No. 10-1510 JUN 14 2011

In the Supreme Court of the United States

PRISON LEGAL NEWS,

Petitioner,

v.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 14, 2011

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QUESTION PRESENTED

Whether the Government can refuse to disclose records by successfully invoking an exemption to the Freedom of Information Act, 5 U.S.C. § 552, when it has already disclosed those very same records elsewhere by placing them in the public domain as unsealed evidence in a public trial.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Prison Legal News states that its parent corporation is the Human Rights Defense Center. No publicly held corporation owns 10% or more of Human Rights Defense Center's stock.

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals entered judgment on January 11, 2011. On February 25, 2011, Prison Legal News filed a timely petition for rehearing en banc. On March 16, 2011, the Tenth Circuit denied en banc review. Prison Legal News timely filed this petition on June 14, 2011.

STATUTORY PROVISIONS INVOLVED

Exemption 7(C) of the Freedom of Information Act ("FOIA") exempts from mandatory disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

The appendix sets out other pertinent FOIA provisions. App. 70–73.

STATEMENT OF THE CASE

The Tenth Circuit held below that the Government could successfully rely on a FOIA exemption to refuse to disclose audiovisual records — even though the Government had already disclosed those very same records in open court. The panel concluded that the Government did not waive its right to rely on exemption 7(C) by doing such an about-face; that airing this evidence in open court was a disclosure of a "limited nature" only to the people in the courtroom; and that Prison Legal News and the public would learn little from viewing these materials first hand when they could read about them second hand. App. 8–10, 17–19.

This Court should grant certiorari and reverse. The Tenth Circuit's decision creates a circuit split on an important question of federal law — one that goes to the heart of whether public records are, in fact, truly available to the public. Under the Tenth Circuit's approach, when the Government uses records as evidence in open court, they are only temporarily accessible to whomever happens to make it to court while the trial is ongoing. This decision thus significantly shrinks the set of people who can view audiovisual evidence first hand. The D.C. Circuit and the Second Circuit have adopted the opposite view, holding that the Government cannot rely on an otherwise applicable FOIA exemption to defeat a request for the very same records that it has already disclosed as unsealed evidence in open court. *See, e.g., Cottone v. Reno*, 193 F.3d 550, 553–56 (D.C. Cir. 1999); *Inner City Press/Cmty. on the Move v. Bd.*

of Governors of the Fed. Reserve Sys., 463 F.3d 239, 248–49 (2d Cir. 2006).

In particular, the decision below squarely conflicts with *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276 (D.C. Cir. 1992). As here, *Davis* involved a FOIA request for audiovisual materials that implicated exemption 7(C). *Id*, at 1278–79. But unlike the Tenth Circuit, the D.C. Circuit held that once the Government played tapes at a public trial, exemption 7(C) could no longer apply and the Government was required to disclose those exact tapes. *Id.* at 1280. The Tenth Circuit reached the opposite result below on materially identical facts. It held that exemption 7(C) prevented release of the video and photos here — notwithstanding that the Government had aired those very same records in open court not once but twice. App. 17–19.

The Tenth Circuit's cramped view that a public disclosure of evidence at a public trial is only a "limited" disclosure to the courtroom audience, App. 10, minimizes the constitutional notion of a public trial and runs counter to a longstanding tradition of making public records generally accessible to the public at large. The decision below thereby threatens to undermine significantly the ability of the press and people to learn from past records about "what the Government [was] up to." *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 780 (1989). Moreover, at a time when modern technology has given new meaning to the old adage that a picture is worth a thousand words — as this Court itself has recognized, *see, e.g., Brown v. Plata*, 131 S. Ct. 1910 (2011); *Scott v. Harris*, 550 U.S.

372 (2007) — the Tenth Circuit's decision makes these valuable materials particularly difficult for the public to see. To resolve the split between the circuits on an important question of federal law, this Court should grant certiorari and reverse.

A. The Freedom of Information Act

FOIA generally requires every federal agency to make "promptly available" records that any person requests. 5 U.S.C. § 552(a)(3)(A). Congress enacted FOIA to implement "a general philosophy of full agency disclosure." *Reporters Committee*, 489 U.S. at 754 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976)). FOIA's purpose is "crystal clear": "[T]o pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 361 (quotation marks omitted).

Congress exempted several categories of documents from FOIA's disclosure requirements. *See* § 552(b). These exemptions "must be narrowly construed," as "disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361. "Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious," FOIA "expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" *Reporters Committee*, 489 U.S. at 755 (quoting § 552(a)(4)(B)).

As relevant here, exception 7(C) exempts records compiled for law enforcement purposes "but only to the extent" that their production "could reasonably be expected to constitute an unwarranted invasion of

personal privacy." § 552(b)(7)(C). The "personal privacy" interest protected by exemption 7(C) includes that of "surviving family members" with respect to unpublished images of a "close relative's death-scene." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004). To determine whether such an invasion is "unwarranted," courts must "balance the family's privacy interest against the public interest in disclosure." *Id.* at 171; *see Reporters Committee*, 489 U.S. at 762. "[C]itizens' right to be informed about 'what their government is up to'" is not advanced by "information about private citizens that . . . reveals little or nothing about an agency's own conduct." *Reporters Committee*, 489 U.S. at 773. But this right to be informed is advanced by disclosures that "shed any light on the conduct of any Government agency or official." *Id.*

FOIA Exemption 6 also protects personal privacy. Its protection is limited, however, to "personnel and medical files and similar files" and it requires that the invasion be "clearly" unwarranted. § 552(b)(6). The Government waived exemption 6 and thus it is no longer at issue here. App. 5 n.4.

