No. _____

In The Supreme Court of the United States

HOWARD B. BLOOMGARDEN,
Petitioner,

v.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where an Assistant United States Attorney was terminated for misconduct and has continued to cite his former government service in public letters critical of the current President and United State Attorney General, does Exemption 6 of Freedom of Information Act, 5 U.S.C. § 552(b)(6) require disclosure of the final agency termination decision withheld below because such disclosure is not "a clearly unwarranted invasion of personal privacy"?

LIST OF PARTIES

All of the Parties to the proceedings below appear on the cover page.

LIST OF RELATED PROCEEDINGS

State Proceedings:

People v. Bloomgarden, No. BA128564 (Los Angeles, Cal., Superior Court). Judgment entered June 3, 2016.

People. v. Bloomgarden, No. B276634 (Calif. Ct. App.). Judgment entered October 8, 2019. Petition for rehearing denied Oct. 24, 2019.

People v. Bloomgarden, No. S259155 (Calif.). Petition for review denied Jan. 22, 2020. No petition for hearing filed.

Federal Proceedings:

Judgments in the District Court:

United States v. Bloomgarden, No. 1:96-cr-00182-ARR (E.D.N.Y). Judgment entered July 13, 1998.

Bloomgarden v. United States, No. 1:99-cv-03676-ARR (E.D.N.Y.). Judgement entered July 17, 2009.

Bloomgarden v. United States Department of Justice, No. 1:12-cv-00843-ESH (D.D.C.). Judgments entered January 22, 2014 & July 19, 2016.

Bloomgarden v. United States Department of Justice, No. 1:15-cv-00298-ESH (D.D.C.). Administrative closure entered March 2, 2016.

Bloomgarden v. National Archives and Records Administration, No. 1:17-cv-02675-CKK (D.D.C.). Judgment entered October 26, 2018.

Judgments in the Court of Appeals:

United States v. Bloomgarden, No. 98-1396 (2nd Cir.). Judgment entered December 23, 1998.

Bloomgarden v. United States, No. 09-3853-pr. (2nd Cir.). Judgment entered March 10, 2010.

Bloomgarden v. United States Department of Justice, No. 14-5065 (D.C. Cir.). Judgment entered November 13, 2014.

Bloomgarden v. United States Department of Justice, No. 16-5263 (D.C. Cir.). Judgment entered October 31, 2017.

Bloomgarden v. National Archives and Records Administration No. 18-5347 (D.D.C.). Judgment entered March 13, 2020.

Pending Petitions in this Court:

Bloomgarden v. California, No. 19-1409.

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TABLE OF AUTHORITIES

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Other Authorities

Howard Bloomgarden respectfully petitions for a *writ of certiorari* to review the judgment of the U.S. Court of Appeals for the D.C. Circuit.

OPINIONS AND ORDERS BELOW

The March 13, 2020, decision of the D.C. Circuit was not designated for publication. It is available electronically at *Bloomgarden v. Nat'l Archives & Records Admin.*, 798 Fed. App'x 674 (D.C. Cir. 2020). It is reprinted in the Appendix. No petition for rehearing was filed.

The October 26, 2018, decision of the U.S. District Court for the District of the District of Columbia was selected for publication and is available at *Bloomgarden v. Nat'l Archives & Records Admin.*, 344 F. Supp. 3d 66 (D.D.C. 2018). It is reprinted in the Appendix.

JURISDICTION

The civil action at issue was filed in the U.S. District Court for the District of the District of Columbia pursuant to that court's federal-question jurisdiction, 28 U.S.C. § 1331.

Mr. Bloomgarden filed a timely notice of appeal to the U.S. Court of Appeals for the D.C. Cir-

cuit. That court had jurisdiction to review the final judgment the district court entered on October 26, 2018. 28 U.S.C. § 1291. The D.C. Circuit entered judgment on March 13, 2020. No petition for rehearing was filed.

