No. 10-1510

In the Supreme Court of the United States

PRISON LEGAL NEWS, PETITIONER

v.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, RESPONDENT

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

LEONARD SCHAITMAN
DOUGLAS N. LETTER
JONATHAN H. LEVY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the unlimited public production of gruesome death-scene images "could reasonably be expected to constitute an unwarranted invasion of privacy" under Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(C), if the images previously were displayed at two criminal trials but were not otherwise disseminated or made available to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

Miscellaneous: Page

In the Supreme Court of the United States

No. 10-1510

PRISON LEGAL NEWS, PETITIONER

v.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, RESPONDENT

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 628 F.3d 1243. The opinion of the district court (Pet. App. 22-40) is not published in the *Federal Supplement* but is available at 2009 WL 2982841.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 2011. A petition for rehearing was denied on March 16, 2011 (Pet. App. 20-21). The petition for a writ of certiorari was filed on June 14, 2011. 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 requires that federal agencies

make agency records available to "any person" who has submitted a "request for [such] records," unless a statutory exemption or exclusion applies. 5 U.S.C. 552(a)(3)(A); see 5 U.S.C. 552(b) (FOIA exemptions) and (c) (exclusions); *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754-755 (1989) (*Reporters Committee*). Because FOIA is "exclusively a disclosure statute," it does not prevent agencies from exercising their "discretion to disclose [requested] information" even when the relevant records are exempt from mandatory disclosure under FOIA. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 292-294 (1979). But when FOIA compels the disclosure of agency records, "the information belongs to the general public." *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004). "There is no mechanism under FOIA for a protective order * * * or for proscribing [the] general dissemination" of the records disclosed. *Ibid.* If FOIA mandates an agency's disclosure of records in response to a particular request, it compels the same disclosure to "any member of the public." *Reporters Committee*, 489 U.S. at 771 (citation omitted).

Exemption 7(C) exempts from mandatory FOIA disclosure records or information compiled for law enforcement purposes if the production of such records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). "[T]he concept of personal privacy under Exemption 7(C) is not some limited or 'cramped notion' of that idea." *Favish*, 541 U.S. at 165 (citation omitted). "Personal privacy" encompasses not only an "individual's control of information concerning his or her person," *ibid.*; it also protects an individual's ability to "limit attempts to exploit pictures of [his or her] de-

ceased family member's remains for public purposes" by limiting the dissemination of such "death-scene images." *Id.* at 167, 170.

2. a. In October 1999, cousins William and Rudy Sablan murdered their cellmate, Joey Jesus Estrella, in their cell at the United States Penitentiary in Florence, Colorado. After the murder, while a team of guards donned appropriate protective gear to enter the cell, prison employees filmed the cell's interior through the cell-door window. The video graphically shows "death-scene images" involving the Sablans, including the "mutilation of Estrella's body." Pet. App. 2, 7, 23-24.

As petitioner acknowledges, the video captures the "heinous and gruesome mutilation of Estrella's body, which was extraordinarily degrading and disrespectful." Pet. 7. The "grotesque and degrading depiction of corpse mutilation * * * as it occur[red]" in the cell shows, among other things, "William Sablan's mutilation and handling of Mr. Estrella's body and internal organs and his purported drinking of Mr. Estrella's blood." Pet. App. 7, 24.[1]

Officials conducted an autopsy on Estrella's body as part of the law-enforcement investigation of his murder. Pet. App. 2, 29. The autopsy photographs that were taken depict "death scene images" showing "close-up views of the injuries to Estrella's body." *Id.* at 7. The court of appeals in this case ordered the autopsy photographs and the "unredacted full-length video" (that the government submitted for *ex parte*, *in camera* review)

[1] A second portion of the video—which shows prison officers extracting the Sablans from the cell and the Sablans' subsequent treatment, Pet. App. 2, 32—does not depict Estrella's body or injuries. That portion has been produced by the government and is no longer at issue. *Id.* at 4 & n.3.

to be filed under seal. *Id.* at 19 n.9. Those materials are available for this Court's *ex parte*, *in camera* review.

b. After separate, capital jury trials in a single case in the District of Colorado, the Sablans were each convicted on one count of first-degree murder, in violation of 18 U.S.C. 1111, and were sentenced to life in prison without parole. *United States* v. *Sablan*, No. 1:00-cr-531 (D. Colo.). During each trial, the government introduced as evidence the relevant corpse-abuse video and autopsy photographs. Those exhibits were not ordered sealed but were displayed only to the juries and to others "physically present in the courtroom" and "were never reproduced for public consumption beyond those trials." Pet. App. 2-3, 10; see D. Colo. Local Crim. R. 57.3 (prohibiting use of "audio, video, or photographic recording devices" in court).

