No. 09-1279

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

v.

AT&T INC., *et al.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* BUSINESS ROUNDTABLE IN SUPPORT OF RESPONDENT AT&T INC.

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INTEREST OF *AMICUS CURIAE*[1]

Business Roundtable is an association of chief executive officers of leading U.S. companies with nearly $6 trillion in annual revenues and more than 12 million employees. Member companies comprise nearly a third of the total value of the U.S. stock markets and more than 60 percent of all corporate income taxes paid to the federal government.

As the senior leaders of many of the country's largest and most responsible corporate citizens, Business Roundtable members have a strong interest in the proper construction of Exemption 7(C). Where a business misbehaves, its right to privacy should be no greater than any other person's. However, where responsible corporate citizens commit themselves to ethical conduct, they deserve a reasonable opportunity to protect their good reputations against indiscriminate disclosure of information collected by the government.

Business Roundtable will explain how the Freedom of Information Act allows federal agencies to exercise sound judgment to help prevent the reputation of any person from being unduly or unfairly tarnished beyond any official sanction the relevant agency has determined to impose pursuant to due process.

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[1] Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus* certifies that counsel of record for both parties have consented to its filing in letters on file with the Clerk's office submitted herewith.

SUMMARY OF ARGUMENT

As Respondent AT&T demonstrates, FOIA's plain text includes corporations within the protections of Exemption 7(C). Petitioners' contrary construction would be inconsistent with FOIA's purpose, unfaithful to the text and intent of Exemption 7(C), and oblivious to the judiciary's existing treatment of confidential commercial information under Exemption 4.

First, Congress crafted FOIA to protect the public's need for open government, and to balance disclosure of government operations with legitimate public and private confidentiality concerns. See S. Rep. No. 89-813, at 3, 6 (1965). FOIA does not favor the indiscriminate release of private information held by the government that would result in unwarranted injury. Yet, unless the decision below is upheld, corporations will be deprived of any opportunity to assert the confidentiality of large swaths of sensitive, non-public information obtained by the government in connection with law enforcement proceedings.

This would open corporations to public scrutiny that Congress did not intend, is not properly imposed by the relevant federal agency, and is neither necessary nor appropriate to advance the public interest in open government. In contrast, upholding the Third Circuit will merely empower federal agencies to be responsible stewards of the vast troves of confidential data they collect.

Second, Exemption 7(C) covers a broad range of sensitive, confidential information, which a corporation, like an individual, would not normally make public for any number of reasons including the desire to defend one's reputation for good citizenship and integrity, preserve the ability to engage in

internal self-criticism, avoid undue embarrassment or being unfairly judged, and reduce the potential for others to be misled.

Corporations are considered to possess and be accountable for distinctly personal qualities such as morality, mental states, culture and ability to learn. Corporations are distinct legal actors with constitutional and other privacy rights. Businesses and other associations work hard to earn positive reputations with their customers and employees. As Business Roundtable's *Principles of Corporate Governance* (Apr. 2010) instruct, the "board of directors, the CEO and senior management should set a 'tone at the top' that establishes a culture of legal compliance and integrity." *Id.* at 2.[2] Indeed,

> [c]orporations have obligations to be good citizens of the local, national and international communities in which they do business. Failure to meet these obligations can result in damage to the corporation, both in immediate economic terms and in longer-term reputational value.

Id. at 34. See also *Brown & Williamson Tobacco Corp.* v. *Jacobson*, 713 F.2d 262, 269 (7th Cir. 1983) (noting that a corporation "can have a reputation for adhering to the moral standards of the community in which it sells its products."). Exemption 7(C) protects the ability of businesses to defend their well-earned reputations.

Third, while Exemption 4 also concerns sensitive and confidential information that is distinctly "commercial" in nature, it has been construed narrowly by the lower courts. This exemption does

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[2] Available at http://businessroundtable.org/studies-and-reports/2010-principles-of-corporate-governance/.

not protect the full range of valuable confidential information, such as information that would injure a corporation's reputation with customers, employees, stockholders or even government agencies. Instead, such interests are properly covered under Exemption 7(C).

Fourth, FOIA's exemptions work together to ensure the statute's balance is met. In accordance with longstanding judicial construction, and Department of Justice FOIA guidance, commercial material covered by Exemption 4 *must* be withheld—agencies have no discretion to release such information. See Dep't of Justice, *Guide to the Freedom of Information Act* 355-56 (2009) (*FOIA Guide*). Confidential material covered by Exemption 7(C), on the other hand, *may* be withheld, subject to the agency's balancing of the asserted privacy interest against the interest in public disclosure. This discretionary approach to protecting information that is confidential, but does not involve actual trade secrets, or the like, allows agencies to weigh FOIA's conflicting goals and avoid the informational clamp-down that Petitioners and their *amici* fear.

Petitioner's view that any private corporate information beyond the parameters of Exemption 4 is subject to unmitigated—and potentially irrespons-ible—public disclosure is not how Congress conceived FOIA.

Affirming the Third Circuit will entail only a *de minimis* additional burden on agencies, which are in any event required to comply with the dictates of FOIA. See 5 U.S.C. §552(a)(3); *EPA* v. *Mink*, 410 U.S. 73, 79 (1973) ("[FOIA] eliminate[d] the [previously applicable] 'properly and directly concerned' test of access, stating repeatedly that official information *shall* be made available 'to the public,' 'for public inspection.'") (emphasis added). Petitioners' alternative—the mandatory disclosure of a corporation's private information without any inquiry into its nature or the effect of its disclosure—is not faithful to FOIA and would make poor public policy.

Affirmance will allow agencies to provide responsible protection for the personal privacy of corporations, and other associational persons, and is properly respectful of the increasing sensitivity our law recognizes for privacy interests generally.

ARGUMENT

By its plain terms, FOIA Exemption 7(C) extends to corporations. 5 U.S.C. §551(2) (defining "person" to include corporations). Exemption 7(C) applies to "records or information compiled for law enforcement purposes" insofar as disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* §552(b)(7)(C). As Petitioners acknowledge, the word "personal" means, *inter alia*, "'of or relating to a particular *person*.'" Pet. Br. 17-18 (quoting *Webster's Third New International Dictionary* 1686 (1961)) (emphasis added). Because "personal" is the adjectival form of the defined term "person," Exemption 7(C) expressly affords corporations the opportunity to invoke "personal privacy" interests under FOIA.

