No.-_____.

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN DOE,

Petitioner,

- v -

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

RICHARD G. NOVAK
COUNSEL OF RECORD
RICHARD G. NOVAK LAW OFFICES
65 N. RAYMOND AVE., SUITE 320
PASADENA, CA 91103
TELEPHONE: (626) 578-1175
FACSIMILE: (626) 685-2562
richard@rgnlaw.com

(Additional Counsel Listed on Inside Cover)

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

DONALD JAY RITT
RITT HODGES, LLP
65 N. RAYMOND AVE., SUITE 320
PASADENA, CA 91103
TELEPHONE: (626) 685-2550
FACSIMILE: (626) 685-2562

Counsel for Petitioner John Doe

QUESTIONS PRESENTED FOR REVIEW

Introductory Statement

This petition follows a decision of the Ninth Circuit affirming the district court's dismissal of petitioner's civil complaint alleging the violation of his statutory and constitutional privacy rights by the United States Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI").

Petitioner is a private citizen who in 2007 entered a plea of guilty to federal financial crimes, served a short federal prison sentence, paid restitution, and completed a term of supervised release. The gravamen of petitioner's claims below are that DOJ and the FBI maintain on government websites numerous irrelevant and untimely press releases concerning petitioner and the concluded criminal proceeding. The press releases were issued between 2007 and 2011 but are still available to anyone conducting an internet search using petitioner's name.

Specific Questions Presented

1. Does judicial application of the "single publication rule" to all claims arising under the Privacy Act, 5 U.S.C. § 552a et seq., deprive private citizens such as petitioner of their statutory right to bring an otherwise timely action for relief under that Act, where the cognizable injury that is the basis for the action does not ripen until a significant period of time after initial publication and only once the

published material is no longer "relevant" and "timely" within the meaning of that Act.

2. Is the constitutional right to "informational privacy" implicated by the federal government's perpetual maintenance on publicly available websites of press releases concerning federal criminal proceedings concluded numerous years-ago?[1]

[1] The press releases at issue were filed under seal in the district court pursuant to that court's order. The press releases were also lodged with the Ninth Circuit in a separate sealed excerpt of record.

PARTIES TO THIS PROCEEDING AND RELATED CASES

Parties to this Proceeding

Petitioner is an individual, designated here as "John Doe" as authorized by order of the United States District Court for the Central District of California in the proceeding below.

Respondents are: 1) Merrick B. Garland, Attorney General of the United States, in his representative capacity; 2) Christopher A. Wray, Director of the Federal Bureau of Investigation, in his representative capacity; 3) the United States Department of Justice; and 4) the Federal Bureau of Investigation.

Related Cases

John Doe v. William Barr, et al., Central District of California Case Number 2:20-cv-03434-CJA-AGR. Judgment entered on October 8, 2020.

John Doe v. Merrick B. Garland, et al., Case Number 20-56063, United States Court of Appeals for the Ninth Circuit. Judgment entered on November 9, 2021; Petition for Rehearing En Banc denied on February 1, 2022.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Regulations

Rules

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner John Doe respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 9, 2021.

CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS BELOW

On November 9, 2021, the United States Court of Appeals for the Ninth Circuit issued a published decision affirming the district court's order granting the defendants' motions to dismiss. The decision below of the United State Court of Appeals for the Ninth Circuit is published at *Doe v. Garland*, 17 F.4th 491 (9th Cir. 2021). *See* Appendix "A." The district court decision from which the appeal was taken is unpublished and is cited as *Doe v. Barr*, 2020 U.S. Dist. LEXIS 194981 (C.D. Cal. Oct. 8, 2020). *See* Appendix "B". On February 2, 2022, the United States Court of Appeals for the Ninth Circuit denied petitioners' Petition for Rehearing *En Banc*. *See* Appendix "C."

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 9, 2021. The order of that Court denying the petition for rehearing en banc was entered on February 1, 2022.

This Court has jurisdiction to consider this petition pursuant to 28 U.S.C. § 1254(1). The Ninth Circuit's jurisdiction was pursuant to 28 U.S.C. § 1291. The district court's jurisdiction was pursuant to 5 U.S.C. § 552a(g)(1), 5 U.S.C. § 702, and 28 U.S.C. §§ 1331, 2201, and 2202.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The Due Process Clause of the Fifth Amendment to the United States Constitution

No person shall be [ ] deprived of life, liberty, or property, without due process of law... U.S. Const. amend. V

The Privacy Act

(g) Civil remedies.

(1) Whenever any agency—

…

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated

thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

…

(5) An action to enforce any liability created under this section may be brought in 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, without regard to the amount in controversy, within two years from the date on which the cause of action arises …

5 U.S.C. § 552a

Federal Regulation Governing Release of Information by Personnel of the Department of Justice Relating to Criminal and Civil Proceedings

…

(b) Guidelines to criminal actions.

(1) These guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.

28 C.F.R. § 50.2

Justice Manual Title 1-7.000, Confidentiality and Media Contacts Policy

1-7.001 - Purpose

The Department of Justice (DOJ) Confidentiality and Media Contacts Policy (the Policy) applies to all DOJ personnel, including employees, contractors, detailees, and task force partners.

The Policy governs the protection and release of information that DOJ personnel obtain in the course of their work, and it balances four primary interests: (1) an individual's right to a fair trial or adjudicative proceeding; (2) an individual's interest in privacy; (3) the government's ability to administer justice and promote public safety; and (4) the right of the public to have access to information about the Department of Justice.

The Policy provides internal guidance only and does not create any rights enforceable in law or otherwise. DOJ components may promulgate more specific policies, consistent with and subject to this Policy.