Members of the press who were present at the trials reported the content of the video. One article explains that, "[a]s the tape begins rolling, blood is seen spilling out from under the door of cell 124. Then the video camera pans upward to a small window in the door. Inside lies the body of Joey Estrella, his throat slit, his abdomen cut open and his organs strewn about the cell." Sara Burnett, *Jurors View Video from Prison Killing*, Denver Rocky Mountain News, Feb. 13, 2007, at 9, available at 2007 WLNR 2821093. The "often gruesome footage," the article reports, shows "William Sablan slapping the dead body, smoking a cigarette while sitting on Estrella's chest and boasting several times about 'taking the guts out.'" *Ibid.* Another published article explains that the video "shows that Estrella's abdomen had been cut open" and, "[a]t one point, William Sablan reaches into the body and pulls out an organ, then shows it to the guards." Sara Burnett, *Brain Injury Cited in Prison*

Killing, Denver Rocky Mountain News, Mar. 2, 2007, at 20, available at 2007 WLNR 4025354. Yet another article similarly reports that the "gruesome" and "stomach-turning video" depicts "a prisoner eviscerating the corpse" with "blood flowing from under the cell door and into the corridor, as William Sablan shouted obscenities and crowed about killing Estrella." Kieran Nicholson, *Jurors Watch Video of Gruesome Jail Scene*, Denver Post, Feb. 13, 2007, at B3, available at 2007 WLNR 2938228. "At different points in the footage—the scene in the cell lasts about 20 minutes—William Sablan slapped the corpse in the face, sat on the chest of Estrella and stuck a lit cigarette in the dead man's mouth." *Ibid.* "He also grabbed Estrella's arm, lifting it and manipulating a finger to flash an obscene hand gesture at the camera." *Ibid.* The article adds that "William Sablan, seen in the video dressed in blood-stained white boxer shorts and T-shirt, held a mouth-wash bottle toward the camera and screamed that it had Estrella's blood in it. He then chugged from the bottle, gagged and belched before letting go with a chilling scream." *Ibid.*

The district court in the *Sablan* case ordered that counsel for the parties "shall retain custody of their respective exhibits * * * until such time" as "all need for the exhibits * * * has terminated and the time to appeal has expired" or "all appellate proceedings have been terminated, plus sixty days." 1:00-cr-531 Docs. 2349, 2966 (orders filed Mar. 12, 2007, and May 20, 2008). The parties' obligation to retain custody of the trial exhibits under the court's orders expired after the Sablans failed to appeal. The United States Attorney's Office has nevertheless preserved the video and autopsy photographs in its own files. Pet. App. 3, 24.

3. Petitioner filed this FOIA action after the United States Attorney's Office denied its FOIA request for the corpse-abuse video and autopsy photographs. The district court requested, and the government provided, copies of the contested videotape and photographs for the court's own *ex parte*, *in camera* review. Cf. 5 U.S.C. 552(a)(4)(B). The court subsequently granted summary judgment to the government with respect to the records that remain at issue, Pet. App. 22-40, holding that Exemption 7(C) authorized the government to withhold the portion of the corpse-abuse video that depicted Estrella's body and the autopsy photographs. *Id.* at 26-34.

The district court explained that under this Court's Exemption 7(C) decision in *Reporters Committee*, a court must determine whether the requested FOIA disclosure "'could reasonably be expected' to constitute an 'unwarranted' invasion of privacy" by balancing the relevant public interest in disclosure—*i.e.*, an interest in records that "contribute[] to the public's understanding of government actions or operations"—against the affected privacy interest. Pet. App. 26-27 (quoting 5 U.S.C. 552(b)(7)(C)). The court concluded that petitioner's asserted public interest in disclosing the records in this case was "small" and "limited" and that petitioner "offer[ed] little justification for disclosure." *Id.* at 29-30, 33-34. The court also concluded that, on the other side of the balance, the privacy interest of Estrella's close relatives was "significant." *Id.* at 30-31. The court explained that the "public display or dissemination" of the video's "graphic images" depicting the "brutal treatment of Mr. Estrella's body following the murder," as well as the autopsy photographs' depiction of "the exceptionally heinous nature of [his] injuries," would "greatly impact[]

the privacy interest of Mr. Estrella's family" members and would likely interfere with their "ability to mourn Mr. Estrella's death and achieve emotional closure." *Id.* at 31, 34.

