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 FREE PRESS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Aparna Sridhar
Coriell S. Wright*
M. Chris Riley
Free Press
501 Third Street, N.W.
Suite 875
Washington, D.C. 20001
(202) 265-1490
cwright@freepress.net
Counsel for Amicus Curiae
**Counsel of Record*

November 2010

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

Statutes and Regulations

TABLE OF AUTHORITIES—Continued

Page

Other Authorities

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF *AMICUS CURIAE*[1]

Free Press is a national, nonprofit, nonpartisan organization dedicated to reforming the media. Founded in 2002, the organization has approximately 500,000 members and supporters across the country. Through education, organizing, and advocacy, Free Press seeks to promote universal access to communications technologies and infrastructure; preservation of the Internet as a vibrant platform for commerce, speech, and culture; diverse and independent media ownership; strong public media; and quality journalism. Free Press's work is grounded in the idea that structural reform of the media is one key to developing a more representative democracy — its mission is animated by the belief that citizens can only make informed decisions if they have access varied and diverse sources of news and analysis.

As a part of Free Press's advocacy work, it participates extensively in proceedings before the Federal Communications Commission. In 2010 alone, Free Press has filed substantive comments in over two dozen open Commission proceedings. Free Press's submissions are among the most extensive and thorough filings offered by public interest advocates in Commission proceedings. Free Press's policy staff frequently testify before the Commission

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certify that 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. Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court pursuant to Rule 37.3.

and Congress, addressing media and telecommunications policy issues.[2]

Advocating for greater transparency at the FCC has been a key component of Free Press's telecommunications and media policy agenda. For example, Free Press recently filed comments encouraging the Commission to reform its *ex parte* notice process such that the filing of letters memorializing *ex parte* meetings with Commission staff provides more meaningful disclosure regarding the interests of the participants, as well as the nature of such discussions and their impact on the policymaking process. *Reply Comments of Free Press*, *Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, GC Docket No. 10-43 (June 8, 2010).

Further, organizations such as Free Press rely on requests made pursuant to the Freedom of Information Act (FOIA) to better understand how media and telecommunications policy gets made, as well as whether and how the FCC enforces its rules. Information gathered as a result of FOIA requests — whether made by Free Press or other organizations — also helps Free Press develop and calibrate its own policy positions and goals, as well as enables it to hold the Commission accountable for agency overreach, inaction, and misconduct.

SUMMARY OF ARGUMENT

Free Press agrees with Petitioners: the FOIA exemption that allows withholding of law

[2] For a sampling of Free Press's research, filings, and written testimony, see www.freepress.net/resources/library.

enforcement records if disclosure could reasonably be expected to constitute an unwarranted invasion of "personal privacy" does not apply to corporate entities. See, e.g., Pet. Br. at 13 (explaining that the text and drafting history of Exemption 7(C), as well as FOIA's broader structure, does not support the Third Circuit's creation of a "personal privacy" right for corporation under FOIA).

Free Press submits this brief to emphasize two points: First, acknowledging a corporate right to privacy in this case would contravene this Court's jurisprudence interpreting both FOIA and the Constitution, which consistently rejected the notion that corporations as entities possess purely dignitary interests like a right to "personal privacy." Second, such a result would significantly undermine the core purpose of FOIA *and* would hamper the ability of individuals and interested organizations to advocate for policies that promote the public interest before the FCC.

1. The Third Circuit's novel creation of a right to corporate privacy in the context of FOIA litigation misinterprets this Court's privacy jurisprudence. The Court's cases interpreting both FOIA and the Constitution recognize that the right to privacy is grounded in our notions of individual dignity and autonomy. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977); *Winston v. Lee*, 470 U.S. 753, 758-59 (1985) (characterizing the privacy right protected by the Fourth Amendment as the "right to be let alone") (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Thus, to the extent that the Court has recognized a privacy right for corporations in other contexts, it has done so to

protect the privacy interests of individuals who happen to be affiliated with the corporation. The corporation's right is fundamentally derivative of various individuals' right to privacy; it is not a right enjoyed by the corporation in the abstract. See, e.g., *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978). In the instant case, there is no dispute that individuals affiliated with respondent AT&T enjoy the privacy protections of Exemption 7(C). See *SBC Commc'ns, Inc.*, 23 F.C.C.R. 13,704, 13,705 (2008). By extending the privacy protections contained in Exemption 7(C) to guard against reputational harms or harassment suffered by corporations *as* corporations, the Third Circuit exceeded the boundaries of this Court's privacy cases.

