation in *Times Picayune* in 1999.[149] *Times Picayune*, although a district court decision located within the Fifth Circuit, has had a substantial influence on the Tenth and Eleventh Circuit decisions rejecting *Detroit Free Press* as well as on USMS's attempts to change its disclosure policy.[150] Indeed, *Times Picayune* offers intellectual rigor and insight explicating the rationale favoring nondisclosure.

The case arose when a newspaper, the *Times Picayune*, requested the mug shot of a businessman arrested in relation to federal charges arising out of a criminal investigation involving a former Louisiana governor; USMS rejected the request.[151] Unlike in *Detroit Free Press*, USMS took the arrestee's mug shot *after* he had already pled guilty to the charges and been sentenced, meaning, under USMS policy, his mug shot was unavailable even within the Sixth Circuit.[152]

On a motion for summary judgment, the court explicitly rejected *Detroit Free Press* as contrary to both *Reporters Committee* and Fifth Circuit precedent, and ruled that an arrestee has a cognizable privacy interest in his mug shot regardless of the arrestee's notoriety in the public eye.[153] According to the court, "a picture is worth a thousand words" as mug shots convey a "visual association of the person with criminal activity" that is both humiliating and stigmatizing, the effects of which "last well beyond the actual criminal proceedings."[154] The nature of mug shots, which "generally disclose unflattering facial expressions" and "include front and profile shots, a backdrop with lines showing height and . . . most humiliating of all, a sign under the accused's face with a unique [USMS] criminal identification number," separates them from ordinary

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149. Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 477–78 (E.D. La. 1999) ("There is no justification to treat a criminal defendant's guilty plea as a waiver of his or her interest in suppressing a mug shot's graphic representation of that guilt.").

150. See infra Part II.B.3–4 (analyzing Eleventh and Tenth Circuit opinions, respectively). When USMS engaged in executive nonacquiescence in 2004, it placed considerable emphasis on *Times Picayune* even though it was a district court decision. See infra notes 207–208 and accompanying text.

151. *Times Picayune*, 37 F. Supp. 2d at 474. The *Times Picayune* argued that Exemption 7(C) did not apply to mug shots taken after a suspect has pled guilty to charges, contending that USMS took them for "administrative purposes" as opposed to "law enforcement purposes"; the court rejected this creative argument. Id. at 475.

152. Id. at 478; see also 1997 Media Policy, supra note 8 (stating USMS does not release mug shots inside Sixth Circuit once proceedings conclude). *Detroit Free Press* declined to consider this issue and no requester has since tested it within the Sixth Circuit. See supra notes 135–137 and accompanying text.

153. *Times Picayune*, 37 F. Supp. 2d at 477 (citing U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762–64 (1989)). The court did not have to take the step of explicitly rejecting *Detroit Free Press* because, as it would later note, the two are distinguishable. See infra note 164 and accompanying text.

154. *Times Picayune*, 37 F. Supp. 2d at 477.

photos.[155] Like rap sheets, USMS creates mug shots "for the use of a particular group or class of persons," meaning mug shots fit the dictionary definition of records intended to be private.[156]

Similar to Justice Stevens's reasoning in *Reporters Committee*, the court noted that the mere fact that the *Times Picayune* was litigating the case indicated that the mug shot was private.[157] Perhaps implicating an even stronger privacy interest than in the rap sheet context, mug shots, unlike rap sheets, are not publicly available as separate (although hard-to-assemble) pieces because USMS keeps the photographs completely confidential unless disclosure would serve a law enforcement purpose.[158] Although USMS could not halt the publication of a mug shot if an individual were to obtain it without the agency's permission, USMS would still be under no obligation to grant a subsequent FOIA request since the privacy interest in the mug shot would still exist.[159] The court asserted that a concession of guilt does not alter this privacy interest, reasoning that, in the case of arrestees who have pled guilty, part of the motivation for the plea is to avoid continued negative exposure in the public eye; in fact, an arrestee's publicity can enhance the privacy interest at stake by subjecting the arrestee to "'renewed [privacy] intrusion.'"[160] The fact that the arrestee might be of unsavory "character" also had no bearing on the privacy interest.[161]

Attending to Exemption 7(C)'s broad "could reasonably" language, the court concluded that it was "'not required to determine with absolute certainty the effects of releasing'" a mug shot in order to find that the mug shot could reasonably implicate an arrestee's privacy right.[162] The court also rejected the *Times Picayune*'s arguments regarding common

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155. Id.

156. Id. at 477–78 (citing *Reporters Comm.*, 489 U.S. at 764). For a discussion of the use of the dictionary definition of "private" in *Reporters Committee*, see supra note 44.

157. *Times Picayune*, 37 F. Supp. 2d at 478 ("[A]s in *Reporters Committee*, the fact that The Times Picayune is litigating this case at all indicates that . . . [the] mug shot is more than just another photograph that portrays 'freely available' information."). For Justice Stevens's argument, see supra note 44 and accompanying text.

158. *Times Picayune*, 37 F. Supp. 2d at 477.

159. Id. at 478. This situation is distinct from USMS's policy of voluntarily releasing a mug shot first to the requester within the Sixth Circuit and then permissively to any subsequent requester nationally. See supra note 8 and accompanying text.

160. *Times Picayune*, 37 F. Supp. 2d at 478–79 (quoting Halloran v. Veterans Admin., 874 F.2d 315, 322 n.10 (5th Cir. 1989)). *Halloran* had upheld the nondisclosure of unredacted transcripts of recorded conversations compiled as part of an investigation into fraud. *Halloran*, 874 F.2d at 322–23.

161. *Times Picayune*, 37 F. Supp. 2d at 479. The court found the present case indistinguishable from *New York Times Co. v. NASA*, which had upheld the nondisclosure of audiotapes recording the last moments of astronauts before their death in a space shuttle crash—the fact that the astronauts were "American heroes," as opposed to criminals, did not alter the privacy analysis. Id. (citing N.Y. Times Co. v. NASA, 782 F. Supp. 628, 631 (D.D.C. 1991)).

162. Id. at 477 (quoting *Halloran*, 874 F.2d at 320).

law and constitutional notions of privacy rights as well as state practices concerning mug shots, concluding neither had any bearing upon the federal, statutorily created privacy right in FOIA's Exemption 7(C).[163] The court noted that, even if *Detroit Free Press* had been controlling precedent, because that case only concerned mug shots in *ongoing proceedings*, it would have been distinguishable.[164] Regardless, the district court rejected *Detroit Free Press* wholesale.[165]

Next, the court engaged in a balancing test, concluding that an arrestee's privacy interest categorically outweighs the nonexistent public interest in disclosure except in certain limited circumstances.[166] Under the court's interpretation of FOIA, *Reporters Committee*, *Ray*, and Fifth Circuit precedent, a request must definitively (as opposed to abstractly) reveal information about government misconduct in that specific instance.[167] The court rejected as too abstract, and consequently as outside the ambit of FOIA, arguments that disclosure would serve the public's "broad legitimate interest in all aspects of the criminal justice system."[168] Furthermore, the court noted that the extensive news coverage of this particular case had already served this public interest, leading to the inexorable conclusion that the real motivation behind the request was the sale of more newspapers—again, outside the ambit of FOIA.[169]

The result of the court's reasoning, which could discern no public interest in disclosure, is that it would appear to be nearly impossible to establish a viable public interest that could outweigh the arrestee's privacy interest in nondisclosure. A requester must wait for the perfect, egregious case for a chance to successfully establish a viable public interest; indeed, the court acknowledged that disclosure might be warranted under circumstances similar to those of the Sixth Circuit's

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163. Id. at 476 (citing U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 n.13 (1989)). The court also rejected a "public figure" argument as inapplicable to FOIA's privacy right. Id. at 478 (citing Nation Magazine, Wash. Bureau v. U.S. Customs Serv., 71 F.3d 885, 894 n.9 (D.C. Cir. 1995)) (noting public figure status reduces but does not eliminate privacy rights). In *Reporters Committee*, the Supreme Court had found state practices relevant but not dispositive. See supra note 47 and accompanying text.

164. *Times Picayune*, 37 F. Supp. 2d at 478 (citing Detroit Free Press, Inc. v. U.S. Dep't of Justice, 73 F.3d 93, 97 (6th Cir. 1996)).

165. Id.

166. Id. at 479–82.

167. Id. at 479–80 (citing U.S. Dep't of State v. Ray, 502 U.S. 164, 179 (1991); *Reporters Comm.*, 489 U.S. at 772–73; *Halloran*, 874 F.2d at 323).