This Court has jurisdiction to review via *certiorari* the decision from the D.C. Circuit. 28 U.S.C. § 1254. This Petition is timely because it has been filed within 150 days of that court's decision. *See* Order of March 19, 2020, 589 U.S. __ (2020) (extending the period for filing petition for *certiorari* to 150 days during the Covid-19 pandemic).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 552:

(a)(4)

> …
>
> (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records

> and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action….

(b) This section does not apply to matters that are…

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy….

STATEMENT OF THE CASE

I. Background

A. The Federal-State Investigation

Beginning in January 1995, then Assistant United States Attorney (AUSA) Raymond Granger of the Eastern District of New York (EDNY) led a multi-jurisdictional state-federal investigation and prosecution of drug-trafficking-

related crimes, including the California kidnaping and murders of Peter Kovach and Ted Gould. AUSA Granger worked with California authorities, especially Anne Ingalls, Deputy District Attorney (DDA) for Los Angeles County, California District Attorney's Office (LACDA).

At the behest of federal agents, Mr. Bloomgarden entered into a proffer agreement that, he was told, bound both the United States and California. Pursuant to that agreement, Mr. Bloomgarden met with federal law enforcement in summer and fall of 1995. Mr. Granger repeatedly represented that he would—and was authorized by all relevant parties, including LACDA and DDA Ingalls—to make a plea agreement that would resolve both the federal and state charges via a term of imprisonment.

In November 1995, however, Granger was abruptly and without explanation removed as the federal prosecutor on Mr. Bloomgarden's case. Shortly thereafter, DDA Ingalls denied that Mr. Granger had authority to enter into the proffer agreement on her behalf and refused to engage in any plea negotiations with Mr. Bloomgarden or honor the agreement. The new federal prosecutor, with the help of defense counsel who would later

be adjudged constitutionally ineffective, conditioned a more severe federal plea on Mr. Bloomgarden allocuting to facts that would subject him to the death penalty in California.

Following receipt of a 405-month sentence in the Eastern District of New York, Mr. Bloomgarden was extradited to California to face a capital prosecution for the same acts underlying the federal plea agreement.

B. The State Capital Trial

In April 2005, Mr. Bloomgarden was transferred from federal custody to pre-trial detention in the Los Angeles County jail. Over the next nine years, the parties litigated numerous issues, including the extent to which the state was allowed to introduce prior-bad-acts evidence that had been revealed in the proffer sessions. Ultimately, the state court permitted the bad-acts evidence but excluded the allocution.

Sixteen years after the federal plea agreement, the California jury trial finally began. It resulted in guilty verdicts on two counts each of 1st degree murder and kidnapping for extortion. The jury deadlocked (11-1, in favor of life), however,

as to whether to impose a capital sentence. California declined to retry the sentencing phase, and Mr. Bloomgarden was sentenced to life imprisonment without the possibility of parole (in a conviction that is on direct appeal in the state courts).

C. The Termination of Mr. Granger

Following the abrupt termination of Mr. Granger from Mr. Bloomgarden's federal case and the assertions of state authorities that Mr. Granger had no authority to sign the proffer agreements on their behalf, Mr. Bloomgarden began, in 2007, to search for information relating to Mr. Granger's dismissal.

Among the documents that Mr. Bloomgarden obtained was a transcript of a status conference before the U.S. Merit Systems Protection Board in Mr. Granger's case. There, the DOJ agreed that Mr. Granger had become a permanent employee in 1993 and was thus entitled to the statutory protections before removal, which the DOJ had not followed when removing him in 1995. Accordingly, the DOJ rescinded the original 1995 termination, reinstated him, and immediately placed him on administrative leave. The basis for the leave was a new termination proposal that was 35

pages single spaced, with seven binders of evidence documenting professional misconduct committed by Mr. Granger.