2. The Third Circuit's decision also undermines FOIA's core purpose — the right of citizens to "know what their government is up to." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1989) ("*Reporters Committee*") (internal quotation marks, citations, and emphasis omitted). In general, FOIA seeks to "open agency action to the light of public scrutiny," see *United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 498 (1994) (internal quotation marks and citation, omitted). In the case of the FCC, a critical agency function is to adopt and enforce rules that apply to regulated entities like AT&T, the respondent seeking to assert a privacy interest. See, e.g., 47 U.S.C. § 154(*i*) (establishing the Commission's rulemaking authority); 47 U.S.C. § 208 (establishing procedures for bringing complaints against common carriers). By creating a right to corporate privacy, the Third Circuit's decision undermines the public's ability to obtain information about the FCC's fulfillment of its operative mandate — the enforcement of the laws and regulations under its jurisdiction. See 47 U.S.C. § 151 (creating the Commission to "enforce the provisions" of the Communications Act). But the harm done by the Third Circuit's opinion does not end there. The purpose of FOIA is disclosure; however, disclosure is merely a tool used by an informed citizenry to participate more effectively in the political and regulatory processes. The Third Circuit's decision undermining disclosure will further limit the ability of citizens to participate meaningfully in FCC proceedings and advocate for the formation of media and technology policies that serve the public interest.

This Court should reject the Third Circuit's unwarranted and unsound departure from precedent. The judgment of the Court of Appeals must be reversed.

ARGUMENT

I. THE THIRD CIRCUIT'S INTERPRETATION OF FOIA EXEMPTION 7(C) DEPARTS FROM THIS COURT'S PRECEDENTS ADDRESSING BOTH FOIA AND CORPORATE PRIVILEGES.

Congress enacted FOIA to "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation marks and citation omitted). "[T]he Act is broadly conceived," and "disclosure, not secrecy, is the dominant objective of the Act." *Id.* Disclosure of agency records is mandatory under FOIA, 5 U.S.C. § 552(a), and the statute's exemptions are to be narrowly construed. See *Rose,* 425 U.S. at 361.

As relevant here, FOIA's Exemption 7(C) permits agencies to withhold records or information if such records are "compiled for law enforcement purposes, but only 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). When the Third Circuit construed FOIA's Exemption 7(C) to recognize a corporation's interest in "personal privacy" distinct from the privacy of individuals who may be affiliated with the corporation, not only did it depart from the language of the statute itself as Petitioners have argued, Pet. Br. at 17-20, but it also it departed from both the principle of favoring disclosure and from this Court's settled precedent in interpreting both FOIA and corporate rights.

A. This Court's FOIA Decisions Characterize The Statute's Personal Privacy Exemptions As Protecting The Interests Of Natural Persons, Not Corporations.

This Court's characterizations of the privacy interests protected by FOIA make clear that corporations do not have "personal privacy" interests under the Act. In *Reporters Committee*, this Court described the privacy interest protected by FOIA as "the *individual* interest in avoiding disclosure of personal matters." 489 U.S. at 762 (citing *Whalen*, 429 U.S. at 598-600 (emphasis added)). Other discussions of the values protected by the exemption make clear that the Court sought to safeguard the interests of individual dignity which do not extend to corporations.

First, in *Reporters Committee*, the Court observed that historically, "[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others." *Id.* at 763 n.15 (quoting Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890)). Such a characterization plainly does not support extending the personal privacy exemptions under FOIA to corporations. Corporations cannot be said to have "thoughts, sentiments, [or] emotions," which are the kinds of private musings and innermost feelings that this Court ascribed as unique to the individual.

