No. 09-1279

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

AT&T INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(C), exempts from mandatory disclosure records or information compiled for law enforcement purposes when such disclosure could reasonably be expected to constitute an unwarranted invasion of "personal privacy." The question presented is:

Whether Exemption 7(C)'s protection for "personal privacy" protects the "privacy" of corporate entities.

PARTIES TO THE PROCEEDING

The petitioners are the Federal Communications Commission and the United States of America.

Respondent AT&T Inc. was the petitioner in the court of appeals. Respondent CompTel was an intervenor below.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulations:

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 582 F.3d 490. The order of the Federal Communications Commission (Pet. App. 19a-33a) is reported at 23 F.C.C.R. 13,704.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2009. A petition for rehearing was denied on November 23, 2009 (Pet. App. 45a-46a). On February 12, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 23, 2010. On March 15, 2010, Justice Alito further extended the time to April 22, 2010, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Exemption 7(C) of the Freedom of Information Act exempts from mandatory disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). Other pertinent statutory and regulatory provisions are set out in the appendix to the petition for a writ of certiorari. Pet. App. 47a-60a.

STATEMENT

1. In July 1966, Congress enacted the Freedom of Information Act (FOIA), 5 U.S.C. 552, as an amendment to the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, to limit, subject to certain exemptions, the broad discretion that federal agencies previously had exercised concerning the publication of government records. *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989) (*Reporters Committee*); FOIA, Pub. L. No. 89-487, 80 Stat. 250 (amending APA § 3); see Act of June 5, 1967, Pub. L. No. 90-23, § 1, 81 Stat. 54 (codifying FOIA at 5 U.S.C. 552). Under FOIA, federal agencies generally must make records available to "any person" who has submitted a "request for [such] records," unless a statutory exemption applies. See 5 U.S.C. 552(a)(3)(A); 5 U.S.C. 552(b) (FOIA exemptions); *Reporters Committee*, 489 U.S. at 754-755. If an agency fails to comply with its disclosure obligations within FOIA's statutory time limits, 5 U.S.C. 552(a)(6)(A) and (B) (2006 & Supp. III 2009), the requester may file an action in district

court to compel disclosure. 5 U.S.C. 552(a)(4)(B) and (6)(C).

Three FOIA exemptions, including Exemption 7(C), are relevant to this case.

First, Exemption 6 applies to "personnel and medical files and similar files" the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). The "statutory goal" of Exemption 6 is to establish "a workable compromise between individual rights 'and the preservation of public rights to Government information.'" *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976) (citation omitted). Congress designed the exemption to strike the "proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information." *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (*1966 House Report*)); *DoD* v. *FLRA*, 510 U.S. 487, 495-496 (1994) (discussing "basic principles" governing FOIA).

Second, Exemption 7, as enacted in 1966, exempted "investigatory files compiled for law enforcement purposes" unless the files were "available by law to a party other than an agency." 5 U.S.C. 552(b)(7) (1970). After courts construed the exemption to cover "all material found in [such] investigatory file[s]," Congress narrowed Exemption 7 in 1974 by enumerating six specific categories of law-enforcement records that are exempt from mandatory disclosure. *FBI* v. *Abramson*, 456 U.S. 615, 627 & n.11 (1982). As relevant here, one category is encompassed by Exemption 7(C), which exempts from mandatory disclosure records or information compiled for law-enforcement purposes if their production "could

reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). "Congress gave special attention to the language in Exemption 7(C)," *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 166 (2004), and included its "protection for personal privacy" in order to "make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." 120 Cong. Rec. 17,033 (1974) (statement of Sen. Hart).

Finally, Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Because the exemption applies to information "obtained from a person," *ibid.*, and because the APA (which includes FOIA) defines the term "person" to include "an individual, partnership, corporation, association, or public or private organization other than [a federal] agency," 5 U.S.C. 551(2), Exemption 4 protects commercial and financial information that the government has obtained from a wide variety of sources, including private corporations and public organizations other than federal agencies. Cf. *Federal Open Mkt. Comm.* v. *Merrill*, 443 U.S. 340, 360 (1979). Exemption 4 was enacted to protect privileged and confidential material that "would not customarily be made public by the person from whom it was obtained," including "business sales statistics, inventories, customer lists," and "technical or financial data." *1966 House Report* 10.

"FOIA is exclusively a disclosure statute." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 292 (1979). If one of its exemptions applies, FOIA does not forbid the agency from exercising its "discretion to disclose [the] information." *Id.* at 292-294. But in what is known as a

"'reverse-FOIA' suit[]," *id.* at 285, a person seeking to prevent an agency's production of records may, in certain circumstances, seek judicial review under the APA of a final agency decision to disclose agency records. See *id.* at 317-318. In such a suit, a court may set aside an agency's decision to disclose if the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A). See *Chrysler Corp.*, 441 U.S. at 317-318 (reverse-FOIA suit alleging that disclosure of records was prohibited by the Trade Secrets Act, 18 U.S.C. 1905).

2. Federal agencies have adopted their own regulations to govern the handling of FOIA requests. As relevant here, the applicable Federal Communications Commission (FCC or Commission) regulations provide that a FOIA requester who seeks FCC records that are exempt from mandatory disclosure under FOIA must specify the "reasons for inspection and the facts in support thereof." 47 C.F.R. 0.461(c); see 47 C.F.R. 0.457. Under the Commission's regulations, if the records contain material submitted to the agency by a third person, the Commission will provide a copy of the FOIA request to that person and afford the person an opportunity to object to disclosure in certain specified circumstances: if the person previously requested that the records be kept confidential (47 C.F.R. 0.459); if the Commission has accepted the records on a confidential basis pursuant to FOIA Exemption 4 (see 47 C.F.R. 0.457(d)); or if the custodian of records has reason to believe that "the information may contain confidential commercial information." 47 C.F.R. 0.461(d)(3); cf. Exec. Order No. 12,600, §§ 1, 3-5, 8, 3 C.F.R. 235-237 (1988) (directing agencies to provide submitters of certain confidential

commercial information with notice of, and an opportunity to object to, agency disclosure).

If the Commission ultimately determines that FOIA requires disclosure of the requested records because no exemption from mandatory disclosure applies, the Commission will grant the FOIA request and produce the records. See 47 C.F.R. 0.457(f)(3). But if the Commission determines that the records fall within one of FOIA's exemptions and their "disclosure * * * is [not] prohibited by law," the Commission will proceed to "weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection in light of the facts of the particular case," and will decide whether to exercise its authority to produce the records. 47 C.F.R. 0.457; see 47 C.F.R. 0.461(f)(4).

3. This case arises from a FOIA request for FCC records concerning an investigation involving respondent AT&T Inc.[1] AT&T participated in a federal program, the E-Rate Program, administered by the FCC and designed to improve access to advanced telecommunications technology by educational institutions. Pet. App. 2a. Under the E-Rate Program, AT&T provided equipment and services to elementary and secondary schools and billed the government for the cost. *Ibid.*

By letter dated August 6, 2004, AT&T informed the Commission that it had discovered "certain irregularities" that constituted an "apparent violation of the E-[R]ate rules," resulting in AT&T's over-billing the government for its services. C.A. App. A22; see Pet. App. 2a-3a. On August 24, 2004, the Commission's En-

[1] The FCC investigated actions taken by SBC Communications, Inc., which subsequently acquired AT&T Corp. and changed its name to AT&T Inc. See Pet. App. 19a n.1. To avoid confusion, this brief refers to that respondent as AT&T.

forcement Bureau (Bureau) issued a Letter of Inquiry to AT&T, notifying the company that the Bureau had initiated an investigation and ordering AT&T to produce information relevant to that investigation. *Id.* at 35a, 41a. AT&T produced the information as directed. *Id.* at 41a.

In December 2004, the Bureau terminated its investigation pursuant to an administrative consent decree. See *SBC Commc'ns, Inc.*, 19 F.C.C.R. 24,014 (Enf. Bur. 2004) (order and consent decree). Under that decree, AT&T, without admitting liability, agreed to pay $500,000 to the government and to institute a two-year compliance plan to ensure future compliance with pertinent FCC rules by all AT&T subsidiaries. *Id.* at 24,016-24,019; Pet. App. 35a-36a.

4. On April 4, 2005, respondent CompTel, a trade association representing some of AT&T's competitors, submitted a FOIA request to the Commission, seeking "[a]ll pleadings and correspondence contained in" the AT&T E-Rate investigation file. C.A. App. A27. The Commission notified AT&T of CompTel's FOIA request, and AT&T submitted an objection to disclosure. See *id.* at A28.

a. In August 2005, the Bureau granted CompTel's FOIA request in part and denied it in part. Pet. App. 34a-44a. The Bureau concluded that portions of the information submitted to the FCC by AT&T were protected from mandatory disclosure under FOIA Exemption 4 because those portions "constitute[d] commercial or financial information" that, if disclosed, "could result in substantial competitive harm to [AT&T]." *Id.* at 41a. Under Exemption 4, the Bureau declined to disclose "commercially sensitive information," including AT&T's "costs and pricing data, its billing and payment dates,

and identifying information of [AT&T's] staff, contractors, and the representatives of its contractors and customers." *Id.* at 41a-42a. But because AT&T failed to explain the degree to which other information could be deemed "commercial or financial," how disclosing such information might "result in substantial competitive harm," or whether the information was "already available to the public," the Bureau concluded that the additional information could not be properly withheld as confidential commercial information under Exemption 4. *Id.* at 39a-40a.

The Bureau additionally determined that FOIA Exemption 7(C) protected from mandatory disclosure information in the agency's investigative file that would invade the personal privacy of AT&T's employees and customers. Pet. App. 42a-43a. The Bureau stated that it would therefore "withhold the names and identifying information of those individuals." *Id.* at 43a.

