No. 09-1279

In The Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

AT&T INC. AND COMPTEL,
Respondents.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—continued

Page

TABLE OF AUTHORITIES—continued

Page

Constitutional Provisions and Legislative Materials

TABLE OF AUTHORITIES—continued

Page

Books and Articles

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms and structural safe-guards guaranteed by our Constitution.

CAC has filed briefs supporting the protection of individual fundamental rights in this Court, in cases such as *McDonald v. City of Chicago*, *Padilla v. Kentucky*, and *Northwest Austin Municipal Utility District No. 1 v. Holder*. In *Citizens United v. FEC*, CAC filed a brief in this Court noting the different treatment given to individuals and corporations under our Constitution's text and history. Furthermore, CAC has examined the historical treatment of corporations in Court precedent and the development of the idea of "corporate personhood" in American law. Accordingly, CAC has a strong interest in the Court's treatment of the claim of corporate privacy rights in this case.

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

AT&T seeks to shield certain corporate documents from disclosure under Exemption 7(C) of the Freedom of Information Act, which protects documents obtained through law enforcement investigations that could result in an unwarranted invasion of "personal privacy" if disclosed.[2] This exemption has been applied to protect individuals from harassment and embarrassment but never to protect corporate interests. And rightly so—the idea that corporations like AT&T are entitled to the same protection of such fundamental rights as privacy that individual human beings enjoy is seriously out of step with our Nation's history.

From the Founding on, corporations have been regarded as "artificial being[s], invisible, intangible, and existing only in the contemplation of the law." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). A corporation is a "creature of the law" that does not possess inalienable human rights, but rather "only those properties which the charter of creation confer on it." *Id.* To be sure, corporate interests and property are protected in certain important ways—under the Constitution's Contract Clause, for example, and the Fourth Amendment's prohibition on unreasonable searches and seizures. Corporations also enjoy the general protection of

[2] FOIA's Exemption 7(C) exempts from mandatory disclosure records or information compiled for law enforcement purposes when such disclosure could reasonably be expected to constitute an unwarranted invasion of "personal privacy." 5 U.S.C. 552(b)(7)(C).

the laws; for example, in *Citizens United v. FEC*, the Court held that "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity." 558 U.S. 50, 81 (2010). But corporations enjoy First Amendment rights not because they have an inherent dignitary interest in sharing their thoughts and deeply-held convictions, but because the worth of speech under the Constitution "does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

In contrast to the First Amendment issues in *Citizens United*, a long line of precedent makes clear that corporations and individuals do not stand on equal footing with respect to privacy interests. As the Court has held, "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Congress did not deviate from these first principles in enacting FOIA's "personal privacy" protections.

FOIA's protection of the dignity interests and basic privacy rights of individuals, while establishing separate provisions ensuring that corporations are not subject to commercial harm or property loss as a result of disclosure, is consistent with the historical distinctions between the fundamental rights of individuals as opposed to corporate interests. There is no reason under the text of the statute or existing precedent for the Court to break new ground by extending the

concept of "personal privacy" to include the commercial interests of artificial, corporate entities.

ARGUMENT

I. CORPORATIONS HISTORICALLY HAVE BEEN TREATED AS ARTIFICAL ENTITIES CREATED BY THE STATE, NOT AS THE EQUIVALENT OF INDIVIDUAL PERSONS.

From the very beginnings of our Nation and the adoption of its Founding charter, the legal protections afforded to living persons and corporations have been fundamentally different. As its opening words reflect, the Constitution was written for the benefit of "We the People of the United States," U.S. CONST., Preamble, and never specifically mentions corporations. Shortly after ratification, the framers of the Constitution added the Bill of Rights to the original Constitution to protect the fundamental rights of the citizens of the new nation, reflecting the promise of the Declaration of Independence that all Americans "are endowed by their Creator with certain unalienable rights, [and] that among these are life, liberty, and the pursuit of happiness."

Corporations stood on an entirely different footing at the Founding. A corporation, in the words of Chief Justice John Marshall, "is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819); *see also Head & Amory v. Providence Ins. Co.*, 6 U.S. (2 Cranch.) 127, 167 (1804) (describing a corporation as a "mere creature of the act to which it owes its existence"). *See generally* JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970, at 15 (1970) ("Knowing their Coke and Blackstone, lawmen in the United States could thus readily accept the established seventeenth-century English doctrine that only the sovereign's act might make a corporation.").

