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 OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, INC., THE ASSOCIATED PRESS, PIONEER NEWSPAPERS, INC., THE SOCIETY OF PROFESSIONAL JOURNALISTS, THE WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, THE WASHINGTON STATE ASSOCIATION OF BROADCASTERS, AND WESTWORD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LISA S. BLATT
Counsel of Record
DIRK C. PHILLIPS
KRISTIN M. HICKS
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, DC 20004
(202) 942-5000
Lisa.Blatt@aporter.com

Counsel for Amici Curiae

July 14, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE* [1]

Amici curiae Allied Daily Newspapers of Washington, Inc., the Associated Press, Pioneer Newspapers, Inc., the Society of Professional Journalists, the Washington Newspaper Publishers Association, the Washington State Association of Broadcasters, and Westword (together, "*Amici*") respectfully submit this brief in support of petitioner Prison Legal News ("PLN"). *Amici* are news organizations and associations of news professionals with longstanding interests in the public availability of court records. The Freedom of Information Act ("FOIA") is critical to public understanding of the affairs of the government, including the operation of the criminal justice system. *Amici*'s ability to disseminate and analyze newsworthy information depends on timely access to accurate, complete information concerning the conduct of the government.

Allied Daily Newspapers of Washington, Inc. is a Washington not-for-profit trade association representing 25 daily newspapers serving the State of Washington and the Washington bureaus of the Associated Press.

The Associated Press gathers and distributes news of local, national and international importance to its member newspapers and broadcast stations and to thousands of other customers in all media formats across the United States and throughout the world.

---

[1] Counsel of record for all parties were given timely notice of *amici curiae*'s intention to file this brief as required by Rule 37.2(a) and have consented to its filing in letters on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission.

Pioneer Newspapers, Inc. ("Pioneer") is a family-owned, for-profit media association located in Seattle, Washington that consists of 23 different community newspapers. Pioneer owns multiple publication companies, each of which produce daily and weekly newspapers serving rural or suburban communities within Washington, Oregon, Utah, Idaho, and Montana.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Washington Newspaper Publishers Association ("WNPA") is a for-profit association representing 115 community newspapers in Washington. With the exception of three daily newspapers, four bi-weekly newspapers and seven monthly newspapers, WNPA's members are weekly or semi-weekly newspapers. Most serve rural or suburban communities.

The Washington State Association of Broadcasters ("WSAB") is a not-for-profit trade association. Its membership is made up of 148 radio stations and 25 television stations licensed by the Federal Communications Commission to communities within the state of Washington. These stations engage in news-gathering and reporting on issues and events of public interest. They serve as a primary source of news and information for their viewers and listeners.

Westword is a weekly newspaper published in Denver, Colorado, the largest media market in that state. Westword has extensively covered conditions and events at the United States Penitentiary in Florence, Colorado.

INTRODUCTION AND SUMMARY OF ARGUMENT

"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 by petitioner PLN to disclose audiovisual exhibits shown in open court during the capital trials of William Concepcion Sablan and Rudy Cabrera Sablan for the murder of their cellmate, Joey Jesus Estrella.

During each trial, the government relied upon autopsy photographs of Mr. Estrella and a videotape showing the Sablans' gruesome mutilation of Estrella's body following the murder. Pet. App. 2-3. The trials were open to the public, and the video and photographs were shown to the jury and to members of the public seated in the courtroom. *Id.* at 2. At no point did the government move to seal the exhibits containing the video and photographs, *id.*, even though the second trial took place *after* the submission of PLN's FOIA request. *See* Compl. ¶¶ 41, 47-48; Answer ¶¶ 41, 47-48. Yet the government asserted that these materials were 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).

