No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BARBARA KOWAL,
PETITIONER,

V.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
RESPONDENTS.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a judicial record admitted into evidence as an unsealed exhibit at a public trial ceases to be a public record if the Government takes custody of it once the trial concludes?

LIST OF PARTIES

Petitioner is Barbara Kowal (plaintiff-appellant below), a paralegal in the Office of the Federal Defender for the Middle District of Florida (FDO).

Respondents (defendants-appellees below) are the United States Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the Drug Enforcement Agency (DEA).

RELATED PROCEEDINGS

Kowal v. U.S. Dep't of Just., et al., Civil Action No. 18-2798 (TJK), 2021 WL 4476746 (D.D.C. Sept. 30,2021)

Kowal v. U.S. Dep't of Just., et al., Civil Action No. 18-2798 (TJK), 2022 WL 2315535 (D.D.C. June 27, 2022)

Kowal v. U.S. Dep't of Just., et al., 107 F.4th 1018 (D.C. Cir. July 16, 2024) *reh'g & reh'g* en banc *denied, Sept. 17, 2024*

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PETITION FOR WRIT OF CERTIORARI

BARBARA KOWAL petitions the Court for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 107 F.4th 1018 and is reproduced at Appendix 1. The District Court's memorandum opinion granting summary judgment in favor of Respondents is not reported but is reproduced at Appendix 2. The District Court's memorandum opinion denying Petitioner's motion to alter or amend its judgment is not reported but is reproduced at Appendix 3.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals entered judgment on July 16, 2024. On August 30, 2024, Ms. Kowal filed a timely petition for panel rehearing and rehearing *en banc*. On September 17, 2024, the D.C. Circuit denied panel and *en banc* rehearing. On December 6, 2024, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including January 15, 2025. Ms. Kowal timely filed this petition on January 7, 2025.

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).

Other pertinent FOIA provisions are reproduced at Appendix 6.

STATEMENT OF THE CASE

"What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). In contravention of this basic principle, the Government refused a FOIA request to disclose a trial exhibit it admitted into evidence in open court at a federal trial.

The exhibit in question was a plea agreement the Government made with a testifying witness who had been charged in the case. The Government marked it as an exhibit, entered it into evidence in open court, the witness testified about it on the stand, and the exhibit was published to the jury. App. 1 at a6; App. 3 at a27. At no point did the Government move to seal the exhibit. Yet the Government now asserts this exhibit is exempt from disclosure under FOIA Exemption 7(C), which precludes production of records compiled for law-enforcement purposes, "but only to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In other words, the Government claims it is necessary to withhold this court record to protect the personal privacy of the witness who openly testified about it at a public trial.

The D.C. Circuit upheld the denial of disclosure under Exemption 7(C). Its ruling hinged on the fact that the Government, rather than the clerk of the court, took custody of the plea agreement exhibit at the conclusion of the trial. Since that

meant the exhibit was not accessible on the public docket, the D.C. Circuit held the exhibit was not a public record. App. 1 at a6. Thus, despite its previous public disclosures at trial, the lower court concluded that the Government had not waived the witness's purported privacy interests because by taking custody of the exhibit, it was removed from the public domain.

The decision below 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. It is well-established that a "trial is a public event." *Craig*, 331 U.S. at 374. Thus, documents that play an adjudicative role in a trial are considered "judicial records" ordinarily subject to public inspection. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). But under the D.C. Circuit's approach, a judicial record ceases to become public if the Government takes custody of it. Consequently, when the Government uses records as evidence in open court, they are only temporarily accessible to whomever happens to make it to court while trial is ongoing. The decision below thus significantly and improperly curtails the public's access to trial exhibits.

The First, Second, Third, and Seventh Circuits have adopted the opposite view, holding that whether judicial records are public depends purely on the role those documents played in the adjudicatory process; materials on which a court relies in determining the litigants' substantive rights are "judicial records," subject to the right of public access. *See FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987); *United States v. Graham*, 257 F.3d 143, 152-53 (2d Cir. 2001);

United States v. Martin, 746 F.2d 964, 968 (3d Cir. 1984); *Smith v. United States Dist. Ct.*, 956 F.2d 647, 650 (7th Cir. 1992). Whether trial exhibits are subsequently retained by the clerk or returned to the custody of the Government has no bearing on whether they are "judicial records" subject to public inspection. *Graham*, 257 F.3d at 152 n.5.

