No. 25-686 ORIGINAL

In the Supreme Court of the United States

GARY SEBASTIAN BROWN III

Petitioner, *Pro Se*

v.

THE FEDERAL BUREAU OF INVESTIGATION

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Freedom of Information Act embodies a presumption of disclosure. In 2016, Congress enacted the FOIA Improvement Act, 5 U.S.C. § 552(a)(8)(A), which requires an agency, before withholding, to determine that disclosure of the particular information would foreseeably harm an interest protected by a FOIA exemption (or that disclosure is prohibited by law) and to release all reasonably segregable nonexempt material. The Act was intended to promote transparency and curb reflexive use of exemptions by requiring context-specific justifications.

Exemption 7(D) protects "records or information compiled for law-enforcement purposes" to the extent disclosure "could reasonably be expected to disclose the identity of a confidential source," or information furnished by such a source. Congress enacted this provision to preserve source anonymity and cooperation in criminal and analogous investigations, including protection against retaliation, harassment, or intimidation.

I. Whether, after the FOIA Improvement Act of 2016, an agency invoking Exemption 7(D) must, in addition to establishing that the exemption applies, separately demonstrate that disclosure of the particular information would foreseeably harm an interest protected by that exemption.

II. Whether Exemption 7(D) permits withholding consistent with FOIA's 2016 foreseeable-harm requirement when the agency's asserted risk is recognition of a witness's account by other victims, witnesses, or investigators—rather

than by members of the public, co-conspirators, or other adversaries involved in an investigation.

PARTIES TO THE PROCEEDING

Petitioner is Gary Sebastian Brown III, Appellant in the proceedings below.

Respondent is the Federal Bureau of Investigation, Appellee in the proceedings below.

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Gary Sebastian Brown III, proceeding *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unpublished and is available at Brown v. FBI, No. 23-5244, 2025 WL 1933347 (D.C. Cir. July 15, 2025). The memorandum opinion and order of the district court is unpublished and is available at Brown v. FBI, No. 21-cv-01639 (RBW), 2023 WL 5333210 (D.D.C. Aug. 18, 2023).

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2025. The petition for rehearing and rehearing en banc was denied on August 29, 2025, and the mandate issued on September 8, 2025. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Freedom of Information Act and The FOIA Improvement Act of 2016 are set forth in an appendix to this petition.

INTRODUCTION

Congress strengthened FOIA in 2016 by adding a substantive "foreseeable harm" requirement: an agency may withhold information only if it both (1) establishes that a statutory exemption applies and (2) reasonably foresees that disclosure of that information would harm an interest that the exemption protects, while releasing all reasonably segregable material. 5 U.S.C. § 552(a)(8)(A). This case presents a clean vehicle to clarify that requirement's operation in law-enforcement files under Exemption 7(D).

Petitioner submitted a FOIA request to the FBI seeking witness accounts describing the perpetrators of the December 2nd, 2015 mass shooting in San Bernardino California.[1] More specifically, the request was for witness descriptions of the perpetrators during the conduct of the attack. The FBI produced much of the narrative accounts but redacted the requested descriptions. The asserted risk was not public exposure or danger from adversaries. Rather, the government argued that, because witness descriptions of the perpetrators are "singular," other participants in the incident or investigation: fellow victims or witnesses and assigned investigators already familiar with their stories and associated identities, could attribute an account to a particular witness. The agency explained at oral argument that, "this was "a workplace" shooting, that "the witnesses knew each other" and "worked with one of the suspects," and that the narratives described "what they did during the attack, how they responded." Because of that pre-existing familiarity, they argued, "those accounts, if revealed, could identify" which co-worker supplied which statement, "someone could identify, oh, you know, this is Bob's account because it says during the attack, I ran into the closet with Harry and Susie. That's the sort of information that could identify a witness." (Oral Arg. Tr. 26–27.)

The court of appeals treated it as doubtful that a separate foreseeable-harm showing was required under Exemption 7(D) but accepted the FBI's rationale for withholding under an unarticulated standard of "singularity." The court found that the intrinsic "singularity" of a witness's description of a

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[1] Such descriptions may be found at:
https://www.youtube.com/watch?v=TwTYja7GXcY
https://www.youtube.com/watch?v=74CYZT1mnzU

perpetrator was sufficient reason for the FBI to anticipate that witnesses' identities would be revealed to one another through release of the disputed portions of the records. And that witness's recognition of one another's stories and associated identities could lead to retaliation or harassment, presumably from each other.

That approach conflicts with the statute Congress enacted. The FOIA Improvement Act makes the harm step distinct from exemption coverage and requires a record-specific, interest-tethered explanation tied to the actual substantive content of the record withheld, followed by a segregability analysis. Treating insider attribution as harm collapses that analysis: recognition among participants is an inherent feature of any eyewitness narrative, so "foreseeable harm" would then become intrinsic whenever narratives are distinctive, of which they invariably are. The result is a categorical veto over an entire class of records which, throughout the entirety of FOIA's history, have never before been exempt. Such an outcome wholly reverses the meaning and purpose of the FOIA Improvement Act, leading to an outcome in stark contradiction to Congress's intent.

The questions here are purely legal, outcome-determinative, and recur across law-enforcement records. FOIA litigation is concentrated in the D.C. Circuit, whose rulings shape nationwide agency practice and sister circuit methodologies; the decision below therefore carries national consequences. The record is simple: large swathes of witness narratives were released, but the exact information requested: witness descriptions of the perpetrators during the attack, was precisely what was withheld. The government's rationale turned on "singularity" leading to attribution among non-adversarial insiders

rather than risk from the public, adversarial participants in the investigation, or adversaries generally.

After nearly a decade of percolation in the lower courts, this petition provides an excellent opportunity and clean vehicle within which this court may clarify for the first time the FOIA Improvement Act's meaning and purpose. It asks the Court to confirm that the FOIA Improvement Act's foreseeability requirement applies with full force to Exemption 7(D), and that insider recognition, without a record-specific showing of harm to the confidentiality interest 7(D) protects, cannot justify withholding where segregable information can be disclosed.