1-7.500 - Release of Information in Criminal, Civil, and Administrative Matters—Disclosable Information

Subject to limitations imposed by law or court rule or order, and consistent with the provisions of this Policy, DOJ personnel may make public the following information in any criminal case in which charges have been brought:

> The defendant's name, age, residence, employment, marital status, and similar background information;
>
> The substance of the charge, as contained in the complaint, indictment, information, or other public documents;
>
> The identity of the investigating or arresting agency and the length and scope of the investigation; and
>
> The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized during the arrest.
>
> A news release issued before a finding of guilt should state that the charge is merely an accusation, and the defendant is presumed innocent until proven guilty.
>
> …
>
> The public policy significance of a case may be discussed by the appropriate United States Attorney or Assistant Attorney General when doing so would further law enforcement goals.

Justice Manual Title 1-7.000 et seq.

STATEMENT OF THE CASE

Introduction to the Issues Presented in this Petition

This petition seeks review of two portions of the published decision of the United States Court of Appeals for the Ninth Circuit, each of which implicates an important question of federal law that has not previously been addressed by this Court. Each of these questions concerns the limitations on the federal government's discretion to continually publish on government websites stale information about a private citizen who was, at one time, a defendant in a federal criminal proceeding, but has long since completed all portions of the judgment imposed against him.

The first issue concerns the extent to which decisional law that has come to be known as the "single publication rule" properly triggers the running of the statute of limitations for private actions against a federal agency under the Privacy Act, 5 U.S.C. § 552a, where the initial publication is accurate and, therefore, does *not* violate that statute, but due to the passage of time, the "system of records" eventually no longer complies with the "timeliness" and "relevance" provisions of the Privacy Act.

Petitioner asserts that once a convicted federal criminal defendant has fulfilled all of the terms of his judgment, government press releases about the defendant and that prosecution begin to lose their "timeliness" and "relevance" as those terms are used in the Privacy Act, 5 U.S.C. § 552a(g)(1)(C). Only once they have become untimely or irrelevant does the

publication become injurious and the two-year statute of limitations provided for in the Privacy Act begins to run. In the absence of any judicial guidance on this issue other than the opinion below, petitioner urges this Court to grant certiorari and, after merits briefing, decide if the "single publication rule" is a proper construct for statute of limitations purposes where the violation of the Privacy Act does not accrue until long after the initial publication.

The second issue concerns what this Court first described in *NASA v. Nelson*, 562 U.S. 134 (2011), as the constitutional right to "informational privacy" which arises under the Due Process Clause of the Fifth Amendment. More specifically, the issue presented in this petition is whether individual citizens have a *constitutional* privacy interest in their historical criminal conviction information summarized years ago in government-issued press releases.

This Court has held, in *United States DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763 (1989), and Respondent DOJ has argued, in *ACLU v. United States DOJ*, 655 F.3d 1 (D.C. Cir. 2011), that private citizens do have significant privacy interests in criminal record information, including records of their convictions, but those privacy interests have been analyzed under the Freedom of Information Act and not under the Due Process Clause. In the proceedings below, DOJ and FBI argued, and the Ninth Circuit agreed, that there is no *constitutional* right to informational privacy with respect to historical information about an individual and a criminal prosecution of them, where that information is contained in press releases issued long

ago during that prosecution, even where all proceedings have concluded and the subject of the press releases has fulfilled all of the terms of the judgment imposed upon him.

The next section of this portion of this petition summarizes the federal criminal proceeding during which the government's press releases were issued, as well as the direct proceedings below.

Petitioner's Criminal Proceeding

Almost 20 years ago, petitioner was one of many subjects of a DOJ and FBI investigation of alleged mortgage fraud in real estate transactions in Southern California. In May 2007, petitioner executed a cooperation plea agreement under which he agreed to plead guilty to a five-count Information and to assist the government in its investigation and prosecution of others. Three months later, in August 2007, petitioner waived indictment and entered a plea of guilty. Other than this offense, petitioner has no other criminal history.

In September 2011, the district court sentenced petitioner to an 18-month term of imprisonment to be followed by three years of supervised release. Petitioner surrendered to the Bureau of Prisons ("BOP") on August 23, 2013 and was released on December 12, 2014. Petitioner's three-year term of supervised release expired on December 11, 2017. In December 2019, the district court entered an order finding that petitioner had paid all restitution.

The Government's Stale Press Releases Are Still Available to the Public

Despite paying his debt to society by fulfilling all of the terms of the judgment in his criminal case (serving 18 months of imprisonment, three years of supervised release and paying all restitution ordered by the district court), petitioner's statutory and constitutional rights to privacy are violated by the continuing availability today of several stale press releases issued by the Department of Justice regarding petitioner's prosecution and sentencing.

On May 25, 2007, the same date that the Information and cooperation plea agreement were filed, the United States Attorney's Office for the Central District of California ("USAO") issued a press release announcing that petitioner had agreed to plead guilty. The press release detailed the charges against petitioner, described the conduct underlying the charges, and identified petitioner's place of employment.

In October 2008, the USAO issued a press release concerning the sentencing of a defendant in a separate but related prosecution and referred to petitioner as one of the defendants who had pled guilty.

In August 2009, the USAO issued another press release after a jury convicted two individuals on related charges, and again referred to petitioner as one of the defendants who had pled guilty.

In January 2010, the USAO issued another press release after the district court entered judgment against a defendant in another matter, and again referred to petitioner as one of the defendants who was scheduled for sentencing at a later date.

In September 2011, the USAO issued a press release announcing that petitioner had been sentenced. The press release detailed the term of imprisonment imposed, the surrender date, the restitution order, the victims, petitioner's employment history, and the other charged individuals. It also reiterated the conduct underlying petitioner's offense. The FBI maintains a mirror image of that press release under its own banner on its own servers.

