No. 15-196

# In the Supreme Court of the United States

ELECTRONIC PRIVACY INFORMATION CENTER,
PETITIONER

*v.*

DEPARTMENT OF HOMELAND SECURITY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether Exemption 7(F) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(F), exempts from mandatory disclosure portions of a Department of Homeland Security protocol for coordinating the shutdown of wireless networks during critical emergencies such as the threatened use of wireless-activated explosive devices, where publicly releasing the protocol could reasonably be expected to endanger the lives and physical safety of individuals, but the government has not identified in advance with some degree of specificity which individuals would be endangered by a future incident.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:



Statutes:

Statutes—Continued: Page



Miscellaneous:

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 777 F.3d 518. The opinion of the district court (Pet. App. 21a-39a) is reported at 999 F. Supp. 2d 24.

### JURISDICTION

The judgment of the court of appeals was entered on February 10, 2015. A petition for rehearing was denied on May 13, 2015 (Pet. App. 20a). The petition for a writ of certiorari was filed on August 11, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. This action under the Freedom of Information Act (FOIA), 5 U.S.C. 552, concerns a Department of Homeland Security (DHS) protocol known as Standard Operating Procedure (SOP) 303. SOP 303 was

developed in the wake of the 2005 bombings of the London transportation system. Pet. App. 3a. The protocol addresses the shutdown of wireless networks in the United States "during critical emergencies such as the threat of radio-activated improvised explosive devices." *Ibid.* (quoting *id.* at 47a); see *id.* at 6a. The protocol includes, *inter alia*, a series of questions used to "determine[] if a shutdown is necessary," procedures for restoring communications, and "the executing protocols related to the implementation of SOP 303." *Id.* at 4a.[1]

FOIA Exemption 7(F) exempts from mandatory disclosure agency records or information compiled for law enforcement purposes when the production of such records or information "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. 552(b)(7)(F). DHS established that publicly releasing SOP 303 could enable "bad actors" seeking to "use wireless networks to activate

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[1] Petitioner appears to suggest (Pet. 3-4), without evidentiary support, that SOP 303 was applied in 2011 to shut down cellular service during a protest in the Bay Area Rapid Transit (BART) system. The Federal Communications Commission (FCC) and DHS have informed this Office that the 2011 incident did not involve SOP 303, and that BART officials shut down a network serving BART property without coordinating with the FCC or DHS. Cf. *Public Notice: Commission Seeks Comment on Certain Wireless Service Interruptions*, 27 FCC Rcd. 2177, 2177-2178 & nn.4, 6 (2012); cf. also David Murphy, *To Prevent Protests, San Francisco Subway Turns Off Cell Signals*, PC Magazine (Aug. 13, 2011), http://www.pcmag.com/article2/0,2817,2391046,00.asp (reporting that BART officials who discussed the shutdown of BART's "underground cellular service" indicated that BART "itself has the power to, and did, turn off the wireless signals it provides for transit riders" without "contact[ing] cellular service providers").

* * * explosive devices" in the United States to interfere with the protocol's shutdown processes and "impersonat[e] officials" who play a central role in the protocol's verification procedures. Pet. App. 5a (quoting *id.* at 50a); see *id.* at 49a. Both courts below thus acknowledged that publicly releasing SOP 303 could reasonably be expected to endanger individuals in the United States. See *id.* at 10a, 19a (court of appeals); *id.* at 35a, 38a (district court). The question now presented is whether the government may withhold the protocol under Exemption 7(F), even though it has not identified in advance "with some degree of specificity" (Pet. 6) which individuals would be endangered in such a future incident.

2. a. Petitioner filed a FOIA request with DHS seeking the full text of SOP 303, questions used in deciding whether a shutdown is necessary, and any related protocols and guidelines. Pet. App. 4a. Petitioner subsequently filed this action, which challenges DHS's decision to release only limited portions of SOP 303 and to withhold the balance of the protocol under several FOIA exemptions, including Exemption 7(F). *Id.* at 5a.

b. The district court granted summary judgment to petitioner. Pet. App. 21a-39a. As relevant here, the court found Exemption 7(F) inapplicable, *id.* at 31a-38a, and ordered DHS to release SOP 303 with redactions limited to those protecting the personal privacy of individuals named therein, *id.* at 38a.

