No. 09-1279

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

AT&T INC., ET AL.,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT AT&T INC.

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QUESTION PRESENTED

Whether the court of appeals properly granted the petition for review and remanded the matter to the Federal Communications Commission ("FCC") for further proceedings, where the FCC had concluded that corporations are categorically excluded from the protections of Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), which prevents unwarranted invasions of "personal privacy," and where the statute defines the root word "person" to include "corporation[s]," *id.* § 551(2).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent AT&T Inc. states the following:

AT&T Inc. is a publicly held company that has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 11

I. THIS COURT'S REVIEW OF THE COURT OF APPEALS' INTERPRETATION OF EXEMPTION 7(C) IS UNWARRANTED 12

A. There Is No Division of Authority Warranting This Court's Intervention 12

B. The Government's Claim of Adverse Consequences Is Speculative and Insubstantial 18

C. The Interlocutory Posture of This Case Makes This Court's Review Particularly Inappropriate at This Time 20

II. THE COURT OF APPEALS CORRECTLY INTERPRETED THE STATUTE 22

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) 27

Bast v. United States Dep't of Justice, 665 F.2d 1251 (D.C. Cir. 1981) 24

Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327 (1967) 21

CompTel v. FCC, No. 1:06-cv-01718-HHK (D.D.C. Mar. 5, 2008) 6

Computer Prof'ls for Soc. Responsibility v. United States Secret Serv., 72 F.3d 897 (D.C. Cir. 1996) 19

Consolidated Edison Co. v. Pataki, 292 F.3d 338 (2d Cir. 2002) 28, 29

County of Santa Clara v. Southern Pac. R.R. Co., 118 U.S. 394 (1886) 29

Davin v. United States Dep't of Justice, 60 F.3d 1043 (3d Cir. 1995) 2, 24

Dow Chem. Co. v. United States, 476 U.S. 227 (1986) 28

FBI v. Abramson, 456 U.S. 615 (1982) 2, 31

First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) 29

FLRA v. United States Dep't of Veterans Affairs, 958 F.2d 503 (2d Cir. 1992) 17

Forest Serv. Employees for Envtl. Ethics v. United States Forest Serv., 524 F.3d 1021 (9th Cir. 2008) 17

G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) 28

Grosjean v. American Press Co., 297 U.S. 233 (1936) 27

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 21

Horowitz v. Peace Corps, 428 F.3d 271 (D.C. Cir. 2005) 17

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 22

Judicial Watch, Inc. v. FDA, 449 F.3d 141 (D.C. Cir. 2006).....14, 15, 16, 18, 30

Keene Corp. v. United States, 508 U.S. 200 (1993) 23

Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26 (1889) 29

Multi Ag Media LLC v. Department of Agric., 515 F.3d 1224 (D.C. Cir. 2008) 15, 16

National Archives & Records Admin. v. Favish, 541 U.S. 157 (2004)..... 27

National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976) 16

Sims v. CIA, 642 F.2d 562 (D.C. Cir. 1980) 16

St. Michael's Convalescent Hosp. v. California, 643 F.2d 1369 (9th Cir. 1981) 23-24

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 29

United States v. Mendoza, 464 U.S. 154 (1984) 20, 22

United States v. Morton Salt Co., 338 U.S. 632 (1950) 28

United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) 1, 2, 9, 24, 28

Washington Post Co. v. United States Dep't of Justice, 863 F.2d 96 (D.C. Cir. 1988) 13, 14

ADMINISTRATIVE DECISIONS

Consent Decree, *SBC Communications Inc.*, 19 FCC Rcd 24015 (2004) 3, 4

Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, 20 FCC Rcd 11308 (2005)..... 3

Order, *SBC Communications Inc.*, 19 FCC Rcd 24014 (Enf. Bur. 2004) 4

Second Report and Order and Further Notice of Proposed Rulemaking, *Schools and Libraries Universal Service Support Mechanism*, 18 FCC Rcd 9202 (2003)..... 3

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const.:

Art. I, § 9, cl. 3 (Bill of Attainder Clause)..... 29

Amend. I..... 29

Amend. IV 28, 29

Amend. V 27, 28, 29
Double Jeopardy Clause 29
Due Process Clause 29
Amend. XIV 27
Due Process Clause 29
Equal Protection Clause 29
Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* 1, 2
5 U.S.C. § 551(2) 2, 8, 12, 22, 26
Communications Act of 1934, 47 U.S.C. § 151 *et seq.* 7
47 U.S.C. § 402(a) 7
Freedom of Information Act, 5 U.S.C. § 552 .....*passim*
5 U.S.C. § 552(a)(2)..... 30
5 U.S.C. § 552(a)(3)..... 1
5 U.S.C. § 552(a)(3)(A)..... 1
5 U.S.C. § 552(a)(6)(A)(i) 6
5 U.S.C. § 552(a)(6)(C)(i) 6
5 U.S.C. § 552(b) 1
5 U.S.C. § 552(b)(4) (Exemption 4) 5
5 U.S.C. § 552(b)(6) (Exemption 6) 8, 14, 15, 16, 17, 18, 29, 30, 31
5 U.S.C. § 552(b)(7)(C) (Exemption 7(C)) ... *passim*
5 U.S.C. § 552(b)(7)(F) (Exemption 7(F))..... 8, 23
5 U.S.C. § 552(e) 24

Privacy Act of 1974, 5 U.S.C. § 552a.....23, 24
5 U.S.C. § 552a(a)(1)..... 24
5 U.S.C. § 552a(a)(2).....23, 24
28 U.S.C. § 1391(c)..... 27
28 U.S.C. § 2342(1) 7
47 C.F.R.:
§ 0.457.....10, 20
§ 0.457(g)(3) 3, 5, 20
§ 0.459..... 10
§ 0.459(a)(1) 10
§ 0.461..... 20
§§ 54.500-54.523 3
§§ 54.701-54.702 3

OTHER MATERIALS

Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & Econ. 489 (1999) 25

Richard A. Bierschbach & Alex Stein, *Over-enforcement*, 93 Geo. L.J. 1743 (2005) 25

Brief for the Federal Energy Regulatory Commission in Opp., *Coral Power, L.L.C. v. California ex rel. Brown*, Nos. 06-888 & 06-1100 (U.S. filed Apr. 25, 2007)..... 21

Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. Legal Stud. 319 (1996) 25

U.S. Dep't of Justice:

Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (Feb. 1975) 31

Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967).....30, 31

Webster's New International Dictionary (2d ed. 1950).....22, 27

Webster's Third New International Dictionary (2002) 22, 27

STATEMENT OF THE CASE

On April 4, 2005, respondent CompTel – a trade association representing competitors of respondent AT&T Inc. – submitted a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(3), seeking documents that AT&T submitted to petitioner the Federal Communications Commission ("FCC" or "Commission") as part of a confidential FCC investigation. *See* C.A. App. A27. Upon receiving notice of CompTel's request, AT&T submitted a letter opposing that request on the ground that the AT&T documents included in the FCC's internal file were protected from mandatory disclosure by FOIA's law-enforcement exemption, Exemption 7(C), 5 U.S.C. § 552(b)(7)(C). *See* C.A. App. A28-A36. On August 5, 2005, the FCC's Enforcement Bureau ruled that AT&T, as a corporation, is not entitled to invoke Exemption 7(C). *See* Pet. App. 34a-44a. On September 12, 2008, the FCC released an order denying AT&T's application for review of the Enforcement Bureau's order. *See id.* at 19a-33a. On September 22, 2009, the court of appeals granted AT&T's petition for review of the FCC's order and remanded the case to the FCC for further proceedings. *See id.* at 1a-18a.

1. Enacted as an amendment to the Administrative Procedure Act ("APA") in 1966, the statute known as FOIA generally requires a federal agency such as the FCC to disclose records upon request, unless a statutory exemption applies. *See* 5 U.S.C. § 552(a)(3)(A) (general disclosure requirement); *id.* § 552(b) (exemptions). FOIA "was designed to create a broad right of access to official information" – that is, information "that sheds light on an agency's performance of its statutory duties." *United States Dep't of Justice v. Reporters Comm. for Freedom of the*

Press, 489 U.S. 749, 772-73 (1989) (internal quotation marks omitted). As this Court explained in *Reporters Committee*, that congressional purpose "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Id.* at 773.

One of FOIA's exemptions from mandatory disclosure – Exemption 7(C) – provides that FOIA "does not apply to matters that are . . . records or information compiled for law enforcement purposes, . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The APA, which FOIA amended, defines "person" – the noun form of the term "personal" in Exemption 7(C) – to include "an individual, partnership, corporation, association, or public or private organization other than an agency." *Id.* § 551(2). Exemption 7(C) reflects Congress's judgment that "[s]uspects, interviewees and witnesses" in law-enforcement investigations "have a privacy interest because disclosure may result in embarrassment or harassment." *Davin v. United States Dep't of Justice*, 60 F.3d 1043, 1058 (3d Cir. 1995). Exemption 7(C) also guards against the "potential disruption in the flow of information to law enforcement agencies" caused by a fear "of the prospect of disclosure." *FBI v. Abramson*, 456 U.S. 615, 630 (1982); *see* Pet. App. 14a n.5.

FOIA itself does not prohibit an agency from disclosing records to which an exemption from mandatory disclosure applies. However, the FCC has promulgated a regulation prohibiting it from disclosing material that belongs to a third party and is

otherwise covered by Exemption 7(C). *See* 47 C.F.R. § 0.457(g)(3); Pet. App. 7a n.2.

2.a. In August 2004, AT&T voluntarily and confidentially informed the FCC of concerns regarding certain invoices related to the FCC "E-Rate" program. *See* Pet. App. 2a-3a. The E-Rate program is the universal service mechanism designed to assist schools and libraries in gaining access to affordable telecommunications services and Internet access. *See id.* at 2a.[1] In its disclosure to the FCC, AT&T explained that its Connecticut subsidiary, Southern New England Telephone Company, had submitted arguably improper invoices to the universal service fund administrator relating to certain services provided to the New London, Connecticut school district. *See id.* at 2a-3a.[2] AT&T refunded to the universal service fund administrator all amounts collected pursuant to the questionable invoices, and it cancelled outstanding invoices that raised similar concerns. *See* Consent Decree, *SBC Communications Inc.*, 19 FCC Rcd 24015, ¶ 3 (2004) ("Consent Decree").

In response to AT&T's voluntary disclosure, the FCC's Enforcement Bureau conducted an investigation. *See* Pet. App. 3a. In the course of the Enforce-

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[1] *See* 47 C.F.R. §§ 54.500-54.523; Second Report and Order and Further Notice of Proposed Rulemaking, *Schools and Libraries Universal Service Support Mechanism*, 18 FCC Rcd 9202, ¶¶ 1-90 (2003) (describing E-Rate).

[2] The universal service fund administrator is an independent, not-for-profit corporation that administers the federal universal service fund on behalf of the FCC. *See* Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, 20 FCC Rcd 11308, ¶ 4 (2005); 47 C.F.R. §§ 54.701-54.702.

ment Bureau's investigation, the Bureau ordered AT&T to produce, and AT&T did produce, a wide range of documents. *See id.* Those documents included detailed written responses to the Enforcement Bureau's interrogatories; names and job descriptions of AT&T employees involved in the arguably improper billing; completed universal service fund invoice forms; internal AT&T emails (including documents attached to those emails) that provided cost, pricing, and billing information in connection with the services provided to New London public schools and that indicated how AT&T came to invoice the universal service fund for certain aspects of those services; and AT&T's written views regarding whether and the extent to which its employees had violated AT&T's Code of Business Conduct. *See id.*

In December 2004, the FCC adopted a consent decree resolving its investigation; the order and consent decree involved no admission of wrongdoing on behalf of AT&T. *See* Order, *SBC Communications Inc.*, 19 FCC Rcd 24014 (Enf. Bur. 2004). The Consent Decree, which is publicly available, states that AT&T had voluntarily informed the Enforcement Bureau that AT&T's subsidiary had invoiced the universal service fund administrator (i) "in one funding year for services provided in another"; (ii) "for services it provided to certain schools and other entities for which it had not sought and obtained authorization"; and (iii) "for services that are not eligible for [universal service fund] support." Consent Decree ¶ 3.

b. On April 4, 2005, CompTel submitted a one-sentence FOIA request demanding the contents of the Enforcement Bureau's investigative file. *See* C.A. App. A27 (Email from Mary C. Albert, CompTel, to FOIA FCC (Apr. 4, 2005)). CompTel did not reveal –

either in its FOIA request or thereafter – why it sought the contents of the Bureau's file.

