No. _____

IN THE

Supreme Court of the United States

ELECTRONIC PRIVACY INFORMATION CENTER,

Petitioner,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether paragraph (b)(7)(F) of the Freedom of Information Act, 5 U.S.C. § 552, permits a federal agency to withhold from public release the reasons for shutting down public telephone service.

2. Whether the phrase "any individual" in paragraph (b)(7)(F) of the Freedom of Information Act, 5 U.S.C. § 552 refers to unknown individuals unconnected to an actual law enforcement investigation.

PARTIES TO THE PROCEEDING

Petitioner, Electronic Privacy Information Center ("EPIC") was the appellee in the court of appeals. EPIC is a District of Columbia corporation with no parent corporation or publicly held company with a 10 percent or greater ownership interest.

Respondent, the U.S. Department of Homeland Security was the appellant in the court of appeals.

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The Electronic Privacy Information Center respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–19a) is reported at 777 F.3d 518 (D.C. Cir. 2015). The order of the court of appeals denying rehearing *en banc* (Pet. App. 20a) is unreported. The opinion of the district court (Pet. App. 21a–39a) is reported at 999 F. Supp. 2d 24 (D.D.C. 2013).

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2015. The petition for rehearing *en banc* was denied on May 13, 2015. Pet. App. 20a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). *See Forsyth v. Hammond*, 166 U.S. 506, 511–13 (1897).

STATUTORY PROVISION INVOLVED

This case concerns the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(F), which is reproduced in the appendix to this petition. Pet. App. 51a.

STATEMENT

Congress passed the Freedom of Information Act in 1966 with the express purpose of facilitating "broad disclosure" of agency records. *Milner v. Dep't of Navy*, 562 U.S. 562, 571 (2011). The general rule under the Act is that agencies must disclose records in response to requests from the public, and Congress provided only nine narrow exemptions to that rule. This Court has recognized Congress' intent in limiting the scope of the exemptions, and held that the exemptions must be "given a narrow compass." *DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989). Without the application of the narrow construction rule grounded in the purpose of the Act, there is a clear "risk that FOIA would become less a disclosure than 'a withholding statute.'" *Milner*, 562 U.S. at 578 (citing *EPA v. Mink*, 410 U.S. 73, 79 (1973)).

Nonetheless, the Court of Appeals for the D.C. Circuit construed Exemption 7(F) so broadly that it threatens to conceal from public access all records in the possession of any federal agency upon a mere assertion that the record concerns security procedures. Such an outcome is contrary to the intent of Congress, this Court's precedent, and this Court's specific guidance on statutory interpretation. Absent review by this Court, the decision of the court of appeals could transform the FOIA from a disclosure to a withholding statute.

A. Standard Operating Procedure 303

In 2011, a Bay Area Rapid Transit (BART) officer in San Francisco shot and killed a homeless man named Charles Hill. The officer claimed that he acted in self-defense, alleging that Hill attacked him with a knife. Hill's death sparked a protest against BART later that year. Though the protests disrupted service at several transit stations, no one was injured. A second protest in 2011 ended abruptly after BART officials cut off all cellular service inside four transit stations for three hours. This act by public officials to suspend a widely used communications network prevented everyone inside the transit stations from sending or receiving phone calls, messages, emergency notifications, and other transmissions.

Standard Operating Procedure 303 (SOP 303) is the protocol used by public officials to coordinate the disruption of wireless communications networks. The policy, created by the Department of Homeland

Security in 2006, describes the process for "verifying that circumstances exist that would justify shutting down wireless networks." Holzer Decl. ¶ 25. (Pet. App. 49a). It also "establishes a procedure by which state homeland security officials can directly engage with wireless carriers, and it establishes factual authentication procedures for decision-makers." Pet. App. 47a. According to the President's National Security Telecommunications Advisory Committee, the government created SOP 303 in response to the need for

> a single governmental process to coordinate determinations of if and when cellular shutdown activities should be undertaken in light of the serious impact on access by the public to emergency communications services during these situations and the need to preserve the public trust in the integrity of the communications infrastructure.