The district court explained that it was "not unaware of the potential adverse use to which [SOP 303] could be put," and it emphasized that its decision was not a judgment that SOP 303 should be publicly disclosed. Pet. App. 38a. The court further observed

that the danger to individuals created by disclosing SOP 303 "could materialize at any time, in any place, and affect anyone in the United States." *Id.* at 35a (citation omitted). But the court explained that it was persuaded by the now-vacated decision in *ACLU* v. *Department of Defense*, 543 F.3d 59 (2d Cir. 2008), vacated, 558 U.S. 1042 (2009), that Exemption 7(F) does not apply unless the government has "identif[ied] the individuals at risk with some degree of specificity." Pet. App. 32a. Only then, the district court concluded, will the government show that releasing the requested record "could reasonably be expected to endanger the life or physical safety of any individual," 5 U.S.C. 552(b)(7)(F), within the meaning of the exemption. Pet. App. 32a-35a. Because "the individuals at risk [from disclosing SOP 303] include anyone near any unexploded bomb, which could include anyone anywhere in the country," *id.* at 36a, the court held Exemption 7(F) inapplicable. *Id.* at 32a-38a.

3. The court of appeals reversed and remanded. Pet. App. 1a-19a. As relevant here, the court held that "Exemption 7(F) protects law enforcement records the disclosure of which 'could reasonably be expected to endanger the life or physical safety of any individual,' 5 U.S.C. § 552(b)(7)(F), during a critical emergency, without requiring the withholding agency to specifically identify the individuals who would be endangered." *Id.* at 2a; see *id.* at 7a, 9a-19a.

The court of appeals explained that it must "apply the statute's plain text" to interpret Exemption 7(F). Pet. App. 12a. The court also stated that the text enacted by Congress should be "narrowly construe[d]," *ibid.*; see *id.* at 7a, but explained that this Court has rejected "lower courts' attempts to graft

atextual glosses on the FOIA," *id.* at 12a (citing, *e.g.*, *Milner* v. *Department of the Navy*, 562 U.S. 562, 569, 573 (2011)). The court of appeals ultimately concluded that the "scope of [Exemption 7(F)] is broadly stated" in FOIA's text, that the district court's atextual narrowing of that statutory text was unwarranted, and that the analysis in this case both "begins and ends" with that text. *Id.* at 9a, 12a-13a.

In particular, the court of appeals concluded that Exemption 7(F)'s application to law-enforcement records when disclosure could reasonably be expected to endanger the life or physical safety of "any individual" provided "no textual basis for requiring [the government] * * * to identify the specific individuals at risk from disclosure." Pet. App. 12a-13a. The term "any," the court explained, generally has an "expansive meaning." *Id.* at 13a (citation omitted). The court recognized that "any" can be given a more limited construction in certain statutory contexts, but it concluded that Exemption 7(F) uses the phrase "any individual" in its ordinary sense. *Ibid.* The court noted in that regard that FOIA is unlike its companion statute—the Privacy Act, 5 U.S.C. 552a—which specifically includes text giving "special treatment to certain law enforcement records associated with an 'identifiable individual.'" Pet. App. 13a (quoting 5 U.S.C. 552a(a)(6), (j)(2)(B), and (*l*)(2)). Exemption 7(F)'s focus on "danger to the life or physical safety of any individual," the court added, itself suggests that Congress "contemplated protection beyond a particular individual who could be identified before the fact." *Ibid.* "[B]efore-the-fact individual identification is unlikely to be practical" in many contexts, *id.* at 15a, and while the specific individuals endangered by a

future emergent event "may often be unknowable," the nature of the emergency provides a limit on the application of Exemption 7(F). *Id.* at 13a-14a.

The court of appeals thus concluded that Congress's 1986 enactment of the phrase "'any individual' makes clear that Exemption 7(F) now shields the life or physical safety of any person, not only the law enforcement personnel protected under the pre-1986 version of the statute." Pet. App. 14a; see *id.* at 17a-19a (discussing legislative history). Petitioner's assertion that the government should classify SOP 303 to avoid disclosure, the court further explained, was not a course that was dictated by statutory text and would, in any event, encounter the "practical barriers" identified by the government, including the fact that "[SOP 303] must be shared with federal law enforcement officials, [s]tate homeland security officials, and national cellular carriers." *Id.* at 16a (citation omitted).

