No. 09-1279

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,

Petitioners,

v.

AT&T INC., *ET AL.*

Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AT&T INC.

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QUESTION PRESENTED

The Freedom of Information Act's Exemption 7(C) protects against the disclosure of "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(7)(C). The question presented is:

Whether all incorporated individuals and entities are categorically excluded from Exemption 7(C)'s privacy protection.

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the Country. More than 96% of the Chamber's members are small businesses with 100 employees or less, including a number of home-based, one-person operations. In addition to businesses, the Chamber's membership also includes trade and professional associations.

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases of vital concern to the Nation's business community. The Chamber and its members have a significant interest in the question presented in this case, which concerns the privacy interests of corporations in law enforcement investigations. The Chamber, which is itself incorporated, and its corporate members frequently

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief; letters of consent are on file with the Clerk of the Court.

appear as witnesses, facilitators, cooperators, and subjects in such investigations. During those interactions, corporations submit innumerable internal documents, records, communications, and other materials, including confidential and privileged material, to the government for its review. That information is often important, sensitive, or revealing of confidential internal processes, and corporations have a strong interest in protecting such information from widespread dissemination, especially to competitors (the real risk of which is illustrated by this case). To accommodate the needed protection for confidentiality with businesses' parallel interest in cooperation with law enforcement, Exemption 7(C)'s shield is critical. That is especially true for small businesses, which are extremely vulnerable to unfair competitive and reputational harm, as well as for larger companies like respondent.

This Court's determination of Exemption 7(C)'s applicability and scope, as well as its analysis of the privacy rights that corporations enjoy, will thus have a significant bearing on the ability of American businesses and business organizations to protect their reputations, identities, and confidential materials. That protection, in turn, directly affects businesses' operational viability and productivity. The Chamber submits this brief to place the concerns of the full range of American businesses before this Court.

SUMMARY OF ARGUMENT

The FCC advances a simplistic and extreme position: Exemption 7(C) does not even recognize, much less protect, *any* corporate privacy interest for *any* incorporated individual or entity under *any* circumstances. That argument is wrong, for all of the reasons advanced by respondent, and at least three others.

First, the FCC's interpretation ignores more than a century of precedent from this Court holding that corporations enjoy a range of protected constitutional and statutory rights, including privacy rights. Of most relevance here, this Court has repeatedly held in the law enforcement context that the privacy interests of corporations are protected against law-enforcement intrusion by the Fourth Amendment.

To be sure, a corporation's protections are not identical to those of natural persons under the Constitution or common law. But the issue here is whether corporations have any privacy right against law enforcement intrusion and protection against the harm that the disclosure of law enforcement records would inflict. The FCC's one-size-fits-all preclusion of *all* privacy rights for *all* corporations (and any other associations who do not qualify as "particular individual human being[s]," FCC Br. 13) would do what this Court has repeatedly refused to do: it would make Exemption 7(C) *narrower* than the Constitution's and common law's protection.

Congress legislated against a backdrop of recognized privacy rights in corporations when it adopted Exemption 7(C), and no evidence indicates that, when Congress included the word "personal" in

the exemption, it intended to strip corporations of their well-established rights or to woodenly shut the door to any corporate privacy interest outside of Exemption 4's straitened scope. Quite the opposite, Congress's express inclusion of corporations as "persons" under FOIA reflects a congressional determination to invest corporations with the same protection as all the other persons whose privacy is protected by Exemption 7(C).

Second, by denying wholesale the existence of any corporate privacy interest in law enforcement records, the FCC upsets the balance that Congress struck in enacting Exemption 7(C). That Exemption balances privacy interests against the public interest in disclosure, and this Court has been explicit that the only relevant public interest is in learning about the *government's* activities. To ensure that FOIA's operation stays focused on the disclosure of information about the government, and not private individuals or entities, this Court has consistently defined the privacy interest protected by Exemption 7(C) capaciously and pragmatically. The FCC's approach eschews this flexibility in favor of a categorical rule subjecting any and all sensitive corporate information (falling outside Exemption 4's narrow confines) to automatic disclosure in all cases. The FCC's headlong rush toward disclosure, however, does nothing to advance the public interest in *government* transparency or to contribute to the public's understanding of the *government's* operations and activities.