The Tenth Circuit's decision upholding the denial of disclosure under Exemption 7(C) is in conflict with the decisions of the D.C. and Second Circuits, both of which apply the public-domain doctrine to require disclosure of materials similar to those at issue here. *See* Pet. 15-20. Under the public-domain doctrine, "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999); *see also Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 248-49 (2d Cir. 2006). As long as the party requesting disclosure "point[s] to specific information in the public domain that appears to duplicate that being withheld," – as PLN did here, Pet. App. 42 – the government must disclose the requested records. *Cottone*, 193 F.3d at 554 (quoting *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983)) (internal quotation marks omitted).

In rejecting application of the public-domain doctrine, the Tenth Circuit's decision also is inconsistent with well-established First Amendment and common-law principles emphasizing the right of the public to access court documents. Indeed, the public-domain doctrine is grounded in the "venerable common-law right to inspect and copy judicial records," which "make[s] it clear that audio tapes enter the public domain once played and received into evidence." *Cottone*, 193 F.3d at 554.

Preserving a robust public-domain doctrine – one which recognizes that documents shown at trial become a permanent part of the public record subject to access under FOIA – is important to the press. In this case, the exhibits at issue are audiovisual

materials that inform not only the conditions of confinement at a federal prison, but also the government's decision to seek the death penalty for both Sablans. Accordingly, the requested material undoubtedly would convey important information that cannot be gleaned from trial transcripts alone.

Moreover, government restrictions on press access to audiovisual materials shown during a public trial are particularly troublesome at a time when media budget constraints limit reporters' availability to observe judicial proceedings in person. The public-domain doctrine is an important tool for the press in this challenging landscape because it reduces the costs of accurate and comprehensive trial reporting.

Absent application of the public-domain doctrine, the only way for news organizations to obtain court documents of the kind at issue in this case is to prevail under the FOIA 7(C) balancing test. This substitution of a case-by-case balancing test in place of a bright-line rule will increase the expense of litigation to obtain rightfully public documents and will impair the ability of resource-constrained news organizations to obtain government records in the public interest. Accordingly, the Court should grant certiorari and reverse the ruling below.

ARGUMENT

THE DECISION BELOW MISCONSTRUES THE FREEDOM OF INFORMATION ACT IN A MANNER THAT LIMITS NEWS ORGANIZATIONS' ABILITY TO INFORM THE PUBLIC OF IMPORTANT GOVERNMENT CONDUCT

At issue in this case is the ability of a news organization to obtain dramatic and informative audiovisual materials that speak to, among other things,

the conditions of confinement at a high-security federal prison; the government's failure to provide for the safety of an inmate it held in that prison; and, as a direct result of this failure, the government's decision to take the rare step of seeking the death penalty against two other inmates confined in that facility.

A. The Tenth Circuit's Cramped Interpretation Of Exemption 7(C) And The Public-Domain Doctrine Is Inconsistent With Constitutional And Common-Law Principles Protecting Public Access To Court Documents

1. This Court has long recognized the "presumption of openness" in criminal trials. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982). "Openness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co.*, 464 U.S. at 508.

Similarly, "[i]t is clear that the courts of this country recognize a general right to inspect and copy . . . judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1977). This general presumption of access under the common law promotes transparency and accountability in the judicial system; specifically, it enables the public "to monitor the functioning of our courts, thereby ensuring quality, honesty and respect for our legal system." *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984).

Courts have recognized that the public enjoys a strong presumption of access to audiovisual evidence shown at trial, like the video and photographs at issue here. *See United States v. Martin*, 746 F.2d 964, 968 (3d Cir. 1984). For example, in the corruption trials of members of Congress and other public officials resulting from the "Abscam" incident, the media were granted contemporaneous access to audiovisual materials presented to the jury:

> Once the evidence has become known to the members of the public, including representatives of the press, through their attendance at a public session of court, it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically present in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction.

In re Application of Nat'l Broad. Co., Inc., 635 F.2d 945, 952 (2d Cir. 1980); *see also United States v. Criden*, 648 F.2d 814 (3d Cir. 1981) (upholding television company's common-law right to copy audio and videotapes used in criminal corruption trial); *In re Application of Nat'l Broad. Co., Inc.*, 653 F.2d 609 (D.C. Cir. 1981) (holding district court abused its discretion in denying permission to copy tapes played during Abscam criminal trial).