In the 1st Congress, James Madison summed up the Founding-era vision of corporations: "[A] charter of incorporation . . . creates an artificial person not existing in law. It confers important civil rights and attributes, which could not otherwise be claimed." Annals of Congress, 1st Cong., 3rd Sess. 1949 (1791). In short, from the beginning of American history, corporations, unlike the individual citizens that made up the Nation, did not have fundamental and inalienable rights by virtue of their inherent dignity.

Early rulings from the Court provided limited protection for corporations, chiefly in matters relating to property and commerce, while consistently reaffirming a fundamental distinction between corporations and natural persons. This basic understanding of the differences between individual rights and corporate interests held true even in cases in which, for practical reasons,

corporations were considered to be "citizens" or persons.

For example, one of the thorniest early questions concerned how to treat corporations for the purposes of federal jurisdiction under Article III. A primary attribute of the corporate form is that it allows the corporation itself to sue and be sued for matters related to corporate rights and duties. But Article III repeatedly refers to "citizens" in defining the types of cases that can be heard by the federal courts, including cases involving "Citizens of different States." U.S. CONST. art. III, § 2. In *Bank of the United States v. Deveaux*, Chief Justice Marshall first addressed this question, holding:

> [t]hat invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members in this respect can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union.

9 U.S. (5 Cranch) 61, 86-87 (1809).

Chief Justice Marshall concluded that the term "citizen" "ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name." *Id.* at 91. Thus, the Court held that courts had to "look beyond the corporate name, and notice the character of the individual," for purposes of determining whether the parties in a case were in fact "citizens of different states." *Id.* at 90.

Chief Justice Marshall's interpretation of Article III quickly proved unworkable, however, mainly because it allowed corporations to evade federal court jurisdiction whenever it had members that resided in many states. Noting widespread dissatisfaction with *Deveaux*, the Court overruled the decision three decades later in *Louisville, Cincinnati, & Charleston Railroad Co. v. Letson*, holding that "[a] corporation created by a state to perform its functions under the authority of that state . . . seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state." 43 U.S. (2 How.) 497, 555 (1844). Nine years later, in *Marshall v. Baltimore & Ohio Railroad Co.*, the Court emphasized *Letson*'s point that treating a corporations as a "citizen," resident in the state of its incorporation for jurisdictional purposes, was a legal fiction, required mainly to protect citizens wishing to sue out of state corporations in federal court. 57 U.S. (16 How.) 314, 328 (1853).

This treatment of corporations as citizens or persons for practical purposes contrasts with the treatment of corporations in the context of fundamental substantive rights. For example, in *Bank of Augusta v. Earle*, the Court held that even if corporations were to be considered "citizens" in federal court for jurisdictional purposes to ensure that corporations remained accountable in federal court to those they had wronged, corporations were not protected by the substantive guarantees of the Constitution that apply only to "citizens." 38 U.S. (13 Pet.) 519 (1839).

In *Earle*, the Court held that corporations were not entitled to the protection of the Privileges and Immunities Clause of Article IV, which provides that "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV. The Court reasoned that a corporation could not claim both the special privileges that inhere in corporate status and the individual-rights protections the Constitution guarantees to living persons. "If . . . members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens . . . they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in a like manner." *Id.* at 586. In other words, having accepted special privileges from the state, including limited liability unavailable to citizens, a corporation could not turn around and claim the substantive constitutional protections granted in the Constitution to citizens. *See also Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177

(1869) (noting that while corporations may be considered citizens for the purpose of maintaining federal jurisdiction, "[t]he term citizens [in the Privileges and Immunities Clause] applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed").

Even under more expansive historical views of corporate rights that held sway for periods of our Nation's history, corporations never enjoyed the same privacy and liberty interests that individuals were guaranteed.

For example, Justice Field's circuit decision in the *Railroad Tax Cases*—arguably "the most sustained and comprehensive effort to justify reading the Constitution to grant corporations the fundamental constitutional rights possessed by living persons"[3]—conceded that the Due Process Clause's protection of life and liberty does not apply to corporations "because . . . the lives and liberties of the individual corporators are not the life and liberty of the corporation." *Railroad Tax Cases*, 13 F. 722, 747 (C.C.D. Cal. 1882). Likewise, Justice Field agreed that the "privileges and immunities of citizenship" do not "attach to corporations. These bodies have never been considered citizens for any other purpose than the protection of the property

[3] David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past and Uncertain Future of Corporate Personhood in American Law* 24 (2010), *available at* http://www.theusconstitution.org/page_module.php?id=11&mid=7.

rights of the corporators. The status of citizenship . . . does not belong to corporations." *Id.* Thus, while Justice Field's opinion in the *Railroad Taxes* case was revolutionary in suggesting a constitutional mandate to treat corporations the same as individuals with respect to taxation of property, it was nonetheless limited in the range of constitutional rights it protected. *See also Northern Securities Co. v. United States*, 193 U.S. 197, 362 (1904) (Brewer, J., concurring) (observing that corporations are "artificial person[s], created and existing only for the convenient transaction of business," and, as such, "not endowed with the inalienable rights of [] natural person[s]").