These press releases did more than enumerate the charges against petitioner and set forth his sentence. They included details concerning the conduct, which occurred more than 15 years ago, and included personal, private information about petitioner's work history, his positions at various companies, his city of residence, and the other charged individuals.

More than a decade after petitioner was initially charged, more than eight years after he was sentenced, and now, even after he has completed all of the terms of his judicially imposed punishment, these press releases continue to be made available to the public through DOJ and FBI websites. The press releases are accessible through simple internet searches utilizing petitioner's name and are often the first results when petitioner's name is searched on several third-party search engines.

Petitioner's Informal Efforts to Resolve this Dispute

After completion of his restitution obligation and release from imprisonment and at the tail end of his term of supervised release, petitioner expended significant effort to identify individuals within the

USAO, DOJ and the FBI who could explain when press releases describing conduct that was more than a decade old would no longer be easily available to the public, and if there are any government policies and procedures in place concerning how stale press releases are maintained in government archives, and under what conditions they are made available to the public.

None of these government agencies ever produced any policies and procedures concerning these matters, nor did they identify government officials who have the authority to develop, implement and administer such policies and procedures.

Petitioner thereafter made significant efforts to engage the USAO in discussions concerning the manner in which the government's arbitrary and capricious continued republication of stale press releases through its internet-accessible archives violate petitioner's rights under various statutes and constitutional provisions. Petitioner and the USAO were not able to resolve this dispute.

Petitioner's Effort to Seek Relief in the Context of His Criminal Proceeding

In light of the USAO's refusal to remedy the harms brought to its attention by petitioner, petitioner filed in 2017, in the district court, and within his criminal proceeding, a motion to compel DOJ to eliminate public access to electronically stored press releases regarding the underlying criminal case and the then-completed punishment.

The USAO opposed the motion, arguing that the district court lacked jurisdiction within the confines of

the criminal case to rule on petitioner's claims. The USAO specifically argued that in order to obtain the relief he was seeking, petitioner should be required to bring an independent civil action.

Without oral argument or an evidentiary hearing, the district court denied petitioner's motion, but did not specify the grounds for its decision.

Petitioner thereafter noticed an appeal of the district court's order denying his motion. After full briefing, the Ninth Circuit resolved the appeal by remanding the matter to the district court with instructions to deny the motion only on the jurisdictional grounds urged by the USAO. The Ninth Circuit did not reach the merits of petitioner's claims.

The Civil Complaint for Declaratory and Injunctive Relief

On April 13, 2020, petitioner filed a civil complaint that set forth five causes of action. Respondents Barr, DOJ, Wray, and the FBI moved to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Petitioner timely filed his opposition to the motion to dismiss and sought leave to amend his complaint. Respondents timely filed their reply in support of their motion to dismiss. Thereafter, the district court granted the motion to dismiss without leave to amend the complaint. The district court's order did not address petitioner's stated intention to amend the complaint and did not address whether the proffered amendments would overcome the alleged defects in the initial operative complaint. Petitioner's appeal to the Ninth Circuit followed.

The Decision of the Ninth Circuit Affirming the District Court's Order Dismissing Petitioner's Civil Complaint

After full briefing and oral argument, the Ninth Circuit issued a published opinion affirming the district court in all respects. With respect to the two issues presented in this petition, the Ninth Circuit held, first, that the "single publication rule" bars petitioner's cause of action under the Privacy Act because the press releases were all issued more than two years before the filing of the operative complaint. The opinion states,

> The Privacy Act imposes a two year statute of limitations, which begins to run when a cause of action arises. 5 U.S.C. § 552a(g)(5). Even where information violating the Act remains continuously available to the public after initial publication, it can give rise to only one cause of action. *Oja v. U.S. Army Corps of Eng'rs*, 440 F.3d 1122, 1130 (9th Cir. 2006). Thus, while information may be repeatedly accessed long after publication, the "single publication rule" provides that the statute of limitations runs only from the date of original dissemination. *Id*.
>
> Online information, like that at issue in this case, does pose some Privacy Act challenges not shared by its printed counterparts. However, this Court held in *Oja* that the single publication rule nevertheless applies. *Id*. at 1133 (acknowledging the unique characteristics of online media but holding

parallels to printed information necessitate finding the single publication rule applicable to both). Appellant's emphasis on the continued availability of the Press Releases is therefore misplaced; original dissemination—not present availability—is the relevant inquiry under *Oja*.

The most recent original dissemination in this case occurred in 2011—more than eight years before Appellant filed his Privacy Act claim. And it is clear from the record that Appellant had actual knowledge of the Press Releases for years. In fact, Appellant "expended significant effort" in 2017 to ascertain when the Releases would cease being available to the public and even filed a Motion to Compel the DOJ to eliminate public access to them. Yet, despite Appellant's apparent awareness of and dissatisfaction with the Releases' continued availability, he waited until April 2020 to file his Privacy Act claim.

Appellant argues, however, that no violation occurred until the Press Releases became irrelevant or untimely within the meaning of the Privacy Act. See 5 U.S.C. § 552a(g)(1)(C). In other words, Appellant admits the Releases did not violate the Privacy Act when originally posted, but contends they became irrelevant and untimely when the district court found Appellant had made all his restitution payments in December 2019. Were Appellant correct, his Privacy Act claim, filed just a few months later in April 2020, would be timely.