Public access to court documents is further protected by an "even more stringent" First Amendment right. *In re Providence Journal Co.*, 293 F.3d 1, 11 (1st Cir. 2002). Indeed, in the decades since this Court recognized a First Amendment right to access criminal proceedings, *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion), nearly every circuit has held that these principles

extend from attendance at court hearings to create a qualified right of access to related court records.[2]

2. Judicial interpretation of the scope of Exemption 7(C) should be consistent with and informed by the First Amendment and common-law principles described above. Application of the public-domain doctrine – as is the case in the D.C. and Second Circuits, *see* Pet. 15-20 – achieves this goal. Failure to apply the public-domain doctrine, by contrast, leads to nonsensical results.

The common law and the First Amendment protect the public's interest in monitoring judicial proceedings by requiring that certain procedural safeguards be observed before judicial documents may be sealed from the public. For example, according to the local rules applicable in this case, a motion to seal in a criminal proceeding must address, among other things, "[t]he factual basis showing the reasons to seal a paper or to close a proceeding." D.C. Colo. L. Cr. R. 47.1(C). In addition, the moving party must provide notice to the public and an opportunity to object:

> On the business day after the filing of a motion to seal or motion to close court proceedings, a

---

[2] *See Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989); *Matter of New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987); *United States v. Smith*, 776 F.2d 1104, 1112 (3d Cir. 1985); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986); *Applications of Nat'l Broad. Co.*, 828 F.2d 340, 345 (6th Cir. 1987); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988); *Associated Press v. U.S. Dist. Court for Cent. Dist. of Cal.*, 705 F.2d 1143, 1145 (9th Cir. 1983); *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991).

> public notice will be posted in the clerk's office and on the court's web site. The public notice will advise of such motion and state that any person or entity may file objections to the motion on or before the date set forth in such public notice.

Id. 47.1(E). These procedures recognize the "constitutional obligation to determine whether sealing a paper filed in a case or closing all or a portion of a court proceeding is warranted." *Id.* 47.1(A). A submission not under seal "shall be deemed part of the public record." *Id.* 47.1(H).

Here, however, the government did not move to seal the exhibits containing the video and photographs – even in the second Sablan trial, which took place *after* the submission of PLN's FOIA request. Pet. App. 2; Compl. ¶¶ 41, 47-48; Answer ¶¶ 41, 47-48. Consequently, the public was not put on notice or given any opportunity to object to the government's attempt to limit access to these materials after trial, as would have been required by a motion to seal. *See* D.C. Colo. L. Cr. R. 47.1(E).

Indeed, rather than seeking to seal these exhibits, the government displayed the video and photographs "on Monitors placed for the sole purpose of enabling members of the public seated in the courtroom audience to view the images." Compl. ¶¶ 33, 47-49; Answer ¶¶ 33, 47-49. Thus, disclosure of the video and photographs at trial was a public disclosure, and, under the applicable local rules, the audiovisual materials at issue were "deemed part of the public record." D.C. Colo. L. Cr. R. 47.1(H). They therefore qualify for disclosure under the public-domain doctrine.

The Tenth Circuit's conclusion that the doctrine did not apply here was based on the counterintuitive and unsupported notion that audiovisual materials shown in open court are not "truly public." Pet. App. 16 (quoting *Cottone*, 193 F.3d at 554). According to the court of appeals, "the actual images have been viewed by a limited number of individuals who were present in the courtroom at the time of the trials," and thus Exemption 7(C) could still "fulfill its purposes" of protecting the privacy of the victim's family. *Id.* at 17.

This explanation defies common sense. The government made a purposeful decision to introduce the audiovisual materials at issue into the public domain when it displayed them in open court. The materials thus are unqualifiedly public. The government cannot have it both ways; it simply cannot be that the materials at issue are public when it serves the government's purpose to make them so, but private when it has no further use for them. As this Court stated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), "[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." *Id.* at 495.