To the extent that written documents of a corporation could be construed to be reflective of something analogous to "thoughts" or "sentiments," such records once submitted to the FCC are not

protected by any "personal privacy" interests. Under FOIA, the potential harm from disclosure of such documents is limited to competitive harm, and is fully contemplated under, and addressed by, FOIA Exemption 4. See Pet. Br. at 24-27. Furthermore, under the Communications Act, the Commission has broad authority to inspect such books and records. For example, with respect to common carriers, the Communications Act mandates that "[t]he Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers." 47 U.S.C. § 220(c). The Commission enjoys not only the right to inspect such records at will, but also the right to "prescribe the form" of such records. *Id.* § 220(a). FCC access to, and partial control over, any and all such documents belies any claims of "personal privacy" in their contents; thus, no personal privacy interest that may be attributed to a corporation itself inheres to corporate documents in the possession of the FCC.

Second, the Court has discussed the right of privacy protected by FOIA as "the right to control the flow of information concerning the details of one's individuality." *Reporters Committee,* 489 U.S. at 764 n.16 (quoting *Project, Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1225 (1975)). Here, again, AT&T can make no claim to "individuality." By its very nature, it is not an individual — rather, it is an artificial entity made possible by the laws of the state and the *collective* accumulation of capital by many individuals. Cf. *United States v. Morton Salt Co.*, 338 U.S. 632, 652

(1950). Moreover, it seems strange indeed to refer to AT&T as the kind of organization that has the "right to control the flow of information" about itself. The corporation is a highly regulated entity subject to numerous disclosure requirements both before the FCC and other federal agencies.[3]

Third, in *National Archives and Records Administration v. Favish*, 541 U.S. 157, 167 (2004), the Court characterized the privacy interest contemplated by FOIA as the "privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions." In so doing, the Court cited the deeply personal example of autonomy in the conduct of burial rites. *Id.* at 167-69. Corporations have never enjoyed these kinds of rights; indeed, many cases in our common law have emphasized that (1) corporations are artificial entities and (2) because corporations are creatures of the state, the state continues to have visitorial

---

[3] For example, as a broadband service provider, AT&T provides semiannual reports to the FCC regarding the nature and extent of its broadband service offerings and subscribers. See, e.g., *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 F.C.C.R. 9,691 (2008); Order on Reconsideration, 23 F.C.C.R. 9,800 (2008) (modifying requirements for submitting these data). As a publicly traded company, AT&T also submits detailed filings to the Securities Exchange Commission. See AT&T Online SEC Filings, http://phx.corporate-ir.net/phoenix.zhtml?c=113088&p=irolsec&control_selectgroup=Show%20All (last visited Nov. 15, 2010) (providing online versions of recent SEC filings).

powers to inquire into the affairs of a corporation. See, e.g., *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819); *Hale v. Henkel*, 201 U.S. 43, 74 (1906); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 204 (1946) ("Historically private corporations have been subject to broad visitorial power . . . of the incorporating state, when their activities take place within or affect interstate commerce.").[4] Because the FOIA privacy rights are grounded in the historical dignitary liberties we have accorded to individuals, not corporations, the Third Circuit erred in creating a "corporate personal privacy interest" cognizable under FOIA.

Finally, in discussing the redactions permitted under FOIA, Congress has explained that allowing those redactions "balance[s] the public's right to know with the private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public." *Reporters Committee*, 489 U.S. at 766 n.18 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 7 (1965)). In the instant matter, no one could reasonably contend that AT&T's actions in complying with a government investigation into potential misuse of E-Rate Universal funds "have no bearing or effect on the general public."[5] Indeed, the

[4] It is true that this Court has extended rights to corporations in various contexts, including in the context of unreasonable searches and seizures, but these cases amply demonstrate that releasing corporate documents is not the kind of "public intrusions long deemed impermissible under the common law and in our cultural traditions." *Favish*, 541 U.S. at 167.

[5] E-Rate is a program administered by the FCC with the goal of improving the access of education institutions, such as schools and libraries, to advanced telecommunications technologies. The fund distributes in excess of $2 billion each year, 47 C.F.R. §54.507(a), and has been the frequent subject of controversy, including findings of waste, fraud, and abuse. See, e.g., FCC Office of Inspector General Semiannual Report to Congress, October 1, 2009 through March 31, 2010 at 23, available at http://www.fcc.gov/oig/SAR_March_2010_050710.pdf (last visited Nov. 12, 2010).

