No. 14-1670

IN THE

United States Court of Appeals for the Sixth Circuit

DETROIT FREE PRESS, INC.,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Michigan
No. 13-12939
Hon. Patrick J. Duggan

BRIEF OF *AMICI CURIAE* THE CONNECTICUT COUNCIL ON FREEDOM OF INFORMATION AND 14 MEDIA AND OPEN GOVERNMENT ORGANIZATIONS IN SUPPORT OF APPELEE SEEKING AFFIRMATION

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All *amici* listed on the next page.

LIST OF AMICI CURIAE

1. Connecticut Council on Freedom of Information
2. Connecticut Foundation for Open Government
3. Connecticut Chapter of the Society of Professional Journalists
4. Manchester Journal Inquirer
5. Meriden Record-Journal
6. The Norwich Bulletin
7. The Norwalk Hour
8. The Lakeville Journal,
9. The Winsted Journal
10. The Millerton News
11. The CTNewsJunkie
12. The Willimantic Chronicle
13. The New Britain Herald
14. The Bristol Press
15. The Waterbury Republican-American

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are local and state media, journalist and open government organizations with a longstanding interest in ensuring that the public has access to documents and information concerning pending criminal prosecutions, including booking photographs. Access to such information serves multiple salutary purposes, including, but not limited to, assisting law enforcement in solving crimes, informing the public about ongoing criminal investigations and prosecutions, and enabling the public to evaluate the performance and quality of law enforcement officials and investigations.

The open government organizations appearing as *amici* are the Connecticut Council on Freedom of Information ("CCFOI") and the Connecticut Foundation for Open Government ("CFOG"). The mission of the CCFOI is to promote, preserve and protect the public's access to government in this state and in its municipalities and to uphold the constitutional principles of freedom of the press. Similarly, CFOG is dedicated to promoting the open and accountable government essential in a democratic society. It seeks to achieve this by educating policymakers and citizens in general on the need for a free flow of information on all public policy matters.

The media and journalist organizations appearing as *amici* are the Connecticut Chapter of the Society of Professional Journalists, Manchester Journal Inquirer,

Meriden Record-Journal, Norwich Bulletin, Norwalk Hour, Lakeville Journal, Winsted Journal, Millerton News, CTNewsJunkie, Willimantic Chronicle, New Britain Herald, Bristol Press and the Waterbury Republican-American.

.AUTHORSHIP STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* declare:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fun preparing or submitting the brief;
3. no person, other than *amici*, their members or their counsel, contributed money intended to fun preparing or submitting the brief.

CORPORATE DISCLOSURE STATEMENT

The Connecticut Council on Freedom of Information is a 501(c) corporation with no parent corporation and no stock. The corporate disclosure statement for each media and open government organization joining this brief is set forth in full in Appendix A.

AUTHORITY TO FILE *AMICUS* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a), all parties to this case have consented to the filing of this *amicus* brief on behalf of Plaintiff-Appellee.

INTRODUCTION

Information is power, particularly when it is in the hands of the government. The ability to determine whether and when certain information becomes public is also power. That power is one federal, state and local law governments, including law enforcement agencies, too often abuse.

Congress enacted the modern federal Freedom of Information Act ("FOIA") largely in response to one of the clearest governmental abuses of power in our nation's history. Yet, instead of embracing the fundamental premise of the federal FOIA—an open and transparent government is a *better* government—many governmental agencies continue to resist disclosing public records to the public. Such agencies continue to cling to the notion that they are better arbiters than the public of whether information is or is not of legitimate public concern.

The government argues that persons who have been arrested have a privacy interest in their booking photographs and that whether such photographs should be publicly disclosed ought to be decided on a case-by-case basis. Appellant's Supplemental Brief on Rehearing *En Banc* ("DOJ Br.") at 19-20. But what the government really wants is the exclusive power to determine whether and when booking photos should be released. The transaction costs associated with pursing a federal FOIA complaint, measured in terms of time and money, are significant. The reality is that if the government refuses to release a booking photo at or around

the time of an arrest, and thus forces the requestor to bring an expensive and time-consuming FOIA action, the booking photo may never be released.

This case does not involve national security matters. It does not involve government records containing sensitive or intimate details about an individual's medical, financial or sexual history. It is about an official photograph depicting a person whom the government had probable cause to arrest and prosecute. Such persons are innocent until proven guilty, but the fact of and details about their arrest, including booking photographs depicting their appearance at or about the time of arrest, are matters of legitimate public concern.