A contrary result would allow the government, as it has done here, to effectively avoid all constitutionally-required sealing procedures by failing to file a motion to seal, and then deny disclosure under FOIA once the documents are returned to its custody. In other words, the Tenth Circuit's approach enables the government to obtain a *de facto* judicial seal without observing the notice requirements and other procedural protections demanded by a motion to seal.

3. The decision below also failed to properly weigh the common-law and First Amendment principles of judicial access when balancing the "privacy interest" in the records against the "public interest" in their release pursuant to Exemption 7(C). *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989) (setting forth the Exemption 7(C) balancing test). The Tenth Circuit's conclusion that the public interest in the "incremental addition of information" from the video and photos "is outweighed by the Estrella family's strong privacy interests in this case," Pet. App. 13, is incorrect for three reasons.

First, under public-access principles, any privacy interest in the video and photographs is diminished by their display at two public trials. *See Robles v. EPA*, 484 F.2d 843, 846 (4th Cir. 1973) (where information has been made available to the public through one source, an interest in keeping it confidential through an alternative source cannot defeat disclosure). To be sure, this Court has stated that "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *U.S. Dep't of Defense v. FLRA*, 510 U.S. 487, 500 (1994); *see also Reporters Comm.*, 489 U.S. at 765 (recognizing a privacy interest in non-public criminal rap sheets compiled from public information). But this statement was made outside the context of judicial exhibits.

And this Court has not held, as the Tenth Circuit did here, that disclosure in a public trial is only a "limited" disclosure, or that information already disclosed can somehow cease to be part of the public

record. Rather, this Court has continually reaffirmed that "[a] trial is a public event. What transpires in the court room is public property." *Cox Broad. Corp.*, 420 U.S. at 492 (quoting *Craig*, 331 U.S. at 374)) (internal quotation marks omitted). The Tenth Circuit's holding undermines this longstanding principle of judicial access.

Second, the court of appeals failed to properly weigh the public interest in disclosure. The records at issue here concern the first trials in several years in which the federal government sought the death penalty in Colorado, *see* Mike McPhee, *Pair May Face Death in Prison Slaying*, Denver Post, Jan. 27, 2001, at B-4, a decision of great public interest that the withheld photographs and video would help illuminate.

These materials also would give the public "a better understanding of Estrella's killers and the conditions, motivations, and other circumstances that led to their horrific actions." Pet. App. 60 (Prendergast Decl. ¶ 12). In particular, the records would shed light on the "conditions of confinement experienced by the Sablans and Estrella in terms of the cramped quarters resulting from the fact that the [Bureau of Prisons] had triple-celled these inmates at the time of Estrella's murder." *Id.* ¶ 13. Indeed, troublesome conditions of incarceration may have influenced the FOIA denial, as "the [Bureau of Prisons] is notorious for being hostile to media requests for documents or information that would shed light on its operations and functions." Pet. App. 65 (Wright Decl. ¶ 7).

The added public interest in open judicial proceedings surely tips the scales. "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without

question events of legitimate concern to the public." *Cox Broad. Corp.*, 420 U.S. at 492. In fact, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers*, 448 U.S. at 575.

Public access to criminal proceedings helps society come to terms with the crime itself because the trial "serve[s] an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Id.* at 571. The need for such understanding is especially apparent where, as here, "[t]here was a lot of speculation about what actually happened after the murder, including rumors of cannibalism by one of the Sablans." Pet. App. 66 (Wright Decl. ¶ 14). But this purpose "cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Richmond Newspapers*, 448 U.S. at 571 (internal citations omitted). Public access also serves as a check on the administration of justice even as it increases the public's faith in their judicial system. "People in open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* at 572. Public access to criminal proceedings ensures "an opportunity both for understanding the system in general and its workings in a particular case." *Id.*