The decision below also created an intra-circuit split. The D.C. Circuit had long held 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 Cottone v. Reno*, 193 F.3d 550, 554-56 (D.C. Cir. 1999); *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992). In both *Cottone* and *Reno*, the Circuit held that the Government was required to disclose audio tapes previously played at public trials. In each case, the relevant tapes were in the custody of the Government, and not otherwise available on the public docket. But that was immaterial to the analysis; by publishing materials in open court, the Government had entered them into the permanent public record. Consequently, the Government could not rely on FOIA exemptions to resist disclosure. Here, however, the decision below reached the opposite result on materially identical facts.

Only one other circuit follows the approach articulated in the decision below. In *Prison Legal News v. Exec. Off. for U.S. Att'ys*, 628 F.3d 1243, 1253 (10th Cir. 2011), the Tenth Circuit held that photographs and video recordings admitted into evidence at a public trial had been removed from the public record when the

Government took custody of the exhibits at the completion of trial. It reasoned that the records were properly withheld pursuant to Exemption 7(C) to protect the privacy interests of third parties because the photos and recordings had not entered the public domain; they were viewed only by the limited number of individuals present in the courtroom during the trial. *Id.*

The D.C. Circuit has now adopted this cramped view that a public disclosure of evidence at a public trial is only a limited disclosure to the courtroom audience. This approach minimizes the constitutional notion of a public trial and runs counter to a longstanding tradition of making court records generally accessible to the public at large. The decision below thereby threatens to undermine the ability of the public to learn from past judicial records about "what the Government [was] up to." *U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 780 (1989). To resolve the split between the circuits on an important question of federal law, this Court should grant certiorari and reverse.

I. 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." *Reps. Comm.*, 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 (cleaned up).

Congress exempted several categories of documents from FOIA's disclosure

requirements. *See* 5 U.S.C. § 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.'" *Reps. Comm.*, 489 U.S. at 755 (quoting § 552(a)(4)(B)).

As relevant here, FOIA Exemption 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). To determine whether such an invasion is "unwarranted," courts must balance the personal privacy interest against the public interest in disclosure. *Nat'l Archives & Recs. Admin. V. Favish*, 541 U.S. 157, 171 (2004); *Reps. Comm.*, 489 U.S. at 762. This right to be informed is advanced by disclosures that "shed any light on the conduct of any Government agency or official." *Id.* at 773.

II. Factual and Procedural Background.

Barbara Kowal is a paralegal in the Federal Defender's Office for the Middle District of Florida (FDO). That office was appointed to represent an indigent defendant, Daniel Troya, in his federal capital post-conviction proceedings. Mr. Troya was sentenced to death after a public trial in the Southern District of Florida.

As part of her paralegal duties, Ms. Kowal submitted a FOIA request to the FBI for its records regarding the investigation and prosecution of Mr. Troya. App. 1

at a2. The FBI produced some records, but withheld others. After exhausting administrative remedies, the FDO filed suit in the United States District Court for the District of Columbia, alleging that the agency's withholdings were improper under the FOIA. App. 1 at a2.

One of the withheld records—and the only one relevant to this Petition—was a Government exhibit admitted at Mr. Troya's trial: a plea agreement between the Government and one of Mr. Troya's co-defendants. The FBI invoked FOIA Exemption 7(C) to justify withholding this record. App. 1 at a5-a6.[1] That exemption is intended to protect the personal privacy of third parties mentioned in agency records. Specifically, Exemption 7(C) protects "records or information compiled for law enforcement purposes ... [that] could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

The FDO argued the withholding was unjustified. Under well-settled law, if information is already in the public domain, an agency cannot invoke an otherwise valid exemption to withhold it. *Cottone*, 193 F.3d at 554–55. Here, the plea agreement was plainly in the public domain: the Government entered it into evidence as an unsealed exhibit in open court. Thus, any privacy rights were waived when the Government voluntarily disclosed the agreement and offered it into the public record.

Despite these facts, the district court granted summary judgment in favor of

[1] The Government also invoked FOIA Exemption 6, which protects "personnel . . . and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The decision below, however, relied solely on Exemption 7(C) in its analysis.

the FBI. It reasoned that "because the plea agreement is not available on the public docket, it is not in the public domain, and may be withheld under Exemption 7(C)." App. 2 at a15.

