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 NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AT&T INC.

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STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS

The National Association of Manufacturers (the "NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing in creating America's economic future and living standards.[1]

The NAM and its members have a vital interest in ensuring that manufacturers who find themselves caught up in a government investigation do not, as a result, have their private papers openly disseminated, thereby damaging their reputation, revealing their confidential communications, and causing competitive and other harm to themselves and their shareholders and employees.

As explained below, business entities, including corporations, create millions, perhaps billions, of messages and documents within the confines of the business organization each day. Most of them are not intended for dissemination to the public. Unless

[1] This *amicus* brief is filed with the written consent of the parties, on file in the clerk's office, in accordance with Rule 37.3(a). Pursuant to Rule 37.6, the NAM notes that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

generated for some improper purpose, those documents would be regarded by virtually anyone as private to the organization. And there is absolutely no reason to believe that such documents lose their privacy and suddenly become available for public display, to aid competitors and potentially damage the reputation of the business entity that generated them, merely because a business entity has the misfortune of being swept up in a government civil or criminal investigation – as target or victim, or simply a source of information – which might involve thousands of messages being provided to the Government in aid of its investigation. No policy or law suggests or requires that result.

DESCRIPTION OF THE ISSUES TO BE ADDRESSED BY *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS

This case concerns private papers of a business entity in the hands of the United States Government. They are there as the result of a government investigation. The question is whether those private papers, which the Government used its broad investigative power to obtain, have, once obtained by the Government, thereby been essentially placed into the public domain. Specifically, the question is whether those documents are subject to public disclosure for the asking by virtue of a Freedom of Information Act request, even if the information is indeed private, embarrassing, and harmful to the entity that created those papers, or to other business entities who may be mentioned in those papers.

The answer is "no." Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), creates an exception to FOIA disclosure for information compiled in the course of a government investi-

gation if release of the information at issue could cause harm and embarrassment. Petitioners and their supporting Respondent CompTel posit that Exemption 7(C) does not apply if the harm or embarrassment will only befall a business entity, not a natural person. In the view of Petitioners and their supporting Respondent, the protection of privacy reflected in Exemption 7(C) is limited to the privacy of human beings, and thus categorically excludes any corporations, business entities, non-profit entities, associations and other similar entities from its reach. The Third Circuit held to the contrary, finding that the privacy of corporations is specifically within the reach of Exemption 7(C).

Because Petitioners' claim is that Exemption 7(C) does not apply to the private information of corporations in *any* circumstance, there is no occasion here to consider the limits of any privacy protection that Exemption 7(C) might afford to business entities in some specific factual setting. Petitioners' categorical position that Exemption 7(C) has no application at all requires this Court to assume, on the one hand, that there is no public interest in the disclosure of the information whatsoever, and, on the other, that the harm resulting from the disclosure will be extreme.

The theory advanced by Petitioners as to why such documents must be disclosed, notwithstanding the lack of public interest in the disclosure, the harm it will do, and the embarrassment it will cause, is that the harm and embarrassment will be inflicted on a business entity – a company, corporation, partnership, non-profit entity, or sole proprietorship – not an individual. And the rationale Petitioners offer to explain why such harm and embarrassment must be tolerated rests almost entirely on an asserted textual

analysis of the words "personal privacy" in Exemption 7(C).

On the one hand, the FOIA, by its terms, extends its protections to corporations, companies and businesses. 5 U.S.C. § 552(b)(4); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152-53 (D.C. Cir. 2006) (affirming FDA's decision to redact names of companies as well as individuals who worked on the approval of mifepristone as an abortion drug). It defines "person" expressly to include business entities, including corporations. 5 U.S.C. § 551(2). Indeed, in other provisions of the FOIA, Congress explicitly used the term "person" to refer to corporations. *E.g.*, 5 U.S.C. § 552(b)(4) (exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential"). And thus the use and reach of the adjectival phrase, "personal," in Exemption 7(C) would likewise seem naturally to include corporations and other business entities, clarifying that this exemption was not concerned about governmental privacy. Finally, Congress did not use any phrase in Exemption 7(C) – such as "individual" – that would have unambiguously eliminated business entities from the scope of coverage.

On the other hand, Petitioners argue that the usual connotations and usages of the word "personal," and the combination of words, "personal privacy," are strong enough to limit the scope of the exemption to the privacy interests of individual human persons, rather than persons as defined by the FOIA.