Accordingly, even in instances where corporations were treated as citizens or persons or otherwise given fundamental constitutional protections, these rights were limited to interests related to a corporation's inherent status as an artificial, state-chartered entity.[4] The idea that corporations should be able to claim protection for privacy rights or other rights that flow from human dignity concerns is unsupported by the historical treatment of corporate rights and "personhood."

[4] And, of course, the Court has also extended protections that are not specifically tied to personhood, citizenship or individual dignity. For example, the Court has held that the First Amendment applies to corporations, *e.g., First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778, n.14, because the government cannot restrict speech based solely on the identity of the corporate "speaker." *Citizens United v. FEC*, 558 U.S. 50, 81 (2010).

II. THE COURT HAS HELD THAT CORPORATIONS AND INDIVIDUAL PERSONS DO NOT SHARE AN EQUAL RIGHT TO PRIVACY.

While the Court has generally distinguished between the rights and interests of individual persons and those of corporations, it has made this distinction particularly clear in the context of privacy. The Court's contrasting treatment of corporate and individual interests under constitutional protections against unreasonable searches and seizures and self-incrimination are particularly relevant in this case.

In *United States v. White*, for example, the Court reaffirmed that the Fifth Amendment's Self-Incrimination Clause does not protect corporations, observing that the privilege "is essentially a personal one, applying only to natural individuals . . . . The framers . . . who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations." 322 U.S. 694, 698, 700 (1944).

While the Court has applied certain Fourth Amendment protections to corporations, specifically those that address the security of certain premises, *e.g.*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978), a corporation's rights against unreasonable searches and seizures are derivative of the individual rights of the people who own and work

for the corporation. *See See v. City of Seattle*, 387 U.S. 541, 543 (1967). As the Court explained in *Hale v. Henkel*, 201 U.S. 43 (1906), *overruled in part on other grounds*, *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964):

> A corporation is . . . an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected . . . against unlawful discrimination.

201 U.S. at 76.

Even while extending Fourth Amendment protections to businesses, the Court has been careful to distinguish between individual and corporate rights under the Fourth Amendment. In *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), the Court recognized that the Fourth Amendment rights of corporations are necessarily less extensive than those of living persons. *Morton Salt* rejected a corporation's Fourth Amendment challenge to an administrative order requiring production of documents relevant to an agency investigation of the corporation's trading practices.

The Court unanimously held that:

> corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities . . . Favors from government often carry with them an enhanced measure of regulation . . . . [L]awenforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Id. at 368-69 (citations omitted); *see also California Bankers' Ass'n v. Schultz*, 416 U.S. 21, 65-67 (1974) (reaffirming *Morton Salt*). Under *Morton Salt*, corporate records do not receive the same privacy protection as does information pertaining to individuals.

Because corporations are artificial entities with certain special privileges, they are also subject to different measures of regulation than individual human beings are when it comes to privacy. *See Morton Salt*, 338 U.S. 368-69. This differential treatment is reflected in FOIA's disclosure exemptions, discussed below in Section III, which give protection to an individual's "personal privacy" rights under Exemptions 6 and 7(C), while providing protection to a corporation's legitimate

business interest in keeping certain sensitive documents confidential under Exemption 4. Because "lawenforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest," *id.* at 369, corporations cannot "plead an unqualified right to conduct their affairs in secret." *See id.* Even with respect to the Fourth Amendment's prohibition against warrantless searches, which the Court has held applies "to shield places of business as well as of residence," *Marshall*, 436 U.S. at 312, "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy" could exist, *id.* *See also United States v. Biswell*, 406 U.S. 311 (1972).

The Court's centuries-old distinction between the interests of individuals and corporations under the Fourth and Fifth Amendments remains good law. *See, e.g.*, *Braswell v. United States*, 487 U.S. 99, 100 (1988) (noting that Braswell was not asserting a "self-incrimination claim on behalf of the corporations," as "it is well established that such artificial entities are not protected by the Fifth Amendment"). FOIA's "personal privacy" exemptions, as discussed below, reflect this longstanding recognition of the different privacy interests that individuals and corporations may legitimately claim.