The FDO moved for reconsideration. App. 8. It argued the district court's determination of whether the plea agreement entered the public record was flawed because it hinged on whether the relevant trial exhibit was accessible through the public docket. This novel rule contravened the long-settled understanding that what transpires in open court is a matter of public record. That understanding is rooted in the common-law right of access to judicial records—a right so fundamental that it predates the Constitution. App. 8 at a42-a44; *In re Leopold*, 964 F.3d 1121, 1127 (D.C. Cir. 2020). Whether an exhibit is available on the court's docket after the trial concludes is thus immaterial to the question at hand: whether the exhibit, by virtue of being a judicial record, is a *public* record subject to inspection.

The district court declined to reconsider its ruling. It held that even if the plea agreement was admitted into evidence and thus "technically public," the fact that it was not available on the electronic docket of the criminal case made it "practically obscure," and therefore not within the public domain. App. 3 at a27-a28.

The FDO appealed. The D.C. Circuit affirmed the grant of summary judgment and ruled that the FBI properly justified its withholding of the plea agreement under Exemption 7(C). App. 1 at a6. Tracking the lower court's reasoning, the panel held that the dispositive issue was whether the relevant trial exhibit was accessible on the public or electronic docket:

> Kowal also specifically challenges the FBI's withholding of a testifying witness's plea agreement because the agreement was admitted into evidence at trial and discussed in open court. Trial records are generally considered public; however, to satisfy the public domain doctrine, they must be "preserved in a permanent public record." *Cottone*, 193 F.3d at 554. Records are no longer public when "destroyed, placed under seal, or otherwise removed from the public domain." *Id.* at 556. And our circuit has cast doubt on the proposition that "practically obscure" material remains public. *Davis*, 968 F.2d at 1279 (cleaned up). Here, the FBI has provided evidence that Troya's trial records, including the specified plea agreement, were not filed with the court and preserved. *Because these records are not accessible on the public or electronic docket, the plea agreement does not fit within the public domain doctrine.*

App. 1 at a6 (emphasis added).

The FDO filed a timely petition for rehearing and rehearing *en banc*. App. 7. The petition specifically argued that the panel's newly-created "docket accessibility" rule contravened long-standing circuit precedent holding that when the Government admits materials into evidence in open court, such materials enter the permanent public record and must be disclosed pursuant to a FOIA request. App. 7 at a42-a45 [rehearing pet at 5-8]. The D.C. Circuit, however, did not act to resolve the intra-circuit conflict; it denied the petition for rehearing and rehearing *en banc* on September 17, 2024. App. 4; App. 5.

REASONS FOR GRANTING THE PETITION

1. This Court should grant certiorari because the D.C. Circuit's decision below conflicts with decisions of the First, Second, Third, and Seventh Circuits that unsealed judicial records are matters of public record. It is well-settled in those circuits that if a judicial record played a role in the adjudicatory process, the public has a right to see it. That right of public access to court records continues to apply, notwithstanding a change in the government custodian of the records. The D.C. Circuit—along with the Tenth Circuit—is in direct conflict with the majority approach. Under its rule, a change in the government custodian is dispositive; an unsealed judicial record used in a public trial ceases to be a public record if the Government takes possession of it at the conclusion of the trial. These two approaches cannot be harmonized. Given the breadth and depth of the conflict, this Court should grant certiorari to resolve the split. This is especially so given the national significance of the underlying issue—the public's right to inspect judicial records and the associated public interest in transparent court proceedings.

2. Certiorari is also warranted because the decision below created an intra-circuit split. Prior to this decision, it was well-settled in the D.C. Circuit that the Government must grant a FOIA request for records that it previously disclosed in open court. *See Cottone*, 193 F.3d at 554; *Davis*, 968 F.2d at 1281. But under the D.C. Circuit's newly-promulgated rule, these cases would have been decided differently because the relevant trial exhibits were not accessible on the public docket. Accordingly, the decision below squarely conflicts with *Cottone* and *Davis*.

While an intra-circuit conflict is not, by itself, ordinarily a basis for certiorari review, "when the intracircuit conflict relates to a recurring and important issue or is accompanied by a 'widespread conflict among the circuits,'" it may become one of the facts inducing the Court to grant certiorari. Stephen M. Shapiro et al., Supreme Court Practice, 4-24 (11th ed. 2019) (quoting *Commissioner v. Estate of Bosch*, 387 U.S. 456, 457 (1967), and collecting cases). Given the prominent role the D.C. Circuit plays in shaping FOIA jurisprudence for the federal courts, as well as the recurring and important underlying issue, this Court should grant certiorari to resolve the D.C. Circuit's divergent precedents.