The Bureau, however, rejected AT&T's argument that Exemption 7(C) also protected from mandatory disclosure all other records that the FCC had obtained from AT&T during its investigation. Pet. App. 42a-43a. The Bureau concluded that records that do not implicate the privacy interests of individuals fall outside Exemption 7(C) because AT&T itself does "not possess 'personal privacy' interests" protected by that exemption. *Ibid.*

b. AT&T filed an administrative appeal from the Bureau's determination, challenging the decision to release the agency's investigative records that the Bureau concluded were subject to mandatory FOIA disclosure. C.A. App. A47; Pet. App. 22a & n.16. In September

2008, the Commission denied AT&T's administrative appeal. *Id.* at 19a-33a.[2]

As relevant here, the Commission rejected AT&T's argument that AT&T is a "corporate citizen" with "personal privacy" rights protected by Exemption 7(C), that AT&T should therefore be "protected from [a] disclosure that would 'embarrass' it," and that the FCC should accordingly withhold "all of the documents that [AT&T] submitted" to the FCC. Pet. App. 26a (citation omitted). The agency concluded that "established [FCC] and judicial precedent" demonstrated that the "personal privacy" protected under Exemption 7(C) concerns only the privacy interests of individuals, and corporations do not have "'personal privacy' interests within the meaning of [that] Exemption." *Id.* at 26a-28a.

The Commission explained that this Court's decision in *Reporters Committee* indicated that the "personal privacy" interest protected by both Exemption 6 and Exemption 7(C) is "applicable only to individuals," be-

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[2] CompTel also filed an administrative appeal from the Bureau's determination. Pet. App. 22a & n.16. But after CompTel constructively exhausted its administrative remedies, see 5 U.S.C. 552(a)(6)(A)(ii) and (C)(i), it filed a FOIA action in the United States District Court for the District of Columbia. Pet. App. 23a & n.17. The Commission therefore did not address the merits of CompTel's administrative appeal. *Ibid.*

The district court subsequently stayed CompTel's FOIA action. See Pet. App. 23a & n.19. The district court explained that AT&T had intervened to assert a reverse-FOIA claim against the FCC, but that APA review was not yet available on that claim because the FCC had yet to take a "final agency action" subject to review. *CompTel* v. *FCC*, Civ. No. 06-1718 (D.D.C. Mar. 5, 2008), slip op. 4 (citing 5 U.S.C. 704). The district court reasoned that judicial economy warranted a stay until "there is a final agency action on AT&T's intra-agency appeal," in order to "permit[] the court to simultaneously address the issues raised by [all parties]." *Id.* at 6. CompTel's FOIA case remains stayed and does not affect the question presented here.

cause *Reporters Committee* relied on Exemption 6 to construe Exemption 7(C) and, as AT&T "admit[ted]," "Exemption 6 applies only to individuals." Pet. App. 30a & n.46 (citing AT&T letter brief reproduced at C.A. App. A52). The Commission further reasoned that judicial decisions demonstrate that Exemption 7(C)'s purpose is to avoid damage to "personal reputation, embarrassment, and * * * harassment * * * that an individual might suffer from disclosure." *Id.* at 29a. Such harms, the Commission concluded, are distinct from the potential impact of disclosure on a purely "legal entity like a corporation." *Ibid.*

The Commission thus did "not have authority to withhold the records," 47 C.F.R. 0.461(f)(3), based on its conclusion that Exemption 7(C) did not apply to (and that FOIA therefore compelled disclosure of) the agency records that the Bureau ordered released. The Commission accordingly affirmed the Bureau's decision to grant CompTel's FOIA request in part. Pet. App. 32a-33a. Because the Commission found Exemption 7(C) inapplicable, it did not decide whether, if the Exemption were applicable, it might nonetheless decline to exercise regulatory "authority to withhold the records from public inspection." 47 C.F.R. 0.461(f)(4); see 47 C.F.R. 0.457.

5. The court of appeals granted AT&T's petition for review under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, and remanded for further agency proceedings. Pet. App. 1a-18a.[3]

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[3] The Hobbs Act vests the courts of appeals with exclusive jurisdiction over petitions for review of certain agency orders. 28 U.S.C. 2342. The "nature and attributes of judicial review" under the Hobbs Act are governed by the APA's judicial-review provisions. *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987); see *id.* at 277 (citing APA standard of review in 5 U.S.C. 706(2)(A)).

The court of appeals held, in pertinent part, that "FOIA's text unambiguously indicates that a corporation may have a 'personal privacy' interest within the meaning of Exemption 7(C)." Pet. App. 13a; see *id.* at 9a-14a. The court reasoned that "FOIA defines 'person' to include a corporation" and that the term "personal" is "derived" from the word "person" and is simply the "adjectival form" of that defined term. *Id.* at 10a-12a (discussing APA definition at 5 U.S.C. 551(2)). In light of that conclusion, the court rejected the contention that the statutory phrase "personal privacy" should be construed to reflect the "ordinary meaning" of the word "personal." *Id.* at 12a.

The court of appeals assumed *arguendo* that FOIA's protection for "personal privacy" in Exemption 6 "applies only to individuals (and not to corporations)," but decided that this assumption did not undermine its understanding of the scope of "personal privacy" protected by Exemption 7(C). Pet. App. 13a. The court reasoned that Exemption 6 expressly applies to "personnel and medical files," 5 U.S.C. 552(b)(6), and that particular statutory phrase "limits Exemption 6 to individuals because only individuals (and not corporations) may be the subjects of such files." Pet. App. 13a.

Consistent with the government's position, the court of appeals concluded that it possessed Hobbs Act jurisdiction over this reverse-FOIA action because AT&T's suit challenged an "order of the Commission under [the Communications Act of 1934, 47 U.S.C. 151 *et seq.*]," 47 U.S.C. 402(a). See Pet. App. 6a-7a. The court of appeals explained that AT&T's challenge to the Commission's order regarding disclosure based on that order's alleged inconsistency with FCC regulations was a challenge subject to Hobbs Act review, see 28 U.S.C. 2342(1), and that "[c]ourts have consistently held that an [FCC] order" allegedly violating FCC regulations is subject to such review. Pet. App. 7a & n.2.

Having concluded that "FOIA's text unambiguously" resolved the case, the court of appeals declined to "consider the parties' arguments concerning statutory purpose, relevant (but non-binding) case law, and legislative history." Pet. App. 13a-14a. The court nevertheless expressed the view that its interpretation advanced Exemption 7(C)'s purpose by providing privacy protection to corporations because, as the court saw it, "[c]orporations, like human beings, are routinely involved in law enforcement investigations" and, "like human beings, face public embarrassment, harassment, and stigma because of that involvement." *Id.* at 14a n.5. The court also expressed the view that D.C. Circuit decisions indicating that the protections for privacy in Exemptions 6 and 7(C) apply to "individuals only" were based on atextual considerations that did "not impugn [the Third Circuit's] textual analysis." *Id.* at 14a n.6.

The court of appeals declined to examine how "AT&T's 'personal privacy'" should be balanced against any public interest in disclosure, explaining that the Commission had not conducted such balancing under Exemption 7(C) in the first instance. Pet. App. 15a-16a. The court accordingly "remand[ed] the matter to the FCC with instructions to determine" whether the requested "disclosure 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" *Id.* at 17a (quoting 5 U.S.C. 552(b)(7)(C)); cf. *id.* at 7a & n.2 (indicating that FCC regulations governing the agency's processing of FOIA requests contemplate that determination).

SUMMARY OF ARGUMENT

The court of appeals has held that FOIA's statutory protection for "personal privacy" in Exemption 7(C)

extends beyond the privacy interests of individuals and protects the so-called privacy of corporate entities. That holding is inconsistent with the text of Exemption 7(C), FOIA's broader context, and the statute's drafting history, all of which make clear that Congress intended the Exemption to protect individuals, not corporations. The court of appeals' decision is itself a singular outlier in an otherwise uniform body of more than 35 years of decisional law and commentary. The Third Circuit's rationale would lead to highly anomalous results by granting "personal privacy" protections not only to corporations but also to state, local, and foreign governmental entities. Nothing suggests Congress intended FOIA's protection for "personal privacy" to extend to such unprecedented contexts.

1. a. Exemption 7(C)'s text and FOIA's broader context demonstrate that corporations do not possess "personal privacy." The compound phrase "personal privacy" has long been understood to refer only to the privacy of individuals. The term "personal" traditionally refers to matters that relate to a particular individual human being and, when joined with the word "privacy," the resulting statutory phrase invokes background principles that relate exclusively to individuals. Indeed, it is well settled that corporations have no right to "personal privacy," which only individuals enjoy. And while the law protects matters such as the name and business prestige of corporate entities, those protections reflect derivative and property rights that preserve the business—not "personal"—interests of corporations.

b. FOIA's broader structure confirms that understanding. Exemption 7(C)'s protection for "personal privacy" in the law-enforcement-record context took its text directly from Exemption 6, which Congress enacted

in 1966 to more generally protect "personal privacy" under FOIA. Exemption 6's drafting history makes clear that Congress intended the exemption to protect the privacy of individuals only, and this Court has itself held that the text of Exemption 6 requires courts to balance the *individual*'s right of privacy against any public interest in disclosure. Congress's use of the exact same phrase in Exemption 7(C) should be given an equivalent meaning. Indeed, the Congress that passed Exemption 7(C) would have recognized, based on the existing law and commentary, that that statutory phrase would protect only individuals and not corporations.

FOIA Exemption 4 likewise demonstrates that Exemption 7(C) does not protect the interests of corporations. Congress enacted Exemption 4 to safeguard from public disclosure the "trade secrets" and "confidential" commercial and financial information that the government receives from corporations. Had Congress intended Exemption 7(C) to extend similar protections, it presumably would have used similar language to identify the sorts of information that a corporation might normally keep secret or confidential.

2. Exemption 7(C)'s drafting history confirms that conclusion. The Exemption originated as an amendment to extend Exemption 6's "personal privacy" protections to the law-enforcement context and, in the ensuing debate, it became apparent that Exemption 6 did not protect corporate interests. Congress's debates on Exemption 7(C) accordingly focused exclusively on the privacy rights of individuals, with nothing suggesting analogous protection for corporate interests.

3. In the more than 35 years since the 1974 enactment of Exemption 7(C), courts and commentators have consistently concluded that the Exemption protects only

individuals, not corporations. The Executive Branch has applied that understanding in processing millions of FOIA requests; courts have confirmed that approach; and scholarly commentators have made clear that Exemption 7(C)'s protection extends only to individuals.