On May 27, 2005, three days after receiving notice of CompTel's request, AT&T submitted a letter opposing disclosure. *See id.* at A28-A36 (Letter from Jim Lamoureux, SBC Services, Inc., to Judy Lancaster, Enforcement Bureau, FCC, FOIA Control No. 2005-333 (May 27, 2005)). AT&T explained that the internal documents that AT&T had produced to the Bureau had been "compiled for law enforcement purposes" and were protected from disclosure under FOIA Exemption 7(C) and 47 C.F.R. § 0.457(g)(3). (AT&T also explained that the documents included competitively sensitive information that was protected from disclosure under FOIA's exemption for confidential commercial information (Exemption 4), *see* 5 U.S.C. § 552(b)(4).) CompTel responded approximately one month later with a letter filing in which it disputed AT&T's claims. *See* C.A. App. A37-A40 (Letter from Mary C. Albert, CompTel, to Judy Lancaster, Enforcement Bureau, FCC, FOIA Control No. 2005-333 (June 28, 2005)).

On August 5, 2005, the Enforcement Bureau issued a letter ruling in which it rejected AT&T's reliance on Exemption 7(C). *See* Pet. App. 34a-44a. It reasoned that "businesses do not possess 'personal privacy' interests as required for application" of that exemption. *Id.* at 42a-43a. The Bureau stated that, unless AT&T filed an application for review by the full Commission, it would produce the records CompTel requested, except to the extent they revealed internal FCC communications, names and identifying information of particular AT&T employees, or what the Bureau considered to be confidential commercial information. *See id.* at 40a-44a.

c. On August 19, 2005, AT&T filed an application for review with the full Commission challenging the Enforcement Bureau's conclusion that Exemption 7(C) is categorically inapplicable to corporations. *See* C.A. App. A47-A54 (Letter from Jim Lamoureux, SBC Services, Inc., to Samuel Feder, Acting General Counsel, FCC, FOIA Control No. 2005-333 (Aug. 19, 2005)). AT&T argued that the "broad" protection afforded by Exemption 7(C) was designed to "protect parties who had been the subject of law enforcement proceedings from embarrassment, reprisal or harassment." *Id.* at A48 (internal quotation marks and alterations omitted). AT&T explained that there was no reason to exclude corporations as a rule from that "broad" protection, thereby potentially subjecting them to "the embarrassment, reprisal or harassment" associated with law-enforcement investigations. *Id.* at A52.[3]

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[3] CompTel filed its own application for review challenging the Enforcement Bureau's decision to withhold or redact certain categories of records. *See* C.A. App. A55-A60 (Letter from Mary C. Albert, CompTel, to Samuel Feder, Acting General Counsel, FCC, FOIA Control No. 2005-333 (Sept. 6, 2005)). In October 2006, when the FCC had not ruled on either party's application for review, CompTel initiated a civil action in the United States District Court for the District of Columbia seeking disclosure. *See* Compl., *CompTel v. FCC*, No. 1:06-cv-01718-HHK (D.D.C. filed Oct. 5, 2006); *see also* 5 U.S.C. § 552(a)(6)(A)(i), (C)(i) (providing that a FOIA requester will have exhausted administrative remedies if the agency does not decide an administrative appeal within 20 days). AT&T intervened and resisted disclosure, in part on the basis of its claim that the AT&T documents at issue were protected by Exemption 7(C). On March 5, 2008, the district court stayed further action pending the FCC's resolution of "AT&T's intra-agency appeal" on the applicability of Exemption 7(C). Memorandum Opinion and Order at 6, *CompTel v. FCC*, No. 1:06-cv-01718-HHK (D.D.C. Mar. 5, 2008). That stay remains in place.

On September 12, 2008, the FCC denied AT&T's application for review and ordered disclosure of AT&T's records as specified in the Enforcement Bureau's decision. *See* Pet. App. 19a-33a. The Commission explained that it "disagree[d] with [AT&T's] contention that [it] should withhold all of the documents that [AT&T] submitted in response to [the Enforcement Bureau's] letter of inquiry under Exemption 7(C)." *Id.* at 26a. That was so, the FCC said, because, as a per se matter, a corporation has no "'personal privacy' interests within the meaning of Exemption 7(C)." *Id.*[4]

3. The Third Circuit granted AT&T's petition for review and remanded the case to the FCC for further proceedings. *See* Pet. App. 1a-18a.[5] The court began its analysis by noting that the FCC's interpretation of Exemption 7(C) is not entitled to deference, because "FOIA applies government-wide, and no one agency is charged with enforcing it." *Id.* at 9a-10a. Interpreting the statute de novo, the court rejected the FCC's categorical assertion that the phrase "personal

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[4] On AT&T's motion, which the FCC did not oppose, the court of appeals granted a stay of the FCC's order pending appeal. *See* Pet. App. 5a n.1.

[5] The court of appeals first addressed, and rejected, CompTel's contention that the court lacked jurisdiction to review the FCC's order. The court noted that the courts of appeals generally have jurisdiction to review "final orders" of the FCC, 28 U.S.C. § 2342(1), that are issued "under" the Communications Act of 1934, 47 U.S.C. § 402(a). *See* Pet. App. 6a. Because the FCC order under review "adjudicated AT&T's claim that disclosure of the information collected by the FCC concerning the E-Rate program in New London would violate FCC regulations implementing Exemption 7(C)," the FCC's order "constituted an order 'under' the Communications Act within the meaning of" those jurisdictional statutes. *Id.* at 7a-8a.

privacy" in Exemption 7(C) excludes corporations. The court explained that FOIA's plain text compels the conclusion that corporations can have "personal privacy" under Exemption 7(C), because "'personal' is the adjectival form of 'person,' and FOIA defines 'person' to include a corporation." *Id.* at 11a; *see* 5 U.S.C. § 551(2). It further noted that another FOIA exemption – Exemption 7(F) – protects information that "could reasonably be expected to endanger the life or physical safety of any *individual*," 5 U.S.C. § 552(b)(7)(F) (emphasis added), demonstrating that "Congress knew how to refer solely to human beings (to the exclusion of corporations and other legal entities) when it wanted to." Pet. App. 12a.

The court of appeals also addressed the FCC's and CompTel's argument that, because FOIA Exemption 6 (which protects "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)) applies only to individuals, and the phrase "personal privacy" must have the same meaning in Exemptions 6 and 7, the phrase "personal privacy" in Exemption 7 must exclude corporations. Without accepting the premise that only individuals can invoke Exemption 6 (an issue on which it "express[ed] no opinion," Pet. App. 13a), the court explained that Exemption 6 contains other language not found in Exemption 7(C) – namely, the phrase "personnel and medical files" – that could be read as limiting the application of Exemption 6 to natural persons. *Id.* Thus, the court reasoned, to the extent Exemption 6 does not protect corporations, it is not because the provision contains the phrase "personal privacy" but because other words in the statute arguably limit its application to human beings.

