No. 09-1279

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,

Petitioners,

v.

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

Respondents.

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

BRIEF OF COLLABORATION ON GOVERNMENT SECRECY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is a non-partisan educational project devoted to openness in government, freedom of information, government transparency, and the study of "government secrecy" in the United States and internationally. Founded in 2007 at American University Washington College of Law, its mission is to foster both academic and public understanding of these subjects by serving as a center of expertise, scholarly research, and information resources; to promote the accurate delineation and development of legal and policy issues arising in this subject area; to conduct educational programs and related activities for interested members of the academic and openness-in-government communities; and to become the premier clearinghouse for this area of law both in the United States and worldwide. Among the expertise it holds is complete familiarity with every aspect of the enactment of the 1986 Freedom of Information Act amendments and direct familiarity with the preparation of every portion of the Attorney General Memorandum that was issued with respect to those amendments. Its Web Site, which among other things contains links to all

[1]. The parties have consented to the filing of this brief, and counsel of record for all parties received advance notice of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus* or its counsel made a monetary contribution to its preparation or submission. *Amicus* wishes to thank CGS Senior Research Assistant LaToya D. Rembert-Lang for her research assistance.

Freedom of Information Act decisions issued by the Court, can be accessed at http://www.wcl.american.edu/lawandgov/cgs/.

SUMMARY OF ARGUMENT

Although this case arose from an unusual procedural posture,[2] it stands as representative of the many thousands of instances annually in which federal agencies must determine whether – and if so, to exactly what extent – to apply Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), to the commercial information that is obtained by them for regulatory, procurement, and law enforcement purposes. And this major part of governmentwide FOIA administration is all the more significant in that animates the realm of "reverse FOIA," in which agency FOIA personnel deal with "business submitters" directly, when those entities' submitted information is requested under the FOIA, in accordance with Executive Order 12,600, 3 C.F.R. 235 (1988), *reprinted in* 5 U.S.C. § 552 note (2006 & Supp. III 2009).

[2] Notably, this case came to the Court of Appeals below not as Freedom of Information Act cases ordinarily do, i.e., with the benefit of briefing and adjudication first at the district court level. *See AT&T Inc. v. FCC*, 582 F.3d 490, 496 (3d Cir. 2009) ("Thus, we exercise plenary review . . . ."). Suffice to say here that one consequence of this might be what now is presented to this Court. *See also* Part I.C., *infra*.

The fact that the Third Circuit's notion of "corporate privacy" would so greatly distort this realm of administrative law and practice comports with how deeply flawed it is. There is absolutely no sound basis for its radical departure from the decades-long understanding of "personal privacy" under Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6), 7(C) – not in the statute's language, not in the teachings about "privacy" in this Court's prior FOIA decisions, and certainly not in the Third Circuit's reasoning itself. In short, this bid to extend the FOIA's "personal privacy" protections to entities other than individuals is, colloquially speaking, about as meritless as they come.

ARGUMENT

I. THERE IS NO SOUND BASIS FOR ADOPTING THE NOTION OF "CORPORATE PRIVACY" FOR IMPLEMENTATION OF THE FOIA'S PERSONAL PRIVACY EXEMPTIONS

A. The Statutory Language Plainly Compels Reversal

The question of statutory construction presented in this case is relatively simple: Did Congress, when it enacted the FOIA in 1966, intend to provide "privacy" protection, under Exemption 6, to anything other than individuals? To be sure, this case most directly involves the Act's Exemption 7(C), which was created in 1974 and amended considerably in 1986, but there is no good reason in logic or law why the answer would be any different under that exemption. *Accord U.S. Dep't of Justice v. Reporters*

Comm. for Freedom of the Press, 489 U.S. 749, 767-69 (1989) (discussing both privacy exemptions together, in applying *Department of the Air Force v. Rose*, 425 U.S. 352, 373-77, 380-81 (1976)); *see also* Part 1.C., *infra*. So the question ought to be one in the same.