168. Id. at 480. These aspects involved derivative uses of FOIA, including: assisting law enforcement by encouraging citizens to come forward with information; exposing racial bias; evidencing abuse of prisoners; revealing whether the arrestee received preferential treatment due to wealth; and exhibiting whether the arrestee took the arrest seriously. Id. For a discussion of derivative use, see supra Part I.B.2.a. The court in *World Publishing* also rejected similar arguments. See infra note 195 and accompanying text.

169. *Times Picayune*, 37 F. Supp. 2d at 480–81.

Rodney King hypothetical.[170] While the court declined to define the exact magnitude of the privacy interest inherent in mug shots, it noted that "a modest privacy interest may outweigh a nonexistent or minimal public interest," and indicated that it would be the rare case in which disclosure would be appropriate.[171] In the vast majority of cases, "'[s]omething [would] outweigh[] nothing every time.'"[172]

The *Times Picayune* did not appeal the district court's decision, letting sleeping dogs lie. Consequently, the *Times Picayune* opinion did not offer USMS substantial ammunition to change its disclosure policy within the Sixth Circuit.[173] While *Detroit Free Press* limited requests for mug shots to those in ongoing proceedings and necessitated jumping through artificial procedural hoops to obtain those mug shots, requesters had what they wanted: access to the vast majority of federal mug shots via requests in the Sixth Circuit.[174] It would be more than another decade before a court outside the Sixth Circuit would get the opportunity to consider whether an arrestee has a privacy interest in his mug shot during ongoing proceedings.

3. *Eleventh Circuit:* Karantsalis. — In 2011, the Eleventh Circuit in *Karantsalis v. U.S. Department of Justice* rejected *Detroit Free Press*, adopted the district court's opinion as its own, and held that an arrestee's privacy interest in his mug shot categorically outweighs the public interest in disclosure.[175] The case arose when Theo Karantsalis, a freelance journalist, requested the mug shot of Luis Giro, who had recently pled guilty to securities fraud after spending six years as a fugitive; USMS invoked Exemption 7(C) to deny disclosure.[176]

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170. Id. at 480 (citing Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93, 98 (6th Cir. 1996)). See supra note 135 and accompanying text for a description of the Rodney King hypothetical.

171. *Times Picayune*, 37 F. Supp. 2d at 481–82.

172. Id. at 481 (first alteration in *Times Picayune*) (quoting Nat'l Ass'n of Retired Fed. Emps. v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989)).

173. For USMS's short-lived attempt at changing its disclosure policy using *Times Picayune* as support in 2004, see infra notes 207–209 and accompanying text.

174. See supra note 8 and accompanying text (detailing USMS disclosure procedures following *Detroit Free Press*).

175. 635 F.3d 497, 499 (11th Cir. 2011) (per curiam), cert. denied, 132 S. Ct. 1141 (2012). Unlike *Times Picayune* and *World Publishing*, *Karantsalis* does not explicitly state whether its holding implemented a per se rule within the Eleventh Circuit. However, in the part of the decision the Eleventh Circuit authored itself, the court goes out of its way to state, "We take note of the opinion in *Detroit Free Press v. Department of Justice* and respectfully reject its holding." Id. (citation omitted). Given the way the Eleventh Circuit, USMS, and those in favor of disclosure have treated *Karantsalis*, it is safe to say that the general policy of the Eleventh Circuit is against disclosure—although whether the Eleventh Circuit would order disclosure in limited circumstances (as in *Times Picayune* and *World Publishing*) remains an open question.

176. Id. Unlike *Times Picayune*, *Karantsalis* involved ongoing proceedings at the time Karantsalis, the pro se petitioner, had filed his request with USMS. Id. While Giro had pled guilty, he had yet to be sentenced at the time of his trial. Id. Since Karantsalis could

In finding that a mug shot implicates an arrestee's privacy interest, the Eleventh Circuit noted that mug shots are distinct from normal photographs in that they "capture[] the subject in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties," and are "often equated with[] guilt."[177] According to the court, the fact that an arrestee has been adjudicated as guilty does not deprive this stigmatizing and embarrassing moment of its force.[178] Furthermore, under *Reporters Committee*, the court concluded that the fact that USMS does not release mug shots to the public in the first place implies that they embody an extant privacy interest.[179]

The court could not identify any viable public interest that would justify disclosure.[180] Noting that the core purpose of FOIA is to reveal government misconduct, the court did not believe a mug shot would be a sufficient proxy for evaluating whether an arrestee has benefitted from harsh or preferential treatment.[181] Echoing Justice Stevens's sentiments regarding using FOIA to sell newspapers, the court stated that curiosity, while perhaps an interest, is not an applicable one under FOIA.[182] *Karantsalis* created an ineffectual circuit split between the Sixth and Eleventh Circuits—a split in name only, with no practical effect on the

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have obtained Giro's mug shot if he had filed his request within the Sixth Circuit, why did he litigate? See id. at 501–02 (acknowledging USMS would have been required to disclose had Karantsalis filed within Sixth Circuit). One potential explanation is that Karantsalis, "an amateur litigator with hundreds of lawsuits under his belt," was simply litigious. Elfrink, supra note 87. A second explanation could be that Karantsalis made a mistake with his original request, as he filed another FOIA request for Giro's mug shot within the Sixth Circuit during the pendency of the appeal. *Karantsalis*, 635 F.3d at 501 n.1. By the time he filed his request within the Sixth Circuit, the criminal proceedings seemed to have concluded, rendering the mug shot unavailable there too. See id. at 499 (noting Giro pled guilty to securities fraud in 2009); Reply Brief of Plaintiff-Appellant Theodore Karantsalis at 7, *Karantsalis*, 635 F.3d 497 (No. 10-10229), 2010 WL 4411077, at *7 ("USMS could have, and presumably would have, released Giro's mug shot to someone requesting it from the Sixth Circuit, or even to Karantsalis had someone previously requested it from the Sixth Circuit."). A third explanation could be that, in choosing to litigate, Karantsalis thought the facts more favorable than they actually were. See *Karantsalis*, 635 F.3d at 503 (discussing petitioner's misapprehension of facts).

177. *Karantsalis*, 635 F.3d at 503. The court also referenced favorable Eleventh Circuit precedent in support of this conclusion. Id. ("'[I]ndividuals have a substantial privacy interest in their criminal histories.'" (quoting O'Kane v. U.S. Customs Serv., 169 F.3d 1308, 1310 (11th Cir. 1999))); id. ("'[M]ug shots carry a clear implication of criminal activity.'" (quoting United States v. Hines, 955 F.2d 1449, 1455 (11th Cir. 1992))).

178. See id. (dismissing suggestion that Giro's guilt renders privacy interest moot).

179. Id. (citing U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989)).

180. Id. at 504.

181. Id.

182. Id. (citing *Reporters Comm.*, 489 U.S. at 775); see supra text accompanying note 51 (noting Justice Stevens's arguments regarding purpose of FOIA).

disclosure of mug shots.[183] Less than one year later, the Tenth Circuit would side with the Eleventh.

4. *Tenth Circuit:* World Publishing. — In 2012, the Tenth Circuit in *World Publishing Co. v. U.S. Department of Justice* became the latest court to expressly reject *Detroit Free Press*, finding, as in *Times Picayune* and *Karantsalis*, that an arrestee has a privacy interest in his mug shot, which trumps the corresponding negligible public interest in disclosure.[184] World Publishing issued FOIA requests originating within the Tenth Circuit for the mug shots of six pretrial detainees; USMS rejected the requests, citing Exemption 7(C).[185] In affirming the district court's decision to grant USMS's motion for summary judgment, the Tenth Circuit found that an arrestee has "some privacy interest" in his mug shot, although it declined to define the contours of this interest.[186] To support its finding, the court quoted wide swaths of *Times Picayune*, *Karantsalis*, and *Reporters Committee*, focusing especially on the stigmatizing aspects of mug shots.[187]

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183. See infra note 197 and accompanying text (discussing practical effects of circuit split on mug shot disclosure).

184. 672 F.3d 825, 831 (10th Cir. 2012). The *Tulsa World* newspaper, a subsidiary of the World Publishing Company, was the actual entity that made the FOIA request. Id. at 826. For the sake of simplicity, World Publishing is referred to as the requester instead.

