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

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

REPLY BRIEF FOR THE UNITED STATES

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For the first time in the 35-year history of FOIA Exemption 7(C), the court of appeals in this case held that corporate entities enjoy "personal privacy" under the exemption. That unprecedented decision creates a new and amorphous privacy concept that finds no support either in FOIA's text or the uniform body of case law and commentary that—until this case—instructed that FOIA's "personal privacy" provisions protect only the interests of individuals. Pet. 14-27. The court of appeals' holding will disrupt long-settled government procedures for processing large numbers of FOIA requests and induce forum-shopping by corporate litigants seeking to keep secret "records that are at the heart of FOIA's disclosure goal," Public Citizen Amicus Br. 6. See Pet. 27-30. And the decision will place substantial burdens on government agencies that

collect information about corporations and corporate wrongdoing in the course of law-enforcement activities—information that has never previously been thought to be shielded from mandatory disclosure under FOIA.

Respondent AT&T (respondent) nonetheless contends that the court of appeals correctly read FOIA's "unambiguous[]" text, Br. in Opp. (Opp.) 22-31, and that review is unwarranted because the decision below does not create a conflict of authority, is interlocutory, and will have only an "insubstantial" impact on FOIA processing, Opp. 12-22. None of those contentions provides a reason to deny review.

1. The court of appeals fundamentally erred in its unprecedented extension of Exemption 7(C)'s "personal privacy" protection to corporate entities. Although "novelty is [not] always fatal in the construction of an old statute," *Keene Corp.* v. *United States*, 508 U.S. 200, 213 (1993), "[t]he presumption is powerful" that the reason that the court's newly minted interpretation of Exemption 7(C) was not "uncovered by judges, lawyers or scholars" for more than 35 years is "because it is not there." See *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370-371 (1959). Respondent fails to offer even a scintilla of evidence that Congress, the Executive, the Judiciary, or any private entity ever previously thought that corporations could have "personal privacy" under Exemption 7(C). To the contrary, FOIA's legislative history confirms that Congress understood that the privacy exemption would not protect corporations. Pet. 18-19. Courts and legal scholars, including Professor Davis and then-Professor Scalia, unanimously confirmed that view. Pet. 19-22. And the federal government, in over 35 years of applying Exemption 7(C) to millions of FOIA requests, has never considered corporations to have "personal privacy" interests. Pet. 19, 27-28.

In the face of all this, respondent contends (Opp. 22) that "the 'plain text' of Exemption 7(C) 'unambiguously' applies to corporations" because it uses the term "personal privacy" and Congress defined the word "person" to include corporations. But respondent's own reasoning undermines its position. Respondent does not dispute that Congress will expressly extend statutory definitions (*e.g.*, person) to "variants" of the defined terms (*e.g.*, personal) when it intends such an extension. Pet. 23. And respondent cites nothing to support its reading in the interpretive rules of the Dictionary Act, 1 U.S.C. 1 *et seq.*, which apply to all legislation. Respondent instead relies (Opp. 22) on a dictionary definition of "personal"—*i.e*, "of or relating to a particular *person*," *Webster's Third New International Dictionary* 1686 (2002) (emphasis added)—to argue that, because the dictionary shows that "personal" refers to a "person," the word "personal" in Exemption 7(C) must share the same meaning as FOIA's special definition of "person." But that dictionary's use of "person" to define "personal" necessarily employs the dictionary's *own* understanding of "person," which is "an individual human being." See *ibid.* (defining "person"). The standard dictionary definitions of "personal" that respondent ignores, Pet. 14-15, confirm that conclusion. *Webster's* lexicographers clearly did not intend their own definitions to borrow whatever *non*-standard use that Congress might impose on the word "person" in special contexts.

Respondent notes (Opp. 23-24) that the Privacy Act, 5 U.S.C. 552a, protects only the privacy of "individuals," but that, too, confirms the court of appeals' error. Notwithstanding the Privacy Act's exclusive focus on privacy rights of "individuals," Congress referred to those rights in precisely the same way that it did in FOIA, declaring that the Privacy Act protects the "personal privacy" of "personal

information" in agency records. See Privacy Act of 1974, Pub. L. No. 93-579, § 2(b), 88 Stat. 1896 (5 U.S.C. 552a note). The use of "personal privacy" in both FOIA and the Privacy Act reflects the established understanding that the phrase refers only to the privacy of individuals. See Pet. 15-16.