4. The court of appeals erred in holding that the phrase "personal privacy" in FOIA departs from its well-settled meaning. In the court's view, FOIA's text "unambiguously" demonstrates that corporations have "personal privacy" because the APA defines "person" to include corporations and that "defined term" is "the root from which the statutory word at issue [(personal)] is derived." Pet. App. 12a-13a. That analysis does not withstand scrutiny.

The APA's definition of "person" is irrelevant here because Congress did not use that term in Exemption 7(C). Had Congress intended to invoke a statutory definition of "person," it would have drafted text to protect "the privacy of any person." Congress did so in FOIA's other exemptions when it wanted to protect corporate entities from potential harms from FOIA disclosures, and its decision not to follow that course in Exemption 7(C) should be given full effect. When Congress specifically intends to extend a statutory definition to related "variants" of a defined term, it enacts text to make that intent clear. See, *e.g.*, 15 U.S.C. 3802(f). And without such a statutory instruction, the phrase "personal privacy" must be construed in its proper context. The placement and purpose of Exemption 7(C) in FOIA's framework plainly shows that "personal privacy" concerns the interests of individuals, not corporations.

5. The logical implications of the Third Circuit's analysis underscore its error. The APA's definition of

"person" includes not only corporations but also state, local, and foreign governmental entities, all of which would possess "personal privacy" under the court's flawed rationale. Reading Exemption 7(C) to confer a new and amorphous "privacy" right upon such entities would lead to highly anomalous results. There are no meaningful benchmarks to guide the federal agencies and the courts in defining the limits of that wholly non-intuitive interest. Had Congress intended that exceptional result, it surely would have given at least some indication that it intended such an extraordinary exercise of policy-making authority and supplied some framework for doing so. But all indicators point in the precisely the opposite direction: They demonstrate that "personal privacy" carries its ordinary meaning and protects only the privacy of individuals.

ARGUMENT

EXEMPTION 7(C)'S PROTECTION FOR "PERSONAL PRIVACY" SAFEGUARDS THE INTERESTS OF INDIVIDUALS, NOT CORPORATIONS

FOIA Exemption 7(C) exempts from mandatory disclosure records or information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). The text of Exemption 7(C), FOIA's broader context, and the statute's drafting history make clear that Congress intended the Exemption to protect individuals, not corporations. Indeed, until the decision under review, that conclusion was uniformly accepted: Neither the court below nor AT&T has cited any court, agency, or commentator in the more than 35 years of Exemption 7(C)'s existence that has ever concluded that corporations can invoke the Exemption's

protection for "personal privacy." The court of appeals' novel construction would erroneously create a new and amorphous "privacy" right not only for corporations but also for local, state, and foreign governments. It would also leave federal agencies and courts with no meaningful benchmarks against which to measure whether any invasion of that unprecedented "privacy" interest would be "unwarranted." This Court should reverse the decision of the court below and confirm that Exemption 7(C)'s protection for "personal privacy" protects only the privacy of individuals.

A. FOIA's Text Demonstrates That Exemption 7(C) Protects Only The Privacy Interests Of Individuals

The meaning of the phrase "personal privacy" in Exemption 7(C) "turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken* v. *Holder*, 129 S. Ct. 1749, 1756 (2009) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Those basic interpretive guides each demonstrate that Exemption 7(C)'s protection for "personal privacy" extends only to individuals.

1. The term "personal privacy" itself encompasses only the privacy of individual human beings

FOIA does not define the phase "personal privacy." When such a term is "left undefined by the statute," it "carries its ordinary meaning." *Crawford* v. *Metropolitan Gov't of Nashville & Davidson Co.*, 129 S. Ct. 846, 850 (2009); see also *Smith* v. *United States*, 508 U.S. 223, 228 (1993). The ordinary meaning of "personal privacy" is one that encompasses only the privacy of individual human beings.

Dictionaries demonstrate that the conventional meaning of the word "personal" is (1) "of or relating to

a particular person," *i.e.*, a particular "individual human being"; (2) "affecting one individual or each of many individuals"; (3) "relating to an individual"; or (4) "relating to or characteristic of human beings as distinct from things." *Webster's Third New International Dictionary* 1686 (1961); *ibid.* (defining "person" to mean "an individual human being"); see *The American Heritage Dictionary of the English Language* 978 (1976) ("personal" means "[o]f or pertaining to a particular person; private; one's own: *personal affairs*," and "[c]oncerning a particular individual and his intimate affairs"). Under those definitions, the characteristics of a corporation, in contrast to those of an individual, would not commonly be understood to be "personal" traits.

When "personal" is joined with the word "privacy" in Exemption 7(C), the resulting statutory phrase invokes background principles that focus exclusively on individuals. The law ordinarily protects personal privacy to safeguard human dignity and preserve individual autonomy. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 197-199, 205-207, 213-214 (1890), cited in *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 n.15 (1989) (construing Exemption 7(C)). Such concepts do not translate to a corporation, which "exist[s] only in contemplation of law" as "an artificial being, invisible, [and] intangible." *Trustees of Dartmouth Coll.* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (Marshall, C.J.). Artificial entities like corporations cannot experience the emotions (*e.g.*, embarrassment, annoyance, shame, or stigma) that are at the heart of what personal privacy is all about. Such emotions are unique to individuals.

It therefore is well established that a "corporation * * * has no personal right of privacy," Restatement (Second) of Torts § 652I cmt. c (1977) (Restatement) (torts based on invasions of privacy), and, for at least half a century, it has been "generally agreed that the right to privacy is one pertaining only to individuals." William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 408-409 & n.207 (1960) (citing cases); see, *e.g.*, *Warner-Lambert Co* v. *Execuquest Corp.*, 691 N.E.2d 545, 548 & n.6 (Mass. 1998) (explaining that "[c]ases from other jurisdictions unanimously deny a right of privacy to corporations"). In other words, "[a] corporation * * * can have no personal privacy" because the "right of privacy" is "a personal one," unique to human beings. William L. Prosser, *Law of Torts* § 97, at 641-642 (2d ed. 1955) (*Prosser*).[4]

The law, of course, will recognize a corporation's right to control and protect matters such as "its name and business prestige," *Prosser* § 97, at 642, but those protections reflect derivative protections for *property* rights that preserve the economic—not "personal"—interests of businesses. See Restatement § 652I cmt. c (protections derive from "the law of unfair competition"). Any so-called "privacy" interests that a corporation enjoys thus take the form of "property interests rather than intimate personal rights." See Note, *Attorney-Client and Work Product Protection in a Utilitarian World*, 108 Harv. L. Rev. 1697, 1703 (1995) (footnotes omitted); see also *Maysville Transit Co.* v. *Ort*, 177 S.W.2d 369, 370 (Ky. 1944) (holding that company may seek damages for injuries to its business or good

[4] Accord William L. Prosser, *Law of Torts* § 117, at 814-815 (4th ed. 1971); William L. Prosser, *Law of Torts* § 112, at 843 (3d ed. 1964).

will but cannot assert a "right to privacy" because "such a right is designed primarily to protect the feelings and sensibilities of human beings, rather than to safeguard property, business or other pecuniary interests").

2. FOIA's broader structure confirms that "personal privacy" protects individual, not corporate, interests

FOIA's broader structure likewise demonstrates that Exemption 7(C)'s protection for "personal privacy" applies only to individuals. First, Congress incorporated the phrase "personal privacy" into Exemption 7(C) directly from Exemption 6, which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). The statutory protection for "personal privacy" in Exemption 6 has long been recognized as safeguarding the privacy interests only of individuals, and Congress's use of the identical term in Exemption 7(C) carries the same meaning. Second, Congress specifically addressed the legitimate need of corporations and other entities to maintain the confidentiality of "trade secrets" and "commercial or financial information" that they provide to the government in Exemption 4, 5 U.S.C. 552(b)(4). The text of that Exemption sharply contrasts with that of Exemptions 6 and 7(C), reinforcing the conclusion that Congress never intended Exemption 7(C) to provide an independent basis for withholding government records concerning corporations.

a. Exemption 6

1. When Congress enacted Exemption 6 in 1966, it made clear that it exempted agency records to exempt disclosures that "might harm the *individual*" and that the exemption's use of the phrase "'clearly unwarranted

invasion of personal privacy' provides the proper balance between the protection of an *individual*'s right to privacy and the preservation of the public's right to government information." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (*1966 House Report*) (emphasis added). Congress thus specifically designed Exemption 6's protection for "personal privacy" to safeguard an "*individual*'s private affairs from unnecessary public scrutiny." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (*1965 Senate Report*); see also *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976) (discussing both committee reports).

Indeed, this Court has specifically held that "the *text* of [Exemption 6]" itself "requires the Court to balance 'the *individual*'s right of privacy' against the basic policy of opening 'agency action to the light of public scrutiny.'" *United States Dep't of State* v. *Ray*, 502 U.S. 164, 175 (1991) (quoting *Rose*, 425 U.S. at 372) (emphasis added). The Court has therefore emphasized that Exemption 6's "statutory goal" is to establish "a workable compromise between *individual* rights 'and the preservation of public rights to Government information,'" *Rose*, 425 U.S. at 381 (citation omitted; emphasis added), with the "primary purpose" of the Exemption being "to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982); see *id.* at 601 (explaining that Congress sought to protect an "'individual's right of privacy' * * * by preventing 'the disclosure of [information] which might harm the individual'") (quoting *1966 House Report* 11) (brackets in original). Under Exemption 6, then, the process of determining whether a disclosure could result in a "clearly unwar-

ranted" invasion of "personal privacy" "require[s] a balancing of the individual's right of privacy against" the public interest in disclosure. *Rose*, 425 U.S. at 372; accord *DoD* v. *FLRA*, 510 U.S. 487, 495-496 (1994) (following *Rose*).

2. It is well established that "identical * * * phrases within the same statute should normally be given the same meaning." *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). That interpretive rule has particular force here, because Congress incorporated the phrase "personal privacy" into Exemption 7(C) directly from Exemption 6 in 1974 in order to "make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under" Exemption 7. 120 Cong. Rec. 17,033 (1974) (statement of Sen. Hart); cf. *FBI* v. *Abramson*, 456 U.S. 615, 627 n.11 (1982) (discussing Senator Hart's role as "the sponsor of the 1974 amendment"). It follows that the phase "personal privacy" in Exemption 7(C) has the same meaning as the identical phrase in Exemption 6 and protects only an "individual's right of privacy" (*Ray*, 502 U.S. at 175 (citation omitted)) from unwarranted invasions.