Having concluded that Exemption 7(C)'s language is "unambiguous[]," the court of appeals explained that it need not resolve the parties' disputes regarding statutory purpose, legislative history, and the applicability of cases from other circuits. *Id.* at 13a-14a. Even so, it observed that "interpreting 'personal privacy' according to its plain textual meaning serves Exemption 7(C)'s purpose of providing broad protection to entities involved in law enforcement investigations in order to encourage cooperation with federal regulators." *Id.* at 14a n.5. The court also explained that the D.C. Circuit cases on which the FCC and CompTel relied did not "impugn [its] textual analysis," because none addressed the question whether a corporation has "personal privacy" interests within the meaning of Exemption 7(C). *Id.* at 14a n.6.

Finally, the court of appeals rejected AT&T's assertion that remanding the matter to the FCC was unnecessary because the invasion of personal privacy that would result from disclosure of AT&T's documents would be "unwarranted" under Exemption 7(C) as a matter of law. *See id.* at 15a-17a. The court noted AT&T's contention that, "'when [a FOIA] request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing,' granting that request would, as a matter of law, constitute a 'clearly unwarranted' invasion of personal privacy within the meaning of Exemption 7(C)." *Id.* at 16a (quoting *Reporters Comm.*, 489 U.S. at 780) (alteration in original). It reasoned, however, that CompTel had "indeed alleged that it seeks" information on "the FCC's administration of E-Rate" and that the requested documents "may shed light" on that subject. *Id.* at 16a-17a. Consequently, the court remanded

the matter to the FCC with instructions "to determine, in accordance with [the court's] construction of Exemption 7(C), whether disclosure 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" *Id.* at 17a (quoting 5 U.S.C. § 552(b)(7)(C)).[6]

The government filed a petition for rehearing, which the court of appeals denied on November 23, 2009.

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[6] The Enforcement Bureau also had concluded, and the Commission had agreed, that AT&T had failed to comply with 47 C.F.R. § 0.459, the FCC regulation governing requests for confidential treatment of materials submitted to the agency, when it had submitted the material pursuant to the Enforcement Bureau's order. *See* Pet. App. 24a-25a, 38a-40a. That conclusion was incorrect because, under the regulation's plain terms, no request for confidential treatment is necessary when, as here, an exemption from disclosure under 47 C.F.R. § 0.457 applies. *See* 47 C.F.R. § 0.459(a)(1) ("If the materials are specifically listed in § 0.457, [a request for confidential treatment] is unnecessary."). In any event, the FCC did not rest on that ground and instead proceeded to decide the merits of AT&T's objection to disclosure. *See* Pet. App. 25a. And the court of appeals rejected the FCC's contention that AT&T's alleged failure to request confidential treatment provided a basis on which to sustain the FCC's order. *Id.* at 8a-9a. The petition neither defends the FCC's conclusion nor challenges the court of appeals' resolution of this issue.

REASONS FOR DENYING THE PETITION

The petition seeks review of the Third Circuit's judgment to consider whether corporations can have privacy interests protected by Exemption 7(C) of FOIA. *See* Pet. I. In support of that request, the government identifies no division of authority in the lower courts over whether Exemption 7(C) can be invoked by corporations. Instead, it asserts that the court of appeals' interpretation of the statute is erroneous. *See* Pet. 14-27. And it contends that declining to impose a categorical exclusion of all corporations from Exemption 7(C) would increase the government's burden in processing FOIA requests. *See* Pet. 27-30.

Further review of the court of appeals' interlocutory decision is unwarranted at this time for four primary reasons. First, the court's decision does not conflict with any decision of this Court or any other court of appeals. Indeed, the government identifies no other court of appeals decision addressing a corporation's right under Exemption 7(C) to protect records from mandatory disclosure. Without a division of authority in the lower courts, this Court's intervention would be unjustified.

Second, the government's claim that the decision below will wreak havoc with the administration of FOIA is tenuous at best. The court of appeals' ruling requires only that agencies *consider* the privacy interests of corporations in the balancing analysis set forth in Exemption 7(C). The government does not quantify the number of FOIA requests that the Third Circuit's decision will implicate or provide any other support for the claim that applying the Third Circuit's interpretation of Exemption 7(C) would create a significant burden for agencies.

Third, the interlocutory posture of this case makes certiorari inappropriate. The Third Circuit did not hold that Exemption 7(C) bars disclosure of the records in question. Instead, it remanded the matter to the FCC to apply Exemption 7(C) in the first instance. If the FCC concludes that disclosure of AT&T's records could not reasonably be expected to constitute an unwarranted invasion of AT&T's privacy interests, then the court of appeals' holding on the meaning of Exemption 7(C) will have been unnecessary to the outcome in this case.

Fourth, the court of appeals' judgment is correct. FOIA's plain language establishes that corporations can claim "personal privacy" interests under Exemption 7(C). The statute defines "person" to include corporations, *see* 5 U.S.C. § 551(2), and Congress's choice of the adjectival form of that defined term – "personal" – must be understood to refer to that definition. *See* Pet. App. 11a ("It would be very odd indeed for an adjectival form of a defined term *not* to refer back to that defined term."). The petition should be denied.

I. THIS COURT'S REVIEW OF THE COURT OF APPEALS' INTERPRETATION OF EXEMPTION 7(C) IS UNWARRANTED

A. There Is No Division of Authority Warranting This Court's Intervention

The government does not claim explicitly that the Third Circuit's judgment conflicts with the decision of any other court of appeals, *see* Pet. 20-21, and with good reason.[7] The cases on which the government

[7] Indeed, for its part, CompTel straightforwardly invites this Court to engage only in error correction. *See* CompTel Br. 1 ("certiorari should be granted to correct [an] error").

relies do not establish a conflict requiring this Court's resolution.

