NO. 10-1510

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

REPLY BRIEF FOR PETITIONER

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The Government would like to have it both ways. On one hand, it would like to enjoy the advantage of using evidence in open court in its capacity as a prosecutor while avoiding the "disadvantage" of having to justify a sealing order over the likely objection of the press. On the other hand, it would like to turn around and invoke privacy concerns when FOIA requesters seek that same evidence to shed potentially unflattering light on the Government's own omissions. This Court should grant certiorari and make clear that public records are indeed public.

The Government does not dispute that the Tenth Circuit declined to apply the "public domain" doctrine that the D.C. Circuit and the Second Circuit have applied. *See* Opp. 11. The Government instead distinguishes the "public domain" doctrine as being inapplicable in cases involving exemption 7(C). In fact, these courts have applied the "public domain" doctrine across the gamut of FOIA exemptions. More to the point, the D.C. Circuit's leading "public domain" case, *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276 (D.C. Cir. 1992), involved exemption 7(C).

Unable to distinguish *Davis*, the Government attempts to dismiss it as dicta. But the Government itself has recognized in prior filings that *Davis* establishes the applicability of the "public domain" doctrine to exemption 7(C) — and numerous courts have agreed. Under *Davis* and the well-settled view of courts interpreting it, the Government cannot successfully invoke exemption 7(C) to refuse

disclosure of the same records that it has previously used as evidence in open court. If the court below had applied this rule of law, it would have reversed, not affirmed. There is therefore a circuit split on an important question of federal law.

The Government emphasizes the horrific and grotesque details of the assault that the video depicts here. Those details are deeply troubling, but they are a reason to grant certiorari, not deny it. The violence here underscores the public interests in understanding and addressing how an attack of this severity could happen to someone dependent on the Government for protection. It also illustrates the Government's about-face. The video implicated stronger privacy interests when the Government introduced it as evidence in open court. The Government nevertheless proceeded not only once, but twice because the evidence was highly probative. It remains highly probative of the Government's nonfeasance in protecting an inmate entrusted to its care. The same Government should not now invoke the privacy concerns it found unavailing at trial to prevent the media from seeing for itself evidence that highlights the Government's own failures.

The "public domain" doctrine prevents the Government from having it both ways: The Government cannot successfully invoke a FOIA exemption to resist disclosure of unsealed evidence that it used in open court. This Court should grant certiorari and make this rule the law of the land.

I. THE CIRCUITS ARE SPLIT ON THE QUESTION PRESENTED

The Government seeks to distinguish the decision below from the D.C. Circuit and Second Circuit "public domain" cases by arguing that those courts have not applied the doctrine in cases involving exemption 7(C). Opp. 11–12. This distinction fails for two reasons.

First, it is a distinction without a difference. The "public domain" doctrine does not vary exemption-by-exemption because, as the Government recognizes, it is not grounded in any particular exemption's text. *See* Opp. 12. Instead, it is grounded in principles of waiver and forfeiture. Pet. 16; *Cottone v. Reno*, 193 F.3d 550, 553, 555 (D.C. Cir. 1999). The rule is simple: "[M]aterials 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. These courts have applied the "public domain" doctrine in cases involving numerous FOIA exemptions. Pet. 17 (collecting cases involving exemptions 1, 3, 4, 7(C), and 7(D)). And the Second Circuit stated in a case involving exemption 4 that cases involving "*other FOIA exemptions* [were] applicable [t]here." *Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 245 n.5 (2d Cir. 2006).

Second, *Davis* applied the doctrine in circumstances that are materially indistinguishable: It involved audiovisual evidence and exemption 7(C). Unable to distinguish *Davis* on the facts, the

Government argues that *Davis* was dicta. In its view, *Davis* had "no occasion to decide" whether the "public domain" doctrine applied because the Government "did '*not* challenge [the] public domain doctrine's' general application in the context of the case." Opp. 15 (quoting *Davis*, 968 F.2d at 1280).