185. Id. at 826. It was undisputed that the photos were compiled for law enforcement purposes. Id. at 828–29. It was also undisputed that, had the request originated within the Sixth Circuit, USMS would have been obligated to release the requested mug shots. Id. at 829. Why World Publishing chose to litigate is puzzling, especially since it successfully acquired the mug shots during the pendency of its appeal. Appellant's Reply Brief: Oral Argument Requested at 8 n.3, *World Publ'g*, 672 F.3d 825 (No. 11-5063), 2011 WL 4732175, at *8 n.3. World Publishing acquired the mug shots in dispute under the Oklahoma Open Records Act—state law applied because government contractors had processed the prisoners and taken the mug shots on behalf of USMS. Id. There is a strong possibility that World Publishing misunderstood the applicable law, which could lead to the inference that the company (or at least its legal counsel) did not realize that requests could easily go through the Sixth Circuit. World Publishing argued that DOJ maintained discretion within the Sixth Circuit as to whether to release mug shots, incredulously stating, if USMS were to follow *Detroit Free Press* to its logical conclusion, then "DOJ's rule would be easily circumvented by requesting all Mug Shots from within the Sixth Circuit. DOJ's Sixth Circuit rule and explanation for release of Madoff and Nacchio Mug Shots defy logic." Id. at 15. Of course, DOJ has acknowledged this inconsistency and the resulting issue of forum shopping. Brief of Appellees, *World Publ'g*, supra note 34, at 30 n.6. As DOJ rebutted, "[W]ith regard to *Detroit Free Press*, plaintiff inexplicably takes the government to task for following the mandate of that judgment and releasing mug shots where the request comes from within the Sixth Circuit." Id. at 29.

186. *World Publ'g*, 672 F.3d at 827–31.

187. E.g., id. at 827 ("The Court rejected the argument that because the events summarized in rap sheets had been previously disclosed to the public, there was a diminished privacy interest in the rap sheet." (citing *Reporters Comm.*, 489 U.S. at 762–63)); id. at 828–29 ("'A booking photograph is a vivid symbol of criminal accusation, which, when released to the public, intimates, and is often equated with, guilt.'" (quoting *Karantsalis*, 635 F.3d at 503)); id. at 828 ("'[A]s in the cliché, a picture is worth a thousand words. For that reason, a mug shot's stigmatizing effect can last well beyond the actual

The court rejected arguments that mug shots were distinguishable from rap sheets or that arrestees somehow lost their privacy interests in them because they were commonly available at the state level or even at the federal level as a result of USMS's disclosure policies following *Detroit Free Press,* stating, "We are not persuaded by the practice of other jurisdictions."[188] The court found unconvincing further efforts to distinguish statutorily protected rap sheets from mug shots, which are protected only by agency policy; although the court "acknowledge[d] . . . subtle differences" between the two records, it fixated on the "comparison between the sensitive nature of the subject matter in a rap sheet, and the vivid and personal portrayal of a person's likeness in a booking photograph."[189] The court also found that the "'explosion of camera phones,'" meaning that an arrestee could have his photo taken at any time, actually cut against World Publishing's position since the company should be able to obtain other suitable photographs.[190] Indeed, the Tenth Circuit had the previous year rejected the "'public domain doctrine'"—the notion that revealing a record somehow gutted its inherent privacy interest.[191]

Having found that an arrestee has some privacy interest in his mug shot, the court could detect little countervailing public interest in disclosure, again leaning heavily upon *Reporters Committee*, *Karantsalis*, and *Times Picayune* to support its finding.[192] The court rejected as outside the purpose of FOIA arguments that disclosure would aid in determining the arrest of the correct detainee, helping witnesses come forward to assist law enforcement in solving crimes, or revealing whether arrestees took the charges seriously.[193] While these interests might assist law enforce-

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criminal proceedings. . . . A mug shot preserves, in its unique and visually powerful way, the subject individual's brush with the law *for posterity*.'" (emphasis added by *World Publ'g*) (quoting Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 477 (E.D. La. 1999))).

188. Id. at 829.

189. Id.

190. Id. at 830 (citation omitted).

191. Id. at 827 (citing Prison Legal News v. Exec. Office for U.S. Attorneys, 628 F.3d 1243, 1252–53 (10th Cir. 2011)). In *Prison Legal News*, the Tenth Circuit upheld the nondisclosure of autopsy photos and a video taken in the aftermath of a murder notwithstanding the fact that the items were displayed during an open jury trial and to a public audience. 628 F.3d at 1252–53.

192. E.g., *World Publ'g*, 672 F.3d at 830 ("Disclosing a defendant's rap sheet 'would provide details to include in a news story, but, in itself, this is not the type of public interest for which Congress enacted the FOIA.'" (quoting *Reporters Comm.*, 489 U.S. at 774) (misquotation)); id. ("[P]ublic curiosity about the facial expression of a detainee was not a significant public interest outweighing a detainee's personal privacy interest in a booking photo." (citing *Karantsalis*, 635 F.3d at 504)); id. ("'[A] court must measure the public interest of disclosure solely in terms of [the objective of the FOIA], rather than on the particular purpose for which the document is being requested.'" (second alteration in *World Publ'g*) (quoting *Times Picayune*, 37 F. Supp. 2d at 479)).

193. Id. at 831–32.

ment in performing its duties, the court argued that they would not aid in revealing government misconduct.[194] The court acknowledged that disclosure of mug shots, in line with FOIA's purpose, might reveal abuse of a detainee, evidence racial profiling, disclose the outward appearance of a detainee (including whether he was impaired at the time of arrest), and provide a comparison of a detainee at the time of arrest and time of trial; however, the court doubted that disclosure would be helpful in the vast majority of circumstances, rejecting a derivative use of FOIA in the process.[195] Applying *SafeCard*, the court held open the possibility that in some narrow, undefined circumstances, compelling evidence might justify an exception to the categorical approach in which a court could order disclosure.[196]

C. *Problems Resolving the Dispute: Executive Nonacquiescence and a Showdown on the Horizon*

Up to this point, the circuit split has been entirely cosmetic in effect. Ex ante, requesters could obtain mug shots by filing their requests within the Sixth Circuit; ex post, *Karantsalis* and *World Publishing* have done nothing to alter this paradigm.[197] The real legacy of the legally impotent *Karantsalis* and *World Publishing* has been to create a climate in which USMS will almost certainly try to provoke another dispute within the Sixth Circuit to induce the circuit to reconsider en banc the issues in *Detroit Free Press*.[198] This provocation could result in executive nonacquiescence—"[t]he selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals."[199] Executive nonacquiescence is rare and controversial, raising a host of constitutional issues and policy concerns regarding institutional competence, as well as the role of the executive in relation to the judiciary, that are generally outside the scope of this Note, especially

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194. Id. *Detroit Free Press*, although it did not reach the issue, seemed to indicate that these might constitute viable public interests. See supra notes 131–135 and accompanying text.

195. *World Publ'g*, 672 F.3d at 831–32 (citing U.S. Dep't of State v. Ray, 502 U.S. 164, 179 (1991)). For a discussion of derivative use, see supra Part I.B.2.a.

196. *World Publ'g*, 672 F.3d at 831 n.1.

197. See Petition for Writ of Certiorari at 14, Karantsalis v. Dep't of Justice, 132 S. Ct. 1141 (2011) (No. 11-342), 2011 WL 4352283, at *14 ("The practical effect of the split here is that records readily attainable to citizens and others living in the Sixth Circuit are not obtainable to citizens living in the Eleventh Circuit unless they are assisted by persons from the Sixth Circuit.").

198. This situation could be created if DOJ can convince the Sixth Circuit that the issue is important enough to warrant reconsideration, or in order to maintain uniformity among circuit courts. See Fed. R. App. P. 35(a) (providing rehearing en banc appropiate when circuit split on issue exists); Fed. R. App. P. 35(b)(1)(B) (providing rehearing en banc appropriate for issues of exceptional importance).

199. Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679, 681 (1989).

given that the legal dispute has yet to truly manifest.[200] That said, where a court has interpreted a national statute like FOIA to preclude agency action, executive nonacquiescence is basically unprecedented.[201]

The reason executive nonacquiescence by USMS appears inevitable is as follows: In its brief opposing the petition for certiorari to review the Eleventh Circuit's holding in *Karantsalis*, DOJ announced that "[i]n light of the recently developed division of authority and the associated potential for rehearing en banc in the Sixth Circuit, [USMS] will be able to reconsider its prior practice of granting mug-shot FOIA requests in the Sixth Circuit to facilitate further review by that court."[202] From a litigant's perspective, this course of action presents the safest legal path for USMS: If the Sixth Circuit were to deny a rehearing en banc or reaffirm its holding in *Detroit Free Press*, the agency could take another crack at overturning the decision by petitioning the Supreme Court itself without first risking a final adverse Supreme Court decision. However, as USMS had previously acknowledged in its appellate brief in *World Publishing*, "[u]ntil *Detroit Free Press* is overturned by the en banc Court of the Sixth Circuit or the Supreme Court, the Marshals Service cannot ignore the mandate of the Sixth Circuit with regard to requests for the release of mug shots within that jurisdiction."[203] Since the Supreme Court, as USMS requested, has denied Karantsalis's petition for a writ of certiorari, and since World Publishing never filed a petition, the Supreme Court will not

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200. For more, see, for example, Dan T. Coenen, The Constitutional Case Against Intracircuit Nonacquiescence, 75 Minn. L. Rev. 1339, 1346, 1357–59 (1991) (identifying constitutional problems with nonacquiescence); Frank B. Cross, Shattering the Fragile Case for Judicial Review of Rulemaking, 85 Va. L. Rev. 1243, 1253 (1999) (highlighting concerns over executive nonacquiesence, intracircuit nonacquiesence, and rule of law); Nancy M. Modesitt, The Hundred-Years War: The Ongoing Battle Between Courts and Agencies over the Right to Interpret Federal Law, 74 Mo. L. Rev. 949, 952 (2009) (arguing agency nonacquiescence should only occur with substantial justification).