Petitioners, Respondent Comptel, and their *amici* argue that corporations have only "commercial" interests, which, they claim, are fully protected under Exemption 4. See Pet. Br. 24-27. The necessary consequence of their argument is that corporate data that is *not* covered by Exemption 4 is fair game for indiscriminate public disclosure—no matter how sensitive, non-public or confidential.

This counter-textual argument must be rejected. FOIA does not favor such indiscriminate disclosure. Instead, it promotes the public's interest in transparent government while carefully avoiding undue intrusion on legitimate privacy interests.

I. FOIA BALANCES TRANSPARENT GOVERNMENT WITH LEGITIMATE PRIVACY INTERESTS.

The question before the Court is a narrow one—whether a corporation may even ask an agency to weigh a personal privacy interest under Exemption 7(C). Petitioners, Respondent Comptel, and their *amici* assert that Congress exclusively addressed corporate privacy interests in Exemption 4, which protects trade secrets, commercial or financial data. See Pet. Br. 24-27. Corporate information *not* covered by Exemption 4, they argue, is subject to public disclosure without any constraint or careful consideration. This extreme view is unsupportable under FOIA.

A. FOIA Encourages Government Transparency, Not The Disclosure Of Private, Confidential Information.

Congress enacted FOIA to allow citizens to inform themselves about the activities of their government. "[T]he basic purpose of [FOIA is] to open *agency* action to the light of public scrutiny." *Dep't of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976) (emphasis added) (quotations omitted). FOIA's "basic policy of full agency disclosure unless information is exempted under clearly delineated statutory language [supports] citizens' right to be informed about what their *government* is up to." *U.S. Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S.

749, 773 (1989) (emphasis added) (quotations omitted).

FOIA was not conceived as a blunt instrument to force public whatever private information comes into the government's possession. As this Court has explained, "FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *Reporters Comm.*, 489 U.S. at 774.

This is particularly true for law enforcement records.

> [J]ust as the identity of the individuals given public relief or involved in tax matters is irrelevant to the public's understanding of the Government's operation, so too is the identity of individuals who are the subjects of rap sheets irrelevant to the public's understanding of the system of law enforcement.

Id. at 766 n.18. In short, FOIA does not provide a crowbar to anyone wishing to uncover private information that finds its way into a law enforcement file.

This case well illustrates the point, as the party seeking disclosure represents Respondent AT&T's commercial competitors. See Pet. Br. 7. Indeed, Comptel's single-sentence FOIA demand simply requested release of the FCC's investigative file. *Id.* It would strain credulity to believe that such a request was more concerned about scrutinizing the government than the government's target.[3] To the

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[3] Petitioner's *amici* betray a signal misapprehension of FOIA's purpose of shedding light on *governmental* activity. For

extent that such a request could serve a dual purpose, Congress properly charged agencies to exercise their best judgment with regard to disclosure under Exemption 7(C). See *ante* at 9-10.

B. FOIA's Exceptions Promote Legitimate Public And Private Privacy Needs.

FOIA requires each agency to make public a broad array of materials. See 5 U.S.C. §552(a)(2)&(3). This advances "FOIA's central purpose [of] ensur[ing] that the *Government's* activities be opened to the sharp eye of public scrutiny." *Reporters Comm.*, 489 U.S. at 774. FOIA's exemptions temper this disclosure mandate by accommodating legitimate governmental and non-governmental confidentiality concerns. See 5 U.S.C. §552(b). In enacting the exemptions, "Congress tried to craft the FOIA exemptions to prevent harm to the public—whether the risk of that harm stems from criminals or investors who would trade on confidential information regarding a company or a bank."[4]

FOIA's exemptions "set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *Mink*, 410 U.S. at 79. They protect discrete classes of information and complement each other to accommodate reasonable confidentiality interests. See *id.* at 80 (quoting the Senate Committee's

example, the Reporters' Committee brief argues that to affirm would deprive it of its "constitutionally protected 'watchdog' function" overseeing "the *corporate power structure*." Br. of Reporters Comm. 3, 18 (emphasis added). That function may be a perfectly valid one for the Reporter's Committee, but it is not the purpose FOIA is designed to advance.

[4] Alan Charles Raul, *Privacy and the Digital State: Balancing Public Information and Personal Privacy* 27 (2002).

explanation that "it was not 'an easy task to balance the opposing interests, but it is not an impossible one either.... Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.'").

Congress provided numerous protections for private sector interests. Exemption 4 covers privileged and confidential trade secrets, commercial, and financial data. Exemption 6 regards medical, personnel, and related files. Exemption 7(B) covers law enforcement information that may hinder a fair trial. Exemption 7(C) protects against invasions of personal privacy. Exemption 7(F) protects life or physical safety. And Exemption 8 shields data gathered by financial institution examiners.[5]

Some constraints on disclosure are mandatory. In particular, confidential commercial materials, and financial institution data covered by Exemptions 4 and 8 are, in general, protected absolutely. See *FOIA Guide* 355-56, 360-61 ("[A] determination by an agency that information falls within Exemption 4 is 'tantamount' to a decision that it cannot be released.").[6] Others are discretionary and subject to a balancing test. For example, Exemptions 7(A) and

[5] Exemption 3 prohibits disclosure of materials expressly protected by other laws, such as trade secrets and grand jury materials.

[6] *See, e.g.*, *Bartholdi Cable Co.* v. *FCC*, 114 F.3d 274, 281 (D.C. Cir. 1997) (noting that agencies are generally "precluded from releasing" information protected by Exemption 4 due to provisions of Trade Secrets Act). The FCC has acknowledged as much, recognizing that the "Trade Secrets Act…prohibits unauthorized disclosure of all data protected by Exemption 4." *See* FCC, *FOIA Annual Report* 9 (2007), *available at* http://www.fcc.gov/foia/2007foiareport.pdf.

