No. 24-6692

IN THE SUPREME COURT OF THE UNITED STATES

BARBARA KOWAL, PETITIONER

v.

DEPARTMENT OF JUSTICE, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a law-enforcement record must be disclosed under the Freedom of Information Act, 5 U.S.C. 552, despite privacy concerns, by virtue of the document's previous admission into evidence at a criminal trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a7) is reported at 107 F.4th 1018. The opinion of the district court granting summary judgment to the government (Pet. App. a8-a21) is available at 2021 WL 4476746. The opinion of the district court denying petitioner's motion to alter or amend the judgment (Pet. App. a22-a28) is available at 2022 WL 2315535. Prior opinions of the district court are reported at 464 F. Supp. 3d 376 and 490 F. Supp. 3d 53 or available at 2021 WL 3363445.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2024. A petition for rehearing was denied on September 17, 2024 (Pet. App. a29-a30). On December 6, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 15, 2025. The petition was filed on January 7, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, generally mandates disclosure upon request of records held by a federal agency, subject to several exemptions. Department of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 7-8 (2001). Exemption 6 authorizes an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Exemption 7(C) authorizes an agency to withhold "records or information compiled for law enforcement purposes," if production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). In assessing an agency's reliance on Exemption 7(C), courts balance the privacy interests at stake against the public interest in disclosure. See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989).

2. On the evening of October 12, 2006, Daniel Troya and Ricardo Sanchez, Jr., began to stalk Jose Luis Escobedo, a rival drug dealer, who was driving a Jeep Cherokee on Florida highways. Br. in Opp. at 3, Sanchez v. United States, 575 U.S. 995 (2015) (No. 13-10282). Escobedo's wife, Yessica Escobedo, and his two children, three-year-old Luis Damian Escobedo (Damian) and four-year-old Luis Julian Escobedo (Julian), were passengers in the Jeep. Ibid. After following the Escobedo family for nine hours, Troya and Sanchez confronted them on the side of the Florida Turnpike. Id. at 3-4. Troya and Sanchez shot all four members of the family and left their bodies on the side of the road. Id. at 4. Each person was shot multiple times, and two different firearms were used. Ibid. Damian drowned in his own blood after being shot through the heart. Ibid. Julian was killed by a close-range shot to the head. Ibid. Yessica died while trying to protect the children. Ibid.

After a jury trial in the Southern District of Florida, Troya and Sanchez were convicted of various federal crimes and sentenced to death for the murders of the Escobedo children. Br. in Opp. at 4-5, 12, Sanchez, supra (No. 13-10282). Both defendants appealed, and the Eleventh Circuit affirmed. United States v. Troya, 733 F.3d 1125 (2013), cert. denied, 575 U.S. 995 (2015). In 2016, Troya moved under 28 U.S.C. 2255 to vacate his sentence on various grounds. 16-cv-80700 D. Ct. Doc. 1 (S.D. Fla. May 4, 2016). That motion remains pending, although in

December 2024 President Biden commuted Troya's and Sanchez's death sentences to life imprisonment.

3. Petitioner is a paralegal for a federal public defender who represents Troya in his Section 2255 proceedings. Pet. App. a2. In connection with those proceedings, petitioner submitted FOIA requests to components of the Department of Justice for "all documents, files, records, etc. pertaining to any investigation, arrest, indictment, conviction, sentencing, incarceration, and/or parole of . . . Daniel Troya." Ibid. The agencies searched for and identified responsive records, ultimately producing hundreds of pages of documents in whole or in part and withholding others. Ibid. Among the records withheld was a plea agreement entered into by a witness who testified at Troya's trial. Id. at a6. The government explained that FOIA Exemptions 6 and 7(C) shield the plea agreement and other documents because they contain personal information about third parties, including investigators and witnesses. Id. at a5.

Dissatisfied with the government's productions, petitioner filed suit in the District of Columbia. Pet. App. a2. As relevant here, petitioner contended that the trial witness's plea agreement is not covered by Exemptions 6 and 7(C) and cannot be withheld in any event "because the agreement was admitted into evidence at [Troya's] trial and discussed in open court." Id. at a6; see id. at a13-a15 & n.1. Under the D.C. Circuit's "public domain doctrine," "'materials normally immunized from disclosure

under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.'" Id. at a5 (quoting Cottone v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999)).

