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 Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT COMPTEL IN SUPPORT OF 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 but only to the extent that 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 PROCEEDINGS

The Federal Communications Commission and United States of America were Respondents in the court below and are Petitioners in this Court. AT&T Inc. was Petitioner in the court below and is a Respondent in this Court. COMPTEL was an Intervenor in the court below and is a Respondent supporting the Petitioners in this Court. COMPTEL is a non-profit corporation and has not issued shares or debt securities to the public. It does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 22, 2009. The Third Circuit denied a petition for rehearing on November 23, 2009. Pet. App. D at 45a-46a. On February 12, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari until March 23, 2010. On March 15, 2010, Justice Alito further extended the time within which to file a petition for a writ of certiorari until April 22, 2010. The petition for a writ of certiorari was filed on April 22, 2010, and was granted on September 28, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act (FOIA), 5 U.S.C. § 552 provides in pertinent part:

> (b) This section does not apply to matters that are . . .
>
> > (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
> >
> > (7) 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[.]

STATEMENT OF THE CASE

This case presents the question whether corporations have protected "personal privacy" interests within the meaning of FOIA Exemption 7(C).

A. The Freedom of Information Act and Its Personal Privacy Exemptions

Congress enacted FOIA in 1966 "to permit access to official information long shielded unnecessarily from public view." *EPA v. Mink*, 410 U.S. 73, 80 (1973). FOIA's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). "Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-21 (1978). "[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act," and they must be "narrowly construed." *Rose*, 425 U.S. at 361.

At the time of FOIA's enactment, the only exemption to mention "personal privacy" was Exemption 6, which exempts from mandatory disclosure "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). As the House Report on FOIA explains, Exemption 6's purpose is to provide "a proper balance between the protection of an individual's right of 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." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966).

As originally enacted, Exemption 7 applied to all "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966). In 1974, in response to certain D.C. Circuit decisions that it believed had construed the exemption too broadly, and out of concern that agencies could commingle nonexempt materials with exempt materials in law enforcement files to avoid disclosure, Congress amended Exemption 7 to remove from its scope investigatory records the release of which would not cause any harm. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 227-30. As amended, Exemption 7 permitted agencies to withhold investigatory records only where disclosure would cause one of six enumerated harms. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 156 (1989) ("As amended, Exemption 7 requires the Government to demonstrate that a record is 'compiled for law enforcement purposes' *and* that disclosure would effectuate one or more of the six specified harms." (emphasis in original)). The provision at issue here, Exemption 7(C), covered investigatory records the release of which would "constitute an unwarranted invasion of personal privacy." Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, § 2(B), 33 Stat. 1561 (1974). In 1986, Exemption 7(C) was amended again

and, in its current form, applies to law enforcement records the release of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

B. COMPTEL's FOIA Request and Proceedings Below

Effective December 16, 2004, Respondent AT&T[1] and the FCC's Enforcement Bureau entered into a Consent Decree that terminated an investigation into possible violations of Section 254 of the Communications Act, 47 U.S.C. § 254, and FCC rules by AT&T in relation to its receipt and use of E-Rate universal service funds.[2] The E-Rate program assists schools and libraries in obtaining affordable access to telecommunications and Internet access services by funding discounts for those services. *See* 47 U.S.C. § 254(h). Service providers such as AT&T are reimbursed for the discounts on the services they provide to eligible schools and libraries with federal universal service funds administered by the Universal Service Administrative Company ("USAC") under the supervision and direction of the FCC. According to the Consent Decree, AT&T informed the FCC that it had invoiced USAC for services not eligible for E-Rate

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[1]The FCC's Memorandum Opinion and Order and the pleadings filed at the FCC refer to Respondent AT&T as SBC Communications, Inc. SBC acquired AT&T in November 2005 and changed its name to AT&T. For convenience, AT&T is used throughout to refer to Respondent AT&T.

[2]In the Matter of SBC Communications, Inc., File No. EB-04-IH-0342, 19 F.C.C.R. 24014 (Enf. Bur. 2004) ("Consent Decree").

support, for services for which it had not sought or received authorization, and for services in one funding year that were provided in another. Consent Decree ¶ 3. To resolve the matter, AT&T reimbursed USAC and agreed to make a "voluntary contribution" of $500,000 to the U.S. Treasury. *Id.* ¶ 5.

COMPTEL is a national trade association that represents communications service providers and their supplier partners. On April 4, 2005, COMPTEL filed a FOIA request with the FCC seeking a copy of the Enforcement Bureau's file on the investigation into AT&T. AT&T objected to the release of any documents to COMPTEL arguing, *inter alia*, that the entire file was exempt from disclosure pursuant to FOIA Exemption 7(C). COMPTEL responded that corporations do not have "personal privacy" interests protected by Exemption 7(C), but noted that it did not object to the redaction of personally identifiable information relating to any AT&T employees that might be in the file. *See* Pet. App. C at 36a-37a.

The Enforcement Bureau agreed with COMPTEL and rejected AT&T's argument that Exemption 7(C) protected all of the records from disclosure, explaining that "businesses do not possess 'personal privacy' interests as required for application of FOIA Exemption 7(C)." *Id.* at 42a-43a. The Enforcement Bureau stated that it would make certain documents available, with AT&T employees' personal information redacted, unless AT&T filed a timely application for review. *Id.* at 43a. AT&T filed an application for review on August 19, 2005, arguing that FOIA Exemption 7(C) protected all documents in the

Enforcement Bureau file from disclosure. Pet App. B at 22a, 26a.