Court has recognized that, unlike private citizens, corporations are "endowed with public attributes" and "have a collective impact upon society, from which they derive the privilege of acting as artificial entities." *Morton Salt*, 338 U.S. at 652. Thus, the legislative history of FOIA, coupled with this Court's precedent, further confirm that it makes little sense to extend the personal privacy protections of Exemption 7(C) to corporations whose very existence springs from the public concern.

Taken together, these cases stand for the proposition that the personal privacy interests protected by Exemption 7(C) are grounded in notions of personal dignity and autonomy, including the right to be let alone, the right to withhold one's thoughts from public consumption, and the right to make life and death decisions or follow traditions and customs without interference from the state. While our common law and traditions accord corporations certain kinds of privileges, such as the ability to enjoy government subsidies, see 47 U.S.C. § 254, or the ability to take advantage of particular tax structures, and certain kinds of rights, such the right to just compensation for the taking of property, *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106 (1924), it has never accorded corporations purely dignitary interests. See, e.g., *United States v. White*, 322 U.S. 694, 698-700 (1944). Instead, this Court

traditionally treated corporations as "artificial being[s], invisible, intangible, and existing only in contemplation of law." See *Dartmouth Coll.*, 17 U.S. at 636. Creating cognizable privacy interests for corporations under FOIA would mark a dramatic departure from these cases and the cultural traditions of our society.

B. This Court's Cases Interpreting The Fourth Amendment, Self-Incrimination, And Substantive Due Process Cases Also Demonstrate that Corporations Do Not Have The Kinds Of Privacy Interests Contemplated By Exemption 7(C).

While "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether . . . an individual's interest in privacy is protected by the Constitution," this Court's constitutional cases addressing an individual's right to privacy further indicate that the Third Circuit erred in its construction of the statute. See *Reporters Committee*, 489 U.S. at 762 n.13.

The Court has recognized that corporations have a Fourth Amendment right to be protected from unreasonable searches by the government, but at core, that right exists to protect individuals affiliated with a corporation, not the corporation itself. That is, in discussing the Fourth Amendment protections to which corporations are entitled, the Court has described the interest protected as the interests of the businessman, not of the entity. In discussing the purpose served by the Fourth Amendment in the context of the search of a business, the Court has explained that the Amendment was designed "to

safeguard the privacy and security *of individuals* against arbitrary invasions by governmental officials." *Barlow's,* 436 U.S at 312 (internal quotation marks and citation omitted) (emphasis added). "The *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." *Dow Chemical Co. v. United States*, 476 U.S. 227, 237 (1986) (internal quotation marks and citation omitted) (emphasis added).

The Fourth Amendment cases also emphasize that as compared to an individual, a corporation enjoys fewer Fourth Amendment protections. Indeed, the Court has repeatedly recognized that "corporations can claim no equality with individuals in the enjoyment of a right to privacy" and that "neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret." See, e.g., *Morton Salt*, 338 U.S. at 652; *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 65 (1974).

To the extent that the purpose of creating privacy interests is merely to protect individuals, even in their capacities as directors, employees, or members of a corporation, extending exemption 7(C) to corporations does not serve that purpose. Such individuals are already protected by the plain terms of the Exemption, and it need not be extended to corporate entities to further that goal. In this case, it is undisputed that any information contained in the FCC's records may be withheld if it could reasonably be expected to constitute an unwarranted invasion of an individual's personal privacy. Indeed, the FCC

withheld numerous records from disclosure on precisely this ground. See *SBC Commc'ns, Inc.*, 23 F.C.C.R. at 13,705.

By contrast, this Court has refused to grant corporations a Fifth Amendment privilege against self-incrimination. *White*, 322 U.S. at 698-99. The Court's analysis of the Fifth Amendment right dovetails precisely with the relevant considerations in this case.

In the Court's self-incrimination cases, the Court first recognized that "[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." *Id.* In other words, the privilege against self-incrimination is inherently personal and designed to protect the dignity, humanity, and autonomy of real people, not artificial entities. Because the Court's paramount concern in the Fifth Amendment context is preserving a personal dignitary right, it has required custodians of corporate records to produce such documents when the "organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." *Id.* at 701.