STATEMENT OF THE CASE

A. Legal background

1. The Freedom of Information Act requires federal agencies to "make [agency] records promptly available to any person" upon request, subject to carefully defined exemptions. 5 U.S.C. § 552(a)(3)(A). In litigation, "the burden is on the agency to sustain its action," including any decision to withhold information in whole or in part. Id. § 552(a)(4)(B). FOIA thus establishes a presumption of disclosure, placing on the government the obligation to justify any departure from that presumption.

2. In 2016, Congress amended FOIA through the FOIA Improvement Act, adding a substantive limitation on withholding. Under 5 U.S.C. § 552(a)(8)(A), an agency "shall withhold information" only if it (I) "reasonably foresees

that disclosure would harm an interest protected by an exemption described in subsection (b)," or (II) determines that "disclosure is prohibited by law." Id. § 552(a)(8)(A)(i). The same provision directs agencies to "consider whether partial disclosure of information is possible" and to "take reasonable steps necessary to segregate and release nonexempt information." Id. § 552(a)(8)(A)(ii). This requirement operates in addition to the traditional task of establishing that a claimed exemption applies: agencies must both bring the information within a statutory exemption and articulate how disclosure of that information would foreseeably harm the interest that exemption protects (unless a separate statute independently bars disclosure).

3. Independently of the 2016 amendment, FOIA has long required agencies to release nonexempt material contained within records that also include exempt information. Section 552(b) provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). Courts reviewing FOIA withholdings must therefore ensure that agencies have carried out this segregability obligation and have not withheld nonexempt portions merely because they appear in records that also contain exempt material.

4. Exemption 7(D) applies to "records or information compiled for law enforcement purposes" to the extent that disclosure "could

reasonably be expected to disclose the identity of a confidential source," including specified governmental entities and private institutions, and, in the case of records compiled in a criminal or lawful national-security intelligence investigation, "information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D). The exemption is designed to protect the government's ability to obtain information in sensitive investigations by safeguarding the anonymity of sources who provide information with an express or implied assurance of confidentiality and by shielding the information they furnish when disclosure would effectively identify them.

The core harms that Exemption 7(D) addresses are the risks that disclosure will subject confidential sources to retaliation, intimidation, harassment, or other adverse consequences because of their cooperation with law enforcement, and the corresponding chilling effect on future sources who might otherwise come forward. By protecting confidential sources and the identifiable information they provide from public exposure to such risks, Exemption 7(D) seeks to preserve the flow of information necessary to criminal and analogous investigations, while operating within FOIA's broader structure of a presumption of disclosure and mandatory release of reasonably segregable, nonexempt material.

B. Factual and procedural background

1. On November 7, 2019, Petitioner submitted a narrow FOIA request to the FBI seeking,

> "any witness accounts, narratives, or statements provided by witnesses from an incident which occurred on December 2nd, 2015 at the Inland Regional Center in San Bernardino, CA. This was a high profile massacre involving some 14 dead and 22 injured, allegedly committed by Tashfeen Malik and Syed Farook. Specifically, I am seeking accounts, narratives, and statements from witnesses who were located in the conference room where the attack mainly took place. Of particular importance to this requester are any descriptions of the perpetrators such as, the number of attackers, their behavior, apparel, equipment, and any other details regarding their appearance."

2. On November 25, 2019, the FBI sent Petitioner 19 pages that had previously been released and said it would "conduct a further search for responsive records"; on December 12, 2019, Petitioner asked for an "additional search"; the Bureau acknowledged receipt on January 3, 2020. On February 26, 2020, the FBI denied the request in full under Exemptions 7(A) and 7(E) because of a then-pending enforcement proceeding; after Petitioner followed up on July 15, 2020, the FBI resent the same denial on July 29, 2020. Petitioner filed an administrative appeal on September 17, 2020, and the Department of Justice's Office of Information Policy affirmed on December 1, 2020.

3. Petitioner then filed suit in the U.S. District Court for the District of Columbia on June 16, 2021. When, in May 2022, the FBI determined the referenced enforcement proceeding was no longer pending, it reopened processing and on July 29, 2022 produced 406 pages with five pages withheld in full, invoking, among other provisions, Exemption 7(D) for witness-provided information.

4. From the outset of merits briefing, the Bureau's declarant (Section Chief Michael Seidel) explained that some witness information was "specific, detailed," and "singular in nature," available to "only a few individuals," such that disclosure "could be used to identify confidential sources," especially by "those familiar with the events described." He further asserted that release would "forever eliminate that source as a means of obtaining information," chill other sources, and risk retaliation or backlash against witnesses and their families.

5. In moving for summary judgment, the FBI pressed Exemption 7(D) on an implied-confidentiality theory, arguing that the violent, terrorism-related character of the crime, the witnesses' proximity, and the "singular" nature of certain accounts permitted withholding both identifying details and the underlying narrative information itself. The district court granted summary judgment on August 18, 2023. Against that, Plaintiff argued in district court that 7(D) was applied overbroadly and

without the statute's required causal showing: witness descriptions of the perpetrators are not "identifying information" about the witnesses and, as a matter of segregability, those non-identifying perpetrator descriptions must be released even if other portions are redacted. He asked the court to conduct in camera review, emphasized that FOIA's foreseeable-harm requirement demands more than labels or generalized invocations, and showed that the FBI had already disclosed granular, situational details far more likely to identify witnesses than generic descriptions of the shooters (undercutting the Bureau's claim that releasing perpetrator descriptions would reveal sources).

Plaintiff further explained that the FBI's privacy-dignity rationale and "singularity" theory conflated names/identifiers with narrative content about suspects; the foreseeable-harm showing must articulate a concrete, non-speculative link between disclosure of a particular description and a risk of identifying a particular witness, which the record did not supply. He also pointed to instances where entire paragraphs were withheld as supposedly "inextricably intertwined" with identifiers, even when the interview text made plain the exchange concerned pre-incident observations such as those of a vehicle, and the actual attack itself, arguing that such blanket redactions lacked a lawful nexus to 7(D) and violated FOIA's segregability command.