B. Factual Background

1. The United States Penitentiary in Florence, Colorado ("USP-Florence") is a high-security prison that is part of the Florence Federal Correctional Complex ("FCC"). App. 64 (Wright Decl. ¶ 5). USP-Florence and the FCC have a history of grave security problems, including inmate-on-inmate violence. There have been numerous murders in USP-Florence, and at least three in its "Special Housing Unit,"

which is intended to "securely separat[e]" prisoners "from the general inmate population." Bureau of Prisons, Program Statement, Special Housing Units § 541.21 (June 9, 2011) ("BOP Statement");[1] *see, e.g.*, Alan Prendergast, *Marked for Death*, Westword, May 25, 2000;[2] Robert Boczkiewicz, *Gang Inmates' Murder Trial Resumes Today*, Pueblo Chieftain, May 31, 2011.[3] Further, several former correctional officers at USP-Florence were convicted of federal crimes for "widespread abuse of prisoners," including beating prisoners while they were restrained and "falsif[ying] . . . records to cover up that abuse." *United States v. LaVallee*, 439 F.3d 670, 677–79 (10th Cir. 2006).

Prison Legal News publishes a legal journal and a website concerning prisoners' rights issues, and has been covering conditions at USP-Florence and the FCC since 1995. App. 64 (Wright Decl. ¶ 5).[4] Prison Legal News' coverage has focused, in particular, on the "high levels of violence experienced at the prison complex in Florence." *Id.* Other media outlets have also covered conditions at USP-Florence. The Denver *Westword* has published numerous articles covering inmate-on-inmate violence and reports of officers abusing prisoners. App. 57–58 (Prendergast Decl. ¶ 5); *e.g.*, Alan Prendergast, *Cowboy Justice*,

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[1] http://www.bop.gov/policy/progstat/5270_010.pdf

[2] http://www.westword.com/2000-05-25/news/marked-for-death/

[3] http://www.chieftain.com/news/local/gang-inmates-murder-trial-resumes-today/article_3d76c81a-8b3d-11e0-9b14-001cc4c002e0.html

[4] http://www.prisonlegalnews.org/

Westword, June 26, 2003.[5] *60 Minutes* aired a segment on the FCC titled "A Clean Version of Hell."[6] App. 51 (Schuster Decl. ¶ 2). "Prison Legal News is," however, "the only national media outlet that has regularly reported on these facilities" and conditions therein. App. 64 (Wright Decl. ¶ 5).

2. On October 10, 1999, two prisoners at USP-Florence, William Concepcion Sablan and Rudy Cabrera Sablan, brutally murdered their cellmate, Joey Jesus Estrella. App. 2, 23. The Bureau of Prisons had assigned the three men, including the two Sablan cousins, to a single cell in the prison's Special Housing Unit. App. 2.

Bureau of Prisons ("BOP") personnel videotaped the aftermath of the violent murder. "The first portion of the video depicts the interior of the shared cell and the Sablans' conduct inside the cell" after the murder. App. 2. This portion of the video captures the Sablans' heinous and gruesome mutilation of Estrella's body, which was extraordinarily degrading and disrespectful. *Id.*; *see* App. 23–24. "The second portion of the video depicts BOP personnel extracting the Sablans from the cell and does not contain any images of Estrella's body." App. 2. "BOP personnel also took still autopsy photographs of Estrella's body." *Id.*

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[5] http://www.westword.com/2003-06-26/news/cowboy-justice/

[6] http://www.cbsnews.com/stories/2007/10/11/60minutes/main3357727.shtml

The Government tried the Sablans separately and sought the death penalty in each trial. *Id.* They were both convicted of first degree murder, but were sentenced to life imprisonment rather than death. App. 2–3.

The Sablans' trials were public and attracted press coverage. *E.g.*, Mike McPhee, *Pair May Face Death in Prison Slaying*, Denver Post, Jan. 27, 2001, at B1. In both trials, the Government introduced the full video and autopsy photographs into evidence — without moving to seal. App. 2. Indeed, rather than seeking to keep these materials private, the Government displayed the video and photographs on "monitors placed for the sole purpose of enabling members of the public seated in the courtroom audience to view the images." Compl. ¶ 33, 47–49; Answer ¶ 33, 47–49. Prison Legal News was unable, however, to send a reporter to attend either of the two trials. "Prison Legal News is a small organization with a small budget," and "do[es] not have the ability to send staff journalists to attend every federal trial that [it has] an interest in reporting on." App. 65 (Wright Decl. ¶ 8).

Local court rules required the video and photographs to remain in the custody of the clerk during the trials. D. Colo. L. Crim. R. 55.1. "At the completion of trials, the photographs and video were returned to the United States Attorneys Office pursuant to a standard order regarding the custody of exhibits." App. 3. The Government still possesses these records. App. 24.

C. Procedural History

1. On March 12, 2007, Prison Legal News sent a FOIA request to the United States Attorney's Office for the District of Colorado, seeking the production of "the complete videotape" and the autopsy photographs. App. 42. The request specifically identified the video as the Government's Exhibit 20 and the photographs as the Government's Exhibits 168 through 177D in the trial of William Concepcion Sablan, *United States v. Sablan*, No. 00-cr-531-WYD-01 (D. Colo. Jan. 22, 2007). *Id.*

The Executive Office for United States Attorneys ("EOUSA") denied the request and the Department of Justice ("DOJ") denied Prison Legal News' subsequent administrative appeal. App. 44–45, 48. DOJ asserted that the Government had properly withheld the records pursuant to FOIA exemptions 7(A), 7(B), and 7(C). App. 48–49.