III. FOIA'S PROTECTION OF THE PERSONAL DIGNITY AND PRIVACY RIGHTS OF INDIVIDUALS, WHILE PROVIDING SEPARATE PROTECTION FOR BUSINESS INTERESTS, ACCORDS WITH THE DIFFERENT PROTECTIONS HISTORICALLY AFFORDED TO INDIVIDUALS AND CORPORATIONS.

As demonstrated in Section I, corporations have historically been considered artificial entities distinct from individuals even when corporations, through a legal fiction, are treated as "persons" or citizens. Similarly, while the Administrative Procedure Act (APA), of which FOIA is a part, defines "person" to include corporations, 5 U.S.C. 551(2), the text and legislative history of FOIA's "personal privacy" exemptions show that the legal fiction of corporate "persons" does not extend so far as to give corporations and individuals equal privacy interests. *See* Br. of Pet'r at 17-34 (discussing the text and legislative history of FOIA and its disclosure exemptions).

In addition, as demonstrated in Section II, even as the Court has applied protections against unreasonable searches and seizures to corporations, it has unambiguously held that "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *Morton Salt*, 338 U.S. at 638. FOIA's disclosure exemptions based on "personal privacy," and American law more generally, protect privacy rights to safeguard human dignity and individual

autonomy—interests not shared with corporations. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 n.15 (1989) (construing FOIA Exemption 7(C)) and citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197-199, 205-207, 213-214 (1890)). Accordingly, FOIA's protection of individual privacy and dignity interests, on the one hand, and corporations' legitimate commercial interests on the other, are consistent with the historical protection of distinct individual and corporate rights.

For example, FOIA exempts from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Exemption 6 establishes "a workable compromise between individual rights and the preservation of public rights to Government information." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976) (citation and internal quotation marks omitted). Congress drafted the statutory language of this exemption to strike the "proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information . . . ." *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)). As the FCC demonstrates, and the lower court assumed, Exemption 6's protection of personal privacy interests affected by the potential disclosure of personnel and medical records applies only to individuals, not corporations. *See* 120 Cong.

Rec. at 17,045 (Sen. Dole) (explaining that "the right of privacy envisioned in [the Exemption] is personal and cannot be claimed by a corporation or association.") (reprinting *Washington Research Project, Inc.* v. *HEW*, 366 F. Supp. 929, 937-938 (D.D.C. 1973), *aff 'd in part on other grounds*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975)). *See generally* Br. of Pet'r at 20-24, 34-41.

Exemption 7(C), at issue in this case, mirrors Exemption 6's use of "personal privacy" with respect to records compiled for law enforcement purposes and suggests that it, too, applies to protect only the privacy of individuals. Indeed, in the debates over Exemption 7(C), Senator Roman Hruska explained that one of "the most important rights" that "an individual may possess, his right to privacy," was at stake. 120 Cong. Rec. at 17,037. *See* Br. of Pet'r at 27-34 (detailing legislative history of Exemption 7(C) and noting the many times concern was expressed regarding protection of an individual's right to privacy). In contrast, there is a well-established principle that a "corporation . . . has no personal right of privacy." Restatement (Second) of Torts § 652I cmt. c (1977). *See also* William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 408- 409 & n.207 (1960) (noting that "the right to privacy is one pertaining only to individuals" and citing cases). "A corporation . . . can have no personal privacy" because the "right of privacy" is "a personal one." William L. Prosser, *Law of Torts* § 97, at 641-642 (2d ed. 1955). *See generally* Br. of Pet'r at 19-20 (distinguishing between privacy rights attributable only to human

beings and a corporation's more limited right to protect its name and business reputation).

To be sure, corporations have a legitimate interest in protecting from disclosure certain business information that could subject a company to commercial disadvantage or harm. Congress protected such information in FOIA's Exemption 4, which exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Because the APA defines the statutory term "person" to include "an individual, partnership, corporation, association, or public or private organization other than [a federal] agency," 5 U.S.C. 551(2), the exemption specifically protects from disclosure corporations' "trade secrets" and confidential "commercial or financial information." In this way, legitimate corporate interests in confidentiality are protected by Exemption 4, and individual privacy rights are protected by Exemptions 6 and 7(C).

FOIA's different disclosure exemptions for individual privacy and corporate business interests, respectively, are consistent with the way individual and corporate interests in confidentiality and privacy have been treated by the Court. For many reasons, as the Court has explained, "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *Morton Salt Co.*, 338 U.S. at 652. AT&T should not be allowed to claim an unprecedented corporate "personal privacy" interest under FOIA's Exemption 7(C).

CONCLUSION

For the foregoing reasons, the Court should reverse the ruling of the lower court and remand for further proceedings.

Respectfully submitted,

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