1. Only one of the cases that the government cites (at 20) involved Exemption 7(C), *see Washington Post Co. v. United States Dep't of Justice*, 863 F.2d 96 (D.C. Cir. 1988). But the opinion in *Washington Post* does not indicate that either of the parties resisting the FOIA request in that case argued that disclosure would invade the privacy interests of the corporation (Eli Lilly) that had submitted the document in question. *See id.* at 100-01. Instead, the Department of Justice ("DOJ") and Eli Lilly appear to have contended only that disclosure would invade the privacy of particular Eli Lilly employees. *See id.*

The document at issue in *Washington Post* was the report of an investigation by a special outside committee of Eli Lilly's board of directors and an outside law firm into the company's development and marketing of an arthritis drug that had been withdrawn from the market after reports of serious adverse reactions. *See id.* at 99. The Eli Lilly board had charged the committee with determining, among other things, whether "the company had any claims against employees." *Id.* The DOJ subsequently commenced its own investigation, and it requested and obtained from Eli Lilly a copy of the special committee's report. *See id.* Eli Lilly publicized the existence of both the special committee's report and the DOJ's investigation. *See id.* In covering the story, the Washington Post requested under FOIA a copy of the special committee's report. *See id.* In rejecting the DOJ's reliance on Exemption 7(C) to withhold the report, the D.C. Circuit concluded that disclosure of the report would not invade any cognizable privacy interest of any Eli Lilly employee, be-

cause the report was an "assessment of the business decisions of Lilly employees during the development and marketing of a commercial product." *Id.* at 100. It further observed that "the protection accorded reputation" by Exemption 7(C) generally would shield from disclosure documents accusing employees "of having committed a crime" or showing them to be "the target of a law enforcement investigation." *Id.* at 100-01. Thus, the upshot of the court's analysis was that, as to individuals, Exemption 7(C) protects documents relating to alleged criminality, not documents pertaining to ordinary "business judgments." *Id.* at 100. The court did not address – because it was not presented – the question whether Eli Lilly's own privacy interests might have justified withholding of the report.

2. Aside from *Washington Post*, the government principally relies (at 20) on D.C. Circuit cases construing a different FOIA exemption – Exemption 6, which protects "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 government asserts that the D.C. Circuit has interpreted the phrase "personal privacy" in Exemption 6 to refer only to the privacy interests of individuals. Because the phrase "personal privacy" must mean the same thing in both Exemptions 6 and 7(C), the theory goes, a D.C. Circuit panel would be bound to reject the Third Circuit's interpretation of Exemption 7(C).

As an initial matter, the law in the D.C. Circuit regarding whether Exemption 6 protects corporate privacy interests is far from clear. In *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), which the government does not cite, the D.C. Circuit stated

that the "personal privacy" protections in Exemption 6 applied to "private individuals *and companies*." *Id.* at 152 (emphasis added). There, the Food and Drug Administration ("FDA"), citing FOIA Exemption 6, had withheld information relating to "private individuals and companies who worked on the approval" of a controversial drug. *Id.* The petitioner argued that such information could not be withheld because it was not "'about an individual.'" *Id.* The D.C. Circuit rejected that "crabbed reading of the statute," noting that the Supreme Court has instructed that the privacy interests protected by FOIA should be construed "broadly." *Id.* The court further explained that the privacy interests at stake under FOIA "vary depending on . . . context" and that, in that case, disclosure of information about "persons and businesses associated with [the drug]" risked retaliation against those individuals and entities and therefore implicated the privacy interests of Exemption 6. *Id.* at 153 (internal quotation marks omitted). The court thus concluded that the FDA's withholding of information under the "personal privacy" protections of Exemption 6 was proper to protect private parties – including "companies" and "businesses" – "from the injury and embarrassment that can result from the unnecessary disclosure" of protected information. *Id.* at 152-53 (internal quotation marks omitted).

The assertedly contrary statements in the cases on which the government relies (at 20) were unnecessary to the holdings in those cases. In *Multi Ag Media LLC v. Department of Agriculture*, 515 F.3d 1224 (D.C. Cir. 2008), the D.C. Circuit rejected the applicability of Exemption 6 because it held that any invasion of privacy would not be "clearly unwarranted" in light of the strong interest in enabling the public

to monitor the Department of Agriculture's implementation of the benefit program at issue. *See id.* at 1232 (internal quotation marks omitted). Further, although the court opined that "businesses . . . do not have protected privacy interests under Exemption 6," it offered that view in discussing an issue that the parties had not "contest[ed]" and in concluding that information in the business records was "traceable to an *individual*" and therefore within the scope of Exemption 6 in any event. *Id.* at 1228. The court thus had no occasion to revisit the conclusion in *Judicial Watch* that corporations can invoke the "personal privacy" protections of Exemption 6.

Similarly, in *Sims v. CIA*, 642 F.2d 562 (D.C. Cir. 1980), the Central Intelligence Agency made "no claim that the names of the institutions participating in" the program at issue could be withheld under Exemption 6. *Id.* at 572 n.47. And, in *National Parks & Conservation Association v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976), the court raised the possible applicability of Exemption 6 on its own and said only that Exemption 6 had "not been extended to protect the privacy interests of businesses or corporations," *id.* at 685 n.44; it did not say that such an extension would be unwarranted in an appropriate case. In sum, none of the cases on which the government relies for its claim that the Third Circuit has departed from a long line of consistent D.C. Circuit precedent holds that corporations are categorically excluded from claiming the protection of Exemption 6, and the D.C. Circuit's recent decision in *Judicial Watch* supports the opposite conclusion. Thus, even assuming that cases considering the applicability of Exemption 6 to corporations are even relevant to the scope of Exemp-

tion 7(C), it is far from clear that these cases hold that Exemption 6 categorically excludes corporations.

In any event, even if the government were correct that a number of cases have held that corporations do not have privacy interests cognizable under Exemption 6, the Third Circuit's conclusion that corporations are not categorically excluded from Exemption 7(C) is not in conflict with them. Unlike Exemption 7(C), which potentially can apply to any type of record compiled for law-enforcement purposes, Exemption 6 protects only certain types of records – namely, "personnel and medical files and similar files." 5 U.S.C. § 552(b)(6). As the court of appeals in this case explained, "only individuals (and not corporations) may be the subjects of such files." Pet. App. 13a. Therefore, to the extent only individuals can invoke Exemption 6, it is because a corporation does not have a privacy interest in an individual's personnel or medical file, not because the phrase "personal privacy" excludes corporations.[8]

At a minimum, the differences in the types of files that Exemptions 6 and 7(C) protect preclude reflex-

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[8] The cases the government cites (at 21 n.8) for the proposition that Exemptions 6 and 7(C) protect the same privacy interests are not to the contrary. None considered the question whether either exemption protects any interest in corporate privacy. *See Forest Serv. Employees for Envtl. Ethics v. United States Forest Serv.*, 524 F.3d 1021 (9th Cir. 2008) (dispute over redaction of names of individual employees from government report); *Horowitz v. Peace Corps*, 428 F.3d 271 (D.C. Cir. 2005) (dispute over withholding of name of individual who had accused government employee of misconduct); *FLRA v. United States Dep't of Veterans Affairs*, 958 F.2d 503 (2d Cir. 1992) (Veteran Affairs' challenge to Federal Labor Relations Authority order requiring VA to disclose names and addresses of employees in the bargaining unit).

ive application of precedents interpreting one exemption to the other without consideration of their differing language. Thus, even if the D.C. Circuit had developed a firm view that Exemption 6 does not protect the privacy interests of corporations (and, in light of *Judicial Watch*, it has not), it would be entirely premature to say that a conflict exists between that court and the Third Circuit. At the very least, this Court should wait until the D.C. Circuit has had an opportunity squarely to address whether a corporation can have "personal privacy" within the meaning of Exemption 7(C) before it grants review of this issue.