Third, the threat of disclosure will harm law enforcement interests by chilling the ability of corporations (and other associations) to cooperate and

communicate with law enforcement about matters of joint concern. The FCC's interpretation will also devastate small businesses that lack the resources to rehabilitate their reputations after disclosures that damage their business reputation and goodwill. Congress enacted FOIA to tell citizens what its government is up to, not to arm business competitors with a new tool in industrial warfare or to make a business's humiliation and economic devastation the price of law enforcement cooperation.

ARGUMENT

I. CORPORATE PERSONS, INCLUDING NON-PROFITS, MUNICIPAL, AND INDIVIDUAL OR PROFESSIONAL CORPORATIONS, ARE NOT CATEGORICALLY EXCLUDED FROM EXEMPTION 7(C)'S PROTECTION OF PERSONAL PRIVACY

The Chamber agrees strongly with the arguments presented by respondent, and in particular its straightforward textual analysis of FOIA'S inclusion of corporations as "person[s]" under FOIA, 5 U.S.C. § 551(2). The FCC's foundational error in construing FOIA's Exemption 7(C) is encapsulated in its opening reliance on a generic dictionary definition of "personal" (FCC Br. 18). The problem is that the dictionary the FCC uses comes to that definition by first defining the root word "person" in the same terms. *See Webster's Third New Int'l Dictionary* 1686 (2002).

FOIA's starting point, however, is that corporations are "person[s]," 5 U.S.C. § 551(2), and the term "personal" accordingly must be construed against that definitional baseline. Indeed, the FCC's

argument ignores that Congress, unlike *Webster's*, has deemed "the word 'person'" to include "bodies politic and corporate" since 1871. *See* Dictionary Act, Act of Feb. 25, 1871, § 2, 16 Stat. 431.[2]

The operative question before this Court thus is whether Congress, having chosen to include "corporation[s]" as "person[s]" protected by FOIA's exemptions and having long statutorily treated corporations as "persons," would then have categorically concluded that no such corporate person – no business, non-profit, incorporated political or advocacy organization, sole, or professional corporation – would ever have any distinct privacy interest in records that might come into the hands of federal law enforcement officials. The FCC's complete excision of every corporate privacy interest from the vast sweep of materials that come into law enforcement's possession defies not only the text of FOIA, as respondent explains (Br. 14-18), but precedent and logic.

A. The FCC's Interpretation Of Exemption 7(C) Ignores Precedent From This Court Recognizing That Corporations Have Privacy Rights, In Particular In The Law Enforcement Context

The FCC's position that all corporations are so devoid of any privacy interest as to be categorically excluded from Exemption 7(C)'s protection is unmoored from more than a century of this Court's

[2] Today, the Dictionary Act, as amended, establishes that the word "person" includes "corporations." *See* 1 U.S.C. § 1.

precedent recognizing that corporations enjoy rights under the Constitution including, of most relevance, here, privacy rights against law enforcement intrusion.

The starting point is the long "settled" rule "that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws." *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 592 (1896); *see also Southern Railway v. Greene*, 216 U.S. 400, 412 (1910) (Equal Protection Clause protects the corporations of one State against discrimination in another State); *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) (Equal Protection Clause protects corporations to the same extent that it protects "similar associations within the jurisdiction of the state"); *see generally First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 n.15 (1978).

Of most relevance here, in 1906, this Court has explicitly recognized that corporations have a right to privacy in the law enforcement context. In *Hale v. Henkel*, 201 U.S. 43 (1906), this Court held that every "person, be he individual or corporation, is entitled to protection" against unreasonable searches and seizures, *id*. at 76. In so holding, the Court explained that "[a] corporation is, after all, but an association of

individuals under an assumed name with a distinct legal entity." *Ibid.*[3]

This Court's recognition of corporations as distinct entities invested with rights of autonomy, confidentiality, and privacy as against governmental intrusion continued in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). In *Martin Linen*, the Court held that corporations are "person[s]" protected by the Double Jeopardy Clause of the Fifth Amendment. The Court reasoned that corporations, as much as natural persons, would be "subject[ed] * * * to embarrassment, expense and ordeal and * * * liv[ing] in a continuing state of anxiety and insecurity" were they to be subject to "repeated attempts" by the State "to convict the[m]." *Id.* at 569 (quotation marks omitted). The Court thus recognized that corporations, just like natural persons, could suffer embarrassment, insecurity, anxiety, and ordeal at the hands of government officials. *See also Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (Double Jeopardy barred re-trial of corporate defendant).