7(C) entrust disclosure to agency discretion. *Id.* at 523-58, 591-95 (discussing agency balancing responsibility). Petitioners argue, however, that corporate confidential information that is not covered by Exemption 4 is categorically and absolutely subject to disclosure. There is no basis in law for that irresponsible position.

II. FOIA EXEMPTION 7(C) PROTECTS INDIVIDUAL AND ASSOCIATIONAL PRIVACY INTERESTS.

Exemption 7(C) protects information intended to be kept private, the release of which would result in substantial reputational or other injury. Many of the interests protected under Exemption 7(C) for individuals are shared by corporations and other persons. Moreover, the common law tradition to which this Court looks to define personal privacy recognizes such interests in corporations. Excluding corporations from Exemption 7(C)'s protections would thus be arbitrary.

A. Exemption 7(C) Regards Information Whose Release May Invade Personal Privacy.

Exemption 7(C) covers information whose disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(7)(C). This exemption casts a wide net. "[T]he concept of personal privacy under Exemption 7(C) is not some limited or 'cramped notion' of that idea." *Nat'l Archives & Record Admin.* v. *Favish*, 541 U.S. 157, 165 (2004) (quoting *Reporters Comm.*, 489 U.S. at 763). It is not limited to the sort of privacy implicated in this Court's due process jurisprudence. See *Reporters Comm.*, 489 U.S. at 762. Instead, it protects the "interest in avoiding

disclosure of personal matters" generally, *id.*, and includes freedom from the sorts of "public intrusion[] long deemed impermissible under the common law and in our cultural traditions," *Favish*, 541 U.S. at 167.

Congress purposefully drew Exemption 7(C) broadly, requiring only a reasonable expectation of an unwarranted invasion of personal privacy. 5 U.S.C. §552(b)(7)(C). As the Court specifically explained in *Reporter's Committee*, Exemption 7(C) was "the product of a specific amendment" and was intended to be more broad than, for example, the protection for "personal privacy" offered in Exemption 6. 489 U.S. at 756.

Indeed, Exemption 7(C) privacy is not limited to the person the information concerns, but includes the privacy of others who may be impacted by its release. *Favish*, 541 U.S. at 165-66. Hence, in *Favish*, the Court held that family members could invoke Exemption 7(C) to prevent the release of photographs of a dead relative because the release would invade *their* privacy. *Id.* at 167.

Broad protection of privacy is particularly appropriate with regard to information compiled for law enforcement. As the D.C. Circuit has recognized, Exemption 7(C) "recognizes the stigma potentially associated with law enforcement investigations." *Bast* v. *U.S. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). Suspects in a law enforcement investigation "have the most obvious privacy interest in not having their identities revealed." *McDonnell* v. *United States*, 4 F.3d 1227, 1255 (3d Cir. 1993) (citations omitted).

For example, Exemption 7(C) protects the privacy interest of targets and subjects who are never indicted or prosecuted:

> The decision to prosecute an individual for a crime is attended by consequences beyond the risk of conviction. When the individual or the crime has attracted general notoriety, institution of proceedings typically provokes widespread speculation attended by at least some damage to the reputation of the individual involved. Common experience teaches that this speculation is not quieted when, and if, a jury finally announces its verdict. Typically, the decision not to prosecute insulates individuals who have been investigated but not charged from this rather significant intrusion into their lives.

Fund for Constitutional Gov't v. *Nat'l Archives & Records Serv.*, 656 F.2d 856, 864 (D.C. Cir. 1981).

Where an agency, after investigation, elects not to proceed publicly on some issue, FOIA does not—and should not—stoke a subsequent, further trial in the court of public opinion. Indeed, "[a] FOIA disclosure that would announce to the world that certain individuals were targets of an FBI investigation, albeit never prosecuted, may make those persons the subjects of rumor and innuendo, possibly resulting in serious damage to their reputations." *Stern* v. *FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984) (internal quotation marks and omission omitted). The Exemption has likewise been held to protect:

- interviewees and witnesses that "have a substantial privacy interest because disclosure may result in embarrassment and harassment";[7]

- "the disclosure of the identity of individuals where such disclosure would be likely to cause harassment or embarrassment because of the person's cooperation in the investigation or the nature of the information disclosed by that individual";[8]
- those that assist law enforcement and who therefore face a "fear of harassment" and "'stigma' sometimes attached to such cooperation with the authorities";[9]
- attendees at a meeting "that had reportedly attracted the attention of law enforcement officials" who therefore have a privacy interest in "not being connected in any way with a criminal investigation."[10]

Significantly, Exemption 7(C) recognizes the possible shortcomings lurking in law enforcement records. Information may be incomplete, irrelevant, misleading, disproportionate, or simply wrong.

> Law enforcement documents…often contain information about persons interviewed as witnesses or initial suspects but whose link to the official inquiry may be the result of mere happenstance. There is special reason, therefore, to give protection to this intimate personal data,

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[7] *McDonnell*, 4 F.3d at 1255.

[8] *Cuccaro* v. *Sec'y of Labor*, 770 F.2d 355, 359 (3d Cir. 1985).

[9] *Holy Spirit Ass'n for Unification* v. *FBI*, 683 F.2d 562, 565 (D.C. Cir. 1982) (per curiam) (MacKinnon, J. concurring).

[10] *Computer Professionals for Social Responsibility* v. *U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996).

> to which the public does not have a general right of access in the ordinary course.

Favish, 541 U.S. at 166. Records "are sometimes incorrect or incomplete and sometimes contain information about other persons with similar names." *Reporters Comm.*, 489 U.S. at 752.

For these reasons, Exemption 7(C) provides a broad privacy safeguard to protect reputations, avoid embarrassment or harassment, and prevent damaging information from being made irretrievably and irresponsibly public—unless there is a sufficient public interest in doing so.

B. Corporations Possess Personal Privacy Interests Of The Sort Protected Under Exemption 7(C).

Associational persons enjoy the legal and traditional privacy interests protected by Exemption 7(C) no less than individuals. See *Favish*, 541 U.S. at 167 (Exemption 7(C) protects against the sorts of "intrusion long deemed impermissible under the common law and in our cultural traditions").