6. In its August 18, 2023 memorandum opinion, the district court adopted the Bureau's implied-confidentiality theory under Exemption 7(D), crediting the Seidel declaration's account of the "highly violent nature of the mass shooting" and the witnesses' proximity to the suspects to conclude that "anyone cooperating with a law enforcement investigation concerning this terrorist act would want and expect confidentiality," and thus that the FBI properly withheld the names, identifying personal data, and investigative information provided by sources who received implied assurances of confidentiality. (App. B, [48a])

   The court then made the pivotal move that drives the dispute here: because it found "there is no question—nor is there any dispute from the plaintiff—that the FBI's sources were confidential, and that the information was compiled during a criminal investigation," it held that "the content at issue, namely, the descriptions of the shooters, is irrelevant to the analysis of the propriety of the withholdings under Exemption 7(D)." (App. B, [51a])

   That framing short-circuited any inquiry into whether non-identifying portions of witness narratives (e.g., descriptive details of the perpetrators) could be disclosed without revealing source identities, effectively collapsing the 7(D) analysis into the implied-confidentiality finding itself. Against that backdrop, the court did not conduct a distinct foreseeable-harm

assessment under the FOIA Improvement Act with respect to the 7(D) withholdings, even though § 552(a)(8)(A)(i) now requires agencies to "reasonably foresee" harm to an interest protected by the exemption.

Brown moved to alter or amend on September 15, 2023, squarely pressing the omission: he argued the court was required, after the 2016 amendments, to perform a separate foreseeable-harm analysis for Exemption 7(D) and to address segregability of non-identifying narrative content. The government's opposition did not dispute that § 552(a)(8)(A)(i) applies; instead, it contended that, "when invoking [Exemption 7(D)], an agency need not establish much more than the fact of disclosure to establish foreseeable harm," a position Brown characterized as incompatible with the statute's requirement of a record-specific harm rationale beyond mere applicability of the exemption.

Brown noticed his appeal on October 19, 2023, and the district court held a post-judgment hearing on October 23, 2023, after which it denied the motion. (App. C, [59a])During those post-judgment proceedings, the court indicated that, if a separate foreseeable-harm analysis were required, it would not undertake it on a Rule 59(e) motion and that correction, if any, would come from the court of appeals, remarking, "if I was wrong, I guess the Court of Appeals will tell me."

Finally, although the opinion recited that the Bureau satisfied "segregability" by attesting it reviewed and released all non-

exempt material, the ruling did not grapple with Brown's specific contention that descriptions of the perpetrators could be segregated from any source-identifying details because, under the court's "content is irrelevant" view of 7(D), such narrative substance was treated as categorically beyond reach once implied confidentiality was found.

7. In the court of appeals, the FBI filed a motion for summary affirmance on March 5, 2024. Petitioner opposed on March 16, 2024, pressing (among other issues) that Exemption 7(D) does not trump FOIA's separate foreseeable-harm requirement and that the Bureau's "singularity" rationale was too generalized to justify categorical redactions of witness descriptions. The government replied on April 25, 2024. On June 6, 2024, the motions panel denied summary affirmance and appointed amicus curiae to address the proper application of the FOIA Improvement Act's foreseeable-harm standard.

8. On the merits, Petitioner and amicus argued that after the 2016 Act, agencies invoking 7(D) must do more than establish source confidentiality: they must "specifically and thoughtfully" articulate *how* disclosure of the particular withheld information would foreseeably harm interests protected by Exemption 7(D), and they must segregate non-harmful, non-identifying portions, such as generic shooter

descriptors, from genuinely identifying details.

9. The FBI countered that Seidel's declaration satisfied the two-step *Leopold/Reporters Committee*[2] framework by tying harms, such as loss of source cooperation and risk of retaliation, to "singular," circumstance-specific witness information (e.g., precise location or actions during the attack) that could be attributed to particular individuals. Petitioner responded that this showing still failed to explain why witness descriptions of the perpetrators' appearance could not be segregated and released and emphasized that long, paragraph-length blocks had been withheld wholesale.

10. The court heard argument on January 14, 2025, and on July 15, 2025, it affirmed. In doing so, the panel agreed that witnesses provided information "under implied assurances of confidentiality" in light of the nature of the ISIS-inspired mass-casualty attack and the witnesses' proximity to the events, and it credited the Bureau's

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[2] See *Leopold v. U.S. Dep't of Justice*, 94 F.4th 33, 37 (D.C. Cir. 2024) (holding that whether a record falls within a FOIA exemption and whether withholding is permissible under the FOIA Improvement Act's foreseeable-harm standard are "distinct, consecutive inquiries" and requiring an "independent and meaningful" showing of harm); *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369–72 (D.C. Cir. 2021) (rejecting "boilerplate and generic" assertions and requiring a "focused and concrete demonstration" of how disclosure of the specific information at issue would foreseeably harm an exemption-protected interest).

"singular information" rationale as a basis to withhold portions of witness narratives under 7(D). The panel further concluded that the FBI had "adequately explained" foreseeable harm from disclosing witnesses' descriptions of the shooters, both the risk of retaliation/backlash and the harm to the FBI's ability to cultivate and rely on confidential sources, rejecting the request to remand for a fresh, express foreseeable-harm analysis by the district court. (App. A, [1a])

11. On August 1, 2025, Petitioner filed a Petition for Panel Rehearing and Rehearing En Banc. In that filing, Petitioner argued that, as to Exemption 7(D), the panel misapprehended both the record and FOIA's foreseeable-harm inquiry. Not by failing to apply it, but by treating non-harm as if it were harm. Petitioner explained that he had repeatedly disclaimed any interest in witnesses' names or personal identifiers and sought only narrative descriptions of the shooters, so the panel's contrary suggestion inflated the risk of harm by recasting a narrowly tailored request for perpetrator descriptions as if it targeted identifying details about the witnesses themselves. Petitioner further contended that, by crediting the FBI's theory that any "singular" piece of narrative information could expose a source to retaliation or backlash, the panel effectively accepted speculative "could happen" scenarios and generalized fears of reprisals as sufficient, even though FOIA, as construed in cases

such as Reporters Committee, requires a concrete account of how disclosure of the specific, non-identifying descriptions at issue would result in reasonably foreseeable harm, not merely how it might lead to some hypothetical risk. Building on the record below, Petitioner argued that the FBI's claims about uniqueness, potential identification, and possible reprisals remained untethered to any particular description of the shooters and therefore did not amount to a legally cognizable "harm" under 5 U.S.C. § 552(a)(8)(A)(i), and that allowing such an expansive "singularity" theory to stand would swallow FOIA's segregability requirement by permitting agencies to withhold even purely descriptive third-party information solely because it appears in a confidential witness narrative.