The Congress that drafted Exemption 7(C) would have recognized that, as in Exemption 6, its use of "personal privacy" would protect only individuals from unwarranted invasions of their privacy. Exemption 6's focus on the interest of real persons was clearly established in 1974. As noted above, the committee reports in both Houses of Congress concerning the enactment of FOIA in 1966 made plain that Exemption 6 protected an "individual's right to privacy" by shielding the "individual's private affairs" from unnecessary public scrutiny. See pp. 20-21, *supra* (quoting reports). And by 1970, the

leading treatise on administrative law and FOIA had concluded that "a corporation cannot claim 'personal privacy'" under Exemption 6 because the phrase "'personal privacy' always relates to individuals." Kenneth Culp Davis, *Administrative Law Treatise* § 3A.22, at 163-164 (1970 Supp.); see John A. Hoglund & Jonathan Kahan, Note, *Invasion of Privacy and the Freedom of Information Act: Getman* v. *NLRB*, 40 Geo. Wash. L. Rev. 527, 540 (1972) (emphasizing that "the interest exemption 6 seeks to safeguard is that of individual privacy"); *id.* at 529-530 & nn.19-20 (examining legislative history); Gregory L. Waples, Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 Colum. L. Rev. 895, 954 n.323 (1974) (explaining that the statute's definition of "person," which includes corporations, does not suggest that "a corporation has a 'personal privacy' within the meaning of the sixth exemption"; stating that "it is difficult to perceive how a corporation could invoke" Exemption 6's protections).

Courts similarly had emphasized that the "personal privacy" referred to in Exemption 6 protected the privacy of individuals. Based on the "statute and its legislative history," the lower courts had determined that the Exemption required a balancing of "the potential invasion of individual privacy" against "a public interest purpose for disclosure of [the] personal information." *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133, 136 & n.12 (3d Cir. 1974) (quoting *Getman* v. *NLRB*, 450 F.2d 670, 677 n.24 (D.C. Cir. 1971)); accord *Rural Hous. Alliance* v. *USDA*, 498 F.2d 73, 77 & n.13 (D.C. Cir. 1974) (Exemption 6 is "designed to protect individuals from public disclosure of intimate details of their lives"); *Getman*, 450 F.2d at 674 & n.10 (Exemption 6 protects "the right of privacy of affected individuals"). Indeed, in March

1974, the Second Circuit made clear—in a passage that this Court would later adopt as part of its Exemption 6 holding in *Rose*—that the "statutory goal of Exemption Six" is "a workable compromise between individual rights 'and the preservation of public rights to Government information.'" *Rose* v. *Department of the Air Force*, 495 F.2d 261, 269 (citation omitted), aff'd, 425 U.S. 352, 381 (1976) (incorporating quoted text as part of this Court's holding in *Rose*).

This Court "can assume that Congress legislated against this background of law, scholarship, and history * * * when it amended Exemption 7(C)" in November 1974. *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 169 (2004). Indeed, this Court has emphasized that "Congress gave special consideration to the language in Exemption 7(C)" when it borrowed and modified the text of Exemption 6. *Id.* at 166; see pp. 27-32, *infra*. Against the existing legal background, the Congress that enacted Exemption 7(C) would have concluded that the "personal privacy" protections that it adopted would apply to protect only the privacy of individual human beings, not corporate entities.

b. Exemption 4

The conclusion that Exemption 7(C), like Exemption 6, is focused exclusively on the privacy interests of individuals is reinforced by the broader structure of FOIA. Corporations do have a legitimate interest in preserving the confidentiality of certain information, but Congress addressed that need in 1966 through a specific and circumscribed exemption: Exemption 4.

Congress enacted Exemption 4 to protect from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privi-

leged or confidential." 5 U.S.C. 552(b)(4). That exemption applies when the government has "obtained from" a non-agency "person" (*ibid.*) the specified categories of information. See *Federal Open Mkt. Comm.* v. *Merrill*, 443 U.S. 340, 360 (1979). And because the APA (which includes FOIA) defines the statutory term "person" to include "an individual, partnership, corporation, association, or public or private organization other than [a federal] agency," 5 U.S.C. 551(2), the exemption specifically protects "trade secrets" and confidential "commercial or financial information" that the government obtains from private corporations like AT&T. See generally Steven G. Breyer et al., *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 876 (5th ed. 2002) (Exemption 4 reflects Congress's purpose of ensuring that FOIA be used to "ensure citizen scrutiny of the federal government rather than to open private businesses to public scrutiny.").

Exemption 4 protects such information as "business sales statistics, inventories, customer lists," and "technical or financial data," when a corporation voluntarily provides the government with such information and "would not customarily" make it available to the public. See *1966 House Report* 10; see also *1965 Senate Report* 9; *Critical Mass Energy Project* v. *NRC*, 975 F.2d 871, 872, 879 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993). The lower courts have also construed Exemption 4 to apply where disclosure of confidential commercial or financial information that the government has required a person to submit would likely "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 873, 878 (citation omitted); *id.* at

876 (citing decisions from courts of appeals); see *Utah* v. *United States Dep't of the Interior*, 256 F.3d 967, 969 (10th Cir. 2001); *Frazee* v. *United States Forest Serv.*, 97 F.3d 367, 371-372 (9th Cir. 1996); *Nadler* v. *FDIC*, 92 F.3d 93, 95-96 & n.1 (2d Cir. 1996); see also Pet. App. 40a-41a.[5]

Congress's enactment of a specific exemption for trade secrets and confidential commercial and financial information (Exemption 4) at the same time that it adopted a general exemption for "personal privacy" (Exemption 6) strongly indicates that Congress's subsequent incorporation of Exemption 6's "personal privacy" protection into Exemption 7's law-enforcement context was not intended to protect the business interests of corporations. Had Congress intended its enactment of Exemption 7(C) in 1974 to enhance FOIA's protections for the confidentiality interests of corporations and other entities, it presumably would have employed language similar to that used in Exemption 4—such as "trade secrets" or "confidential" "commercial or financial information"—that identifies the sorts of information that corporations normally keep secret or confidential. Its failure to do so strongly suggests that Congress never intended Exemption 7(C) to serve that function

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[5] Some courts of appeals have indicated that Exemption 4 may apply where public disclosure of commercial or financial information would undermine the effectiveness of a governmental program. See *Critical Mass Energy Project*, 975 F.2d at 879 (noting this ground); *9 to 5 Org. for Women Office Workers* v. *Board of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 11 (1st Cir. 1983). But see *Bloomberg, L.P.* v. *Board of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 150-151 (2d Cir. 2010) (rejecting similar grounds for withholding), petition for cert. pending, No. 10-543 (filed Oct. 26, 2010).

and, instead, enacted its protections for "personal privacy" to safeguard only the privacy of individuals.

B. Exemption 7(C)'s Drafting History Demonstrates That Congress Protected Only The Privacy Interests Of Individuals

The drafting history of the 1974 amendments to FOIA further demonstrates that the Congress that enacted Exemption 7(C) understood that the Exemption's protection of "personal privacy" in records compiled for law-enforcement purposes would apply only to individuals. Nothing in that history supports the view that Exemption 7(C) contains the sweeping protection of corporate "privacy" that the court of appeals envisioned.

1. Congress amended several aspects of FOIA in 1974. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 226 (1978) (*Robbins Tire*). As relevant here, Congress amended Exemption 7, which had previously applied to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. 552(b)(7) (1970). The 1974 amendment revised that exemption to protect "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would," *inter alia*, "(C) constitute an unwarranted invasion of personal privacy." Act of Nov. 21, 1974, Pub. L. No. 93-502, § 2(b), 88 Stat. 1563; see 5 U.S.C. 552(b)(7) (1976); cf. *Abramson*, 456 U.S. at 626-627 (discussing the 1974 modifications to Exemption 7). That amendment resulted from a May 1974 proposal on the floor by Senator Hart during the Senate's debate of the FOIA amendment bill that Congress later enacted. *Robbins Tire*, 437 U.S. at 227; see 120 Cong. Rec. at 17,033 (Amendment No. 1361).

Senator Hart's proposal would have exempted records compiled for law-enforcement purposes if their disclosure would "constitute a clearly unwarranted invasion of personal privacy." 120 Cong. Rec. at 17,033. The Senator explained that this "protection for personal privacy" was already "part of the sixth exemption in the present law" and that "[b]y adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." *Ibid.*; see *id.* at 17,040 (reproducing memorandum that Senator Hart "distributed to each Senator").[6]

The ensuing debate demonstrates that the Senate was fully aware that Exemption 7's protection for "personal privacy"—copied directly from Exemption 6—

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[6] Unlike the balance of Senator Hart's amendment to Exemption 7, his proposal to protect "personal privacy" within the Exemption was not based on a legislative recommendation by the Administrative Law Section (ALS) of the American Bar Association. See 120 Cong. Rec. at 17,033; cf. *id.* at 17,035 (reprinting ALS proposal). During the Senate hearings on FOIA legislation, Robert Gilliat testified on behalf of the Department of Defense that the ALS's recommendation would "limit the use" of Exemption 7 by enumerating several specific "reasons for protecting investigatory records." 2 *Freedom of Information, Executive Privilege, Secrecy in Government: Hearings on S. 1142 Before Subcomms. of the Senate Judiciary and Government Operations Comms.* 86 (1973). Mr. Gilliat further explained that an investigatory record might not be deemed "'similar' to a personnel or medical file" otherwise protected by Exemption 6, and he therefore recommended amending Exemption 6 to "clarif[y]" that its protections would apply to investigatory records if Congress were to adopt the ALS's revision to Exemption 7. *Ibid.* Mr. Gilliat also concluded that the alternative of amending Exemption 7 itself to protect against "a clearly unwarranted invasion of personal privacy" was "a fairly good approach." *Ibid.* Senator Hart's subsequent proposal appears to have adopted that recommendation.

would protect only the privacy of individuals. During the debate, Senator Dole introduced into the record a court decision that expressly held that the identity of organizations, unlike the "identity of * * * individuals," cannot be withheld under Exemption 6 because "the right of privacy envisioned in [the Exemption] is *personal* and *cannot be claimed by a corporation* or association." 120 Cong. Rec. at 17,045 (emphasis added) (reprinting *Washington Research Project, Inc.* v. *HEW*, 366 F. Supp. 929, 937-938 (D.D.C. 1973), aff'd in part on other grounds, 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975)). Nothing said in the congressional debate took issue with that principle.