Moreover, the harms that might result from extending a Fifth Amendment privilege against self-incrimination to corporations are the same sorts of harms that would result if corporations were accorded privacy interests under FOIA. In *Braswell v. United States*, 487 U.S. 99, 115 (1988), the Court recognized that because "[t]he greater portion of evidence of wrongdoing by an organization . . . is usually found in the official records and documents of that organization," "effective enforcement of many federal and state laws would be impossible" if "the cloak of privilege [were] to be thrown around impersonal records and documents." (Internal citation and quotation marks omitted.) The Court concluded that allowing custodians to claim a Fifth Amendment privilege with respect to corporate records would "largely frustrate legitimate governmental regulation of such organizations." *Id.* at 116 (internal citation and quotation marks omitted). Just as extending a Fifth Amendment privilege to corporate custodians would frustrate "effective enforcement of many federal and state laws," creating privacy interests under FOIA would dramatically stifle the public's ability to understand whether its government is, in fact, effectively enforcing those laws against large, highly regulated, artificial corporate entities like AT&T.[6]

---

[6] As noted by the government in its Reply Brief in Support of the Petition for Certiorari, *United States v. Martin Supply Co.* does not run afoul of these precepts. 430 U.S. 564 (1977). *Martin Supply* assumed, without deciding, that corporations are entitled to protection under the Double Jeopardy Clause. *Id.* at 570-76. To the extent that corporations enjoy such protections, they would serve the primary purpose of the Clause, "protect the integrity of final determinations of guilt or

In a parallel set of privacy cases, the Court has recognized an interest in "independence in making certain kinds of important decisions." *Whalen*, 429 U.S. at 598-600. These rights, too, seek to vindicate interests "central to personal dignity and autonomy." *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion). They include choices regarding marriage, procreation, contraception, family relationships, and child rearing and education. See, e.g., *Paul v. Davis*, 424 U.S. 693, 713 (1976); see also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). In recognizing this right, the Court acknowledges individuals' fundamental humanity — it preserves "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" without interference from the State. *Planned Parenthood of Southeastern Penn.*, 505 at 851 (joint opinion). Plainly, these deeply personal and fundamentally existential rights simply do not translate to the corporate context. As such, these cases provide further indication that this Court's privacy jurisprudence is grounded in notions of individual dignity which do not extend naturally to corporations.

innocence," *Sattazahn v. Pennsylvania*, 537 U.S. 101, 120 (2003) (internal quotation marks and 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).

C. The Theory Animating This Court's Corporate Speech Cases Provides Further Support For The Notion That Corporations Do Not Enjoy A Personal Privacy Interest Under FOIA.

Finally, this Court's understanding of the nature of corporate speech rights provides no support for the creation of a corporate personal privacy interest under FOIA because those cases are not grounded in theories of personhood, much less personal dignity. The Court's cases granting free speech rights to corporations focus on (1) the ability of the challenged speech to inform the public and (2) the rights of listeners to decide which speech prevails in the marketplace of ideas.

For example, in campaign finance cases, the Court protects a corporation's right to speak on the merits of a political referendum in order to preserve the societal interest in "free discussion of governmental affairs." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978). In *First National Bank of Boston v. Bellotti*, the Court explained that "[t]he inherent worth of the speech in terms of its capacity for informing the public" did not depend on the identity of the speaker. *Id.* at 776-77. Indeed, *Bellotti* specifically held that allowing free discussion was a "major purpose" of the First Amendment separate and apart from the "individual's interest in self-expression." *Id.* at 777 & n.12.

Thus, *Bellotti* and subsequent speech cases affirm that the corporate right to speak is grounded in the idea that citizens, not the government, shall decide what views carry the day in the marketplace

of ideas. See *id*. at 777 n.12; *Consolidated Edison Co. of New York v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 533-535 (1980) (quoting, in part, *Abrams v. United States*, 250 U.S. 616, 630 (1919), "the best test of truth is the power of thought to get itself accepted in the competition of the market" and distinguishing the individual's right to self expression)); *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-62 (1980) ("Commercial expression . . . assists consumers and furthers the societal interest in the fullest possible dissemination of information."); *United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001) (holding that the First Amendment protects a societal interest in "the freedom resulting from speech in all its diverse parts" and recognizing that the "general rule is that the speaker and the audience, not the government, assess the value of the information presented").