The statutory words to be construed in answering that question are primarily the words "privacy," "personal," "person," and "individual." And to that must be added the phrase "personal privacy" as a combination of the first two. None of them, properly construed and applied, supports the Third Circuit's notion that "corporate privacy" exists within the Freedom of Information Act. *Accord U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 601 (1982) (construing the word "similar" within Exemption 6 by reasoning that "[i]t strains the normal meaning of the word" to read it as the lower court did).

The Act uses the phrase "personal privacy" in each of its two privacy exemptions, identically so, and also in the part of its "reading room" provision that authorizes agencies to achieve privacy protection in that context as well. *See* 5 U.S.C. § 552(a)(2) (authorizing agencies most specifically to "prevent a clearly unwarranted invasion of personal privacy [by] delet[ing] identifying details" when they comply with their automatic disclosure obligations under the Act).[3] It uses the word "person" numerous times to refer to FOIA requesters, *see, e.g.*, 5 U.S.C. § 552(a)(6)(A)(i) ("the person making such request"), and also within two of its other exemptions, Exemption 4 and Exemption 7(B). And it uses the word "individual" within another exemption, Exemption 7(F).[4]

These latter three FOIA exemptions, of course, pertain to matters other than personal privacy. The first, Exemption 4, 5 U.S.C. § 552(b)(4), pertains to commercial and financial information. The second, Exemption 7(B), 5 U.S.C. § 552(b)(7)(B), pertains to law enforcement information the disclosure of which has "fair trial" significance. And the third, Exemption 7(F), 5 U.S.C. § 552(b)(7)(F), pertains to law enforcement information that has "life or physical safety" significance.

What this amounts to is the following: In enacting and then amending the FOIA, Congress used the word "person" (in 1966 and 1974) whenever it was referring to any interested party that could be making a FOIA request, to any interested party from whom an agency could obtain sensitive business information, and to any interested party that might

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[3]. *See also Reporters Comm.*, 489 U.S. at 755 n.7; *cf. Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.,* 421 U.S. 168, 184 n.21 (1975) (revealing redundancy of such protection due to general FOIA exemption applicability within subsection (a)(2) just as within subsection (a)(3)).

[4]. Likewise, as amended in 1996, the Act employs the word "individual" in much the same way when defining "compelling need" for purposes of affording "expedited processing" under one of its procedural provisions, found at 5 U.S.C. § 552(a)(6)(E)(v)(I).

have protectable "fair trial" rights.[5] It used the word "individual" (in 1986) when referring to any interested party whose "life or physical safety" could be at stake in the disclosure of requested information.[6] And it used the term "personal privacy" (in 1966, 1974, and as reiterated in 1986) when addressing the protection of privacy interests.

There is nothing about this statutory scheme that is odd or unordinary in the least. Each ambit of the statute described above, as well as the particular words chosen by Congress to be employed within it, makes perfect sense both within itself and within the statute as a whole. Simply put, the notion that the protection of "corporate privacy" interests somehow

[5] Exemption 7(B), by its nature, provides protection to corporations subject to judicial proceedings, as well as to individuals. *See, e.g.*, *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 101-03 (D.C. Cir. 1988) (applying Exemption 7(B) in case of pharmaceutical company facing personal injury suits).

[6] Exemption 7(F) of the FOIA was created in 1974 when Congress divided Exemption 7 into six subparts, but like nearly all other of those subparts it was itself significantly amended in 1986. *See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* 9-18 (Dec. 1987) (explicating entirety of amendments made to Exemption 7, inter alia), *available at* http://www.justice.gov/oip/86agmemo.htm. Originally, it provided exceptionally strong exemption protection but "was limited in scope so as to protect the lives and physical safety of 'law enforcement personnel' only." *Id*. at 18. As amended in 1986, it provides broader protection by covering law enforcement information the disclosure of which "could reasonably be expected to endanger the life or physical safety of *any individual*." 5 U.S.C. § 552(b)(7)(F), *as amended by* Pub. L. No. 99-570, § 1802 (1986) (emphasis added).

derives from the Act's structure is nothing more than that.