D. FOIA Litigation Against the Department of Justice

In a prior FOIA proceeding against the Department of Justice, Mr. Bloomgarden sought the termination proposal and supporting evidence. He obtained the binders of evidence at the district court but was denied the termination proposal. On his appeal to the D.C. Circuit, that court affirmed. *Bloomgarden I*, 874 F.3d 757. It held that while there was some public interest in the disclosure, Mr. Granger's privacy interest, as a lawyer now in private practice, clearly outweighed that interest. *Id.* at 761. In particular, the court was concerned about one fact in particular: The termination proposal "contains mere allegations; it was never tested, nor was ever formally adopted by the deputy-attorney general's office." *Id.*

E. Mr. Granger's Signature on Open Letters

Mr. Granger, now in private practice in New York, has been a public critic of the current administration. For example, in January 2017, Mr. Granger signed his name to an open letter condemning the Trump Administration's travel ban. *See* https://www.yumpu.com/en/document/view/56800922/openletter2017-1-31withsignatories440pm (last visited July 27, 2020). The open letter read, in part, as follows:

> We are former Assistant United States Attorneys, many of whom held supervisory positions in various United States Attorneys' Offices. Collectively, our Department of Justice tenure spans more than 40 years, from the 1970s to the recent past. Representing the United States of America was a privilege and an honor. In that job our highest duty as government lawyers was not to win, but to seek justice. It was to make our case based on the law

and the evidence, fairly, without favor or prejudice. It was to speak with candor to the courts that questioned the positions we took. And always, it was to follow the law and the fundamental tenets upon which our nation was founded, embodied in our Constitution….

It would be our job, if we were representing the United States today, to say, no, this Executive Order is wrong and should not be defended. Acting Attorney General Yates was right to refuse to do so. If her successor wishes to follow in the finest traditions of the Justice Department, he will reverse course and do the same.

SIGNATORIES

…

Raymond R. Granger
U.S. Attorney's Office, E.D.N.Y.
1992 – 1998….

Id.

Mr. Granger again touted his governmental service in another open letter, signed in February 2020, this time criticizing the Department of Justice's sentencing recommendation in the Roger Stone case. *See* https://medium.com/@dojalumni/doj-alumni-statement-on-the-events-surrounding-the-sentencing-of-roger-stone-c2cb75ae4937 (last accessed July 27, 2020). That letter read in part as follows:

> We, the undersigned, are alumni of the United States Department of Justice (DOJ) who have collectively served both Republican and Democratic administrations. Each of us strongly condemns President Trump's and Attorney General Barr's interference in the fair administration of justice.
>
> As former DOJ officials, we each proudly took an oath to

support and defend our Constitution and faithfully execute the duties of our offices….

[W]e support and commend the four career prosecutors who upheld their oaths and stood up for the Department's independence by withdrawing from the Stone case and/or resigning from the Department. Our simple message to them is that we — and millions of other Americans — stand with them. And we call on every DOJ employee to follow their heroic example and be prepared to… refuse to carry out directives that are inconsistent with their oaths of office…. The rule of law and the survival of our Republic demand nothing less.

…

[Signatory Number] 870 Raymond Granger Assistant United States Attorney

Id.

F. The FOIA Requests at Issue in This Action

In 2013, Mr. Bloomgarden submitted a FOIA request to the National Archives and Records Administration ("NARA"), which according to NARA resulted in two relevant documents that the assigned NARA FOIA analyst promised to release:

> I ... was able to locate…. letters written between Deputy Attorney General Dennis M. Corrigan and Mr. Raymond Granger. The earliest letter is dated March 28, 1997, and is from Dennis M. Corrigan to Raymond Granger [("the Corrigan Letter")]. The 12-page letter serves as Dennis M. Corrigan's final decision with respect to the allegations charged against Raymond Granger. It provides an overview of the seven charges against Mr. Granger, describes the evidence in support of the charges, and Mr. Corrigan's assessment of the charges. *** The other two letters consist of Mr. Granger's April 4, 1997, response to the March

> 28th letter.... Mr. Granger's April 4th letter consists of three pages in which he requests records about himself relating to his time at the Eastern District of New York. Mr. Corrigan's one page response that Mr. Granger's request has been forwarded to the appropriate office.