This reading of *Davis* is both novel and wrong. Numerous courts have read *Davis* as establishing that the "public domain" doctrine applies in cases involving exemption 7(C). *E.g., Inner City Press*, 463 F.3d at 244; *Cottone*, 193 F.3d at 554; *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19(D.C. Cir. 1999); *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 896 (D.C. Cir. 1995); *Covington v. McLeod*, No. 09-5336, 2010 WL 2930022, *1 (D.C. Cir. July 18, 2010); *Peay v. Dep't of Justice*, No. 04-1859, 2006 WL 1805616, *3 (D.C. Cir. June 29, 2006); *Edwards v. Dep't of Justice*, No. 04-5044, 2004 WL 2905342, *1 (D.C. Cir. Dec. 15, 2004); *Lopez v. Dep't of Justice*, No. 03-5192, 2004 WL 626726, *1 (D.C. Cir. Mar. 29, 2004); *Bullock v. FBI*, 577 F. Supp.2d 75, 78–79 & n.4 (D.D.C. 2008); *McCall v. U.S. Marshals Service*, 36 F. Supp.2d 3, 7 (D.D.C. 1999); *Geronimo v. Executive Office of U.S. Attys.*, No. 05-1057, 2006 WL 1992625, *6 (D.D.C. July 14, 2006); *Lair v. Dep't of Treasury*, No. 03-827, 2005 WL 645228, *5–6 (D.D.C. Mar. 21, 2005).

Indeed, the Government itself has read *Davis* this way. In its brief in *Isley v. Executive Office for U.S. Attys.*, No. 98-5098, 1999 WL 34833571 (D.C. Cir. June 17, 1999), the Government cited *Davis* as "settled law" that "makes clear" that the "public domain" doctrine *can* "overcome a legitimate

Exemption 7(C) withholding" provided that the requester carries his "initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Id.* at 20–21 (*quoting Davis*, 926 F.2d at 1279).

The Government was right in *Isley* and is wrong now to dismiss *Davis* as dicta, because its current position is contradicted by *Davis*'s disposition and subsequent history. In *Davis*, the D.C. Circuit concluded that, "[b]ut for the publication of the tapes," exemption 7(C) would apply to prohibit their disclosure. *Davis*, 968 F.2d at 1279. Rather than affirming the district court's order denying disclosure, the D.C. Circuit vacated and remanded to give the requester the opportunity to carry his burden of showing that the Government had played the same tapes he requested at trial. *Id.* at 1282. On remand, he made this showing, leading to release of the tapes. *Davis v. U.S. Dep't of Justice*, 460 F.3d 92, 96 (D.C. Cir. 2006) ("*Davis IV*").[1]

Furthermore, the Government *did* challenge the application of the "public domain" doctrine in *Davis*. The Government argued that it did not apply because *U.S. Dep't of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749 (1989), limited it to cases where the requester shows that he is

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[1] The Government notes that it released the tapes in *Davis* without a court order directing it to do so. Opp. 16. There is nothing remarkable about the Government providing relief to a party after it becomes clear that he is entitled to that relief under the Government's own legal position.

seeking exactly the same materials that were played in open court, and because the requester had not carried this burden. *Davis*, 968 F.2d at 1280. The D.C. Circuit agreed that *Reporters Committee* requires this heightened showing, but it disagreed that the doctrine did not apply. Instead, it remanded to give the requester the opportunity to carry the evidentiary burden that it had imposed. *Id.* at 1279–80.[2]

Quite simply, *Davis* relied on the "public domain" doctrine to remand, not affirm, where exemption 7(C) otherwise would have applied. If the court below had done the same, it would have reversed, not affirmed. There is therefore a conflict between the circuits.