Significantly, there also is another segment of exemption language in the Act that logically must be considered here, the "threshold" language of Exemption 6. The FOIA as amended contains several "threshold requirements" in its exemptions. Four consecutive exemptions – Exemptions 4, 5, 6, and 7 – require that a certain threshold be satisfied before the body of their protective elements can be reached. *See* 5 U.S.C. § 552(b)(4) (requiring, non-sequentially, that the information be "obtained from a person"); 5 U.S.C. § 552(b)(5) (requiring, both stiltedly and archaically, that privileged information first be "inter-agency or intra-agency memorandums or letters"); 5 U.S.C. § 552(b)(7) (requiring, more modernly, that requested material be "records or information compiled for law enforcement purposes" before exemption subparts can be employed). *See, e.g.*, *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-16 (2001) (discussing Exemption 5 threshold); *FBI v. Abramson*, 456 U.S. 615, 621-32 (1982) (same as to Exemption 7).[7]

[7] The Act contains one additional "threshold requirement," which is found within a subpart of Exemption 7 itself. *See* 5 U.S.C. § 552(b)(7)(D) (providing that, "in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation," the agency may withhold all "information furnished by a confidential source").

And when Congress established "personal privacy" as a basis for exemption protection, in Exemption 6 in 1966, it likewise created a threshold requirement to be met before any matter of "privacy" could be considered under it. Specifically, it required that the record or information first be part of a "personnel[,] medical[, or] similar file[ ]." 5 U.S.C. § 552(b)(6). This fact, as much as any other, speaks to the statutory construction question presented in this case, under both of the FOIA's privacy exemptions.

Briefly stated, one must carefully consider the body of Exemption 6 together with its legislated threshold. In other words, and beyond anything else, does it make any sense that in 1966 Congress intended the "privacy" that it was protecting in the Act to transcend the scope of that which is implicated in personnel files, medical files, and "similar files"? Those files unquestionably contain information about individuals and do not typically contain information about corporations, associations, or other non-individuals. And they certainly do not encompass the types of government files that do, as a threshold matter, contain information pertaining to (and often submitted by) such entities. So if Congress's fundamental conception of "privacy" in enacting the FOIA were as respondent maintains (even putting aside use of the word "personal"), then Congress did an extremely poor job of effectuating it.[8]

[8] For instance, the file that contains the information at issue here is not a medical file, personnel file, or a file at all similar to such files. Rather, it is something of an altogether different type, which happens to be a law enforcement file. That file would have fallen within the broad "law enforcement files" version of Exemption 7 under the FOIA as originally enacted, which is akin to saying that the information contained within it meets the threshold requirement of Exemption 7 in its amended form today, but the information at issue within it would have been protected then because of its general law enforcement connection, not because of its particular "privacy" character. *See FOIA Update*, Vol. III, No. 4, at 5 (observing, as long ago as September 1982, that "[i]t is well settled that the FOIA's privacy exemptions [i.e., both Exemptions 6 and 7(C)] provide personal privacy protection and cannot be invoked to protect the interests of a corporation or association"), *available at* http://www.justice.gov/oip/foia_updates/Vol_III_4/page7.htm; *see also, e.g.*, *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d at 103 (observing that "[i]nformation relating to business judgments and relationships does not qualify for" Exemption 7(C)); *Aguirre v. SEC*, 551 F. Supp. 2d 33, 57 (D.D.C. 2008) (observing that "there is a clear distinction between one's business dealings, which obviously have an affect [sic] on one's personal finances, and financial information that is inherently personal in nature"); *Hodes v. HUD*, 532 F. Supp. 2d 108, 119 (D.D.C. 2008) (observing that "only individuals (not commercial entities) may possess protectable privacy interests under Exemption 6"); *Cohen v. EPA*, 575 F. Supp. 425, 429 (D.D.C. 1983) (observing that Exemption 7(C) "does not apply to information regarding professional or business activities"). And by the same token the wealth of information that is obtained by federal agencies in a non-law enforcement connection – during routine procurement processes or for a host of regulatory purposes – would have been exempt or not for reasons other than any notional "privacy" character. In short, it would have fallen plainly outside of Exemptions 6 and 7 due to their thresholds and within Exemption 4 (or not) instead. *See also* note 22, *infra*.