2. On May 20, 2008, Prison Legal News filed a complaint in the United States District Court for the District of Colorado, challenging the denial of its request for the video and photographs. *See* § 552(a)(4)(B). In response, the EOUSA defended its refusal to release the records on the basis of exemptions 6 and 7(C), dropping its reliance on exemptions 7(A) and 7(B). App. 25–26. The parties cross-moved for summary judgment. As relevant here, Prison Legal News argued that, under the "public domain" doctrine, the Government was required to disclose these materials because it had already introduced them as unsealed evidence at a

public trial. Prison Legal News Mot. for Summ. J. 3–4; *see Cottone*, 193 F.3d at 554–56.

The District Court granted and denied each motion in part, ordering the Government to disclose some of the materials but not others. As to the video itself, the court ordered the Government to disclose only the second part of the video, that is, the portions that do not depict Estrella's body. App. 40. As for the audio track, the court ordered the Government to disclose only the audio of BOP officials but to redact any other audio, including the Sablans' voices. *Id.* The Court affirmed the Government's refusal to turn over the autopsy photographs. *Id.*; *see also* App. 3 & n.1.

Prison Legal News appealed. While the appeal was pending, the EOUSA disclosed the materials required by the district court's order. App. 3. The EOUSA also dropped its reliance on exemption 6. App. 5 n.4. The only live question on appeal was thus whether the EOUSA could rely on exemption 7(C) to resist disclosing: (1) the first portion of the video and the autopsy photographs, which depict Estrella's body; and (2) the redacted audio of the Sablans' voices from the second portion of the video, which "pertain to what [the Sablans] were doing to Estrella's body." App. 14.

3. On January 11, 2011, the Tenth Circuit dismissed the appeal in part as moot with respect to materials the EOUSA had released. App. 18–19. It otherwise affirmed. *Id.*

First, the court ruled that the Government had not waived its ability to rely on exemption 7(C), even

though it had publicly disclosed the materials in two separate trials. "The government cannot waive individuals' privacy interests under FOIA." App. 8. According to the court of appeals, there was no waiver because "Estrella's family members did not take any affirmative actions to place the images in the public domain." App. 9.

Second, the court ruled that, although the Government used the records as unsealed evidence at two public trials, it had not made those records truly public. Rather, the court characterized the Government's display of the records at two public trials as disclosure of a "limited nature." App. 10. "[O]nly those physically present in the courtroom were able to view the images"; "the images were never reproduced for public consumption beyond those trials"; and "the images are no longer available to the public." App. 9–10. Accordingly, the court of appeals concluded that "Estrella's family retains a strong privacy interest in the images." App. 10.

Third, the court concluded that the "public domain" doctrine did not apply here. The Tenth Circuit recognized that the D.C. Circuit had held in broad terms that "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." App. 16 (quoting *Cottone*, 193 F.3d at 554). But instead of applying *Cottone*'s rule, the Tenth Circuit derived a different rule from part of *Cottone*'s reasoning. The Tenth Circuit concluded that the "public domain" doctrine does not apply to exemption 7(C) because unsealed evidence disclosed in open court is not "truly public" and thus that

exemption could still "fulfill its purposes" of protecting the family's privacy. *Id.* (quotation marks omitted).

The Tenth Circuit acknowledged that the D.C. Circuit's opinion in *Davis* also involved exemption 7(C). App. 17. But the Tenth Circuit concluded that *Davis* "decline[d] to apply the ['public domain'] doctrine because of a failure of the plaintiff to demonstrate with specificity the information that is in the public domain." *Id.*

The court of appeals denied a timely petition for rehearing and rehearing en banc on March 16, 2011. App. 20.

REASONS FOR GRANTING THE PETITION

1. This Court should grant certiorari because the Tenth Circuit's decision below conflicts with decisions of the D.C. Circuit and Second Circuit applying the "public domain" doctrine. It is well-settled in those circuits that the Government must grant a FOIA request for records that the Government has previously disclosed in open court. "[U]ntil destroyed or placed under seal, tapes played in open court and admitted into evidence — no less than the court reporter's transcript, the parties' briefs, and the judge's orders and opinions — remain a part of the public domain." *Cottone*, 193 F.3d at 554; *accord Inner City Press*, 463 F.3d at 249. The Tenth Circuit adopted a different rule of law. In the Tenth Circuit, the "public domain" doctrine does not apply where the Government has invoked FOIA exemption 7(C). App. 17. The court reasoned that exemption 7(C) is not the Government's to waive and that its purposes "can still

be served" following the disclosure of records as unsealed evidence in a public trial because such disclosure is "limited" to "only those physically present in the courtroom." App. 10, 17–18. This decision thus conflicts with decisions of the D.C. Circuit and Second Circuit and creates a circuit split.

In particular, the decision below squarely conflicts with *Davis*. In *Davis*, the D.C. Circuit applied the "public domain" doctrine where exemption 7(C) otherwise would have allowed the Government to resist disclosing audiovisual records. 968 F.2d at 1279, 1281. To give the requester the opportunity to show the "exact portions" that the Government had released into the public domain, the court remanded. *Id.* at 1280, 1282. On remand, the requester carried his burden as to most of the portions of the tapes, and the Government released those portions that it still possessed. *See Davis v. Dep't of Justice*, 460 F.3d 92, 96 (D.C. Cir. 2006) ("*Davis IV*"). By contrast, under the Tenth Circuit's rule — that exemption 7(C) trumps the "public domain" doctrine, rather than vice versa — there would have been no remand and no disclosure. Rather, the court would have held that the Government did not need to disclose any of the tapes. Accordingly, the decision below squarely conflicts with *Davis*.