Ensuring that, in the course of revealing the *government's* activities and operations, FOIA does not

[3] The *Hale* Court also held that corporations are not protected by the Fifth Amendment privilege against self-incrimination. 201 U.S. at 46. The Court reasoned that the corporate charter bound the corporation to comply with the law and, thus, that the Fifth Amendment's division of power between the prosecutor and an accused individual did not extend to corporations, *id.* at 75. However, unlike the Court's Fourth Amendment holding, this part of the opinion said nothing about the right to *privacy*.

inflict such private embarrassment, harassment, and unwanted exposure is Exemption 7(C)'s central mission. *See United States Dep't of State v. Ray*, 502 U.S. 164, 176 (1991) (protection against "embarrassment in their social and community relationships"); *id.* at 177 (protection against "retaliatory action"); *United States Dep't of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 769 (1989) (privacy interest in keeping "wholly forgotten" matters "away from the public eye").

Likewise, in *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), the Court confirmed the Fourth Amendment's application to a corporation *qua* corporation, explaining that "Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe." *Id.* at 236.

Thus, in direct contradiction to the FCC's argument here, this Court has recognized that corporations themselves have privacy expectations that society respects as reasonable, and can suffer the same types of embarrassment, harassment, and intrusion harms that Exemption 7(C) aims to avoid. Even more importantly, that privacy interest goes beyond the narrow category of commercial records and documents protected by FOIA Exemption 4, and broadly protects the integrity of corporate property and privacy as against law enforcement exposure, which is the heart of Exemption 7(C). *See also, e.g., G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (collecting cases for the dual propositions that corporations have Fourth Amendment rights, and that business premises are protected by the

Fourth Amendment). Privacy rights for corporations are not confined to the constitutional context either. In 1948, Congress passed the Trade Secrets Act, which makes it a crime for government officials to disclose private and confidential corporate information. *See* 18 U.S.C. § 1905. And under the common law, corporations have the right to assert the privacy protections of the attorney-client privilege and the work-product rule, *see Upjohn Co. v. United States*, 449 U.S. 383, 395, 401-402 (1981), as well as the right to bring actions in defamation for speech that injures their reputation, *see* Restatement (Second) of Torts § 561. *See also* Resp. Br. 26-27 (citing numerous examples of the law's protection of corporations' privacy). While the FCC is content to cast all of those privacy protections away, nothing in FOIA's text or Congress's purpose requires the unqualified and unyielding categorical excision of corporations from Exemption 7(C)'s privacy protection that the government seeks.

The FCC invokes (Br. 48) this Court's statement in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), that "corporations can claim no equality with individuals in the enjoyment of a right to privacy," *id.* at 652. But that is of no help to the government. First, the statement long predates and has been largely overtaken by *Dow Chemical*'s express recognition of privacy interests for corporations that society recognizes as reasonable.

Second, and more importantly, the question here is not whether the privacy rights between corporations and natural persons are "equal[]," but whether any corporate privacy right against law enforcement intrusion exists at all. *Morton Salt* says

nothing about that, but *Dow Chemical* emphatically does.

At bottom, then, the question is not whether corporations have privacy rights. They plainly do. The question instead is whether this Court should, for the first time ever, read FOIA's protection of personal privacy in Exemption 7(C) to be *narrower* than the Constitution and common law. *Contrast National Archives & Records Administration v. Favish*, 541 U.S. 157, 170 (2004) ("[T]he statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution."); *Reporters Committee*, 489 U.S. at 762 n.13. As respondent explains, especially given FOIA's definition of "person" to include "corporation[s]," 5 U.S.C. § 551(2), there is no textual basis for that backwards result.

Nor would it make any sense. The FCC's straitened and anachronistic conception of corporate rights confounds Congress's intent that courts take a "common sense approach" to Exemption 7(C)'s scope and defies Congress's effort to "eliminate any possibility of an overly literal interpretation" of the Exemption's text. S. Rep. No. 221, 98th Cong., 1st Sess. 22 (1983).[4]

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[4] Because the 1986 revision of Exemption 7(C) was enacted through a floor amendment, there are no contemporaneous committee reports to consult. This Court, however, has previously relied on the 1983 Senate Report, which addressed the virtually identical amendments, in construing the 1986 amendments. *See Reporters Committee*, 489 U.S. at 777.