Moreover, the fact that both the recordkeeping world and the FOIA changed thereafter, to the point at which the unit of focus evolved from "file," to

"record," to "information," makes no difference here.[9] Nor does it alter the analysis that this Court subsequently, in *Washington Post*, pragmatically construed Exemption 6's threshold in such a way as to broaden it. It did so, most significantly, so as to have it be satisfied by any information about any "particular individual." 456 U.S. at 601-02; *accord Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) ("The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the *individual interest* in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.") (emphasis added) (footnotes omitted).

Thus, there are multiple paths for analyzing the statutory terms of the FOIA in order to decide this case, but they lead to the same conclusion: None of these terms, either in itself or when read in comparison with others, does anything other than

[9]. Congress embraced the word "information" for the FOIA when it effectively codified the Court's *Abramson* decision as part of the 1986 amendments to the Act. *See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* 5 (Dec. 1987) (pointing out that amendment to Exemption 7's threshold language followed Court's use of phrase "kind of information" in *Abramson* (citing 456 U.S. at 626)), *available at* http://www.justice.gov/oip/86agmemo.htm; *see also* 5 U.S.C. § 552(f)(2) (2000) (establishing through the 1996 FOIA amendments that the term "'record' . . . includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format").

compel reversal of the Third Circuit's singularly aberrant decision.[10]

B. This Court's Treatment of the Privacy Concept in its FOIA Decisions Stands Against the "Corporate Privacy" Notion

This Court has considered the Freedom of Information Act's privacy exemptions, and the nature of personal privacy under them, on six major occasions.[11] In so doing, it has spoken to privacy matters at considerable length and its teachings already point to the resolution of the question presented in this seventh one.

In the first of these cases, *Department of the Air Force v. Rose*, the Court consistently spoke of privacy as a right adhering to an "individual," rather

[10]. As for the legislative history that sheds further light on these bare statutory terms, no doubt it will be fully identified and explicated by the parties and other amici in this case.

[11]. These six decisions, in reverse chronological order, are: *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2004), *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994), *United States Department of State v. Ray*, 502 U.S. 164 (1991), *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), *United States Department of State v. Washington Post Co.*, 456 U.S. 595 (1982), and *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). *See also Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355 (1997) (per curiam) (reversing Exemption 6 decision summarily); *FBI v. Abramson*, 456 U.S. 615 (1982) (dealing with privacy concerns in context of threshold Exemption 7 issue).

than to the broader, legalistic term "person." *See, e.g.*, 425 U.S. at 372 ("Congress sought to construct an exemption that would require a balancing of the individual's right of privacy . . . ."). So, too, did the Court in *United States Department of State v. Ray*, 502 U.S. 164, 175 (1991), an Exemption 6 case in which it reiterated that, "[a]s we held in *Rose,* the text of the exemption requires the Court to balance 'the individual's right of privacy.'" In *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 500 (1994), another case involving Exemption 6, the Court spoke likewise of "[a]n individual's interest in controlling the dissemination of information regarding personal matters."[12] And the Court's opinion in the major Exemption 6 case of *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 599-02 (1982), is replete with focus on the privacy of "the individual" – more specifically, the "any particular