1. As an initial matter, there is nothing remarkable in the proposition that corporations have personal privacy rights and interests. To the contrary, corporations have long been recognized as legal persons. See *Trs. of Dartmouth Coll.* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). A corporation

> is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage.

Id. at 667 (Story, J. concurring). The corporate form allows "a perpetual succession of many persons [to be] considered as the same, and *[to] act as a single individual*." *Id.* at 636 (emphasis added). Indeed, associations play an essential role in American democracy. As de Tocqueville observed nearly 200 years ago, "[a]mong democratic peoples associations must take the place of the powerful private persons whom equality of conditions has eliminated." Alexis de Tocqueville, *Democracy in America* 516 (Lawrence trans., Mayer ed., HarperPerennial 1988) (1835, 1840).[11]

Thus, corporations may invoke the Contracts Clause, see *Trs. Of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 650, are persons within the Fifth and Fourteenth Amendments, see *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 780 n.15 (1978); *Grosjean* v. *Am. Press Co.*, 297 U.S. 233, 244 (1936), are protected against double jeopardy, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977), and are protected from the taking of property without just compensation, *Penn Cent. Transp. Co.* v. *New York City,* 438 U.S. 104 (1978).

Most relevant for present purposes, corporate persons have constitutional privacy interests. Corporations, for example, are protected against unreasonable searches and seizures. See *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 311-12 (1978); *See* v. *City of Seattle*, 387 U.S. 541 (1967); *Camara* v. *Mun. Court*, 387 U.S. 523, 528-29 (1967). See also *Dow Chem. Co.* v. *United States*, 476 U.S. 227, 237 (1986)

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[11] *See also* de Tocqueville, *supra* at 513 ("In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.").

("Any actual physical entry by EPA into any enclosed [manufacturing plant] would raise significantly different questions, because '[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.'") (quoting *See*, 387 U.S. at 543).

Corporations may also invoke First Amendment associational privacy rights. Thus, in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1958), the NAACP could not be compelled to disclose its general membership lists. See also *Calif. Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 97-98 (1974) (Marshall, J. dissenting) (citing additional authorities).

Corporations also enjoy First Amendment speech rights. The government may not deprive a corporation of its right to speak based solely on its corporate form. See *Consol. Edison Co. of N.Y.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 533-34 (1980); *Bellotti*, 435 U.S. at 778-86. As this Court explained last term, "'[c]orporations and other associations, *like individuals*, contribute to the "discussion, debate, and the dissemination of information and ideas" that the First Amendment seeks to foster.'" *Citizens United* v. *FEC*, 130 S.Ct. 876, 900 (2010) (quoting *Pac. Gas & Elec. Co.* v. *Pub. Utils. Comm'n,* 475 U.S. 1, 8 (1986) (plurality opinion) (quoting *Bellotti,* 435 U.S., at 783)) (emphasis added).

And, apropos of this case, corporations enjoy not only the right to speak, but the right to decline to speak. See *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (invalidating a "right of reply" statute requiring newspapers to publish, free-of-charge, rebuttals to political editorials); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 654 (1994) ("[B]y affording mandatory access to speakers with

which the newspaper disagreed, [the *Tornillo* law] induced the newspaper to respond to the candidates' replies when it might have preferred to remain silent"); *PG&E,* 475 U.S. at 11 (invalidating rule requiring utility to distribute newsletter critical of ratemaking practices).

2. Petitioners and their *amici* dismiss these interests as merely incidental. Fourth Amendment rights, they argue, are "derivative of the individual rights of those who collectively own and operate corporations." Pet. Br. 47 (citing *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906)). But that is a meaningless distinction. Corporations are "many persons… act[ing] as a single individual," *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 636, but the resulting legal entity has rights *not* held by those individuals, *id*. at 667 (Story, J. concurring).[12]

Petitioners' *amici* similarly dismiss the Court's associational privacy cases as intended only "to protect an *individual's* freedom to join with other individuals." Br. of Free Press 19. But this ignores what the Court recognized in *NAACP* v. *Alabama*, namely that members' associational rights could *only* be protected through the association because "[t]o require that [they] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion." 357 U.S. at 459-60. Therefore, the NAACP was "the appropriate party to assert [the] rights, because it and its members are in every practical sense identical." *Id.*

[12] Thus, absent special circumstance, employees lack standing to assert the corporation's Fourth Amendment rights on their own behalf, but must instead demonstrate a violation of their own individual expectation of privacy. *See*, *e.g.*, *Mancusi* v. *DeForte*, 392 U.S. 364, 366-70 (1968); *United States* v. *Mohney*, 949 F.2d 1397, 1403-04 (6th Cir. 1991).

As these decisions demonstrate, corporations have long held precisely the sort of privacy interests protected under Exemption 7(C). It is not much of a refutation to argue that corporate rights are different. See Pet. Br. at 48. Of course they are. As a legal creation, a corporation "possesses only those properties which the charter of its creation confers upon it." *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 636. But, to the extent that they have *some* privacy interests, nothing in Exemption 7(C), or anyplace else in FOIA, excludes corporations or other associations from the class of "persons" whose privacy interests it protects.

Indeed, Exemption 7(C) accommodates different types and degrees of privacy interest. In *Favish*, the Court noted that while membership in a family—an association of sorts—allowed relatives to invoke Exemption 7(C) privacy interests, "[t]his does not mean that the family is in the same position as the individual who is the subject of the disclosure." 541 U.S. at 167. Thus, the extent to which a particular association can assert a particular privacy interest is a question for the agency to decide in the first instance, on a case-by-case basis.

3. Even Petitioners and their *amici* agree that corporations certainly have privacy interests in their confidential commercial information. To the extent that such information meets the criteria of Exemption 4, it is categorically protected from disclosure. However, corporations also have more general privacy concerns that are not necessarily distinctly "commercial" in nature. Protection of such confidential information is subject to discretionary—not categorical—protection under Exemption 7(C).

Commercial confidentiality easily covers trade secrets, product designs, formulas, manufacturing

processes, research and development, and the like, but business associations also closely protect the privacy of information that courts have not readily characterized as commercial in nature. For example, businesses value their goodwill and reputation, and can suffer tremendously when these are injured due to the indiscriminate disclosure of sensitive, non-public information that could—without any due process—undermine their standing with customers, employees, and the public.[13]

As the Seventh Circuit explained:

> [a] corporation cannot have a reputation for chastity but it can have a reputation for adhering to the moral standards of the community in which it sells its products.