Id.

At the time the BART cellphone service shutdown occurred in 2011, SOP 303 was in effect and should have governed the decision by California state officials to disrupt the cellular network during the protest. The action required communications with the relevant wireless service providers, coordination with the DHS officials, and compliance with certain authentication procedures. *Id.* at 46a–47a.

B. EPIC's FOIA Request

In July 2012, following the government shutdown of cellphone service during a public protest at the BART subway station, EPIC submitted a FOIA request to the DHS seeking the full text of SOP 303, the series of questions used to determine whether a shutdown is necessary, and any related protocols or guidelines. The agency responded that it had conducted a comprehensive search, but was unable to locate or identify any responsive records. EPIC appealed the agency's failure to identify responsive records in September 2012. Pet. App. 4a. The DHS acknowledged EPIC's administrative appeal in October 2012 but failed to make a determination within the FOIA's twenty-day deadline.

C. The District Court Order

In February 2013, EPIC filed suit in the United States District Court for the District of Columbia. Pet. App. 5a. The DHS then conducted another search for responsive records and located SOP 303, the document sought by EPIC. The agency released to EPIC a heavily redacted version of SOP 303, withholding nearly all of SOP 303's text, based on its assertions concerning the scope of FOIA Exemptions 7(E) and 7(F). Exemption 7(E) permits an agency to withhold certain law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions." § 552(b)(7)(E). Exemption 7(F) covers law enforcement information that "could reasonably

be expected to endanger the life or physical safety of any individual." § 552(b)(7)(F).

Both parties filed summary judgment motions. The DHS argued that SOP 303 was exempt from disclosure under (7)(F) because making the document "public would, *e.g.*, enable bad actors to insert themselves into the process of shutting down or reactivating wireless networks by appropriating verification methods and then impersonating officials designated for involvement in the verification process." Pet. App. 50a. According to DHS, disclosure of the record could give bad actors the capability "to disable the protocol [and] freely use wireless networks to activate * * * improvised explosive devices" and, therefore, "could reasonably endanger individuals' lives or physical safety." *Id.*

EPIC countered the agency's hypothetical scenarios and explained that 7(F) did not permit the withholding of records in such circumstances. Citing the Second Circuit's analysis in *American Civil Liberties Union v. Department of Defense*, 543 F.3d 59 (2d Cir. 2008), *vacated on other grounds*, 558 U.S. 1042 (2009), EPIC argued that 7(F) applies only when individuals can be identified with some degree of specificity. EPIC also argued that the purpose of 7(F) is to permit the withholding in some circumstances of the names of individuals, such as witnesses and confidential sources, associated with an actual law enforcement investigation—a far cry from the information the DHS sought to withhold here.

The lower court sided with EPIC, rejected the agency's 7(E) and 7(F) claims, and granted summary judgment for EPIC. Pet. App. 22a. In rejecting the DHS's 7(F) claim, Judge Boasberg found the agency had not shown that release of the document "would 'endanger the life or physical safety of *any individual*.'" *Id.* 32a. Specifically, the court found that "the agency reads the 'any individual' standard too broadly." *Id.* In reaching this conclusion, the court considered and adopted the analysis of the Second Circuit in *ACLU*, 543 F.3d at 66–72. The court held that an agency must "identify the individuals at risk with some degree of specificity" in order to satisfy Exemption 7(F). Pet. App. 22a. As the court explained, the Second Circuit's analysis in *ACLU* was based on a "thorough examination of the legislative history of 7(F)." *Id.* at 33a. The court emphasized that when Congress amended 7(F) in 1986, it intended only to "slightly" modify the scope of the exemption, which had previously applied to records where release would "endanger the life or physical safety of *law enforcement personnel*." *Id.* (citing PL 93-502, Nov. 21, 1974, 88 Stat 1561) (emphasis in original). In conclusion, the court held that "bearing in mind the modest expansion intended and the prescription that exemptions must be read narrowly, the Court must require some specificity and some ability to identify the individuals endangered." *Id.* at 35a.