On September 12, 2008, the FCC denied AT&T's application for review. The FCC explained that AT&T's "position that a corporation has 'personal privacy' interests within the meaning of Exemption 7(C) is at odds with established Commission and judicial precedent," *id.* at 26a, and rejected AT&T's contention that "protecting a corporation from 'embarrassment' falls within the purposes of Exemption 7(C)." *Id.*

AT&T filed a Petition for Review of the FCC's decision in the United States Court of Appeals for the Third Circuit, and COMPTEL intervened. The Third Circuit granted AT&T's petition. Pet. App. A at 2a. Although the Third Circuit acknowledged that this Court's decisions may "suggest that Exemptions 7(C) and 6 frequently and primarily protect—and that Congress may have intended them to protect—the privacy of individuals," it held that "FOIA's text unambiguously indicates that a corporation may have a 'personal privacy' interest within the meaning of Exemption 7(C)." *Id.* at 11a. According to the Third Circuit, because "person" is defined in the Administrative Procedure Act (APA), which includes FOIA, to include corporations, "personal privacy" must also include corporate privacy. The court stated that "[i]t would be very odd indeed for an adjectival form of a defined term *not* to refer back to that defined term." *Id.* (emphasis in original). In addition, the Third Circuit noted that Congress used the term "individual" elsewhere in FOIA and could have used it in Exemption 7(C) if it intended to limit its application solely to the privacy of human beings. *Id.* at 12a. In reaching its decision, the Third Circuit

declined to consider the "statutory purpose, relevant (but non-binding) case law, and legislative history" of FOIA. *Id.* at 14a. Stating that disclosure of information covered by Exemption 7(C) would violate 47 C.F.R. §0.457(g)(3), the court remanded the case to the FCC to determine whether disclosure of any of the documents could reasonably be expected to constitute an unwarranted invasion of AT&T's "personal privacy." Pet App. A at 7a n.2, 17a.

SUMMARY OF ARGUMENT

I. FOIA Exemption 7(C) protects "the individual interest in avoiding disclosure of personal matter." *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762 (1989) (citation omitted). In holding that Exemption 7(C) also protects the "personal privacy" interests of corporations, the decision below relied on the APA's definition of "person," which includes "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2). The relevant term in Exemption 7(C), however, is not "person," but "personal privacy."

FOIA does not define"personal privacy" or either of its component words. "When a term is undefined, [the Court] give[s] it its ordinary meaning." *United States v. Santos*, 553 U.S. 507, 511 (2008). The ordinary meaning of "personal privacy," as derived from the meanings of its words and as reflected in this Court's and Congress's use of the term, encompasses only the privacy interests of human beings. Indeed, the Third Circuit cited no instance in which the term "personal privacy" has been used to

describe the privacy interests of a corporation or other business enterprise.

When Congress intends to give a word a technical meaning, it does so expressly. The Third Circuit's contrary approach of incorporating the technical meaning of a defined word into undefined variants of that word would cause confusion and lead to absurd results.

II. FOIA's history, structure, and purpose all confirm that Exemption 7(C) protects only human privacy interests. Exemption 7(C) was intended to extend to investigative files the protections given to personnel, medical, and similar files by Exemption 6, which applies only to records relating to individuals. In contrast, corporate interests in confidentiality are protected by FOIA Exemption 4, which applies to trade secrets and confidential or privileged commercial and financial information. Moreover, the interests protected by FOIA's personal privacy exemptions are uniquely human interests that corporations do not share. Corporations and other inanimate entities cannot feel embarrassed or dishonored if their "privacy" is invaded.

Exempting agency records on the ground that they would "embarrass" corporations would undermine FOIA's goals of opening government action to the light of public scrutiny. Particularly in light of this Court's direction that FOIA's exemptions are to be narrowly construed, "personal privacy" should be interpreted to protect only individuals, not institutions.

ARGUMENT

I. "Personal Privacy" Refers to the Privacy of Human Beings.

A. The Plain Meaning of "Personal Privacy" Is Limited to the Privacy of Individuals.

The ordinary meaning of "personal privacy" includes only the privacy interests of human beings.

1. The word "privacy" generally connotes individual, rather than institutional, interests. The concept of a right to privacy is often traced back to Samuel Warren's and Louis Brandeis's seminal article on privacy, which discussed the need to protect "the privacy of the individual" and "the acts and sayings of a man in his social and domestic relations." Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 197, 214 (1890). The article located the right to privacy in the individual's right to an "inviolate personality." *Id.* at 205. As the right to privacy was developed in the common law, it continued to be limited to individuals. Just a few years before FOIA was enacted, Dean Prosser noted that "[i]t seems to be generally agreed that the right of privacy is one pertaining only to individuals, and that a corporation or a partnership cannot claim it as such[.]" William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 408-09 (1960). Similarly, the Restatement (Second) of Torts limits actions for invasion of privacy (except for appropriation of one's name or likeness) to the invasion of privacy of an individual, noting that a "corporation, partnership or unincorporated association has no personal right of privacy." Restatement (Second) of Torts § 652I, Comment c (1977). Congress's decision to use the word "privacy" in

Exemption 7(C) should be read against this background in which privacy has generally been associated with individual, as opposed to institutional, interests. *Cf. Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 166 (2004) ("We can assume Congress legislated against this background of law, scholarship, and history when it enacted FOIA and when it amended Exemption 7(C) to extend its terms.").[3]

To be sure, as AT&T has noted, this Court has used the term "privacy" in describing corporations' Fourth Amendment right to be free from unreasonable searches and seizures. *See, e.g.*, *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977). Even in that context, however, it has emphasized that "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

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[3]*See also Reporters Comm.*, 489 U.S. at 763 & n.16 (in discussing the personal privacy protections of Exemption 7(C), looking to the "common law and the literal understandings of privacy" and citing "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 of 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')").

Moreover, to the extent there is any ambiguity about the meaning of "privacy" standing alone, the modifier "personal" in Exemption 7(C) removes that ambiguity. Congress did not protect all privacy interests in Exemption 7(C); it protected only those of a "personal" nature. And only human beings have "personal privacy" interests.