> Because his claim arose before 2019, we need not decide in this case whether Appellant is correct that a special statute of limitations rule applies to Privacy Act claims based on the irrelevance or untimeliness of information.2 Appellant argues here that he was not "injured" by the Press Releases until December 2019, but his argument is contradicted by his own efforts to have them removed in 2017. In fact, in his 2017 Motion to Compel, Appellant alleged the very thing he does in this case—that the DOJ's failure to remove the Releases amounted to a Privacy Act violation. Thus, while Appellant now argues there was no Privacy Act violation until December 2019, he argued the DOJ had already violated his rights under the Act in a motion filed two years earlier. Appellant's own actions show that his claim arose before 2019.
>
> We reject Appellant's argument that the press releases became irrelevant and untimely as soon as the district court declared he had satisfied his restitution obligations. Such a holding would be especially arbitrary considering, according to the order, Appellant actually made his final restitution payment in 2012, not 2019.

Doe v. Garland, 17 F.4th 941, 945-46 (9th Cir. 2021)

Second, the Ninth Circuit held that there is no constitutional right of informational privacy with respect to the materials set forth in the press releases. The opinion states,

> The "precise bounds" of the constitutional right to privacy are uncertain. *In re Crawford*,

194 F.3d 954, 958 (9th Cir. 1999). The Constitution protects certain conduct related to "marriage, procreation, contraception, family relationships, and child rearing and education." *Paul v. Davis*, 424 U.S. 693, 713, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). However, in *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977), the Supreme Court also identified the somewhat elusive interest in "avoiding disclosure of personal matters" as a privacy interest protected by the Constitution. *Id.* at 599. Here, Appellant argues Appellees have violated his right to the latter, and that the district court erred by holding there is no informational right to privacy. This is not, however, what the district court held. Rather, the district court held Appellant did not have a privacy interest in the type of information disclosed in the Press Releases. We affirm.

As explained in the district court's dismissal order, the Supreme Court held in *Davis* that government disclosure of an "official act such as an arrest" does not implicate the constitutional right to privacy. 424 U.S. at 713. Since *Davis*, circuit courts have found other similar disclosures constitutional as well. *See, e.g., Eagle v. Morgan*, 88 F.3d 620, 626-27 (8th Cir. 1996) (finding no legitimate expectation of privacy in the details of a prior guilty plea, as such matters are, by their very nature, within the public domain); *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995) ("[G]overnment

disclosures of arrest records, judicial proceedings, and information contained in police reports do not implicate the right to privacy." (citations omitted)); see also *Nunez v. Pachman*, 578 F.3d 228, 231 (3d Cir. 2009) (holding expunged criminal record disclosure constitutional).

While analogous to the examples of other non-private information above, the information disclosed in this case is easily distinguished from what this Court has found may implicate a constitutional right to privacy. For example, in *Tucson Woman's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004), this Court held a statutory provision requiring abortion providers to disclose unredacted medical records—including full medical histories—and ultrasound prints with patient identifying information violated patients' informational right to privacy. *Id.* at 552-53. The Court has also acknowledged the "indiscriminate public disclosure" of social security numbers "may implicate the constitutional right to informational privacy." *Crawford*, 194 F.3d at 958, 960 (emphasis added) (finding no constitutional violation despite SSN disclosure).

While individuals may have a constitutional privacy interest in certain, highly sensitive information, Appellant simply does not have such an interest in the information at issue in this case. Tellingly, Appellant never challenged the constitutionality of the Press Releases at the

> time they were published. And he cites no authority supporting his claim that a press release, after being available for years, can somehow transform into an unconstitutional disclosure simply because it is now "stale."
>
> The only authority Appellant does cite in support of this position relates to Freedom of Information Act ("FOIA") privacy exemptions, not a constitutional right to privacy. See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989) (considering extent to which FOIA Exemption 7(C) prevents disclosure of expansive law enforcement records about a private citizen); *Am. Civil Liberties Union v. U.S. Dep't of Justice*, 655 F.3d 1, 398 U.S. App. D.C. 1 (D.C. Cir. 2011) (considering extent to which FOIA Exemption 7(C) prevents disclosure of docket numbers, case names, and presiding courts). Such authority is not helpful to Appellant—"[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether . . . an individual's interest in privacy is protected by the Constitution." *Reporters Comm.*, 489 U.S. at 762 n.13.
>
> Appellant has failed to state a constitutional privacy right claim because the information contained in the Press Releases does not implicate his privacy rights under the Constitution.

Doe v. Garland, 17 F.4th 941, 946-47 (9th Cir. 2021)

REASONS FOR GRANTING THE PETITION

I. Application of the "Single Publication Rule" to Privacy Act Claims That Are Based Upon the "Timeliness" and "Relevance" Requirements of the Act Renders Those Requirements Unenforceable, and Deprives Private Citizens of the Opportunity to Seek Relief from Government Action or Inaction Which Violates the Act

A. The Purposes of the Privacy Act

This Court has explained that the Privacy Act of 1974 "authorizes the Government to keep records pertaining to an individual only when they are 'relevant and necessary' to an end 'required to be accomplished' by law." "Individuals are permitted to access their records and request amendments to them." *NASA v. Nelson*, 562 U.S. 134, 142, 131 S. Ct. 746, 753 (2011).

Congress expressly stated its concern that "the increasing use of computers and sophisticated information technology" by federal agencies to collect, maintain and disseminate personal information "directly affected" the "privacy of an individual." Privacy Act of 1974, § 2(a), 88 Stat. 1896. Congress was concerned that "the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems." *Id.* Congress also noted in its findings set forth in the Privacy Act that "the right to privacy is a personal and fundamental right protected

by the Constitution of the United States" and that "in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies." *Id.*

Congress further explained that the "purpose" of the Privacy Act "is to provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies" to "permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent" and by requiring federal agencies to "collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguard are provided to prevent misuse of such information." *Id.* at § 2(b).

