No. 09-1279

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

AT&T INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The court of appeals has held that the "personal privacy" protection of Exemption 7(C) of the Freedom of Information Act (FOIA) extends beyond the privacy of individuals and safeguards the so-called "privacy" of corporations. That novel holding is a singular outlier in the 36-year history of Exemption 7(C) (Gov't Br. 34-41) for multiple reasons: The term "personal privacy" itself applies only to the privacy interests of individuals, *id.* at 17-20, 41-44; other FOIA exemptions confirm that Exemption 7(C) protects only individuals' interests, *id.* at 20-27, 42, 44-46; and the Exemption's 1974 drafting history shows that Congress understood that it was safeguarding only individuals' privacy interests, *id.* at 27-34. If the court of appeals' reasoning were adopted, it would confer "personal privacy" rights not only upon

corporations but upon foreign, state, and local governmental entities. *Id.* at 50-54. Nothing suggests that Congress ever intended such anomalous results.

AT&T does not dispute that the ordinary meaning of "personal" applies only to individuals. It instead argues that "[t]he difference here is the statutory definition of 'person'"—which covers corporations—and the effect of what AT&T asserts is a "grammatical imperative" that requires the word "personal" to take its meaning from that definition of "person." Br. 14-16 (citation omitted). On that premise, AT&T then seeks to fit its strained reading into "common legal usage," *id.* at 18-30; FOIA's structure, *id.* at 30-41; and Exemption 7(C)'s purpose, *id.* at 41-46.

AT&T's contentions are without merit. No "grammatical imperative" demands that the meaning of an adjective correspond to that of a related noun—especially where, as here, the noun ("person") is given a special definition that departs from the common usage that rules of grammar reflect. The word "personal" has existed as a distinct word for centuries, and it does not mean "of or pertaining to" a corporation. AT&T's other contentions cannot salvage that core deficiency in its case and, in any event, do not withstand scrutiny. Moreover, the full term actually used in Exemption 7(C)—"personal privacy"—cannot plausibly be construed to refer to the interests of corporations and other non-human entities. And conferring such protection would require the courts to exercise extraordinary policymaking authority to define "personal privacy" rights of those entities without congressional benchmarks.

A. The Term "Personal Privacy" Encompasses Only The Privacy Interests Of Individuals

The government's opening brief demonstrates that the meaning of the term "personal" applies only to individual human beings and that, when the term is joined with "privacy," the resulting term "personal privacy" invokes background principles that further focus exclusively on individuals. Gov't Br. 17-20; see Project on Gov't Oversight (POGO) Amicus Br. 16-26 (explaining that corpora—large, historical databases of written English—demonstrate that "personal" has a specialized meaning that refers only to individuals, particularly when used with "privacy").

AT&T does not dispute that ordinary meaning of "personal" or of "personal privacy." AT&T instead contends (Br. 14-16) that although "dictionary definitions * * * define 'personal' with reference to an individual," Exemption 7(C) does not employ that "ordinary" meaning because Congress enacted a "statutory definition of 'person,'" which includes more than just individuals. AT&T argues (Br. 14, 16) that, by so defining the noun "person," "Congress necessarily defined the adjective form of that noun—'personal'—also to include corporations," because it is a "basic principle of grammar" that "the adjective form of a noun draws its meaning from the noun." In AT&T's view (Br. 14-15, 56) this purported "grammatical imperative" shows that, "in FOIA, 'personal' means 'of or pertaining to a particular' 'individual, partnership, corporation, association, or public or private organization,'" including a "foreign, state, and local government[]."

In announcing the existence of its "grammatical imperative," AT&T cites (Br. 14) only the decision below and a concurring opinion in an earlier Third Circuit case

that (without supporting authority) criticized the majority in that case for *rejecting* the asserted imperative. *Delaware River Stevedores* v. *DiFidelto*, 440 F.3d 615, 623 (2006) (Fisher, J., concurring). AT&T's inability to identify further support underscores the basic flaw in its position: No such "grammatical imperative" exists. The term "personal" long ago evolved as its own word that pertains only to individuals, as illustrated by this Court's interpretation of the term. Background principles associated with the term "personal privacy" reinforce that conclusion. Indeed, AT&T is unable to identify a single instance in which "personal privacy" is used to refer to the interests of a corporation.

1. a. Certain forms of words, known as inflections or "inflected forms," are "predetermined by the system of grammar." 1 *Oxford English Dictionary* xxxii (2d ed. 1989) (*OED*). For instance, the plural forms of nouns; the third-person-present tense, past tense, and participles of verbs; and the comparative and superlative forms of adjectives carry the same core meaning as the basic noun, verb, or adjective and normally are formed (with some irregular exceptions) by adding standard suffixes. See *Webster's Third International Dictionary* 15a, 1160 (2002) (*Webster's*). But beyond such inflections, no "grammatical imperative" specifies the meaning of other words.