2. Certiorari is further warranted because the decision in this very case misconstrues FOIA and threatens to shield valuable information from public view. At the outset, the Tenth Circuit is simply wrong to hold that the Government cannot waive exemptions protecting personal privacy. It is well-

settled that the Government can waive any FOIA exemptions, and indeed the Government waived exemption 6 below.

The decision below also undermines the longstanding and important principle that unsealed judicial records are truly matters of public record. In the Tenth Circuit's view, evidence used at a public trial has only been disclosed in a "limited" fashion to "those physically present in the courtroom." App. 10. If that were true, our public record would be remarkably inaccessible to the public. But it is not true. Absent a motion to seal, disclosure of materials at a public trial is a real public disclosure, making those records part of the permanent public record that is generally accessible under longstanding principles. Having disclosed those documents for its own purposes, the Government is not free to claw them back from the public domain and to relegate the public to second-hand reports.

The Tenth Circuit's view that use of evidence at a public trial is a "limited" disclosure to the courtroom audience has particularly pernicious implications for audiovisual evidence. The Tenth Circuit maintained that such evidence adds little to the public understanding, because "[a]ll of the information" was disclosed in the court transcript or was reported elsewhere. App. 13. But it is widely understood — including by the court below in its discussion of the privacy interests at stake — that "a picture is worth a thousand words" and that video may pack an even stronger punch. At a time when audiovisual evidence is becoming increasingly prevalent and important,

this Court should ensure that the public retains its right to see this evidence for itself.

I. THE CIRCUITS ARE SPLIT ON THE QUESTION PRESENTED

A. The Decision Below Conflicts with the "Public Domain" Doctrine that the D.C. Circuit and Second Circuit Embrace

1. If this case had arisen in the D.C. Circuit or the Second Circuit, it would have come out the other way. Under the "public domain" doctrine, "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Cottone*, 193 F.3d at 554. The FOIA requester first bears the burden to "demonstrat[e] precisely which recorded conversations were played in open court" and thus are part of the public domain. *Id.* at 555. The burden then shifts to the Government to show that "the specific tapes or records identified" have been destroyed or placed under seal. *Id.* at 556. "[U]ntil destroyed or placed under seal, tapes played in open court and admitted into evidence — no less than the court reporter's transcript, the parties' briefs, and the judge's orders and opinions — remain a part of the public domain." *Id.* at 554. This doctrine is "firmly anchored" in the D.C. Circuit. *Id.* at 553. The Second Circuit has adopted this same rule of law. *Inner City Press*, 463 F.3d at 248–49; *see also Watkins v. U.S. Bureau of Customs & Border Prot.*, ___ F.3d ___, No. 09-35996, 2011 WL 1709852, at *8 (9th Cir. May 6, 2011) (Rymer, J., concurring in part and dissenting in

part) (the "public domain" doctrine is "embraced by the D.C. Circuit and the Second Circuit").

These courts have primarily grounded the "public domain" doctrine in principles of waiver. *See, e.g., Cottone*, 193 F.3d at 553. The rationale is powerful and straightforward: The Government cannot affirmatively release information into the public domain and then turn around and assert that it cannot release that very same information because it is too private. The "public domain" doctrine is also grounded in the "venerable common-law right to inspect and copy judicial records," under which "audio tapes enter the public domain once played and received into evidence." *Id.* at 554; *see, e.g., In re Application of CBS, Inc.*, 828 F.2d 958, 959 (2d Cir. 1987). "A trial is a public event. What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947).

If the Tenth Circuit had applied the "public domain" doctrine, it would have required the Government to disclose the files that Prison Legal News requested. It is undisputed that Prison Legal News identified the exact materials that the Government "played in open court." *Cottone*, 193 F.3d at 555. Indeed, Prison Legal News' FOIA request specifically listed the exhibit numbers of each requested item. App. 42; *see also* Compl. ¶¶ 23–37, Answer ¶¶ 23–37. The Government still possesses these records and they have not been sealed. App. 24. Accordingly, the records "remain a part of the public domain." *Cottone*, 193 F.3d at 554.

The Tenth Circuit dismissed *Cottone* as limited to cases involving exemption 3, which protects records that must be withheld under another statute. App. 16. But that is a limitation of the Tenth Circuit's own creation. It is immaterial under *Cottone* which FOIA exemption the Government has invoked; what matters is whether the requester can show that the Government aired those very same records in open court. *Cottone*, 193 F.3d at 554. Furthermore, the D.C. Circuit and Second Circuit have applied *Cottone*'s "public domain" doctrine in cases involving a wide spectrum of FOIA exemptions — including exemption 7(C). *See, e.g., Public Citizen v. Dep't of State*, 11 F.3d 198, 201–03 (D.C. Cir. 1993) (exemption 1); *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) (exemption 1); *Cottone*, 193 F.3d at 554–55 (exemption 3); *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999) (exemption 4); *Inner City Press*, 463 F.3d at 253 (exemption 4); *Davis*, 968 F.2d at 1278–80 (exemptions 3, 7(C), and 7(D)); *Wolf v. CIA*, 473 F.3d 370, 378–80 (D.C. Cir. 2007) (exemptions 1 and 3); *Afshar v. Dep't of State*, 702 F.2d 1125, 1130–34 (D.C. Cir. 1983) (exemptions 1 and 3).

B. The Decision Below Squarely Conflicts with the D.C. Circuit's Decision in *Davis*

Crucially, in *Davis*, the D.C. Circuit applied the "public domain" doctrine in a setting identical to this one — yet the two courts reached polar opposite results. As here, *Davis* involved a request for audiovisual records: undercover recordings that the Government made during an investigation into organized crime in New Orleans. 968 F.2d. at 1278.