3. Certiorari is further warranted because the decision below undermines the longstanding and important principle that unsealed judicial records are truly matters of public record. Application of exemptions to FOIA disclosure must take into account not only the public's interest in the underlying information, but also the well-established interest in transparent court proceedings. Any other approach allows the Government to obtain a *de facto* seal on court records without a public process, inverting what should be the Government's burden to articulate a need for secrecy *ex ante* into the public's need to litigate disclosure under FOIA *ex post*. Having divulged records for its own purposes at trial, the Government should not be free to claw them back from the public domain. Nor should it be allowed to retroactively assert a privacy interest it plainly waived at the time of its public disclosure. This Court should grant certiorari and reverse to ensure the public retains the right to see for itself evidence the Government used in a public trial.

I. THE CIRCUITS ARE SPLIT ON THE QUESTION PRESENTED.

The trial exhibit requested by Petitioner became a judicial document when the Government admitted it into evidence in open court. At no time before, during, or after the trial did the Government move to seal the exhibit. This unsealed exhibit is currently in the custody of a government office. Under the approach followed by the First, Second, Third, and Seventh Circuits, the exhibit remains in the permanent public record, and the public retains the right to access it. But under the minority rule announced by the D.C. Circuit in the decision below, the exhibit was removed from the public domain once the Government took custody of it. In so ruling, the D.C. Circuit followed the approach previously articulated by the Tenth Circuit. The D.C. Circuit's decision thus deepened a pre-existing circuit split on a significant and recurring issue: whether unsealed judicial records are truly public.

A. A Majority of Circuits Hold That Materials Published In Open Court Are "Judicial Records" That Permanently Enter The Public Record.

A number of circuit courts have concluded that materials published in open court are "judicial records" that enter the public domain, and are thus subject to public access.

In *United States v. Graham*, *supra*, the Second Circuit considered this issue with respect to tapes played at a pretrial hearing. There, the Government argued that since the tapes were never formally admitted into evidence and filed with the court, they were not public. 257 F.3d at 151. The Second Circuit wholly rejected "the view that this Court could answer this question simply by determining whether the

document was on file with the court[.]" *Id.* at 152. As it observed, it was immaterial that the tapes were "not in the custody of the Clerk, but rather in the hands of prosecutor" because "the tapes became public by virtue of having been played in open court." *Id.* at 153 n.5.

Similarly, while evidence admitted at trial was unquestionably a "judicial record," that category of records includes more than just trial exhibits. *Id.* at 152. In order to be considered a "judicial record," the pertinent inquiry was whether the record was "relevant to the performance of the judicial function and useful in the judicial process[.]" *Id.* (quoting *United States v. Amadeo*, 44 F.3d 141, 145 (2d Cir. 1995)). If so, the document was a "judicial record," and it was axiomatic that the public had a right of access to the record, regardless of the government custodian. *Id.* at 152-53.

The First, Third, and Seventh Circuits have all likewise held that documents that play an adjudicative role in a court proceeding are "judicial records" ordinarily subject to public inspection, regardless of whether they have been entered into evidence or otherwise formally filed with the court.

In *Standard Fin. Mgmt. Corp.*, *supra*, the First Circuit held that financial statements examined by the district court at a hearing on a consent decree were "judicial records" subject to public inspection, notwithstanding the fact the relevant litigation by the parties had already been terminated at that point and the statements had never been entered into evidence. Of note, the relevant hearing was public, and the financial statements were unsealed. 803 F.2d at 406. Moreover, the

district court unquestionably relied upon the documents to determine the litigants' substantive rights and to perform its adjudicatory function. *Id.* at 410. Hence, the financial statements were "judicial records" to which the presumption of public access attached. *Id.*

In *United States v. Martin, supra,* the Third Circuit considered whether transcripts published to a jury in a criminal trial, but not entered into evidence, were judicial records subject to public inspection. In finding that they were, the court noted that the "common law right of access is not limited to evidence," and that the "public interest in monitoring judicial proceedings" supported a presumption of access. 746 F.2d at 968. Indeed, it would "unduly narrow the right of access were it to be confined to evidence properly admitted, since the right is based on the public's interest in seeing and knowing the events which actually transpired" in open court. *Id.* at 969 (quoting *United States v. Criden,* 648 F.2d 814, 828 (3d Cir. 1981)).