II. THE QUESTION PRESENTED GOES TO THE HEART OF WHAT IT MEANS FOR PUBLIC RECORDS TO BE "PUBLIC"

The Government repeatedly describes its use of unsealed evidence in open court as a "limited" disclosure. Opp. 9, 13, 14, 16. But that begs the question, which is *whether* the Government's disclosure of records in open court is "limited" or whether those records are actually accessible to the public. When the Government introduces evidence into the public record, is that sufficient to waive

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[2] The issue that "the government chose not to litigate" in *Davis* was whether *Reporters Committee* foreclosed the "public domain" doctrine entirely. *Davis*, 968 F.2d at 1280; Opp. 16. The Government has again "chose[n] not to litigate" that issue here.

otherwise applicable FOIA exemptions? Or are those records only temporarily available to the people who make it to court on time, such that the Government can use evidence in open court and then singlehandedly prevent others from viewing it once trial is over?

The Tenth Circuit's answer is wrong and undermines the "venerable" common-law right of access to court records. *Cottone*, 193 F.3d at 554; *see Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). This right "is not some arcane relic of ancient English law," it "is fundamental to a democratic state." *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982) (quotation marks omitted). "Like the First Amendment, the right of inspection serves to produce an informed and enlightened public opinion. Like the public trial guarantee of the Sixth Amendment, the right serves to 'safeguard against any attempt to employ our courts as instruments of persecution, to promote the search for truth, and to assure confidence in judicial remedies. And like the Fifth and Fourteenth Amendments, the right of inspection serves to promote equality by providing those who were and those who were not able to gain entry to the courtroom the same opportunity to hear the tapes." *Id.* (quotation marks and alterations omitted).

The Government argues that Petitioner should have requested the tapes from the *Sablan* court, and that this FOIA request "circumvent[s] [that court's] authority to regulate properly the manner and degree of public access to any sensitive materials." Opp. 22–23. But Petitioner *did* ask the *Sablan* court

for the video. That request was fruitless because that court no longer possesses it — the Government does. App. 3, 24. Furthermore, we agree that the *Sablan* court was the proper tribunal to control access to these sensitive materials. But it is the Government's approach, not Petitioner's, that circumvented that court.

The "public domain" doctrine makes the trial court the gatekeeper for access to its records. The Government must ask the trial court to seal evidence pursuant to applicable procedural safeguards, such as giving the public notice and opportunity to object. *See* D.C. Colo. L. Cr. R. 47.1(C), (E); *see also* Br. of Allied Daily Newspapers et al. as *Amici Curiae* at 8–9 ("Media *Amici*"). If the court decides to seal, that decision applies globally: While sealed, records are unavailable from the court or via FOIA. *Cottone*, 193 F.3d at 554 ("public domain" doctrine does not extend to sealed records). But if the court does not seal, that decision applies globally as well. Unsealed materials will be generally available from the court, as the district court's local rules state point-blank that unsealed evidence used at trial is "deemed part of the public record." D.C. Colo. L. Cr. R. 47.1(H); *see* Media *Amici* at 8–9. They also will be generally available under FOIA.

By contrast, the Government's approach allows it to bypass the district court's oversight and procedural safeguards — including notice to the public and opportunity to comment. "In other words, [this] approach enables the government to obtain a *de facto* judicial seal without observing the notice

requirements and other procedural protections demanded by a motion to seal." Media *Amici* at 10.

The Government argues that *Reporters Committee* requires this counterintuitive result. Opp. 10–12. But *Reporters Committee* did not address these issues. Pet. 27–29. That case involved arrest records that "reveal[ed] little or nothing about an agency's own conduct." *Reporters Committee*, 489 U.S. at 773. This case involves court records that shed light on "what the government [was] up to" as warden, as prosecutor, and in its courts. App. 12–13. That case involved a request to one entity for "nonpublic" compilations of data that other entities had made public elsewhere. *Reporters Committee*, 489 U.S. at 753, 764–65. This case involves a request for the same records that were disclosed from the same entity that disclosed them: the Government.

Reporters Committee thus does not involve the inequity or constitutional interests that drive the "public domain" doctrine. The Government here has used records in open court to its advantage as prosecutor, but then prevented citizens from using FOIA to see those same records to ask difficult questions about the Government's own shortcomings. *Reporters Committee* did not consider, and does not countenance, such inconsistent behavior.