[12]. Most significantly, the Court had occasion in *DOD v. FLRA* to emphasize that the privacy principles enunciated by it in *Reporters Committee*, a case arising under Exemption 7(C), apply under Exemption 6 as well: "The privacy interest protected by Exemption 6 'encompass[es] the individual's control of information concerning *his or her person*.'" 510 U.S. at 500 (quoting *Reporters Committee*, 489 U.S. at 763) (emphasis added). This passage brings up yet another form of the word "person" here: The fundamental concept of "personhood." *See, e.g.*, Note, *Privacy, Personhood and the Courts: FOIA Exemption 7(C) in Context*, 120 Yale L.J. 379 (2010) (analyzing issue also in relation to *Citizens United v. FEC*, 130 S. Ct. 876 (2010)). It is one more reason why the "plain text" seized upon by the Court of Appeals below (see Part I.C., *infra*) is not quite as "plain" as it would have it be.

individual" whose identification in FOIA-requested information logically triggers possible exemption protection.[13]

More recently, in the Exemption 7(C) case of *National Archives & Records Administration v. Favish*, 541 U.S. 157, 167 (2004), the Court actually construed (or at least specifically applied) the phrase "personal privacy," finding that it was deeply personal in nature: "[W]e think it proper to conclude from Congress' use of the term 'personal privacy' that it intended to permit family members to assert their own privacy rights" in records about a deceased loved one. While the particular records involved in *Favish* were highly personal ones to be sure, this view of "personal privacy" stands as a far cry from how the Third Circuit concluded it could be "plainly" viewed.

[13]. Moreover, in *Washington Post* the Court assayed some of the legislative history that the Third Circuit eschewed, finding as follows:

> The House and Senate Reports, although not defining the phrase "similar files," suggest that Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information. After referring to the "great quantities of [Federal Government] files containing intimate details about millions of citizens," the House Report explains that the exemption is "general" in nature, and *seeks to protect individuals* . . . .

456 U.S. at 599 (emphasis added).

Most significantly of all, in its landmark FOIA privacy decision, *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Court spoke of "the sort of 'personal privacy' interest that Congress intended Exemption 7(C) to protect," *id.* at 762, as one seemingly irreconcilable with the novel "corporate privacy" conception that is espoused here. It repeatedly emphasized, as a privacy touchstone, "the individual's right to control" information about him- or herself. *See id.* at 763, 764 n.16 (quoting authorities). It made clear that "privacy" under the FOIA is "not the same" as in tort law or in matters of constitutional law. *Id.* at 762 n.13. And it enshrined for FOIA purposes "both the common law and the literal understandings of privacy," *id.* at 763, which hardly encompass any notion of "corporate privacy" within them.

In sum, nothing in the Court's discussions, analyses, and teachings about "personal privacy," in an array of decisions under both Exemptions 6 and 7(C), supports the adoption of "corporate privacy" here. To the contrary, this Court's jurisprudence stands in the way.

C. The Decision Below Itself Provides No Sound Support for Affirmance

This is not a case in which the reasoning of the Court of Appeals' decision below provides a sound basis for its own affirmance. Rather, the Third Circuit reached its "corporate privacy" conclusion in a fashion that was transparently

outcome-determinative, with reasoning flawed at every turn.

First, the Court of Appeals strained badly and quite obviously to treat its analysis as one untethered from, inter alia, the FOIA's rich vein of legislative history. This Court, of course, has drawn upon that to strong effect in its analyses of several questions raised under the Act. *See, e.g.*, *Washington Post*, 456 U.S. at 599-602; *Abramson*, 456 U.S. at 626-31. But the Third Circuit simply posited, at the outset of its analysis, that in this case "the plain text of Exemption 7(C)" is "unambiguous" and that therefore, in conclusion: "We need not consider the parties' arguments concerning statutory purpose, relevant (but non-binding) case law, and legislative history." 582 F.3d at 498 & n.7. In between, it used its self-indulgent myopia to conclude that "the FOIA's text unambiguously indicates" that "corporate privacy" exists within Exemption 7(C).[14]