B. Obligations of Agencies That Maintain "Systems of Records"

The Privacy Act requires agencies that maintain a "system of records" to "maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. § 552a(e)(1). Importantly, it also requires agencies to "maintain all records which are used by the agency in making any determination about any individual with such

accuracy, relevance, timeliness, and completeness as is reasonably necessary to ensure fairness to the individual …" 5 U.S.C. § 552a(e)(5).

In *Doe v. Chao*, this Court explained that the Privacy Act "authorizes a civil action when an agency 'fails to maintain [a] record concerning [an] individual with [the] accuracy, relevance, timeliness, and completeness' needed to determine fairly 'the qualifications, character, rights, or opportunities of, or benefits to the individual,' if the agency's lapse yields a 'determination . . . adverse to the individual." *Doe v. Chao*, 540 U.S. 614, 629, 124 S. Ct. 1204, 1213 (2004). This Court further explained that the Act also allows a civil action when an agency "fails to comply with [a] provision or rule promulgated thereunder, in such a way as to have an adverse effect on an individual." *Id.*

C. The Department of Justice Acknowledges That It Is an "Agency" Within the Meaning of the Act and That Its Press Releases Are a System of Records Covered by the Act

The Privacy Act applies to all executive departments. 5 U.S.C. §§552a(a)(1), 552(f)(1). The Act defines a "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(5). DOJ's Office of Privacy and Civil Liberties has published a "listing of systems of records maintained by DOJ" as that term "is defined by the Privacy Act of 1974." According to DOJ, its Office of

Public Affairs maintains a system of records which it calls "News Releases, Document and Index System." DOJ acknowledges that this system of records is not covered by any exemptions from Privacy Act requirements. DOJ System of Records, located at https://www.justice.gov/opcl/doj-systems-records#PAO, last accessed on April 24, 2022.[2]

D. The Relevance and Timeliness Requirements the Privacy Act Imposes on Agencies Maintaining Systems of Records

Agencies maintaining systems of records covered by the Privacy Act have an obligation to "maintain all records which are used by the agency in making any determination about any individual with such accuracy, *relevance, timeliness*, and completeness as is reasonably necessary to assure fairness to the individual." 5 U.S.C. § 552a(e)(5) (emphasis added).

While this Court has not had an opportunity to consider the meaning of the relevance and timeliness requirements under the Privacy Act, the Act itself ties both of these requirements to "fairness to the individual." In the context of press releases concerning criminal proceedings that are issued and then maintained by DOJ in its "system of records" the

---

[2] While not central to the decisions of the district court and the Ninth Circuit, respondents incorrectly argued to those courts that the press releases maintained by DOJ are not a "system of records" within the meaning of the Privacy Act. Petitioner assumes that respondents' counsel, the United States Attorney for the Central District of California, overlooked and was unaware of this publicly-available listing of the "systems of records" maintained by DOJ which clearly includes "news releases".

relevance and timeliness requirements and their relationship to individual fairness can be at least preliminarily understood by looking to federal regulations which control, to some extent, the timing and content of press releases, as well as DOJ's own internal guidelines for press releases.

The federal regulations which govern DOJ's release of information to the news media concerning criminal proceedings are set forth at 28 C.F.R. § 50.2. The regulations have not been amended since 1975, shortly after enactment of the Privacy Act.

It is notable that the regulations which are intended to govern DOJ's release of information to the public about criminal proceedings do not address the disposition of those press releases once a criminal proceeding has concluded. "These guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise." 28 C.F.R. § 50.2(b)(1). The regulations provide no guidance as to how DOJ is to manage its press release system of records once a proceeding resulting from a criminal investigation "has been terminated by trial or otherwise."

Current DOJ guidelines provide more clarity. DOJ's Media and Contacts Policy was updated in April 2018. It can be found in the Justice Manual at Title 1-7.000 et seq. https://www.justice.gov/jm/jm-1-7000-media-relations#1-7.500, last accessed on April 24, 2022. "The Policy governs the protection and release of information that DOJ personnel obtain in the course of their work, and it balances four primary interests: (1) an individual's right to a fair trial or

adjudicative proceeding; (2) an individual's interest in privacy; (3) the government's ability to administer justice and promote public safety; and (4) the right of the public to have access to information about the Department of Justice." Justice Manual, Title 1-7.001. "Each of the 93 United States Attorneys will exercise discretion and sound judgment, consistent with this Policy, as to matters affecting their own district…" Justice Manual, Title 1-7.310. 1-7.500

With respect to the content of press releases, the Justice Manual provides that:

> Subject to limitations imposed by law or court rule or order, and consistent with the provisions of this Policy, DOJ personnel may make public the following information in any criminal case in which charges have been brought:
>
> The defendant's name, age, residence, employment, marital status, and similar background information;
>
> The substance of the charge, as contained in the complaint, indictment, information, or other public documents;
>
> The identity of the investigating or arresting agency and the length and scope of the investigation; and
>
> The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized during the arrest.
>
> A news release issued before a finding of guilt should state that the charge is merely an

> accusation, and the defendant is presumed innocent until proven guilty.

Justice Manual, Title 1-7.500.

Nothing in DOJ's regulations or guidelines concerning the issuance of statements to the media about criminal proceedings addresses the relevance and timeliness requirements under the Privacy Act. They govern the "release" of information prior to and during a criminal proceeding, but not the manner in which DOJ is to "maintain" its records once the proceeding is completed.