The Court recently reaffirmed these principles in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). In *Citizens United*, the Court explained that corporate speech is entitled to First Amendment protection because "[s]peech is an essential mechanism of democracy." *Id.* at 898. That is, the First Amendment protects not only individuals but a societal interest in "enlightened self-government." *Id.* In summarizing its corporate speech jurisprudence, the Court held that speaker-based distinctions are disfavored because "it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources" in order to participate in the political process. *Id.* at 899.

Finally, the cases discussing disclosure of campaign contributions do not counsel in favor of extending a privacy right to AT&T here because that doctrine, too, seeks to protect individuals, not corporations. The Court has acknowledged that disclosure requirements may be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed. *Id*. at 917.

Even if such a disclosure requirement could be held unconstitutional based on a showing of a threat to the entity itself, rather than its members, that conclusion would not suggest that the entity itself has privacy interests. Rather, the Court's freedom of association cases — upon which the disclosure cases rely — make clear that the doctrine intends to protect an *individual's* freedom to join with other individuals. For example, in *NAACP v. Alabama*, 357 U.S. 449 (1958), the NAACP brought suit against the state of Alabama to resist the state's order requiring the production of the NACCP's membership lists. *Id.* at 454. The Court recognized that the NAACP could assert "a right personal to [its members]" in being protected from "compelled disclosure by the State of their affiliation with the Association as revealed by the membership lists." *Id.* at 458; *see also id.* at 462 (referring to "a substantial restraint upon the exercise *by petitioner's members* of their right to freedom of association") (emphasis added); *id.* at 463 (referring to "the free exercise *by petitioner's members* of their constitutionally protected right of association") (emphasis added). But the FOIA statute as written already protects the privacy interests of any individuals who may be

affected by the documents' release. See 5 U.S.C. § 552(b)(7)(C). As noted above, no party disputes that this is the case, and in the proceeding before the Commission, the Commission's Enforcement Bureau specifically withheld documents from disclosure for this very reason. Because the freedom of association cases protect associations only as a proxy for dignitary protection of their members, and because the FOIA statute as interpreted by the FCC already protects such interests, only a finding that corporations do not enjoy privacy interests under FOIA is consistent with this line of cases. Taken together, these cases demonstrate that while corporations are accorded certain speech rights, those cases are not grounded in notions of autonomy, dignity, or even self-expression — and as such, they do not support the creation of a privacy interest for corporations under FOIA.

II. THE THIRD CIRCUIT'S DECISION UNDERMINES FOIA'S PURPOSE AND HAMPERS THE ABILITY OF CITIZENS TO PARTICIPATE IN AGENCY PROCEEDINGS.

At its core, FOIA is designed to illuminate the activities of government to ensure that the public can monitor agency compliance with the law, and to provide citizens with the information they need to participate more effectively in shaping government behavior. Access to information regarding government operations can reveal evidence of agency malfeasance, overreach, inaction, or capture by industry. "Sunlight is said to be the best of disinfectants." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting Justice L. Brandeis, Other People's Money

62 (National Home Library Foundation ed. 1933)). Specifically, "the sunlight of public access to information about governmental operation kills or retards the growth of mould in the government. . . ." Arthur E. Bonfield, "Chairman's Message," 40 ADMIN. L. REV. ii (Win. 1988).

The Court of Appeals' interpretation is not consonant with the "disinfecting" purpose of FOIA. To the contrary, if left to stand, the lower court's decision would unduly constrain the ability of organizations like Free Press to secure information about the FCC's enforcement activities and would hinder citizens' informed involvement in agency oversight and processes.

A. The Public Has A Legitimate And Critical Interest In Disclosure Of Certain Information Concerning Agency Enforcement Activities.

Regulatory agency activities necessarily and frequently involve enforcement actions with regard to the industries and corporate interests they oversee. The FCC's enforcement activities are significant both because they comprise a large portion of the FCC's regulatory work and because they represent a fundamental function of the agency.