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[14] The circularity of the Third Circuit's reasoning is most evident when one considers that it employed its "unambiguous/plain text" approach toward a conclusion without first construing the full "plain text" of the phrase actually at issue. This Court has had occasion to comment on the purpose that can underlie such an approach, as well as its deficiencies: "[P]lain meaning, like beauty, is sometimes in the eye of the beholder. The court below inferred 'plain meaning' without consulting indicia of congressional intent in the legislative history . . . ." *Fla. Power & Light Co. v. Lorion,* 470 U.S. 729, 737 (1985); *see also Abramson*, 456 U.S. at 625 n.7 ("'The notion that, because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.'"

Second, there is the fact that the Third Circuit reached its tautological conclusion by looking at the "plain text" of Exemption 7(C) in relation to that of a broader statute. Indeed, its reference to a definition of the word "person," as a basis for divining the "unambiguous" meaning of the phrase "personal privacy," is not as it says it is: "FOIA defines 'person' to include a corporation." 582 F.3d at 497; *see also id.* at 496 ("FOIA does not define 'personal,' but it does define 'person'"). Rather, it is to the "person" definition that is contained within the Administrative Procedure Act, 5 U.S.C. § 551(2) (2006 & Supp. III 2009), which of course defines that word so as to include parties who can sue the federal government, just as the FOIA uses the same word consistently to refer to those who can make FOIA requests. The Third Circuit not only mistook the location of that definition, it plainly misapprehended its import as well.[15]

Third, and quite fundamental, is the Third Circuit's very leap from the word "person" to the word "personal," as if they can be nothing more than two forms of the same thing. 582 F.3d at 497 ("After all, 'personal' is the adjectival form of 'person,' . . ."). Even putting aside that this reasoning is highly questionable and as such breaches the Third Circuit's own "unambiguously" threshold, it proceeds as if only the word "person" is there to be construed (and to be found "unambiguous") in this case. *See id.* (speaking tellingly of "the root from which the statutory *word* at issue is derived") (emphasis added); *cf. Favish*, 541 U.S. at 166 (rejecting comparable effort to "rely on the modifier 'personal' before the word 'privacy'" within Exemption 7(C)). Thus, the actual, commonplace phrase "personal privacy" remained largely unconstrued below, in accordance with the Third Circuit's necessary implication that it must be "unambiguous."[16]

Fourth, the Third Circuit badly erred in reasoning that "*Congress knew* how to refer solely to human beings (to the exclusion of corporations and other legal entities) when it wanted to." 582 F.3d at 497 (emphasis added). Its "example" of this is Congress's use of the word "individual" in Exemption 7(F). *See id.* But as is detailed in Part I.A., *supra*, Congress did not use the word "individual" anywhere in the FOIA when it first crafted the Act's scope of privacy protection in 1966. Nor did it use it even when it divided Exemption 7 into subparts, including its privacy counterpart to Exemption 6, in 1974. Actually, the word "individual" came into use

(quoting *United States v. Monia,* 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting))).

[15] It also should not be overlooked in this regard that the Third Circuit inexplicably relied on the definition of "person" contained in the broader but distinct Administrative Procedure Act without even recognizing that that word appears within the text of the FOIA itself as part of the threshold requirement of Exemption 4. *See* 582 F.3d at 496-97. It therefore did not attempt to reason that Congress has used that word to apply to business entities for FOIA purposes directly. Had it done so, however, its reasoning still would have been fatally flawed in all other respects.

[16] This critical point having been made here, this *amicus* will leave it to others to address how the distinct phrase "personal privacy" is commonly used and understood as a whole.

only as of 1986, when Exemption 7(F) was amended. That subsequent use then says absolutely nothing about what "Congress knew" how to do in 1966 when first employing the phrase "personal privacy," or in 1974 when replicating it.[17] Thus, this underpinning of the Third Circuit's reasoning (actually more a rationale in search of a reality-based underpinning) was manifestly flawed.