The NAM believes that Respondent AT&T and the Third Circuit have the better side of the debate regarding the meaning of the statutory language, given the definitional provisions of the FOIA.

But even if Petitioners' reliance on a customary connotation of "personal" and "personal privacy" were sufficient to create doubt or ambiguity about the meaning of Exemption 7(C) as an abstract matter, that should make no difference to the outcome here, given the basic interests at stake, and the essential purposes and limits of the FOIA.

This brief thus focuses on two overriding concerns: (1) the understanding that business entities have a legitimate entitlement to privacy in their day-to-day operations; and (2) the principle that the Government's investigative powers should not be used to serve private interests or to cause unnecessary reputational or market harm to subjects or witnesses in government investigations. In light of those concerns, which we describe in broad terms below, it should be impossible to read the addition of the word "personal" to the word "privacy" to reflect a specific intention on the part of Congress to deem the privacy interests of corporations unworthy of protection under Exemption 7. Specifically:

1. There should be no ground for dispute or disagreement that a corporation or business entity has privacy interests long regarded as worthy of protection. The NAM believes that such interests – the business entity's "reasonable expectation of privacy" – would be acknowledged and understood by virtually everyone as a matter of common experience, common usage, and ordinary parlance. Every day, millions upon millions of documents and messages are created within the confines of corporations and other business entities. Those documents would be widely recognized as private and confidential, not merely because of some indirect effect their release might have on individuals, but as respects the privacy right

of the entity itself. The point is easily illustrated at the outset.

To choose one type of example, one might expect a broad government investigation, implemented through a subpoena or investigative demand, to result in numerous e-mails, pieces of correspondence, notes, and writings ending up in the hands of the Government. Within the confines of a business organization, including a corporation, one might expect to find candid communications among and between the employees on an enormous range of topics bearing on the business and internal workings of the corporation.

The materials submitted to the Government in this context may contain critical comments about a customer or a supplier – or perhaps about some local or national regulator or politician. The subject of the comment might be the competence (or lack thereof) of some group or department within the company, or perhaps of the company as a whole. The commentary might address how the company treats its employees. It may constitute a serious attempt on the part of the company to engage in a self-critical examination intended to reduce the environmental impact of its operations, or to improve its retention of minority employees.

The comments might be brutally candid. They may even be in bad taste. The comments may include facts, opinion, hypothesis, speculation, derision or sarcasm. They may reflect intra-company rivalry or infighting. They may include commentary, the expression of which is beneficial to the functioning of the company, but they may also include communications that are in violation of the company's own internal policies.

In the hands of a competitor or a third party, including the press or trial lawyers, such materials could be deployed to harm the company and thereby its shareholders and employees. Their dissemination could destroy the reputation of a company or business, rendering the company a subject of public ridicule or worse, or could interfere with a valuable business relationship of the company. If selectively released, they could be used to generate a false impression about the nature of the company, its business, its competence, or its purpose. By affecting the company's public image, such releases could have a dramatic effect on its economic fortunes, and, in turn, on those of its shareholders and employees.

The important point that such a scenario illuminates for this case is that virtually everyone would regard such materials, in common parlance and usage, as private – beyond the scope of prying eyes, except for some very good reason. It is difficult to imagine that we would expect such information, through the power of the Government, to be gathered up and made available to competitors, the press, and other persons to do with that material as they will.

2. Equally important is the recognition that our constitutional system reflects a deep suspicion of the potential for abuse inherent in the Government's exercise of its broad investigative power. Indeed, one might view that suspicion as a cornerstone of our Constitution.

The Government's investigative power over documents is broad in pursuit of the public interest and legitimate areas of public inquiry and investigation. But it has always been regarded as improper and abusive for the Government's broad investigative

power to be used to serve private ends and cause private injury.

That balance is reflected in the Freedom of Information Act generally, and Exemption 7(C) in particular, which imposes special limits on the Government's disclosure of information associated with law enforcement. FOIA's "basic policy . . . focuses on the 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), citing *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) (quotation omitted). It "does not create an avenue to acquire information about other private parties held in the government's files." *Painting Indus. of Haw. Market Recovery Fund v. U.S. Dep't of Air Force*, 26 F.3d 1479, 1484 (9th Cir. 1994), citing *Reporters Comm.*, 489 U.S. at 772-73. That principle underlies Exemption 7(C), and it applies just as strongly to information about private companies as it does to information about other private parties who happen to be subject to a government investigation.