As here, the Government invoked exemption 7(C) to protect the privacy of third parties who were recorded or mentioned on the tapes: the defendants, their coconspirators, and others mentioned as being under Mafia influence. *Id.* at 1278–79, 1281. As here, the Government had played the tapes in open court as unsealed evidence, although in *Davis* it had played only segments of the tapes (and only played them once). *Id.* And as here, the tapes were no longer physically available at court; they were in the Government's possession. *Id.*

Unlike the court below, however, the D.C. Circuit applied the "public domain" doctrine. The D.C. Circuit held that "the government cannot rely on an otherwise valid exemption claim to justify withholding" records where the requester has carried his burden of showing that the Government has already released that "specific information" into the "public domain." *Id.* at 1279. "But for the publication of the tapes," the D.C. Circuit underscored, exemption 7(C) would have blocked their disclosure. *Id.* Because the requester had not had the opportunity to show which "exact portions" of the tapes had been played at trial, the court remanded. *Id.* at 1279, 1282. On remand, the requester carried this burden by "produc[ing] docket entries and transcripts" showing that the Government had played at trial 158 of the 163 segments he requested. *Davis IV*, 460 F.3d at 96. The Government in turn released every one of

those segments that it still possessed. *Id.*[7] Faced with an indistinguishable scenario, the Tenth Circuit below reached the opposite result, holding that the Government *could* rely on exemption 7(C) even after airing the exact same records in a public trial.

The Tenth Circuit dismissed *Davis* as merely "declin[ing] to apply the ['public domain'] doctrine because of a failure of the plaintiff to demonstrate with specificity the information that is in the public domain." App. 17. But the D.C. Circuit did not "decline to apply" the "public domain" doctrine in *Davis*; its application of that doctrine was essential to the outcome of the case. Indeed, the D.C. Circuit made clear that the prior publication of the tapes altered the outcome by stating that exemption 7(C) would apply "[b]ut for the publication of the tapes." *Davis*, 968 F.2d at 1279. If the D.C. Circuit had "declined to apply" the "public domain" doctrine, it would have ruled that the Government correctly denied the FOIA request as a whole and left it at that. Instead, the D.C. Circuit remanded to give the requester the opportunity to show which exact segments the Government had played at trial — and after remand the Government disclosed these segments. *Id.* at 1282; *Davis IV*, 460 F.3d at 96. In *Davis*, the "public domain" doctrine thus made all the difference.

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[7] The Government continued to assert exemption 7(C) as to the five segments that Davis did not show had been played at trial, leading to a series of further appeals. *See Davis IV*, 460 F.3d at 96–97.

This sequence of events would never have occurred under the Tenth Circuit's rule. If the D.C. Circuit had applied the Tenth Circuit's rule, it would have affirmed — not remanded — in *Davis*. Conversely, if the Tenth Circuit had followed *Davis*, it would have reversed — not affirmed — the judgment below. Because Prison Legal News *did* "demonstrate with specificity" that the precise information it requested had been played in open court, *Davis* would have required disclosure. App. 17. Accordingly, *Davis* and the decision below squarely conflict.[8]

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[8] The Ninth Circuit has decided a case with similar facts, but it is too ambiguous to squarely implicate the split. In *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035 (9th Cir. 1999), the Ninth Circuit held that the Government could rely on exemption 7(C) to reject a request for a trove of documents about an FBI search, where "some documents relating to the search [were] necessarily public in various courthouses." *Id.* at 1047. *Fiduccia* can be read as rejecting an all-or-nothing request that, simply because *some* of the trove's contents were public, the Government must turn over *all* of its contents. Or it can be read as rejecting a request for public documents that failed to identify which documents were public. On these readings, *Fiduccia* is uncontroversial and does not implicate the split here. But *Fiduccia* can also be read as rejecting a request for specifically-identified documents that the Government placed into the public record. This reading would put *Fiduccia* on the Tenth Circuit's side of the split, but it would also be in tension with the Ninth Circuit's subsequent decision in *Watkins*, 2011 WL 1709852 at *7–*8. Given the ambiguity, *Fiduccia* is best viewed as not part of the split.

II. THE TENTH CIRCUIT'S DECISION MISCONSTRUES FOIA AND MAKES PUBLIC RECORDS SIGNIFICANTLY LESS PUBLIC

The Tenth Circuit's decision not only opens a circuit split, but also is profoundly wrong. Under the Tenth Circuit's approach, records that the Government uses in open court cannot truly be considered part of the public record. They are not in fact generally available to the public, but instead can only be seen by the people who happen to access them while the Government is still using them to support a prosecution. The question presented thus goes to the heart of what it means for a trial and judicial record to be "public."

A. The Government Can Waive Any FOIA Exemption

First, the Tenth Circuit was wrong to conclude that the Government did not waive exemption 7(C) because it "cannot waive individuals' privacy interests under FOIA." App. 8. This reasoning misunderstands that exemption 7(C) is the Government's to assert or waive, not the family's. FOIA gives the Government — not third parties — "the option" of asserting or waiving an exemption "if it so chooses." *Rose*, 425 U.S. at 361 (quotation marks omitted); *see also Halbert v. Michigan*, 545 U.S. 605, 637 (2005) ("Legal rights, even constitutional ones, are presumptively waivable."). Indeed, the Government recognized that it is free to waive exemptions that protect individuals' privacy interests by waiving exemption 6 below. *See* App. 5 n.4. If the

Government had also waived exemption 7(C), either as a litigation decision or by failing to assert it, Estrella's family would have been unable to object to the release of the materials or to sue the Government or Prison Legal News for invasion of privacy. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975). Control over exemption 7(C) thus rests firmly with the Government.