The district court granted summary judgment to the government. Pet. App. a8-a21. The court concluded, among other things, that the government had properly invoked Exemptions 6 and 7(C) for the plea agreement and other documents. Id. at a13-a15 & n.1. And the court found the public-domain doctrine inapplicable because the agreement was not available on the trial court's public docket and thus was not accessible to the public. Id. at a15 n.1. The court later denied petitioner's motion to alter or amend the judgment. Id. at a22-a27.

4. The court of appeals affirmed. Pet. App. a1-a7. In pertinent part, it upheld the application of Exemptions 6 and 7(C) to the plea agreement and other documents in light of the privacy interest in "prevent[ing] 'possible harassment' or 'derogatory inferences and suspicion' against [government] personnel and witnesses for their involvement in a gang murder investigation" and the lack of a countervailing public interest in disclosure. Id. at a5; see id. at a5-a6. The court further held that the public-domain doctrine does not apply to the plea agreement because that document, having not been "filed with the [trial] court" or made "accessible on the public or electronic docket," has not been "'preserved in a permanent public record.'" Id. at a6 (quoting Cottone, 193 F.3d at 554).

ARGUMENT

Petitioner renews her contention (Pet. 23-30) that the plea agreement must be disclosed under FOIA by virtue of having been admitted into evidence at Troya's trial. The court of appeals correctly rejected that contention, however, and its decision does not conflict with any decision of this Court or another court of appeals. In any event, this case would be an unsuitable vehicle for considering the question presented, principally because petitioner states (Pet. 19 n.3) that she is already in possession of the relevant document. Further review is unwarranted.

1. The court of appeals correctly held that the plea agreement is exempt from disclosure under FOIA Exemptions 6 and 7(C). Pet. App. a5-a6.

a. Exemption 7(C) excludes from FOIA "records or information compiled for law enforcement purposes" insofar as disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C); see Pet. App. a5 (explaining that when law-enforcement records are at issue, Exemption 6 is subsumed by Exemption 7(C) and need not be considered). Petitioner does not dispute that the plea agreement is a law-enforcement record. Pet. App. a14. Exemption 7(C) thus applies to the plea agreement if the privacy interests involved outweigh "the public interest in disclosure." United States

Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 776 (1989).

The privacy interests at stake here outweigh any public interest in disclosure. The government explained below that disclosing the plea agreement and the other withheld documents would reveal "names and other personal information, such as telephone numbers, addresses, and confidential source numbers," which could lead to "'harassment' or 'derogatory inferences and suspicion' against the personnel and witnesses for their involvement in a gang murder investigation." Pet. App. a5. On the other side of the ledger, there is no significant public interest in disclosure. As the court of appeals noted, petitioner "provide[d] no evidence of agency misconduct" related to the withheld records and "merely speculate[d] that the government may have exculpatory evidence" in Troya's case. Id. at a6; see SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1205-1206 (D.C. Cir. 1991).

Accordingly, the court of appeals and the district court rightly concluded that privacy interests outweigh the public interest in disclosure of the plea agreement. Pet. App. a5, a14-a15; see Reporters Comm., 489 U.S. at 762. Such a case-specific determination does not warrant this Court's review, particularly "when district court and court of appeals are in agreement as to what conclusion the record requires." Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

b. Petitioner nevertheless contends, relying largely on the "common-law right of access to judicial records," that the plea agreement must be disclosed by virtue of having been admitted into evidence at Troya's trial. Pet. 8; see Pet. 23-30; Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597-599 (1978) (describing such common-law right). That is incorrect. First, the relevance of the common-law right of access to judicial records is doubtful because petitioner seeks an executive-branch document under FOIA, not a judicial record. See 5 U.S.C. 551(1)(B) (providing that a federal court is not an "agency" subject to FOIA); Center for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 937 (D.C. Cir. 2003) (holding that FOIA's "carefully calibrated statutory scheme, balancing the benefits and harms of disclosure," "preempts any preexisting common law right"), cert. denied, 540 U.S. 1104 (2004).