SUMMARY OF ARGUMENT

Even assuming that there is some ambiguity about the scope of Exemption 7(C) based on its plain language, any doubts about the meaning of that exemption should be resolved in favor of finding that private information of business entities in the hands of the Government as a result of government law enforcement activities is not automatically subject to disclosure. To require disclosure of such information would be inconsistent with the basic purpose, and the limits, of the FOIA generally, as well as the evident purpose, and limits, of Exemption 7(C) in particular.

Business entities have a privacy interest for internal communications that virtually any modern observer would readily recognize as worthy of respect. That interest should be recognized for a wide range of communications intended to be confidential, and which, if released, could damage an entity's reputation or its fortunes, with consequences for its managers, owners, and employees. The NAM has identified above a range of circumstances and situations in which internal e-mails, correspondence, reports and other documents would easily be regarded as fundamentally private by any modern observer. And this Court's cases, particularly the cases interpreting the Fourth Amendment, have long accepted the formal proposition that a business entity has an interest in privacy that warrants respect.

The FOIA as a whole reflects no interest or intention to invade the communications and documents of private parties, of any sort. To the contrary, the FOIA has long been understood as a window into the inner workings of the Government. Exemption 7(C) must be construed in a manner consistent with that understanding.

Exemption 4 to the FOIA does not exhaust the business entities' privacy interest. There are, as described above, many types of documents and communications that could easily fall into the hands of the Government in connection with a government investigation that almost anyone would regard as private, but would not fall within the parameters of Exemption 4. Exemption 4 is an exemption from FOIA disclosure for traditional financial or trade secret material, no matter how the information has come into the hands of the Government.

In contrast, Exemption 7(C) provides a broader protection primarily for documents and information that fall into the hands of the Government on account of the Government's exercise of its law enforcement authority. The Constitution, and this Court's cases – as well as popular sentiment – have long reflected a suspicion and concern about the potential for misuse of the Government's investigative powers. Those powers are extremely broad in pursuit of legitimate law enforcement objectives. But it is equally clear that allowing the happenstance that one's private documents have come into the hands of the Government as part of a government investigation to result in their being accessed and used by other private parties, in order to cause reputational damage, is not a legitimate law enforcement objective. There is no dispute about the mischief or great harm that might result from the release of such documents. And there is no reason to construe Exemption 7(C) to allow such mischief and such harm.

ARGUMENT

I. CORPORATIONS ENJOY EASILY RECOGNIZABLE PRIVACY INTERESTS BEYOND THOSE PROTECTED BY EXEMPTION 4.

That corporations and other business entities are entitled to privacy is not truly disputed by the parties in this case. Nor could there properly be such a dispute. This Court has long used the term "privacy" to describe the interest of a corporation or business entity in protection from unreasonable searches and seizures under the Fourth Amendment. *See, e.g.*, *Dow Chem. Co. v. United States*, 476 U.S. 227, 235 (1986) ("Plainly a business establishment or an industrial or commercial facility enjoys certain protections under the Fourth Amendment."); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 487 (1974) ("A most fundamental human right, that of privacy, is threatened when industrial espionage is condoned or is made profitable."); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) ("[A] corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body, it waives no constitutional immunities appropriate to such body."), *overruled in part on other grounds by Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964).

Indeed, Petitioners and various *amici* acknowledge that corporations have a legitimate interest in maintaining the secrecy and confidentiality of information. They argue, however, that Exemption 4 of the FOIA, addressing "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4), exhausts that interest under the FOIA. *See* Brief of Petitioners at 24-27; Brief of Respondent CompTel at 29-31; Brief for Reporters Comm., *et al*. as *Amici Curiae* Supporting Petitioners at 13-18; Brief for Const'l Accountability Center as *Amicus Curiae* Supporting Petitioners at 18.