12. On August 29, 2025, the court denied panel rehearing and, separately the same day, denied rehearing en banc; the mandate issued on September 8, 2025. (App. D, [60a-61a])

Reasons for Granting the Petition

This court should correct the decision below because it undercuts Congress's 2016 reforms and, if left standing, will effectively nullify the FOIA Improvement Act for Exemption 7(D). FOIA now requires agencies not only to bring withheld material within an exemption, but also to "reasonably foresee" harm to the specific interest that exemption protects and to release all reasonably segregable nonexempt

information. 5 U.S.C. § 552(a)(8)(A). The D.C. Circuit nonetheless held that, for "information furnished by a confidential source" under Exemption 7(D), it is "doubtful" that the FBI needed to articulate any harm beyond Congress's decision to create the exemption, and it accepted a sweeping "singularity" theory under which any distinctive narrative detail in a witness's account is inherently harmful and may be categorically withheld even where, as here, the only asserted risk is that other victims, witnesses, or investigators might recognize which colleague's account is which, and where the underlying FOIA request seeks only witness's descriptions of the perpetrators, which have no rational link to identification of the witnesses. (App. A, [12a]) That approach collapses the foreseeable-harm inquiry into the mere applicability of 7(D), disregards FOIA's segregability command, and transforms a targeted protection for confidential sources into a broad secrecy privilege over eyewitness narratives in law-enforcement files. Because FOIA litigation is concentrated in the D.C. Circuit, its "doubtful" view of the FOIA Improvement Act's reach, and its endorsement of insider-recognition as a sufficient harm under Exemption 7(D), will shape nationwide agency practice and substantially weaken a central transparency reform. This case, with a clean record and a stark mismatch between the harms Congress contemplated and the harms the court of appeals accepted, is an ideal vehicle for the Court to clarify that the FOIA Improvement Act's foreseeable-harm requirement applies with full force to Exemption 7(D) and cannot be satisfied by generic or non-cognizable theories of harm.

A. The decision below is wrong

The court of appeals' ruling is irreconcilable with the FOIA Improvement Act's text and with any sensible understanding of Exemption 7(D). FOIA now requires that, in addition to establishing that an exemption applies, an agency must "reasonably foresee that disclosure would harm an interest protected by" that exemption and must articulate both "the nature of the harm from release and the link between the specified harm and specific information contained in the material withheld." 5 U.S.C. § 552(a)(8)(A). The panel recited that standard but then declared that, for "information furnished by a confidential source" under Exemption 7(D), it was "doubtful that the FBI needed to articulate any harm beyond the harm already identified in Congress's decision to create a special exemption for 'information furnished by a confidential source." (App. A, [12a]) In practice, that treats the very existence of Exemption 7(D)'s second clause as sufficient to satisfy the separate foreseeable-harm requirement Congress added in 2016.

The nature of the "harm" the panel accepted confirms the problem. The FBI did not contend that releasing the disputed material would enable members of the public, hostile outsiders, or any adversarial participant in the investigation to identify and retaliate against witnesses. Instead, relying on the Seidel declaration, the court emphasized that "much of the information the witnesses provided is singular in nature and could be attributed to them 'by those familiar with the events described,'" and concluded that disclosure "could subject these individuals, as well as their families, to retaliation or backlash." (App. A, [10a]) The only audience "familiar with the events described" here consists of co-workers, fellow victims, and investigators, individuals who already know who was present, who spoke to the FBI,

and, in many cases, who did what during the attack. The opinion identifies no way in which releasing descriptions of the perpetrators would newly expose any witness to identification by the public, co-conspirators, gangs, terrorist networks, or other adversaries.

In short, the decision below reads the FOIA Improvement Act out of Exemption 7(D) precisely where its discipline is most needed. By suggesting it is "doubtful" that any separate harm showing is required once information is "furnished by a confidential source," and by treating insider recognition among non-adversaries as if it were equivalent to retaliation by hostile outsiders, the court transforms a targeted protection for confidential sources into a broad secrecy privilege over eyewitness narratives. And by accepting, without rational explanation, that generic descriptions of perpetrators' appearance can be treated as uniquely identifying and uniquely dangerous, while more revealing contextual details are released, the decision illustrates exactly why Congress insisted that agencies demonstrate a real, record-specific, and cognizable harm before withholding.

1. The FOIA Improvement Act of 2016 serves an important democratic interest

FOIA has always been a transparency statute designed to let citizens know "what their Government is up to," not a secrecy default that agencies relax at their discretion. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). From its inception, FOIA embodied a "strong presumption in favor of disclosure," with "disclosure, not

secrecy," as its "dominant objective." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). But by the time Congress enacted the FOIA Improvement Act of 2016, it had become clear that this presumption was being steadily eroded in practice. Agencies were invoking exemptions reflexively, particularly discretionary ones, and offering only generic, across-the-board assertions of harm. Congress responded by codifying a substantive "foreseeable harm" requirement to curb excessive withholding and restore FOIA's democratic function.