The district court also rejected petitioner's contention that the earlier display of the video and photographs in the *Sablan* case put those records in the "public domain" and made Exemption 7(C) inapplicable. Pet. App. 35-39. The court noted that "there could be circumstances where information is so public that it might negate a personal privacy exemption under FOIA," *id.* at 37, but it concluded that the public display to individuals present in a courtroom was "only for a limited time and a limited purpose" and that the exhibits might "never have public exposure" again, *id.* at 39. The court therefore concluded that family members in this case retained a privacy interest in preventing the "absolute, unrestrained, and perpetual" "release of [the] death scene material through FOIA." *Ibid.*

4. The court of appeals unanimously affirmed. Pet. App. 1-19.

As relevant here, the court of appeals concluded that the privacy interest of Estella's family members—*i.e.*, their interest in restricting dissemination of the video "depict[ing] corpse mutilation" and autopsy photographs depicting "close-up views of [Estrella's] injuries"—was "high." Pet. App. 6-7. The court acknowledged that the public display of the records at a trial could "impact the family's expectation of privacy in those materials," but it concluded that the earlier display in the *Sablan* case did "not negate" the family's privacy interest. *Id.* at 9. The court explained that the images "were displayed only twice (once at each Sablan trial); only those physically present in the courtroom were able to view the im-

ages"; and "the images were never reproduced for public consumption beyond those trials." *Id.* at 9-10. The court further concluded that "the images are no longer available to the public." *Id.* at 9.

Like the district court, the court of appeals found little "public interest in disclosure." Pet. App. 11-13, 14-15. The court of appeals explained that the requested records provide no information regarding how the murder occurred (because the recording begins after Estrella was murdered), contain no new information regarding the relevant conditions of confinement (which were widely reported in the press), and shed no new light on the prosecutor's decision to seek the death penalty against the Sablans. *Id.* at 11-13. The court concluded that to the extent that public disclosure of the records under FOIA could provide "any additional information" of public interest, that interest would be "outweighed by the Estrella family's strong privacy interests in this case." *Id.* at 13.

The court of appeals rejected petitioner's argument that Exemption 7(C) did not apply because the records had been placed in the "public domain" through their earlier use in the *Sablan* prosecution. Pet. App. 15-18. The court explained that the logic of the public-domain doctrine developed by other courts of appeals for other FOIA exemptions is that an exemption will not apply when it "cannot fulfill its purposes" because the "information requested is truly public." *Id.* at 16 (quoting *Cottone* v. *Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999)). In other words, the "public domain doctrine is limited and applies only when the applicable exemption can no longer serve its purpose." *Id.* at 17. But unlike in other FOIA contexts, the court concluded, "the purpose of Exemption 7(C) in this case remains intact despite the

government's use of the records at a public trial." *Ibid.* The court explained that "enforcement of Exemption 7(C) can still protect the privacy interests of the family" where, as here, the actual images have been viewed only "by a limited number of individuals who were present in the courtroom at the time of the trials" and the images "have not been disseminated" further. *Ibid.*

The court added that it had "no occasion to decide" whether the video and photographs had been "properly removed from the public record" in the *Sablan* case or "whether those records should have been available for public copying" in that separate case. Pet. App. 18. The court instead emphasized that "[t]he claim presented here is a claim brought under FOIA" and, under FOIA, the relevant records are protected by Exemption 7(C). *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. Exemption 7(C) exempts from mandatory FOIA disclosure records or information compiled for law-enforcement purposes if producing the records or information under FOIA "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). The court of appeals correctly held that Exemption 7(C) continues to protect Estrella's surviving family members from the unlimited dissemination of his gruesome death-scene images. Even where, as here, there has been a limited, public disclosure of such images in the past, the additional and unlimited disclosure of those images under FOIA can in circum-

stances like those here reasonably be expected to produce an "unwarranted" invasion of their privacy.