It also ignores the role of corporations in society and the economy at the time Congress enacted Exemption 7(C)'s key language in 1986. Modern corporations take on myriad forms, including single individuals, Mom-and-Pop businesses, and minority or unpopular political advocacy groups, and they pursue a vast array of economic, charitable, political, and social ends, all of which could be harmed by broadly opening their communications with federal law enforcement to public display.

B. Exemption 4's Narrow Protection Falls Far Short Of The Privacy Interests That Corporations Enjoy

The FCC's suggestion that Exemption 4 provides all the privacy protection that corporations merit (Br. at 24-27) misses the mark.

First, Exemption 4 protects only "commercial or financial" records, 5 U.S.C. § 552(b)(4), a phrase that does not commonly reach a variety of corporate records, such as internal emails, candid internal exchanges of advice on non-commercial matters, or a host of records maintained by non-profit, sole, closely held, or municipal corporations. While the FCC's reading of Exemption 7(C) might allow the redaction of identifying information about individual members of incorporated advocacy groups, like the NAACP, Public Citizen, or the American Friends Service Committee, its theory would offer no protection to collective information about the number, geographical dispersion, or demographic makeup of such organizations. Nor would it offer any protection – other than blacking out names – to internal communications between members about the organization's goals, interests, or political viewpoints,

since those are not naturally considered to be "commercial" or "financial" records.

It is no secret that the federal government's law enforcement officials sometimes investigate the activities of private advocacy associations, undoubtedly creating law enforcement records of those corporations' sometimes intimate and sensitive (but not "commercial" or "financial") internal communications. *See, e.g.*, Jerry Markon, *FBI Probes of Groups Were Improper, Justice Says*, WASH. POST, Sept. 20, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/20/AR2010092003100.html (describing a Department of Justice Inspector General report documenting improper FBI investigations of liberal advocacy organizations, including the Thomas Merton Center, Greenpeace, and the Catholic Worker Movement, the first two of which were incorporated, after the September 11, 2001 attacks).

"Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *National Ass'n for the Advancement of Colored People, a Corporation v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *cf. Roberts v. United States Jaycees*, 468 U.S. 609, 622-623 (1984) ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority," and noting that governmental efforts "to interfere with the internal organization or affairs of the group" may infringe on such association). But FOIA,

according to the FCC, now compels the government to turn those documents over to any requester and even, under the e-FOIA provisions, to post the private and internal records of incorporated advocacy and associational groups on agency websites, regardless of the propriety of the law enforcement investigation.[5]

Indeed, under the FCC's rigid view, FOIA apparently would mandate the broad public disclosure of non-profit and advocacy group records seized by law enforcement even if those records were obtained in violation of the First or Fourth Amendment and thus were subject to suppression as an unconstitutional intrusion on privacy interests. Everybody but the jury could see them because FOIA permits no discrimination based on the identity of the requester. *Favish*, 541 U.S. at 170. That is not what FOIA is about, and there is no sensible reason that Exemption 7(C)'s personal privacy protection would woodenly exclude the recognized privacy interests of incorporated persons in law enforcement records in that manner.

The records and private inter-governmental communications of municipal corporations like New

[5] *See* 5 U.S.C. § 552(a)(2)(D) (requiring agencies to make available in their FOIA reading rooms "copies of all records * * * which * * * the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records," and to produce certain records in electronic format); President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009) (directing agencies to "use modern technology" to make proactive disclosures).

York City and Chicago that engage in joint law enforcement efforts with the federal government would also now be at risk of disclosure under FOIA (albeit with individual names redacted) if this Court holds that corporations are categorically excluded from Exemption 7(C). Exemption 7(A)'s protection would not fill in the gap because that exemption's protection ends when law enforcement proceedings end. *See National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978) (Exemption 7(A) "d[oes] not endlessly protect material"); *Computer Professionals for Social Responsibility v. United States Secret Service*, 72 F.3d 897, 907 (D.C. Cir. 1996).[6]

The FCC's wooden exclusion of such corporations, moreover, fails to come to grips with this Court's decision in *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978), which held that municipal corporations are "persons" within the meaning of 42 U.S.C. § 1983. In so holding, the Court explained that, "by 1871, it was well understood that corporations should be treated as natural persons for *virtually all purposes of constitutional and statutory analysis*," *id.* at 687 (emphasis added). *See also id.* at 687-688 (relying interchangeably on cases involving business and municipal corporations).