"Personal" means "[o]f, pertaining to, concerning or affecting the individual person or self (as opposed, variously, to other persons, the general community, etc., or to one's office, rank, or other attributes)." 11 *Oxford English Dictionary* 599 (2d ed. 1989) (also defining personal as "individual; private; one's own"); *see also* 7 Oxford English Dictionary 726 (1st ed. 1933) (same). The word is associated with "the qualities of human beings," often even with particularly intimate aspects of human life. *See, e.g*, *Black's Law Dictionary* 1029 (5th ed. 1979) (defining personal as "[a]ppertaining to the person; belonging to an individual; limited to the person; having the nature or partaking of the qualities of human beings, or of movable property"); *Black's Law Dictionary* 1300-01 (4th ed. 1951) (same); *Webster's Third New International Dictionary* 1686 (1976) (defining "personal" as "of or relating to a particular person: affecting one individual or each of many individuals[;] . . . relating to the person or body[;] . . . relating to an individual, his character, conduct, motives, or private affairs[;] . . . relating to or characteristic of human beings as distinct from things[;] . . . rational and self-conscious"); *Webster's Third New International Dictionary* 1686 (1961) (same). Thus, the word "personal" connects the words it modifies to particularly human interests.

Noting that many dictionaries use the word "person" in defining "personal," AT&T has argued that because "person" is defined in the APA to include corporations, "personal" must include corporate rights. *See* Cert. Opp. 22 (citing *Webster's Third New International Dictionary* 1686 (2002); *Webster's New International Dictionary* 1828 (2d ed. 1950)). But when dictionaries use the word "person" in the definition of "personal," they are referring to the ordinary meaning of "person," not to its definition in the APA. And it is beyond dispute that "person" "[i]n general usage, [is] a human being." *Black's Law Dictionary* 1028 (5th ed. 1979).

Simply put, "one cannot say that a corporation has a 'personal privacy.'" Kenneth Culp Davis, *Administrative Law Treatise* (1970 Supp.) § 3A.12. The adjective "personal" unambiguously limits the privacy rights protected by Exemption 7(C) to those of individuals.

2. Both Congress's and this Court's uses of the term "personal privacy" confirm that the term refers to the privacy rights of individuals. Although no statute uses the term "personal privacy" expressly to include the interests of artificial entities, Congress has frequently used "personal privacy" in contexts that are expressly limited to humans. For example, the Privacy Act addresses government handling of records maintained on individuals and defines "individual" to mean a United States citizen or an alien lawfully admitted for permanent residence. 5 U.S.C. § 552a(a)(2). The preface to the Privacy Act uses the term "personal privacy" to refer to the interests protected: "The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy[.]" *Privacy Act of 1974*, Pub.L. No. 93-579, § 2(B),

88 Stat. 1896. Thus, the Act plainly uses "personal privacy" to refer solely to human interests. *See also, e.g.*, 38 U.S.C. § 5705(b)(2) ("The name of and other identifying information regarding any individual patient or employee of the Department, or any other individual associated with the Department . . . shall be deleted from any record or document before any disclosure . . . if disclosure of such name and identifying information would constitute a clearly unwarranted invasion of personal privacy.").

Similarly, this Court has never used the term "personal privacy" to refer to the interests of a corporation. Rather, like Congress, the Court has used the term interchangeably with "individual privacy" and to refer to the interests of the "individual." *See, e.g.*, *The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (noting that there might be a "zone of personal privacy within which the State may protect the individual from intrusion by the press"). And the Court has used the term to apply to uniquely human interests in human dignity, individual autonomy, and physical security. *See, e.g.*, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (explaining that the right of "personal privacy" includes the right to make personal decisions relating to marriage, procreation and child rearing (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977))).

The Court's use of the term "personal privacy" in FOIA cases is no exception. In these cases as well, the Court has used "personal" and "personal privacy" interchangeably with "individual" and "individual privacy" to refer to the interests of "individuals." *See, e.g.*, *Reporters Comm.*, 489 U.S. at 755 n.7 (paraphrasing "clearly unwarranted invasion of personal privacy" to mean that which "might

otherwise offend an individual's privacy"); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 174 (1991) ("Congress thus recognized that the policy of informing the public about the operation of its Government can be adequately served in some cases without unnecessarily compromising individual interests in privacy."); *Rose*, 425 U.S. at 372 ("[In Exemption 6], Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act[.]"). And the Court has used the term to protect interests unique to human beings. *See, e.g., Favish*, 541 U.S. at 166 (holding that family members have a protectible personal privacy interest in death scene photographs, the release of which would impact their "peace of mind and tranquility").

In short, the phrase "personal privacy" refers to uniquely human interests. As this Court has recognized in the context of the privilege against compulsory self-incrimination, "[s]ince the privilege . . . is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation." *United States v. White*, 322 U.S. 694, 699 (1944). Corporate documents "embody no element of personal privacy." *Id.* at 700.

B. The APA's Definition of "Person" Does Not Alter the Meaning of "Personal Privacy."

The Third Circuit did not dispute that the ordinary, common-sense meaning of "personal privacy" includes only human privacy interests. Nonetheless, it held that "FOIA's text unambiguously indicates that a corporation may have a 'personal privacy' interest within the meaning of Exemption 7(C)." Pet. App. A at 13a. This is so,

according to the court of appeals, because the word "person" is defined in the APA, which includes FOIA, to include a corporation (along with any other partnership, association, or public or private organization other than a federal agency). 5 U.S.C. § 551(2). Exemption 7(C), however, does not use the word "person." It uses the term "personal privacy." And although they are related, "personal" and "person" are not the same word. *See* Davis, *Administrative Law Treatise* § 3A.22 ("The definition of 'person' seems to me irrelevant because the exemption does not use that term.").

By interpreting "personal privacy" to include corporate interests, the Third Circuit disregarded the "seemingly obvious rule" that "[u]nless Congress explicitly states otherwise, '[courts must] construe a statutory term in accordance with its ordinary or natural meaning.'" *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 184 (2003) (Thomas, J., dissenting) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)); *see also, e.g.*, *Hamilton v. Lanning*, 130 S. Ct. 2464, 2471 (2010) ("'When terms used in a statute are undefined, we give them their ordinary meaning.'" (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995))); 2A N. Singer & J. Singer, *Sutherland on Statutory Construction* § 46:1 (7th ed. 2007) ("In the absence of a specific indication to the contrary, words used in the statute will be given their common, ordinary and accepted meaning[.]"). Here, Congress did not expressly define "personal privacy" or either of its component words. Accordingly, "personal privacy" should have been given its ordinary, natural meaning, which is limited to the privacy rights of individuals.