201. See Coenen, supra note 200, at 1350 n.34 (observing federal agencies tend to honor national statutes as opposed to organic statutes where they presumptively have institutional expertise); Estreicher & Revesz, supra note 199, at 753–58 (discussing weak foundation justifying agency nonacquiescence regarding national statutes like FOIA).

202. Brief for the Respondents in Opposition at 14–15 & n.5, *Karantsalis*, 132 S. Ct. 1141 (No. 11-342) ("[E]n banc rehearing is warranted to resolve a conflict with another court of appeals." (citing Fed. R. App. P. 35(b)(1)(B))); see also 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. (Jan. 4, 2012) [hereinafter 2012 Dalglish Ltr.] (on file with the *Columbia Law Review*) (requesting clarification of USMS policy in aftermath of *Karantsalis*).

203. Brief of Appellees, *World Publ'g*, supra note 34, at 34; see Indus. TurnAround Corp. v. NLRB, 115 F.3d 248, 254 (4th Cir. 1997) (requiring agencies to abide by laws of circuits unless overturned by Supreme Court or appropriate circuit); Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decision of another panel . . . unless an inconsistent decision of . . . [the] Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.").

be considering this issue in the foreseeable future.[204] Absent legislative intervention, this leaves an en banc reconsideration of the issues in *Detroit Free Press* as the only means by which *Detroit Free Press* can be overturned; due to constitutional standing issues, USMS would have to deny disclosure within the Sixth Circuit to create the opportunity for a rehearing.[205] USMS is caught in a catch-22: If it, a federal agency, wants to change its policy regarding mug shots, it will have to preemptively conclude that *Detroit Free Press* is wrongly decided—which USMS, as noted above, has expressly conceded it cannot do—leading to a showdown with the Sixth Circuit.[206]

Yet, USMS has already engaged in executive nonacquiescence on the mug shot issue: In 2004, in the aftermath of *Favish*, USMS sought to force the issue unilaterally and ceased releasing mug shots within the Sixth Circuit's jurisdiction.[207] USMS reasoned, "[I]n light of the *Favish* decision, atop the overwhelming weight of case law broadly interpreting Exemption 7(C)'s privacy protection, *Detroit Free Press* should no longer be regarded as authoritative even within the Sixth Circuit."[208] The policy did not last long. In 2005, pending litigation in two district courts in the Sixth Circuit, USMS recognized—apparently "after preliminary talks before the judge" in *Beacon Journal Publishing v. Gonzalez*—that it was

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204. *Karantsalis*, 132 S. Ct. at 1141–42 (denying certiorari); see Sup. Ct. R. 13 (setting time for appellant to file petition for writ of certiorari at ninety days from entry of judgment). It is true that USMS could get lucky if, for instance, a litigant were to try to expand some aspect of *Detroit Free Press*; however, this seems highly improbable.

205. A full explication of the reasons is outside the scope of this Note, but courts cannot hear disputes without properly constituted "Cases" or "Controversies." U.S. Const. art. III, § 2; see Richard H. Fallon Jr. et al., Hart and Wechsler's the Federal Courts and the Federal System 44 (6th ed. 2009) (discussing rarity of en banc rehearing); see also Fed. R. App. P. 40 (setting time to file petition for rehearing en banc at forty-five days from entry of judgment in case where United States agency is party to controversy). Since requesters have little incentive to challenge the Sixth Circuit ruling under the current paradigm, USMS would probably need to manufacture the controversy for a court to hear another mug shot disclosure case.

206. See 2012 Dalglish Ltr., supra note 202, at 2 ("[T]he government believes it can flout established law and unilaterally deny FOIA requests for mug shots that originate within the Sixth Circuit to . . . incite a new legal dispute. . . . [W]e find such an unprovoked and antagonistic escalation an illegal repudiation of judicial authority.").

207. See Rebecca Daugherty, Marshal, Take Your Toothbrush to Court, News Media & L., Fall 2004, at 13 (discussing 2004 USMS decision to withhold publication of mug shots in Sixth Circuit following DOJ directive).

208. Freedom of Information Act Guide, May 2004: Exemption 7(C), U.S. Dep't of Justice, http://www.justice.gov/oip/exemption7c.htm (on file with the *Columbia Law Review*) (last visited Oct. 11, 2013) ("[*Times Picayune*] has logically distinguished 'mug shots' from standard photographs, noting that a 'mug shot' carries with it a unique 'stigmatizing effect,' even for a defendant who already has been convicted and sentenced.").

bound by *Detroit Free Press*, and resumed releasing mug shots within the Sixth Circuit.[209]

The conflict between USMS and the Sixth Circuit may be coming to a head: In December 2012, citing *Karantsalis* and *World Publishing* as authority, USMS released a new policy memo that purports to apply a national "uniform policy" of mug shot nondisclosure in the Sixth Circuit despite *Detroit Free Press*; paradoxically, the memo also states USMS will continue releasing mug shots "consistent with existing Sixth Circuit precedent."[210] The Reporters Committee for Freedom of the Press has asked both the United States Attorney General and the Senate Committee on the Judiciary to explain USMS's current policy and, if the USMS is defying the ruling in *Detroit Free Press*, for the Attorney General or the Senate Committee on the Judiciary to force the agency to reverse course.[211] The effect of the memo is thus currently unclear—it may represent the latest attempt by USMS to enact its preferred policy of nondisclosure within the Sixth Circuit, although perhaps selectively.[212] Indeed,

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209. Federal Mug Shots Available Once Again in Sixth Circuit, Reporters Comm. for Freedom of the Press (Aug. 17, 2005), http://www.rcfp.org/browse-media-law-resources/news/federal-mug-shots-available-once-again-sixth-circuit (on file with the *Columbia Law Review*); see Beacon Journal Publ'g Co. v. Gonzalez [sic], No. 5:05CV1396, slip op. at 2 (N.D. Ohio Nov. 16, 2005) (indicating USMS realized it was bound by *Detroit Free Press*). Because petitioners sought attorney's fees in each case, both district courts found that DOJ had committed FOIA violations, and awarded those fees. *Beacon Journal*, No. 5:05CV1396, slip op. at 2; Detroit Free Press, Inc. v. U.S. Dep't of Justice, No. 05-71601, slip op. at 1 (E.D. Mich. Oct. 7, 2005).

210. Memorandum from Gerald M. Auerbach, Gen. Counsel, U.S. Marshal Servs., to all United States Marshals, Chief Deputy United States Marshals, Associate Directors, and Assistant Directors 2–3 (Dec. 12, 2012), available at http://www.usmarshals.gov/foia/policy/booking_photos.pdf (on file with the *Columbia Law Review*); see 2013 Brown Ltr. to Holder, supra note 89, at 6 (highlighting inconsistent nature of USMS position). USMS's 2009 attempt to block the disclosure of Loughner's mug shot does not count as executive noncompliance since it asked a peer circuit for a legal ruling that would frustrate the effect of *Detroit Free Press* as opposed to deciding the issue itself. See supra notes 9–11 and accompanying text.

211. See 2013 Brown Ltr. to Holder, supra note 89, at 2–4 (demanding Attorney General Eric Holder force USMS compliance with *Detroit Free Press*); Letter from Bruce D. Brown, Exec. Dir., Reporters Comm. for Freedom of the Press, to Patrick J. Leahy & Charles Grassley, Senators (Mar. 1, 2013) (on file with the *Columbia Law Review*) (requesting Senate oversight over USMS). As of writing, neither body has responded substantively to the letters. Telephone Interview with Herschel Fink, Legal Counsel, Reporters Comm. for Freedom of the Press (Sept. 19, 2013).