a. That conclusion follows from this Court's Exemption 7(C) decision in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). The Court in *Reporters Committee* confronted a FOIA request for the rap sheet of an individual "insofar as [the rap sheet] contained 'matters of public record.'" *Id.* at 757. The FOIA requesters argued that because the information was "previously disclosed to the public," Exemption 7(C)'s privacy protections no longer applied. *Id.* at 762. This Court specifically rejected that contention as a "cramped notion of personal privacy" inconsistent with FOIA's use of the term. *Id.* at 762-763.

Reporters Committee explained that "the fact that 'an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'" 489 U.S. at 770 (citation omitted). The Court recognized that the information at issue—arrests, indictments, convictions, and sentences—are "public events that are usually documented in court records" and that the specific FOIA request before the Court was expressly limited only to information that was already "a matter of public record." *Id.* at 753, 757. The Court nevertheless explained that the traditional understanding of personal privacy turned in part on the actual "degree of dissemination of the allegedly private fact" and the "extent to which the passage of time rendered it private." *Id.* at 763. And although the sought-after information was already contained in public "courthouse files, county archives, and local police stations," the Court determined that such information is not always "'freely available' * * * to the general pub-

lic": "Indeed, if the [rap-sheet] summaries were 'freely available,' there would be no reason to invoke the FOIA to obtain access to the information they contain." *Id.* at 764; see *Martin* v. *Department of Justice*, 488 F.3d 446, 457 (D.C. Cir. 2007) (concluding that "*Reporters Committee* * * * ruled that a person's privacy interest in law enforcement records that name him is not diminished by the fact that the events they describe were once a matter of public record").

Reporters Committee accordingly held that Exemption 7(C)'s personal-privacy protection continued to demand that courts conduct the normal Exemption 7(C) balancing by weighing "the privacy interest in maintaining * * * the 'practical obscurity'" of such information "against the public interest in [its] release." 489 U.S. at 762; see *id.* at 780 (concluding that the "privacy interest in maintaining the practical obscurity of rap-sheet information will always be high"). That is precisely what the court of appeals did in this case.

b. Petitioner invokes (at 12, 15-16) the so-called "public domain" doctrine that some courts of appeals have applied when analyzing FOIA exemptions other than Exemption 7(C), but petitioner fails to address the different considerations that arise in different contexts. As the court of appeals explained, "the public domain doctrine appears nowhere in the statutory text of FOIA." Pet. App. 17. Courts therefore appear to have applied a public-domain rationale in statutory contexts in which the fact that the "information requested is truly public" may be seen as undermining the very "purposes" served by the text of the relevant exemption. *Id.* at 16 (citation omitted). For instance, if records are freely available in the public domain, it would be difficult to sustain the government's withholding of the records

under Exemption 4. The premise of that exemption's textual protection for "trade secrets" and "privileged or confidential" commercial or financial information, 5 U.S.C. 552(b)(4), would be undermined by the fact that the information is already freely available.

But as *Reporters Committee* makes clear, the "personal privacy" protections in Exemption 7(C) involve distinct considerations that can dictate continued application of the exemption where information disclosed in court is practically obscure and thus not readily available outside the FOIA context. Notwithstanding such a prior disclosure, the further and unlimited disclosure under FOIA in certain contexts can still "reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(7)(C). And if that statutory criterion is satisfied (as here), no other provision of FOIA authorizes a court to displace Exemption 7(C). To do so would erroneously jeopardize the very privacy interests that Congress enacted Exemption 7(C) to protect.

Petitioner's suggestion (at 13) that a "'public domain' doctrine" should automatically "trump" Exemption 7(C) finds no basis in FOIA's text. Indeed, petitioner does not attempt even to identify a textual basis for its position. The court of appeals thus correctly declined petitioner's invitation to craft a judicially devised "gloss to the operative language of the statute quite different from its commonly accepted meaning." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199 (1976). Petitioner's argument is particularly out of place in this case, in which the relevant privacy interest pertains not to information about an individual but to gruesome images of a deceased loved one, each new public display of which would invade the privacy of surviving family members. See

National Archives & Records Admin. v. *Favish*, 541 U.S. 157, 167-168 (2004) (discussing survivors' right to "limit attempts to exploit [such] pictures," which would "intrud[e] upon their own grief" when publicly redistributed).