Indeed, Senators debated whether Senator Hart's amendment would unduly risk the privacy of individuals. Senator Hruska, for instance, opposed Senator Hart's amendment on the ground that "information in law enforcement files must be kept in confidence to insure that the individual's right to privacy is secure," and he argued that the proposal could lead to the disclosure of information that would "infringe on the individual's right to privacy" by, *inter alia*, "caus[ing] embarrassment to individuals mentioned in FBI files." 120 Cong. Rec. at 17,036. Senator Hruska urged his colleagues not to alter the text of Exemption 7 because one of "the most important rights" that "an individual may possess, his right to privacy," was at stake. *Id.* at 17,037; see also *ibid.* (statement of Sen. Thurmond) (opposing amendment because it would lead to the "invasion of an individual's privacy"). After the Senate adopted Senator Hart's amendment and passed its text as part of H.R. 12,471, see *id.* at 17,041, 17,045-17,047, Senator Hruska declared that he would "urge the President as strongly as I can to veto this measure" because, *inter alia*, it

"could set the stage for severe problems regarding the privacy of individuals." *Id.* at 17,046.

After the House of Representatives and the Senate appointed the members of the Conference Committee for H.R. 12,471, see 120 Cong. Rec. at 18,072, 18,506, President Ford wrote identical letters to the Conference Committee Chairmen, expressing specific concerns about the bill. Letter to the Chairmen of the Conference Committee Considering Freedom of Information Act Amendments, 2 Pub. Papers 45 (Aug. 23, 1974) (letters to Sen. Kennedy and Rep. Moorhead). As relevant here, the President wrote that he was "concerned that an individual's right to privacy would not be appropriately protected" by requiring disclosure of law-enforcement records "unless the invasion of individual privacy is *clearly unwarranted*." *Id.* at 47. The President accordingly requested that the Conference Committee "strike the words 'clearly unwarranted' from" the proposed revision to Exemption 7 in order to prevent "the Freedom of Information Act from disclosing information harmful to the privacy of *individuals*." *Ibid.* (emphasis added); see 120 Cong. Rec. at 33,158-33,159, 34,162-34,163 (reproducing President's letters).

The Conference Committee discussed the issues identified by the President and "adopted language * * * to respond to those concerns." 120 Cong. Rec. at 33,157 (statement of Sen. Kennedy). Among other things, the conferees specifically agreed to "strike the word 'clearly' from the Senate-passed language" to accommodate the President's concern regarding "law enforcement records involving personal privacy." *Id.* at 33,159, 34,163 (reproducing letter from committee chairmen to President Ford dated Sept. 23, 1974). Although both Houses of Congress adopted the Conference Re-

port, *id.* at 33,300, 34,168-34,169, which memorialized that change, H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 12 (1974), President Ford vetoed H.R. 12,471. He explained, as relevant here, that requiring the government to "prove * * * that disclosure 'would' cause a type of harm specified in the amendment" could undermine the "confidentiality" of numerous law-enforcement files. Veto of Freedom of Information Act Amendments, 2 Pub. Papers 374, 375 (Oct. 17, 1974); see 120 Cong. Rec. at 36,243-36,244 (reproducing veto message).

Congress overrode the President's veto, see 120 Cong. Rec. at 36,633, 36,882, and its debate again confirmed that Exemption 7(C) was directed to the privacy of individuals. Although the House of Representatives focused on other matters, *id.* at 36,622-36,633, the Senate returned to its prior debate on "personal privacy." Senator Hruksa again argued against the bill, maintaining that it would be difficult for the government to prove that disclosure would constitute an unwarranted invasion of "personal privacy," and that such a requirement should not be imposed because "the individual's right to privacy" is at stake. *Id.* at 36,873. He contended that "[t]he right to know must be balanced against the right of the individual to privacy" and recommended sustaining the veto because the bill, in his view, incorrectly "emphasize[d]" the former "to the detriment of" the latter. *Ibid.* Although other Senators shared that view, see, *e.g.*, *ibid.* (statement of Sen. Taft) (bill would damage "the individual's right of privacy" in "law enforcement" records); *id.* at 36,877 (statement of Sen. Thurmond), the Conference Committee co-chair, Senator Kennedy, explained that "[w]e have been most careful to protect privacy" and indicated that the bill would "protect *individual* privacy" against unwarranted inva-

sions. *Id.* at 36,865, 36,866 (emphasis added); see *id.* at 36,880 (statement of Sen. Ribicoff) (explaining that the FOIA amendments would "provide adequate guidelines to insure that an individual's right to privacy will not be endangered").

2. Congress's exclusive focus on the privacy of individuals when it enacted Exemption 7(C) also reflects the broader legislative context in which Congress debated and passed the 1974 FOIA amendments. At the same time that Congress was considering those amendments, it was also working to pass the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (5 U.S.C. 552a).[7] The Privacy Act was "passed largely out of concern over the 'impact of computer data banks on individual privacy,'" and it therefore prohibits a federal agency (with specified exceptions) from disclosing any record in the agency's system of records except pursuant to the written authorization of the individual to whom the record pertains. *Reporters Committee*, 489 U.S. at 766 (citation omitted); see 5 U.S.C. 552a(b). This Court has accordingly con-

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[7] The substance of the Privacy Act as enacted in December 1974 was largely derived from H.R. 16,373, 94th Cong., 2d Sess. See *Perry* v. *FBI*, 759 F.2d 1271, 1275 n.4 (7th Cir. 1985); 120 Cong. Rec. at 39,204 (passing S. 3418 by inserting the text of H.R. 16,373 "as passed by the House"); *id.* at 40,880 (statement of Rep. Moorhead) (explaining House-Senate compromise that "retain[ed] the basic thrust of the House version" of the Privacy Act while including "important segments of the Senate measure"); cf. *id.* at 36,652-36,660, 36,955-36,966, 36,976 (H.R. 16,373 as passed by the House). That bill and its direct predecessors were developed from February 1974 until the House passed H.R. 16,373 on November 21, 1974. See *id.* at 36,976; H.R. Rep. No. 1416, 93d Cong., 2d Sess. 11 (1974) (explaining drafting history). That drafting history closely parallels the May to November 21, 1974 chronology for Exemption 7(C). See 120 Cong. Rec. at 17,033, 17,045-17,047, 33,300, 34,168-34,169, 36,633, 36,882 (Exemption 7(C) history).

cluded that "Congress' basic policy concern * * * for personal privacy" in the Privacy Act is "relevant in [the Court's] consideration of the privacy interest" protected by Exemption 7(C). *Reporters Committee*, 489 U.S. at 767.[8]

AT&T has itself acknowledged that the Privacy Act protects only the privacy rights of individuals. Br. in Opp. 23. Yet Congress referred to those individual rights in the Privacy Act in *precisely* the same way that it did in FOIA: It declared that the Privacy Act's purpose is to protect the "personal privacy" of "personal information" in agency records. See Privacy Act § 2(b), 88 Stat. 1896 (5 U.S.C. 552a note). That parallel statutory use of "personal privacy" in both FOIA and the Privacy Act reflects the established understanding that "personal privacy" refers only to the privacy interests of human beings.

In short, Members of Congress were aware that Exemption 7(C)'s "personal privacy" protection had been lifted directly from Exemption 6 to apply the same privacy protections to law-enforcement records, and that Exemption 6 had itself been construed to apply only to individuals, not corporations. The debates concerning Exemption 7(C) focused exclusively on the privacy rights of individuals, and Congress used the same statutory term "personal privacy" in the contemporaneously enacted Privacy Act to refer exclusively to the privacy of individuals. Nothing in Exemption 7(C)'s drafting

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[8] Congress specifically addressed the statute's interaction with FOIA by providing that the Privacy Act's general prohibition on disclosure does not apply if disclosure would be "required under [FOIA]." 5 U.S.C. 552a(b)(2); see 120 Cong. Rec. at 40,882 (discussing provision).

history suggests that Congress intended the Exemption to protect artificial entities like corporations.[9]

C. Exemptions 6 And 7(C) Have Been Uniformly Understood For More Than 35 Years To Protect Only The Privacy Interests Of Individuals

For more than 35 years, since the 1974 enactment of Exemption 7(C), there has been unanimity among courts and commentators that the "personal privacy" protections in Exemptions 6 and 7(C) apply only to individuals. That uniform understanding accurately reflects the overwhelming textual and historical evidence demonstrating that Congress employed the term "personal privacy" in FOIA to refer to the privacy of individuals, not corporations.

Following the 1974 amendments to FOIA, Attorney General Edward Levi issued a memorandum that interpreted the new provisions. That memorandum concluded that Congress's use of "[t]he phrase 'personal privacy' [in Exemption 7(C)] pertains to the privacy interests of individuals" and thus "does not seem applicable to corporations or other entities." U.S. Dep't of Justice, *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9 (1975) (*1975 FOIA Memorandum*). That memorandum, which this Court has cited as a reliable interpretation of

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[9] Exemption 7(C) took its present form in 1986, when Congress modified the exemption to apply whenever disclosure "could reasonably be expected to" constitute an unwarranted invasion of "personal privacy." 5 U.S.C. 552(b)(7); see *Reporters Committee*, 489 U.S. at 756 & n.9, 778 n.22. That amendment vindicated President Ford's concerns with Exemption 7(C) by "eas[ing] considerably" the showing needed to protect personal privacy in law-enforcement records, *id.* at 756 n.9 (citation omitted); see 132 Cong. Rec. 29,619 (1986), but did not alter the meaning of "personal privacy."

the 1974 amendments, see *Favish*, 541 U.S. at 169; *Abramson*, 456 U.S. at 622 n.5, further explained that Exemption 7(C) should be interpreted in light of "the body of court decisions" that interpret Exemption 6. See *1975 FOIA Memorandum* 9.[10]

The D.C. Circuit, which has jurisdiction over appeals from the district court that has universal jurisdiction over FOIA actions, see 5 U.S.C. 552(a)(4)(B), likewise has emphasized repeatedly that "businesses themselves

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[10] Attorney General Levi's 1975 memorandum reflected an evolution in the Department of Justice's understanding of Exemption 6. In 1967, one year after Congress enacted FOIA, Attorney General Ramsey Clark described Exemption 6 as protecting "the privacy of any person" and stated that "the applicable definition of 'person,' which is found in section 2(b) of the Administrative Procedure Act, would include corporations and other organizations as well as individuals." U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36-37 (1967) (*1967 FOIA Memorandum*). Attorney General Clark then qualified his statement by observing that Exemption 6 normally would protect "the privacy of individuals rather than of business organizations." *Id.* at 37.