Respondent loses sight of the inescapable reality that a corporation exists only as a *legal* "person" in arguing (Opp. 24-25) that Exemption 7(C) prevents disclosure that may "embarrass, harass, or stigmatize" a corporation. Attempted personification aside, corporations do not experience any of those human reactions protected by "personal privacy" rights. "Any privacy interests that a corporation does possess" take the form of "property interests rather than intimate personal rights." Note, *Attorney-Client and Work Product Protection in a Utilitarian World*, 108 Harv. L. Rev. 1697, 1703 (1995) (footnotes omitted). And Congress specifically protected such interests for corporate "persons" under FOIA Exemption 4. Pet. 22. Respondent makes no attempt to reconcile its view of "personal privacy" with FOIA's more specific protections for business interests.

Nor does respondent dispute that if the court of appeals were correct that FOIA's definition of "person" governs the scope of "personal privacy," governments and governmental entities would also possess protected privacy interests under Exemption 7(C). Pet. 24-25 & n.11. Defining the scope of that novel and amorphous interest would raise exceedingly difficult problems never contemplated by Congress. Without guiding precedents or any indication of congressional intent, the scope of such organizational "privacy" would be exceedingly difficult to define. Moreover, corporations and governments exist to serve the interests of their shareholders and constituents in the public, yet Exemption

7(C) demands a balancing of such newly created organizational privacy interests against the interest of the public (including the same shareholders and constituents) in disclosure. Respondent makes no attempt to address such troubling implications of the court of appeals' decision, which leaves federal agencies with no basis for evaluating the new privacy interests it has created.

2. Respondent attempts to show that corporations have "personal" and "privacy" rights in various constitutional contexts (Opp. 27-29), but respondent's showing does not aid its cause. For instance, the concept of "personal jurisdiction" (Opp. 27) reflects a technical term of art that defines when a *court* may exercise jurisdiction over a defendant. Corporations are legal entities that may own property and may be sued, and a court may therefore have "personal jurisdiction" over a corporation. But that authority of a court is not "personal" in the same sense that an *individual* may possess "personal privacy."

Likewise, the limited Fourth Amendment protections that corporations enjoy (Opp. 28 & n.14) do not show that they experience "personal privacy." This Court has concluded that "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property," *See* v. *City of Seattle*, 387 U.S. 541, 543 (1967), and has applied that right when such people conduct business under the corporate form. See *Dow Chem. Co.* v. *United States*, 476 U.S. 227, 236 (1986) (applying *See*); see also *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 311 (1978) (Fourth Amendment was intended to protect the "merchants and businessmen whose premises and products were inspected" by officials). But the limited corporate right against "unreasonable searches and seizures" of "houses, papers, and effects," U.S. Const. Amend. IV, does

not suggest that corporations have their own "personal privacy" interests. Corporations do not have constitutional rights that are "purely personal." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 778 n.14 (1978). This Court has thus declined to recognize non-derivative privacy interests of "collective entit[ies]" such as corporations in the Fifth Amendment context. See *Braswell* v. *United States*, 487 U.S. 99, 102, 104-105 (1988) (explaining that corporations are "'creature[s] of the State,' with powers limited by the State," and that, while individuals may assert their own right against self-incrimination concerning corporate matters, "corporate books and records are not 'private papers' protected by th[at] Fifth Amendment" right) (citation omitted).[1]

3. Respondent incorrectly suggests (Opp. 14-15, 29-30) that the D.C. Circuit has stated that corporations possess

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[1] Respondent's reliance on the Double Jeopardy Clause (Opp. 28) is equally unavailing. This Court has yet to address squarely whether corporations enjoy double-jeopardy protection. In *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 570-576 (1977), the Court assumed that they would without addressing the question, see *id.* at 570-576, and described the Clause's protection against "embarrassment" and a "continuing state of anxiety and insecurity" as part of the "*personal* strain which a criminal trial represents for the *individual* defendant." *Id*. at 569 (emphasis added); cf. U.S. Br. at 13 n.6, *Martin Linen*, *supra* (No. 76-120) (Government assumed application of the Double Jeopardy Clause and did not argue that the Clause "does not apply to corporations" because it did not raise the point below). If the Double Jeopardy Clause protects corporations from successive prosecutions, it would apply to advance the "'primary purpose'" of the Clause, namely, to "'protect the integrity' of final determinations of guilt or innocence," *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 120 (2003) (citation omitted), by preventing the government from "taking the question of guilt to a series of persons or groups empowered to make binding determinations," *Swisher* v. *Brady*, 438 U.S. 204, 216 (1978).