Petitioner's related argument (at Pet. 12-14, 21-22) that the government "waived" Exemption 7(C) by disclosing the disputed images in the *Sablan* case to a limited audience fails on multiple grounds. To the extent that petitioner relies on the concept of a party's litigation forfeiture, its argument is misplaced. The prior disclosures at issue occurred in a *separate* suit *before* petitioner even filed its FOIA request.[2] And to the extent petitioner suggests that the prior, limited disclosure in *Sablan* "waived" the privacy interests of Estrella's family members that underlie the government's assertion of Exemption 7(C) in this case, its submission cannot be squared with *Reporters Committee* and *Favish*. Those decisions make clear that the privacy interest protected by Exemption 7(C) "encompass[es] the individual's control of information," *Reporters Committee*, 489 U.S. at 763—including an individual's control over death-scene images of a close relative, *Favish*, 541

[2] Petitioner incorrectly asserts (at 21, 35) without authority that the government on appeal "waived" its separate assertion of Exemption 6, which the district court found unnecessary to resolve (Pet. App. 31 n.6), because the government (as appellee) did not reassert it on appeal as an alternative ground for affirming the district court's favorable judgment (see *id.* at 5 n.4). "[U]nlike an appellant's failure to raise all possible grounds for reversal," the "failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision" does not "operate as a waiver" of those grounds in further proceedings. *Schering Corp.* v. *Illinois Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996); accord, *e.g.*, *Eichorn* v. *AT&T Corp.*, 484 F.3d 644, 657-658 (3d Cir.), cert. denied, 552 U.S. 1071 (2007).

U.S. at 166-167—not the government's control of such information. Cf. *FCC* v. *AT&T, Inc.*, 131 S. Ct. 1177, 1183 (2011) (Exemption 7(C)'s personal-privacy protection is "evocative of human concerns—not the sort usually associated with an entity."). And here the personal-privacy interest at stake is the right of Estrella's *relatives* to "be shielded by the exemption to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility." *Favish*, 541 U.S. at 166. The limited disclosure in *Sablan* "may impact" the relevant privacy-disclosure balancing under Exemption 7(C), see Pet. App. 9, but it does not through the guise of a public-domain rationale eliminate the application of Exemption 7(C) regardless of that balance.

Finally, petitioner appears (at 29-31) to dispute the court of appeals' conclusion that the family's privacy interest outweighed any public interest in disclosure. The court properly concluded that the extraordinarily graphic death-scene images in this case outweighs petitioner's asserted public interest. Pet. App. 11-13. The relevant video and photographs, which are available for this Court's review, amply confirm that conclusion. In any event, the court of appeals' fact-bound balancing of the interests in this case does not warrant review by this Court.

2. Petitioner contends (at 12-13, 15-20) that the court of appeals' Exemption 7(C) decision "squarely conflicts" with *Davis* v. *United States Department of Justice*, 968 F.2d 1276 (D.C. Cir. 1992), and conflicts (though not squarely) with D.C. and Second Circuit decisions that employ a public-domain rationale in evaluating FOIA exemptions other than Exemption 7(C). Petitioner is incorrect. None of those decisions reflects a division of authority warranting review.

a. In *Davis*, the government appealed a district court order to disclose several audio tapes of recorded conversations, some of which had been played previously as evidence during a public, criminal trial. The government argued that those tapes were exempt from mandatory FOIA disclosure under Exemptions 3 and 7(D), see 968 F.2d at 1280-1281, and asserted the personal-privacy protections in Exemption 7(C) "as an alternative justification for withholding the tapes." *Id.* at 1281. Significantly, the government did "*not* challenge [the] public domain doctrine['s]" general application in the context of the case. *Id.* at 1280 (emphasis added). The D.C. Circuit therefore had no occasion to decide whether the (unlimited) public disclosure through FOIA of audio tapes in law-enforcement files "could reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(7)(C), after the tapes had been played at trial, or whether invocation of a public-domain doctrine would in such circumstances render Exemption 7(C) inapplicable.