212. See Telephone Interview with Ed Bordley, Assoc. Gen. Counsel, Dep't of Justice (Jan. 14, 2013) (stating USMS's official policy regarding disclosure "is whatever is in the policy notice"); see also 2013 Brown Ltr. to Holder, supra note 89, at 1, 5–6 (complaining USMS has ignored policy clarification inquiries). USMS has rejected at least two requests for disclosure originating within the Sixth Circuit since publication of the memo. 2013 Brown Ltr. to Holder, supra note 89, at 4–5. In its rejection letters, however, as the reason for the nondisclosure, USMS informed requesters that they had not listed an applicable FOIA public interest under *Reporters Committee*. Id. Since USMS has stated it will continue to release mug shots consistent with Sixth Circuit precedent, it may be that requesters must merely reference *Detroit Free Press* and a public interest in boilerplate-style language to

in response to a recent request denial within the Sixth Circuit for the mug shots of arrestees whose proceedings were still ongoing at the time of the request, the *Detroit Free Press* filed a complaint against USMS in the Eastern District of Michigan demanding the release of the photos in accordance with *Detroit Free Press*.[213] As of writing, whether USMS will back down, as it did in 2004 (the USMS ignored the *Detroit Free Press*'s request for appeal of its initial denial decision,[214] and its answer to the *Detroit Free Press*'s complaint consists largely of perfunctory denials[215]), or is actually (in line with its pugnacious posture) prepared for a lengthy court battle, remains to be seen.[216] If the latter is true and USMS has stopped releasing mug shots in a direct rebuke to *Detroit Free Press*, litigation that will one day reach the Sixth Circuit appears inevitable.[217]

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induce USMS to comply with the request. Otherwise, it appears USMS has taken the odd position of expressly complying with Sixth Circuit precedent while implicitly excluding *Detroit Free Press*.

213. Complaint at 2–8, Detroit Free Press v. U.S. Dep't of Justice, No. 2:13-cv-12939-PJD-MJH (E.D. Mich. filed July 5, 2013). Notwithstanding the legal merits of its claims, the *Detroit Free Press* has selected a propitious case to challenge the nondisclosure: The newspaper's request is for the mug shot of a former Detroit mayor (a *public* figure), whose prosecution revolves around corruption charges (a *public* crime). Id. at 2–3.

214. Id. at 5–6. In addition, the *Detroit Free Press* gave USMS two extra months to reverse course before filing legal action. Id.

215. See Answer, *Detroit Free Press*, No. 2:13-cv-12939-PJD-MJH (filed Sept. 9, 2013). For instance, in response to the *Detroit Free Press*'s claim "that this is not the DOJ's first attempt to unilaterally end-run, or openly defy, *Free Press I*," Complaint, supra note 213, at 6, DOJ answered succinctly, "Denied," Answer, supra, at 3.

216. Counsel for the *Detroit Free Press* is contemplating whether to ask the Eastern District of Michigan to hold USMS in contempt for refusing disclosure. Telephone Interview with Herschel Fink, supra note 211; see also 5 U.S.C. § 552(a)(4)(G) (2012) ("In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.").

217. In addition to the *Detroit Free Press*, USMS will have no shortage of willing litigants. See 2013 Brown Ltr. to Holder, supra note 89, at 2 (demanding on behalf of thirty-eight media outlets Attorney General order revocation of new policy notice in line with *Detroit Free Press*).

USMS's intractability on the mug shot issue seems to reflect DOJ's general though unspoken approach toward law enforcement document disclosure, which has been to (usually successfully) resist disclosure where possible. See 2009 FOIA Guide, supra note 27, at 561–601 (providing instances where DOJ has successfully invoked Exemption 7(C) to resist disclosure); Josh Gerstein, Detroit Newspaper Sues for Ex-Mayor's Mugshot, Politico: Under the Radar (July 10, 2013, 9:05 AM), http://www.politico.com/blogs/under-the-radar/2013/07/detroit-newspaper-sues-for-exmayors-mugshot-167948.html (on file with the *Columbia Law Review*) ("While President Barack Obama vowed to run the most transparent administration in history, last year the Marshals Service reversed a longstanding policy that made federal mugshots available directly in four states and indirectly in virtually any case nationwide."); supra Part I.B (highlighting scope of Exemption 7(C)). The mug shot issue appears to be the rare blemish in an otherwise basically flawless record of USMS invoking Exemption 7(C), especially at the circuit court level. See generally 2009 FOIA Guide, supra note 27, at 561–601. Regardless of the

III. A LEGISLATIVE SOLUTION TO RECOGNIZE PRIVACY RIGHTS IN MUG SHOTS

The circuit split between the Sixth Circuit on the one side and the Tenth and Eleventh Circuits on the other presents an extraordinary situation because, unlike the usual split involving different applications of law in different jurisdictions, the Sixth Circuit's decision in effect determines USMS's national policy. The ability to forum shop under FOIA has completely frustrated the authority of the Tenth and Eleventh Circuits; indeed, so long as *Detroit Free Press* remains good law, the decision essentially controls national policy even if every other circuit rules against disclosure.[218] As a result, an appellate court of equivalent authority to the Sixth Circuit has no way of protecting citizens within its jurisdiction from forum shoppers seeking mug shots so long as those requests originate within the Sixth Circuit. As a practical matter, the Sixth Circuit has issued a national decision with force similar to a Supreme Court ruling. This situation is untenable, and must be resolved.

This Note argues that this dispute should be resolved in favor of the Tenth and Eleventh Circuits: In the case of mug shot requests, courts should uphold agency invocations of Exemption 7(C) in favor of nondisclosure. Part III.A argues that the 1986 amendment to FOIA's Exemption 7(C) as well as subsequent Supreme Court jurisprudence interpreting the Exemption mandate this conclusion as a legal matter. Part III.B contends that policy concerns regarding the use of mug shots also militate in favor of nondisclosure of mug shots. Finally, Part III.C acknowledges the current legal complications of resolving this dispute within the judiciary due to executive nonacquiescence, and suggests a legislative solution that would address the mug shot issue at both the state and federal levels.

A. *FOIA Jurisprudence Weighs in Favor of Nondisclosure*

The 1986 amendment to Exemption 7(C) and the weight of subsequent case law interpreting that amendment demand a resolution in favor of the Tenth and Eleventh Circuits. The 1986 amendment broadened Exemption 7(C)'s reach, changing the relevant language from "would constitute an unwarranted invasion" to "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[219] Subsequent Supreme Court jurisprudence—in particular *Reporters Committee*, *Ray*, *FLRA*, and *Favish*—extended the scope of this Exemption

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reasons, that USMS has been fighting the mug shot issue for two decades evidences its importance to the agency.

218. See supra note 197 and accompanying text (noting *Karantsalis* and *World Publishing* have not impacted *Detroit Free Press*).

219. See supra notes 30, 35 and accompanying text (analyzing Exemption 7(C)'s expansion following 1986 amendment).

such that some commentators now refer to FOIA as a "nondisclosure statute."[220]

Detroit Free Press found that an arrestee has no privacy interest in his mug shot so long as the request "concerns ongoing criminal proceedings in which the names of the indicted suspects have already been made public and in which the arrestees have already made court appearances."[221] In doing so, the Sixth Circuit relied on the notion that sheer embarrassment was not a protectable privacy interest because the names and visages of the arrestees had already been released in other contexts; moreover, it indicated that Supreme Court jurisprudence—including *Ray*, *FLRA*, and *Reporters Committee*—supported this conclusion.[222] This interpretation twisted the holdings of these decidedly antidisclosure cases.[223] For example, crucial to the analysis in *Ray* was that the witness summaries in and of themselves were not fundamentally embarrassing.[224] Mug shots are different because, like rap sheets, they are inherent sources of embarrassment.[225] The fact that arrestees have become publicly identifiable does not affect this embarrassment—under *Reporters Committee* and *FLRA*, neither the availability of verisimilitudes to mug shots nor an arrestee's status as a public figure diminishes the humiliating aspects of the mug shot.[226] If there were any doubt to this latter position in 1996, *Favish* settled it in 2004.[227] Furthermore, as *Times*

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220. See, e.g., Halstuk & Chamberlin, supra note 30, at 563–64 (contending Supreme Court expansion of privacy rights heavily favors nondisclosure); Beall, supra note 21, at 1279–80 (arguing core purpose doctrine changed FOIA into nondisclosure statute).

221. Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93, 95 (6th Cir. 1996).

222. See supra notes 120–130 and accompanying text (discussing *Detroit Free Press*'s analysis of controlling Supreme Court precedent).