The well-established rule that words are to be given their ordinary meaning unless they are expressly defined otherwise reduces opportunities for misunderstandings between Congress and the courts by making it absolutely clear when a court should ignore the ordinary meaning of a statutory term: that is, when Congress has expressly given that term a different meaning. Indeed, when Congress has intended to give a variant of a defined term the same technical meaning as the defined term, it has done so expressly. *See, e.g.*, 29 U.S.C. § 203(k) (defining "sale" and "sell"); 8 U.S.C. § 1101(a)(13)(A) (defining "admission" and "admitted"); 39 U.S.C. § 3201(3), (4) (defining "franked mail" by reference to the defined term "frank"); 7 U.S.C. § 6202(3), (4) (defining "handler" by reference to the defined term "handle"); 15 U.S.C. § 375(5), (6) (defining "delivery seller" by reference to the defined term "delivery sale"). Moreover, "Congress has often used [the] drafting technique [of] repeating a discretely defined word . . . when it intends to incorporate the definition of a particular word into the definition of a compound expression." *Burgess v. United States*, 553 U.S. 124, 130-31 (2008) (citing 15 U.S.C. § 1672(a)-(b) (defining "earnings" and then defining "disposable earnings" as "that part of the earnings" meeting certain criteria); 18 U.S.C. § 1956(c)(3)-(4) (defining "transaction" and then defining "financial transaction" as "a transaction which" meets certain criteria); § 1961(1), (5) (2000 ed. and Supp. V) (defining "racketeering activity" and then defining "pattern of racketeering activity" to require "at least two acts of racketeering activity")).

In contrast, the Third Circuit's approach of giving words the technical meaning assigned to related, but

different, words would create uncertainty over how similar in spelling, origin, and usage words must be for Congress's definition of one word to constitute a definition of another. The lack of a clear line is apparent even in the decision below. Both "personnel" and "personal" share a common root—"person." Following the Third Circuit's approach, "personnel" should be defined according to the APA's definition of "person," such that "personnel files," as used in Exemption 6, should include files on all entities within the scope of the APA's definition of person. Even the Third Circuit agreed, however, that "only individuals (and not corporations) may be the subjects" of "personnel and medical files." Pet App. A at 13a. The court provided no explanation for adopting the ordinary meaning of "personnel," but rejecting the ordinary meaning of "personal privacy."

The Third Circuit's rationale for holding that "personal" includes "corporate," and therefore that "personal privacy" includes "corporate privacy," was that "it would be very odd indeed for an adjectival form of a defined term *not* to refer back to that defined term." Pet. App. A at 11a (emphasis in original). On the contrary, it is the Third Circuit's rule that would often lead to "very odd," indeed even absurd, results. The word "person" is defined over 150 times in the U.S. Code, sometimes to include corporations, associations, and governmental entities, and sometimes not. The word "personal" is used hundreds, if not thousands of time, in statutes that define "person" to include corporations or organizations. These uses include, among many others, personal employees, 8 U.S.C. § 1101(a)(15)(A)(iii), personal safety, *id.* § 1101(a)(27)(G), personal interview, *id.* § 1186a(c)(1)(B), personal service,

id. § 1229(a)(1), personal care, *id.* § 1231(f), personal possession, *id.* § 1304(e), personal property, *id.* § 1353, personal contact information, *id.* § 1375a(d)(1), personal injury, 15 U.S.C. § 1193(a), personal responsibility contract, 42 U.S.C. § 603(a)(5)(C)(iii)(III), personal identifiers, *id.* § 653(j)(5), personal and emotional support, *id.* § 677(4), personal medical records, *id.* § 1320a-4(c), personal effects, *id.* § 1382b(a)(2)(A), personal funds, *id.* § 1395i-3(c)(1)(B), personal comfort items, *id.* § 1395y(a)(6), and personal hygiene, *id.* § 1396b(q)(4)(B)(ii).

Interpreting "personal" according to a statutory definition of the term "person" would be harmless, albeit ridiculous, with respect to many of these provisions. In other cases, however, such an interpretation would clearly undermine congressional intent. For example, person is defined as including corporations or organizations in many statutory provisions that refer to "personal injury." *See, e.g.*, 8 U.S.C. § 1101(b)(3); 15 U.S.C. § 1261(e); 33 U.S.C. § 1321(a)(7). Under the Third Circuit's analysis, "personal injury" in these sections would include injury to corporations or organizations. It is extremely unlikely, however, that when Congress defined a "serious criminal offense" in 8 U.S.C. § 1101(h)(3) to include reckless driving that "involves personal injury to another," it intended to include reckless driving that injures an organization. Or that, in defining a "hazardous substance" in 15 U.S.C. § 1261(f)(1)(A) to include a substance that, along with other criteria, "may cause substantial personal injury or substantial illness" as a result of its forseeable use, it intended to include substances that may injure corporations. Or that, in allowing a person to be liable for damages for "personal injury or wrongful death" that

results from certain actions relating to oil discharges in 33 U.S.C. § 1321(c)(4)(B)(iii), Congress intended "personal injury" to refer to all injuries to individuals, firms, corporations, associations, and partnerships.

Similarly, the term "personal property" has the accepted legal meaning of "[a]ny movable or intangible thing that is subject to ownership and not classified as real property." *Black's Law Dictionary* 1337 (9th ed. 2009). Several statutes that define "person" also refer to "personal property." *See, e.g.*, 8 U.S.C. §§ 1101(b)(3) (defining "person"), 1353 (referring to "personal property"), 1375c(b)(2)(C) (same); 42 U.S.C. §§ 1301(a)(3) (defining "person"); 411(a)(1) (referring to "personal property"), 416(h)(1)(a)(ii) (same), 666(4)(A) (same), 1396p(b)(4)(A), (B) (same); 42 U.S.C. § 6903(15) (defining "person"); 6903(16) (referring to "personal property"). Under the Third Circuit's rule that the definition of "personal" is tied to the statutory definition of "person," the term "personal property" in each of these statutes would mean all the property belonging to any "person," which would include real property. Such a reading runs counter to the accepted meaning of "personal property" and would render statutory language superfluous in the many instances in which a provision references both real and personal property. *See, e.g.*, 42 U.S.C. § 666(4)(A), *id.* § 1396p(4)(A), *id.* § 6903(16).