But there is no reason to believe that this is true. Exemption 4 is a generalized exemption that maintains traditional trade secret and confidentiality privileges that often attach to commercial and financial information. It applies generally to information held by the Government. (In contrast, as explained below, Exemption 7(C) is a limitation specially applicable to information compiled for law enforcement purposes.) Exemption 4 simply does not encompass all documents that would be deemed confidential and private. In particular, relying on the "plain mean-

ing" of the terms "commercial" and "financial" in interpreting the language of Exemption 4, the lower courts have concluded that Exemption 4 does not protect against the risk of reputational harm—the very type of harm that Exemption 7(C) *was* intended to prevent. [2]

Exemption 7(C) rests on a different footing. It is a particularized exemption for documents and information compiled in the course of government investiga-

[2] *See United Tech. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 564 (D.C. Cir. 2010) ("Exemption 4 does not guard against mere embarrassment in the marketplace or reputational injury. . . ."); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (risk of unfavorable publicity or employee demoralization as result of releasing company reports to agency concerning hiring and promotion of women and minorities insufficient to warrant withholding under Exemption 4); *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) ("Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws.") (quotation omitted); *Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 280 (S.D.N.Y. 2009) ("[T]he risk of looking weak to competitors and shareholders is an inherent risk of market participation; information tending to increase that risk does not make the information privileged or confidential under Exemption 4."); *In Def. of Animals v. U.S. Dep't of Agriculture*, 587 F. Supp. 2d 178, 182 (D.D.C. 2008) (finding expert testimony on tactics of animal rights' groups designed to harm company's business irrelevant to issue of whether Exemption 4 applied to protect investigatory files of company on alleged violations of Animal Welfare Act, because any harm posed by such tactics "is akin to the reputational harm caused by negative publicity that . . . is irrelevant to the competitive harm inquiry under Exemption 4.").

tions. It is hardly irrational to believe that Congress would have wanted to protect a broader class of privacy interests, and guard against a wider range of harms, in connection with documents and information that end up in the hands of the Government as a result of the exercise of the Government's law enforcement powers. There is, as noted below, a traditional repugnance to allowing the Government's law enforcement powers to be used for private purposes.

Thus, Exemption 7(C) affords a broader protection of privacy to law enforcement files than, for example, the privacy protections provided under Exemption 4 or even Exemption 6. In connection with documents and information associated with law enforcement, Congress exempted any and all information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

In particular, Exemption 7(C) recognizes that persons caught up in government investigations, whether as suspects or witnesses, have a "strong interest" in not being associated unwarrantedly with alleged criminal activity. *Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996); *see also Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995) ("third parties who may be mentioned in investigatory files" and "witnesses and informants who provided information during the course of an investigation" have an "obvious" and "substantial" privacy interest). Such subjects, witnesses and informants may include business entities as well as individuals. *See DOJ v. Landano*, 508 U.S. 165, 175 (1993) ("The FBI collects information from a variety of individual and institutional sources during the course of a

criminal investigation."). No less than individuals, companies that are uncharged targets of investigations or are cooperating with investigators can suffer the same harms of reprisal, harassment, and the stigma of being associated with an investigation if their identities and confidential internal communications are subject to public disclosure.

Indeed, under any construction of Exemption 7(C), it is surely intended to cover, in the context of law enforcement records, some broader class of privacy interests than are specifically shielded and defined elsewhere in the FOIA.[3] As shown below, there is every reason to believe that in the context of Exemption 7, Congress would have wanted to ensure that the Government's exercise of its investigative powers, as respects the private documents and information of people or business entities, did not become the vehicle for private mischief.

In the introductory section of this brief, the NAM described some of the types of documents likely to be found in the filing cabinets, hard drives, servers, and backup tapes of a modern business entity. There is little doubt that the candid comments of company

[3] CompTel erroneously asserts that "[i]f Exemption 7(C) were interpreted to protect corporate interests, corporations would be given broader protections during the consideration of whether to release law enforcement records than individuals are given during the consideration of whether to release their medical files" under Exemption 6, and that this "can hardly be what Congress intended." Brief of Respondent CompTel at 25. This argument makes no sense. Individuals have a broad exemption from the release of medical information that is in the hands of the Government for whatever reason. But with respect to the information that is in the hands of the Government through the exercise of its investigative power, the individual has under Exemption 7(C) the same broad protection as corporations.

employees on company policy, company performance, and the performance of peers, bosses, regulators, customers, suppliers, and others would be regarded as private. Moreover, there is little doubt that such information is generated routinely with the understanding that the information ordinarily would not be revealed, and that virtually every citizen would understand such communications to be private.