**ARGUMENT**

Petitioner renews its argument that FOIA Exemption 7(F) "d[oes] not permit the withholding" of SOP 303, even though disclosing the protocol could allow bad actors to circumvent it, activate "explosive devices," and thereby "endanger individuals' lives or physical safety." Pet. 6 (citation omitted). In petitioner's view, the exemption "applies only when [such] individuals can be identified with some degree of specificity" in advance. *Ibid.* The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. Exemption 7(F) exempts from mandatory disclosure under FOIA any agency record or information

compiled for law enforcement purposes if its production "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. 552(b)(7)(F). The court of appeals correctly held that Exemption 7(F) applies when the government demonstrates such a reasonable expectation of danger, even if the government has not "specifically identif[ied] the individuals who would be endangered." Pet. App. 2a. Petitioner's proposed extra-textual requirement of *ex ante* identification of future victims with "some degree of specificity" (Pet. 6) is inconsistent with the text of Exemption 7(F), as well as its purpose and history.

a. Congress's 1986 amendment to Exemption 7(F) defined the scope of that exemption by reference to the life or physical safety of "any individual." "[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)); see, *e.g.*, *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 9 (2011). In the absence of "language limiting the breadth of that word," the term "any" should be given that normal, expansive meaning. *Gonzales*, 520 U.S. at 5 (citing cases); see *Boyle* v. *United States*, 556 U.S. 938, 944 (2009).

Exemption 7(F) contains no such limiting language. In authorizing an agency to withhold law-enforcement records if their production "could reasonably be expected to endanger the life or physical safety of any individual," 5 U.S.C. 552(b)(7)(F), Congress avoided statutory language that might have restricted the class of individuals entitled to the exemption's protection. Congress, for instance, did not limit Exemption

7(F) to individuals associated directly or indirectly with either "law enforcement" or a "law-enforcement investigation." To the contrary, the 1986 amendments to Exemption 7(F) intentionally broadened the exemption's earlier text, which had been limited to the protection of "law enforcement personnel." 5 U.S.C. 552(b)(7)(F) (1982). Likewise, Congress enacted no language that might have restricted Exemption 7(F)'s protections to those at-risk individuals whom an agency can identify with specificity in advance. Significantly, in FOIA's companion statute, the Privacy Act, 5 U.S.C. 552a, Congress gave special treatment to criminal law-enforcement records associated with an "identifiable individual." See 5 U.S.C. 552a(j)(2)(B); see also 5 U.S.C. 552a(a)(6), (*l*)(2), and (3). But Congress enacted no analogous text limiting the scope of Exemption 7(F) to harms faced only by an "identifiable individual," much less an individual who must (as petitioner contends) be identified in advance with some degree of specificity, Pet. 6.

Instead of imposing limits on the applicability of Exemption 7(F) by requiring an *ex ante* identification of victims with some specificity, Congress defined the boundaries of Exemption 7(F) in terms of the harm that could ensue: whether disclosure "could reasonably be expected" to endanger the life or physical safety of any individual. That restriction ensures that an "objective test" of "reasonableness" will govern an agency's "predict[ion of] harm," and thus regulates the assessment of probability required to trigger Exemption 7(F). See S. Rep. No. 221, 98th Cong., 1st Sess. 24 (1983); 132 Cong. Rec. 29,619 (1986) (reproducing S. Rep. No. 221 in pertinent part as explanation of Exemption 7(F)'s "intended effect"). The ob-

jective standard ensures that Exemption 7(F)'s protection will kick in only when the potential for danger is sufficiently realistic. But once that express textual condition has been satisfied, the exemption applies. The government need not disclose records causing danger to human life or physical safety merely because the particular victims cannot be identified in advance with some degree of specificity.