The government's arguments against disclosure of booking photos are antithetical to the purposes and objectives of the FOIA, and are flatly inconsistent with the common law meaning of the term "invasion of privacy" at the time 5 U.S.C. § 552(b)(7)(C) ("Exemption 7(C)") of the federal FOIA was enacted. *Amici* respectfully urge this Court to reject the government's arguments and reaffirm *Detroit Free Press v. Dep't of Justice*, 73 F.3d 93 (6th Cir. 1996) ("*DFP* I").

ARGUMENT

I. Persons Arrested For Federal Crimes Have No Privacy Interest In Their Booking Photographs.

Amici do not question that persons who are arrested often feel shame and embarrassment by the public disclosure of the fact of, and facts about, their arrest. And they often feel shame and embarrassment when they appear in an open courtroom for their arraignment and trial. However, that shame and embarrassment is unavoidable in a country that does not tolerate secret arrests or trials. Moreover, the public disclosures that lead to that shame and embarrassment are *constitutionally unavoidable*.

A. Because the public has a *constitutional* right of access to details about an arrest once they are in the judicial domain, the marginal additional detail provided by the release of a booking photograph does not implicate a protected privacy interest.

"The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . *are without question events of legitimate concern to the public* and consequently fall within the responsibility of the press to report the operations of government." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (emphasis added). Thus, while the federal FOIA provides the public with a statutory right of access to public records of the executive branch, the First Amendment provides the public with a *constitutional* presumption of access to most judicial documents and criminal court proceedings,

including most pretrial proceedings. *E.g.*, *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986); *Application of Nat'l Broad. Co., Inc.*, 828 F.2d 340 (6th Cir. 1987)[1]; *Newsgathering and the Law* (4th ed. 2011) at § 3.01[1]. In short, most arrests promptly become judicial matters, subject to the First Amendment presumption of openness. Consequently, the disclosure of the facts concerning an arrest and the suspect's physical appearance to the public in court *is a matter of <u>when</u>, not if*. At most, a federal FOIA request for disclosure of the facts of an arrest and a booking photograph advances in time, ever so slightly, the release of information, including the physical appearance of the suspect, to which the public has a constitutional right of access.

Given that indisputable truth, the argument that a federal indictee has a legally cognizable privacy interest in his or her booking photograph is fallacious. To the extent that the disclosure of a booking photo increases a suspect's shame and embarrassment beyond the level associated with the constitutionally required disclosure of the fact of the arrest itself and appearances in court, that increase is

[1] This court stated the following in *Application of Nat'l Broad. Co., Inc*.: "Openness in judicial proceedings promotes public confidence in the courts. The Supreme Court has pointed out that openness has been a principle that accompanied the long evolution of proceedings culminating in the modern criminal trial. *One feature of that evolution has been the increasing importance of pretrial proceedings.* The Supreme Court has recognized that the importance of some pretrial proceedings dictates that the rule of openness not be confined to the actual trial." 828 F.2d at 347 (emphasis supplied) (internal citations omitted).

negligible. Accordingly, there is no merit to the proposition that the disclosure of an arrestee's booking photo constitutes an unwarranted invasion of personal privacy.

B. The U.S. Supreme Court's decision in *FCC v. AT&T* supports the disclosure of booking photographs under the federal FOIA.

In *Federal Communications Commission, et al. v. AT&T*, et al., 131 S.Ct. 1177 (2011)("*FCC v. AT&T*"), the Supreme Court looked to, inter alia, the Restatement (Second) of Torts (1977) ("Restatement") for guidance concerning the common law understanding of the term "personal" privacy at the time Congress adopted Exemption 7(C). Specifically, the Supreme Court sought to determine whether corporations could claim privacy protection under Exemption 7(C). The Court held that they could not. It is therefore appropriate to look to the Restatement for guidance on how the term "privacy" should be interpreted in the context of Exemption 7(C). *Cf. Perkins v. Freedom of Information Commission*, 228 Conn. 158, 635 A. 2d 783 (1993) (adopting Restatement (Second) Torts, § 652D, as guide to determining when disclosure of personnel, medical or similar files under state FOIA would constitute an unwarranted invasion of privacy).

Under Restatement § 652D, which sets forth elements for invasion of privacy by the publication of private, truthful facts, the disclosure of such a fact does not constitute an actionable invasion of privacy unless the disclosure is *both*

"highly offensive to a reasonable person" *and* "not of legitimate public concern." Restatement § 652D. The disclosure of a booking photo violates neither of these requirements.