The Commission houses an entire Enforcement Bureau specifically tasked with implementing the agency's myriad statutory and regulatory mandates, and whose enforcement activities are the subject of the instant matter.[7] In

[7] For more information regarding the specific duties of the Enforcement Bureau, *see* Federal Communications Commission

addition to this central Bureau, the FCC maintains three Regional Offices, sixteen District Offices, and eight Resident Agent Offices — all dedicated to the FCC's enforcement functions.[8] Other FCC offices also engage in enforcement of FCC rules. The Media Bureau "administers the policy and licensing programs relating to electronic media, including cable television, broadcast television, and radio in the United States and its territories."[9] The Wireless Telecommunications Bureau "handles all FCC domestic wireless telecommunications programs and policies . . . including licensing, enforcement, and regulatory functions."[10] The International Bureau "[m]onitors compliance with the terms and conditions of authorizations and licenses granted by the Bureau [and] pursues enforcement actions in conjunction with appropriate bureaus and offices."[11] Accordingly, enforcement activities span across every area of, and industry subject to, FCC jurisdiction.

Enforcement Bureau Website, http://www.fcc.gov/eb/ (last visited Nov. 11, 2010).

[8] For more information regarding the functions of these offices, *see* Federal Communications Commission Enforcement Bureau Website, http://www.fcc.gov/eb/rfo/ (last visited Nov. 11, 2010).

[9] Federal Communications Commission Media Bureau Website, http://www.fcc.gov/mb/ (last visited Nov. 11, 2010).

[10] Federal Communications Commission Wireless Telecommunications Bureau Website, http://wireless.fcc.gov-/index.htm?job=about (last visited Nov. 11, 2010).

[11] Federal Communications Commission International Bureau Website, http://www.fcc.gov/ib/functions.html (last visited Nov. 11, 2010).

The FCC receives hundreds of thousands of complaints each year pertaining to alleged industry violations of Commission rules.[12] Some of these complaints result in orders ascribing liability and exacting penalties on corporations that are deemed in violation of FCC rules. Some are dismissed. Others, like the case below, result in consent decrees where no liability is assigned, but a company nonetheless makes a voluntary "donation" to the U.S. Treasury. Still other complaints remain unresolved for months or even years with no explanation from the agency as to whether it has investigated or intends to resolve the claims at issue.

The public and organizations such as Free Press have legitimate and critical interests in how these enforcement activities are conducted, as well as how the agency interacts with the industries it regulates and whether the FCC enforces its rules. The fact that, in addition to protections directed at preserving personal privacy, FOIA also exempts from mandatory release "records or information compiled for law enforcement purposes" that "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. §552(b)(7)(A), does not obviate the value of these records. Exposing how an agency has conducted itself with regard to enforcement activities remains a valid public interest even after such activities have concluded. For example,

[12] Each year the Commission receives hundreds of thousands of complaints regarding indecent or obscene broadcasts *alone*. See, e.g. Chart of FCC Indecency Complaints and Notices of Apparent Liability 1993 – 2006, available at http://www.fcc.gov/eb/oip/ComplStatChart.pdf (last visited Nov. 13, 2010).

information garnered via a FOIA request can help illuminate the norms that are truly guiding agency action (or inaction) with respect to specific complaints or areas of enforcement. This information can shed light on questions of agency efficiency and resource allocation in handling such complaints; or it may reveal problems of agency capture by the industries it regulates.

Given the critical role of enforcement in an agency like the FCC's oversight of industries under its jurisdiction, concealing information pertaining to these functions undermines the effectiveness and public value of FOIA.

B. The Court of Appeals' Creation Of A Corporate Personal Privacy Interest Undermines The Transparency Goals That FOIA Is Intended To Promote.

In creating a corporate personal privacy interest, the Third Circuit has managed to break new soil in thirty-six years of an otherwise solidly-grounded interpretation of FOIA Exemption 7(C). In doing so, it threatens to upset the foundation of well-established precedent and to put agency application of the Exemption in very shaky territory. It also threatens to shield from public scrutiny a significant portion of the FCC's regulatory activities.

In concluding that corporations, like humans, have "personal privacy interests," the Third Circuit suggested that a corporation "has a strong interest in protecting its reputation." *AT&T v. FCC*, 582 F. 3d 490, 498 (3d Cir. 2009). However, notwithstanding the Court of Appeals' novel understanding, there is nothing in the relevant legislative or case history to

suggest that a corporation's reputational interest is a personal privacy interest under FOIA. See *infra* at Section I(A).