Later, however, NARA changed its mind, finding that the privacy interests of former AUSA Granger authorized the withholding of the two letters under FOIA Exemption 6, while acknowledging that "public interest exists in the disclosure of records created by Mr. Granger during his tenure as an AUSA during this specific period." The NARA did, however, disclose in full the third letter, from Mr. Corrigan, dated May 2, 1997.

This litigation concerns the two letters that the NARA ultimately withheld.

G. This Litigation

Following cross motions for summary judgment, the district court below entered summary judgment in favor of NARA finding that the two letters at issue are subject to withholding under FOIA Exemption 6.

Mr. Bloomgarden thereafter appealed to the D.C. Circuit.

At oral argument before the D.C. Circuit, Judge Pillard alluded to this misconduct contained in the termination proposal (which Mr. Bloomgarden has obviously not seen): "But [*Kimberlin*] doesn't draw the prosecutorial power into question in the same way that Mr Granger's lying to judges, lying to supervisor[s], unauthorized signing off on things as if you were [a] supervisor. This is a very different picture one gets of internal supervisory checks and the evasion thereof."

Nonetheless, as to the Corrigan Letter, the D.C. Circuit ultimately affirmed its withholding. The court explained the privacy balance in part as follows:

> [T]he Corrigan Letter's findings do not identify any prosecutorial misconduct affecting the merits of any case or otherwise threatening the integrity of the prosecutorial function, but are limited to instances of incompetence and insubordination. *Cf. Bartko v. DOJ*, 898 F.3d 51, 69-70 (D.C. Cir. 2018).

To be sure, our privacy analysis in *Bloomgarden I* emphasized that the proposed discipline letter "contains mere allegations," 874 F.3d at 761, whereas the Corrigan Letter followed a completed investigation, which included an opportunity for the AUSA to present rebuttal, and reflects DOJ's final decision. That factual distinction makes the Corrigan Letter a closer case withholding under Exemption 6. But, given the other factors we considered, that difference does not, in our judgment, overcome the AUSA's continued "privacy interest . . . in avoiding disclosure of the details of the investigation" or "of his misconduct." *Kimberlin*, 139 F.3d at 944. Nor does the fact that the AUSA "continues to tout" his prosecutorial experience by co-signing public letters with dozens of other former AUSAs, Appellant's Br. 19 n.5; *see also*

> Bloomgarden 28(j) Letter (Feb. 24, 2020), materially change the public-interest analysis. Specifically, the public letters signed by lists of former prosecutors neither create a public misimpression that disclosure of the Corrigan Letter might rectify nor meaningfully enhance the public interest in the AUSA's personnel record.

[A8-9].

But the D.C. Circuit reversed the district court's judgment as to Mr. Granger's response letter because NARA "offer[ed] no viable reason why the AUSA…has a substantial privacy interest in the AUSA Response…." [A6].

This Petition timely follows.

REASONS FOR GRANTING THE PETITION

I. The Judgement Below Is Wrong.

Under the FOIA, a "federal agency must disclose agency records unless they may be withheld pursuant to one of the nine enumerated exemptions listed in [5 U.S.C.] § 552(b)." *United States*

DOJ v. Julian, 486 U.S. 1, 8 (1988) (citations omitted). Because "the mandate of the FOIA calls for broad disclosure of Government records…, exemptions are to be narrowly construed." *Id.* (citation and quotation omitted). The judiciary gives no deference to an agency's interpretation of the FOIA exemptions. 5 U.S.C. § 552(a)(4)(B) (requiring "de novo" judicial review).