The court stayed the order to allow DHS an opportunity to appeal or to provide an alternative basis for withholding the records. *Id.* at 39a. The

DHS filed a notice of appeal to the D.C. Circuit on January 13, 2014.

D. The D.C. Circuit Opinion

In its appeal, the DHS argued that Exemption 7(F) is "very broad" and that the agency's only burden in asserting the exemption is to "demonstrate that it reasonably estimated that sensitive information could be misused for nefarious ends." Br. Appellant 10. In response, EPIC argued that Congress did not intend Exemption 7(F) to encompass diffuse and speculative harms. Br. Appellee 11. Specifically, EPIC argued that the term "any individual" in 7(F) is limited to "an ascertainable person or group" and that "any other reading of the phrase" would not establish an adequate nexus between disclosure and the harm asserted. *Id*. EPIC also traced the history and purpose of 7(F), which was enacted "to protect individuals from risk of harm when their actual participation in law enforcement activities was exposed." *Id*. at 13. The legislative history makes clear that the phrase "any individual" was intended to refer to specific individuals, such as witnesses, confidential sources, and others, in addition to law enforcement personnel, associated with a law enforcement investigation.

On February 10, 2015, the court of appeals issued an opinion reversing the lower court and remanding for further proceedings. Pet. App. 1a. In reaching its conclusion, the court relied primarily on the D.C. Circuit's recent decision in *Public Employees for Environmental Responsibility v. U.S. Section,*

International Boundary & Water Commission, 740 F.3d 195 (D.C. Cir. 2014) [hereinafter *PEER*], which was issued subsequent to the DHS' appeal in this case. The court in *PEER* held that "inundation maps," which showed the flood zones surrounding two dams on the U.S.-Mexico border, were properly exempt from disclosure under 7(F) because their release could create a risk of injury to populations downstream of the dams. *PEER*, 740 F.3d at 206. The court acknowledged in this case that its decision in *PEER* did not foreclose the "interpretation of Exemption (F)" adopted by the Second Circuit in *ACLU*, because the agency in *PEER* had established a "particularized threat to a discrete population." Pet. App. 11a. Nevertheless, the court held that because the term "any" has an "expansive meaning," Congress did not impose any requirement that the agency provide evidence that disclosure could harm "a particular individual who could be identified before the fact." Pet. App. 13a. Instead, the court found that because the record in this case was related to a "critical emergency" response plan, the general risk that the "protocols" could be "corrupted if made available to the public" was sufficient to satisfy 7(F). Pet. App. 10a.

Following the court's decision, EPIC timely filed a Petition for Rehearing En Banc, which the court denied on May 13, 2015. On remand, the agency made a further production. *See* Notice of In Camera Filing (July 6, 2015), ECF No. 25. The district court then reviewed the documents *in camera* and ruled on July 10, 2015, that the DHS was not

obligated to release any further information from SOP 303. Min. Order (July 10, 2015).

REASONS FOR GRANTING THE PETITION

The decision below warrants this Court's review because it contravenes not only the basic structure and purpose of the Freedom of Information Act, but also goes against this Court's clear guidance on statutory interpretation. Certiorari is necessary to resolve the scope of Exemption 7(F) and also to affirm this Court's holding in *Milner v. Dep't of Navy*, 562 U.S. 562 (2011), that Freedom of Information Act exemptions be "given a narrow compass" in light of "the Act's goal of broad disclosure." *Id.* at 571 (citing *DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989)). The court of appeals did not follow the narrow construction rule in this case; instead, the court expanded the scope of 7(F) far beyond its original purpose and created what is, in effect, a categorical exemption for security-related procedures and other records. Congress' use of the term "any individual" does not imply such a broad carve-out from the government's obligation to produce agency records to the public upon request. Furthermore, the D.C. Circuit's interpretation is contrary to this Court's rulings in cases involving similar statutory language. In prior cases, this Court has rejected overly expansive interpretations of the terms "any" and "any individual" in favor of interpretations that more closely align with the statutory purpose. This Court recently held that the term "any tangible object" may

not be construed in a manner contrary to the purpose of the underlying Act. *See Yates v. United States*, 135 S. Ct. 1074, 1081 (2015). This Court should similarly take the opportunity in this case to resolve the interpretation of Exemption 7(F).