"personal privacy" under FOIA. In *Judicial Watch, Inc.* v. *FDA*, 449 F.3d 141 (D.C. Cir. 2006), the court of appeals held that the personal privacy of individuals—not corporations—warranted withholding under FOIA Exemption 6. In that case, the FDA withheld the names of "private individuals and companies" and the street addresses of businesses that had worked on approval of the controversial morning-after abortion drug, RU-486. *Id.* at 152. The government argued that employees of those companies had a privacy interest in withholding "the names and addresses of * * * businesses associated with [the drug]" in order to avoid potential "abortion-related violence." *Id.* at 153; see U.S. Br. at 39-43, *Judicial Watch*, *supra* (No. 05-5256), available at 2006 WL 515736 (arguing that "all of the withheld information," including business "street address[es]," can "be identified as applying to a particular individual" and implicate the "personal privacy interests of these employees"). The D.C. Circuit agreed that "individuals have a 'privacy interest in the nondisclosure'" to "avoid[] physical danger," and concluded that the government need not justify withholding on an "individual-by-individual basis" because the same "privacy interest extends to all such employees." 449 F.3d at 153 (citation omitted). The court thus held that Exemption 6 exempted the information from disclosure by balancing the private interest involved—"namely, the individual's right to privacy"—and concluding that the "private interest in avoiding harassment or violence tilts the scales" for nondisclosure. *Ibid.*

Even the court below recognized that *Judicial Watch* "considered only individuals' privacy interests." Pet. App. 14a n.6. The D.C. Circuit has thus since made plain, as it previously had, that "businesses themselves do not have protected privacy interests under Exemption 6." *Multi AG Media LLC* v. *USDA*, 515 F.3d 1224, 1228 (D.C. Cir. 2008);

see *Sims* v. *CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980) ("Exemption 6 is applicable only to individuals."); *National Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976) ("The sixth exemption has not been extended to protect the privacy interests of businesses or corporations.").

Respondent asserts (Opp. 13-14) that the D.C. Circuit's Exemption 7(C) analysis does not yet reflect a square holding that rejects the concept of "personal privacy" for corporate entities. But respondent appears to agree that the case law establishes that "Exemptions 6 and 7(C) protect the same privacy interests," Opp. 17 n.8; see Pet. 20-21 & n.8, and respondent has failed to show that Exemption 6 decisions can be read to comport with the decision below. Cf. Pet. App. 14a n.6. Respondent asserts (Opp. 31) that the "personal privacy" protections of Exemption 6 would not apply to corporations because the exemption contains text not present in Exemption 7(C). That assertion reflects the Third Circuit's views, but it provides no response to our explanation of why those views do not withstand scrutiny. See Pet. 26.

4. Finally, respondent contends that review is unwarranted because the case is interlocutory (Opp. 20-21), and will not, in respondent's view, impose substantial burdens on agencies (Opp. 18-20). Neither contention counsels against review.

a. This Court's review of interlocutory decisions is appropriate when an "important" issue of law "is fundamental to the further conduct of the case," particularly where, as here, the "lower court's decision is patently incorrect" and "will have immediate consequences for the petitioner." Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007) (citing cases). In *CIA* v. *Sims*, 471 U.S. 159 (1985), for instance, the Court granted certiorari notwith-

standing the court of appeals' remand to the district court with instructions to "focus its inquiry on whether the [a]gency offered sufficient proof" to warrant application of Exemption 3. *Id.* at 166. This Court's review is even more appropriate here because, unlike *Sims*, the government in this case will have no right to seek further review after remand. The FCC "has no choice but to conduct its proceedings and to render its decision pursuant to th[e] standard" established by the Third Circuit, and, after the FCC acts on remand, it will be unable to seek judicial review of its own decision. See *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 330 (D.C. Cir. 1989); see also Opp. 21 n.10 (acknowledging that the "FCC itself might be unable to seek review of its own decision").