[6] Exemption 7(D) would only apply if the city could prove that it was a confidential "source" in the investigation. *United States Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993) (construing the exemption "narrowly" so that "the Government is not entitled to a presumption that a source is confidential within the meaning of Exemption 7(D)").

Second, the FCC's confident assertion (Br. 25) that Exemption 4 will protect most business information glides over the fact that the Exemption 4's protection varies substantially depending on whether the information was provided voluntarily or involuntarily to the government. Where the information is required, even the most confidential business records can be disclosed by the government unless the business carries the burden of showing, in a reverse-FOIA action, that disclosure is "likely" "to cause *substantial* harm to the competitive position of the person from whom the information was obtained." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 878, 879 (D.C. Cir. 1992) (en banc) (emphasis added).[7]

Including FOIA's corporate "persons" in Exemption 7(C)'s privacy protection, however, would ensure that Exemption 4's significantly qualified protections would not impair the substantial public interest in law enforcement cooperation by all persons, including corporations. Indeed, Congress specifically amended Exemption 7(C) in 1986 to impose an objective test to protect privacy interests

[7] The D.C. Circuit first cleaved Exemption 4's protection into two distinct standards depending on whether the information was voluntarily or involuntarily provided in *Critical Mass*, 975 F.2d at 872. In the view of the Chamber, that aspect of *Critical Mass* is incorrect, and there should be a single uniform inquiry into confidentiality that governs all Exemption 4 cases and that focuses exclusively on whether the materials customarily are created and treated confidentially. *See id.* at 878-880; *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 931 F.2d 939, 947-948 (D.C. Cir. 1991) (Randolph & Williams, JJ., concurring).

in law enforcement records. That is why Exemption 7(C) now "applies to any disclosure that 'could reasonably be expected to constitute' an invasion of privacy that is 'unwarranted,'" as opposed to disclosures that "would" result in harm. *United States Dep't of Defense v. Federal Labor Relations Authority* ("*FLRA*"), 510 U.S. 487, 496 n.6 (1994). Exemption 4, which was enacted two decades before Exemption 7(C)'s objective test, Pub. L. No. 89-487, 80 Stat. 250 and Pub. L. No. 90-23, § 1, 81 Stat. 54, is incapable of offering such protection for private business materials in law enforcement records, because it requires proof that disclosure in the particular case actually "*would* be likely" to cause "*substantial*" harm. *Critical Mass*, 975 F.2d at 878 (emphasis added). *See FLRA*, 510 U.S. at 496 n.6 (noting the operative difference between the "could" and "would" cause harm formulations in FOIA's exemptions).

In short, the FCC's argument fails to provide the very specialized protection for privacy in law enforcement records – a heightened protection that serves the substantial public and *governmental* interest in encouraging forthcoming cooperation with law enforcement – that the government has long sought under Exemption 7(C). *See, e.g.,* U.S. Opening Br. at 17, 44, *Favish, supra*; U.S. Reply Br. at 17, *Favish, supra.*[8]

[8] The FCC suggests (Br. 25) that information would also be protected under Exemption 4 if disclosure would "impair the Government's ability to obtain necessary information in the future" or impede "administrative efficiency and effectiveness." A number of courts have held, however, that private persons

C. The FCC's Position Ignores The Context And Balanced Structure Of Exemption 7(C)

This Court's cases establish two aspects of Exemption 7(C)'s operation that the FCC's position in this case defies. First, the privacy interest in Exemption 7(C) is more comprehensive and flexible than the FCC suggests. Rather than referring only to "matters that relate to a particular individual human being," as the FCC argues (Br. 13), the personal privacy interest that FOIA protects encompasses materials relating to others as well, including groups, like a family. The privacy protection also exceeds what the common law provides, and even extends to such non-intimate materials as criminal record "rap" sheets.