The court of appeals in *Davis* instead emphasized that, in the case before it, the government was "willing to give Davis only exactly what he can find in hard copy"—*i.e.*, the portions of the audio that had been "transcribed in public documents" constituting "a permanent public record"—and that any tapes the government might ultimately disclose in this manner would confer "merely the added value of voice inflection." 968 F.2d at 1280. The D.C. Circuit ultimately agreed with the government's submission, concluded that its "public domain cases * * * require the requester to point to 'specific' information identical to that being withheld," and held that "Davis ha[d] the burden of showing that there is a permanent public record of the exact portions"

of the audio tapes. *Ibid.*; see *Assassination Archives & Research Ctr.* v. *CIA*, 334 F.3d 55, 60 n.6 (D.C. Cir. 2003) (discussing *Davis*).

Although the government chose not to litigate whether the rationale of public-domain cases from different contexts would properly apply to the *Davis* case (focusing instead on the plaintiff's failure to satisfy his burden even under those cases), the D.C. Circuit observed that this Court's Exemption 7(C) decision in *Reporters Committee* "strongly suggested that a public domain rule such as ours 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 1279-1280 (quoting *Reporters Committee*, 489 U.S. at 764). The court also opined that *Reporters Committee* "cast[s] 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 1279 (quoting *Reporters Committee*, 489 U.S. at 762). But because the government did "not challenge [the] public domain doctrine" in the context of the *Davis* appeal, the D.C. Circuit did not resolve those doubts, let alone hold that Exemption 7(C) cannot apply once audio tapes have been played to a limited audience in open court. See *id.* at 1280; cf. *Davis* v. *Department of Justice*, 460 F.3d 92, 106 (D.C. Cir. 2006) (noting that the government's subsequent release of tapes "was not made pursuant to any judgment or order"), cert. denied, 551 U.S. 1144 (2007). *Davis* thus does not illus-

trate a conflict of authority—"square" or otherwise—warranting review.[3]

b. Petitioner fares no better in relying (at 12, 15-17) on *Cottone* v. *Reno*, 193 F.3d 550 (D.C. Cir. 1999), and *Inner City Press/Community on the Move* v. *Board of Governors of the Federal Reserve System*, 463 F.3d 239 (2d Cir. 2006). Neither conflicts with the court of appeals' Exemption 7(C) holding here.

In *Cottone*, the government invoked Exemption 3 to withhold several FBI tapes of Title III wiretap conversations, and it separately invoked Exemption 7(C) to redact tapes of two non-Title III conversations that the FBI recorded with the consent of a party to each conversation. 193 F.3d at 553. Cottone explained on appeal that the government had previously admitted "[a]ll the FBI records at issue"—including the tapes redacted under Exemption 7(C)—into evidence during his criminal trial, and he argued that playing those tapes in "open court" had placed them "in the 'public domain'" and

[3] The government's willingness in *Davis* to release audio tapes that would provide only the "value of voice inflection" to the text of normal conversations already "transcribed in public documents," 968 F.2d at 1280, implicated interests of a vastly different magnitude than those at issue here. Petitioner himself invokes (at 14, 30) the adage that a "picture is worth a thousand words," and he supports his demand for the extraordinarily graphic and disturbing video depicting the mutilation of Estrella's body with the declaration of a TV journalist who asserts that "show[ing] the public actual videotaped footage" is "completely different and vastly superior" to a written description (Pet. App. 52). See also Pet. 32 (suggesting that petitioner may "publish[] the video and photos here" to its customers). But it is precisely the power of the gruesome video here that underlies the strong personal-privacy interest that members of Estrella's family have in preventing the images from being disseminated for repeated and unlimited public viewing under FOIA. Neither the government nor the D.C. Circuit confronted similar issues in *Davis*.

therefore "waived any FOIA Exemptions that might have [applied]." Appellant's Br. § III, .1(b), .2(b) and (e), *Cottone*, *supra* (No. 98-5497) (citing *Davis*), available at 1999 WL 34833449.[4] The government appears not to have disputed the fact that it played the relevant tapes as evidence in court, arguing instead that (a) Exemption 3 warranted withholding of the Title III tapes because Exemption 3 incorporated Title III's prohibitions on disclosure, and (b) the FBI properly redacted the other tapes under Exemption 7(C). Appellee's Br. §§ II and III, *Cottone*, *supra*, available at 1999 WL 34833450.