The FOIA Improvement Act did not merely tweak procedures; it added a cross-cutting constraint on every exemption. Under 5 U.S.C. § 552(a)(8)(A)(i), an agency must now do two distinct things before withholding: (1) show that the information falls within a statutory exemption, and *also* (2) "reasonably foresee that disclosure would harm an interest protected by" that exemption, or else point to a separate legal bar to disclosure. This change was expressly conceived as a "countermeasure against excessive withholding," compelling agencies to release information unless they can "articulate both the nature of the harm [from release] and the link between the specified harm and specific information contained in the material withheld." *Reps. Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369 (D.C. Cir. 2021) (internal quotation marks omitted); see also *Human Rts. Def. Ctr. v. U.S. Park Police*, 23-5236, slip op. at 10–11 (D.C. Cir. Jan. 24, 2025) (reaffirming that the FIA requires a "particularized inquiry into what sort of foreseeable harm would result from the material's release").

Congress's aim was not abstract. The

legislative history reflects concern that agencies were treating exemptions, especially those protecting deliberations, law-enforcement interests, or third-party information, as virtually self-executing, invoking them whenever they *could* withhold rather than when they *needed* to. The Senate Report quoted by the D.C. Circuit underscores that "speculative or abstract fears" are no longer enough; agencies must identify a concrete harm that will "likely result" from disclosure of the specific information at issue. S. Rep. No. 114-4, at 3, 8 (2015). In practical terms, the Act reorients FOIA back toward its democratic core: disclosure is the rule, and exemptions are narrow, *justified* departures from that rule. Justified not only by satisfying exemption text, but by a real, articulable risk to the interest Congress actually meant that exemption to protect.

That structure matters acutely in the law-enforcement context. FOIA is often the only tool by which the public can scrutinize how agencies investigate major incidents, allocate responsibility, and communicate with the public. Congress understood that transparency about investigative files promotes accountability, helps the public evaluate whether law-enforcement institutions are functioning properly, and guards against the very secrecy that can erode trust in the aftermath of high-profile events. By imposing a foreseeable-harm requirement that applies *even when an exemption's literal terms are met*, the FOIA Improvement Act ensures that agencies cannot convert law-enforcement exemptions into permanent black boxes. Instead, they must distinguish between material whose disclosure would genuinely threaten protected interests and non-identifying, segregable information, such as

neutral descriptions of perpetrators, that can safely be released without undermining those interests.

The decision below undermines that congressional design. Rather than treating the FOIA Improvement Act as a meaningful, second-step safeguard, the D.C. Circuit characterized its application to Exemption 7(D) as "doubtful," and accepted a theory of harm so attenuated that virtually any narrative detail furnished by a confidential source becomes categorically withholdable. In doing so, it blunts the very reform Congress enacted to restore FOIA's presumption of openness and preserve the statute's role as a tool of democratic oversight. This case therefore presents not just a technical dispute about one exemption, but a concrete test of whether the FOIA Improvement Act's foreseeable-harm requirement will operate as Congress intended, or be read out of the statute in the very context where it is most needed.

2. **The facts of this case aptly demonstrate why Exemption 7(D) necessarily falls within the ambit of the FIA**

Exemption 7(D) was never written as a freestanding secrecy mandate. It is one of the nine discretionary exemptions listed in § 552(b), and the FOIA Improvement Act makes clear that *all* such discretionary exemptions are now constrained by the same threshold rule: an agency "may withhold information under this section only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or disclosure is prohibited by

law. 5 U.S.C. § 552(a)(8)(A)(i). Nothing in the text of the FOIA Improvement Act carves out Exemption 7(D), or its "information furnished by a confidential source" clause, from that requirement. Nor does Exemption 7(D) itself purport to override the later-enacted "only if" limitation. The natural reading is that 7(D) continues to define *what* category of information may be protected (identity of a confidential source and information furnished by such a source), while the FOIA Improvement Act now governs *when* that otherwise-eligible information may in fact be withheld: only where the agency can articulate a concrete, non-speculative harm to the interests 7(D) was meant to protect, and only as to the specific information withheld.

The decision below nonetheless treats the second clause of Exemption 7(D) as effectively exempt from the FOIA Improvement Act's discipline. After correctly reciting that agencies must "articulate both the nature of the harm from release and the link between the specified harm and specific information contained in the material withheld," the panel turns to Exemption 7(D) and declares that it is "difficult to imagine a criminal investigation" in which the interest underlying 7(D) "would not be applicable," because 7(D) "categorically exempts from disclosure 'information furnished by a confidential source'" in criminal investigations. (App. A, [11a]) On that basis, the court concludes:

"Accordingly, we are doubtful that the FBI needed to articulate any harm beyond the harm already identified in Congress's decision to create a special exemption for 'information furnished by a confidential source.'" (App. A, [12a]) That reasoning effectively reads the FOIA Improvement Act out of the statute for Exemption 7(D): the categorical nature of the *category* is treated as a substitute for the post-2016 requirement of a record-specific harm analysis, even though Congress used broad "only if the agency reasonably foresees" language with no exception for any particular exemption or clause.

This case cleanly demonstrates why Exemption 7(D) cannot be placed outside the FOIA Improvement Act in that way. At oral argument, government counsel did not claim that release of Petitioner's requested material would expose witnesses to public retaliation, danger from perpetrators or co-conspirators, or any other adversarial threat. Instead, they offered a very narrow theory of harm tied to the workplace setting of the San Bernardino shooting: because the incident occurred at a workplace where "the witnesses knew each other" and "worked with one of the suspects," the FBI feared that if witness accounts were disclosed, insiders might recognize each other's narratives from contextual detail. Counsel explained that witnesses described "what they did during the attack, how

they responded," and gave the example that an account might say "I ran into the closet with Harry and Susie," allowing co-workers to say "this is Bob's account." (Oral Arg. Tr. 26–27.)

That is the entire articulated harm: not identification of confidential sources by the public or by adversaries, but mutual recognition among witnesses and investigators who already know each other, already know who cooperated, and already know the rough contents of each other's stories.