Second, FOIA Exemption 7(C) only protects material from disclosure if the relevant privacy interest outweighs any public interest in government transparency and accountability. This balancing test ensures that material bearing on the public's right to know about the operations and activities of its government will still be subject to disclosure, even if Exemption 7(C) protects corporations. There thus is little upside, but much downside, to the FCC's inflexible and troublesome position.

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cannot assert those two defenses to disclosure; only the government can. *See United Technologies Corp. v. United States Dep't of Defense*, 601 F.3d 557, 565 (D.C. Cir. 2010); *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988); *Comdisco, Inc. v. General Servs. Admin.*, 864 F. Supp. 510, 516 (E.D. Va. 1994).

1. *This Court's Pragmatic Definition Of Exemption 7(C)'s Privacy Protection Logically Includes The Privacy Of Corporate Persons*

Congress did not intend for FOIA to afford the general public a right of access to the vast amounts of "information about *private citizens* that happens to be in the warehouse of the Government." *Reporters Committee*, 489 U.S. at 774. Accordingly, "the concept of personal privacy under Exemption 7(C) is not some limited or cramped notion of the idea." *Favish*, 541 U.S. at 165 (quotation marks omitted); *see Reporters Committee*, 489 U.S. at 774 (rejecting a "cramped notion of [the] personal privacy" that FOIA protects); *cf. Whalen v. Roe*, 429 U.S. 589, 605 (1977) ("We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files."). Indeed, in *Reporters Committee*, the Court held that criminal history records – "rap sheets" – are exempted from disclosure under Exemption 7(C), even though the individual records of conviction are matters of public record. 489 U.S. at 762-780.

Importantly, in *Favish*, this Court adopted a practical and functional reading of the "personal" privacy that Exemption 7(C) protects, holding that it extends beyond images or documents about a "particular individual" person (FCC Br. 13) to include records about a third person – a family decedent. 541 U.S. at 170-171. That "personal privacy" applies, moreover, even if the decedent was a high-level government official who died in a public place. *Id.* at 160, 167.

Exemption 7(C) also protects against the disclosure of information about an individual that is already in the public record, but that is "intended for or restricted to the use of a particular person or group or class of persons" and is "not freely available to the public." *Reporters Committee*, 489 U.S. at 763-764 (quoting *Webster's Third New Int'l Dictionary* 1804 (1976)). The "practical obscurity" of such information and its "hard-to-obtain" character work together to create a FOIA-protected privacy interest against the information's broad disclosure to the public. *Reporters Committee*, 489 U.S. at 762, 764; *see also FLRA*, 510 U.S. at 497 (protecting the addresses of government employees).

The FCC's rigidly automatic and unyielding excision of every and all corporate entities from Exemption 7(C)'s privacy protection cannot be reconciled with that practical and contextually flexible conception of privacy adopted by this Court – at the United States' behest – in *Reporters Committee*, *Favish,* and *FLRA*. Nor does it comport with the FCC's acknowledgment that corporations do enjoy privacy protections in their interactions with law enforcement, which is the precise focus of Exemption 7(C). Br. at 47-48.

Instead, the FCC's central argument (beyond its reliance on an inapt dictionary definition of "person" and "personal") is that the nature of the privacy protection enjoyed by corporate persons is somewhat more variable than natural persons, existing in some contexts but not in others. *See* Br. at 48 (citing *Morton Salt Co., supra*). That may be true. But the acknowledgment that there *are* recognized and well-established corporate privacy

interests *vis-a-vis* law enforcement – interests that are not co-extensive with Exemption 4's cabined coverage – proves the opposite of what the FCC argues. It dictates that Exemption 7(C)'s heretofore comprehensive protection of information that is "not freely available to the public," *Reporters Committee*, 489 U.S. at 764, should extend to corporations (and other associations). Any variations in the law's coverage of corporate privacy interests could then be factored into Exemption 7(C)'s balancing test. That, in fact, is precisely what this Court did in *Favish,* when it recognized that finding a privacy interest in family members "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. There is certainly no basis in precedent or logic for holding that Exemption 7(C)'s protection of privacy is *narrower* than the Constitution's or common law's.