In *Smith v. U.S. Dist. Court, supra,* the Seventh Circuit held that a memo that had not been entered into evidence was nevertheless a "judicial record" subject to public inspection because it was "read in open court, and thus was part of the court proceedings." 956 F.2d at 650. As it explained, "the policy behind the common law presumption of access is that what transpires in the courtroom is public property," *Id.*

As each of these circuit courts recognized, the common-law right functions to extend the right of the public to attend court proceedings to include the inspection

of materials presented at those proceedings:

> Thus, just as a member of the public sitting in the courtroom might observe the presentation of evidence as to which an objection is made and sustained as well as evidence which is admitted, it makes sense that the definition of a "judicial document" would extend to any material presented in a public session of court "relevant to the performance of the judicial function and useful in the judicial process" whether or not it was formally admitted.

Graham, 257 F.3d at 153 (citing *United States v. Amodeo*, 44 F.3d 141, 146 (2d Cir. 1995)).

Indeed, even the D.C. Circuit itself adhered to this principle until recently. Prior to its decision below, the D.C. Circuit had long relied on the "venerable common-law right to inspect and copy judicial records" to hold that the Government could not rely on an otherwise valid FOIA exemption to resist disclosure of evidence it had previously published in open court. *See Cottone*, 193 F.3d at 554. As detailed more fully in Section II, *infra*, the decision below has thus also created an intractable intra-circuit split.

B. The Decision Below Deepened An Already-Existing Circuit Split.

Prior to the decision below, the Tenth Circuit had already created a circuit split when it issued its decision in *Prison Legal News*. There, the FOIA requester sought access to a video depicting the aftermath of a prison murder and autopsy photographs of the victim. 628 F.3d at 1246. The Government invoked Exemption 7(C) to withhold these records, asserting that disclosure would constitute an unwarranted invasion of personal privacy of the victim's family. *Id.* The FOIA

requester countered that notwithstanding the exemption, the records must nonetheless be released because they were admitted as unsealed exhibits in open court at two previous criminal trials, and therefore were already in the public domain. *Id.* at 1252.

The Tenth Circuit upheld the Government's use of Exemption 7(C) to withhold the trial exhibits. It noted that after the trials concluded, "the photographs and video were returned to the United States Attorneys Office pursuant to a standing order regarding the custody of exhibits." *Id.* at 1246. This fact was dispositive to its analysis because it meant the exhibits had been "removed from the public record." *Id.* at 1253. Given that, it reasoned that the exhibits had not truly become public:

> [T]he actual images have been viewed by a limited number of individuals who were present in the courtroom at the time of the trials. Thus, enforcement of Exemption 7(C) can still protect the privacy interests of the family with respect to the images and recordings because they have not been disseminated.

Id.

The D.C. Circuit's decision follows the rationale articulated by the Tenth Circuit. It, too, concluded that since the relevant trial exhibit was not in the custody of the clerk of court—and thus not available on the public docket—it was no longer in the public domain. App. 1 at a6. ("[T]he FBI has provided evidence that Troya's trial records, including the specified plea agreement, were not filed with the court and preserved. Because these records are not accessible on the public or electronic docket, the plea agreement does not fit within the public domain doctrine."). In so

doing, the D.C. Circuit deepened the pre-existing split among the circuits on whether the public's right of access to judicial records depends entirely on what government entity happens to be the custodian of those records. This is a question of enormous importance because it fundamentally defines what it means for a trial and judicial record to be "public." Accordingly, this Court should grant certiorari to resolve this conflict among the circuit courts.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT WITHIN THE D.C. CIRCUIT.

The decision of the panel below is in direct conflict with the decisions of two other panels of the D.C. Circuit. Typically, such an intra-circuit conflict would not necessitate this Court's involvement. But this intra-circuit conflict is not typical. FOIA litigation is heavily concentrated in the District of Columbia, so the D.C. Circuit plays a unique and outsized role in shaping FOIA jurisprudence for all federal courts. Thus, an intra-circuit conflict here on a FOIA matter is intolerable. It will create needless confusion for FOIA requesters, agencies, and courts across the country attempting to determine when judicial records are subject to disclosure. While such intra-circuit conflicts are ordinarily expected to be resolved by the circuits themselves by way of panel or *en banc* reconsideration, the D.C. Circuit declined to do so here, even after Petitioner brought the conflict to its attention. Given the importance of the issue, and the Circuit's refusal to act, this Court should grant certiorari to address the intra-circuit conflict.[2]

[2] The Court, of course, need not resolve the conflict itself. It may exercise the option of granting the writ, vacating the judgment, and remanding the issue to the D.C. Circuit for further

A. The Decision Below Created An Intra-Circuit Conflict.

The conflict here concerns whether the Government can refuse to disclose records by invoking a FOIA exemption when it has already disclosed those very same records by placing them in the public domain as unsealed evidence in a public trial. Prior to the decision below, the D.C. Circuit definitively settled this matter in two seminal cases: *Davis* and *Cottone*.