The real question is not whether the Government *can* waive exemption 7(C); it is whether the Government does in fact waive exemption 7(C) when it discloses records in open court. Basic principles of equity dictate that the Government cannot take a position in one court and then do a nearly 180-degree reversal to prevail in another. *E.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). The Government thus waived its own right to contend that the video and photos here were too private to disclose when it disclosed them publicly twice.

B. The Tenth Circuit's Decision Threatens to Shield Public Records from Public View

1. The Tenth Circuit clearly erred in holding that exemption 7(C) prevents disclosure when the Government has previously disclosed the exact same records in open court. The crux of the Tenth Circuit's ruling was that the Government made only a "limited" disclosure to those "physically present in the courtroom[s]" when it put the video and photos into the public record at trial. App. 10. That fundamentally subverts the notion of a public trial. Once unsealed materials are introduced in a public

trial, the documents are part of the public domain, generally available to the public under longstanding principles. The Government cannot claw them back, shielding them from access that would otherwise be available at court. Once the disclosure occurs, the press is free to report — either contemporaneously or years later — without fear of invasion of privacy liability. By the same logic, the Government may no longer successfully invoke exemption 7(C).

"[M]atters of public record" are, by definition, public. Restatement (Second) of Torts § 652D cmt. b. (1976). A "public record" is "[a] documentary account of past events, usu[ally] designed to memorialize those events," that is "generally open to view by the public." Black's Law Dictionary 1301 (8th ed. 2004). "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media." *Cox Broadcasting*, 420 U.S. at 495. "With respect to judicial proceedings in particular," the free availability of public records to the press "serves to guarantee the fairness of trials" and "bring[s] to bear the beneficial effects of public scrutiny upon the administration of justice." *Id.* at 492.

Because public records must be available to the public to fulfill their purposes, there is a "venerable" common-law right "to inspect and copy public records and documents, including judicial records and documents." *Cottone*, 193 F.3d at 554; *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). The right to access public records is grounded in an informed citizenry's need "to keep a watchful

eye on the workings of public agencies" and to "preserv[e] the integrity of the law enforcement and judicial processes." *Nixon*, 435 U.S. at 598; *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985). That concern is at its pinnacle "in cases where the government is a party." *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987). "[I]n such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch." *Id.* Under the common-law, unsealed evidence thus is ordinarily *not* limited only to those who see it in the courtroom; it is presumptively available to the public at large. Of course, the common-law right of access is "not absolute." *Nixon*, 435 U.S. at 598. Trial courts have discretion to deny access that would, *inter alia*, "gratify private spite or promote public scandal" with "no corresponding assurance of public benefit." *Id.* at 599, 603 (quotation marks omitted). But this case is far removed from that situation. There is a strong public interest in disclosure of the evidence here because the Government relied on it in two capital cases, and it also sheds light on the Government's abject failure to protect federal inmates in its care from extreme violence. *See infra* 29–30, 32–33.

Indeed, the "public's right to know" the contents of public records is so important that the First Amendment flatly prohibits the Government from "expos[ing] the press to liability for truthfully publishing information released to the public in official court records." *Cox Broadcasting*, 420 U.S. at 496. Absolute First Amendment protection for reporting on matters of public record extends even

where reporting would significantly expand the audience for material that would have been profoundly private — for example, the name of a deceased rape victim — but for its inclusion in the public record. *Id.* at 471, 496.

The common-law rule is similar. "There is no liability" for invasion of privacy "when the defendant merely gives further publicity to information about the plaintiff that is already public." Restatement § 652D cmt. b.; *cf.* Samuel Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 196 (1890). Only "if the record is one not open to public inspection" can there be an actionable invasion of privacy. Restatement §652D cmt. b. Quite simply, a person "has no objectively reasonable expectation of privacy in matters in the public domain." David A. Elder, Privacy Torts § 3:5 (2002) (quotation marks and footnote omitted).

To be sure, the Government has the tools to use sensitive materials in court while preventing public disclosure. Most obviously, the Government can redact, move to seal records in whole or part, or even close the courtroom for part of the proceedings. *See* Fed. R. Crim. P. 49.1(a), (d), (f); Fed. R. Civ. P. 5.2(a), (d). Those tools, however, are subject to procedural protections, constitutional limits, and the strict oversight of a judicial officer, who is able to balance all the interests at stake. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 48–50 (1984). The Tenth Circuit's approach effectively relegates that *ex ante* balancing of interests to an *ex post* determination by an executive branch official deciding whether to invoke a FOIA exemption.

The Tenth Circuit's holding undermines the value of public judicial records by making them available to a much narrower portion of the populace. Under its rule, only a select few — those with the time and resources to make it to court — can learn first hand "what the executive branch is about" or "appraise the judicial branch"; the opportunity ends as soon as the trial is over and the Government retakes possession of its exhibits. *Standard Fin. Mgmt.*, 830 F.2d at 410. At that point, the Tenth Circuit's decision effectively removes the records from the public domain, and the public can never access them ever again.

The Tenth Circuit's decision is so at odds with our constitutional and common-law traditions that it leads to anomalous results. To be sure, "the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution." *Favish*, 541 U.S. at 170. But it is not "reasonable" to expect that disclosing records in response to a FOIA request will constitute an "unwarranted invasion of personal privacy," § 552(b)(7)(C), when the Government has already fully aired those records twice, thereby eliminating any "objectively reasonable expectation of privacy" that the common law otherwise would have protected in those records, David A. Elder, Privacy Torts § 3:5 (2010); *accord* Restatement § 652D cmt. b. Disclosure of unsealed judicial records is also not "unwarranted," as it advances the values of "guarantee[ing] the fairness of trials" and "bring[ing] to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting*, 420 U.S. at 492. Conversely, allowing privacy concerns to trump public scrutiny in this context would allow the Government to invoke

the former to avoid disclosure of materials that shed light on the Government's own shortcomings and thus subject it to adverse publicity or embarrassment.