As the definition of "person" in the APA demonstrates, Congress knew how to define words to include corporations or corporate interests when it wanted to do so. Congress did not do so with respect to "personal" or "personal privacy." This Court need not break new ground to reject the Third Circuit's rule of statutory

interpretation. It need only apply the longstanding rule that unless expressly defined otherwise, "words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979).

II. In FOIA, "Personal Privacy" Carries Its Ordinary Meaning, Referring Solely to Human Interests.

FOIA's legislative history, the role of Exemption 7(C) in the context of the statute as a whole, and the purposes of both Exemption 7(C) and FOIA overall all confirm that "personal privacy" in Exemption 7(C) carries its ordinary, natural meaning.

A. Exemption 6 and FOIA's Legislative History Demonstrate that Congress Intended "Personal Privacy" to Refer Solely to the Privacy of Individuals.

As explained above, the plain meaning of "personal privacy" is limited to the privacy of individuals. To the extent any doubt remains about the meaning of the term in Exemption 7(C), however, FOIA's legislative history confirms that "personal privacy" in 7(C) refers solely to the privacy of human beings.

1. FOIA's legislative history demonstrates that Congress intended Exemption 7(C) to incorporate the privacy interests addressed in Exemption 6, which are limited to individual privacy interests.[4]

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[4]This Court has often looked to legislative history in interpreting FOIA. *See, e.g.*, *FBI v. Abramson*, 456 U.S. 615, (continued...)

When FOIA was enacted in 1966, the only exemption to mention personal privacy was Exemption 6, which protects from mandatory disclosure "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 legislative history of Exemption 6 makes clear that, in crafting an exemption that protects "personal privacy," Congress was concerned about *individuals*' privacy interests. The House Report states that the exemption was "intended to cover detailed Government records on an individual which can be identified as applying to that individual." H.R. Rep. No. 1497, at 11; *see also Wash. Post*, 456 U.S. at 599 ("The House Report explains that the exemption . . . seeks to protect individuals."). Likewise, the Senate Report provides that "[t]he phrase '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." S. Rep. No. 813, at 9. And in discussing the types of records that the exemption would protect, both the House and Senate Reports mention the Veterans' Administration, the Department of Health, Education, and Welfare, and the Selective Service—agencies whose files "contain[] intimate details about millions of citizens." H.R. Rep. No. 1497, at 11.

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[4](...continued)
626-31 (1982) ; *NLRB v. Robbins Tire & Rubber* Co., 437 U.S. at 224-36; *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 599-602 (1982) ; *Rose*, 425 U.S. at 360-82.

Thus, in enacting Exemption 6, "Congress sought to construct an exemption that would require a balancing of the *individual*'s right of privacy against the preservation of the basic purpose of [FOIA]." *Rose*, 425 U.S. at 372 (emphasis added). Accordingly, "the text of the exemption 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.'" *Ray*, 502 U.S. at 175 (quoting *Rose*, 425 U.S. at 372).

The Third Circuit stated that if Exemption 6 protects only individual privacy, it is because of Exemption 6's threshold limitation to "personnel and medical files and similar files," not because of its reference to "personal privacy." Pet App. A at 13a. Both the House and Senate Reports, however, tie Exemption 6's focus on the individual to the "clearly unwarranted invasion of personal privacy" language. As the House Report explains, "[t]he limitation of a 'clearly unwarranted invasion of personal privacy' . . . exclud[es] those kinds of files the disclosure of which might harm the individual." H.R. Rep. No. 1497, at 11; *see also* S. Rep. No. 813, at 9 ("The phrase '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 public's right to governmental information."). This Court has read Exemption 6 in a similar fashion. *See Rose*, 425 U.S. at 372 (noting that the "device adopted to achieve that balance" "of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act" "was the limited exemption, where privacy was threatened, for 'clearly unwarranted' invasions of personal privacy"); *id.* at

384-85 (Burger, J., dissenting) (noting Congress's "definition of a 'clearly unwarranted invasion of personal privacy' as equated with 'protect(ing) an individual's private affairs from unnecessary public scrutiny'" (emphasis removed) (quoting S. Rep. No. 813, at 9)).

In any event, particularly given the threshold language—which this Court has interpreted to include all "information which applies to a particular individual," because "[t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual," *Wash. Post*, 456 U.S. at 602 (quoting H.R. Rep. No. 1497, at 11)—it is beyond question that Exemption 6 was intended to protect the privacy of human beings only. And cases from the years between FOIA's enactment and the enactment of Exemption 7(C) in 1974 equated the term "personal privacy" in Exemption 6 with "individual privacy." *See, e.g.*, *Getman v. NLRB*, 450 F.2d 670, 674, 675 (D.C. Cir. 1971) (explaining that "Exemption (6) requires a court reviewing the matter de novo to balance the right of privacy of affected individuals against the right of the public to be informed," and that "the real thrust of Exemption (6) is to guard against unnecessary disclosure of files . . . which would contain 'intimate details' of a 'highly personal' nature") (citations omitted); *Wine Hobby USA, Inc. v. U.S. Internal Revenue Serv.*, 502 F.2d 133, 136 (3d Cir. 1974) (agreeing that "'Exemption (6) necessarily requires the court to balance a public interest purpose for disclosure of personal information against the potential invasion of individual privacy'" (quoting *Getman*, 450 F.2d at 677 n.24)).

