No. 24-6692

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

REPLY BRIEF FOR PETITIONER

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The Government admitted a plea agreement into evidence as an exhibit at a public trial. It still exists and is unsealed. The only question is whether the public may access this trial exhibit now that it is in the custody of a government agency, rather than the clerk's office.

Four circuits would answer affirmatively: By virtue of being published in open court and received into evidence, the plea agreement entered the permanent public record and is subject to public inspection, regardless of the current custodian. Two circuits, however, would hold otherwise: The trial exhibit was removed from the public domain once the Government took possession of it at the conclusion of trial.

This is an intractable circuit split over an issue of enormous importance—the public's right to access court records. This Court should grant certiorari and make clear that such public records are indeed public.

I. THE CIRCUITS ARE SPLIT ON THE QUESTION PRESENTED.

The Government tries to erase the circuit split by reframing the issue narrowly—whether the court below properly applied FOIA Exemption 7(C) to withhold the plea agreement. Starting from that premise, it argues there is no split because "none of the cited decisions involved FOIA, let alone Exemption 7(C)." Opp. 10. But this is a diversion.

This case's outcome does not turn on the application of Exemption 7(C). Rather, the central question is whether the plea agreement entered the permanent

public record. The court below ruled that since the plea agreement was "not filed with the court and preserved" and "not accessible on the public or electronic docket," it had been removed from the "public domain." App. 1 at a6. Thus, even though the plea agreement was admitted as an unsealed exhibit in open court, the mere fact that the Government took custody of the exhibit at the conclusion of trial extinguished its status as a judicial record subject to public inspection.

Four other circuits—and until the decision below, the D.C. Circuit itself—would have decided this issue differently. Pet. at 12-15, 18-20. These circuits have held that simply by submitting materials in open court, the Government enters them in the permanent public record. *See FTC v. Standard Fin, Mgmt. Corp.*, 830 F.2d 404, 408-10 (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). Thus, the fact that records are not "physically on file with the court," or "not in the custody of the Clerk, but rather in the hands of the prosecutor," is immaterial; such records "[become] public by virtue of having been [published] in open court." *Graham*, 257 F.3d at 152 & n.5.

The outcome of this case thus turns solely on the question presented: whether the public status of a judicial record, established by its admission in open court, is terminated if the Government takes custody of it after trial. It was this issue—not the application of Exemption 7(C)—that was dispositive in the opinion below, and that is the basis of the circuit split.

The Government's arguments about whether Exemption 7(C) was properly

applied here are thus unavailing. Opp. 6-7. Indeed, had the court below properly determined that the plea agreement was, in fact, in the public domain, the Government would have been *precluded* from invoking Exemption 7(C) to justify its withholding. *See Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) ("We have held, however, that the government cannot rely on an otherwise valid exemption claim to justify withholding information that has been 'officially acknowledged' or is in the 'public domain.'"); *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999). Contrary to the Government's assertion, the court would have had no need to engage in Exemption 7(C)'s weighing of private versus public interests, Opp. 7, because the public-domain doctrine renders such analysis moot.

The Government tries to avoid this straightforward conclusion by questioning the applicability of the common-law right of access to judicial records in the FOIA context. Opp. 8. While it is generally true that the FOIA preempts any preexisting common law right, in this specific context there is no conflict. As the *Cottone* court explained, the "venerable common-law right to inspect and copy judicial records" is entirely consistent with the FOIA because "the logic of FOIA mandates that where information requested is truly public, then enforcement of an exemption cannot fulfill its purposes." *Cottone*, 193 F.3d at 554. Thus, the public-domain doctrine articulated in *Cottone* harmonizes the common-law right with FOIA's purpose.

The Government then argues that the common-law right has no "relevance" here because "petitioner seeks an executive-branch document under FOIA, not a judicial record." Opp. 8. But this is just a semantic game. An exhibit admitted into

evidence in open court is the quintessential example of a judicial record. Not even the Government disputes that. Instead, it asserts that when a trial exhibit passes hands from the clerk to the Government, the record loses its status as a judicial record. But that merely re-states the question presented by this Petition: whether a judicial record ceases to be a public record if the Government takes possession of it after trial. The court below and the Tenth Circuit[1] side with the Government, while the First, Second, Third, and Seventh Circuits side with the Petitioner. Pet. 12-17. This Court should grant certiorari to resolve this broad and intractable split.