It is also easy to identify other types of documents that are more formal and more serious – but every bit as private. Though we are all accustomed to a great deal of public disclosure about the governance of large public companies, most companies are not public. The internal governance and decision-making processes of close corporations, partnerships, and a wide range of other entities are typically secret, for good reason.

So too, it would be unsurprising that a corporation or other business entity might find it useful to do some self-critical evaluation or investigation as part of a corporate compliance program. Such programs and evaluations are done with the best of intentions, rooting out errors in order to correct them now and prevent them in the future. They are almost certainly to be encouraged. But the reports of such investigations, depending on what they uncover, could easily be regarded as embarrassing. (Indeed, when, through some leak, such reports do find their way into the public domain, and into the newspapers, they are generally regarded as embarrassing.)

Almost anyone would recognize a significant degree of privacy associated with all such categories of corporate documents. (Moreover, it does not appear that any of those categories of documents would be protected under Exemption 4.) To the extent that

there are close questions about whether such documents really should be accessible through an FOIA request because they reveal something important about the workings of the Government, that can and would be determined on a case-by-case basis. But unless those privacy interests are recognized under Exemption 7(C) in the first instance, there will be no occasion for such balancing.

II. THE GOVERNMENT'S INVESTIGATIVE POWERS SHOULD NOT BE USED TO SERVE PRIVATE ENDS, OR TO CAUSE HARM OR EMBARRASSMENT UNRELATED TO PROPER INVESTIGATIVE PURPOSES.

The desire to curb the potential for abuse that inheres in the basic power of the Government to investigate has a significant role within our constitutional tradition. It may fairly be said to underlie, among other things, the Fourth Amendment to the Constitution.

Notwithstanding the Fourth Amendment, the power of the Government to investigate both regulatory violations and crimes remains broad. And corporations and business entities are often involved in civil, regulatory and criminal investigations.

Exemption 7 extends broadly to documents and other information compiled in the course of such investigations by a wide array of government agencies. *Mittleman v. Office of Pers. Mgmt.*, 76 F.3d 1240, 1243 (D.C. Cir. 1996) ("We have held that the term 'law enforcement purpose' is not limited to criminal investigations but can also include civil investigations and proceedings in its scope."); *Rural Hous. Alliance v. U.S. Dep't of Agric.*, 498 F.2d 73, 81

n.46 (D.C. Cir. 1973), quoting H.R. Rep. No. 1497 (1966) ("This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings.").

Government agencies may compel the disclosure of corporate documents in many ways – through search warrants, grand jury subpoenas, agency subpoenas, criminal and civil investigative demands, and informal requests for documents or information. It is not uncommon for government agents, armed with a warrant, to seize entire computers, taking with them everything on the owner's hard drive or server. Such requests, in aid of legitimate government purposes, invariably will sweep within them scores of documents that are largely or entirely unrelated to any investigatory purpose.

Administrative agencies are frequently vested with broad investigatory power and the discretion to require the disclosure of any information concerning matters within their jurisdiction. *See, e.g.*, *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) (district court must enforce administrative subpoena unless the evidence sought was "plainly incompetent or irrelevant to any legal purpose" of the agency). Courts will enforce an administrative agency's subpoena unless it is "unreasonably burdensome." *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984).

Because a corporation must comply with a subpoena unless it is unreasonably burdensome, such that it "threatens to unduly disrupt or seriously hinder normal operations of a business," *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 649 (5th Cir. 1999), the corporation cannot withhold documents

merely because the documents could be viewed as inflammatory or advantageous to its competitors if they were to fall into the wrong hands. Government agencies are given the leeway to define the scope of their own investigations, much as a grand jury is. Thus, it is not an exaggeration to say that the Government can (and does) collect embarrassing e-mails and competitively damaging documents from corporations – although only tangentially, if at all, relevant to the Government's investigation.

Moreover, the mere fact that a company is the subject of a government subpoena or investigative demand or simple request carries with it no suggestion that the company has engaged in any wrongdoing whatsoever. The Government is entitled to pursue potential evidence of wrongdoing, even in the hands of wholly innocent parties, including parties who are not a target of any inquiry.

It is against the backdrop of this understanding of the Government's broad investigative authority that Exemption 7 should be interpreted. Petitioners and their supporters have invoked the history of that exemption, but have failed to draw the most obvious inferences from it.