That initial description of Exemption 6 was promptly criticized as premised on an erroneous view that the statute protected "the privacy of any person," even though Congress employed the phrase "personal privacy" and did "not use th[e] term" "person." Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 799 (1967). Moreover, the Attorney General's description found no support in the legislative history cited in his analysis, which described Exemption 6 as protecting the "individual's right of privacy" and preventing "harm [to] the individual." *1967 FOIA Memorandum* 36 (quoting *1966 House Report* 11). No court subsequently endorsed this aspect of the Attorney General's analysis, and by 1974 courts and commentators had concluded that Exemption 6 is addressed to the protection of individuals. See pp. 22-24, *supra*. In 1975, Attorney General Levi agreed with the uniform body of law and commentary and concluded that "[t]he phrase 'personal privacy' * * * does not seem applicable to corporations." *1975 FOIA Memorandum* 9.

do not have protected privacy interests under Exemption 6." *Multi Ag Media LLC* v. *USDA*, 515 F.3d 1224, 1228 (2008); see *Sims* v. *CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980) ("Exemption 6 is applicable only to individuals."); *National Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976) ("The sixth exemption has not been extended to protect the privacy interests of businesses or corporations."). And in *Washington Post Co.* v. *United States Department of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988), the court of appeals concluded that Exemption 7(C) provides no privacy protection for "[i]nformation relating to business judgments and relationships." Those decisions reflect judicial recognition that both exemptions protect the same interest in "personal privacy," which does not encompass a purely corporate interest in confidentiality.[11]

Indeed, the parallel text of Exemption 6 and Exemption 7(C) all but compels the conclusion that they protect the same respective privacy interests. This Court has concluded that "Exemption 7(C) is more protective of privacy than Exemption 6" based on the textual difference between disclosures (under Exemption 6) that

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[11] Agency records concerning corporations sometimes implicate the privacy of an individual and therefore may be withheld to protect that individual's "personal privacy." For instance, Exemptions 6 and 7(C) can "appl[y] to financial information in business records when the business is individually owned or closely held and 'the records would necessarily reveal at least a portion of the owner's personal finances.'" *Multi Ag Media LLC*, 515 F.3d at 1228-1229 (Exemption 6) (citation omitted); see *Consumer's Checkbook* v. *HHS*, 554 F.3d 1046, 1051 (D.C. Cir. 2009) (Exemption 6), cert. denied, 130 S. Ct. 2140 (2010). Similarly, a corporation's identity may be withheld when it sufficiently risks the "identification of [a] corporate officer who reported [a] crime" to the government. *Computer Prof'ls for Social Responsibility* v. *United States Secret Serv.*, 72 F.3d 897, 905 (D.C. Cir. 1996) (Exemption 7(C)).

"would" constitute a "clearly unwarranted" invasion of personal privacy and disclosures (under Exemption 7(C)) that merely "could reasonably be expected" to constitute an "unwarranted" invasion. *DoD*, 510 U.S. at 497 n.6. In other words, the exemptions simply "differ in the magnitude of the public interest that is required to override the respective privacy interests" they protect. *Ibid.* "The privacy interest protected" by the exemptions, however, is the same. Cf. *id.* at 500 (following *Reporters Committee*'s understanding of "personal privacy" in the Exemption 7(C) context to define "[t]he privacy interest protected by Exemption 6"). The lower courts have accordingly concluded that "the only distinction between the balancing tests applied [by Exemptions 6 and 7(C)] is the 'magnitude of the public interest' required to override the respective privacy interests they protect." See *Forest Serv. Employees for Envtl. Ethics* v. *United States Forest Serv.*, 524 F.3d 1021, 1024 n.2 (9th Cir. 2008); see also, *e.g.*, *Horowitz* v. *Peace Corps*, 428 F.3d 271, 279 & n.2 (D.C. Cir. 2005) (analyzing Exemption 6 "privacy interest" based on Exemption 7(C) decisional law; explaining that "the difference between the standards for the two exemptions 'is of little import' except when analyzing 'the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions'") (quoting *DoD*, 510 U.S. at 497 n.6), cert. denied, 547 U.S. 1041 (2006); *FLRA* v. *United States Dep't of Veterans Affairs*, 958 F.2d 503, 510 (2d Cir. 1992) (explaining that the balance between personal privacy and any public interest in disclosure is different under Exemptions 6 and 7(C), but that the "degree of invasion to th[e] privacy interest" necessary to trigger that balance is the same).

Scholars likewise have concluded that FOIA's protection for "personal privacy" protects only individuals. A leading treatise on administrative law, for instance, explains that Exemption 6 "does not extend to information concerning corporations" because it "provides a qualified exemption only for 'personal privacy.'" 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 5.12, at 373 (5th ed. 2010); accord, *e.g.*, 4 Charles H. Koch, Jr., *Administrative Law and Practice* § 14:36[2], at 502 (3d ed. 2010) (*Koch Treatise*) (Exemption 6 "covers only 'personal privacy' and hence it was only intended to protect confidential information about private individuals," not "business entities or other associations," which "must look to exemption 4" for protection); 2 Jacob A. Stein et al., *Administrative Law* § 10.07[1], at 10-204 (Dec. 2006) (*Stein Treatise*) ("[T]he phrase 'personal privacy' * * * refers to the privacy interests of individuals * * * but excludes businesses."). The same textual analysis holds true for Exemption 7(C). See 1 Justin D. Franklin & Robert F. Bouchard, *Guidebook to the Freedom of Information and Privacy Acts* § 1:104, at 1-719 to 1-720 & n.54 (2d ed. Apr. 2010) (explaining that "the privacy interest protected under Exemption 7(C) is only applicable to 'individual' privacy interests, as also described in Exemption 6," such that "corporations * * * do not generally possess a protectible privacy interest under Exemption 7(C)" except where disclosure would, for instance, affect the privacy of individual "owners' personal finances"); *id.* § 1.77, at 1-552 to 1-553 & n.70 (same for Exemption 6); 2 James T. O'Reilly, *Federal Information Disclosure* § 17:75, at 172 & n.5 (3d ed. 2000) (Exemption 7(C)'s protections "are limited to individual matters and actions" such that "[c]orporations do not usually qualify for [Exemption] 7(C) privacy inter-

ests" unless the relevant records affect "individuals' interests in privacy"); *id.* § 16:7, at 13-14 (same for Exemption 6). In other words, "the intent of [Exemptions 6 and 7(C)] is the same": the "protection of the individual's right of privacy." *Stein Treatise* § 10.08[4][c], at 10-273.[12]

Then-Professor Scalia similarly testified in 1981 that "[p]erhaps the most significant feature" of the 1974 FOIA amendments to Exemption 7 was that they did not protect "what might be called associational or institutional privacy" from requests under FOIA for disclosure of investigatory records about "corporations, unions," and other "independent institutions." 1 *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 957-958 (1981). The Exemption 7 amendments, Professor Scalia explained, gave no "protection [to] those institutions' deliberate and consultative processes" and therefore enabled FOIA requesters to "impair[]" the "privacy * * * of [such] institutions." *Id.* at 958.

In the face of these uniform decisions and commentaries, AT&T has argued that one decision—*Judicial Watch, Inc.* v. *FDA*, 449 F.3d 141 (D.C. Cir. 2006)—suggests that corporations might possess "personal privacy" under Exemption 6. See Br. in Opp. 14-15, 29-30. But even the court below rejected that reading of *Judicial Watch*. Pet. App. 14a n.6. In *Judicial Watch,* the

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[12] See also, *e.g.*, *Koch Treatise* § 14.37[4](c)(i), at 517 ("Both exemption 6 and exemption 7(C) require a balance of the public interest in disclosure against the individual's interest in privacy."); Lee Modjeska, *Administrative Law: Practice and Procedure* §§ 3.14-3.15, at 65, 69 (1982) (Exemptions 6 and 7(C) both require "balanc[ing] the individual's privacy interest against the public's disclosure interest").

FDA withheld the names of "private individuals and companies" and the street addresses of businesses that had worked on approval of the controversial morning-after abortion drug, RU-486. 449 F.3d at 152. The government argued that employees of those companies had a privacy interest in withholding "the names and addresses of * * * businesses associated with [the drug]" in order to avoid potential "abortion-related violence." *Id.* at 153; see Gov't Br. at 39-43, *Judicial Watch*, *supra* (No. 05-5256), available at 2006 WL 515736 (arguing that "all of the withheld information," including business "street address[es]," can "be identified as applying to a particular individual" and implicate the "personal privacy interests of these employees"). The D.C. Circuit agreed that "individuals have a 'privacy interest in the nondisclosure'" to "avoid[] physical danger," and concluded that the government need not justify withholding on an "individual-by-individual basis" because the same "privacy interest extends to all such employees." 449 F.3d at 153 (citations omitted). The court thus held that Exemption 6 exempted the information from disclosure by balancing the private interest involved—"namely, 'the individual's right of privacy'"—and concluding that the "private interest in avoiding harassment or violence tilts the scales" to nondisclosure. *Ibid.* (citation omitted). In other words, *Judicial Watch* was about an individual's "personal privacy," not a corporation's. Cf. p. 36 n.11, *supra*.