Jacobson, 713 F.2d at 269; see *id.* (noting that "the standards for proof of defamation are [no] different for corporations than for other plaintiffs. The cases treat corporate plaintiffs just like individuals.").

Individuals and associations share an interest in protecting their reputations. To that end, a corporation has a potentially protectable interest in keeping private the fact that it was implicated in a law enforcement investigation, whether as a witness, a subject or a target. For example, the corporate respondent in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), opposed the disclosure of grand jury investigative materials to Department of Justice lawyers generally. Agreeing, the Court explained that "[g]rand jury secrecy…is 'as important

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[13] The threats to corporate reputational interests are all the more heightened in today's internet society. *See* Andy Greenberg, *WikiLeaks' Julian Assange Wants to Spill Your Corporate Secrets*, Forbes, Dec. 20, 2010, at 71, 74-76.

for the protection of the innocent as for the pursuit of the guilty.'" *Id.* at 424-25 (quoting *United States* v. *Johnson*, 319 U. S. 503, 513 (1943)).

Indeed, a business may reasonably desire to keep confidential how it was referenced in an investigative file, the contents of which are hardly always reliable. *Favish*, 541 U.S. at 166; *Reporters Comm.*, 489 U.S. at 752. A business, like any person, has a compelling privacy interest in keeping confidential the fact that they were investigated of some wrongdoing, even where the accusations were reviewed and thoroughly discredited or resolved by the government short of a determination of liability on all allegations.

Such interests are routinely protected for all persons under FOIA Exemption 7(C).[14]

4. In assessing a corporation's interest in personal privacy, it is important to note that, contrary to

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[14] Disenfranchising corporations from Exemption 7(C) would deny its protections not only to large corporations such as Respondent AT&T, but also every other type of business. The vast majority of employers in the United States are small businesses, *see* SBA, Office of Advocacy, *Frequently Asked Questions* (Sept. 2010), *available at* http://www.sba.gov/advo/stats/sbfaq.pdf, which depend heavily on their good reputation in the community. Such a ruling would also exclude not-for-profit and religious corporations, whose interests are less frequently covered by Exemption 4, and quite similar to the sort of personal privacy interests covered by Exemption 7(C). *See, e.g.*, *Church of Scientology Flag Serv.* v. *City of Clearwater*, 2 F.3d 1514, 1535-47 (11th Cir. 1993) (striking down city registration ordinance on establishment and free exercise grounds); *Council on Am.-Islamic Relations* v. *Gaubatz*, 667 F. Supp. 2d 67, 77 (D.D.C. 2009) ("Disclosure of a non-profit corporation's confidential donor list, like disclosure of a for-profit corporation's customer list, might well lead to a loss of trust and goodwill if donors begin to feel that their personal information is not safe.") (quotations omitted).

Petitioners' argument, Pet. Br. 18, corporations are distinctly considered to have "states of mind" just like individuals. As a matter of law, corporations are routinely judged with regard to their state of mind with respect to the applicable *mens rea* requirement. See, *e.g.*, *Safeco Ins. Co.* v. *Burr*, 127 S. Ct. 2201, 2215-16 (2007) (assessing the standard of "willful" conduct under the Fair Credit Reporting Act); *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 706 (2005) (reversing conviction of corporation where "the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing").[15] A corporate defendant cannot avoid liability on the basis that, as merely a "legal person," it cannot have a "guilty mind." Cf. *United States* v. *Sci. Applications Int'l Corp.*, __ F.3d __, 2010 WL 4909467, at *16 (D.C. Cir. Dec. 3, 2010) (noting that the "standard for knowledge under the [False Claims Act] is [not] lower for corporate defendants").

Likewise, associations can be embarrassed, harassed, or stigmatized. Cf. Pet. Br. 53. Officials do not hesitate to ascribe emotional capacity to corporations. See, *e.g.*, Letter of Representative Michael Michaud (Mar. 17, 2009) to the CEO of a major bank asserting that "your institution should be ashamed of leading" outsourcing strategies. Indeed, when business organizations are charged or sentenced for crimes, they are accused, punished or given leniency based on behavioral, cultural and ethical factors just like

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[15] Arthur Andersen LLP provides perhaps the most stark illustration of reputational injury, as the firm was literally destroyed by the investigation and indictment following the Enron scandal. *See* Charles Lane, *Justices Overturn Andersen Conviction*, Wash. Post, June 1, 2005 (noting that by the time this Court reversed Andersen's criminal conviction, its 28,000 employees had dwindled to some 200).

"natural persons." See Memorandum from Paul J. McNulty, Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations*, §§II.B, VI.B (Dec. 2006) (noting *passim* that corporations are "legal persons," and stating that "[a] corporation, like a natural person, is expected to learn from its mistakes. A history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs."), *available at http://www.justice.gov/dag/speeches/2006/mcnulty-memo.pdf;* see also U.S. Sentencing Comm'n, *2010 Federal Sentencing Guidelines Manual* 496 (Nov. 2010).

Fairly or unfairly, corporations are lionized or demonized just as individuals would be, and are expected to behave as moral actors that have ethics, cultures, intentions, and states of mind capable of supporting or defeating culpability.[16] There is, accordingly, no basis in FOIA, or in our customs and traditions, to exclude corporations from reasonable protection for their personal privacy interests under Exemption 7(C).

III. FOIA EXEMPTION 4 HAS BEEN CONSTRUED NOT TO PROTECT SIGNIFICANT CORPORATE PRIVACY CONCERNS.

In order to mitigate the injustice of categorically excluding associational entities from Exemption 7(C), Petitioners and their *amici* suggest that Congress fully addressed corporate privacy in Exemption 4. 5

[16] *See, e.g.*, Bus. Roundtable, *Principles of Corporate Governance 2010*, at 2 ("The board of directors, the CEO and senior management should set a 'tone at the top' that establishes a culture of legal compliance and integrity.").