Third, in considering the public-access portion of the Exemption 7(C) balancing test, the court of appeals failed to properly weigh the unique power of audiovisual images to inform and impact the public. The Tenth Circuit held that disclosure of the autopsy video and photographs shown at the Sablan trials would constitute an "unwarranted" invasion of pri-

vacy because "there is nothing to suggest the records would add anything new to the public understanding." Pet. App. 12. But the court's reasoning is internally inconsistent. On one hand, the court of appeals recognized that "there is a distinct privacy interest in the images" despite the fact that descriptive information regarding the images was widely available. *Id*. at 10. On the other hand, however, the court held that there was little or no public interest in the images themselves, because "[a]ll of the information PLN claims would shed light on the issue, including the heinous nature of the mutilation of Estrella's corpse, is already publicly known." *Id.* at 13.

This holding suggests that release of the requested audiovisual materials could have a substantial impact – over and above the impact attendant to their public display during the Sablans' respective trials – on those desiring to withhold them, but cannot convey useful information to the public. That reasoning weighs the unique nature of audiovisual materials on only one side of the 7(C) balancing test – the privacy side – and underestimates the significant public interest in accessing these materials. As explained below, this approach is refuted by this Court's past rulings, empirical evidence, and recent trends in news reporting, all of which highlight the unique and valuable nature of audiovisual evidence.

B. Audiovisual Materials Are Unique In Their Ability To Convey Information That Cannot Be Captured In Written Descriptions Alone

1. This Court has recognized that descriptions often are a poor substitute for contemporaneous photographic or audiovisual recordings. *See* Pet. 31-32 (discussing *Scott v. Harris*, 550 U.S. 372 (2007),

and *Brown v. Plata*, 131 S. Ct. 1910 (2011)). "The adage that 'one picture is worth a thousand words' reflects the common-sense understanding that illustrations are an extremely important form of expression for which there is no genuine substitute." *Regan v. Time, Inc.*, 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part).

The impact audiovisual evidence has on judges and juries has been well documented. One study has shown that visual aids "facilitate comprehension, [and] increase understanding and retention levels by as much as sixty-five percent," and that "information which is perceived by the individual from a variety of methods (aural, visual, and written) is retained and understood at a substantially higher level." J. Bradley Ponder, *But Look Over Here: How the Use of Technology at Trial Mesmerizes Jurors and Secures Verdicts*, 29 Law & Psychol. Rev. 289, 291 (2005).

Several studies also have suggested that graphic photographic and audiovisual materials, such as those depicting a crime scene or a victim's cause of death, have an effect on both jury verdicts and damage awards in civil trials. Carleen M. Thompson & Susan Dennison, *Graphic Evidence of Violence: The Impact on Juror Decision-Making, the Influence of Judicial Instructions and the Effect of Juror Biases*, 11 Psychiatry, Psychol. & Law 323, 324 (2004). That the government attorneys prosecuting the Sablans chose to display the materials at issue rather than simply describe them to the jury underscores their unique significance.

2. Outside the courtroom, audiovisual representations have demonstrated a unique power to attract and inform the public. According to Henry Schuster, a career veteran of television news, "there is simply

no substitute for the power of video footage." Pet. App. 52 (Schuster Decl. ¶ 5). An attention-grabbing audiovisual component can be the difference between a major and minor story. *See, e.g.*, Noel Whitty, *Soldier Photography of Detainee Abuse in Iraq: Digital Technology, Human Rights and the Death of Baha Mousa*, 10 Hum. Rts. L. Rev. 689, 690 (2010) ("[T]he extent of public and media engagement with the issues . . . can depend on the availability of visual evidence."). The dissemination of video footage introduced at trial also conveys the relevant information in its purest form, as it "allows the public to form their own opinions based on the raw data, unmediated by a journalist." Pet. App. 52 (Schuster Decl. ¶ 5).