2. *Protecting The Privacy Of Corporate Persons Is Important*

Giving recognition and protection to that privacy interest is important to FOIA's calibrated operation and the longstanding recognition that "legitimate governmental and private interests could be harmed by release of certain types of information," *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988), and thus that "public disclosure is not always in the public interest," *Central Intelligence Agency v. Sims*, 471 U.S. 159, 166-167 (1985).

First, without privacy protection, any corporate information in the government's hands, no matter how private or privileged, that falls outside of Exemption 4 will automatically be disclosed. There is no need for that. The balancing test that already

applies under Exemption 7(C), *see generally Favish, supra,* already will factor in any of the limitations on the scope of corporate persons' privacy of concern to the government. But without recognized privacy protection, corporations – and every other association or group that does not meet the FCC's "individual human being" test (Br. 13) – will have nothing at all to balance even when there is *no* public interest in disclosure at all, such as when disclosure is sought by a competitor simply to advance its own economic interests. Even a reduced or slight privacy interest would prevent disclosures serving such purely mercenary interests because "something, even a modest privacy interest, outweighs nothing every time." *Consumers' Checkbook Center for the Study of Services v. United States Dep't of Health & Human Servs.*, 554 F.3d 1046, 1056 (D.C. Cir. 2009) (quoting *National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)); *see also Stone v. Federal Bureau of Investigation*, 727 F. Supp. 662, 667 n.4 (D.D.C. 1990) (noting that private curiosity "and the public interest are not necessarily identical"), *aff'd*, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990); *Julian*, 486 U.S. at 17 (Scalia, J., dissenting) (" FOIA is not meant to provide documents to particular individuals who have special entitlement to them, but rather 'to inform the *public* about agency action.' ")(alteration in original) (citation omitted).

Second, adoption of the FCC's categorical exclusion would confound the public interest in effective law enforcement and private cooperation with investigations. As the United States has previously argued to this Court, "only an artificial and wooden conception of the public interest would *always* weigh in favor of more disclosure" under FOIA. U.S. Br., *Favish, supra*, at 44. In fact, the public interest in effective law enforcement and in encouraging cooperative disclosures and dialogue in law enforcement investigations strongly favor including the privacy interests of incorporated persons in Exemption 7(C)'s balanced protection. That is because investigations of business and white collar crimes, in particular, depend heavily on the cooperation of corporate entities.[9]

American corporations, moreover, have been exceptionally proactive in ferreting out misconduct within their ranks, disciplining those responsible and implementing policies and procedures to prevent future wrongdoing. Indeed, in this case, it was respondent that first brought the results of its own internal investigation to the government's attention.

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[9] For example, the Department of Justice's manual for U.S. Attorneys states that charging decisions against corporations should be based, in part, on the extent of voluntary cooperation furnished by corporations. *See* U.S. Attorney's Manual, § 9-28.700, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm. The Securities and Exchange Commission and the Environmental Protection Agency also have voluntary disclosure programs in place, as do a number of other agencies. *See, e.g.*, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, Exchange Act Release No. 44,969 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm; Environmental Protection Agency, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000).

Pet. App. 2a-3a. The FCC's "no corporate good deed goes unpunished" approach to such forthcoming disclosures and cooperation, however, profoundly disserves the public interest in promoting the cooperative relationship between corporate citizens, regulators, and law enforcement agencies.

Third, the FCC's interpretation of the disclosure requirement will also disproportionately harm small businesses, closely held, and sole corporations. The FCC has adopted a one-size-fits-all policy, arguing that regardless of a corporation's size or character, the corporation, as distinct from its shareholders and employees, has no protected privacy interest. That argument ignores that the vast majority of corporations – 96% of all the Chamber's members – are businesses with fewer than 100 employees. *See* M. Keightley, Congressional Research Service Report for Congress, Business Organizational Choices: Taxation and Responses to Legislative Changes 10 (2009) (more than 75% of corporations whose income is taxed under federal law, *see* 26 U.S.C. § 301, have less than $1 million in receipts per year). For small businesses and organizations – especially for sole and professional corporations – the FCC's distinction is unworkable because their identity is bound up with the identity of the individuals who operate the corporation. Nor, in those situations, will it be easy for courts to disentangle the individual's privacy from the corporate person's privacy.