U.S.C. §552(b)(4).[17] That is not correct. As applied in the lower courts, Exemption 4 leaves substantial *bona fide* corporate privacy concerns unprotected.

A. Exemption 4 Protects A Discrete Category Of Confidential Commercial Information.

FOIA Exemption 4 exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Id.* Given its particular focus, Exemption 4 is naturally a primary source of protection for corporate financial and proprietary data.[18] Nevertheless, Exemption 4 has been construed relatively narrowly to reach only a limited set of commercial data; it has not been interpreted to cover all corporate or associational privacy interests, let alone the acute privacy concerns discussed above.

1. "Trade Secrets"

The first class of information protected under Exemption 4—"trade secrets"—is limited to "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either

[17] *See also* Br. of Respondent Comptel 29-31; Br. of Reporters Comm. 13-18; Br. of Free Press 27; Br. of Project on Government Oversight 25-26; Br. of CREW 11-12; Br. of Constitutional Accountability Center 18.

[18] Just as Exemption 7(C) does not arbitrarily exclude associational persons, nor does Exemption 4 arbitrarily exclude individuals. While primarily associated with business, Exemption 4 likewise applies to trade secrets and commercial or financial information submitted by "persons" who happen to be individuals. *See, e.g.*, *Defenders of Wildlife* v. *U.S. Dep't of the Interior*, 314 F. Supp. 2d 1, 15 (D.D.C. 2004).

innovation or substantial effort." *Pub. Citizen Health Research Group* v. *FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). See *Ctr. for Auto Safety* v. *Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 151 (D.C. Cir. 2001) ("Our Decision in *Public Citizen* narrowly cabins trade secrets to information relating to the 'productive process' itself."). The trade secrets prong of Exemption 4, therefore, does not protect all information that would provide a competitive advantage.

2. "Commercial Or Financial Information"

The second type of information protected by Exemption 4—"commercial or financial information"—is likewise limited. To qualify for its protection, information must: (1) be "commercial or financial" in nature; (2) have been "obtained from a person," and; (3) be "privileged or confidential." 5 U.S.C. §552(b)(4). These factors are discussed below.

While courts have construed the term "commercial" broadly, encompassing all information "relating to or dealing with commerce," *Am. Airlines, Inc.* v. *Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978); see *Baker & Hostetler LLP* v. *U.S. Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006), and have generously interpreted the requirement that information must be "obtained from a person," (including, of course, corporate persons, 5 U.S.C. §551(2)). However, Exemption 4 has been sharply curtailed by the lower courts' restrictive view of what information qualifies as "confidential" under Exemption 4.[19]

[19] Exemption 4 requires information to have been "privileged" or "confidential." 5 U.S.C. §552(b)(4). The case law focuses principally on "confidential." The few lower court opinions to have treated with the term "privileged" have understood it to refer to protections such as the attorney-client and settlement discussion privileges, and judicial protective orders. *See*, *e.g.*, *Indian Law Res. Ctr.* v. *DOI*, 477 F. Supp. 144, 148 (D.D.C. 1979); *Miller, Anderson, Nash, Yerke & Wiener* v. *DOE*, 499 F. Supp. 767, 771 (D. Or. 1980).

Unfortunately, courts have not generally construed Exemption 4 in accordance with a fair reading that protects documents considered to be confidential *by their owner*. See *id.* §552(b)(4). Indeed, courts have resisted this understanding even though the Senate's report on FOIA endorsed precisely this subjective view, explaining that Exemption 4 was "necessary to protect the confidentiality of information…*which would customarily not be released to the public by the person from whom it was obtained*." S. Rep. No. 89-813, at 9 (emphasis added).

Courts have focused instead on whether the effect of the disclosure would likely "(1)…impair the Government's ability to obtain necessary information in the future; or (2)…cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnotes omitted). This restrictive, objective test has achieved "widespread acceptance" among the lower courts. *Critical Mass Energy Project* v. *NRC*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc).

The D.C. Circuit, the principal forum for FOIA-related actions,[20] subsequently placed a further judicial gloss on the *National Parks* test for confidentiality by assessing *why* the person submitted the information to the government. Specifically, in *Critical Mass*, it held that the

[20] *See Litigation Under the Federal Open Government Laws 2002*, at 279 (Hammitt, Sobel & Zaid eds., 21st ed. 2002).

National Parks effects-of-disclosure test applies to all information that the submitter was *required* to provide to the government. *Critical Mass*, 975 F.2d at 879. However, information the person submitted *voluntarily* would be treated under the Senate Report's original, more protective standard; in other words, mandatory Exemption 4 protection would apply for all information "that would customarily not be released to the public by the person from whom it was obtained." *Id.*[21]

Whether a submission was voluntary or mandatory under this judicially-crafted dichotomy can be confusing. It has been held to depend on the agency's "actual legal authority," not on the submitter's subjective understanding or agency representations. See *Ctr. for Auto Safety*, 244 F.3d at 149 ("[L]inking enforceability and mandatory submissions creates an objective test; regardless of what the parties thought or intended, if an agency has no authority to enforce

[21] No other circuit has expressly adopted the *Critical Mass* distinction between voluntary and compelled disclosure. In *Utah* v. *DOI*, 256 F.3d 967, 969 (10th Cir. 2001), the Tenth Circuit cited *Critical Mass* favorably, but did not adopt the test as that case regarded only compelled disclosure. Other circuits have acknowledged *Critical Mass* but declined to consider it. *See Nadler* v. *FDIC*, 92 F.3d 93, 96 n.1 (2d Cir. 1996) (recognizing that the *National Parks* test "is now 'confine[d] to information that persons are required to provide to the Government'" but finding the amendment of the test "irrelevant" because the records in question were not provided voluntarily) (alteration in original); *Inner City Press/Cmty. on the Move* v. *Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 245 n.6 (2d Cir. 2006) (noting that the Second Circuit has not yet adopted the *Critical Mass* distinction but declining to consider it because the parties did not raise it); *see also Frazee* v. *U.S. Forest Serv.*, 97 F.3d 367, 372 (9th Cir. 1996) (declining to address the *Critical Mass* distinction because the information at issue was compelled).

an information request, submissions are not mandatory."). Thus, information submitted in response to an agency's explicit demand may in fact have been a voluntary submission. *Id.* at 148-49. Conversely, information submitted in response to a letter that "merely requested, but did not require" submission of information may in fact be a mandatory submission. See *In Def. of Animals* v. *HHS*, No. 99-3024, 2001 U.S. Dist. LEXIS 24975, at *35 (D.D.C. Sept. 28, 2001).