I. The D.C. Circuit Erred in Expanding the Scope of Exemption 7(F)

In holding that an agency need not establish a "particularized threat to a discrete population" in order to meet the requirements of Exemption 7(F), the court of appeals has expanded the exemption far beyond the purpose Congress intended and created a new catchall provision that can be used in any case involving records related to domestic and national security programs. Pet. App. 11a. Given that the D.C. Circuit also emphasized the "deferential posture" courts adopt when assessing "national security harms," requestors can expect that even the most speculative claim of possible future security risks stemming from disclosure will be enough to satisfy this new 7(F) standard. Certiorari is necessary to correct this expansive interpretation, which is contrary to this Court's precedent requiring that FOIA exemptions be interpreted narrowly, and to prevent 7(F) from becoming a blanket nondisclosure rule for all agency records related to security programs.

This Court has repeatedly held that the FOIA should not be interpreted in a way that would make it "less a disclosure than a 'withholding statute.'" *Milner*, 562 U.S. at 578 (citing *EPA v. Mink*, 410 U.S.

73, 79 (1973)). "Without question, the Act is broadly conceived," *Mink*, 410 U.S. at 80, with a "goal of broad disclosure," *Tax Analysts*, 492 U.S. at 151, which is why the exemptions must be "narrowly construed." *FBI v. Abramson*, 456 U.S. 615, 630 (1982).

A. The D.C. Circuit's Interpretation of Exemption 7(F) is Contrary to Congress' Intent

Congress provided for nine exemptions to the general mandate of agency disclosure when it enacted the FOIA in 1966. *See* Pub. L. 89-487, 80 Stat. 251 (1966). In 1974, dissatisfied with the government's failure to comply with the Act, and with court decisions broadly construing Exemptions 1 and 7, Congress passed significant amendments over a Presidential veto, intending to narrow the circumstances under which federal agencies could withhold information sought by the public. *See* Cong. Research Serv., *The Freedom of Information Act Amendments of 1974*, *reprinted in* H. Subcomm. on Gov't Information and Individual Rights, Comm. on Gov't Operations, & S. Subcomm. on Admin. Practice and Procedure, Comm. on the Judiciary, *Freedom of Information Act and Amendments of 1974 (P.L. 93–502) Source Book* 109–116 (Joint Comm. Print 1975) [hereinafter *1975 FOIA Source Book*].

The 1974 amendments thus clarified the narrow scope of protections for investigatory records in Exemption 7 and simultaneously increased judicial oversight of the government's withholding under

Exemption 1 of documents implicating national security concerns. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 163 (1989) (Scalia, J., dissenting). The Exemption 7 amendments were drafted in response to decisions that would have erected "a 'stone wall' against public access to any material in an investigatory file." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 229 (1978) (citing *1975 FOIA Source Book* at 332). The Exemption 1 amendments were drafted in response to this Court's decision in *Environmental Protection Agency v. Mink,* 410 U.S. 73 (1973). *See CIA v. Sims*, 471 U.S. 159, 189 n.5 (1985) (discussing Congress' response to the *Mink* decision, the adoption of the "properly classified" standard, and *de novo* review in the 1974 amendments).