Lastly, there is the Third Circuit's attempt to deal with the fact that Exemption 6 uses the same key "personal privacy" phrase as Exemption 7(C). *See* 582 F.3d at 497 (speaking of the "FOIA's other uses of the phrase 'personal privacy'"). It posits, in effect, that this key phrase does "encompass[ ] corporations," but that, as it sees it, "[t]he phrase 'personnel and medical files' serves [the] function [of] limit[ing] Exemption 6 to individuals." *Id.* Even beyond the fact that such an analysis posits its own conclusion, this makes little sense, as it is asks this Court to believe that Congress *sub silentio* created yet disallowed a "corporate privacy" concept when crafting Exemption 6. And (though less explicitly on the face of the Third Circuit's opinion) it asks one to

[17] As the Attorney General Memorandum on these amendments explains: "The expansion of this exemption's protective scope to encompass 'any individual' is obviously designed to ensure that no law enforcement information that could endanger anyone if disclosed under the FOIA should ever be required to be released." *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* 18 (Dec. 1987), *available at* http://www.justice.gov/oip/86agmemo.htm. There is absolutely no basis for thinking that anything done by Congress in amending the FOIA supports the notion of "corporate privacy." *See also id., passim.*

imagine that Congress just as silently embraced this novel concept when creating Exemption 7(C) in 1974 – and that this is "unambiguous" on the face of the Act's "plain text." Hardly so.[18]

II. AS A PRACTICAL MATTER AS WELL, ADOPTION OF THE "CORPORATE PRIVACY" NOTION WOULD BE UNWISE AND UNWARRANTED

Beyond the purely legal merits of an issue presented to this Court in a Freedom of Information Act case, nearly every FOIA question accepted for review by it holds strong import for the effective governmentwide administration of the Act as a day-to-day practical matter. This is particularly so in this case, and should be considered as such, as the question of "corporate privacy" is a dangerously novel one that threatens to turn FOIA administration on its head. *Cf. Favish*, 541 U.S. at 170 ("The statutory scheme must be understood,

[18] As this Court phrased such a reaction in its only "business information" decision under the FOIA to date, *Chrysler Corp. v. Brown*, 441 U.S. 281, 291 (1979): "In fact, that conclusion is not supported by the language, logic, or history of the Act." *See also Abramson*, 456 U.S. at 625 ("Moreover, [our] construction of the statute[,] rather than the interpretation embraced by the Court of Appeals, more accurately reflects the intention of Congress, is more consistent with the structure of the Act, and more fully serves the purposes of the statute.") (footnote omitted); *cf. Washington Post*, 456 at 600 ("there surely would be clear suggestions in the legislative history that such a [remarkable] meaning was intended").

moreover, in light of the consequences that would follow were we to adopt [respondent's] position.").

Indeed, it necessarily holds broad implications for how more than 5000 FOIA personnel throughout the ninety-five departments and agencies of the executive branch must act on the tens of thousands of FOIA requests received each year for files and records that contain information obtained from corporations, associations, unincorporated business entities, and other "non-individuals" – in short, from any legal "person." Since the issuance the Court's seminal decision in *Chrysler Corp. v. Brown* more than thirty years ago, all federal agencies have labored to follow strict procedures by which "business submitters" demonstrate the applicability of Exemption 4 (or not) before a FOIA request is fulfilled. *Accord* Exec. Order No. 12,600 (effective June 23, 1987).[19] Agencies do so within the onerous realm of "reverse FOIA," in which their failure to comply correctly with such procedures, including through the time-consuming preparation of an adequate administrative record of their Exemption 4 determinations in the face of "business submitter" claims, subjects them to court orders enjoining disclosure, sometimes permanently. *See, e.g.*, *McDonnell Douglas Corp. v. NASA*, 895 F. Supp. 316, 319 (D.D.C. 1995) (confirming issuance of permanent injunction), *aff'd on procedural grounds*, No. 95-5290 (D.C. Cir. Sept. 17, 1996).