First, while the disclosure of a booking photo may be embarrassing to a suspect, subjective embarrassment does not equate to "highly offensive to a reasonable person." Second, as a matter of law, an official photograph depicting a suspect at the time of his or her arrest is a matter of legitimate public concern. *See, e.g., Cox Broadcasting Corp.*, 420 U.S. at 492; Restatement § 652D, cmt. g[2] and illus. 13 (publication of pictures and descriptions of criminal defendant is not an invasion of privacy). Any court that sought to hold a newspaper, broadcaster or other media entity liable in damages for publishing a booking photo on the ground that such publication constituted an unlawful invasion of privacy under section 652D would run afoul of the First Amendment, which protects the publication of truthful matters of legitimate public concern. *Florida Star v. BJF*, 491 U.S. 524,

[2] Comment g states: "Included within the scope of legitimate public concern are matters of the kind customarily regarded as 'news.' To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm. Authorized publicity includes publications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, a rare disease, the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal."

534 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979).

The several courts that have held that booking photos are not matters of legitimate public concern have improperly turned themselves into government censors, applying their own subjective notions of newsworthiness. But, the Supreme Court has held that what constitutes a matter of "public concern" must be construed broadly, lest "courts themselves . . . become inadvertent censors." *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011). The sphere of information that is of public concern is "extraordinarily broad with great deference paid to what the publisher deems to be of public interest." *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 102 n.9 (2d Cir. 2000). *See also* R. Sack, SACK ON DEFAMATION § 3:3.2[A] (4th ed. 2010) at 3–9 (public concern must be given broad scope to avoid court assuming "the constitutionally suspect role of super-editor, deciding on a case-by-case basis what is newsworthy").

C. Technological innovation, including the Internet, does not support denying public access to booking photographs.

The government also argues that *DFP* I should be overruled in large part because of "dramatic technological changes over the last twenty years. . . ." DOJ Br. at 7. *Amici* acknowledge the vast growth of the Internet and the implications that such growth has for the ability of the public to access information that might otherwise be obscure. But technological innovations such as the Internet are a fact

of life. The federal government cannot possibly forestall the widespread dissemination of potentially embarrassing details of an arrest, including pictures of the suspect. Given this reality, the question is whether this Court should grant the government the statutory authority to refuse to disclose official photos that depict a person at the time of his arrest. The only argument that the government offers in support of a negative answer to the question is that the photos may be "more" embarrassing than the fact and details of the arrest itself. For the reasons previously stated, that argument is without merit.[3]

D. A categorical rule in favor of disclosure of booking photographs is preferable to the high transaction costs of case-by-case determinations.

There are three possible outcomes when considering the disclosure of booking photos under the federal FOIA: (1) All mugs shots are *categorically disclosable* under the federal FOIA; (2) whether a booking photo falls within Exemption 7(C) must be decided on a case-by-case basis; and (3) all booking photos are *categorically exempt* from public disclosure under Exemption 7(C).

As noted above, even the government does not argue that booking photos should be categorically exempt from disclosure. Thus, the choice is between categorical disclosure or a case-by-case approach. The latter, however, is

[3] Persons who post digital images of themselves on the Internet retain some legal protections, such as copyright, although even those protections are not absolute.

functionally equivalent to a categorical exemption. As open government and media organizations that frequently use federal and state freedom of information laws, *amici* are intimately familiar with the transaction costs associated with challenging contested FOIA requests. In practical terms, those costs mean that challenging law enforcement denials of an FOIA request for a booking photograph are: (1) beyond the financial means of many open government and media organizations; and (2) unlikely to result in a timely disclosure of the booking photo. For these reasons, *amici* support the Detroit Free Press's arguments in favor of a categorical disclosure of booking photos.

II. Connecticut's Recent Legislative Experience Concerning Booking Photos And Other Depictions Of An Arrest Or Person In Custody Supports The Categorical Disclosure Of Booking Photos.

Amici, many of which are Connecticut-based open government and media organizations, also believe that Connecticut's recent legislative experience with booking photographs and other records of an arrest supports reaffirming *DFP* I.