Congress made clear in 1974 that Exemption 1 and Exemption 7 served distinct and independent purposes. Exemption 7 limited disclosure of sensitive law enforcement files and protected the identities of confidential informants, witnesses, and others involved in investigations, whereas Exemption 1 was intended to protect information where disclosure could endanger national security. Given the structure of the Act and the purposes of these exemptions, it was incorrect as a matter of law for the D.C. Circuit to construe Exemption 7(F) to limit disclosure of a record based on the agency's claim that releasing the document would "enable bad actors to insert themselves into the process of shutting down or reactivating wireless networks." Pet. App. 5a. Congress did not address such diffuse claims when it

enacted Exemption 7(F) or when it amended that subsection in 1986. To the extent Congress considered such harms, it did so under Exemption 1, providing for close judicial review of the Government's justifications for withholding. As Justice Scalia explained in his dissent in *John Doe Agency*, "[i]t is particularly implausible" that Congress was expanding the authority to withhold national security records "in its revision of Exemption 7 at the same time that it was adding the 'properly classified' requirement to Exemption 1" in order to prevent overly broad withholdings of such records. 493 U.S. at 163 (Scalia, J., dissenting).

Exemption 7 was enacted to limit the disclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than the agency." *Robbins*, 437 U.S. at 245 (quoting 80 Stat. 251). The intent was to "prevent[] a litigant from using the statute to achieve indirectly 'any earlier or greater access to investigatory files than he would have directly.'" *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)). The exemption applies only where "the prospect of enforcement proceedings is concrete enough" for the relevant files to qualify as "investigatory." *Id.*

The 1974 amendments restructured and limited the application of Exemption 7 to "investigatory records compiled for law enforcement purposes," and required the agency to show that "producing such records would involve one of six

specified dangers." *Robbins*, 437 U.S. at 222. This change, adapted from a proposal by the American Bar Association, explicitly described the limited objectives of Exemption 7 so that courts would not permit the withholding of investigatory records for any other purpose. *Id*. at 230–31. The four core purposes were to ensure that disclosure did not (1) "interfere with enforcement proceedings," (2) deprive someone of "impartial adjudication," (3) "disclose the identity of an informer," or (4) "disclose investigative techniques and procedures." *Id*. at 231 n.12. Prior to enactment, Congress added two additional purposes for withholding investigatory records: where disclosure would result in an "unwarranted invasion of personal privacy" or "endanger the life or physical safety of law enforcement personnel." H.R. Rep. 93-1380 (1974) (Conf. Rep.), *reprinted in 1975 FOIA Source Book* at 229.

It is no surprise that the subsections protecting "personal privacy" (C) and "life or physical safety" (F) were added together because they are closely intertwined; both involve the same concern—the privacy concerns that arise from the release of identities and personal information contained in the records of federal agencies.[1] *See Blanton v. DOJ*, 182

[1] It is significant that the informal notes recording the amendments made by the Conference Committee, including the addition of subsection F, do not discuss the change at all but focus instead on the changes to subsections C and D. *See Conference Notes – The Freedom*

F. Supp. 2d 81, 86–87 (D.D.C. 2002) ("The same information that is withheld under Exemption 7(C) may be withheld under Exemption 7(F) to protect against risk of physical injury or harassment.") (citing *Epps v. DOJ*, 801 F. Supp. 2d 787, 795 (D.D.C. 1992); *Maroscia v. Levi*, 569 F.2d 1000, 1002 (7th Cir. 1977)).[2]

Following the 1974 amendments, the Department of Justice argued that Exemption 7 did not adequately protect the identities of confidential sources; this concern was the impetus for the 1986 amendments. 132 Cong. Rec. 29,618–29,621 (Oct. 8, 1986) (statement of Rep. Thomas N. Kindness). The amendment to subsection (F) addressed the Justice Department's concern, first raised in the Attorney General's Memorandum on the 1974 Amendments, that the "families of law enforcement personnel" or others might also face safety risks upon the release "of information which would reveal [their] identity." *1975 FOIA Source Book* at 522. As Senator Hatch explained when introducing the language that was

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of Information Act Amendments (1974), *reprinted in 1975 FOIA Source Book* 117–18.