3. Limiting access to audiovisual materials thus has the potential to inhibit the press's ability to effectively inform the public about the criminal-justice system. A transcription of an audiovisual representation is not an adequate substitute for its disclosure. *See State v. WBAL-TV*, 975 A.2d 909, 926 (Md. Ct. Spec. App. 2009) (transcripts did not suffice as copies of videotaped and audiotaped confessions, because "a transcript ordinarily reflects only the words spoken, and not how they were said or the physical actions and reactions of the participants present").

Here, for example, autopsy photos and a video "taken at the scene with the perpetrators present and continuing to act and comment" are not susceptible to a transcription that would convey their complete contents. Pet. App. 34. Moreover, because video and still cameras are not permitted in federal courtrooms during criminal trials, *see* Fed. R. Crim. P. 53, journalists cannot record or photograph exhibits like

these as they are introduced. Thus, unless duplicates of audiovisual materials are made available to the press and the public, these materials are lost to public view even if they were widely displayed at trial.

Restricting access to these materials, as the Tenth Circuit's approach does, risks undermining the effectiveness of the press as a legitimate check on the administration of criminal justice. Where, as here, none of the procedures necessary to file under seal were followed, the Tenth Circuit's approach also sets a disturbing precedent in that it allows the government to achieve *ex post* a result it elected not to seek *ex ante* – *i.e.*, to withhold trial exhibits from the press without providing them with notice and an opportunity to object, as would have been required in connection with a properly-filed motion to seal.

C. The Decision Below Is Harmful To Modern Media Companies

The Tenth Circuit's narrow construction of the public-domain doctrine limits the ability of modern media companies to cover trial proceedings. To be sure, the decision below left unaffected the press's right to view audiovisual materials at trial. But in today's changing media landscape, such a limited right is insufficient. In an age of pressroom layoffs and newspaper closures, news organizations are losing the ability to physically send reporters to observe judicial proceedings. Without a robust public-domain doctrine, judicial proceedings in areas with limited or no local press coverage will effectively be closed to public scrutiny.

1. In enacting FOIA, Congress recognized that the press played a critical role in achieving the Act's

basic purpose of "ensur[ing] an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Congress was "principally interested in opening administrative processes to the scrutiny of the press and general public." *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 17 (1974); *see also* H.R. Rep. No. 89-1497, at 23 (1966) (addressing concerns of "[n]ewspapermen . . . about the mushrooming growth of Government secrecy . . . .").

Indeed, many people learn about the conduct of government only from the press – particularly specialized journals, like the one published by petitioner, and local news outlets, like *Amici*. As this Court has recognized, "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations." *Cox Broad. Corp.*, 420 U.S. at 491.

The press plays a particularly important role in covering the criminal-justice system. Indeed, as discussed above, there is a First Amendment right to attend criminal trials, without which "important aspects of freedom of speech and of the press could be eviscerated." *Richmond Newspapers*, 448 U.S. at 580 (internal citations and quotation marks omitted); *see supra* pp. 7-8. Moreover, while the presumptive openness of criminal trials historically was manifested by public attendance at trial, now "people . . . acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public." *Richmond Newspapers*, 448 U.S. at 573. Thus, with respect to judicial proceedings, "the function of the press serves to guar-

antee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broad. Corp.*, 420 U.S. at 492.

2. In addition to making audiovisual materials increasingly available to the public, the digitization of the press is having dramatic effects on the traditional business models of newsgathering and distribution. Most newspapers face resource constraints at all levels. Accordingly, national papers are scaling back the scope of their reporting while many local and regional papers are publishing less frequently, if at all.