Second, this Court has already rejected petitioner's premise (see Pet. 27) that no privacy interest exists, and Exemption 7(C) is inapplicable, when a document has previously been disclosed to a segment of the public. As the Court observed in Reporters Committee, "information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons'" and thus "'not freely available to the public.'" 489 U.S. at 763-764 (citation omitted). Hence, a person's criminal record may be exempt from FOIA even though it compiles publicly available information. See id. at 764.

Similar reasoning applies here. Just as "there is a vast difference" from a privacy perspective between scattered public records and a rap sheet compiling them, ibid., there is a vast difference between disclosing a plea agreement to the jury and other participants in a trial (and discussing aspects of it during courtroom testimony), see p. 4, supra, versus disseminating it to the general public. See Prison Legal News v. Executive Office for U.S. Attorneys, 628 F.3d 1243, 1253 (10th Cir.) (where gruesome crime-scene photographs had only "been viewed by a limited number of individuals who were present in the courtroom," "enforcement of Exemption 7(C) c[ould] still protect the privacy interests of the [victim's] family"), cert. denied, 565 U.S. 971 (2011); see also Department of the Air Force v. Rose, 425 U.S. 352, 380-381 (1976) (privacy interest protected by Exemption 6 can apply to information once public and now "forgotten").

There is thus no basis for petitioner's proposed rule that a record's past admission into evidence at a trial precludes application of Exemption 7(C). Consistent with the court of appeals' discussion of its public-domain doctrine, the exemption's text and purpose may remain applicable when such a record was once made public to some extent but was not "preserved in a permanent public record." Pet. App. a6 (quoting Cottone v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999)). And petitioner acknowledges (Pet. 3, 8-9, 16-17) that the plea agreement here was not so preserved -- for example, on the trial court's public docket.

To be sure, the occurrence and extent of a record's past publication may well bear on the applicability of Exemption 7(C), see Prison Legal News, 628 F.3d at 1249 -- and the exemption will not apply in any event absent some personal-privacy interest, see 5 U.S.C. 552(b)(7)(C) (exemption applies insofar as production "could reasonably be expected to constitute an unwarranted invasion of personal privacy"). Petitioner's concerns about government transparency and public access to materials used in judicial proceedings (Pet. 2-5, 10-11) are therefore overstated. FOIA accounts for such concerns in the balance it strikes between personal privacy and disclosure. See Reporters Comm., 489 U.S. at 762. The court of appeals' decision is correct.

2. Petitioner further errs in contending (Pet. 12) that the courts of appeals are divided, and that the D.C. Circuit's precedent is internally inconsistent, on the question presented. For starters, as petitioner recognizes (Pet. 4-5, 15-17), the decision below coheres with the Tenth Circuit's in Prison Legal News, supra, which applied Exemption 7(C) to law-enforcement records "despite the government's use of the records at a public trial." 628 F.3d at 1252; see id. at 1248-1253.

Petitioner asserts (Pet. 12-15) that the decision below conflicts with decisions of the First, Second, Third, and Seventh Circuits. But none of the cited decisions involved FOIA, let alone Exemption 7(C). Each arose under the common-law right of

access to judicial records, which is inapplicable here (p. 8, supra). See Federal Trade Comm'n v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 (1st Cir. 1987); United States v. Graham, 257 F.3d 143, 149-151 (2d Cir. 2001); United States v. Martin, 746 F.2d 964, 967-968 (3d Cir. 1984); Smith v. United States Dist. Ct., 956 F.2d 647, 649-650 & n.1 (7th Cir. 1992). Nor did any of them give dispositive weight, as petitioner would under FOIA, to the relevant records' previous disclosure in court. In Standard Financial Management, for instance, the First Circuit noted that the relevant records had previously been unsealed in court, but went on to consider whether they were sufficiently germane to be subject to disclosure and whether other circumstances, including privacy concerns, justified nondisclosure. 830 F.2d at 406, 408-412. Reflecting the non-"absolute" nature of the common-law right, Nixon, 435 U.S. at 598, the cited cases at most relied on prior disclosure in a judicial setting as one factor in the discretionary access inquiry. See, e.g., Graham, 257 F.3d at 154; Martin, 746 F.2d at 970-971.