[2] See also Attorney General's Memorandum on the 1974 Amendments (1975), reprinted in 1975 FOIA Source Book 519, 522 (describing subsection (C) as protecting privacy interests of the "subject of the investigation" as well as "any [other] person mentioned in the requested file" and subsection (F) as protecting "information which would reveal the identity of undercover agents").

ultimately adopted into the 1986 amendments, "The bill would . . . extend[] exemption 7(F) to include such persons as witnesses, potential witnesses, and family members whose personal safety is of central importance to the law enforcement process." 130 Cong. Rec. 3502 (1984) (statement of Sen. Hatch). This point was reiterated by then-professor Antonin Scalia during a Senate hearing on draft amendments that were subsequently incorporated into the 1986 bill. *See* 1 *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong., 1st Sess. 959–60 (1981) (statement of Prof. Antonin Scalia). According to Professor Scalia, it seemed irrational to protect only "law enforcement personnel" when others might also be threatened by the "release of any investigatory records." *Id.* Congress subsequently adopted an amendment to (7)(F) in the Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, tit. 1, subtit. N, §§ 1801–1804, 100 Stat. 3207-48 to 3207-50 (1986), replacing "law enforcement personnel" with "any individual." *Id.*

Prior to the enactment of the 1986 amendments, the Department of Justice stated that the "provisions of Exemption 7 would be modified slightly—not revised wholesale." 131 Cong. Rec. 240, 248 (1985) (Statement of Deputy Att'y Gen. Carol E. Dinkins). *See also* 132 Cong. Rec. 29,616 (1986) (statement of Representative English) ("these law enforcement amendments would make only modest changes to the FOIA."). The primary factor motivating Congress to pass the amendments in 1986

was to prevent disclosure of "documents compiled in a lawful investigation of organized crime which would harm investigations or informants." 132 Cong. Rec. 26,770 (1986) (statement of Senator Hatch). *See also* 132 Cong. Rec. 29,619 (1986) (statement of Rep. Thomas N. Kindness) ("Much of the impetus . . . . comes from the concerns expressed by the [FBI] . . . that the act is exploited by organized crime figures attempting to learn whether they are targets of investigative law enforcement activities, as well as the identities of informants."). Not once did Congress mention the type of diffuse security risks that the court of appeals found triggered 7(F). In fact, the changes to Subsection F were hardly mentioned in the legislative history. The focus of Congress was on protecting the identities of individuals involved in law enforcement investigations, which supports the conclusion that the amendment to 7(F) was similarly intended to protect those same individuals.

It was clear Congress intended to expand 7(F) protections to individuals other than police officers, such as witnesses and confidential informants, but there was never an indication that Congress intended to change the fundamental purpose of 7(F). That purpose was to prevent disclosure of identifying information in law enforcement records that might put informants, witnesses, agents, or others in physical danger. Congress never expressed an intention to exempt records under 7(F) where disclosure could create diffuse security risks. The decision of the court of appeals is contrary to Congress' intent, and would create a new catchall

exemption for any record related to a security procedure.

B. The D.C. Circuit's Interpretation is Contrary to the Interpretation of the Second Circuit in *ACLU v. DOD*

Not only is the D.C. Circuit's interpretation of 7(F) contrary to Congress' intent, the interpretation is literally unprecedented. Prior to the D.C. Circuit's ruling in *PEER*, no federal appellate court had applied Exemption 7(F) to a record that did not contain identifying information. When the Second Circuit considered the question in *American Civil Liberties Union v. Department of Defense*, 543 F.3d 59, 66–72 (2d Cir. 2008), *vacated on other grounds*, 558 U.S. 1042 (2009), it reached the opposite conclusion—that Congress intended Exemption 7(F) to be limited in scope to:

> the protection of individuals subject to a non-speculative risk of harm incident to a law enforcement investigation. The defendants' attempt to sweep far-reaching and speculative national security concerns into exemption 7(F) reaches far beyond the intent of Congress in enacting or amending the provision.

Id. at 80. This Court should grant review to resolve this disagreement over the scope of Exemption 7(F).