The court of appeals' decision in this case is a singular outlier in the face of more than 35 years of the uniform understanding that FOIA's protection for "personal privacy" extends only to safeguard the privacy of individuals. And although "novelty is [not] always fatal in the construction of an old statute," *Keene Corp.* v.

United States, 508 U.S. 200, 213 (1993), "[t]he presumption is powerful" that the reason that the court of appeals' newly minted interpretation of Exemption 7(C) was not "uncovered by judges, lawyers or scholars" for more than 35 years is "because it is not there." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370-371 (1959). AT&T has yet to offer even a scintilla of evidence that Congress, the Executive, the Judiciary, or any private entity ever previously thought that corporations would have "personal privacy" under Exemption 7(C). That failure reflects the remarkably consistent view that the Exemption protects only the privacy of individuals, not corporate entities.

D. The Court Of Appeals' Analysis Does Not Withstand Scrutiny

The court of appeals did not dispute that the "ordinary" meaning of "personal privacy" excludes corporate secrecy. Pet. App. 12a. It concluded instead that Exemption 7(C) diverges from that normal understanding because the APA defines the term "person" to include corporations and that "defined term" is "the root from which the statutory word at issue [(personal)] is derived." *Ibid*. That analysis, which led the court to conclude that "FOIA's text unambiguously" shows that corporations possess "personal privacy," *id*. at 13a, does not withstand scrutiny.

1. As Professor Davis explained, the APA's "definition of 'person'" is "irrelevant" because Congress "d[id] not use that term" in Exemption 7(C). Kenneth Culp Davis, *Administrative Law Treatise* § 3A.22, at 163-164 (1970 Supp.) (discussing Exemption 6). Exemption 7(C) instead uses the undefined phrase "personal privacy." Had Congress intended in Exemption 7(C) to invoke the

APA's definition of "person" and protect "the privacy of any person," it would have used words to that effect. See *ibid.*

Indeed, Congress did precisely that in other provisions of FOIA. For example, Congress expressly recognized that corporations and other entities may provide to the government trade secrets and confidential commercial or financial information warranting protection, and it therefore drafted Exemption 4 to apply to such information that the government has "obtained from a person." 5 U.S.C. 552(b)(4). Corporate entities can also be parties to judicial or administrative proceedings that should not be prejudiced by publicly disclosing law-enforcement records. Congress accordingly included within a different provision of Exemption 7 protections against such disclosures that "would deprive a person of a right to a fair trial or an impartial adjudication." 5 U.S.C. 552(b)(7)(B). Congress chose not to follow a similar course in Exemption 7(C), and its decision should be given full effect.

The linguistic relationship between the words "person" and "personal"—*i.e.*, that the former is a "root" of the latter, Pet. App. 12a—likewise cannot support the court of appeals' holding.[13] When Congress specifically intends to extend a statutory definition to related "variants" of a defined term, it generally enacts definitional language reflecting that intent. See, *e.g.*, 15 U.S.C. 3802(f) (extending definition to "any variant" of defined terms); 17 U.S.C. 101, 111(f); 33 U.S.C. 1122(6); 42 U.S.C. 7703(1) and (3); 45 U.S.C. 702(10), 802(5). FOIA

[13] The word "personnel" in "personnel * * * files," 5 U.S.C. 552(b)(6), for instance, shares the same "root" as "personal," yet Congress clearly used the term "personnel" in Exemption 6 to refer to files for federal officials, not corporate entities.

includes no such instruction. The same is true for the Dictionary Act, 1 U.S.C. 1 *et seq.*, which establishes interpretive rules that apply generally to all federal legislation. Cf., *e.g.*, 1 U.S.C. 1 (establishing, *inter alia*, the general rule that statutory use of the singular includes the plural and vice versa, that the present tense includes the future; and that the masculine includes the feminine).

In the absence of such a provision, the meaning of a linguistic "variant," as of any other term, "is a creature not of definitional possibilities but of statutory context." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Indeed, "it is a 'fundamental principle of statutory construction * * * that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" *Textron Lycoming Reciprocating Engine Div.* v. *United Auto. Workers*, 523 U.S. 653, 657 (1998) (*Textron*) (citations omitted). Even when Congress provides an *express* definition for a statutory phrase, this Court has looked to both "the statutory text and context" to construe the meaning of the phrase. See *Burgess* v. *United States*, 553 U.S. 124, 129-133 (2008) (looking to statute's context to decide whether the defined term "felony drug offense" incorporates the statute's separate definition of the term "felony"). Where as here, Congress has not defined the term "personal" or the phrase "personal privacy," those terms must also be understood in their proper context.

Viewed in light of that principle, the error of the Third Circuit's decision becomes clear. The phrase "personal privacy" must be understood as a textual unit. See *Textron*, 523 U.S. at 656-657 (explaining that the term "for" cannot be properly understood in isolation from "the meaning of '[s]uits for violation of contracts'")

(brackets in original). And the phrase must additionally "be read in [its] context and with a view to [its] place in the overall statutory scheme.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). Given its context and purpose in the overall framework of FOIA, the term "personal privacy" plainly refers only to the interest of individuals, and not of corporations. See pp. 17-34, *supra*.

2. The court of appeals' attempt to reconcile its interpretation of Exemption 7(C) with Exemption 6 is equally unpersuasive. The court of appeals assumed *arguendo* that FOIA's protection for "personal privacy" in Exemption 6 "applies only to individuals (and not to corporations)," but it reasoned that that assumption did not undermine its conclusion that the term "personal privacy" in Exemption 7(C) goes further to protect corporate interests in secrecy. Pet. App. 13a. The court indicated that its understanding of the phrase "personal privacy" would apply uniformly to both provisions but that the separate "phrase 'personnel and medical files'" in Exemption 6 would limit that exemption's scope "to individuals because only individuals (and not corporations) may be the subjects of such files." *Ibid*. That reasoning is incorrect.

First, Congress's decision to apply Exemption 6 to "personnel and medical files and similar files" confirms the common-sense understanding that only individuals possess "personal privacy" and that the purpose of Exemption 6 (and therefore Exemption 7(C)) is to protect individuals. In the Court's leading decision addressing the types of files referred to in Exemption 6, the Court found it "abundantly clear" that Exemption 6's personal-privacy protections reflect Congress's general concern for "the kind of confidential personal data usually in-

cluded in a personnel file." *Washington Post Co.*, 456 U.S. at 601 (quoting *Rose*, 425 U.S. at 372). But the Court concluded that the illustrative types of files that Congress listed in the Exemption do not limit its protections to "a discrete kind of personal information" concerning individuals or to only "intimate details" or "highly personal" information. *Id.* at 600, 602 (citations omitted). Rather, they reflect that Congress was concerned with the "disclosure of information that applies to a particular individual." *Id.* at 602. As a result, information that could cause "embarrassment" nonetheless falls outside the scope of Exemption 6 where it is "not personal to any *particular* individual." *Id.* at 602 n.4 (emphasis added).

Moreover, the court of appeals' view that "only individuals (and not corporations) may be the *subjects* of [the types of] files" specifically mentioned by Exemption 6, Pet. App. 13a (emphasis added), does not properly distinguish the court's reading of Exemption 7(C) from Exemption 6. Exemption 6 applies to an individual who is *not* the subject of the records at issue, because it applies to any records that contain information that can be "identified as applying to that individual." See *Washington Post Co.*, 456 U.S. at 601-602 (citation omitted); *Wood* v. *FBI*, 432 F.3d 78, 86-87 (2d Cir. 2005) (citing cases); *New York Times Co.* v. *NASA*, 920 F.2d 1002, 1007-1009 (D.C. Cir. 1990); cf. *Favish*, 541 U.S. at 166 (explaining that Exemption 7(C) protects individuals whose personal information is in law-enforcement files by "mere happenstance"). The phrase "personnel and medical files and similar files" therefore would not justify limiting Exemption 6 to the privacy of individuals if "personal privacy" encompassed corporate privacy interests. Indeed, the disclosure of personnel, medical,

and similar files could reveal information about corporations and their internal affairs just as they reveal information about individuals. Such files, for example, could disclose whether a company discriminated against its employees by including documentation of employee's internal complaints of such discrimination and related matter. Medical files likewise could indicate whether a corporation has engaged in a pattern of providing substandard medical care to individual subjects of the files. The central point, however, is that Exemptions 6 and 7(C) both protect only individuals because both employ the same term—"personal privacy"—to impose that limitation. Cf. *Reporters Committee*, 489 U.S. at 768-770 (applying Exemption 6 precedents to analyze an "invasion of privacy" under Exemption 7(C)).

3. In its brief in opposition to the certiorari petition, AT&T attempted to defend the court of appeals' reasoning on grounds not advanced by the court of appeals itself. None of those grounds is persuasive.

a. For instance, AT&T argued that "personal privacy" should be understood to apply to corporations because a court may have "'personal' jurisdiction" over corporate litigants. Br. in Opp. 27. But "personal jurisdiction" defines when a *court* may exercise jurisdiction over a defendant. It thus naturally applies to corporations, which are legal entities that may own property and may be sued. But that authority of a court is not at all "personal" *to a corporation* in the same sense that an individual may possess "personal privacy."

b. AT&T also argued that corporations have "privacy" and other rights in some constitutional contexts. Br. in Opp. 27-29. Those contentions are misplaced for two reasons. First, although common-law and constitutional privacy concepts may be significant benchmarks

in interpreting the scope of FOIA's "personal privacy" protections, "[t]he question of the statutory meaning of privacy" under FOIA is not the same as "whether an individual's interest in privacy is protected by the Constitution." *Reporters Committee*, 489 U.S. at 762 n.13. The same holds true with respect to corporations.

More fundamentally, the rights that AT&T identifies are not rights that suggest that a corporation has "personal privacy" interests recognized by law.