B. The Government's Claim of Adverse Consequences Is Speculative and Insubstantial

The government's argument that the Third Circuit's ruling "threatens" significant adverse consequences boils down to the following complaint: agencies actually will have to consider whether disclosure of a corporation's records compiled for law-enforcement purposes could reasonably be expected to constitute an unwarranted invasion of privacy, rather than automatically producing such documents without even considering the applicability of Exemption 7(C). *See* Pet. 27-29. This supposed harm is illusory.

First, although the government asserts (at 13) that it receives hundreds of thousands of FOIA requests each year, it does not identify the (presumably much smaller) number of requests that seek documents compiled for law-enforcement purposes the disclosure of which potentially could result in an unwarranted invasion of a corporation's privacy. Thus, it is difficult to judge the actual number of FOIA requests

that might have to be processed differently in light of the court of appeals' decision. The speculative quality of the government's claim reinforces the wisdom of permitting the D.C. Circuit and other courts of appeals to decide whether to reject or to follow the Third Circuit's interpretation of Exemption 7(C) before this Court intervenes. If in time a mature circuit conflict were to develop on the question, this Court presumably would have available to it better information with which to evaluate what impact, if any, the Third Circuit's decision has had on the government's administration of FOIA.

Second, there is no reason to conclude that simply considering the privacy interests of corporations under Exemption 7(C) will be an insufferable burden for agencies. Agencies and courts faced with FOIA questions routinely engage in such balancing, without experiencing anything like the parade of horribles the FCC alarmingly predicts. *See*, *e.g.*, *Computer Prof'ls for Soc. Responsibility v. United States Secret Serv.*, 72 F.3d 897, 904-05 (D.C. Cir. 1996) (conducting balancing analysis under Exemption 7(C)). Moreover, reading Exemption 7(C) consistent with its text does not mean that corporate privacy interests would be afforded the same treatment as individual privacy interests in all cases, as AT&T explicitly recognized in its submissions to the Third Circuit, *see* AT&T C.A. Br. 34.[9]

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[9] The government also suggests (at 28 n.12) that agencies will have to weigh corporate privacy interests in applying their own regulations governing requests for information. To the extent the agency's regulations simply track the language of the FOIA exemption, thus protecting from disclosure documents that are exempt from mandatory disclosure under FOIA, then there is no additional burden. For example, here, the FCC's regulations prohibit disclosure of AT&T's documents if they fall within

The government also argues (at 29-30) that differences in the approaches of the Third Circuit and the D.C. Circuit will encourage forum shopping and create uncertainty for federal agencies. But, contrary to the premise of the government's argument, whether corporations have privacy interests protected under Exemption 7(C) remains an open question in the D.C. Circuit. *See supra* Part I.A. If the D.C. Circuit follows the Third Circuit's interpretation of Exemption 7(C), then the government's concern will be eliminated. In any event, the government remains free to pursue its construction of Exemption 7(C) in other cases. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (rejecting the application of nonmutual collateral estoppel against the government because it "would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari").

C. The Interlocutory Posture of This Case Makes This Court's Review Particularly Inappropriate at This Time

Review of the Third Circuit's decision also is unwarranted at this stage because the decision below is interlocutory. The court of appeals rejected AT&T's contention that the documents should be withheld as a matter of law because disclosing them "could reasonably be expected to constitute an unwarranted

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Exemption 7(C), without the need for further inquiry. *See* 47 C.F.R. § 0.457(g)(3); Pet. App. 7a n.2; *see also* 47 C.F.R. § 0.457 (providing that the FCC will not entertain requests for disclosure under § 0.461 when the documents in question "are not the property of the Commission"). In any event, to the extent that an agency regulation imposes an unnecessary burden, the agency itself could remedy that problem by amending the regulation.

invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); *see* Pet. App. 16a-17a. Instead, the court remanded the matter to the FCC to apply Exemption 7(C) in the first instance. *See* Pet. App. 17a-18a.

Further proceedings on remand could render the resolution of the question presented unnecessary in this case; to the extent that does not occur, further review would be available after the FCC's final action. If the FCC determines that disclosing the requested records would not work an "unwarranted" invasion of AT&T's privacy interests, and that action is upheld on review, then the Third Circuit's conclusion that Exemption 7(C) does not categorically exclude corporations would be irrelevant to the ultimate outcome in this matter. If, on the other hand, the FCC rules on remand that Exemption 7(C), as interpreted by the Third Circuit, covers some or all of the records at issue, then the propriety of the Third Circuit's statutory construction could be considered by this Court on review of the FCC's final action. The interlocutory nature of this matter makes any review by this Court premature. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916); *see also* Brief for the Federal Energy Regulatory Commission in Opp. at 12, 17, *Coral Power, L.L.C. v. California ex rel. Brown*, Nos. 06-888 & 06-1100 (U.S. filed Apr. 25, 2007) (contending that remand to the agency rendered certiorari "inappropriate" and "premature").[10]

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[10] Although the FCC itself might be unable to seek review of its own decision to withhold documents under Exemption 7(C), respondent CompTel, which continues to pursue its FOIA request and has submitted a brief in support of the petition,

II. THE COURT OF APPEALS CORRECTLY INTERPRETED THE STATUTE

A. The court of appeals correctly concluded that the "plain text" of Exemption 7(C) "unambiguously" applies to corporations. Pet. App. 11a, 13a. "As in any case of statutory construction," this Court's "analysis begins with the language of the statute," and, "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). Exemption 7(C) provides that FOIA's mandatory disclosure obligation "does not apply" to "records or information compiled for law enforcement purposes, . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The word "personal" means "of or relating to a particular person." *Webster's Third New International Dictionary* 1686 (2002); *accord Webster's New International Dictionary* 1828 (2d ed. 1950) (defining "personal" to mean "[o]f or pertaining to a particular person"). In this context, Congress has defined "person" to include "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2). By expressly defining the noun "person" to include corporations, Congress necessarily defined the adjectival form of that noun – *i.e.*, "personal" –