Precisely because the government's own explanation is so incredulous, it highlights the necessity of applying the FOIA Improvement Act's foreseeable-harm requirement to Exemption 7(D). The protected interest recognized in 7(D) is preservation of confidentiality to avoid retaliation, harassment, intimidation, and chilling of future cooperation, not the elimination of any possibility that insiders might be able to tell which familiar co-worker gave which familiar account. The "harm" the FBI posits in this record is at most a form of attribution: enabling people who already know that "Bob," "Harry," and "Susie" are witnesses to match particular pages of the file to those known individuals. It is not a new disclosure of the identity of a confidential source to people who lack that knowledge; it is not an exposure of confidential sources to perpetrators, co-conspirators, or the public; and the FBI has never offered any

reason to think that co-workers or investigating agents would retaliate against one another or that future witnesses would be deterred from cooperating because other victims might recognize their stories. On the government's own description of the scenario, the identities of the witnesses and the fact of their cooperation are already fully known within the workplace and investigative community. The challenged redactions add only the question "whose account is this?" in an official file. Not, "who cooperated?" or "who talked to the FBI?" Under the FOIA Improvement Act, that sort of incremental, insider-only attribution is too attenuated from any cognizable 7(D) interest to qualify as "reasonably foreseeable" harm.

The nature of the withheld material puts the mismatch between Exemption 7(D)'s purpose and the FBI's theory of harm in even starker relief. Petitioner sought only witness descriptions of the perpetrators' appearance, simple witness descriptions of the shooters, not gory details, emotional narratives, or intimate personal histories. The Bureau nonetheless redacted exactly those perpetrator-description sentences while leaving in place far more situationally specific information about where particular employees were, how they moved through the building, and what they did at particular moments before

and after the attack. As Petitioner told the panel, those remaining details "are far more likely" to enable an insider to recognize whose account is whose than a bare description of the shooters' appearances.

Yet the FBI treated the perpetrators' descriptions as the uniquely dangerous material and the panel accepted that premise without any explanation of how describing a shooter's clothing, build, or facial hair could itself foreseeably disclose the identity of a confidential source to anyone who does not already know it, or give rise to the type of retaliation or chilling that 7(D) was enacted to prevent.

If the FOIA Improvement Act does not apply to this kind of Exemption 7(D) claim or if, as the decision below suggests, it is automatically satisfied whenever the second clause of 7(D) is invoked, then agencies may always withhold non-identifying eyewitness accounts on the theory that some insider could, in some sense, "recognize" them. That would re-create, under a different label, exactly the categorical regime Congress thought it had displaced in 2016: so long as information was "furnished by a confidential source," it would be deemed inherently harmful and presumptively secret. By contrast, giving full effect to § 552(a)(8)(A) in the Exemption 7(D) context would not deprive 7(D) of force. It would simply require what the statute already

demands: that an agency withholding information furnished by a confidential source explain how disclosure of the particular material (as distinct from the mere fact that it came from such a source) would foreseeably harm the concrete interests 7(D) protects. This case, with its unusually clear record about what the FBI fears ("this is Bob's account") and what Petitioner seeks (necessarily non-identifying perpetrator descriptions), is an ideal vehicle for resolving that question and for confirming that Exemption 7(D), like every other discretionary exemption, operates within, not outside, the FOIA Improvement Act's "foreseeable harm" framework.

3. **The court of appeals reasons for upholding the FBI's decision to withhold do not withstand scrutiny**

The decision below recites the FOIA Improvement Act's standard but then effectively nullifies it in the Exemption 7(D) context. The panel correctly acknowledged that, after the 2016 amendments, an agency invoking a FOIA exemption "must 'articulate both the nature of the harm from release and the link between the specified harm and specific information contained in the material withheld.'" (App. A, [7a])

Yet when it turned to Exemption 7(D), the court treated that requirement as satisfied by generalized, categorical assertions that any "singular" narrative

detail furnished by a confidential source is inherently dangerous to disclose. (App. A, [12a]) On that basis, it upheld redactions of witness descriptions of the shooters even though the FBI never supplied a record-specific explanation of how disclosure of those descriptions would foreseeably harm the interests that Exemption 7(D) protects.

Petitioner did not contest that the witnesses here were "confidential sources" within the meaning of Exemption 7(D). The panel found the exemption "met because witnesses provided information to the FBI 'under implied assurances of confidentiality,'" relying on "the nature of the crime — a gruesome, ISIS-inspired terrorist attack — and the witnesses' 'proximity . . . to the investigative subjects and events they described.'" (App. A, [9a])

Petitioner accepts that premise. The controversy arises at the next step: having established that the witnesses were confidential sources, what more, if anything, must the FBI show to withhold specific portions of their statements under FOIA's post-2016 framework? The panel's answer, little or nothing, cannot be reconciled with the text of § 552(a)(8)(A).

The opinion's core 7(D) holding rests on two propositions. First, that "much of the information the witnesses provided is singular in nature and could be attributed to them 'by those familiar with the events described,'" such that disclosure "could subject these individuals, as well as their families, to retaliation or backlash." (App. A, [10a])

Second, that the FBI faces a "twofold" harm from disclosure: (1) retaliation against these witnesses and their families, and (2) diminished cooperation in future investigations, because witnesses "are more likely to 'hedge or withhold information' if they believe 'their cooperation with the FBI will later be made public.'" (App. A, [11a])

Those are textbook examples of the abstract, category-level concerns that Congress sought to discipline with the FOIA Improvement Act. They are not tied to any concrete account of how releasing the narrow class of information at issue, descriptions of the shooters' appearance and behavior, would enable an adversarial actor to identify, retaliate against, or meaningfully chill any particular confidential source.

The FBI's theory, as endorsed by the panel, focuses entirely on insider recognition: that co-workers, fellow victims, or investigators "familiar with the events described" might infer, from situational detail, which colleague's account they are reading.

But those insiders already know both the identities of the witnesses and the broad outlines of their stories; the fact of cooperation is not being revealed to them for the first time by FOIA. Treating such recognition as "disclosure of the identity of a confidential source" within the meaning of Exemption 7(D), much less as "foreseeable harm" for purposes of § 552(a)(8)(A), stretches both concepts beyond their statutory compass. Congress enacted 7(D) to

prevent public exposure and adversarial targeting of sources, retaliation, intimidation, harassment, and the chilling of future cooperation, not to prevent other participants in the same workplace from recognizing familiar accounts of a shared trauma. If recognition by those who already know each other's identities counts as disclosure and harm, then the foreseeable-harm step collapses into the mere fact that a confidential source has spoken at all.