For instance, the fact that corporations may enjoy Fourth Amendment protections (Br. in Opp. 28 & n.14) in some contexts does not show that they have "personal privacy." This Court has concluded that "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property," *See* v. *City of Seattle*, 387 U.S. 541, 543 (1967), and the Court has applied that Fourth Amendment right when such people conduct business under the corporate form. See *Dow Chem. Co.* v. *United States*, 476 U.S. 227, 236 (1986) (applying *See*). That protection for "business premises," *G.M. Leasing Co.* v. *United States*, 429 U.S. 338, 353 (1977), is derivative of the individual rights of those who collectively own and operate corporations. The Court has accordingly explained that "[c]orporations are a necessary feature of modern business activity," and when "an association of individuals" form a corporation that operates as a "distinct legal entity," that process of "organizing * * * as a collective body * * * waives no constitutional immunities appropriate to such body" under the Fourth Amendment. *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906), overruled in part on other grounds, *Murphy* v. *Waterfront Comm'n*, 378

U.S. 52, 65-73 (1964).[14] Moreover, because "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home," the Fourth Amendment permits Congress to authorize warrantless regulatory searches of businesses in appropriate contexts. *Donovan* v. *Dewey*, 452 U.S. 594, 598-599 (1981) (Fourth Amendment permits Congress to authorize warrantless searches of mining companies).[15] The expectation of privacy that attaches to business premises is thus derivative of and secondary to the individual rights and property that the Amendment protects. Cf. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy" under the Fourth Amendment.). Nothing in the Fourth Amendment's protections against unreasonable searches and seizures suggests that corporations have "personal pri-

[14] See *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 311 (1978) (Fourth Amendment protects corporation's "business premises" against unreasonable search because the Framers sought to protect the "merchants and businessmen whose premises and products were inspected"); *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 208-209, 213 (1946) (Fourth Amendment imposes limits on subpoenas for corporate documents to protect "the interests of men to be free from officious intermeddling").

[15] See *United States* v. *Biswell*, 406 U.S. 311, 316 (1972) (same for firearms dealers); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 76-77 (1970) (same for liquor dealers); see also *New York* v. *Burger*, 482 U.S. 691, 702 (1987) (regulatory search doctrine grounded in fact that "the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy"); *Barlow's, Inc.*, 436 U.S. at 313 (explaining that business premises in certain regulated industries have "no reasonable expectation of privacy" because the "businessmen engaged in such * * * regulated enterprises accept the burdens as well as the benefits of their trade").

vacy" rights, much less that they have such rights under FOIA.

AT&T's reliance on the Double Jeopardy Clause (Br. in Opp. 28) is similarly unavailing. This Court has not even squarely addressed whether corporations enjoy double-jeopardy protection. In *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 570-576 (1977), the Court assumed that corporations have such protection without deciding the question. See *id.* at 570-576; cf. U.S. Br. at 13 n.6, *Martin Linen*, *supra* (No. 76-120) (indicating that government "kn[e]w of no reason why the Double Jeopardy Clause" should apply to a corporate defendant, but stating that the government had "not presented it as a question for resolution by this Court" because the government failed to argue the point below). And although the Court noted that the Clause generally protects against "embarrassment" and a "continuing state of anxiety and insecurity" as part of the "personal strain which a criminal trial represents for the *individual* defendant," 430 U.S. at 569 (emphasis added; citations omitted), that specific rationale would not apply to a corporate defendant, which would not experience such emotions. If the Double Jeopardy Clause protects corporations from successive prosecutions, it would not be to protect them from "embarrassment," but rather to advance the "primary purpose" of the Clause, namely, to "protect the integrity" of final determinations of guilt or innocence, *United States* v. *Scott*, 437 U.S. 82, 92 (1978), by preventing the government from "taking the question of guilt to a series of persons or groups empowered to make binding determinations," *Swisher* v. *Brady*, 438 U.S. 204, 216 (1978).

This Court has concluded that the "records and documents" of corporations—like the records that AT&T

provided to the FCC in this case—themselves "embody no element of *personal privacy*" and, for that reason, cannot be protected from compelled disclosure under the Fifth Amendment's "privilege against self-incrimination." *United States* v. *White*, 322 U.S. 694, 699-700 (1944) (emphasis added). That privilege is "a purely personal" right wholly inapplicable to corporations. *Id.* at 699; see *Braswell* v. *United States*, 487 U.S. 99, 102, 104-105 (1988) (Corporations are "'creature[s] of the State,' with powers limited by the State," and that, while individuals may assert their own right against self-incrimination concerning corporate matters, "corporate books and records are not 'private papers' protected by th[at] Fifth Amendment" right.) (citation omitted). The interest in "personal privacy" under Exemption 7(C) likewise protects only individuals, not corporations.

E. Adopting The Court Of Appeals' Rationale Would Produce Anomalous And Unprecedented Results

The logical implications of the Third Circuit's analysis further underscore the flaws in its decision. If the court of appeals were correct that it is a "grammatical imperative" that the undefined phrase "personal privacy" in FOIA must incorporate the APA's statutory definition of the term "person," Pet. App. 12a (citation omitted), then many other entities, beyond corporations, would also possess "personal privacy" under FOIA. That reading would yield highly anomalous results that Congress would have expressly addressed had it intended them.

The APA defines "person" to include not only an individual and a corporation but also a "public * * * organization other than [a federal government] agency." 5 U.S.C. 551(2); see 5 U.S.C. 551(1) (defining "agency").

Foreign, state, and local governments and governmental entities therefore are deemed "persons" under both the APA and FOIA. See *Maryland Dep't of Human Res.* v. *HHS*, 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985) (state agency); *Stone* v. *Export-Import Bank*, 552 F.2d 132, 136-137 (5th Cir. 1977) (foreign governmental agency is a "person" under FOIA), cert. denied, 434 U.S. 1012 (1978).[16] Congress accordingly has recognized that foreign governments are "persons" that may submit FOIA requests for agency records under 5 U.S.C. 552(a)(3)(A), and it specifically amended FOIA to ensure that the U.S. Intelligence Community would not produce agency records in response to FOIA requests from such persons. See 5 U.S.C. 552(a)(3)(E); H.R. Rep. No. 592, 107th Cong., 2d Sess. 11, 27 (2002) (provision prohibits Intelligence Community agencies from responding to "foreign government FOIA requests"). The Third Circuit's rationale would entitle all such entities to "personal privacy" under Exemption 7(C).

It would be exceedingly difficult to identify the parameters of a corporation's or a domestic or foreign government's so-called "personal privacy" interest under FOIA. And it would be even more difficult to determine whether disclosure would "constitute an unwarranted invasion" of such privacy, 5 U.S.C. 552(b)(7)(C), by balancing that wholly novel and non-intuitive privacy interest against the public interest in disclosure. Collective entities such as corporations and governments exist to serve the interests of their shareholders and constituents in the public, yet Exemption 7(C) would demand a

[16] Cf., *e.g.*, *Bowen* v. *Massachusetts*, 487 U.S. 879, 892-893 (1988) (concluding that a State was a "person suffering legal wrong because of agency action," 5 U.S.C. 702); 5 U.S.C. 701(b)(2) (adopting definition of "person" in 5 U.S.C. 551(2)).

balancing of such newly created organizational privacy interests against the interest of the public (including some of the same shareholders and constituents) in disclosure. Cf. *Favish*, 541 U.S. at 171.

The untethered analysis required by the court of appeals' decision contrasts sharply with the balancing required when federal agencies and the courts consider the privacy of individuals under Exemptions 6 and 7(C). Background principles concerning individuals' interest in "personal privacy" provide an important and objective reference for that balancing. The Court in *Reporters Committee*, for instance, reasoned from "the common law and the literal understandings of privacy" to conclude that the "personal privacy" protected by Exemption 7(C) includes the "individual's control of information concerning his or her person." 489 U.S. at 762-763; see also *DoD*, 510 U.S. at 500 (following *Reporters Committee*'s understanding of "personal privacy" to define "[t]he privacy interest protected by Exemption 6"). And when this Court in *Favish* held that Exemption 7(C)'s "right to personal privacy" extends beyond "the right to control information about oneself" to protect the privacy of at least some "individuals" when their own "personal data are not contained in the requested materials," 541 U.S. at 165 (citation omitted), the Court was careful to emphasize that "Congress' use of the term 'personal privacy'" in FOIA includes "rights against public intrusions long deemed impermissible *under the common law and in our cultural traditions*." *Id.* at 167 (emphasis added).

In so ruling, *Favish* recognized that "there must be some stability with respect to both the specific category of personal privacy interests protected by [FOIA] and the specific category of public interests that could out-

weigh the privacy claim. 541 U.S. at 173. Without an established referent against which abstract assertions of "privacy" may be measured objectively, federal agencies and the courts would improperly be "left to balance in an ad hoc manner with little or no real guidance." *Ibid.*

Yet the Third Circuit's reasoning does precisely that: It creates a novel and unprecedented interest in so-called "personal privacy" for corporate entities—and, by necessary implication, governmental entities—for which there are no common-law or historical predicates. Establishing the metes and bounds of this newly created privacy interest would place federal agencies and the courts in entirely uncharted territory. Had Congress intended to authorize such an unbounded endeavor, it surely would have given at least some indication that it intended that extraordinary exercise of policy-making authority and supplied some framework for doing so. But, as explained above, the text, context, and legislative history of Exemption 7(C) point in precisely the opposite direction. They reflect that Congress intended "personal privacy" to safeguard only the previously recognized privacy of individual human beings. See pp. 17-34, *supra*.

The court of appeals asserted that, like an individual, a corporation can suffer "public embarrassment, harassment, and stigma." Pet. App. 14a n.5. But beyond that attempted personification of an entity the very existence of which is a legal construct, the court of appeals provided no insight into how a corporation's experience of "personal privacy" would be analogous to that of an individual. A corporation itself can no more be embarrassed, harassed, or stigmatized than a stone. And while a corporation may have commercial or property interests that can be adversely affected by disclosures of cer-

tain information, those interests (which have not heretofore been regarded as interests in "personal privacy") are addressed elsewhere in the law, including elsewhere in FOIA. See pp. 19-20, 24-26, *supra* (discussing protections for corporations under the common law and Exemption 4).

Under the court of appeals' reasoning, information obtained by law-enforcement agencies that is not protected by Exemption 4 or the other portions of Exemption 7 could nevertheless be withheld based on an assertion that public disclosure could result in "embarrassment" or "stigma" to those companies. Nothing suggests that Congress intended to give such unprecedented and expansive protections under the rubric of "personal privacy."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2010