II. THE INTRA-CIRCUIT CONFLICT WARRANTS CERTIORARI REVIEW.

Although rare, this Court does grant certiorari to resolve intra-circuit splits. Pet. 22-23 (collecting cases). The Government does not dispute this. Nor does it refute that the D.C. Circuit plays an outsized role in shaping FOIA jurisprudence for the nation's federal courts. *Id*. at 20-22. Indeed, when an intra-circuit conflict involves an important question, as it does here, it is precisely the type of circumstance that warrants certiorari review. *Id*. at 22-23. Rather than contest this, the Government instead asserts there is no intra-circuit conflict. But its attempt to distinguish *Cottone* and *Davis* fails.

The Government asserts *Cottone* does not apply because it concerned Exemption 3, not Exemption 7(C). Opp. 12. This is a distinction without a difference. The public-domain doctrine articulated in *Cottone* does not vary

[1] *Prison Legal News v. Exec. Off. for U.S. Att'ys.*, 628 F.3d 1243 (10th Cir. 2011).

exemption-by-exemption because it is not grounded in any particular exemption's text. Rather, it is rooted in principles of waiver and forfeiture. Pet. 25-27; *Cottone*, 193 F.3d at 553, 555. 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. Courts have thus applied the public-domain doctrine in cases involving numerous FOIA exemptions. Pet. 20 n.4 (collecting cases involving Exemptions 1, 3, 4, 7(C), and 7(D)).

As for *Davis*, it applied the public-domain doctrine in circumstances that are materially indistinguishable: It involved audiotapes played in open court and Exemption 7(C). Pet. 18-19. Unable to distinguish *Davis* on the facts, the Government argues its holding was actually dicta. In its view, *Davis* had "no occasion to address" whether the public-domain doctrine applied because the government there agreed to disclose the recordings played in court. Opp. 12 (quoting *Davis,* 968 F.2d at 1280). But 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).[2]

Indeed, the Government itself has read *Davis* this way. In its brief in *Isley v. Executive Off. for U.S. Attys.,* No. 98-5098, 1999 WL 34833571 (D.C. Cir. June 17,

[2] *See, e.g., Inner City Press/Cmty. on the Move v. Bd. Of Governors of the Fed. Reserve Sys.,* 463 F.3d 239, 244 (2d Cir. 2006); *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 Serv.,* 71 F.3d 885, 896 (D.C. Cir. 1995); *Prop. of People v. United States Dep't of Justice,* 310 F. Supp. 3d 57, 64 (D.D.C. 2018)*; Barouch v. United States Dep't of Justice*, 87 F. Supp. 3d 10, 28 (D.D.C. 2015); *Wilson v. U.S. Dep't of Justice*, 42 F.Supp.3d 207, 215 (D.D.C. 2014).

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.

The Government's current position is also contradicted by *Davis*'s 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 allow the requester to carry his burden of showing that the tapes he sought were played by the Government 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*").[3]

Quite simply, *Davis* relied on the public-domain doctrine to remand, not affirm, where Exemption 7(C) otherwise would have applied. If the D.C. Circuit had done the same here, it would have reversed, not affirmed. There is therefore an intra-circuit conflict. And given the importance of the issue, as well as the D.C. Circuit's prominence in interpreting FOIA for the federal courts, this Court ought to

[3] The Government notes that in *Davis* it voluntarily agreed to release the tapes that had been played in court. Opp. 12. But there is nothing remarkable about the Government providing relief to a party after it becomes clear that she is entitled to that relief under the Government's own legal position.

grant certiorari.[4]

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

The unspoken premise of the Government's response is that its use of unsealed evidence in open court is a limited disclosure. But that begs the question, which is *whether* the Government's disclosure of records in open court is limited to that moment, or whether those records are actually accessible to the public even after the trial is over.

The "venerable" common-law right of access to court records "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) (cleaned up).

> 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 [evidence].

Id. (cleaned up).

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. If the court decides to seal, that decision applies globally: While sealed,

[4] This Court, of course, may also exercise the option to grant the writ, vacate the judgment, and remand for further consideration in lieu of resolving the conflict itself. Pet. 17 n.2.

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. They also will be generally available under FOIA.

But the Government's approach allows it to bypass the district court's oversight and procedural safeguards. In other words, it 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. Pet. 26.

The Government argues that *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), requires this counterintuitive result. But Petitioner already distinguished that case at length in her Petition. Pet. 27-30. *Reporters Committee* involved a request for a "nonpublic" record (a rap sheet) that compiled arrest data that was also not public, as well as public information scattered in "courthouse files, county archives, and local police stations throughout the country." 489 U.S. at 753-54, 764-65, 767. That is nothing like the plea agreement at issue here, which was admitted as an unsealed exhibit at a public trial. Petitioner is simply asking for the same trial exhibit the Government made "freely available to the public" in open court. *Id.* at 764.[5]

Moreover, the arrest records in *Reporters Committee* "reveal[ed] little or nothing about an agency's own conduct." *Id.* at 773. By contrast, the plea agreement

[5] Indeed, unlike the arrest data in *Reporters Committee*, which the Government consistently kept private, the Government here 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.

at issue here reveals "what the government [was] up to" as prosecutor when it cut a deal with one of the perpetrators of the crime it was prosecuting. *Id*. at 780. Indeed, the plea agreement is not a record the Government merely happens to possess. It has this record because it created the agreement to serve its prosecutorial goals. Thus, it implicates public interest concerns of the highest order.