As initially enacted, Exemption 7 provided broadly that the FOIA would not reach "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 81 Stat. 54 (1967). As such, the FOIA could not have been a tool for the type of request at issue in this appeal. The FOIA simply was not a vehicle for allowing private parties access to the private documents of private companies, or comments on such subjects, if created or acquired by the Government in connection with a government investigation. The fact

that documents or information had been gathered by the Government, and were in the Government's hands as the result of a government investigation, did not make those documents vulnerable to release to private parties who might seek to take advantage of those documents for competitive advantage, malicious purposes, or otherwise.

But the broad application of Exemption 7 led to concerns that by invoking the words "law enforcement" as a justification for withholding information, the Government could frustrate the public's ability to gain insight into the inner workings of the Government that the FOIA was intended to foster. In response, Congress narrowed the scope of Exemption 7. *See FBI v. Abramson*, 456 U.S. 615, 621 (1982) (attributing the 1974 amendments to the "sweeping interpretation given the Exemption by some courts [that] permitted the unlimited withholding of files merely by classifying them as investigatory files compiled for law enforcement purposes").

With respect to this history, the question here is thus whether there is any indication that Congress intended to allow documents, and other private information gathered from private companies, to be available to competitors and the public. At least judging from the legislative history and commentary cited by Petitioners and their supporters, there is no such indication.

To the contrary, as a general matter, Exemption 7(C), which exempts from disclosure information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(7)(C), suggests an opposite purpose and concern.

Exemption 7(C) is most naturally interpreted in light of the basic structure and purposes of the Freedom of Information Act as a whole. This Court has declared repeatedly that FOIA's "basic policy . . . focuses on the citizens' right to be informed about what their government is up to." *Reporters Comm.*, 489 U.S. at 773, citing *Mink*, 410 U.S. at 105 (Douglas, J., dissenting) (quotation omitted); *see also U.S. Dep't of State v. Ray*, 502 U.S. 164, 177 (1991); *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). Indeed, the Court since has reaffirmed that "the *only* relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 497 (1994) (emphasis added) (quoting *Reporters Comm.*, 489 U.S. at 773); *accord*, *Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355, 356 (1997). The Freedom of Information Act embraces the objective of providing a clear window into the workings of the Government through which the actions *of the Government* can be assessed.

In light of that overriding purpose, disclosure of internal corporate documents in the hands of the Government may be compelled only if such disclosure would further the "core purpose" of FOIA: that of "open[ing] agency action to the light of public scrutiny" and thereby advancing "public understanding of the operations or activities of the government." *Reporters Comm.*, 489 U.S. at 774-75 (internal quotation marks and emphasis omitted). In *Reporters Committee*, this Court drew a sharp distinction between official government information, the disclosure of which

furthers that central purpose, and information about private persons, which ordinarily does not:

> Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

Id. at 773. In short, "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.

It follows that when third parties seek law enforcement records concerning private citizens that would shed no light on the activities of government agencies or officials, "the FOIA-based public interest in disclosure is at its nadir." *Id.* at 780. "[I]n the typical case in which one private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency . . . . [A] response . . . would not shed any light on the conduct of any Government agency or official." *Id.* at 773. The public interest in compelled disclosure of internal corporate communications or other private documents that the Government may have collected in the course of an investigation is "negligible, at best," because it "would not appreciably further the citizens' right to be informed about what their government is up to." *Dep't of Defense*, 510 U.S. at 497 (citation omitted); *see id.* at 500 (finding a "virtually nonexistent FOIA-related public interest in

disclosure"). If a third party requests law enforcement records or information about a private party that contain no "official information" about a government agency, but "merely records that the Government happens to be storing," such a request may be categorically denied without the need to undertake a balancing of interests. *Reporters Comm.*, 489 U.S. at 780.

In short, the FOIA "does not create an avenue to acquire information about other private parties held in the government's files." *Painting Indus. of Haw. Market Recovery Fund*, 26 F.3d at 1484, citing *Reporters Comm.*, 489 U.S. at 772-73. Private parties' interest in learning about the activities of other private parties "is not the sort of public interest advanced by the FOIA." *Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 88 (2d Cir. 1991).