223. For a complete discussion of these cases, see supra Part I.B.1, I.B.2.a.

224. U.S. Dep't of State v. Ray, 502 U.S. 164, 176–77 (1991).

225. See, e.g., Segal, supra note 93 ("It was only a matter of time before the Internet started to monetize humiliation."); Cord Jefferson, How People Profit from Your Online Mug Shot and Ruin Your Life Forever, Gizmodo (Oct. 8, 2012, 12:00 PM), http://gizmodo.com/5949333/how-people-profit-from-your-online-mug-shot-and-ruin-your-life-forever (on file with the *Columbia Law Review*) (detailing humiliation individuals experience as result of mug shot dissemination on websites).

226. See supra notes 43, 71 and accompanying text (discussing *Reporters Committee* and *FLRA*); see also World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 830 (10th Cir. 2012) (discounting camera phones as diminishing privacy interest); Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497, 503 (11th Cir. 2011) (per curiam) (concluding guilty plea does not surrender privacy interest), cert. denied, 132 S. Ct. 1141 (2012); *Detroit Free Press*, 73 F.3d at 99 (Norris, J., dissenting) (noting publicity does not reduce privacy interest under *Reporters Committee*); Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 478–79 (E.D. La. 1999) (contending publicity may enhance privacy interest).

227. 541 U.S. 157, 171 (2004) ("Neither the deceased's former status as a public official, nor the fact that other pictures had been made public, detracts from the weighty privacy interests involved.").

Picayune, *World Publishing*, *Karantsalis*, and the dissent in *Detroit Free Press* properly recognized, mug shots serve as badges of criminality.[228]

Under *Reporters Committee*, the fact that USMS intends that mug shots be private makes them so.[229] In the Sixth Circuit's defense, mug shots do not enjoy the same degree of protection, via statute or state practices, as rap sheets.[230] Indeed, the degree of the privacy interest at stake may be an open question.[231] Nevertheless, under Exemption 7(C), it is difficult to argue that a privacy interest does not exist at all, as one can reasonably suspect that the release of a mug shot *could* violate a privacy interest. The actual experiences of arrestees, some of whom have paid unpublishing vendors thousands of dollars in an effort to erase their mug shots' presence from the Internet, bear out this point.[232]

Given the moribund state of the derivative use doctrine, a categorical mug shot nondisclosure rule with limited exceptions where compelling evidence warrants disclosure presents the best policy for weighing the public interest served by the release of mug shots.[233] Even if the derivative use doctrine were viable, the release of mug shots would not outweigh an arrestee's compelling privacy interest in his mug shot. According to the core purpose doctrine, the only viable public interest under FOIA is shedding light on government misconduct.[234] In the context of mug shots, this means uncovering the mistreatment of arrestees.[235] Mug shots are simply not a good proxy for discovering this mistreatment: Many mug shots evidence injuries from the incident that

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228. *World Publ'g*, 672 F.3d at 827–28; *Karantsalis*, 635 F.3d at 503; *Detroit Free Press*, 73 F.3d at 99 (Norris, J., dissenting); *Times Picayune*, 37 F. Supp. 2d at 477; see also supra Part II.B (discussing these cases at length).

229. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 752–53 (1989) (noting fact that FBI kept rap sheets private made rap sheets private). It is true that this is a tautology. That said, nothing about the quality of the Supreme Court's reasoning alters its binding effect on all inferior courts.

230. For a description of FBI policies regarding rap sheets, see supra note 39 and accompanying text. USMS controls disclosure of mug shots via internal practice. See generally 1997 Media Policy, supra note 8. States, dissimilarly from their more conservative policies with regard to rap sheets, tend to permit liberal disclosure of mug shots—mug shots can be seen on the web and in almost any newspaper. See supra Part I.C (discussing journalist and commercial requests for mug shots).

231. Courts finding a privacy interest in a mug shot have declined to define its contours. See supra Part II.B.2–4 (noting courts did not have to define extent of privacy interests due to nonexistent public interest in disclosure).

232. See, e.g., Kravets, supra note 94 (describing financial lengths individuals go to remove mug shots); Segal, supra note 93 (same).

233. See supra Part I.B.2.a–b (discussing status of derivative use doctrine and compelling evidence test).

234. See supra note 50 and accompanying text (discussing *Reporters Committee* analysis of core purpose doctrine).

235. Courts upholding USMS nondisclosure have accordingly rejected other public interests as outside this ambit. See supra notes 146, 168, 181–182, 193–195 and accompanying text (examining four judicial opinions discussing what qualifies as public interest).

led to the arrest or from regular law enforcement conduct that are also consistent with arrestee mistreatment.[236] In the extreme case where a court could draw the inference that the government abused the arrestee, as in the Sixth Circuit's Rodney King hypothetical,[237] compelling evidence would justify release.[238] Moreover, mug shots do not vanish if they are not subject to third-party FOIA disclosure. An arrestee can disclaim the privacy interest under FOIA.[239] An arrestee alleging a tort claim of government misconduct can enter a mug shot into evidence at a public trial.[240] Under the correct legal interpretation of FOIA, USMS would disseminate mug shots only where dissemination would have a high chance of exposing government misconduct.

B. *Public Policy Concerns Weigh in Favor of Nondisclosure*

Public policy concerns regarding the use of disclosed mug shots also militate in favor of resolving the dispute in favor of USMS. As *Karantsalis*, *World Publishing*, and *Times Picayune* recognized, the true motive behind FOIA requests for mug shots in those cases probably had more to do with the sale of newspapers than with altruism.[241] Even if selling newspapers or basic curiosity were viable interests under FOIA, they would not be very

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236. See, e.g., Olivia Barker, Six Weeks Post-Fight, Gabriel Aubry Is Gorgeous Again, USA Today (Jan. 4, 2013, 5:12 PM), http://www.usatoday.com/story/life/people/2013/01/04/six-weeks-post-fight-gabriel-aubry-is-a-pretty-boy-again/1810105 (on file with the *Columbia Law Review*) (depicting arrestee's heavily bruised face in mug shot after fight and arrest where case involved no allegation of police mistreatment).

237. See supra note 135 and accompanying text (discussing Sixth Circuit Rodney King hypothetical).

238. For a more general discussion of the compelling evidence test, see supra Part I.B.2.b.

239. See supra note 32 and accompanying text (discussing waiver of privacy interest).

240. While the government may have trouble entering a mug shot into evidence at a criminal trial, those same problems are unlikely to be present when the victim attempts the same in a civil hearing. See Fed. R. Evid. 803(8)(C) (permitting introduction of government records into evidence); see also Marc T. Treadwell, Evidence, 44 Mercer L. Rev. 1209, 1216–17 (1993) (detailing ways in which government introduction of mug shots can run afoul of Federal Rule of Evidence 404(b) controlling undue prejudice).

241. See World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 830 (10th Cir. 2012) ("'[I]n the typical case in which one private citizen is seeking information about another[,] the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records.'" (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989))); Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497, 504 (11th Cir. 2011) (per curiam) ("[T]he public obtains no discernible interest from viewing the booking photographs, except perhaps the negligible value of satisfying voyeuristic curiosities."), cert. denied, 132 S. Ct. 1141 (2012); Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 481 (E.D. La. 1999) ("Putting aside the fact that the Times Picayune is the requesting party, and that printing the mug shot would invariably help sell newspapers, the Court still cannot discern how disclosure of [the mug shot] would serve the purpose of informing the public about the activities of their government."); supra note 87 and accompanying text (discussing journalist demand for mug shots).

compelling ones when compared to the individual's privacy interest, especially where other sources of information, ranging from photos taken at public hearings to those taken on camera phones, can stand in place of mug shots disclosed under FOIA.[242]

There are several compelling but ultimately unpersuasive counter-arguments to this position: First, prodisclosure advocates advance the ideal of open government as a reason for subjecting as much of the government as possible to public scrutiny.[243] Nevertheless, Congress did not enact FOIA as a "disclose everything" statute—Exemption 7(C) acknowledges that law enforcement files in the government's possession, like mug shots, can be humiliating to the individual without advancing the public interest.[244] Second, prodisclosure advocates claim an unadulterated right of a free press under the First Amendment to access government records like mug shots.[245] Arguably, FOIA nondisclosure decisions do not infringe upon the right of a free press because once a mug shot reaches private hands, the judiciary cannot stop the wider dissemination of that mug shot.[246] Third, prodisclosure advocates contend mug shots can shame citizens in order to help them better themselves.[247] This argument not only ignores the basic question of whether shame even has a positive effect on arrestees but also discounts other aspects of arrests that serve strong shaming effects, including public hearings and

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242. See *World Publ'g*, 672 F.3d at 830 (noting pictures taken on camera phones can reveal visage).