Reporters Committee does not involve the same interests that drive the public-domain doctrine. The Government here has used a record in open court to its advantage as prosecutor, but then prevented citizens from using FOIA to see that same record to learn what the Government was up to. *Reporters Committee* did not consider, nor does it countenance, such inconsistent behavior.[6]

IV. THIS CASE IS AN IDEAL VEHICLE.

This case squarely presents the question of whether trial records, admitted in open court, are truly public. The Government casts doubt on whether this case is a suitable vehicle for considering that question, but its reservations are meritless.

First, the Government suggests there is no live case or controversy because "petitioner states that she is already in possession of the relevant document." Opp. 6, 13. What the Government is referring to is the proffer that the Petitioner made below to meet her burden of production under the public-domain doctrine. Pet. 19 n.3. But as it readily admits, this case is not moot because—and this is significant—

[6] The Government's reliance on *Dep't of Air Force v. Rose*, 425 U.S. 352 (1976), Opp. 9, is also inapposite. That case concerned the withholding of case summaries of disciplinary hearings of students at the U.S. Air Force Academy. 425 U.S. at 355. It had nothing to do with trial exhibits that entered the permanent public record by virtue of being published in open court. *Rose* has no relevance to the question presented.

the Government, to this day, does not concede that the proffered document is the same as the withheld document. Opp. 13. Thus, this argument is a distraction.[7]

The Government also questions why the Petitioner needs the requested document. Opp. 14. But such considerations are irrelevant: Whether disclosure is warranted "must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny, rather than on the particular purpose for which the document is being requested." *Reporters Committee*, 489 U.S. at 772 (cleaned up).

The Government next claims that the Petitioner only raised the common-law right of access to judicial records "in passing in her briefing below." Opp. 14. That is flatly incorrect. As is evident from the district court's summary judgment ruling, the Petitioner has consistently argued that under *Cottone,* the Government's withholding was improper because the plea agreement was in the public domain by virtue of being admitted as evidence at trial. App. 2 at a15 (n.1). The Petitioner then re-raised this argument in a subsequent motion for reconsideration;[8] in her appellate briefing;[9] and in a petition for rehearing to the circuit court.[10]

Similarly, the Government's assertion that "the court of appeals did not address [the common-law right]," Opp. 14, is mistaken. Indeed, the court below

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[7] Nor is there any FOIA provision that exempts an agency from complying with its statutory duty to disclose public records on the ground that the requester might be able to obtain the record elsewhere. *See Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060, 1067 (D.C. Cir. 1988).

[8] App. 3 at a27-a28; App. 8 at a62-a64.

[9] App. 1 at a6; Pet. C.A. Br. 50.

[10] App. 7 at a38-39, a42-45.

cited *Cottone* and conceded that "[t]rial records are generally considered public." App. 1 at a6. But it erred in concluding that the public-domain doctrine—which enshrines the common-law right—is inapplicable if the Government, rather than the clerk, takes custody of a record at the conclusion of trial. *Id*. Thus, the Government's characterization of the decision below is simply not correct.[11]

In short, this case is an ideal vehicle. Its outcome turns solely on the question presented, and that question is dispositive in resolving both an inter- and intra-circuit split on a matter of national importance.

CONCLUSION

The Government should not be permitted to successfully invoke a FOIA exemption to resist disclosure of unsealed evidence that it used in open court. For the foregoing reasons, the Court should grant the petition for certiorari and make this the law of the land.

[11]The Government's brief contains several other errors. For example, the Government claims it invoked Exemption 7(C) because the plea agreement contained "personal information" about "investigators and witnesses," as well as "telephone numbers, addresses, and confidential source numbers." Opp. 4, 7. That is simply not true, and the record citation that the Government relies on ("Pet. App. a5") says no such thing. As the Government well knows, its basis for asserting the exemption as to the plea agreement was to protect the privacy of the specific individual who entered into that agreement with the Government—an individual who publicly identified himself at trial and even testified regarding the agreement in open court. Pet. 2. The Government also inaccurately stated that the court below "upheld the application of Exemption 6" to the plea agreement, Opp. 5, when in fact the court relied solely on Exemption 7(C). App. 1 at a6.

Respectfully submitted,

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