The Court has previously granted the government's request for certiorari—even without a division of appellate authority—where, as here, the lower court's interpretation of Exemption 7(C) would have "important ramifications for law enforcement agencies, for persons about whom information has been complied, and for the general public." *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982); see also *DOJ* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989). In this case, the court of appeals' unprecedented expansion of Exemption 7(C)'s "personal privacy" protection to corporations threatens significant adverse consequences for law enforcement agencies that administer that exemption. Pet. 27-30. The decision also undermines the public's statutory right to records. Under the court of appeals' reasoning, information obtained by law-enforcement agencies, including agencies that may investigate BP's offshore drilling practices or Goldman Sachs' trading practices, could be withheld simply to protect a corporation from purported "embarrassment" or "stigma." That decision is clearly wrong and, if left unreviewed, will encourage

corporate entities to engage in forum shopping to capitalize on the ruling. See Pet. 30.[2]

b. Respondent complains that the petition does not identify how many FOIA requests will be affected by the Third Circuit's decision and asserts that agency implementation of that ruling will not result in an "insufferable burden." Opp. 18-19. Respondent misunderstands the impact of the decision below.

Federal agencies—particularly regulatory agencies such as the Securities and Exchange Commission, Federal Trade Commission, Nuclear Regulatory Commission, and National Labor Relations Board (NLRB)—routinely collect information in the course of law enforcement investigations of corporations and other business organizations. The NLRB, for example, received 22,943 charges alleging unfair labor practices last year, see NLRB, *Annual Report of the National Labor Relations Board for the Fiscal Year Ended Sept. 30, 2009*, at 1 (2009), http://www.nlrb.gov/shared_files/Annual_Reports/NLRB2009.pdf, virtually all

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[2] The decision has predictably prompted private practitioners to advise their clients that "companies should consider submitting" as "confidential" "information to regulators in connection with investigations," because "doing so could help the company to later challenge attempts by competitors or other third parties to obtain such information from the regulator under FOIA." Proskauer Rose LLP, *A Moment of Privacy* (Sept. 2009), http://www.proskauer.com/files/News/5c69eadf-9bb3-4f85-a60e-6a50db798e92/Presentation/NewsAttachment/eb7287f9-7216-4771-9fd7-6df986acdf3d/a-moment-of-privacy-september-2009.pdf; see also, *e.g.*, David T. Blonder, *Court Properly Protects Businesses' Privacy Rights in Context of FOIA Request*, Washington Legal Foundation (Dec. 11, 2009), http://www.akingump.com/files/Publication/21e08e03-67ed-48f8-a1d1-7baaf3b6bd47/Presentation/PublicationAttachment/33e90804-9ce6-44df-b791-7ecfef5db9c4/Blonder%20WLF%20Dec%202009.pdf.

of which could contain information that a corporation might now claim, for the first time in the history of FOIA, is exempt from disclosure under Exemption 7(C) as "embarrassing."[3]

The concept of personal privacy in Exemptions 6 and 7(C) "encompass[es] the individual's control of information concerning his or her person," *Reporters Committee*, 489 U.S. at 763 (Exemption 7(C)), and it therefore can cover even "publicly available" information such as that found in telephone directories. *DoD* v. *FLRA*, 510 U.S. 487, 497 n.6, 500 (1994) (following *Reporters Committee* in Exemption 6 context). For that reason, Exemptions 6 and 7(C) are the exemptions that apply, respectively, the most and next-most often to FOIA requests government-wide. U.S. Dep't of Justice, Office of Information Policy, *FOIA Post: Summary of Annual FOIA Reports for Fiscal Year 2009* (2010), http://www.justice.gov/oip/foiapost/2010foiapost18.htm. If the "personal privacy" of corporations is defined to be even remotely similar in scope, it will require a massive administrative effort to process and litigate the newly found "privacy" right. Requiring agencies to define the scope of and balance that new and amorphous right threatens to upset the legal regime that agencies have for decades used to process FOIA requests, substantially altering how the government processes a vast volume of such requests each year. Pet. 27-29.

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[3] The NLRB advises this Office that it expects that approximately 98% of its FOIA responses could implicate Exemption 7(C) as construed by the Third Circuit, based on its review of all FOIA requests from three randomly selected months in FY 2009.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Acting Solicitor General

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