As it is, this means that federal agencies rarely if ever manage to comply with the Act's time limits, and the public interest is thwarted, whenever a business entity (upon receiving the notice required by Executive Order 12,600) objects to disclosure. But if the scope of those objections were to be extended beyond Exemption 4 concerns to those arguably implicated by the Act privacy exemptions, the practical difficulties posed within the "reverse FOIA" realm would be both greater and wider, with "business submitters" newly free (and for the first time encouraged) to resist disclosure through amorphous "privacy" claims. It takes little imagination to do so, nor to envision the very ease with which agencies, FOIA requesters, and the public interest overall could routinely be thwarted in such event. *Compare, e.g.*, *Favish*, 541 U.S. at 171 (reasoning dispositively under Exemption 7(C) that "[a]llegations . . . are '"easy to allege . . ."'" quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)).

In sum, on several occasions over the years, at the Solicitor General's urging in the sparing exercise of her judgment that remedial review was absolutely necessary, this Court has had to reverse a novel court of appeals decision that was utterly impracticable for purposes of governmentwide FOIA administration as well as lacking in legal merit. It did so in *Abramson*, in *Washington Post*, in *CIA v.*

[19] This executive order was preceded by governmentwide policy and practice to the same effect. *See, e.g.*, *FOIA Update*, Vol. III, No. 3, at 3 ("OIP Guidance: Submitters' Rights") (setting forth pre-executive order governmentwide policy guidance and describing post-*Chrysler* administrative practice), *available at* http://www.justice.gov/oip/foia_updates/Vol_III_3/page3.htm.

Sims,[20] and most prominently in *Reporters Committee*.[21] And this case deserves no less to be added to that list.[22]

[20] In *CIA v. Sims*, 471 U.S. 159, 174 (1985), the Court as in these other cases granted certiorari despite the absence of a circuit conflict where "the harsh realities of the present day" had to be considered as a practical matter.

[21] The latter decision is regarded as the most significant one issued in the more than four decades of the FOIA's existence; it was the subject of an academic conference recently conducted by the Collaboration on Government Secrecy, "Privacy Protection After Twenty Years Under *Reporters Committee*," at which its practical importance was discussed at length. See Program Webcast (Apr. 28, 2009), *available at* http://media.wcl.american. edu/Mediasite/Viewer/?peid=beaabe05-d276-4c16-8dd5-d67b277f4a84.

[22] There also is the practical consideration that at least some information apparently at issue in this case, representative of much information to which Exemption 7(C) in respondent's view should apply, would fall within the "categorical" protection of Exemption 4 under the prevailing rule of *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879-80 (D.C. Cir. 1982) (en banc), *cert. denied*, 507 U.S. 984 (1993). It is entirely unclear on the face of the Court of Appeals' opinion whether Exemption 7(C) was invoked by respondent in lieu of Exemption 4 in this case – and if so, why. *See AT&T Inc. v. FCC*, 582 F.3d at 493 (speaking of respondent's "law enforcement" argument against disclosure only). The basic circumstances of the case certainly lend themselves to Exemption 4 applicability, including, at least in part, "categorical" protection on "voluntariness" grounds. *See* Brief in Opposition [to Certiorari] for Respondent AT&T Inc. at 3 (filed July 13, 2010) (recounting that respondent "voluntarily and confidentially" disclosed certain information to the agency); *see also id.* at 4 (implying but not stating that other information was produced pursuant to agency order). Whatever the explanation for this may be, however, the fact remains that upon ordinary application of *Critical Mass* much of the information that would qualify for "corporate privacy" protection under Exemption 7(C) according to respondent and the Third Circuit would qualify for protection more "categorically" under Exemption 4.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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