No. 09-1279

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS,

V.

AT&T INC. AND COMPTEL, RESPONDENTS.

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

RESPONDENT COMPTEL'S BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Corporate Disclosure Statement

Pursuant to Supreme Court Rule 29.6 COMPTEL hereby submits the following corporate disclosure statement:

COMPTEL is the leading national trade association representing communications service providers and their supplier partners. COMPTEL is a not-for-profit corporation and has not issued shares or debt securities to the public. COMPTEL does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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RESPONDENT COMPTEL'S BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent COMPTEL filed the Freedom of Information Act ("FOIA") request with the Federal Communications Commission ("FCC") that resulted in the order that was reviewed on appeal by the United States Court of Appeals for the Third Circuit.[1] COMPTEL submits this brief in support of the FCC's Petition for a Writ of Certiorari to review the Third Circuit's judgment.

ARGUMENT

The FCC correctly argues that the Third Circuit erred in interpreting the "personal privacy" language of FOIA Exemption 7(C)[2], 5 U.S.C. §552(b)(7)(C), to protect the "personal privacy" interests of large publicly traded corporations like AT&T and that certiorari should be granted to correct this error.

FOIA embodies a policy authorizing liberal disclosure of government records. Such records must be produced upon request unless they are specifically exempted from disclosure by one of the statute's nine exemptions. In light of the liberal disclosure policy

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1 *AT&T, Inc. v. Federal Communications Commission*, 582 F. 3d 490 (3rd Cir. 2009). The decision is reprinted at Appendix A to the FCC Petition for Certiorari.

2 5 U.S.C. §552(b)(7)(C).

of the statute, the exemptions are to be narrowly construed in favor of disclosure. *National Labor Relations Board v. Robbins Tire & Rubber Co.,* 437 U.S. 214 (1978). Exemption 7(C) protects from disclosure records or information compiled for law enforcement purposes but only to the extent that disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[3] The Third Circuit's interpretation of Exemption 7(C) as protecting "personal privacy" rights of large publicly traded corporations is contrary to the plain text of the Exemption, the legislative history and all case law interpreting the Exemption, as well as to the binding precedent that FOIA Exemptions be narrowly construed.

The Third Circuit determined that the term "personal privacy" in Exemption 7(C) unambiguously applies to corporations because FOIA defines "person" to include corporations and "personal" is the adjectival form of person.[4] This reading cannot be reconciled either with the plain text of Exemption 7(C) or with basic principles of statutory construction. Wherever possible, the words of statutes should be interpreted in their ordinary and everyday senses. *Malat v. Riddell,* 383 U.S. 569, 571 (1966). Although this principle would not apply to the word "person" because it is a defined term in FOIA, it most certainly would apply to the words

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[3] *Id.*

[4] FCC Petition, Appendix A 10a-11a, 13a; 583 F. 3d at 496-7.

"personal" and "privacy," both of which are undefined. The defined term "person" does not appear in Exemption 7(C) and the ordinary meaning of personal privacy does not encompass the privacy interests of corporations.

In interpreting the meaning of personal privacy as that term is used in Exemption 7(C), this Court has explained that "both the common law and literal understandings of privacy encompass the *individual's* control of information concerning his or her person." *U.S. Department of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 763 (1988) (emphasis added).[5] This Court consistently has read the personal privacy language of Exemptions 6 and 7(C) to protect only the privacy of individuals. *Id.; Department of the Air Force v. Rose,* 425 U.S. 352 (1976).

The Third Circuit's expansion of this literal understanding of personal privacy to include a large, publicly traded corporation's right to control

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[5] The Court cited A. Breckenridge, The Right to Privacy 1 (1970) ("Privacy, in my view, is the rightful claim of the *individual* to determine the extent to which he wishes to share himself with others. . . .It is also the *individual's* right to control dissemination of information about himself"); A. Westin, Privacy and Freedom 7 (1967) ("Privacy is the claim of *individuals* . . . to determine for themselves when, how and to what extent information about them is communicated to others"); Project, Government Information and the Rights of Citizens, 73 Mich. L. Rev. 971, 1225 (1974-1975) ("[T]he right of privacy is the right to control the flow of information concerning the details of one's *individuality*"). 489 U.S. at 764, n.16 (emphasis added).

information concerning itself improperly equates an individual's personal privacy interest with a corporation's privacy interest. In *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) this Court made clear that corporations do not enjoy the same right to privacy as individuals and that unlike human beings, "neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret." The Third Circuit's construction is also in conflict with every judicial decision that has addressed the personal privacy exemptions of FOIA, including other decisions issued in the Third Circuit.[6]

The error in the Third Circuit's determination that Exemption 7(C)'s text unambiguously indicates that corporations have personal privacy interests was compounded by its refusal to examine the legislative history of the statute to confirm the propriety of its conclusion. Even where the plain meaning of a relevant statutory provision is sufficient to resolve a question, this Court nonetheless has consulted the legislative history to confirm Congress' intent. *Central Intelligence Agency v. Sims*, 471 U.S. 159, 167-168 (1985); *Environmental Protection Agency v. Mink*, 410 U.S. 73, 82 (1973). As the Court stated in *Consumer Product Safety Commission v. GTE Sylvania, Inc.* 447 U.S. 102, 108 (1980), statutory language is ordinarily deemed conclusive, "[a]bsent a clearly expressed legislative intent to the contrary." Here, where the plain language of Exemption 7(C) does not

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[6] FCC Petition at Appendix A, 11a, 14a, 582 F.3d at 496, 498.

support the Third Circuit's conclusion that corporations have personal privacy interests, the legislative history should be consulted to determine whether the court's unprecedented construction of the statute is compatible with Congress' intent.