The Privacy Act requires DOJ to maintain its system or records "with such accuracy, *relevance, timeliness*, and completeness as is reasonably necessary to assure fairness to the individual" but it is clear from DOJ's current regulations and guidelines, and the history of petitioner's unsuccessful efforts to discern how it does so, that it does not have any systems in place for determining when press releases issued long ago are no longer relevant and timely and thus should be removed from their system of records. It is this failure to comply with the relevance and timeliness requirements of the Privacy Act that renders the judicially-crafted "single publication rule" an improper lens through which to view the statute of limitations under the Privacy Act, since the harms which give rise to a cause of action do not arise, by definition, until sometime after the issuance of the initial press release and the subsequent termination of a criminal proceeding by trial or otherwise.

E. The Two-Year Statute of Limitations for Actions Under the Privacy Act and the Single Publication Rule

The statute of limitations for the filing of an action under the Privacy Act is set forth at 5 U.S.C. § 552a(g)(5), which provides, in pertinent part,

> [a]n action to enforce any liability created under this section may be brought in 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, without regard to the amount in controversy, within two years from the date on which the cause of action arises…

5 U.S.C. § 552a(g)(5).

It is petitioner's position that his cause of action under the Privacy Act did not arise until after the termination of all aspects of his criminal proceeding, mirroring DOJ's guidelines, because it was only at that point in time that DOJ's maintenance on publicly-available websites of the press releases about him and his proceeding was no longer consistent with the relevance and timeliness requirements of the Act. The Ninth Circuit concluded, however, that the "single publication rule" applies to DOJ's issuance *and maintenance* of press releases and therefore the two year statute of limitations began to run upon the issuance of the latest press release, in 2011.

While this Court has had little opportunity to address the proper scope of the judicially-created "single publication rule" and is urged by petitioner to do so here, that rule makes sense where the initial

publication of a false or defamatory publication is followed by repetitious publication of the same material. As this Court explained in *Keeton v. Hustler Magazine, Inc.*, "[t]his rule reduces the potential serious drain of libel cases on judicial resources. It also serves to protect defendants from harassment resulting from multiple suits. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777, 104 S. Ct. 1473, 1480 (1984).

While this Court has not addressed the propriety of applying the "single publication rule" to improper public disclosures of information through the internet by agencies covered by the Privacy Act, the Ninth Circuit squarely held in *Oja v. United States Army Corp of Eng'rs* that it does, where the *initial publication* gives rise to the cause of action.

"Application of the single publication rule to Internet publication is not inconsistent with the Privacy Act's strictures. Application of the single publication rule to Internet publication will focus Privacy Act claims against a defendant, thereby economizing judicial resources while preserving the plaintiff's ability to bring the claims. Thus, we hold that the single publication rule should be applied under the Privacy Act to general Internet publications." *Oja v. United States Army Corps of Eng'rs*, 440 F.3d 1122, 1133 (9th Cir. 2006)

In *Oja*, the Army Corps of Engineers posted on its publicly-available websites confidential medical information. *Id.* at 1125. Oja filed an action for damages under the Privacy Act more than two years after the initial posting and argued that the continuous posting of that information on the Corp's websites created a continuous violation of the Privacy

Act. *Id.* at 1126-27. The district court concluded otherwise and granted the Army Corp's motion for summary judgment. *Id*. at 1127 The Ninth Circuit affirmed. *Id.* at 1136.

The gravamen of petitioner's argument is that the judicially created "single publication rule" is inconsistent with the plain language of the Privacy Act which requires agencies to maintain records "with such accuracy, *relevance, timeliness*, and completeness as is reasonably necessary to assure fairness to the individual" where because both relevance and timeliness are factors that are not frozen in time. As with DOJ's press releases which were issued during the petitioner's criminal proceeding, it is only at some point in time *after* that proceeding has ended that the maintenance of publicly available records may no longer be relevant or timely such that public access to them is no longer "fair" to the individual.

Petitioner did not allege in his civil complaint that the *initial* publication of press releases violated the Privacy Act, as did Oja. He alleged that once the criminal proceeding had concluded, the press releases were no longer relevant or timely, and that continued hosting of those press releases on DOJ and FBI websites after that point in time triggered the relevance and timeliness protections of the Privacy Act.

The Ninth Circuit opinion below essentially renders unenforceable the relevance and timeliness requirements of the Privacy Act in this context, since many federal criminal proceedings, especially where they are followed by a term of probation, or as here a short term of imprisonment and post-release

supervision, will exceed the two year statute of limitations. The Ninth Circuit expresses concern that in the absence of the single publication rule which ties the running of the statute of limitations to the first publication, it will not be clear when the statute of limitations does start to run. However, the answer is clear. It starts to run when the cause of action arises. 5 U.S.C. § 552a(g)(5).

A cause of action alleging that the continuous posting on DOJ and FBI websites of irrelevant and untimely press releases that are, by regulation, only to be issued during the pendency of a criminal proceeding, arises only when that proceeding has concluded. While the definition of when a criminal proceeding has "concluded" may be subject to case-specific factual determinations, that does not portend multiple actions in multiple jurisdictions, the concern that led to adoption of the "single publication rule". Here, petitioner alleged that his criminal proceeding concluded only after his term of supervised release had concluded and he had fulfilled all obligations in the judgment.

As the Ninth Circuit conceded, "Appellant … contends they became irrelevant and untimely when the district court found Appellant had made all his restitution payments in December 2019. Were Appellant correct, his Privacy Act claim, filed just a few months later in April 2020, would be timely." *Doe v. Garland*, 17 F.4th 941, 945-46 (9th Cir. 2021)

F. Conclusion

The Privacy Act was enacted by Congress in the very early days of the digital era in order to protect

the privacy of individuals. It compels agencies to maintain their systems of records in a manner which balances fairness with legitimate government needs to collect, maintain, utilize, and disseminate information about our citizens. Respondents acknowledge that DOJ's press releases are a system of records subject to the Privacy Act, and its own guidelines require the Department to balance legitimate government interests in the dissemination of information about persons who are subject to criminal proceedings with their privacy rights. The Privacy Act expressly recognizes that records maintained at one point in time may, over time, lose their relevance and timeliness, and that an agency's failure to ensure that their records remain relevant and timely may give rise to a cause of action. DOJ does not have any system in place for determining when publicly available press releases concerning persons who were at one time but are no longer involved in criminal proceedings are no longer relevant or timely. The Ninth Circuit's grafting of the "single publication rule" onto the statute of limitations for bringing *any* cause of action under the Privacy Act is inconsistent with Congressional intent and with the plain language of the Act, as it renders unenforceable the relevance and timeliness requirements of the Act.