243. E.g., Charles J. Wichmann III, Note, Ridding FOIA of Those "Unanticipated Consequences": Repaving a Necessary Road to Freedom, 47 Duke L.J. 1213, 1251–55 (1998) (arguing financial costs of FOIA justified as serving open government ideal); Segal, supra note 93 ("Journalists put booking photographs in the same category as records of house sales, school safety records and restaurant health inspections—public information that they would like complete latitude to publish, even if the motives of some publishers appear loathsome.").

244. See supra notes 28–31 and accompanying text (discussing nature of FOIA exemptions). Admittedly, arguments at this level of generality can be difficult to refute. In the final analysis, the balance of privacy and openness rests on unempirical value choices.

245. The First Amendment's relationship to FOIA is debatable and outside the scope of this Note. Compare Heather Harrison, Note, Protecting Personal Information from Unauthorized Government Disclosures, 22 Memphis St. U. L. Rev. 775, 777–78 (1992) (arguing public's right to know must be balanced with individual's right to privacy), with Meredith Fuchs, Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy, 58 Admin. L. Rev. 131, 135 (2006) (contending government nondisclosure can frustrate First Amendment's free speech mandate).

246. See supra note 99 and accompanying text (indicating Court has no mechanism to halt production of information already in public sphere).

247. Many newspapers host "Halls of Shame" displaying mug shot photos—that these expositions are not designed purely for popular consumption is debatable. E.g., Daily Mail Reporter, The Sunshine State's Hall of Shame: Police Mugshots Capture Rogue's Gallery of Florida's Mad, Bad and Ugly, Mail Online (Mar. 16, 2012, 5:47 PM), http://www.dailymail.co.uk/news/article-2116079/The-mad-bad-ugly-Mugshot-hall-shame-reveals-criminals-work-look.html (on file with the *Columbia Law Review*).

potential criminal penalties.[248] Moreover, there is no reason to shame an arrestee who has been found innocent by a jury of his peers. Fourth, requesters rely on the notion that faces produce visceral reactions that can spark debates that (presumably) improve society—the case of Jared Loughner may be an example of such a debate.[249] Whether viewing Loughner's photograph positively contributed to the public discourse is an unanswerable question.[250] Regardless, Loughner's mug shot represents the atypical case. In the vast majority of cases, the mug shot is a device used to give color to the story, an afterthought to the reader and a source of enduring embarrassment to the depicted.

Commercial mug shot websites make many of these arguments to defend their own practices.[251] Owners of mug shot websites (and their associated unpublishing vendors) operate in a legal gray zone, obtaining mug shots legally through freedom of information laws, posting these open records legally on the Internet under the guise of disseminating public information, and then charging exorbitant fees (administrative or otherwise) for their removal without threatening any illegal harm.[252] This is essentially legal extortion.[253] The growth of the commercial mug shot industry is a pernicious example of FOIA's unintended consequences.

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248. For more on the nebulous effects of shame on individuals, see generally Terance D. Miethe, Hong Lu & Erin Reese, Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings, 46 Crime & Delinq. 522, 536 (2000) (attributing unexpected high rates of recidivism for drug court participants to "drug court [being] far more stigmatizing than reintegrative in its orientation toward offenders"); Lawrence W. Sherman et al., The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment, 83 J. Crim. L. & Criminology 137, 138 (1992) (identifying social sanction as purpose of arrests but doubting effectiveness for crime reduction).

249. The cliché "a picture is worth a thousand words" relied upon in *Times Picayune*, *Karantsalis*, and *World Publishing* can be interpreted in both a positive and negative light. For a description of Loughner, see supra notes 1–5 and accompanying text.

250. While the face of a killer may spur debates about crime prevention and mental health, the face may also only inflame those debates. Compare Editorial, Jared Loughner's Enablers, USA Today (Nov. 14, 2012, 4:00 PM), http://www.usatoday.com/story/opinion/editorials/2012/11/13/jared-loughner-sentencing-mental-illness/1703125 (on file with the *Columbia Law Review*) (using Loughner as vehicle to discuss treatment of mentally ill), with Texe Marrs, Shooter Jared Lee Loughner Is a Jew, a Satanist, a Pot-head, and a Heavy Metal Rock Music Addict Who Spitefully Had Declared: "No! I Will Not Trust in God.," Power of Prophecy, http://www.texemarrs.com/012011/jared_loughner_article.htm (on file with the *Columbia Law Review*) (last visited Nov. 4, 2013) (attributing Loughner's actions to religion and love of rock music).

251. See supra notes 102–104 and accompanying text (noting commercial website advancing legal and public policy arguments for liberal mug shot disclosure regime).

252. See supra Part I.C (discussing which entities request mug shots).

253. Under the Model Penal Code, "[a] person is guilty of theft if he purposely obtains property of another by threatening to: (1) inflict bodily injury on anyone or commit any other criminal offense; or . . . (3) expose any secret tending to subject any person to hatred, contempt or ridicule or to impair his credit or business repute." Model Penal Code § 223.4 (1985); see also Russell L. Christopher, Meta-Blackmail, 94 Geo. L.J.

C. *A Legislative Solution*

This section proposes a legislative solution to the mug shot disclosure issue. Part III.C.1 discusses the weaknesses of a judicial response to this dispute, and Part III.C.2 proposes a targeted legislative response to solve this issue.

1. *Why a Judicial Response Is Undesirable.* — At the federal level, a Supreme Court decision could (and probably would) resolve the circuit split in favor of the Tenth and Eleventh Circuits' interpretation of Exemption 7(C).[254] Unfortunately, at USMS's own insistence, the Supreme Court has denied certiorari and will not settle this circuit split in the foreseeable future.[255] Thus, to resolve the split through the judiciary within a reasonable timeframe, the Sixth Circuit would have to reconsider the issues present in *Detroit Free Press* en banc.[256] To satisfy the procedural requirements necessary to create the opportunity for an en banc rehearing, USMS must practice executive nonacquiescence, a device strongly disfavored in the law.[257]

In the context of national statutes like FOIA, no commentator has argued in favor of nonacquiescence.[258] In their seminal work on

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739, 741 n.1 (2006) (analyzing difference between blackmail and extortion). A full discussion of extortion (or blackmail) is outside the scope of this Note.

Briefly, it seems that the reason the acts do not reach the level of a crime is because there is no threatened illegal act—the "legal" act of "exposing" the mug shot has already been committed. See supra Part I.C (discussing commercial uses of mug shots). While some legislators, newspapers, and blogs have begun to dissect the notion that this constitutes legal extortion (and these sources are hardly authoritative), no legal scholarship has done so—in the context of mug shots or otherwise. See, e.g., Segal, supra note 93 ("To . . . millions of other Americans now captured on one or more of these sites, this sounds like extortion. . . . [However,] [t]he sites are perfectly legal, and they get financial oxygen the same way as other online businesses—through credit card companies and PayPal."); see also Ward, supra note 95 ("If a site removes someone's mug shot for a fee, that could be considered blackmail . . . . But showing damages would be difficult.").

Illustrating the difficulties of this legal issue, at least one civil complaint against the mug shot racket is proceeding on Ohio state statute theories of right to publicity and unjust enrichment. Complaint at 5–7, Lashaway v. JustMugshots.com, No. CI0201206547 (Ohio Ct. C.P. filed Dec. 3, 2012).

Ultimately, despite the public demand for mug shots, the mug shot industry's increasing notoriety may prove to be its undoing: In reaction to learning about the mug shot racket, four major credit card companies have closed their accounts with the websites while Google has altered its search algorithm to make mug shot images less prominent in search results. Segal, supra note 93.

254. For a legal analysis of why this outcome is likely, see supra Part III.A.

255. See supra note 204 and accompanying text (discussing denial of certiorari).

256. See supra note 205 and accompanying text (noting unlikely circumstances needed to create opportunity for rehearing).

257. See supra notes 197–201 and accompanying text (addressing constitutional issues and policy concerns accompanying nonacquiescence).