Information submitted voluntarily, but as a necessary prerequisite to participate in a voluntary government program, is said to be a mandatory submission. *E.g.*, *Judicial Watch, Inc.* v. *U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 169 (D.D.C. 2004); *Pub. Citizen Health Research Group* v. *FDA*, 964 F. Supp. 413, 414 n.1 (D.D.C. 1997). So too, information submitted in response to a government "request for proposal" is deemed required. *E.g.*, *Canadian Commercial Corp.* v. *Dep't of the Air Force*, 442 F. Supp. 2d 15, 29 (D.D.C. 2006), *aff'd*, 514 F.3d 37 (D.C. Cir. 2008); *Martin Marietta Corp.* v. *Dalton*, 974 F. Supp. 37, 39 (D.D.C. 1997).

Under the *National Parks* test, a corporation seeking to prevent disclosure of information it would not ordinarily release to the public, but which was required to be submitted to the government, must show that the disclosure would cause substantial harm to its competitive position.[22] This does not encompass every injury to a business's competitive

[22] Exemption 4 does not require a showing of actual injury, but rather only "actual competition and a likelihood of substantial competitive injury." *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); *Frazee*, 97 F.3d at 371; *Gulf & W. Indus.* v. *United States*, 615 F.2d 527, 530 (D.C. Cir. 1979).

position, but rather, is limited to harm stemming from "the affirmative use of proprietary information by competitors." *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (quotations omitted).

The relatively narrow judicial view of "competitive harm" can severely limit the scope of protection available under Exemption 4—and would not likely protect a corporation's privacy interests. For example, the Exemption has been understood to offer no protection to disclosures that would result in "'customer or employee disgruntlement.'" *Pub. Citizen*, 704 F.2d at 1291 n.30. See *CNA Fin. Corp.*, 830 F.2d at 1154 (D.C. Cir. 1987) (unfavorable publicity from release of information on hiring and promotion of women and minorities does not warrant Exemption 4 protection); *Gen. Elec. Co.* v. *NRC*, 750 F.2d 1394, 1402-03 (7th Cir. 1984) (embarrassment from disclosure of internal criticism of nuclear reactor design).[23]

The D.C. Circuit recently reiterated this limitation, rejecting an argument that disclosure of Department of Defense audit reports would cause competitive harm because the corporation's "competitors will use the documents to discredit them in the eyes of current and potential customers." *United Techs. Corp.* v. *U.S. Dep't of Def.*, 601 F.3d 557, 563 (D.C.

[23] *See also In Def. of Animals* v. *USDA*, 587 F. Supp. 2d 178, 182 (D.D.C. 2008); *Ctr. to Prevent Handgun Violence* v. *U.S. Dep't of the Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997); *Daisy Mfg. Co.* v. *CPSC*, No. 96-5152, 1997 WL 578960, at *4 (W.D. Ark. Feb. 5, 1997), *aff'd*, 133 F.3d 1081 (8th Cir. 1998); *Martech USA, Inc.* v. *Reich*, No. C-93-4137, 1993 WL 1483700, at *2 (N.D. Cal. Nov. 24, 1993). *But cf. Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 341 (D.C. Cir. 1989) (declining to decide whether embarrassment from disclosure of bribery-related information is sufficient to trigger Exemption 4 protection).

Cir. 2010). The court reasoned that "[c]alling customers' attention to unfavorable agency evaluations or unfavorable press does not amount to an affirmative use of proprietary information by competitors" and that "Exemption 4 does not guard against mere embarrassment in the marketplace or reputational injury." *Id.* (quotations omitted).

Thus, as interpreted by the lower courts, Exemption 4 protects only a narrow (though admittedly important) subset of corporate interests. This Exemption is focused on direct competitive harm resulting from a competitor's affirmative use of a corporation's commercial information. Courts have rejected the application of Exemption 4 to other important corporate interests. Moreover, though the D.C. Circuit has crafted a reasonably protective approach in *Critical Mass.* in order not to whipsaw companies that volunteer information to the government, this methodology has not been adopted outside the Circuit and is, in any event, still considerably uncertain.

B. Gaps In Exemption 4 Protection For A Corporation's Confidential Information Are Picked Up By Exemption 7(C).

As the foregoing discussion illustrates, while Exemption 4 applies to certain commercial information, it leaves significant corporate privacy interests unaddressed. Such information is properly treated under Exemption 7(C).

1. Exemption 4 offers no protection to information that, if released, would result in reputational injury. *Supra* at 28-29. Regardless of whether disclosure would result in "'customer or employee disgruntlement,'" and an attendant commercial advantage, such information is not covered. *Pub. Citizen*, 704 F.2d at

1291 n.30. That is precisely the sort of privacy concern implicated by Section 7(C).

There is no good reason in law or policy to exclude associational persons such as corporations from reputational protection under FOIA Exemption 7(C). As discussed above, corporations share with individuals the very same sorts of concerns occasioned by the indiscriminate disclosure of law enforcement investigative files.

A corporation targeted or implicated by law enforcement can be indelibly stigmatized by release of the agency's file, even if later found to have been the target of wrongful accusations, cleared of wrongdoing, or not ultimately prosecuted for any or all of the alleged wrongs. Cf. *Fund for Constitutional Gov't*, 656 F.2d at 861, 864 (protecting "information which would reflect investigations of allegations of possible wrongdoing by individuals who were neither indicted nor prosecuted"). In addition, like individual witnesses, interviewees, or whistleblowers, corporations that cooperate with, self-disclose, or settle governmental investigations risk the stigma of being "connected in any way with a criminal investigation," *Computer Professionals*, 72 F.3d at 904.