Petitioner respectfully urges this Court to grant the petition for a writ of certiorari on this narrow question, so that persons similarly situated to petitioner may pursue the remedies provided for in the Privacy Act when the Department of Justice declines to maintain its database of publicly available press releases in a manner which fully complies with the requirements of the Act.

II. This Petition Asks This Court to Provide Guidance on the "Uncertain Bounds" of the Constitutional Right to Informational Privacy

A. This Court Has Acknowledged That There Is a Constitutional Right to Informational Privacy

The Constitutional right of privacy indisputably exists and guarantees individuals the right to maintain private their personal matters. *Whalen v. Roe,* 429 U.S. 589, 598-99 (1977) (noting the "individual interest in avoiding disclosure of personal matters" falls within a constitutionally protected "zone of privacy"); *NASA v. Nelson*, 562 U.S. 134, 144, (2011).[3]

In what can only be seen as a tacit cry for help, the Ninth Circuit below began its analysis of the Constitutional right to informational privacy by complaining that the right is "elusive" and that the

---

[3] The sole and exclusive authority relied upon by the district court below in granting the respondent's Motion to Dismiss and finding no Constitutional right of privacy applied here was *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 447 L.Ed.2d. 405 (1976). In *Paul v. Davis*, this Court noted that *at that time*, the privacy rights that deserved constitutional protection were limited to "matters related to marriage, procreation, contraception, family relationships, and child rearing and education." *Paul v. Davis*, 424 U.S. at 713. However, just one year later, this Court clarified that there is, in fact, a constitutional right to informational privacy. *Whalen v. Roe, supra,* 429 U.S. at 598-600; and this Court re-affirmed the Constitutional right to informational privacy in *NASA v. Nelson*, *supra,* 562 U.S. at 144.

"precise bounds" of the right are "uncertain." *Doe v. Garland, supra,* 17 F.4th at 946. Notwithstanding its admitted difficulty in defining the right, the Ninth Circuit essentially then went on to hold, incorrectly, that the right does *not* extend *at all* to protecting the permanent digital disclosure of decades-old press releases including "official acts" such as arrests and convictions, no matter how stale those press releases may be and no matter the ongoing harm to the person whose debt to society has been fully paid. *Id. at* 947**.**

That holding wholly ignores the compelling Constitutionally based reasons for why the informational right of privacy indeed does and should protect the ongoing disclosure of personal information including irrelevant and stale information about arrests and conviction in old criminal matters.

B. Is the Constitutional Right to Informational Privacy *Less* Protective Than the Statutory Right to Privacy Under the Freedom of Information Act?

In discussing the *statutory* right to privacy under the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, of persons to control and to preclude the stale dissemination of even public personal information such as arrests and convictions, this Court has indeed placed that statutory right within the greater context of the Constitutional right of privacy. *United States DOJ v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 763 (1989).[4]

---

[4] Although this Court noted in *Reporters Committee* that the Constitutional right to keep private personal information is not the same as the statutory right under FOIA (*Id. at* fn. 13), it

It is difficult to better characterize the issues at stake in this case, and the way in which this Court has addressed those issues, than to quote directly from the Department of Justice's own briefs in the matter entitled *ACLU v. United States DOJ,* 655 F.3d 1 (D.C. Cir. 2011).

As DOJ itself argued so coherently:

> In its seminal *Reporters Committee* decision, the Supreme Court recognized that the term "privacy" as used in the FOIA encompasses a wide range of interests, and that Congress intended to afford broad protection against the release of information about individual citizens. *See id.* at 763-64. The Court rejected the "cramped notion of personal privacy" posited in that case and emphasized that "privacy encompass[es] the individual's control of information concerning his or her person." *Id.* at 763; *see also id.* at 762 (recognizing privacy interest in "avoiding disclosure of personal matters"), 769 (recognizing privacy interest in ":keeping personal facts away from the public eye"). In its most recent privacy decision, the Court again reiterated that "the concept of personal privacy . . . is not some limited or 'cramped notion' of that idea." *See Favish*, 541 U.S. at 165-66.
>
> In language that is especially applicable to this case, the Supreme Court has emphasized

---

certainly did not hold that they were wholly different rights stemming from entirely different underlying bases for those rights.

that "[p]rivacy is the claim of individuals. . . to determine for themselves when, how, and to what extent information about them is communicated to others." *Reporters Committee*, 489 U. S. at 764 n.16 (citation omitted; emphasis added). It is also "the individual's right to control dissemination of information about himself," and "the right to control the flow of information concerning the details of one's individuality." *Ibid.* (citations omitted). This key principle controls this case.

In *Reporters Committee*, the Supreme Court further stated that "in an organized society, there are few facts that are not at one time or another disclosed to another" (*id.* at 763), and that there is a privacy interest in information that is "not freely available," or "otherwise hard-to-obtain information." *See id.* at 763-64 & n.15. Thus, although much of the contents of FBI rap sheets were a matter of public record, *id.* at 753, the limited availability of an actual rap sheet to the public reflected a recognition of the privacy interests of criminals. *See id.* at 764. ***As the Court stated, "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information."*** *Id*. at 770; *see also U.S. Dep't of Defense v. FLRA*, 510 U.S. at 500 ("[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to

the public in some form").