The court of appeals agreed with the government that Title III's nondisclosure provisions fall squarely within "the scope of Exemption 3," *Cottone*, 193 F.3d at 553 (citation omitted), but held that the "Title III-wiretapped recordings" at issue "entered the public domain and thereby shed their Exemption 3 protection." *Id.* at 554. The court explained that "audio tapes enter the public domain once played and received into evidence," *ibid.*, and concluded that "Exemption 3 is inapplicable" because Cottone had established "precisely which recorded conversations were played in open court" and the government failed to show that the tapes had "since been destroyed, placed under seal, or otherwise removed from the public domain," *id.* at 555-556. In so ruling, the court explained that the "enforcement of an exemption"—*i.e.*, the application of Title III's nondisclosure provisions through Exemption 3—"cannot fulfill its

[4] See also, *e.g.*, Reply Br. § II.3, *Cottone*, *supra*, available at 1999 WL 34833451 (arguing that there is no "basis for the government to invoke Exemption 7(c)" because "complete unredacted versions" of the two consensual recordings were "introduced into evidence in [Cottone's] open public trial," as established by the "stipulated facts" in the case).

purposes" where the "information requested 'is truly public.'" *Id.* at 554 (citation omitted). Cf. *United States* v. *Rosenthal*, 763 F.2d 1291, 1293-1294 (11th Cir. 1985) (holding that Title III's prohibition against disclosing Title III wiretap information does not prohibit public access to Title III wiretap materials in court records after those materials are "admitted into evidence").

With respect to Exemption 7(C), however, the D.C. Circuit did *not* accept Cottone's argument that the government's prior disclosure of the recorded conversations in open court displaced the exemption's personal-privacy protections. The court instead remanded to the district court to allow the FBI to submit a "*Vaughn* index and declaration" that might demonstrate that the "material withheld is logically within the domain of the exemption." 193 F.3d at 556 (citation omitted).

Cottone's unexplained decision not to apply a public-domain rationale with respect to Exemption 7(C) might not reliably be viewed as holding that Exemption 7(C) demands a different type of public-domain analysis, but the court's failure to rely on a public-domain rationale in that context at the very least suggests that the question remains open in the D.C. Circuit. Indeed, as the court's earlier decision in *Davis* indicates, this Court's Exemption 7(C) analysis in *Reporters Committee* might well lead the D.C. Circuit in a future case to agree with the analytical approach to Exemption 7(C) taken by the Tenth Circuit in this case. See also *Isley* v. *Executive Office for U.S. Attorneys*, No. 98-5058, 1999 WL 1021934, at *4 (D.C. Cir. 1999) (unpublished Exemption 7(C) decision explaining that "the status of the 'public domain' doctrine has been changed, if not eradicated, by * * * *Reporters Committee*").

The Second Circuit's invocation of a public-domain rationale in the Exemption 4 context also fails to reflect a division of authority. In *Inner City Press*, the government invoked Exemption 4's protection for "confidential" commercial information to withhold a document in a bank-merger application that listed certain banking clients. 463 F.3d at 242. The Second Circuit concluded that Exemption 4's protection for "confidential commercial information * * * does not apply if identical information is otherwise in the public domain" because, "if identical information is truly public, then enforcement of an exemption cannot fulfill its purposes." *Id.* at 244 (citation omitted); see *id.* at 249-251 (concluding that the plaintiff failed to establish that the materials were in the public domain). That conclusion is understandable in the Exemption 4 context because when the relevant information is already "'freely available'" in "the public domain," *id.* at 244 (quoting *Reporters Committee*, 489 U.S. at 764), it would be difficult to deem it "confidential" information under Exemption 4. See pp. 11-12, *supra*. The Second Circuit, in rendering its modest holding under Exemption 4, had no occasion to address, let alone resolve, the distinct considerations involving Exemption 7(C).[5] Nor did it consider circumstances similar to those in which, as here, the invasion of privacy would not be the mere disclosure of information but the display to any member of the public the gruesome images of a family's deceased loved one.