In 1974, in response to D.C. Circuit cases that had broadly interpreted Exemption 7, Congress amended the exemption to remove from its scope investigatory records the disclosure of which would not cause any harm. *See FBI v. Abramson*, 456 U.S. at 621-22 (explaining that the exemption "underwent a major revision in 1974" because some courts had interpreted the prior version as "permitt[ing] the unlimited withholding of files merely by classifying them as investigatory files compiled for law enforcement purposes"). At that time, Congress imported Exemption 6's "unwarranted invasion of personal privacy" language into Exemption 7(C).

In incorporating Exemption 6's language, Congress sought to extend Exemption 6's protections for individual privacy into the context of investigative records. As Senator Hart explained in introducing the amendment to Exemption 7 on the Senate floor, "the protection for personal privacy [in 7(C)] . . . is a part of the sixth exemption in the present law." 120 Cong. Rec. 17033 (May 30, 1974) (Statement of Sen. Hart). "By 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." *Id.*; *see also id.* at 17040 (memorandum letter from Sen. Hart) (explaining in a letter on the amendments to Exemption 7 that whether "disclosure is an unwarranted invasion of personal privacy . . . is a determination courts make all the time; indeed the sixth exemption in the Act presently involves just such a task"). Accordingly, this Court has looked to its case law on Exemption 6 in interpreting Exemption 7(C). *See Reporters Comm.*, 489 U.S. at 768 (explaining that although *Department of Air Force v. Rose*

dealt with Exemption 6, "much of our discussion in *Rose* is applicable here"); *see also, e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) ("[I]dentical words used in different parts of the same statute are generally presumed to have the same meaning.").

As originally proposed, Exemption 7(C), like Exemption 6, would have required a "clearly unwarranted" invasion of personal privacy to justify withholding records. President Ford, however, expressed concern "that an individual's right to privacy would not be appropriately protected by requiring the disclosure of information contained in an investigatory file about him unless the invasion of individual privacy is *clearly unwarranted*." Letter from Gerald R. Ford to Edward M. Kennedy, Aug. 20, 1974, *reprinted at* 120 Cong. Rec. 34162-34163 (Oct. 7, 1974) (emphasis in original); *see also id.* ("I believe now is the time to preclude the Freedom of Information Act from disclosing information harmful to the privacy of individuals."). In response to President Ford's concern for the "privacy of individuals," the conference committee on the amendments removed the word "clearly" from Exemption 7(C). Letter from Edward S. Kennedy and William S. Moorhead to Gerald R. Ford, Sept. 23, 1974, *reprinted at* 120 Cong. Rec. 34163-34164 (Oct. 7, 1974). Thus, Exemption 7(C) is more protective of the "personal privacy" interests it covers than is Exemption 6. If Exemption 7(C) were interpreted to protect corporate interests, corporations would be given broader protections during the consideration of whether to release law enforcement records than individuals are given during the consideration of whether to release their medical files.

That can hardly be what Congress intended in responding to President Ford's concerns about individual privacy.

2. The examples that members of Congress used to explain the need to amend Exemption 7 demonstrate that the amendment was intended to ensure that investigatory records concerning whether companies complied with legal requirements would be publicly available, not to protect companies from embarrassment or reputational harm due to the release of such records. In introducing the amendment on the Senate floor, Senator Hart explained that he and the 14 other original co-sponsors of the amendment were introducing it out of concern that "under the interpretation by the courts in recent cases" "such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption." 120 Cong. Rec. 17033 (May 30, 1974) (Statement of Sen. Hart); *see also* 120 Cong. Rec. 36878 (Nov. 21, 1974) (Statement of Sen. Bayh) (noting loophole in law enforcement exemption that "came to be interpreted as including such things as meat inspection reports, reports concerning safety in factories, correspondence between the National Highway Traffic Safety Administration and the automobile manufacturers concerning safety defects, and reports on safety and medical care in nursing homes receiving federal funds").

Similarly, Representative Reid explained on the House floor that "one can easily see the need for plugging the loophole in the old law," "[w]hen one considers that in the past the law enforcement exemption has been construed by agencies to preclude access to meat inspection reports, OSHA safety reports, airline safety analyses and reports

on medical care in federally supported nursing homes." 120 Cong. Rec. 36626 (Nov. 20, 1974). Indeed, one of the cases that the 1974 amendments was specifically intended to overturn, *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974), denied access to correspondence concerning "safety defect investigations" between automobile manufacturers and the agency that regulated them because they were contained in investigatory files compiled for law enforcement purposes. *Id.* at 1074; *see FBI v. Abramson*, 456 U.S. at 627 & n.11 (explaining that the amendments to Exemption 7 were in reaction to a line of D.C. Circuit cases including *Ditlow*). Interpreting Exemption 7(C) to protect corporate interests would defeat Congress's purpose of providing public access to records concerning investigations into corporate compliance with the law.

3. In addition to mentioning "personal privacy" in Exemptions 6 and 7(C), FOIA includes language about personal privacy in Section 552(a)(2). That section provides that "[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or [records likely to be requested again]." 5 U.S.C. § 552(a)(2). The legislative history of that provision, like that of Exemption 6, shows that Congress's focus was on individuals, not corporations. *See* H.R. Rep. No. 1497, at 8 (explaining that the provision "solves the conflict between the requirement for public access . . . and the need to protect individual privacy," by "permit[ting] an agency to delete personal identifications from its public records 'to prevent a clearly unwarranted invasion of personal privacy'"); S. Rep. No. 813, at 7 (noting that the

provision "balance[s] the public's right to know with the private citizen's right to be secure in his personal affairs"). And this Court has likewise interpreted that provision to protect *individual* privacy. *See Reporters Comm.*, 489 U.S. at 756 n.7 (explaining, in case on scope of Exemption 7(C), that "Congress employed similar language earlier in the statute to authorize an agency to delete identifying details that might otherwise offend an individual's privacy").