That overbreadth is especially stark in this case because the withheld material is several steps removed from anything that could plausibly identify a witness. Petitioner repeatedly disclaimed any interest in witnesses' names, biographical details, or obviously identifying circumstances, and sought only "descriptions of the perpetrators such as, the number of attackers, their behavior, apparel, equipment, and any other details regarding their appearance."

The panel nevertheless upheld the Bureau's wholesale redaction of those perpetrator-description sentences on the theory that "many of the witness accounts contain 'singular' descriptions of the shooters that could be attributed to specific witnesses," while crediting the Bureau's claim that it had left in "certain non-singular descriptions of the shooters" as proof that its redactions stopped at the line of necessity. (App. A, [11a])

What the court never did was ask the question FOIA requires: what is the rational, record-specific link between a

particular description of the perpetrators ("three shooters," "black clothing," "body armor," and the like) and a reasonably foreseeable risk of retaliation or harassment by an adversary who does not already know the witness's identity? Generalized fears that some unsympathetic observer somewhere "could" reverse-engineer a source's identity from the mere fact that they saw a well-publicized attack from a particular vantage point are precisely the sort of speculative harms that *Reporters Committee* held insufficient; an agency must "articulate both the nature of the harm from release and the link between the specified harm and specific information contained in the material withheld." The panel recited that standard but declined to enforce it. (App. A, [7a])

The opinion's treatment of "singular" information underscores the problem. The panel repeatedly distinguishes between "singular" and "non-singular" descriptions of the shooters, using that undefined label as the fulcrum for its approval of the redactions. Yet it never articulates any legal or factual standard for what qualifies as "singular," how singularity is to be assessed, or why that attribute alone suffices to transform otherwise non-identifying third-party information about suspects into wholly withholdable "information furnished by a confidential source." As a result, "singular" becomes an *ipse dixit*, whatever the FBI chose to redact is assumed to be singular and therefore inherently harmful, and whatever it happened to leave

unredacted is cited as evidence of its restraint. Petitioner, for his part, pointed out that long blocks of text about the attack and the perpetrators had been withheld while nearby, far more situationally specific material remained; the opinion disposes of those concerns by faulting him for having "offered no material reason to doubt the FBI," effectively shifting the statutory burden of justification back onto the requester. (App. A, [11a])

Nor is this a case in which the requester "offered no material reason to doubt" the Bureau's assertions. At every stage of the litigation, Brown squarely attacked the rationality of the FBI's claimed harms and the causal link between the particular information withheld (witness descriptions of the shooters) and any cognizable risk under Exemption 7(D). In the district court, he argued that the Bureau's "singular"-event theory was speculative and internally incoherent, pointing out that members of the public purportedly being able to identify witnesses from generic perpetrator descriptions, is a concern that is "irrational" and unsupported by evidence, and if instead the FBI meant that other witnesses or participants might recognize each other, those insiders would already need "intimate knowledge of what that person had observed" and so would already know who the witnesses were, defeating any claim of new harm from disclosure. He also showed, with concrete record citations, that the Bureau had released extensive, highly situational

narrative detail, arrival times, seating, movements through the building, that is far more likely to permit insider recognition than the bare perpetrator descriptions he requested, and argued that this empirical mismatch undercut the agency's justificatory story.

On appeal, his opening brief reiterated that under the FBI's own definition of "identifying data," the surrounding context makes it "difficult to believe" that entire blocks of narrative are "inextricably intertwined" with such data and emphasized that there is "no rational or cognizable causal nexus" between generic descriptions of clothing and appearance and the ability to "extrapolate" witness identities. His reply made the same point even more starkly, explaining that while each witness may have said something "singular," it would be "extraordinary" to think their descriptions of the shooters were "so singular, that one could derive their residential address from it," and characterizing that line of reasoning, attributed by the government to the Seidel declaration, as one "this court should reject."

In his petition for rehearing, he distilled the point: to identify a witness based on a narrative, one must already "possess specific knowledge of who was involved," so the only people who could ever match statements to witnesses are fellow victims, confidants, or investigators who already know "which information comes from which witness," meaning the supposed risk of "retaliation or harassment" from

disclosure is both circular and non-existent. Brown and appointed amicus also invoked this Court's and the D.C. Circuit's own FOIA jurisprudence, citing decisions such as *Reps. Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369 (D.C. Cir. 2021) and *Machado Amadis v. U.S. Dep't of State*, 971 F.3d 364, 371 (D.C. Cir. 2020) for the basic proposition that the FOIA Improvement Act "foreclose[s] the withholding of material unless the agency can articulate both the nature of the harm from release and the link between the specified harm and specific information contained in the material withheld," and argued that the FBI had never supplied that record-specific link for the perpetrator descriptions at issue here. On this record, the suggestion that Brown failed to give the court any concrete basis to question the Bureau's foreseeability showing cannot be reconciled with his actual submissions, which repeatedly exposed the logical and evidentiary gaps in the government's theory.

The court's own discussion of the FOIA Improvement Act confirms that it has, in substance, read the foreseeable-harm requirement out of Exemption 7(D). After noting that agencies may withhold only if they "reasonably foresee[] that disclosure would harm an interest protected by" the relevant exemption, and that they must connect the harm to "specific information," the panel concludes its 7(D) analysis by declaring that "we are doubtful that the FBI needed to articulate any harm beyond the harm already identified in Congress's

decision to create a special exemption for 'information furnished by a confidential source.'" (App. A, [12a])

That statement is not a stray aside; it is the capstone of the court's reasoning. It invites agencies and lower courts to treat Exemption 7(D)'s categorical language as self-executing for foreseeable-harm purposes—precisely the position the government disclaimed in this case,[3] and precisely the result Congress sought to avoid when it added § 552(a)(8)(A).