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would be able – and would have every incentive – to do so. In addition, as noted above, nothing precludes the FCC or other government agencies from continuing to apply the government's interpretation of Exemption 7(C) in other cases, *see Mendoza*, 464 U.S. at 160, and the government of course would be able to seek further review of any future court of appeals decision adopting or following the reasoning of the Third Circuit.

also to include corporations. As the court of appeals explained, because "'personal' is the adjectival form of 'person,' and FOIA defines 'person' to include a corporation," Pet. App. 11a, the phrase "personal privacy" in Exemption 7(C) includes not only individual privacy but also corporate privacy. *See id.* ("It would be very odd indeed for an adjectival form of a defined term *not* to refer back to that defined term.").

That reading is confirmed by the fact that, where Congress intends to refer to natural persons and to exclude corporations – both in FOIA itself and in the closely related Privacy Act of 1974 – it uses the term "individual." In FOIA, Congress differentiated between the term "personal" (as, for example, in Exemption 7(C)) and the term "individual," which is used, for example, in Exemption 7(F), *see* 5 U.S.C. § 552(b)(7)(F). That choice must be presumed to be intentional and further confirms that Congress knew how to exclude non-natural persons when it intended to do so. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted, alterations in original); Pet. App. 12a (Exemption 7(F)'s language shows that "Congress knew how to refer solely to human beings (to the exclusion of corporations and other legal entities) when it wanted to").

In the Privacy Act, Congress chose to protect only "individual[s]," 5 U.S.C. § 552a(a)(2), thereby excluding "corporations or sole proprietorships," *St. Michael's Convalescent Hosp. v. California*, 643 F.2d 1369,

1373 (9th Cir. 1981).[11] That Congress expressly incorporated some FOIA definitions into the Privacy Act, *see* 5 U.S.C. § 552a(a)(1) (defining "agency" as that term is defined in FOIA, *id.* § 552(e)), reinforces the significance of Congress's decision to define "individual" separately under § 552a(a)(2). Indeed, Congress used both "person" and "individual" in the Privacy Act, further demonstrating that Congress understood the distinction between the two. *See*, *e.g.*, *id*. § 552a(b) ("[n]o agency shall disclose any record . . . to any *person*, or to another agency, except pursuant to a written request by, or with the prior written consent of, the *individual* to whom the record pertains") (emphases added). Yet, unlike the Privacy Act, FOIA Exemption 7(C) does not use the term "individual" (e.g., "individual privacy") or include any other textual indication of an intent to exclude corporations. The absence of such a limitation is compelling evidence that the scope of Exemption 7(C) is not so limited.

An interpretation of Exemption 7(C) that allows for the possibility of corporate privacy rights accords not only with the text of the exemption, but also with its purposes. Exemption 7(C) "affords broad[] privacy rights to suspects, witnesses, and investigators" in law-enforcement investigations. *Bast v. United States Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). The exemption reflects Congress's judgment that "[s]uspects, interviewees and witnesses have a privacy interest because disclosure [of requested information] may result in embarrassment or harassment." *Davin*, 60 F.3d at 1058. Put differently, Exemption 7(C) protects the personal privacy of those parties

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[11] *See Reporters Comm.*, 489 U.S. at 766-67 (drawing comparison to the Privacy Act in interpreting FOIA).

participating in law-enforcement investigations – whether as suspects, witnesses, or cooperating parties – because the disclosure of information pertaining to those investigations may be used to embarrass, harass, or stigmatize those parties.

That purpose plainly applies to corporations. Corporations, like individuals, are routinely suspects or cooperating parties (or both) in law-enforcement investigations. And corporations, like individuals, face the prospect of public embarrassment, harassment, and stigma based upon their involvement in such investigations.[12] The FCC's construction of Exemption 7(C) thus categorically excludes an important set of actors that can be swept into law-enforcement investigations, and then later made to suffer serious consequences. That outcome cannot be squared with the Exemption's purpose.

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[12] *See* Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & Econ. 489, 492 (1999) (citing study showing that "publicly traded corporations sustained substantial losses in goodwill when named as targets of [Federal Trade Commission] investigations for having possibly violated its regulations against false and misleading advertising"); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. Legal Stud. 319, 332 (1996) ("[c]orporations convicted of crimes may well suffer significant reputational losses"); Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 Geo. L.J. 1743, 1771-72 (2005) ("Investigations and convictions of corporations, like those of individuals, often trigger significant extralegal sanctions for the defendants and their employees. These sanctions include loss of morale, damage to reputation and corporate image, damage to relationships with customers, suppliers, and the government, bars to future business, and (as a consequence of all of this) significant drops in share price and market share. The size of these extralegal penalties often dwarfs that of the formal legal penalties.") (footnotes omitted).

Beyond that, a cramped view of the scope of Exemption 7(C) could chill voluntary cooperation by corporations and other non-natural persons in law-enforcement investigations. As the facts of this case bear out, corporations routinely cooperate in law-enforcement investigations, often initiating such investigations themselves upon discovery of potential wrongdoing. A rule foreclosing the possibility of invoking Exemption 7(C) could make corporations less willing to do so, out of concern that potentially damaging confidential information could, as the FCC held here, be made public based on nothing more than a one-sentence FOIA request from a group of competitors. *See* Pet. App. 14a n.5 ("Reading 'personal privacy' to exclude corporations would disserve Exemption 7(C)'s purpose of encouraging corporations – like human beings – to cooperate and be forthcoming in such investigations.").