As part of the debate over another aspect of the 1974 amendments, Senator Dole entered into the record the full opinion in *Washington Research Project v. Department of Health, Education, and Welfare*, 366 F. Supp. 929 (D.D.C. 1973), *aff'd in part on other grounds*, 504 F.2d 238 (D.C. Cir. 1974), in which the court explained that Section 552(a)(2)'s "personal privacy" language does not apply to corporate interests. Citing the "personal privacy" language, the court stated that "the defendants may only delete that minimum amount of information necessary to conceal the identity of those individuals whose privacy is threatened." *Id.* at 937. "Nor may the identity of an institutional applicant be concealed," the court continued, "because the right of privacy envisioned in the Act is personal and cannot be claimed by a corporation or association." *Id.* at 937-38 (citing K. Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 781, 799 (1967)).

4. In 1986, Congress further amended Exemption 7(C) to make it even more protective of the privacy interests it covers. *See* Freedom of Information Reform Act, Pub. L. No. 99-570, § 1802, 100 Stat. 3207 (1986). Whereas the exemption originally applied to records the release of

which would "constitute an unwarranted invasion of personal privacy," it now applies to records the release of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In addition, Congress amended Exemption 7's threshold language, changing "investigatory records compiled for law enforcement purposes" to "records or information compiled for law enforcement purposes." *Id.* When the language was amended in 1986, Exemption 7(C) was already understood to cover only individual interests. *See, e.g.,* U.S. Dep't of Justice, *FOIA Update*, Vol. III, No. 4, at 5 (May 1982) ("It is well settled that the FOIA's privacy exemptions provide personal privacy protection and cannot be invoked to protect the interests of a corporation or association."); U.S. Dep't of Justice, *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9 (February 1975) ("The phrase 'personal privacy' pertains to the privacy interests of individuals. [It] does not seem applicable to corporations or other entities."); *cf. Cohen v. EPA*, 575 F. Supp. 425, 429 (D.D.C. 1983) ("[Exemption 7(C)'s] privacy exemption does not apply to information regarding professional or business activities."). Nonetheless, Congress maintained Exemption 7(C)'s "unwarranted invasion of personal privacy" language, even as it amended other parts of the Exemption.

B. Exemption 4 Supports Reading Exemption 7(C) to Apply Only to Individuals.

Reading Exemption 7(C) in the context of FOIA's other exemptions further supports interpreting "personal privacy" in Exemption 7(C) to apply only to the privacy of human beings. FOIA Exemption 4 exempts from

disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This provision, which unquestionably applies to corporations because it uses the defined term "person," provides the protection that Congress considered appropriate for corporate confidentiality interests, which are inherently "commercial" rather than "personal." And, indeed, the FCC invoked Exemption 4 in withholding certain AT&T documents. Pet. App. B at 21a.

Exemption 4 reflects Congress's careful balance of business confidentiality and public disclosure. The exemption protects "persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767-68 (D.C. Cir. 1974). But the harm against which Exemption 4 protects is only that which "flow[s] from the affirmative use of proprietary information *by competitors*," not any harm that might arise from bad publicity. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1291 n. 30 (D.C. Cir. 1983) (citation omitted) (emphasis in original). The exemption does not shield companies from "mere embarrassment in the marketplace or reputational injury." *United Techs. Corp. v. U.S. Dep't of Defense*, 601 F.3d 557, 564 (D.C. Cir. 2010).

Viewed together, it is clear that Exemption 4 is the means through which FOIA protects business interests, while Exemptions 6 and 7(C) are the means through which FOIA protects individual interests. This Court should not upset the balance Congress struck between business confidentiality and the need for public disclosure by

shoehorning protection for corporate interests into the exemptions used to protect individual interests.

C. Expanding the Scope of Exemption 7(C) Would Undermine FOIA's Purposes and Would Not Further the Purposes of Exemption 7(C).

1. Interpreting "personal privacy" to include corporate interests would not promote the interests protected by Exemption 7(C). In describing the interests protected by FOIA's personal privacy exemptions, this Court has focused on interests unique to human beings. In *Rose*, the Court considered the dishonor associated with being identified in honor-code hearing summaries. 425 U.S. 352. In *Ray*, the Court expressed concern that releasing identifying information from interviews with Haitians who had illegally entered the United States and been involuntarily returned to Haiti would make public "highly personal information regarding marital and employment status, children, living conditions and attempts to enter the United States," and might subject the interviewees and their families to "embarrassment" and "the danger of mistreatment." 502 U.S. at 175, 176 & n.12. In *Reporters Committee*, the Court emphasized individuals' right to control personal information about themselves, a right rooted in human dignity and autonomy. 489 U.S. at 762-63. In *United States Department of Defense v. Federal Labor Relations Authority*, the Court discussed the special privacy of the home and how "people simply do not want to be disturbed at home by work-related matters." 510 U.S. 487, 501 (1994). And in *Favish*, the Court protected family members' personal privacy interests in a relative's death scene photographs, the release of which would disturb their "peace of mind and tranquility." 541 U.S. at

166, 170. The personal privacy interests this Court has held protected by FOIA are not shared by corporations.

In support of its conclusion that corporations have "personal privacy" interests, the Third Circuit stated that "[c]orporations, like human beings, face public embarrassment, harassment, and stigma" because of their involvement in law enforcement investigations, and that "a corporation . . . has a strong interest in protecting its reputation." Pet. App. A at 14a. Corporations, however, are incapable of feeling "embarrassed," "harassed," or "stigmatized" due to their involvement in law enforcement investigations, because corporations do not feel at all. The court of appeals also noted that "a corporation . . . has a strong interest in protecting its reputation."*Id.* at 15a. It analogized that interest to "'intimate' details" of human life, "including 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation." *Id.* at 15a (quoting *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988)). But a corporation's interest in protecting its reputation is far different from the interests this Court has protected under Exemptions 6 and 7(C). Corporations do not seek to protect their reputations out of embarrassment or fears of dishonor or threats to their physical safety (none of which they are capable of feeling), but out of interest in their bottom lines.

The Third Circuit also concluded that according corporations personal privacy rights would serve Exemption 7(C)'s "purpose of providing broad protection to entities involved in law enforcement investigations in order to encourage cooperation with federal regulators."