The implications for corporations of such stigmatization could be far reaching, impairing the corporation's ability to attract and retain investors, customers, or employees—or even unduly harming its standing with other government agencies or regulators—and possibly jeopardizing its very existence. Without the complementary protection offered by Exemption 7(C), then, corporations would have no means to safeguard their legitimate privacy interests.

2. Under the *National Parks* effects-of-disclosure test, Exemption 4 considers only "substantial harm to the competitive position of the person *from whom the information was obtained*." 498 F.2d at 770 (emphasis added). Cf. *Bloomberg, L.P.* v. *Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143 (2d Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3271 (U.S. Oct 26, 2010) (No. 10-543) (declining to analyze harm to private banks who were the subjects of loan information sought under FOIA when the information was obtained not from the private banks but rather from the Federal Reserve Bank)). This approach leaves corporations exposed to competitive injury from the release of confidential commercial information disclosed to law enforcement by a third party.[24]

Exemption 7(C), by contrast, contains no such limitation, protecting privacy interests regardless of the source of the information, instead assessing disclosure based on the information's ability to invade personal privacy to an unwarranted degree. Exemption 7(C)'s broader view of privacy makes sense in the law enforcement context where information about suspected wrongdoing can come from a wide range of sources, including anonymous or confidential informants.

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[24] To be sure, such an unfair result may be avoided by treating the information as "voluntarily submitted." *See Gov't Accountability Project* v. *NRC*, No. 86-1976, 1993 WL 13033518, at *1 (D.D.C. July 2, 1993) (applying standard for voluntarily-submitted information to information provided by a confidential source without authorization from the corporation). But outside of the D.C. Circuit, where courts have not yet adopted the *Critical Mass* distinction between voluntary and required information, it is unclear whether even such a safety valve would be available.

IV. FOIA EXEMPTIONS 4 AND 7(C) PROVIDE COMPLEMENTARY PROTECTIONS TO EFFECTUATE FOIA'S PURPOSE RESPONSIBLY.

Contradicted by FOIA's plain text and undermined by FOIA's structure and purpose, Petitioners and their *amici* resort at the last to a parade of horribles. Affirming the Third Circuit, they argue, would result in a rash of corporate abuses. *E.g.*, Br. of Reporters Committee 19-32; Br. of CREW 16-17. Separately, they lament the practical difficulties that would befall agencies having to comply with such a ruling. *E.g.*, Pet. Br. 51-53; Br. of CREW 21-22; Br. of Collaboration on Government Secrecy 19-21. These allegations are unfounded, and, upon a proper application of FOIA, highly unlikely.

It is important to recognize that disclosure under Exemption 7(C) is not mandatory. Exemption 4 leaves an agency no discretion; once the agency determines that information comes within its ambit, non-disclosure is required. See *FOIA Guide* at 355-56. Exemption 7(C), on the other hand, requires the agency to weigh the asserted privacy interest against the interests favoring public disclosure. See *Reporters Comm.*, 489 U.S. at 762.

FOIA's exemptions work together to ensure that the responsible balance Congress intended is achieved. Under Exemption 7(C), an agency must exercise its judgment as to whether or not to release the information. Only information that would entail an unwarranted invasion of the corporation's personal privacy would not be released. Where the agency concludes that the public has an interest in knowing the information in question, the agency could be permitted to release even damaging private and confidential material. On the other hand, where

the agency concludes that a public release of the corporation's private and confidential information would be unduly prejudicial, undercut corporate cooperation, lend credence to false or overstated accusations, be misleading to the public, or be unfairly punitive to the corporation, the agency would have the discretion to withhold such material.

Accordingly, there is no reason to fear that Exemption 7(C) would deny the public information about, for example, failed inspections or dangerous products—where the agency believes the public should know about a company's manufacturing conditions or business practices (even beyond whatever enforcement action has been taken), the expert agency will be in a position to make that judgment. On the other hand, where the agency believes that disclosure of information is unwarranted, the information may be withheld.

A ruling for Respondent AT&T will not bury agencies under an avalanche of unprecedented, all-consuming FOIA obligations. First, it should be noted that agencies cannot, in any event, avoid considering requests to release or withhold information simply because of ostensible burden. See 5 U.S.C. §552(a)(3) (agency "shall" carry out various FOIA obligations). Second, agencies will in all likelihood have to expend time and effort to review documents containing corporate information that are the subject of FOIA requests regardless of the Court's ruling.[25] Because agencies will already have to

[25] Agencies are protected from undue burdens imposed by unreasonable searches or by requests that fail to reasonably describe the information requested. *E.g.*, *Trentadue* v. *FBI*, 572 F.3d 794, 797 (10th Cir. 2009); *Ruotolo* v. *DOJ*, 53 F.3d 4, 9-10 (2d Cir. 1995).

review the documents with respect to the application of other FOIA Exemptions, such as Exemption 4, the only incremental burden will be according some consideration to Exemption 7(C) when a corporation invokes its personal privacy interests in addition to its commercial interests. Otherwise, the burden for agencies should remain fairly comparable.

Lastly, agencies are perfectly capable of weighing potential invasions of personal privacy. Agencies can assess the public interest in the release of the information, as well as judicial guidance as to the parameters of personal privacy interest for corporations just as well as for individuals and other persons. Agencies can count on receiving ample guidance in applying FOIA. See, *e.g.*, *FOIA Guide*. See also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009); Memorandum from the Attorney General to Heads of Executive Departments and Agencies, *The Freedom of Information Act* (Mar. 19, 2009), *available at* http://www.justice.gov/ag/foia-memo-march2009.pdf. There is no good reason why agencies cannot handle this obligation for corporations.

Allowing corporations to seek discretionary protection under Exemption 7(C) for information that is not fully protected under Exemption 4 gives effect to the reasonable balance of interests that Congress built into FOIA. If the Third Circuit's decision were reversed, agencies will be compelled to release corporate information even if the agency itself believes that the disclosure would unfairly and unnecessarily injure the corporation's privacy interests. Congress did not mandate a narrow view of personal privacy under FOIA's Exemption 7, and it

would make no sense. Law enforcement agencies must act as responsible stewards of the sensitive data they collect about any person and take care to avoid indiscriminate public disclosure of such information.

CONCLUSION

For these reasons and those stated by Respondent AT&T, the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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