Connecticut's own Freedom of Information Act, Conn. Gen. Stat. § 1-200 *et seq.*, enacted in 1975, has long been considered a model for sunshine laws around the country. From the time of its enactment through July 2014, the state Freedom of Information Commission ("FOIC"), which is charged with enforcing the state FOIA, consistently construed the Act to require the disclosure of all records of an arrest, including booking photos, unless the relevant state or local law enforcement

agency could establish that release of a particular record would be prejudicial to a prospective law enforcement action. Conn. Gen. Stat. § 1-210(b)(3) (listing reasons for exemption from disclosure records compiled by law enforcement agencies).[4]

On July 15, 2014, however, the Connecticut Supreme Court issued a decision that fundamentally altered the legal landscape. In *Dept. of Public Safety v. Freedom of Information Commission*, 312 Conn. 513, 93 A.3d 1142 (2014), the state Supreme Court, giving no deference to the FOIC's longstanding interpretation of state FOIA, concluded that the FOIC had been interpreting the Act incorrectly for twenty years. According to the Supreme Court, while a law enforcement action was pending, the FOIA only required law enforcement agencies to disclose the bare minimum of information about an arrest—basically police blotter

[4] Section 1-210(b)(3) exempts the following from disclosure: "Records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known, (B) the identity of minor witnesses, (C) signed statements of witnesses, (D) information to be used in a prospective law enforcement action if prejudicial to such action, (E) investigatory techniques not otherwise known to the general public, (F) arrest records of a juvenile, which shall also include any investigatory files, concerning the arrest of such juvenile, compiled for law enforcement purposes, (G) the name and address of the victim of a sexual assault … voyeurism . . . or injury or risk of injury, or impairing of morals . . .or of an attempt thereof, or (H) uncorroborated allegations subject to destruction pursuant to section 1-216."

information—and virtually nothing else. The Supreme Court concluded its opinion, however, by observing that the "General Assembly retains the prerogative to modify or clarify [the FOIA] as it sees fit." 312 Conn. at 550; 93 A.3d at 1166.

The General Assembly's response to *Dept. of Public Safety* was both swift and unequivocal. During the legislative session following the decision, the legislature passed, and the governor signed, Public Act 15-164, the express purpose of which was "[t]o reverse the recent Connecticut Supreme Court decision." 2015 Connecticut House Bill No. 6750, Connecticut General Assembly - January Session, 2015. The bill passed both chambers of the General Assembly unanimously.

The relevant text of the public act could not be clearer:

> (c) In addition, any other public record of a law enforcement agency *that documents or depicts* <u>*the arrest*</u> <u>*or custody*</u> *of a person* during the period in which the prosecution of such person is pending shall be disclosed in accordance with the provisions of subsection (a) of section 1-210 and section 1-212, unless such record is subject to any applicable exemption from disclosure contained in any provision of the general statutes.

Conn. Public Act 15-164 (2015)(emphasis supplied). Thus, booking photos (not to mention photographs and videos of police conducting an arrest) *must* be disclosed unless they fall within a specific FOIA exemption, such as Conn. Gen. Stat. § 1-210(b)(3), the state FOIA's law enforcement exemption. Notably, the law enforcement exemption under the Connecticut FOIA does *not* include "privacy"

language comparable to that found in Exemption 7(C). In other words, the Connecticut FOIA does not even acknowledge the possibility of a personal privacy interest on the part of a suspect in his or her arrest records, including booking photos.

The General Assembly debated Public Act 15-164 with full knowledge of the Internet's implications for the public distribution of information about arrests. The General Assembly understood that the disclosure of arrests records, including booking photos and other images or video depicting a suspect being arrested or held in custody, could result in widespread, permanent disclosure. Given this understanding, the present omission of any personal privacy exemption in the Connecticut FOIA for booking photos and other images and video depicting the arrest or custody of a suspect can only be understood as a conscious and categorical rejection of the argument that the embarrassment some suspects might feel from the widespread disclosure of booking photos warrants legal protection. *Amici* respectfully ask this Court to consider Connecticut's recent legislative experience when deciding how to resolve the present case.

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit via email on February 4, 2016, with resulting electronic notice to all counsel of record.

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APPENDIX A

Corporate Disclosure of *Amici Curiae*

The Connecticut Council on Freedom of Information is a nonprofit corporation that has no parent corporation and issues no stock.

The Connecticut Foundation for Open Government is a nonprofit corporation that has no parent corporation and issues no stock.

The Connecticut Chapter of the Society of Professional Journalists is a chapter of the Society of Professional Journalists, a nonprofit, nonstock corporation.

The Manchester Journal Inquirer is a private, for profit, stock corporation owned by the Journal Publishing Co., Inc., a privately-held corporation.

The Meriden Record-Journal is a private, for profit, nonstock corporation that is wholly owned by the Record Journal Publishing Co., a privately-held corporation.

The Norwich Bulletin is a private, for profit corporation, which is wholly owned by Gatehouse Media, Inc., a publicly traded company.

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The Waterbury Republican-American is private, for profit, stock corporation, which is wholly owned by the American-Republican, Inc., a privately held corporation.