Indeed, traditional business models are breaking down in the face of shifting market forces, including the growth of the internet and the demand for real-time news coverage. News organizations are responding to these trends with staff layoffs, consolidation, and outright closure. Since 2001, 36 percent of newspaper jobs have been eliminated; in some regions, the figures are even higher. *See, e.g.*, Jeremy Adam Smith, *Half of Bay Area Newspaper Jobs Gone in Last Decade*, SF Pub. Press, May 23, 2011. In the most extreme cases, satellite bureaus or even entire newspapers have closed entirely. Recent years have witnessed the bankruptcy of the parent company of the 164-year-old *Chicago Tribune*, Michael Oneal, *Tribune Co. Bankruptcy Nearing Finish Line*, Chi. Trib., Mar. 6, 2011, and the demise of several major metropolitan daily newspapers, including the 149-year-old *Rocky Mountain News* and the 145-year-old *Seattle Post-Intelligencer*. Belinda Luscombe, *What Happens When a Town Loses Its Newspaper*, Time, Mar. 22, 2009.

One outcome of these cutbacks has been changing – and, in some cases, decreasing – coverage of local government. *See* John C. Besley & M. Chris Roberts, *Cuts in Newspaper Staffs Change Meeting Coverage*, 31 Newspaper Res. J. 22 (2010). The result is a press facing increasing challenges to its role as a "surrogate[ ] for the public" at judicial proceedings. *Richmond Newspapers*, 448 U.S. at 573. Yet reliable press access to these proceedings is the modern embodiment of the "presumptively open" historical character of Anglo-American trials. *See id.* at 569-73.

3. The public-domain doctrine compensates for these trends in at least two specific ways. First, it enables an increasingly short-staffed press corps to revisit courtroom proceedings it might initially have been unable to attend. With fewer reporters available to cover trials, there is an increasing likelihood that news organizations may simply miss newsworthy proceedings in the first instance. Having to "rely on secondhand accounts from sources who had some knowledge of the recordings" is an inadequate substitute. Pet. App. 58-59 (Prendergast Decl. ¶ 7); *see also* Pet. App. 64 (Wright Decl. ¶ 6). The public-domain doctrine is a pragmatic response to this reality because it recognizes that the operative disclosure occurs when audiovisual materials are "played and received into evidence," not when they are viewed by an audience. *See Cottone*, 193 F.3d at 554 (citing *In re Application of Nat'l Broad. Co., Inc.*, 653 F.2d at 614).

Second, the public-domain doctrine also compensates for the loss of regional and local newspapers. The loss of a local newspaper is the loss of a local watchdog. For obvious reasons, news organizations are more willing to invest in tracking the actions of local criminal-justice systems than those geographi-

cally and culturally removed. Quite naturally, a newspaper located in New Jersey is unlikely to send reporters to cover court proceedings in Colorado. However, the public-domain doctrine lowers the costs of reporting on far-flung communities by enabling reporters in one part of the country to review proceedings in another part of the country without having to prospectively send reporters to distant courtrooms. The photographs and recordings at issue in this case – which illuminate both the conditions of federal prisons and the judgment of federal prosecutors vis-à-vis the death penalty – are perfect examples of the type of courtroom proceedings likely to interest a national audience.

The Tenth Circuit's cramped view of the public-domain doctrine also is harmful because modern news organizations often cannot afford the expense of fact-intensive FOIA litigation. Absent a robust public-domain doctrine, the only way for news organizations to obtain government information of the kind at issue in this case is to pass the balancing test contained in Exemption 7(C), even for documents previously released into the public domain. Thus, eliminating the public-domain doctrine would replace a clear, bright-line rule with a fact-intensive balancing test.

The practical result would be an increase in the volume and expense of litigation to obtain information that is rightfully public. This increased cost would impair the ability of resource-constrained news organizations to obtain government records in the public interest. The Tenth Circuit's approach thus will lead to fewer successful FOIA requests by the media, enabling government agencies to withhold documents safe in the knowledge that news organiza-

tions are unlikely to assume the burden of litigation in all but the most extreme cases. Such a result cannot be reconciled with the purpose of FOIA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LISA S. BLATT
Counsel of Record
DIRK C. PHILLIPS
KRISTIN M. HICKS
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, DC 20004
(202) 942-5000
Lisa.Blatt@aporter.com

Counsel for Amici Curiae

July 14, 2011