Petitioner fares no better in asserting (Pet. 18-20) a conflict between the decision below and prior decisions of the D.C. Circuit in Cottone, supra, and Davis v. United States Department of Justice, 968 F.2d 1276 (1992). Indeed, the Tenth Circuit distinguished both cases in Prison Legal News, 628 F.3d at 1252-1253, and this Court denied a petition for a writ of certiorari in that case despite the petitioner's similar assertion of a

conflict with Cottone and Davis, see Pet. at 2, 15-20, Prison Legal News v. Executive Office for U.S. Attorneys, 565 U.S. 971 (2011) (No. 10-1510). Cottone is inapposite because its public-domain analysis involved FOIA Exemption 3, which covers records that are "specifically exempted from disclosure by statute," 5 U.S.C. 552(b)(3); see Cottone, 193 F.3d at 554, but does not protect any independent privacy interest. Whereas withholding records disclosed at a trial may continue to safeguard personal privacy under Exemption 7(C), see pp. 8-9, supra, "[o]nce the tapes in Cottone were played at a public trial, the purpose of the Exemption 3 statute could no longer be fulfilled because the government had already revealed the intercepted information." Prison Legal News, 628 F.3d at 1252 (citing Cottone, 193 F.3d at 555). The Cottone court did not extend its public-domain analysis to the government's invocation of Exemption 7(C). 193 F.3d at 556 (remanding for further proceedings on that issue).

The D.C. Circuit's decision in Davis is likewise distinguishable. By contrast with this case, the government in Davis agreed to disclose audio recordings that had been played in court. 968 F.2d at 1280. But it argued, and the D.C. Circuit agreed, that the requester failed to carry his burden of establishing that the relevant recordings had in fact been played and transcribed in court. Ibid. The court of appeals thus had no occasion to address the question presented here. See Prison

Legal News, 628 F.3d at 1253 (distinguishing Davis on that basis). The decision below does not conflict with other D.C. Circuit precedent, consistent with the court of appeals' denial of rehearing en banc without dissent. Pet. App. a29; see Fed. R. App. P. 40(b)(2)(A).

In any event, as petitioner acknowledges (Pet. 22), even if there were an intra-circuit disagreement, that would not furnish a basis for certiorari. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). The D.C. Circuit's prominence in the FOIA field does not call for an exception to that rule, contra Pet. 20-22, particularly where the most analogous court of appeals decision cited by petitioner, Prison Legal News, arose elsewhere (and is consistent with the decision below). For much the same reason, there is no basis for petitioner's alternative request (Pet. 17 n.2) that this Court issue an order granting the petition, vacating the decision below, and remanding for further proceedings.

3. Further review is unwarranted for additional reasons. Petitioner states (Pet. 19 n.3) that her office is already in possession of "what it reasonably believe[s]" (but which the government has not confirmed) to be "a copy of the plea agreement that it obtained from a non-public source." Although that does not render this case moot, it greatly limits the importance of

the question presented in this case. As the D.C. Circuit observed in Davis, the public-domain doctrine "is of little significance, because if a requester can establish that the information he seeks is 'freely available,' there would be no reason to invoke the FOIA to obtain access to the information." 968 F.2d at 1280 (quoting Reporters Comm., 489 U.S. at 764). Petitioner does not explain why her office cannot use the purported plea agreement in Troya's Section 2255 proceedings, as she appears to contemplate (Pet. 6), insofar as it is relevant and subject to the rules governing authentication of evidence. See Fed. R. Evid. 901.

Furthermore, as noted, p. 8, supra, petitioner's claim in this Court relies heavily on the common-law right of access to judicial records. But petitioner raised that doctrine only in passing in her briefing below, see Pet. C.A. Br. 50, and the court of appeals did not address it, see Pet. App. a6. Because this Court is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), the evolving nature of petitioner's claim counsels further against granting review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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