2. The Tenth Circuit read this Court's decision in *Reporters Committee* as supporting its cramped conception of the "public domain." App. 9–11. But *Reporters Committee* cuts the other way. *Reporters Committee* held that the Government could rely on exemption 7(C) to refuse FOIA requests for "rap sheets" — compilations of the history of arrests and convictions of individuals. 489 U.S. at 780. The Court defined information as "private" if it is "not freely available to the public." 489 U.S. at 763–64 (quotation marks omitted). And rap sheets fit the bill: They had always been treated as "nonpublic documents." *Id.* at 753, 764–65. Rap sheets in turn compiled arrest data that was itself not public, *id.* at 754 n.2; *see also id.* at 767, as well as information that was public but scattered in "courthouse files, county archives, and local police stations throughout the country," *id.* at 764. In holding that exemption 7(C) applied to rap sheets, *Reporters Committee* thus established a clear rule: FOIA does not guarantee access to government compilations that have always remained private, simply because some of the compiled data is publicly available elsewhere.

Reporters Committee undermines, rather than supports, the Tenth Circuit's position. Prison Legal News is not asking for records that have never been made freely available. Nor is it asking for a compilation of publicly available but otherwise scattered data in an effort to avoid the trouble of compiling the data itself. Prison Legal News is

instead asking for *exactly the same records* that the Government made "freely available to the public" in open court. *Id.* at 764. Moreover, *Reporters Committee* underscores the key point that "courthouse files" are public records even if they contain countless items implicating privacy interests and the public faces practical burdens accessing them. Under the definition this Court applied in *Reporters Committee*, the materials here are public, not private.

Reporters Committee also stressed that the public does not gain a better understanding of "what their Government is up to" "by disclosure of information about private citizens . . . that reveals little or nothing about an agency's own conduct." *Id.* at 773; *see id.* at 774. The invasion of privacy associated with a third party's request for law enforcement records is thus unwarranted "when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing." *Id.* at 780. But here, Prison Legal News seeks records that speak to "what the government [was] up to" as prison warden, as prosecutor, and in its courts. *See* App. 12–13; *infra* Part II.C.

Lastly, whereas in *Reporters Committee* the Government consistently kept the requested records private, the Government's behavior here is strikingly inconsistent: The Government initially made the video and photographs "available to the general public" in two courts without seeking to place the materials under seal either time. 489 U.S. at 759. Further, the Government frequently discloses directly to the press unsealed audiovisual evidence that it

relies on in court, including surveillance videos depicting inmate-on-inmate murders. *See* App. 69 (Wright Supp. Decl. ¶ 4). But now, the Government is refusing to make these records available at all, contending that they are too private to share.

Reporters Committee thus confirms that the D.C. Circuit was correct in *Davis* and therefore that the Tenth Circuit was wrong to conclude that the records here need not be released.

C. The Tenth Circuit's Decision Particularly Hampers Access to Audiovisual Evidence

1. The Tenth Circuit acknowledged that there is a public interest in learning about the contents of the video and photos here. App. 12–13. These materials "shed . . . light on," and draw attention to, "what [the] government is up to" when operating prisons, prosecuting crimes, and adjudicating them in courts. *Reporters Committee*, 489 U.S. at 773. "[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (quotation marks omitted). And one would expect the Bureau of Prisons to keep violent crimes to a minimum in the Special Housing Unit, which is supposed to be particularly secure. *See* BOP Statement § 541.21. But the video and photographs here depict a horrific inmate-on-inmate attack that bespeaks a total breakdown in prison security. Moreover, the brutality underscores the severity of the problem of violence in federally-run prisons more broadly. Finally, these materials also shed light on, and draw

attention to, the Government's decision as prosecutor to seek the death penalty in two separate trials; the evidence that it relied on in those two prosecutions; and the rejection of the death penalty in the courts.

The Tenth Circuit nonetheless found that the video and photographs would not "add anything new to the public understanding" of these important matters because the events they depict had already been "discussed in detail at trial and reported in the press." App. 12. "All of the information" bearing on the Government's conduct was "already publicly known." App. 13. Indeed, the panel analogized Prison Legal News' request to a group's request for an electronic copy of map coordinates that the group already possessed in hardcopy format. *Id.* (citing *Forest Guardians v. FEMA*, 410 F.3d 1214, 1219 (10th Cir. 2005)).

The Tenth Circuit missed the point. Prison Legal News does not seek sterile "information" that duplicates what it knows, like the coordinates in *Forest Guardians*. Prison Legal News seeks photographs and a video showing a horrific crime committed in the most secure cellblock in a high-security federal prison. This crime has been described many times, including by the courts below. But "[t]he adage that 'one picture is worth a thousand words' reflects the common-sense understanding that illustrations are an extremely important form of expression for which there is no genuine substitute." *Regan v. Time, Inc.*, 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part). The communicative force of a video may be even more potent. "Video evidence is always the best

evidence available, when it is available." App. 65 (Wright Decl. ¶ 8). For example, the infamous video of the Rodney King beating was undoubtedly "discussed in detail at trial and reported in the press." App. 12. But it was not "discuss[ions]" of this "information" that had such a profound impact on the public's understanding of the government's activities — it was seeing the video itself.