In *ACLU*, the Second Circuit considered whether the Department of Defense properly

withheld under Exemption 7(F) photographs depicting prisoner abuse by military forces in Iraq and Afghanistan. 543 F.3d at 63. The agency argued that the photos should be exempt because their release could create security risks for U.S. and Coalition forces, as well as civilians in Iraq and Afghanistan. *Id.* at 64. After considering "the language of the remainder of the provision, the structure of FOIA's exemptions, and the context and history leading to its adoption," the Second Circuit refused to construe the term "any individual" so broadly as to encompass "the populations of two nations and two international expeditionary forces." *Id.* at 69–70. In rejecting the government's argument, the court highlighted the perverse conclusion that

> even remote possibilities can become reasonable to expect to befall at least one member of a large enough group. . . . The government's contention that 'any individual' encompasses a person identified only as belonging to [] a population of national size would, if accepted, circumvent the limitation imposed by the phrase 'could reasonably be expected to endanger.'

Id. at 83. The Second Circuit thus concluded that Congress did not intend for Exemption 7(F) to protect against diffuse security risks to unidentified groups. *Id.* at 71. The D.C. Circuit recognized the tension between its interpretation of Exemption 7(F) and that of the Second Circuit. *See* Pet. App. 12a. ("If viewed without regard to SOP 303's requirement that

there be a critical emergency for a shutdown to take place, then the Department's interpretation may not accord with the Second Circuit's approach.").

Like *ACLU*, this case centers on an agency's claim that Exemption 7(F) covers a speculative harm to a large and indeterminate group. The difference here, according to the D.C. Circuit, is that "the critical emergency itself provides a limit (*e.g.*, a situs on the London transportation system)." Pet. App. 14a. But this distinction simply does not hold water. The government could have similarly argued in *ACLU* that the site of a terrorist attack perpetrated in response to a release of detainee abuse photos also provided a limit to the at-risk individuals.

Here, the D.C. Circuit erroneously expanded the scope of Exemption 7(F), and in so doing, contravenes what the Second Circuit recognized as Congress' carefully tailored FOIA exemption. *See ACLU*, 543 F.3d at 80. ("What [Congress] did not do, and what the legislative history makes clear it never contemplated doing, was to reinvent exemption 7(F) as an all-purpose damper on global controversy."). This petition for certiorari should be granted to clarify the confusion regarding the proper scope of Exemption 7(F).

II. The D.C. Circuit Failed to Follow This Court's Guidance on Statutory Interpretation

The D.C. Court of Appeals departed from this Court's guidance on statutory interpretation when it decided that the term "any" within FOIA Exemption

7(F) "demands a broad interpretation." Pet. App. 13a. The court of appeals noted that it "must both narrowly construe the FOIA's exemptions and apply the statute's plain text." *Id.* at 12a. However, as this Court recently found, "in deciding whether the language is plain, [a court] must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

A court's duty is to "construe statutes, not isolated provisions." *Id.* at 2489 (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)). In *Burwell*, this Court held that the phrase "an Exchange established by the State," within the Affordable Care Act, includes exchanges established by the federal government. *Id.* at 2492–93. The Court observed that to limit the scope of "the State" only to state governments would "destabilize the individual insurance market * * * and likely create the very 'death spirals' that Congress designed the Act to avoid." *Id.* at 2493. The Court declined to do so, noting that its responsibility is to "respect the role of the Legislature, and take care not to undo what it has done." *Id.* at 2496.

In many cases this Court has found that the term "any," after consideration of the statutory context, should not be construed broadly. *See, e.g.*, *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034 (2012) (holding the phrase "any portion, split, or percentage" in the Real Estate Settlement Procedures Act denoted only "a part of a whole,"