But most importantly, applying the Third Circuit's interpretation would produce results anomalous to the purpose of FOIA. For example, a corporation could argue that any record that it deems unflattering is harmful to its "reputation" and, thus, should be withheld under FOIA. Most enforcement proceedings are, by definition, fault-finding. A rule exempting all unfavorable enforcement records from disclosure could shield virtually all enforcement records from public view. Much of the information that agencies collect for the purpose of determining if a corporation has violated the law has the potential to cast a company in a negative light. Indeed, even information suggesting the mere existence of an investigation itself could be construed as adversely affecting a corporation's reputational standing under the Third Circuit's version of the exemption. Thus, the application of Exemption 7(C) as construed by the Third Circuit creates an unacceptably low standard for barring disclosure, and would have the effect of cordoning-off an entire subsection of critical agency activities from public scrutiny.

In any event, it is clear that access to these types of enforcement records is precisely what Congress envisioned when it amended Exemption 7 thirty-six years ago. Congress specifically considered and acknowledged the possibility that FOIA disclosures might result in the release of documents that cast a critical light on corporate actors. In 1974, Congress amended Exemption 7 to specifically narrow its scope. Prior to 1974, the statute allowed

the government to withhold disclosure of all "investigatory files compiled by law enforcement purposes except to the extent available for law to a party other than an agency." See, e.g., *Aspin v. Dep't of Defense*, 491 F.2d 24, 25 n.3 (D.C. Cir. 1973) (quoting statutory text as it read prior the 1974 amendment).

In enacting the 1974 amendment, Congress expressed unease that the breadth of the prior language of Exemption 7 could be used to exclude the public from accessing records pertinent to agency oversight of regulated industries. According to Senator Hart, who introduced the amendment on behalf of himself and 14 cosponsors, Congress's concern was "that, under the interpretation by the courts in recent cases, the seventh exemption . . . den[ies] public access to information even previously available. For example, we fear that such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption." 120 Cong. Rec. 17,033 (1974) (statement of Sen. Hart).

Both a meat inspection report and documents regarding a telephone company's compliance with the FCC's administration of the E-Rate program could reflect poorly on a corporation's performance and reputation. In spite of this possibility, it is clear that Congress intended for citizens to be able to access such information under FOIA for the purpose of ascertaining if their government is investigating potential violations of the law and, more importantly, enforcing the law if and when such violations occur.

This does not mean that a corporation has no valid interest in maintaining the secrecy of certain types of information under FOIA. However, that interest is neither a personal or private one; instead its justification is rooted in purely economic concerns. In other words, a corporation does not have a cognizable *personal* interest in *privacy* relevant to FOIA — it has a *commercial* interest in *confidentiality*. But an expansion of Exemption 7(C) is not required to protect a corporation's legitimate proprietary interests in trade secrets or other commercially sensitive materials which, if disclosed, could subject the company to competitive harm. That interest is already amply protected under Exemption 4 of the FOIA. 5 U.S.C. §552(b)(4). Indeed, in the case below the FCC withheld various competitively sensitive documents under that exemption. *SBC Commc'ns, Inc.*, 23 F.C.C.R. at 13,705.

It is clear that under FOIA corporations already enjoy substantial protections for the types of competitively sensitive information for which they may have a commercial interest in withholding. Thus, an expansion of 7(C)'s personal privacy exemption is not required to further protect information in which a corporation may have a legitimate expectation of confidentiality. Moreover, creating a corporate personal privacy exemption that could shield from disclosure information pertaining to a significant share of government enforcement activities would substantially impair the societal and practical value of the FOIA in aiding the public's ability to hold its government accountable for execution and enforcement of our laws.

CONCLUSION

The Third Circuit's decision was flawed as a matter of law and fundamentally undermines the purpose of the FOIA statute. Its creation of corporate privacy interests cognizable under FOIA's Exemption 7(C) cannot be squared with this Court's privacy cases, which sound in concerns regarding individual dignity and autonomy. The decision also undermines the public's ability to "know what [its] government is up to." As a consequence, it hampers the public's ability to participate meaningfully in both public discourse regarding media and telecommunications policy and the related policymaking process at the Commission. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Aparna Sridhar
Coriell S. Wright*
M. Chris Riley
Free Press
501 Third Street, N.W.
Suite 875
Washington, D.C. 20001
(202) 265-1490
Counsel for Amicus Curiae
**Counsel of Record*

November 2010