---

[5] *Inner City Press* stated in a footnote that "cases discussing the application of [a] public domain doctrine to other FOIA exemptions are applicable here." 463 F.3d at 245 n.5. That dictum was unnecessary to the court's holding. In any event, as explained above, no court of appeals has held that a public-domain rationale precludes application of Exemption 7(C).

c. In any event, no further review is warranted in this case because petitioner would not be able to establish the applicability of a public-domain doctrine as applied by the courts of appeals in other FOIA contexts. "For the public domain doctrine to apply, the specific information sought must have already been 'disclosed and preserved in a *permanent* public record.'" *Students Against Genocide* v. *Department of State*, 257 F.3d 828, 836 (D.C. Cir. 2001) (quoting *Cottone*, 193 F.3d at 554) (emphasis added); see *Wolf* v. *CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) ("Prior disclosure of similar information does not suffice; instead, the *specific* information sought by the plaintiff must already be in the public domain by official disclosure."). Thus, if records initially submitted in court have later "been destroyed, placed under seal, or otherwise removed from the public domain," the public-domain rationale does not apply. *Cottone*, 193 F.3d at 556. The records must therefore remain "freely available" to the public. *Inner City Press*, 463 F.3d at 244 (interpreting *Reporters Committee*).

The records here were never "freely available" nor are they permanently preserved in the public domain. As the court of appeals explained, the records were briefly available for viewing only to those actually present in the courtroom when the images were displayed in the *Sablan* case, could never be copied, and now "are no longer available to the public" at all. Pet. App. 9-10; see p. 4, *supra*. Even assuming *arguendo* that the records would once have been regarded as "freely available" to the public, they have since been "removed from the public domain" (*Cottone*, 193 F.3d at 556) because the district court order in *Sablan* requiring the parties to maintain custody of the records for the court has expired. See p. 5, *supra*.

Petitioner presumably has pursued this FOIA action precisely because the records are not freely available to it from the *Sablan* case. As this Court has explained, if such records were readily available, "there would be no reason to invoke the FOIA to obtain access to the information." *Reporters Committee*, 489 U.S. at 764. Cf. *Niagara Mohawk Power Corp.* v. *United States Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999) (acknowledging that the public-domain theory is inherently "a little odd" because "if the information is publicly available, one wonders, why is [the FOIA plaintiff] burning up counsel fees to obtain it under FOIA?").

3. Finally, petitioner advances the policy-based contention (at 22-29) that the court of appeals' decision "subverts the notion of a public trial" and threatens to shield court records from public scrutiny. But that simply reinforces the court of appeals' conclusion (Pet. App. 18) that petitioner's concerns are misplaced in this FOIA action. To the extent that petitioner believes that the public has a right to access materials from the *Sablan* prosecution, his concerns should be presented to the court *in that case*.

If petitioner were to move the district court in *Sablan* for access to the records in question, the government (and others) would have an opportunity to oppose that access. Petitioner itself admits (at 24-25) that the public's right of access to judicial records is circumscribed, subject to the relevant court's determination that access is appropriate after "balanc[ing] all the interests at stake." And if petitioner ultimately sought such access, the *Sablan* court, like the court of appeals here, could elect to "permanently" seal (Pet. App. 19 n.9) any such records that it might order returned to its control. Or the court might allow petitioner to view the im-

ages but not permit copying for further, unlimited dissemination. Cf. *Nixon* v. *Warner Commc'ns, Inc.*, 435 U.S. 589, 594, 609 (1978) (rejecting claim by a press organization to copy tapes "entered into evidence" and "played for the jury and the public in the courtroom," where neither the public nor the press ever had the "physical access" to the tapes needed to copy them).

None of those options is available in a FOIA action for unlimited public disclosure. See p. 2, *supra*; see also *Favish*, 541 U.S. at 167, 170 (discussing relative's concern that FOIA release would allow death-scene images to be "placed on the Internet for world consumption" and noting that a FOIA release would permit convicted "child molesters, rapists, murders, and other violent criminals" to obtain "autopsies, photographs, and records of their deceased victims * * * *without limitations*") (emphasis added). Petitioner's pursuit of this FOIA case, if successful, would effectively bypass the *Sablan* court and circumvent its authority to regulate properly the manner and degree of public access to any sensitive materials that might still exist in the court's own records for the *Sablan* case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
TONY WEST
Assistant Attorney General
LEONARD SCHAITMAN
DOUGLAS N. LETTER
JONATHAN H. LEVY
Attorneys

SEPTEMBER 2011