despite the fact that "'portion' or 'percentage' can be used to include the entirety, or 100 percent."); *Nixon v. Missouri Municipal League*, 541 U.S. 125, 138 (2004) (holding that "any entity" in § 101(a) of the Telecommunications Act of 1996 does not include public entities); *Martin v. Hadix*, 527 U.S. 343, 354 (1999) (noting that while the term "any" in the Prison Litigation Reform Act is broad, "it stretches the imagination that Congress intended, through the use of this one word to make fee limitations applicable to all fee awards."); *Lewis v. United States*, 523 U.S. 155, 162 (1998) (rejecting the literal reading of the phrase "any enactment" in the Assimilative Crimes Act, which "would dramatically separate the statute from its intended purpose."); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (holding that the phrase "any * * * communication" in § 2(10) of the Securities Act of 1933 referred only to public communications, because the words appeared in "a list refer[ring] to documents of wide dissemination."); *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990) (holding that the phrase "any note" in the Securities Exchange Act of 1934 "should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts."); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Assn.,* 453 U.S. 1 (1981) (rejecting a literal interpretation of the phrase "any statute" in the Federal Water Pollution Control Act Amendments of 1972, doubting that "it includes the very statute in which [the] statement was contained."); *United States v. Jin Fuey Moy*, 241

U.S. 394, 402 (1916) (holding that the phrase "any person registered" in § 8 of the Harrison Narcotics Tax Act "cannot be taken to mean any person in the United States," but rather the class of persons the statute aims to cover); *United States v. Palmer*, 16 U.S. 610, 632 (1818) (ruling that although the phrase "any person or persons" was "broad enough to comprehend every human being," such words were limited "to those objects to which the legislature intended to apply them.").

A prior examination of the words "any individual" by this Court further illustrates that statutory context, legislative history, and congressional intent dictate the meaning of that phrase. In *Frisby v. Schultz*, the Court held that an ordinance banning "picketing before or about the residence or dwelling of *any individual*," only barred "picketing focused on, and taking place in front of, a particular residence." 487 U.S. 474, 482–83 (1988). Although the Seventh Circuit construed the ordinance's language as prohibiting all picketing in residential areas, the Court rejected this interpretation as overbroad. The Court's conclusion was due in part to the ordinance's reference to "picketing"—"defined as posting at a particular place." *Id.* at 482. In other words, the prohibition was limited to "speech directed primarily at those who are presumptively unwilling to receive it." *Id.* at 487. The ordinance did not, therefore, forbid "general marching through residential neighborhoods" or "walking a route in front of an entire block of houses." *Id.* at 483.

More recently, in *Yates v. United States*, this Court rejected an expansive interpretation of the phrase "any tangible object" that relied on the term's dictionary definition. 135 S. Ct. 1074, 1081 (2015). There, a commercial fisherman challenged his conviction under a provision of the Sarbanes-Oxley Act of 2002, 116 Stat. 745, a law passed in the wake of the Enron scandal to curb financial crimes. *Yates*, 135 S. Ct. at 1079. The dispute centered around a provision of the Act which punishes a person who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in *any* record, document, or *tangible object*" with the intent to impede an investigation. *Id.* at 1078 (emphasis added). The fisherman, urging that the Court adopt a "contextual reading" of the provision, argued that the term should only apply to "media on which information is stored." *Id.* at 1081. The government, on the other hand, argued that the district court and Eleventh Circuit correctly construed the phrase broadly.

The Court agreed with the fisherman and held that "any * * * tangible object," within the meaning of Sarbanes-Oxley covers "objects one can use to record or preserve information, not all objects in the physical world." *Id.* In so holding, the Court explained that statutory terms must be read "in their context and with a view to their place in the overall statutory scheme." *Id.* at 1092 (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Significantly, the fact that "tangible object" appeared last in a list beginning with "any record [or] object,"

and that the surrounding words— "falsifies, or makes a false entry in any record [or] document"—guided the Court's holding. *Id*. at 1085.

The contextual analysis performed in these cases is precisely what the D.C. Court of Appeals failed to do here. Rather than consider 7(F) in context, the court erroneously concluded that "consideration of Exemption 7(F)'s scope begins and ends with its text." Pet. App. 9a. As this Court stressed in *Yates*, "the same words, placed in different contexts, sometimes mean different things." *Id* at 1082. As with the phrase "any tangible object" in *Yates*, "any person" in Exemption 7(F) must be given reading consistent with its context.

The failure of the court of appeals to follow this Court's guidance on statutory interpretation makes the need for review particularly acute.

CONCLUSION

For the reasons stated above the Petition should be granted.

Respectfully submitted,

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