This Court's FOIA decisions are replete with reviews of the legislative history of various exemptions to verify Congressional intent. *See, e.g., FBI v. Abramson*, 456 U.S. 615, 626-628, 632 (1982) (examination of legislative history of Exemption 7); *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. at 224-236 (extensive and detailed review of legislative history of Exemption 7(A)); *U.S. Department of Justice v. Landano*, 508 U.S. 165 (1993) (examination of legislative history of Exemption 7(D)); *Department of the Air Force v. Rose*, 425 U.S. at 362-268, 371-376, 380, nn. 16, 19 (examination of legislative history of Exemptions 2, 6 and 7); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155-157 (1989) (examination of legislative history of Exemption 7); *Environmental Protection Agency v. Mink*, 410 U.S. at 79, 80, 81-83, 86-91 (examination of legislative history of Exemptions 1 and 5); *Department of State v. Washington Post Co.*, 456 U.S. 595, 599-602 (1982) (examination of legislative history of Exemption 6); *U.S. Department of Justice v. Reporters Committee for Freedom of Press,* 489 U.S. at 756-766, 778, n.22 (1988) (examination of legislative history of Exemption 7(C)).

In contrast to this Court's practice, the Third Circuit stated that it did not believe it was

"analytically appropriate" to infer a statute's meaning from the intent of the enacting Congress.[7] But Congress' clearly expressed legislative intent that the personal privacy language is meant to protect the privacy of individuals, not corporations, must be taken into account in order to arrive at the right result.

The "unwarranted invasion of personal privacy" language in Exemption 7(C) and Exemption 6 [8] is identical.[9] When it enacted Exemption 6 in 1966, Congress explained in both the House and Senate Reports that the personal privacy language was intended to protect individuals. The Senate Report states that

> "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an *individual's* private affairs from unnecessary public scrutiny and the preservation of the public's right to governmental information.[10]

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[7] FCC Petition, Appendix A at 14a, nn. 6, 7; 582 F.3d at 498, nn. 6, 7.

[8] 5 U.S.C. 552(b)(6).

[9] *U.S. Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 496 (1994) (The personal privacy language is identical, but Exemptions 7(C) and 6 differ in the magnitude of the public interest that is required to override the respective privacy interests protected by the Exemptions).

[10] Clarifying and Protecting the Right of the Public to Information, and For Other Purposes, S. Rep. No. 813, 89th Cong. 1st Sess. at 9 (1965) (emphasis added).

Similarly, the House Report states that

> The limitation of a "clearly unwarranted invasion of personal privacy provides a proper balance between the protection of an *individual's* right of
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> privacy and the preservation of the public's right to Government information by excluding those kinds of files, the disclosure of which might harm the *individual.* The exemption is also intended to cover detailed Government records on an *individual* which can be identified as applying to that *individual* and not the facts concerning the award of a pension or benefit. . . .[11]

Because Congress used the identical personal privacy language when it added Exemption 7(C) in 1974, there is no reasonable basis for concluding that it intended for the personal privacy language in Exemption 6 to protect only the privacy interests of individuals but the same language in Exemption 7(C) to protect the privacy interests of large publicly traded corporations. *IBP, Inc. v. Alvarez*, 546 U.S. 21. 34 (2005) (same words used in different parts of same statute generally presumed to have same meaning). While the Third Circuit did not believe it was appropriate to examine the legislative history, this Court has relied upon the cited House and Senate Reports in its decisions interpreting Exemptions 6 and 7(C). *Department of the Air Force*

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[11] Clarifying and Protecting the Right of the Public to Information, H.Rep. No. 1497, 89th Cong. 2d Sess. at 11 (1966) (emphasis added).

v. Rose, 425 U.S. at 372; *U.S. Department of Justice v. Reporters Committee for Freedom of Press,* 489 U.S. at 766.

The flaw in the Third Circuit's interpretation of the personal privacy language is further evidenced by its need to attribute human emotions to corporations in order to support the interpretation. In explaining its construction, the court stated that "[c]orporations, like human beings, face public embarrassment, harassment and stigma" because of their involvement in law enforcement investigations.[12] The court's resort to anthropomorphism does not withstand scrutiny. An artificial entity like a corporation cannot feel or show embarrassment or disgrace. While a corporation's individual officers, directors or employees who are involved in a law enforcement investigation might feel embarrassed, harassed or stigmatized if their involvement was publicly disclosed, Exemption 7(C) would protect from disclosure any records that could reasonably be expected to constitute an unwarranted invasion of their personal privacy. It makes no sense to read Exemption 7(C) to confer an additional personal privacy interest on the artificial corporate entity that cannot feel embarrassment, harassment or stigma if that privacy is invaded.

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12 FCC Petition at 14a, n. 5; 582 F. 3d at 498, n.5.

CONCLUSION

For the foregoing reasons and those set forth in the FCC's Petition For a Writ of Certiorari, COMPTEL respectfully requests that the Court grant the Petition.

Respectfully submitted,

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