There is no reason to believe that Congress, in enacting Exemption 7(F), would have risked endangerment of human life and safety that could reasonably be expected to occur as petitioner's position suggests, simply to promote FOIA's general interest in public disclosure of certain agency records. Other provisions in Exemption 7 permit the withholding of records to advance interests that, while important, are significantly less so than human life and safety. Congress recognized that protecting personal privacy, avoiding interference with civil or criminal enforcement proceedings, ensuring impartial adjudications, and preventing circumvention of the law all warrant withholding under Exemption 7. See 5 U.S.C. 552(b)(7)(A)-(C) and (E). Indeed, this Court has explained that the privacy protections of Exemption 7(C) provide even "more protect[ion] of privacy than Exemption 6," which authorizes withholding of such matters as the names and home addresses of government employees to protect such individuals from being "disturbed at home." *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 497 n.6, 501-502 (1994). The Congress that amended both Exemptions 7(C) and 7(F) in 1986 would not have countenanced any requirement that FOIA's general interest in public disclosure trump the reasonable protection of an individual's life and physi-

cal safety. Indeed, petitioner's proposed extra-textual requirement of *ex ante* victim identification would appear to require disclosures that are *certain* to cause the death of numerous individuals if the particular individuals could not be identified with some degree of specificity in advance. That remarkable result underscores the correctness of the court of appeals' decision. No reasonable legislator would have placed such a low value on human life in order to advance FOIA's general interest in public disclosure.

b. Petitioner argues (Pet. 12-19) that its position is consistent with "Congress's [i]ntent" as divined from legislative history. Petitioner focuses heavily on 1974 events irrelevant to the 1986 language at issue here. See Pet. 12-16. Moreover, as the court of appeals explained, the relevant legislative history is consistent with the court's interpretation of Exemption 7(F)'s text. Pet. App. 17a-19a; see Pet. at 25-30, *Department of Defense* v. *ACLU*, 558 U.S. 1042 (2009) (No. 09-160) (explaining Exemption 7(F)'s history in detail).

Petitioner further contends (Pet. 21-26) that the court of appeals should have interpreted Exemption 7(F)'s use of "any individual" in light of its statutory "context." But the court of appeals did precisely that, explaining that although the term "any" may sometimes be given a reading narrower than its ordinary meaning, such a reading is not warranted "in the context of Exemption 7(F)." Pet. App. 13a. Moreover, petitioner nowhere explains how the phrase "any individual" can be understood to mean only those individuals whom the government can identify in advance with "some degree of specificity," Pet. 6. No

reasonable interpretation of "any individual" supports that extra-textual requirement.[2]

2. Petitioner argues (Pet. 19) that review is warranted "to resolve [a] disagreement over the scope of Exemption 7(F)" reflected by the D.C. Circuit's decision in this case and the Second Circuit's now-vacated decision in *ACLU* v. *Department of Defense*, 543 F.3d 59 (2d Cir. 2008), vacated, 558 U.S. 1042 (2009). That contention is meritless. When this Court vacated the Second Circuit's judgment in *ACLU* in 2009, see 558 U.S. 1042, the order "vacating the judgment of the Court of Appeals deprive[d] that court's opinion of precedential effect." *County of Los Angeles* v. *Davis*, 440 U.S. 625, 634 n.6 (1979) (quoting *O'Connor* v. *Donaldson*, 422 U.S. 563, 578 n.12 (1975)). As a result, the Second Circuit's vacated decision is a legal nullity that poses no obstacle to the Second Circuit (or any other court) in the future following the D.C. Circuit's Exemption 7(F) analysis.[3]

Petitioner asserts (Pet. 19) that the D.C. Circuit's decision "is literally unprecedented" because "no federal appellate court ha[s] applied Exemption 7(F) to a record that did not contain identifying information." But no other court of appeals—except the Second Circuit in its now-vacated *ACLU* decision—has ever addressed the question presented here. Indeed, as the government explained to this Court in *ACLU*, the

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[2] The court of appeals recognized that FOIA exemptions are narrowly construed, Pet. App. 7a, 12a, but that a narrow construction does not allow courts "to graft atextual glosses on the FOIA," *id.* at 12a.

[3] Even if *ACLU* were precedential, the D.C. Circuit concluded the Second Circuit's decision could be reconciled with its decision in this case. Pet. App. 12a.

only federal courts to have resolved analogous Exemption 7(F) cases are district courts whose holdings are consistent with the interpretation that the D.C. Circuit has now adopted in this case. See Pet. at 15-16, *ACLU*, *supra* (No. 09-160). The absence of any contrary appellate precedent confirms that no further review is warranted.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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