In *Davis*, the FOIA requester sought tape recordings made by the FBI during a criminal investigation of a reputed mob boss. The Government invoked various FOIA exemptions, including Exemption 7(C), to resist disclosure of the tapes. The requester asserted that the exemptions did not apply because some of the tapes had already been made public when they were entered into evidence and played in open court at the mob boss's subsequent trial. The D.C. Circuit sided with the requester and held that "the government cannot rely on an otherwise valid [FOIA] exemption claim to justify withholding information that has been officially acknowledged or is in the public domain." *Davis*, 968 F.2d at 1279 (internal quotation marks and citations omitted). Therefore, the requester was entitled to any tapes that were played in open court because such information had entered and remained in the public domain. *Id.* However, the requester bore the burden of demonstrating that the exact portions of the tapes he sought had, in fact, been played in court. *Id.* at 1280. 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*

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consideration. *See Proctor v. State Farm Mut. Auto. Ins. Co.*, 440 U.S. 942 (1979); *Long Island Lighting Co. v. Lloyd Harbor Study Grp., Inc.*, 435 U.S. 964 (1978).

v. Dep't of Just., 460 F.3d 92, 96 (D.C. Cir. 2006).[3]

Cottone concerned an almost identical fact pattern. The FOIA requester sought wiretap recordings that had been introduced into evidence and played in open court during a public criminal trial. Building on *Davis*, the D.C. Circuit observed that "the logic of FOIA mandates that where information is truly public, then enforcement of an exemption cannot fulfill its purposes." *Cottone*, 193 F.3d at 554 (cleaned up). Thus, "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Id.*

The *Cottone* decision left no doubt that materials admitted into evidence in a public trial permanently enter the public domain:

> [O]ur decisions construing the venerable common-law right to inspect and copy judicial records make it clear that audio tapes enter the public domain once played and received into evidence. We have long observed the general rule that a trial is a public event, and what transpire in the courtroom is public property.

Id. (cleaned up). Indeed, "until destroyed or placed under seal, tapes played in open court and admitted into evidence—no less that the court reporter's transcript, the parties' briefs, and the judge's order and opinions—remain a part of the public domain." *Id.* Thus, the public's right to inspect and obtain copies of materials entered into evidence continues "even after a trial has concluded." *Id.*

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[3] Although not at issue here, the FDO met its burden of production by proffering a transcript excerpt of the co-defendant's testimony acknowledging the plea agreement, as well as what it reasonably believed was a copy of the plea agreement that it obtained from a non-public source. The Government acknowledged the transcript established that the plea agreement was entered into evidence in open court, but not that the proffered plea agreement matched the withheld record.

Until recently, *Cottone* and *Davis* established a clear rule: materials admitted into evidence in open court enter the permanent public record, therefore the Government cannot rely on FOIA exemptions to withhold them. Indeed, the D.C. Circuit has applied this "public domain" rule in cases involving a wide spectrum of FOIA exemptions.[4] But what was once lucid D.C. Circuit law is now conflicted. Under *Kowal*, trial evidence loses its status as a public record if the Government takes custody of it after trial.

The D.C. Circuit's decisions cannot be harmonized. Yet despite being in clear conflict with prior precedent, the *Kowal* court did not overrule *Cottone* and *Davis*. Thus, future litigants confronted with this issue will be faced with the precarious and unenviable task of attempting to determine whether the panel of judges deciding their case will follow the long-established rule articulated in *Cottone/Davis*—grounded in decades of precedent construing the common-law right to inspect judicial records—or the novel rule recently announced in *Kowal*.

B. The Intra-Circuit Conflict Is Significant Because Of The Prominent Role The D.C. Circuit Plays In Shaping FOIA Jurisprudence For The Federal Courts.

The D.C. Circuit "has long played a significant role" in interpreting the provisions of the FOIA and shaping its jurisprudence.[5] FOIA litigation is heavily

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[4] *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); *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).