At issue in this Petition is the proper application of FOIA Exemption 6. That Exemption allows withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The requirement that the invasion be "clearly" unwarranted was a deliberate one, placed in the statutory text even over objections from governmental agencies about the "'heavy' burden" that the modifier imposed. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 378 n.16 (1976) (collecting legislative history on rejected attempts to strip the modifier from the text).

With respect to the public interest, it is at least two-fold.

First, the Corrigan Letter relates to how the Government prosecutes criminal cases—and the

Government's decision to allow misconduct to proceed long enough to enable the Government to fill up seven binders of evidence. *See, e.g.*, *Cuban v. S.E.C.*, 744 F. Supp. 2d 60, 84 (D.D.C. 2010) ("There is a compelling public interest in knowing whether the defendant conducts [civil] investigations free of misconduct by its employees…."). Because "[t]he prosecutor has more control of life, liberty and reputation than any other person in America." Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc'y 18, 19 (1940), the public should be entitled to decide for itself whether the Government is adequately supervising prosecutors.

Second, as his signature on the open letters demonstrates, Mr. Granger has been a public critic of the present Administration. Allowing the public to know the particulars of his governmental service will help the public to decide what weight, if any, to afford to his critiques.

As for Mr. Granger's privacy interest, it is not particularly weighty.

First, "secrecy in government [is] one of the instruments of Old World tyranny…. [A] democracy cannot function unless the people are permitted to know what their government is up to." *United*

States Dept. of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 772-73 (1989) (quotation and emphasis omitted)). Consequently, the FOIA provides government employees with a "lesser degree of protection than private citizens." *Fund for Constitutional Gov't v. Nat'l Archives & Records Service*, 656 F.2d 856, 864 (D.C. Cir. 1981).

Second, unlike in the prior litigation, the Corrigan Letter here is the Department of Justice's "final decision," [A3]. *See Bloomgarden I*, 874 F.3d at 761 (allowing draft proposal to be withheld in part because "it was [n]ever formally adopted by the deputy-attorney general's office."). Even the D.C. Circuit below recognized that that fact alone made the disclosure question a "close[]" one. [A8].

Third, especially given that Mr. Granger invokes his public service to give credence to his critiques of the Administration, he cannot be heard to complain when the facts of his public service come to light. *See Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995) ("Perot's decision to bring in-formation connecting himself with such efforts into the public domain… effectively waive[s] Perot's right to redaction of his name from documents on events

that he has publicly discussed." (citation and footnote omitted)).

Finally, because the Government has never sought to redact Mr. Granger's name from this litigation or in the prior litigation, the fact of Mr. Granger's termination and the general grounds for it – "incompetence and insubordination," *Bloomgarden v. United States DOJ*, 2016 U.S. Dist. LEXIS 14613, *11, 2016 WL 471251 (D.D.C. Feb. 5, 2016) – are already in the public record. *See also* [A15 ("Plaintiff request[ed]… NARA documents related to Mr. Granger's termination.") and A24 (evaluating "the public's interest in the negligent job performance and unremarkable misconduct" of Mr. Granger)]. "[E]ven the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975).

In short, the D.C. Circuit was correct to the extent that it determined that, by Congressional design, "the presumption in favor of disclosure" under Exemption 6 is particularly strong…." [A7 (quotation and citation omitted)]. But it was wrong to conclude that the Government had sustained its burden here to prove that disclosure of

the Corrigan Letter would be a "clearly unwarranted invasion of personal privacy" 5 U.S.C. § 552(b)(6).

This Court should order the Corrigan Letter produced in full. "[U]nder Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the [FOIA]." *Wash. Post Co. v. United States Dep't of Health & Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982). Nothing in the record below, however, justifies resort to Exemption 6.

II. This Petition Is a Good Vehicle.

This Petition is a good vehicle for the Question Presented. It was raised and ruled upon below. And it is outcome determinative.

CONCLUSION

This Court should grant the Petition and order the disclosure of the Corrigan Letter.

Dated: August 6, 2020

Respectfully submitted,

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s/Torrence E.S. Lewis
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