III. THE SHOCKING NATURE OF THE CRIME ONLY UNDERSCORES THE CASE FOR CERTIORARI

The Government describes the gruesome death-scene images at issue here in excruciating, blow-by-blow detail. Opp. 3–5. But the Petition itself did not shy away from the "heinous and gruesome" nature of the images, which depict an "extraordinarily degrading and disrespectful" assault on an inmate who was dependent on the Government for protection. Pet. 7. The Government never explains why adding more gruesome details makes this case less worthy of plenary review.[3]

The severity of the attack here only strengthens the case for certiorari. This is not a videotape of a private assault that the Government merely happens to possess. The Government possesses this video because this murder happened on its watch in a federal prison. The Government has a constitutional duty "to protect prisoners from violence at the hands of other prisoners." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994); *see also Brown v. Plata*, 131 S. Ct. 1910, 1928–29 (2011). Pet. 5–6, 29. It is shocking — and a matter of significant public concern — that a crime of this magnitude and duration could occur in what should have been one of

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[3] The Government merely states in a footnote that the privacy interests here are of a "vastly different magnitude" than in *Davis*. Opp. 17 n.3. But the Government does not argue that this difference is material under the "public domain" doctrine, which is grounded in waiver.

the most secure cellblocks in the federal penitentiary system. If this crime could happen here, it could happen anywhere. The video of the results of such extreme government nonfeasance — akin to a 911 line ringing unanswered for hours — implicates public interest concerns of the highest order.

"Every detail of this crime concerns BOP action or inaction." Br. of Columbia Legal Services et al. as *Amici Curiae* at 21. "Why were three inmates housed in a cell intended for administrative segregation? How did the Sablans obtain weapons and alcohol? Why did it take guards so long to respond that the Sablans had time to mutilate Mr. Estrella's body?" *Id.* at 21–22. These matters are particularly pressing for Petitioner's readers who are prisoners. They want no part of a "sensation-seeking culture." Opp. 14 (quoting *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 166 (2004)). For prisoners, the problem of prison violence is a tangible threat. And it is hard to conceive of a more vivid illustration of the Government's failure to quell prison violence than this video.

Under our system of self-government, the decision of how much violence is too much for citizens to watch generally cannot be made for us by the government; it must be made by the people themselves. "[D]isgust is not a valid basis for restricting expression." *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011). This principle is even more true where, as here, the violence is real, not make-believe, and sheds light on the Government's own failures. "Privacy is a concept too integral to the person and a right too essential to

freedom to allow its manipulation to support just those ideas the government prefers." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011). Likewise, privacy is too important to allow the Government to manipulate it to support disclosure when it helps the Government secure convictions, but not when the same materials would subject the Government to potentially embarrassing public scrutiny.

IV. THE QUESTION PRESENTED IS DISPOSITIVE

The outcome of this case turns solely on the question presented. Pet. 34–35. The Government disagrees, arguing that the records here would remain protected because they "were never 'freely available' nor are they permanently preserved in the public domain." Opp. 21. In its view, the "public domain" doctrine applies only when "there would be no reason to invoke the FOIA" because the same records are currently available elsewhere. *Id*. at 22.

But the D.C. Circuit and the Second Circuit have made the "public domain" doctrine important, not pointless. For example, *Davis* did not even ask whether the audiotapes were actually available elsewhere. Presumably, they were not. Otherwise the parties would not have spent 20 years in FOIA litigation. *See Davis IV*, 460 F.3d at 95. Instead, the D.C. Circuit demanded that the request be for the same materials the Government played at trial. "[T]apes enter the public domain once played and received into evidence," and they remain part of the public domain "until destroyed or placed under seal." *Cottone*, 193 F.3d at 554.

The Government played the entire tape here at two trials, it still exists and is unsealed. Accordingly, it remains in the "public domain." The only question, therefore, is whether that doctrine applies.

CONCLUSION

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

RESPECTFULLY SUBMITTED

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