Consistent with these principles, this Court repeatedly has refused to compel disclosure of personal information of private persons that happens to be in the Government's possession. As the Court observed in *Reporters Committee*, "it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen." 489 U.S. at 774-75. *See, e.g.*, *Bibles*, 519 U.S. at 355-56 (protecting names and addresses of individuals receiving Bureau of Land Management newsletter); *Dep't of Defense*, 510 U.S. at 497-502 (protecting home addresses of federal civil service employees because, although disclosure of the addresses might allow unions to communicate more effectively with bargaining unit employees, it "would reveal little or nothing about the employing agencies or their

activities"); *Ray*, 502 U.S. at 173-79 (protecting reports of interviews with Haitian deportees which included identifying information; public interest in knowing whether State Department had adequately monitored Haiti's compliance with its promise not to prosecute returnees was adequately served by disclosure of redacted interview summaries).

In sum, there is no suggestion that the FOIA was intended to provide a window into the workings of private companies, unless perhaps as an incident to the larger purpose of providing some real insight into the workings of the Government itself (in which case such purpose would become a factor in the ensuing balancing process). And that principle extends easily to Exemption 7(C). There was no intention on the part of Congress to allow the Government's investigative power to become the vehicle for one private party to gain access to the private papers and information of another. That principle extends just as naturally to information about private companies as it does to information about any private citizen that happens to be caught up in a government investigation.

Indeed, there is a longstanding tradition that the Government's exercise of its broad investigative power should not be used to serve collateral ends. The coercive power of the Government in the law enforcement context ought not to be subverted to private ends, whether directly or indirectly. Moreover, it is desirable to encourage broad compliance with government investigations; it is conversely undesirable to make business entities reluctant to provide documents and information to the Government for fear that, once released to the Government, they will become available to the world at large through the FOIA. The happenstance of the Govern-

ment's exercise of its investigative power over a particular entity should not become the vehicle for one private party to gain an advantage over another.

For example, this Court has historically limited the use of the grand jury's subpoena power to the service of the investigatory ends for which the power was created, declining to allow it to be employed to serve collateral objectives. *See United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 432 (1983) ("[D]isclosure to government attorneys for civil use poses a significant threat to the integrity of the grand jury itself. If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit . . . . Any such use of grand jury proceedings to elicit evidence for use in a civil case is improper *per se*."); *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218-19 (1979) ("[W]e have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. . . . Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.").

The same basic considerations apply to all forms of government investigation: The power to investigate is broad in aid of the proper subjects of investigation. It is fundamentally improper to employ that vast power for other ends – or, whether intentionally or not, to

allow it to be used for those ends. It is thus difficult to conceive support for the notion that Congress, with the FOIA, intended to allow the Government's investigative power to be the vehicle for private parties to do mischief to one another, whether in some competitive context, or for some malicious purpose.

To be sure, Petitioners' supporters suggest that company documents that end up in the hands of the Government, if then made available to the public through the FOIA, can, on occasion, provide valuable insights to journalists and others on the internal workings of corporations and business entities. And there is no need to doubt that there is some public interest in how companies and business entities operate. Still, there is no reason to believe that *the FOIA* was intended to foster and facilitate such studies. As this Court has explained, "There is, unquestionably, some public interest in providing interested citizens with answers to their questions about [a private party]. But that interest falls outside the ambit of the public interest that the FOIA was enacted to serve." *Reporters Comm.*, 488 U.S. at 1483.

On the other hand, no one can doubt the advantage and opportunity for mischief and malice that would be created under the construction of Exemption 7(C) suggested by Petitioners. The FOIA would provide a company or private citizen a tool of infinite possibility for harm if, for example, a competitor were to find itself caught up in a government investigation, with the Government gaining possession of some mass of its confidential internal documents – thereby rendering the documents available for dissemination. They could be examined for insights into business plans or to identify disgruntled employees, and

searched for strategic weaknesses. The information could then be spread to potential customers, suppliers, or investors, perhaps doing permanent harm, or at least making life more difficult and complicated for the company whose documents and confidential communications ended up in the hands of the Government. The information – even if truthful – could be spread purely for malicious purposes, or, more specifically, to undermine the reputation of the entity. Likewise, it could be spread around for purportedly benign purposes, perhaps to advance a political objective or an academic study, but nonetheless cause reputational and other harm.

The real question in this case is why the FOIA should be interpreted to allow such harm. And the answer is that it should not be.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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