The Tenth Circuit's failure to recognize the stronger public interest in viewing audiovisual evidence over a dry written record is particularly striking because the court recognized the flip side of the same coin: a dry record is less invasive of privacy than photos and video. "Although descriptive information about what the images contain may now be widely available," the court wrote, "there is a distinct privacy interest in the images themselves." App. 10. By taking the unique impact of audiovisual evidence into account only on one side of the balance, the court rendered a decision that was sure to be out of balance.

2. This Court's own conduct confirms the importance of giving the public access to video and photographs. For example, in *Scott v. Harris*, 550 U.S. 372 (2007), the lower court suggested that a driver who was fleeing from police was "cautious and controlled," but this Court found that the "[t]he videotape [told] quite a different story." *Id.* at 379–80. "[W]hat we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort . . . ." *Id.* But rather than leaving readers with only that colorful prose, this Court attached the videotape to its opinion "to allow the

videotape to speak for itself." *Id.* at 379 n.5. Similarly, in *Brown v. Plata*, 131 S. Ct. 1910 (2011), this Court described conditions in California's prisons, but it recognized that the public's engagement and understanding might be incomplete unless the public could see those conditions first hand. Accordingly, the Court attached a series of photographs to its opinion. *Id.* at 1924 & Appx. B, C.

Prison Legal News primarily seeks the video and photographs here so that it can report from first-hand materials on this crime, which is emblematic of the Bureau of Prisons' inability to quell violence in the prisons it operates. *See* App. 62–64 (Wright Decl. ¶¶ 1, 5–6). If Prison Legal News also publishes the video and photos here so that its readers can draw their own conclusions from them, some readers may choose not to look. By all accounts, they depict an extraordinarily violent and depraved crime, and viewing these materials will be too much for many people. But "[i]n this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast" as well as the judgment of potential viewers regarding what to watch. *Cox Broadcasting*, 420 U.S. at 496. No one will be forced to view these materials.

The violence these materials depict also cannot be dismissed as gratuitous or incidental to the public interest in disclosure — *the violence is the story.* When Government officials engage in affirmative acts of violence, such as beating a prisoner or a suspect, it is obvious that the violence weighs strongly in favor of disclosure, not against. The situation is no different if violence ensues because the Government fails to

protect federal prisoners who by necessity must depend on the Government for protection. *See Farmer*, 511 U.S. at 833. The public is aware that, notwithstanding the Government's duty to protect prisoners, inmate-on-inmate violence is a persistent problem in federal prisons. But it is particularly appalling that a crime this brutal could occur under the Government's watch in the most secure cellblock in a high-security prison. The video and photographs make this point far more powerfully than a dry record ever could.

The public is also aware that the Government sought the death penalty in two separate trials and that the video and photographs were central to the Government's case both that the Sablans were guilty and that they deserved the ultimate penalty. But the public also knows that the two juries that viewed this evidence rejected the death penalty and instead sentenced the Sablans to life imprisonment. The public cannot fully evaluate the Government's judgment as a prosecutor or the conduct of the courts and juries in two death-penalty prosecutions — and might be less inclined to train their focus on these important matters — without seeing the video and photographs first hand. The second-hand descriptions that are available here are "no genuine substitute" for the originals. *Regan*, 468 U.S. at 678.

3. The Tenth Circuit's view that reading about the video and photographs is roughly equivalent to seeing them not only contradicts widely shared understandings and practices, but it also has serious practical consequences. Due to technological advances, video and photographs are increasingly

being collected and used as evidence. Tens of millions of Americans carry cellphones that can take photos and video and upload them to the internet. *See* Pew Research Ctr., Generations and their Gadgets 8 (Feb. 3, 2011).[9] And making a copy of a video or a photograph is now as easy as copying any other computer file.

FOIA is a valuable tool for the press and public to access these materials first hand. In many courts, once a criminal trial is complete, transcripts and other documents remain in the court's possession, but audiovisual evidence is often returned to the Government. *E.g.*, App. 9–10; *United States v. Novaton*, 271 F.3d 968, 992 (11th Cir. 2001); *United States v. Graham*, 257 F.3d 143, 152 n.5 (2d Cir. 2001). The Tenth Circuit's position — that the Government can use audiovisual records in open court to secure a conviction, but then rely on exemption 7(C) to resist disclosure of those records when the trial is over — makes it more difficult for the public to see audiovisual evidence at a time when it is becoming increasingly important to public understanding of "what the Government is up to." *Reporters Committee*, 489 U.S. at 780.

III. THIS CASE IS AN IDEAL VEHICLE

This case is an excellent vehicle for resolving the circuit split here. First, this case stands or falls on the difference between the Tenth Circuit's rule and

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[9] http://pewinternet.org/~/media//Files/Reports/2011/PIP_Generations_and_Gadgets.pdf

the rule applied in the D.C. Circuit and Second Circuit. The Tenth Circuit held that the Government could rely on exemption 7(C) to resist disclosure here. But if the Tenth Circuit had followed *Davis*, the Government could not have relied on this exemption. Prison Legal News requested exactly the same materials that the Government used publicly at trial, and thus under *Davis* the Government "cannot rely on an otherwise valid exemption claim to justify withholding [that] information." *Davis*, 968 F.2d at 1279 (quotation marks omitted).

Second, the only question in this case is the question presented. Although the Government invoked exemption 6 and other exemptions in the district court, it waived those arguments on appeal. App. 5 n.4. The Government's waiver makes exemption 7(C) the Government's only defense against disclosure. This is therefore an ideal vehicle for resolving a conflict between the circuit courts on an important question of federal law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

RESPECTFULLY SUBMITTED

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