258. See Coenen, supra note 200, at 1350 n.34 (arguing against agency nonacquiescence in FOIA context); Estreicher & Revesz, supra note 199, at 720 n.214 ("[T]he legitimacy of nonacquiescence in the interpretation of a statute other than the

nonacquiescence, Professors Estreicher and Revesz identified several instances in which nonacquiescence could be defensible but noted that when agency-court disagreements involve questions over national statutes like FOIA, "the agency stands in a position not too different from that of any other litigant complaining of a misapplication of legal principles that interferes with its freedom to maneuver; the agency enjoys no special claim to conduct its proceedings independent of circuit precedent."[259] Although the current paradigm fails to provide appropriate protection to the citizens of the Tenth and Eleventh Circuits, USMS's naked disregard of *Detroit Free Press* would also be inappropriate and would disrupt the expectations of the citizens of the Sixth Circuit.[260] Any attempt to provoke an en banc rehearing is sure to become a legal circus taking years to resolve as constitutional and procedural issues regarding nonacquiescence enter the fray: The issue at the forefront of litigation will be the relationship of the courts to federal agencies as opposed to the disclosure of mug shots under FOIA.[261] Moreover, resolution of the circuit split through judicial means would only affect the approximately 1,000 annual requests for mug shots at the federal level,[262] leaving millions of disclosures made annually at the state level unaffected.[263] A judicial resolution is not ideal.

2. *A Targeted Legislative Response.* — This Note proposes Congress pass a law categorically exempting both state and federal mug shots from disclosure unless there is a compelling justification for release. At the federal level, this would occur under FOIA's Exemption 3 and, at the state level, through Congress's powers of preemption.[264] This solution

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agency's organic statute cannot be defended by reference to the congressional delegation of policymaking authority to that agency.").

259. Estreicher & Revesz, supra note 199, at 754; see also Matthew Diller & Nancy Morawetz, Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz, 99 Yale L.J. 801, 801–03 (1990) (citing universal condemnation of nonacquiescence by courts and criticizing attempts to defend it).

260. See Diller & Morawetz, supra note 259, at 828–29 (discussing importance of circuit stare decisis).

261. For an analogous situation, see Erin Margaret Masson, Note, Social Security Administration Nonacquiescence on the Standard for Evaluating Pain, 36 Wm. & Mary L. Rev. 1819, 1819–22 (1995) (chronicling decade-long battle between Fourth Circuit and Social Security Administration over judicial authority as opposed to substantive issues).

262. See supra text accompanying note 109 (citing number of FOIA mug shot requests in 2011).

263. See supra notes 12, 94, 105 and accompanying text (discussing mug shot disclosure at state level).

264. This proposal would mirror the solution expressly proposed by *SafeCard* and *World Publishing*. See supra notes 76–78 and accompanying text (explaining proposal of compelling evidence test in context of FOIA and mug shots, respectively). The language of the statute could read: "No local, state, or federal agency shall release a booking photo under the Freedom of Information Act or any of the following enumerated State Information Disclosure Acts unless there is compelling evidence under the standard announced in *SafeCard* that the booking photo would evidence that government misconduct had occurred." For a discussion of FOIA Exemption 3, which

would resolve not only the circuit split at the federal level, but also the major problems created by the annual disclosure of millions of mug shots at the state level.[265]

Regarding mug shots taken by a federal agency, a statute exempts a record under Exemption 3 if it "(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld."[266] Congress could amend USMS's organic statute to prohibit the release of mug shots under FOIA's Exemption 3; indeed, direct FOIA prohibitions are becoming more common.[267]

Federal preemption of state FOIAs, while not unheard of,[268] is rare and carries with it a cadre of complaints that the federal government is impermissibly invading a statutory field generally reserved for the

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"incorporates . . . certain nondisclosure provisions that are contained in other federal statutes," see generally Dep't of Justice, Exemption 3, *in* 2013 FOIA Guide, supra note 24, at 1–63 [hereinafter Exemption 3], available at http://www.justice.gov/oip/foia-guide13/exemption3.pdf (on file with the *Columbia Law Review*) (last visited Oct. 2, 2013) (explicating Exemption 3 and giving examples of qualifying statutes).

265. An alternative solution would target only federal FOIA, forgoing state preemption. Indeed, some states have already passed laws in an effort to address problems created by the commercial mug shot industry, although their effectiveness remains to be seen. See Segal, supra note 93 (noting two states passed laws forcing websites to remove mug shot if depicted individual can prove innocence, and one state prohibits sheriffs from releasing mug shots to mug shot websites charging to unpublish, but also indicating lawmakers face resistance from interest groups opposed to such laws). State laws governing mug shots are a morass, differing from state to state and even jurisdiction to jurisdiction, but are also where the vast majority of mug shot disclosure occurs. See, e.g., State FOIA Guide, supra note 12, at 11 ("The City of Los Angeles reportedly refuses to release mug shots unless investigators decide a picture will help with a criminal investigation, but neighboring jurisdictions and county and state officials often release them."). As with mug shot disclosure at the federal level, there is little legal scholarship on mug shot disclosure at the state level.

More global reforms to FOIA could also solve the mug shot dispute at the federal level. See, e.g., Harold H. Bruff, Coordinating Judicial Review in Administrative Law, 39 UCLA L. Rev. 1193, 1233–44 (1992) (advocating creation of national FOIA court to adjudicate federal administrative disputes, including FOIA disputes); Ashley Messenger, What Would a "Right to Be Forgotten" Mean for Media in the United States?, Comm. Law., June 2012, at 29, 30–31, 33 (analyzing mechanism for individual to legally expunge records about self from public domain in European Union).

266. 5 U.S.C. § 552(b)(3) (2012); see also Reporters Comm. for Freedom of the Press v. U.S. Dep't of Justice, 816 F.2d 730, 734–35 (D.C. Cir. 1987) (noting statute must evidence congressional purpose in actual text as opposed to legislative history to qualify for Exemption 3), rev'd on other grounds, 489 U.S. 749 (1989).

267. See Exemption 3, supra note 264, at 17–27 (citing statutes found to explicitly require withholding). But see id. at 63–67 (citing statutes found not to qualify for Exemption 3).

268. See, e.g., Tombs v. Brick Twp. Mun. Utils. Auth., No. 2003-123, 2006 WL 3511459, at *1–*3 (N.J. Super. Ct. App. Div. Dec. 7, 2006) (per curiam) (affirming state agency nondisclosure of topographical map in light of federal preemption of state open government records act).

states.[269] Moreover, prodisclosure groups like journalists and, indeed, many of the legal scholars cited in this Note, would criticize this solution for being yet another step down the slippery slope twisting FOIA from a disclosure statute to one of prohibition.[270] While there might be merits to these claims in other situations, in the context of mug shots, where the harm to the individual is so excessive and the benefit to society so miniscule—essentially satisfying public curiosity—a legislative solution endorsing the approach of the Tenth and Eleventh Circuits is justified. In the case of mug shots, Congress is capable of narrowly tailoring a solution to solve this problem.

CONCLUSION

The Sixth Circuit's determination that an arrestee does not have a privacy interest in his mug shot is difficult to reconcile with the body of Supreme Court law expansively interpreting FOIA's Exemption 7(C). Nevertheless, due to FOIA's venue rules and the ability of requesters to forum shop, *Detroit Free Press* has had the practical effect of a national decision, requiring the release of federal mug shots so long as the request originates within the Sixth Circuit. The Tenth and Eleventh Circuits' contrary decisions have had no impact on the mug shot dispute, offering ineffective protection to the citizens of those jurisdictions. The legacy of these decisions has been to embolden USMS to reinstate its determined policy preference of mug shot nondisclosure via executive nonacquiescence, setting the stage for a rematch between the agency and the Sixth Circuit over the correct interpretation of FOIA. A legislative response prohibiting agency disclosure of mug shots at both the federal and state level could avert this fight while also implementing the best policy choice. Indeed, only a legislative response of this magnitude can effectively address the pernicious rise of the commercial mug shot website industry.

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269. See Minority Staff of H. Comm. on Gov't Reform, 109th Cong., Congressional Preemption of State Laws and Regulations 35 (2006), available at http://environmentalcommons.org/preemption-federal.pdf (on file with the *Columbia Law Review*) (citing federal law preempting disclosure under state FOIAs as part of effort to show lack of congressional respect for state rights). In two analogous situations, Congress under its Commerce Clause powers has preempted states, in the first instance, from selling state driver information, and, in the second, from releasing certain data regarding dangerous crash sites. Presumably, Congress can use the presence of the mug shot cottage industry to establish the commerce link. See supra Part I.C (discussing users of mug shots). For more on analogous situations and the issues preemption raises, see generally Richard T. Cosgrove, Comment, *Reno v. Condon*: The Supreme Court Takes a Right Turn in Its Tenth Amendment Jurisprudence by Upholding the Constitutionality of the Driver's Privacy Protection Act, 68 Fordham L. Rev. 2543 (2000); Robert A. Frazier, Case Note, *Pierce County v. Guillen*: A Dangerous Road: The Federal Highway Program's Collision with State Court Systems and the Impact on State Sovereignty, 56 Ark. L. Rev. 573 (2003).

270. See supra note 35 and accompanying text (noting commentator disappointment with Exemption 7(C) expansion).

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