Whatever the disposition of the criminal proceedings against them, criminal defendants have a substantial privacy interest in nondisclosure of that fact. For individuals whose cases have terminated without a guilty plea or verdict, or whose cases have been sealed, the privacy interest is at its zenith, as it rests first and foremost upon considerations of fundamental fairness – renewed attention should not be brought to charges against them that were not sustained***. But those who have pleaded guilty or been convicted also have significant privacy interests. First, they have a privacy interest, acknowledged in Reporters Committee, in nondisclosure of their criminal history, even if that history may be publicly available elsewhere.*** *See Reporters Committee*, 489 U.S. at 762, 780 (recognizing "practical obscurity" doctrine with respect to previously disclosed information); *see also Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (*Reporters Committee* "cast[s] doubt on the proposition that, simply because material has been made public at one time, it should be thought permanently in the public domain, even though it has since become 'practical[ly] obscur[e]'").

Second, there is also an undeniable privacy interest, shared by all who have been prosecuted, whether acquitted or convicted, in nondisclosure of the fact that an individual has

been the object of covert surveillance – a fact that may adversely affect their relationships with family, friends, associates, and casual acquaintances. *See U.S. Dep't of State v. Ray*, 502 U.S. 164, 176 (1991) (upholding nondisclosure of names of repatriated Haitians interviewed by State Department where "disclosure of the interviewees' identities could subject them or their families to 'embarrassment in their social and community relationships'"); compare *Fitzgibbon v. CIA*, 911 F.2d at 767 (recognizing that among the interests that must be considered in assessing FOIA exemption 7(C) is stigmatizing speculation that may flow from disclosure of even just a name from a law enforcement file); *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) ("suspects, witnesses and investigators" have privacy interests implicated by release of their names in connection with a criminal investigation). In short, regardless of how their prosecutions turned out, individuals whose cell phone data was obtained in conjunction with a criminal case have a substantial privacy interest in nondisclosure of that fact.

Furthermore, the privacy interest at issue here encompasses not only the individuals' privacy per se but also their prospects for successful reintegration into the community – regardless of the outcome of their criminal cases. Individuals who were acquitted, or whose cases were dismissed or sealed, manifestly should not be confronted anew with

the charges against them. But even individuals who were convicted or pleaded guilty have a substantial interest in rehabilitation, and Congress, the Supreme Court and this Court have all recognized the importance of this interest. *See, e.g.*, Second Chance Act of 2007, § 3(a)(2) & (a)(5), Pub. L. No. 110-199, 122 Stat. 657, 658 (2008) (stressing the need to "rebuild ties between offenders and their families,. . . to promote stable families and communities," and "to assist offenders reentering the community from incarceration to establish a self-sustaining and law-abiding life. . ."), codified at 42 U.S.C. § 17501; 1965 Prisoner Rehabilitation Act, Pub. L. No. 89-176, 79 Stat 674, 675, codified at 18 U.S.C. § 4082(0; H.R. Rep. No. 140, 110th Cong., 2d Sess. 2 (2007) (emphasizing the importance of "Me-entry," *i.e.* "the return to the community of incarcerated individuals from America's jails and prisons, and their reintegration into society"; further observing that "ex-offenders are confronted with the 'prison after imprisonment' – a web of obstacles that limit their housing options, employment prospects, access to healthcare, and potential for family reunification," thereby "substantially contribut[ing] to the historically high rate of recidivism[]"); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (recognizing "rehabilitation of prisoners" as a "valid penological objective[]" (citations omitted)); *Brawner Bldg., Inc. v. Shehyn*, 442 F.2d 847,

> 850 (D.C. Cir. 1971). Moreover, this individual interest dovetails with the public interest. Individuals in both categories therefore have a strong interest in not being further stigmatized by disclosure of the information requested here.

Consolidated Responsive and Opening Brief for Appellee/Cross-Appellant United States Department of Justice at 17-23, *ACLU v. United States DOJ*, Case No. 10-5159 (D.C. Cir. 2011, Filed Oct. 12, 2010 at Doc. No. 1271176) (emphasis added)

The very same compelling arguments about the inherent personal privacy rights enjoyed by individuals to prevent the stale disclosure of even formerly public information about criminal acts which the DOJ made so strongly to support its argument to withhold production of information in response to FOIA requests resonates just as loudly and just as strongly here in support of petitioner's argument to compel the DOJ to remove his personal information from its too-easily accessible digital files. The bases for that result do not differ depending on the mechanism for the protection of these rights – whether statutory or Constitutional. To hold otherwise would be to simply sanction a self-serving result whereby the government may withhold from public disclosure the very same information it chooses to affirmatively disclose, depending on whether the individual requesting it is making a FOIA request or engaging in a far simpler Google search.

C. Conclusion

Petitioner respectfully urges this Court to grant the petition on this important question, lest the scope of the Constitutional right to informational privacy continue to be "elusive" and "uncertain".

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari.

Date: May 2, 2022 Respectfully submitted,

RICHARD G. NOVAK
COUNSEL OF RECORD
RICHARD G. NOVAK LAW OFFICES
65 N. RAYMOND AVE., SUITE 320
PASADENA, CA 91103
TELEPHONE: (626) 578-1175
FACSIMILE: (626) 685-2562
richard@rgnlaw.com

DONALD JAY RITT
RITT HODGES, LLP
65 N. RAYMOND AVE., SUITE 320
PASADENA, CA 91103
TELEPHONE: (626) 685-2550
FACSIMILE: (626) 685-2562

Counsel for Petitioner John Doe