[5] Deepa Varadarajan, *Business Secrecy Expansion and FOIA*, 68 UCLA L. Rev. 462, 488 (2021). *See also* Kristi A. Miles, *The Freedom of Information Act: Shielding Agency Deliberations*

concentrated in that jurisdiction: As of calendar year 2020, nearly 60% of all FOIA cases were filed in the District of Columbia.[6]

This is not surprising. The primary defendants in FOIA cases are federal agencies often based in the nation's capital.[7] Additionally, the FOIA statute allows any FOIA suit to be filed in D.C. even if neither the plaintiff nor the requested records are physically located there.[8] Consequently, "[m]ost FOIA case law comes from the D.C. Circuit because, under FOIA, the D.C. Circuit is a proper venue for all FOIA litigation."[9]

Given its status as "the most active FOIA precedent-setter,"[10] other circuits have acknowledged the D.C. Circuit's particular expertise in this area of the law and have accordingly given its FOIA decisions much deference.[11] Thus, this intra-circuit conflict is significant because it will not be confined to the District of

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from FOIA Disclosure, 57 Geo. Wash. L. Rev. 1326, 1327 (1989) ("Since the enactment of FOIA twenty-three years ago, the United States Court of Appeals for the D.C. Circuit has played a leading role in interpreting the provisions of the Act."); Kimberly Woolley, *No Smoke Without FOIA: Rejecting an Exemption 5 Defense*, 65 Geo. Wash. L. Rev. 817, 824 (1997) ("The D.C. Circuit's rulings on FOIA have played a significant role in interpreting the Act.").

[6] *See* FOIA Project Staff, *When FOIA Goes to Court: 20 Years of Freedom of Information Act Litigation by News Organizations and Reporters* (Jan.13, 2021), https://foiaproject.org/2021/01/13/foialitigators2020/.

[7] *Id.*

[8] *Id.*

[9] Isaac A. Krier, *Shining A Light on Rattley: The Troublesome Diligent Search Standard Undercutting New York's Freedom of Information Law*, 91 Fordham L. Rev. 681, 720 n.147 (2022) (citing 5 U.S.C. § 552(a)(4)(B).

[10] 1 James T. O'Reilly, Federal Information Disclosure § 3:6 (2023).

[11] *See Cooper Cameron Corp. v. U.S. Dep't. of Labor*, 280 F.3d 539, 543 (5th Cir. 2002) (acknowledging D.C. Circuit is "the federal appellate court with the most experience" in FOIA cases); *Ingle v. Dep't of Justice*, 698 F.2d 259, 263 (6th Cir. 1983) (noting that the D.C. Circuit "is the forum most frequently confronting FOIA issues"); G. Branch Taylor, *The Critical Mass Decision: A Dangerous Blow to Exemption 4 Litigation*, 2 CommLaw Conspectus 133, 139 (1994) ("Because most FOIA cases are brought in [the D.C. Circuit], its decisions are given some deference by the other circuits.")

Columbia; it will sow confusion among the many federal courts across the nation that look to the D.C. Circuit for guidance on FOIA matters.

C. Granting Certiorari To Resolve An Intra-Circuit Conflict Is Warranted Here.

Ordinarily, intra-circuit conflicts should be resolved by the court of appeals in which the conflict arose. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957). This is accomplished through *en banc* review, so there is normally little need for this Court to become involved. *See* Fed. R. App. P. 40. But here, that remedy failed. Petitioner gave the full D.C. Circuit the opportunity to reconsider the decision in light of the conflict it created with *Cottone* and *Davis*. But without explanation, the panel below and the full Circuit declined that invitation. Thus, absent this Court's granting of the writ, the intra-circuit conflict will not be resolved.

While the Court's use of its certiorari power in such circumstances is rare, it is not unprecedented. *See Kent v. United States,* 383 U.S. 541, 557 n.27 (1966) (certiorari granted where D.C. Circuit decisions had been "self-contradictory"); *United States v. Johnston,* 316 U.S. 649 (1942) (certiorari granted where "conflict of views which has arisen among the judges of the Ninth Circuit"). Given the unique role the D. C. Circuit plays in shaping FOIA jurisprudence for the federal courts, this case presents a much stronger basis to grant certiorari than did *Kent* and *Johnston*. *See Maggio v. Zeitz,* 333 U.S. 56, 59-60 (1948) (granting certiorari based on intra-circuit conflict because Second Circuit was the circuit most frequently confronted with difficult bankruptcy problems). Additionally, certiorari is warranted because the question presented by this intra-circuit conflict is one of importance.

See Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 508 (1950) (certiorari proper where intra-circuit conflict involves important question); *John Hancock Mut. Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939) (same).

III. THE QUESTION PRESENTED CONCERNS AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING PUBLIC ACCESS TO JUDICIAL RECORDS.

The D.C. Circuit's decision not only created inter- and intra-circuit splits. Under its 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 D.C. Circuit's Decision Misconstrues FOIA And Makes Public Records Significantly Less Public.

The D.C. Circuit erred in holding that Exemption 7(C) prevents disclosure when the Government has previously disclosed the exact same record in open court. The crux of the D.C. Circuit's ruling was that the record ceased to be public once the Government took custody of it at the conclusion of trial. 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 long-standing principles. The Government cannot claw them back, shielding them from access that would otherwise be available at court.

"[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 Broad. v. Cohn*, 420 U.S. 469, 495 (1975). "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*, 435 U.S. at 597. 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. Rickey*, 767 F.2d 705, 708 (10th Cir. 1985).

That concern is at its pinnacle "in cases where the government is a party." *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410. "[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 a federal-capital case, and it also sheds light on the Government's actions in providing leniency to a culpable co-defendant in exchange for their cooperation.

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 Broad.*, 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 D.C. 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 D.C 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 D.C. Circuit's decision effectively removes the records from the public domain, and the public can never access them ever again. Under the lower court's approach, this is true regardless of the reason the Government takes a record. So, for example, if a prosecutor took custody of an exhibit after trial merely because the courthouse lacked adequate storage, that arbitrary, administrative decision would then

transform the nature of the judicial record for FOIA purposes.

The D.C. 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 at a public trial, 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 Broad.*, 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.

B. The D.C. Circuit Misread This Court's Precedent In Reaching Its Erroneous Decision.

The D.C. Circuit read this Court's decision in *Reporters Committee* as supporting its cramped conception of the "public domain," noting that this Court had "cast doubt on the proposition that 'practically obscure' material remains

public." App. 1 at a6.[12] The decision below consequently inferred that, per *Reporters Committee*, the trial exhibit here became "practically obscure" by virtue of not being available on the public docket. But this Court's decision 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 D.C. Circuit's position. Petitioner is not asking for records that have never been made freely available. Nor is she asking for a compilation of publicly available but otherwise scattered data in an effort to avoid the trouble of compiling the data herself.

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[12] Although the decision cites to *Davis* for this proposition, the pin cite makes clear that the *Davis* court was relying on *Reporters Committee* for this principle. *See Davis* 968 F.2d at 1270 ("[*Reporters Committee*] ... does cast doubt on the proposition that, simply because material has been made public at one time, it should be thought permanently in the public domain, even though it has since become 'practical[ly] obscur[e].' *Id.* at 762-71, 109 S. Ct. at 1476-80.") (alterations in original).

Petitioner is instead asking for exactly the same record 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 trial exhibit here is 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 also 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, Petitioner seeks records that speak to "what the government [was] up to" as prosecutor, and in its courts.

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 plea agreement "available to the general public" by entering it into evidence, eliciting testimony about it in open court, and never moving to seal it. 489 U.S. at 759. But now, the Government is refusing to make the plea agreement available at all, contending that it is too private to share.

Reporters Committee thus confirms that the D.C. Circuit's prior precedent in *Cottone* and *Davis* was correct, and that the panel below was wrong to conclude that the relevant court record here need not be released.

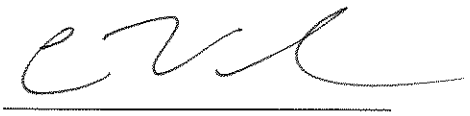
IV. THIS CASE IS AN IDEAL VEHICLE.

This case is an excellent vehicle for resolving the circuit split here. This case stands or falls on the difference between the D.C. and Tenth Circuit's rule and the rule applied in the First, Second, Third, and Seventh Circuits. The D.C. Circuit held that a trial exhibit ceased to be a public record once the Government took custody of it at the conclusion of trial. But if it had followed the rule adopted by the majority of Circuits—as well as its own precedents in *Cottone* and *Davis*—it would have reached the opposite result. The Petitioner here requested exactly the same record that the Government used publicly at trial; under the majority rule, the Government could not rely on an otherwise valid FOIA exemption to justify withholding that record. 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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