Negative publicity surrounding law enforcement actions, moreover, can have devastating effects on businesses. For example, the Department of Justice indicted the accounting firm Arthur

Andersen on March 7, 2002. This Court reversed that conviction on May 31, 2005, but by that point, the firm was already moribund. The stigma of the indictment alone destroyed the business and resulted in the loss of tens of thousands of jobs.[10] As the D.C. Circuit has noted, a "FOIA disclosure that would announce to the world that * * * certain individuals were targets of an * * * investigation, albeit never prosecuted, may make those persons the subjects of rumor and innuendo, possibly resulting in serious damage to their reputations." *Stern v. Federal Bureau of Investigation*, 737 F.2d 84, 92 (D.C. Cir. 1984) (internal quotation marks omitted). Small businesses, sole corporations, non-profit corporations, and intimate associations have even less wherewithal than companies the size of Arthur Anderson to withstand law enforcement disclosures about their internal and private practices, communications, and activities.

The FCC tries to elide the natural consequences of its position by suggesting (Br, 36 n.11) that courts will prophylactically throw a wider net of individualized protection in such cases. But this is a statute that is being construed, and courts cannot make up new rules as they go along. In a reverse-FOIA action (as this case functionally is), the corporation will bear the burden of proving its entitlement to have the documents withheld from disclosure, and under the FCC's view, that burden

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[10] *See* Christopher A. Wray & Robert K. Hur, *The Power of the Corporate Charging Decision Over Corporate Conduct*, 116 YALE L. J. Pocket Part 306, 306 n.2 (2007).

will only be met if the risk of invading an "individual human being's" privacy is established. The FCC's categorical position leaves no margin of error in that analysis.

Nor is there any logical basis for the FCC's solicitude for sole or closely held corporations, but not for slightly larger Mom-and-Pop businesses or advocacy organizations, for which the integrity of internal communications and records can be just as critical to survival.

In short, given (i) the plain text of FOIA, (ii) the long line of precedent recognizing the privacy interests of corporate persons in the law enforcement context in particular, (iii) FOIA's disavowal of any legitimate interest in disclosing private, rather than governmental, conduct, and (iv) the substantial public interest in promoting forthcoming cooperation with law enforcement, the FCC's categorical and wholesale exclusion of every corporate person from Exemption 7(C) is wrong, is unworkable, is contrary to precedent, and, accordingly, should be rejected.

3. *Exemption 7(C)'s Balancing Test Protects The FCC's Interests*

For all the substantial harm that stripping corporations of the heightened protection for privacy afforded by Exemption 7(C) would cause, there is no corresponding benefit gained by the FCC's rigidly exclusionary rule.[11] That is because Exemption 7(C)

[11] It bears repeating, moreover, that the FCC's "individual human being" position would not seem to stop with incorporation and would, instead, presumably include all non-incorporated groups and associations, except for those families covered by *Favish*.

contains a built-in check on meritless invocations of privacy rights, limiting the Exemption's protections to "*unwarranted* invasion[s] of personal privacy." 5 U.S.C. § 552(b)(7)(C) (emphasis added). If "the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake," and disclosure "is likely to advance that interest," then any privacy interest will commonly be outbalanced and the information disclosed. *Favish*, 541 U.S. at 172.

Application of that time-tested and calibrated balancing test effectuates FOIA's purpose of allowing persons to determine "what their government is up to," *Reporters Committee*, 489 U.S. at 773, far better than the FCC's unbending exclusion. To be sure, that balancing test might not permit the disclosure of *all* records concerning corporations' internal affairs that happen to be in the government's vast storehouses of information. But FOIA does not favor the disclosure of information in the government's hands for its own sake. "[T]he only relevant public interest" under FOIA, *FLRA*, 510 U.S. at 497, is the disclosure of information that would "contribute *significantly* to public understanding of the operations of activities *of the government*" itself, *Reporters Committee*, 489 U.S. at 775 (emphasis added); *see also Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-356 (1997) (per curiam).

The categorical exclusion of all corporate persons from Exemption 7(C) does nothing to increase the

exposure of *governmental* records and activities to the public. The FCC nowhere argues that the disclosure it seeks to make here would cast any significant light on *governmental* wrong-doing or right-doing. It would simply turn FOIA into a fount of information about private entities sought by ambitious business competitors, individuals in search of a lawsuit, or a "sensation-seeking culture," *Favish*, 541 U.S. at 166**.**

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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