B. The government's criticisms of the Third Circuit's reasoning are unpersuasive.

1. The FCC offers two textual bases for limiting Exemption 7(C) to individuals, neither of which withstands scrutiny. First, it contends that the word "personal" is "most naturally understood" to refer only to individuals. Pet. 14. But the primary dictionary definitions the government cites define "personal" as "of or relating to a particular person." *See* Pet. 14-15; *supra* p. 22. When, as in this context, the statute defines "person" to include both an "individual" and a "corporation," 5 U.S.C. § 551(2), it would be *unnatural* to conclude that the adjectival form of "person" excludes corporations. Moreover, the word "personal," no less than "person," can quite comfortably be used to refer to corporations. For example, corporations have long been understood to

be "persons" for the purposes of the Fifth and Fourteenth Amendments to the United States Constitution, *see*, *e.g.*, *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) ("a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"), and therefore protected by the doctrine of "personal" jurisdiction that inheres in the concept of due process, *see*, *e.g.*, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109-10 (1987) (plurality); 28 U.S.C. § 1391(c) ("a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction").[13]

Second, the government asserts that the use of the word "privacy" in combination with "personal" leaves no room for Exemption 7(C) to apply to corporations. In support, it observes that corporations cannot sue for the tort of invasion of privacy. *See* Pet. 15. But this Court has made clear that "the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004). And it specifically has distinguished "[t]he question of the statutory meaning of privacy under the FOIA" from "the question whether a tort action might lie for

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[13] The government also argues that the Third Circuit relied too heavily on the linguistic relationship between "person" and "personal" because the word "personnel" also "shares the same 'root'" and "cannot encompass a corporation." Pet. 23 n.10. But, unlike "personal," "personnel" is not simply the adjectival form of "person." Instead, "personnel" is a word with a specialized meaning; it refers to employees in some service, *see Webster's Third New International Dictionary* at 1687; *Webster's New International Dictionary* at 1828, and thus relates only to natural persons.

invasion of privacy." *Reporters Comm.*, 489 U.S. at 762 n.13.

Further, in many areas of law, corporations are entitled to invoke the same protections as individuals, including protections rooted in fundamental privacy concerns. For example, this Court has held that corporations have privacy interests under the Fourth Amendment. *See Dow Chem. Co. v. United States*, 476 U.S. 227, 236 (1986) ("Dow [Chemical Co.] plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe."); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353-54 (1977).[14]

Indeed, of particular significance here, this Court has expressly recognized that corporations can invoke constitutional protections – akin to the protections of Exemption 7(C) – that are rooted in the desire to prevent embarrassment and anxiety. The Fifth Amendment's guarantee against double jeopardy, the Court has explained, is intended to ensure that a defendant is not "subject[ed] . . . to embarrassment, expense and ordeal" and to protect against the "continuing state of anxiety and insecurity" resulting

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[14] *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), which the government cites (at 15-16), is not to the contrary. There, the Court held that corporations cannot "plead an unqualified right to conduct their affairs in secret" under the Fourth Amendment in the face of an agency's "legitimate right to satisfy [itself] that corporate behavior is consistent with the law." 338 U.S. at 652. At most, *Morton Salt* holds that "corporations enjoy narrower rights to privacy" because of "the state's interest in investigating corporate wrongdoing." *Consolidated Edison Co. v. Pataki*, 292 F.3d 338, 348 (2d Cir. 2002). *Morton Salt* does not suggest (as the FCC contends) that corporations have no privacy interests at all.

from a second trial. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (internal quotation marks omitted). The Court then held that the Double Jeopardy Clause applied in a case involving a "criminal contempt proceeding" concerning two defendant "linen supply companies." *Id.* at 565 n.1.

Nor is it uncommon for constitutional protections that are designed to safeguard the interests of individuals also to apply to corporations. In addition to the Fourth and Fifth Amendments noted above, corporations can invoke rights under the First Amendment, *see First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784 (1978), the Due Process Clause, *see Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889), the Equal Protection Clause, *see id.*; *County of Santa Clara v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (statement of Waite, C.J.), and the Bill of Attainder Clause, *see Consolidated Edison*, 292 F.3d at 347. Even so, that corporations are not categorically excluded from claiming the protections of those provisions does not mean that they must be treated the same as individuals. *Cf. supra* note 14. Similarly, the Third Circuit's decision in this case does not require that the privacy interests of corporations be given the same weight as the privacy interests of individuals in applying Exemption 7(C) or its regulatory counterparts. *See supra* p. 19.

2. The government also argues (at 16-19) that the phrase "personal privacy" in Exemption 7(C) must refer only to natural persons because the same phrase appears in Exemption 6 and Exemption 6 protects only individuals. But it is far from settled that Exemption 6 excludes corporations. *See supra* Part I.A.2. On the contrary, the D.C. Circuit has stated that the "personal privacy" protections in

Exemption 6 applies to "private individuals *and companies*." *Judicial Watch*, 449 F.3d at 152 (emphasis added).

As the government acknowledges (at 19 n.7), that reading of Exemption 6 comports with the Attorney General's interpretation of Exemption 6 shortly after the enactment of that provision. *See* U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June 1967) ("*1967 FOIA Memorandum*"). Applying the same textual analysis as the court of appeals in this case, the Attorney General concluded that FOIA's language permitting agencies to redact identifying details from published documents, "[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(a)(2), "would seem as applicable to corporations as to individuals," *1967 FOIA Memorandum* at 19. Turning to Exemption 6, the Attorney General likewise noted that "the applicable definition of 'person,' which is found in section 2(b) of the Administrative Procedure Act, would include corporations and other organizations as well as individuals." *Id.* at 36-37. The Attorney General also observed that "[t]he kinds of files referred to in [Exemption 6], however, would normally involve the privacy of individuals rather than of business organizations," *id.* at 37, thus recognizing, as did the court of appeals here, that generally "only individuals (and not corporations) may be the subjects of" personnel and medical files, Pet. App. 13a.[15]

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[15] As the government notes (at 19), a subsequent Attorney General's memorandum suggested that Exemption 7(C) does not protect corporations. That memorandum contains no significant reasoning on the issue, however, and instead simply asserts

In any event, as the court of appeals recognized, to the extent Exemption 6 does not protect corporations, it need not be because the phrase "personal privacy" excludes them. Instead, because Exemption 6 protects only "personnel and medical files and similar files," 5 U.S.C. § 552(b)(6) – the disclosure of which is highly likely to invade the privacy of individuals, but unlikely to invade the privacy of corporations – it might be reasonable to read the text of Exemption 6 as a whole as intended to be invoked only by natural persons. *See* Pet. App. 13a; *1967 FOIA Memorandum* at 36-37; *supra* Part I.A.2. That does not suggest that the phrase "personal privacy" means different things in the two provisions, but instead that Exemption 6 contains other language that could be read to limit its application to individuals.

CONCLUSION

The petition for a writ of certiorari should be denied.

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that Exemption 7(C) "does not seem applicable to corporations." U.S. Dep't of Justice, *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9 (Feb. 1975); *cf. Abramson*, 456 U.S. at 622 n.5 (criticizing a party for placing "undue emphasis" on the Attorney General's 1975 memorandum).

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