Pet. App. A at 14a. The 1974 amendment to Exemption 7, however, demonstrates that Congress did not intend to exempt from disclosure all records in law enforcement files in order to give broad protection to investigated entities. Furthermore, Exemption 7 has other subparagraphs designed to ensure cooperation by sources Congress feared might not otherwise cooperate. *See, e.g*, 5 U.S.C. § 552(b)(7)(D) (exempting law enforcement records that "could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis"); *see also FBI v. Abramson*, 456 U.S. at 630 (indicating that Exemption 7's other subparagraphs, rather than 7(C), "compensate for the potential disruption in the flow of information to law enforcement agencies by individuals who might be deterred from speaking because of the prospect of disclosure").

Moreover, from the time of Exemption 7(C)'s enactment until the decision below, "personal privacy" was widely and consistently interpreted to include only individual human interests, but the FCC was able to obtain the records at issue in this case. And, notably, the government—the petitioner here—does not agree that an expanded interpretation of Exemption 7(C) is needed to assist its law enforcement efforts.

2. Interpreting "personal privacy" to include corporate interests would undermine FOIA and its government accountability goals. In enacting FOIA, Congress sought "to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 372 (citation omitted). The purpose of FOIA is "to ensure an informed citizenry, vital to the

functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 242. Adopting the lower courts interpretation of "personal privacy," however, would remove a wide swath of records that are directly related to this goal, and that have historically been released, from the "light of public scrutiny."

Records relating to agency investigations of suspected corporate wrongdoing go directly to the heart of FOIA's accountability goals. They shed light on how the agency interacts with members of the industry it regulates, how it responds to wrongdoing by regulated entities, and whether it treats regulated corporations equally and fairly. Under the court of appeals' definition of "personal privacy," however, these records may be exempt from disclosure whenever they would "embarrass" a company. The examples Senator Hart provided when he introduced the amendment that added Exemption 7(C) to FOIA demonstrate the problem. Senator Hart explained that he was introducing the amendment out of "fear that such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption." 120 Cong. Rec. 17033 (May 30, 1974) (Statement of Sen. Hart). If corporations have protected "personal privacy" interests under Exemption 7(C), however, unsanitary meat processing plants, companies that discriminate, and abusive or fraudulent nursing homes will all be able to claim that releasing records about their wrongdoing would "embarrass" them and invade their personal privacy. The public thereby would be denied

information both about those practices themselves and about how the government responded to them.

For information to be exempt under Exemption 7(C), the privacy interest must outweigh the public interest, and not all law enforcement records involving corporations will be exempt under that balancing. However, once a personal privacy interest is asserted under the exemption, it can be difficult to defeat. This Court has stated that, for an invasion of privacy not to be unwarranted, "the citizen must show that the public interest sought to be advanced is a significant one" and that the requested "information is likely to advance that interest." *Favish*, 541 U.S. at 172. And lower courts have sometimes articulated extremely narrow notions of what can be included on the public interest side of the balancing test. In *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991), for example, the D.C. Circuit stated that, to overcome a privacy interest in names and addresses of individuals under Exemption 7(C), a requester must present "compelling evidence" that the agency is engaged in illegal activity. Were such a rule applied to the identities of regulated corporations, the public would not be able to obtain records about government investigations into corporate wrongdoing unless the requester *already* had compelling evidence of agency wrongdoing. Removing the ability to determine whether agencies fairly investigate the industries they regulate is not what Congress had in mind when it amended Exemption 7 specifically to clarify that investigative files are not automatically exempt from disclosure.

The records at issue in this case illustrate the importance of access to investigative records to holding the

agency accountable in the performance of its regulatory duties. For many years, the FCC Inspector General has reported that the E-Rate program, which distributes up to $2.25 billion per year, 47 C.F.R. § 54.507(a), has been a target for waste, fraud and abuse.[5] The FCC's management of the E-Rate fund has likewise been subject to criticism by both the Government Accountability Office and Congress.[6] AT&T has been sued for violations of the False Claims Act in connection with its billing and receipt of E-Rate Funds, paying more than $8.2 million to settle charges in Indiana and $1.4 million to settle charges in Missouri.[7] Although the FCC has debarred other vendors from participation in the E-Rate program,[8] the FCC

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[5]*See, e.g.*, FCC Office of Inspector General Semiannual Report to Congress, October 1, 2009 through March 31, 2010 at 23 ("The E-Rate Program has been a prime target for fraud[.]"), available at http://www.fcc.gov/oig/oigreportssemiannual.html.

[6]*See, e.g.*, U.S. Government Accountability Office, *Concerns Regarding the Structure and FCC's Management of the E-Rate Program*, Statement of Mark L. Goldstein, Director, Physical Infrastructure Issues, GAO-05-439T (Mar. 16, 2005); U.S. Congress, House, Committee on Energy and Commerce, *Waste, Fraud, and Abuse Concerns in the E-Rate Program*, 109th Cong., 1st Sess., Committee Print 109-E (2005).

[7]*See* FCC Office of Inspector General Semiannual Report to Congress, October 1, 2008 through March 31, 2009 at 57; FCC Office of Inspector General Semiannual Report to Congress, October 1, 2009 through March 31, 2010 at 30.

[8]The FCC's rules require the FCC to debar or suspend an individual or corporation found civilly or criminally liable for, *inter*

(continued...)

Enforcement Bureau terminated its investigation into AT&T with a Consent Decree. Interpreting the "personal privacy" language of Exemption 7(C) to protect the Enforcement Bureau file from disclosure would shield from public view important information about how the FCC has managed and operated the E-Rate program.

This Court has noted that "Congress gave special consideration to the language in Exemption 7(C)." *Favish*, 541 U.S. at 166. The plain meaning of "personal privacy," FOIA's legislative history, Exemption 4, and the purposes of FOIA and its personal privacy exemptions all demonstrate that "personal privacy" in Exemption 7(C) refers only to the privacy interests of human beings. This Court should not upset the balance Congress chose between protecting individual privacy and opening investigative records to public scrutiny by extending Exemption 7(C)'s "personal privacy" protections to corporations.

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[8](...continued)
alia, making false claims related to activities associated with the E-Rate program. 47 C.F.R. § 54.8.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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