This case therefore presents an unusually clean vehicle to address the question presented. There is no dispute that the witnesses were confidential sources or that Exemption 7(D) applies in its threshold sense. The only contested issue is whether, once that threshold is crossed, the FOIA Improvement Act still requires the government to show that disclosure of the particular information withheld here, descriptions of the perpetrators, would

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[3] The government itself rejected this position at oral argument.
JUDGE RAO: So, is it the Government's position that it's required for the second part of 7(D) to do this sequential foreseeable harm inquiry, because, because the way that that part of 7(D) is written is very categorical; and, and the, and the foreseeable harm here that's articulated is linked to, arguably, a different exemption, right, which is revealing the identity of a confidential source. So, so I'm wondering if it's even required for the Government to make this sequential determination for an exemption like 7(D)?
MS. SMITH: We have not argued that the FOIA Improvement Act doesn't apply to 7(D) or part of 7(D). The, Exemption 3 is the only exemption that's expressly exempted from that requirement. So, we haven't argued that it doesn't apply. Oral Arg. Tr. 27

foreseeably harm the interests 7(D) protects. The D.C. Circuit's answer is effectively "no": it upheld broad withholdings based on speculative insider recognition and generic invocations of future chilling, and then announced its "doubt" that any further harm showing is required for "information furnished by a confidential source."

That reasoning cannot be squared with the statute's text or with the court of appeals' own articulation of the foreseeable-harm standard, and it threatens to convert Exemption 7(D) into a blanket secrecy provision for any eyewitness narrative, regardless of content, context, or actual risk.

B. The questions presented warrant review

The questions presented go to the core of Congress's 2016 recalibration of FOIA and will affect thousands of law-enforcement cases going forward. Before the FOIA Improvement Act, an agency could prevail simply by showing that requested information fell within one of the nine exemptions. Congress concluded that this practice had led to overusing the FOIA exemptions that allow, but do not require, information to be withheld and therefore added a separate "foreseeable harm" requirement in § 552(a)(8)(A). Agencies must now articulate both the nature of the harm from release and the link between the specified harm and specific information contained in the material withheld and may not rely on mere speculative or abstract fears or generalized assertions. This case squarely presents whether that requirement applies with full force when an agency invokes

Exemption 7(D), and what counts as a cognizable "harm" in that context.

First, the decision below invites courts and agencies to treat Exemption 7(D) as effectively self-executing and largely immune from the FOIA Improvement Act. After reciting the statutory standard and this Court's own circuit precedent requiring a record-specific articulation of harm, the panel nevertheless held that, because Congress created a "special exemption for 'information furnished by a confidential source,'" it was "doubtful that the FBI needed to articulate any harm beyond the harm already identified in Congress's decision" to enact Exemption 7(D). (App. A, [12a]) That reasoning does more than resolve a single case. It signals to agencies that, whenever Exemption 7(D) is invoked, they may satisfy § 552(a)(8)(A) simply by pointing to the exemption's subject matter, rather than by identifying how disclosure of the particular information at issue would foreseeably harm a 7(D) interest in the specific factual setting. Whether a court may effectively nullify Congress's 2016 amendment for an entire exemption, especially one as frequently invoked as 7(D), is a question of recurring and exceptional importance.

Second, the case cleanly presents the downstream question whether the kind of "harm" the FBI asserted here satisfies FOIA's post-2016 standard. The Bureau did not claim that releasing bare descriptions of the shooters' appearances would lead members of the public, co-conspirators, or other adversaries to identify and retaliate against witnesses. Instead, as the record reflects, its theory focused on insiders: that "those already in the know" at the workplace, other victims, witnesses, or investigators "familiar with the events described," might recognize which account belonged to which

colleague. Petitioner and appointed amicus explained that this concern is circular: anyone able to match a narrative to a particular witness must already know who the witnesses are and what they reported, so disclosure cannot "reveal" identities to them in any meaningful sense or expose them to new risks. The panel nonetheless treated this insider-recognition scenario as sufficient foreseeable harm, even in a closed investigation involving long-dead perpetrators, and even though the remaining unredacted records already allow those insiders to reconstruct who said what. Whether FOIA permits withholding based on such an abstract and fully "baked-in" notion of harm, untethered to any realistic risk of retaliation or chilling in future cases, is precisely the kind of statutory-interpretation question this Court should resolve.

Third, this case offers an unusually clean vehicle to decide both questions. There is no dispute that the witnesses were confidential sources within the meaning of Exemption 7(D); Petitioner conceded as much and emphasized that the personally identifying information of witnesses should not be released and has never sought names or direct identifiers. The only controversy is whether, assuming Exemption 7(D) is satisfied at step one, FOIA still requires the government to show a non-speculative, record-specific risk of harm from releasing descriptions of the perpetrators, and whether the FBI's insider-recognition rationale meets that standard. The issue was pressed and passed upon, fully preserved and litigated in the district court, in the court of appeals, and in a petition for rehearing, where Petitioner and amicus repeatedly invoked § 552(a)(8)(A) and argued that the Bureau's "singularity" theory fails to articulate any concrete harm beyond recognition by those who already know

the witnesses' identities. There are no disputed facts that could complicate review; what remains is a pure question of law about how the 2016 amendment operates in the 7(D) context.

Finally, the precedential stakes extend well beyond this case. The D.C. Circuit is the primary forum for FOIA litigation, and its decisions often serve as de facto national guidance for agencies and district courts. Petitioner's rehearing filings explain that the panel's approach "erects a new categorical withholding doctrine in contravention of the FOIA Improvement Act," by allowing agencies to withhold "all narrative accounts" whenever they can invoke a nebulous risk of "singularity," effectively collapsing the foreseeable-harm test into Exemption 7(D) itself. If left unreviewed, the decision will encourage agencies to treat all "information furnished by a confidential source" as per se harmful, precisely the reflexive secrecy Congress sought to curb in 2016. Clarifying that § 552(a)(8)(A) applies fully to Exemption 7(D) and that insider recognition, standing alone, is not a cognizable "foreseeable harm" will restore the balance Congress struck between protecting confidential sources and preserving FOIA's presumption of disclosure.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Signed, Gary Sebastian Brown III
On this 23rd day of November 2025.

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