Some words, known as "derivatives," can also be formed by adding a suffix to an English root word. 1 *OED* xxxii. And while some derivatives take their meaning somewhat directly from their roots, others do not. "[M]ost words that have been used for any length of time in a language" acquire "a long and sometimes intricate series of significations, as the primitive sense has been gradually extended to include allied or associated

ideas, or transferred boldly to figurative and analogical uses." *Id.* at xxviii. A derivative may therefore take its meaning from only one of the multiple meanings of its root, or it may reflect only one trait associated with one of those meanings. The phrase a "crabbed statutory interpretation," for instance, employs an adjective derived from the noun "crab," but "crabbed" does not pertain to a crustacean (crab), a machine for raising heavy weights (crab), a wild apple tree (crab), or a sour, ill-tempered person (crab). See *Webster's* 527 (noun's meanings); 3 *OED* 1092-1094. "Crabbed" invokes a figurative reference to certain traits associated with one of the root's multiple meanings—the tendency of crustaceans to tightly squeeze and "not easily let go what they have seized" and their "crooked or wayward gait," or an "association with the [crab] fruit, giving the notion of 'sour-tempered, morose, peevish, harsh.'" See *id.* at 1094. That illustration reflects a general principle: The relationship of the meanings of even "obviously formed derivatives" and their root words "is very often unpredictable and complex." 1 *OED* xxxii; cf. POGO Amicus Br. 6-9 & nn.8, 16 (explaining that etymology is often not a reliable guide to meaning).[1]

Thus, while AT&T's suggested linkage of adjective to noun might be used as one guide when interpreting the meaning of *newly* formed derivatives that do not already have an established meaning, it cannot determine the meaning of established words that have developed an accepted meaning over time.

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[1] A "critical legal distinction" similarly uses "critical" to mean important and does not refer to either an individual who pronounces a (often harsh) judgment (critic) or one skilled in evaluating literary or artistic works (critic).

That holds particularly true here, because "personal" is not derived from the English word "person." "Personal" appeared as its own English word by the late 1300s: It was adopted into English directly from the Old French *personal*, which was an adaptation of the Latin *personalis*, which was itself formed from the Latin *persona*. 11 *OED* 599; see 1 *OED* xxvii (explaining etymological entries). And in the centuries since its appearance in English, "personal" developed distinct meaning by following its own evolutionary path, diverging—sometimes materially—from the evolved meaning of its cousin, "person."[2]

As AT&T recognizes, the meaning of "person" has evolved in certain legal contexts to include both an individual and a "corporation (*artificial person*)." 11 *OED* 597 (definition 6.a). But the meaning of "personal" has not expanded from its reference to "the individual person or self" to refer to corporate entities. See *id.* at 599-600 (listing definitions for "personal"). If AT&T's "grammatical imperative" were correct, dictionaries would reflect a parallel expanded meaning for "personal" to include artificial persons. They do not.

This Court has accordingly interpreted the adjective "personal" to pertain only to an individual human being —not a corporation—notwithstanding that Congress's definition of the noun "person" includes a corporation. The Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.,* defines "person" to mean an individual, "a corporation," or another public or private organization. 15 U.S.C. 1602(c) and (d). TILA also imposes certain requirements on "consumer" credit transactions, see, *e.g.*,

[2] The word "person" was adopted into English (with multiple spelling variations over time) from the Old French *persone*, a phonetic descendent of the Latin *persona*. 11 *OED* 596.

15 U.S.C. 1666(a), which Congress defined to mean (as relevant here) credit transactions in which "the money, property, or services which are the subject of the transaction are primarily for *personal*, family, or household purposes." 15 U.S.C. 1602(h) (defining "consumer"; emphasis added); see *American Express Co.* v. *Koerner*, 452 U.S. 233, 240-241 (1981).

In *American Express*, this Court unanimously held that TILA did not apply where an individual (Koerner) serving as an "officer[] of [a] corporation" (the Koerner Co.) used his corporate credit card for the corporation's purposes. 452 U.S. at 237, 241-242 & n.9. The Court explained that TILA did not govern the resulting transaction because the transaction was primarily for the corporation's business purposes, not for "*personal*, family, household, or agricultural purposes." *Id.* at 241 n.9, 243-244 (emphasis added). Indeed, the Court concluded that "there can be no dispute" that TILA's relevant definition using the term "personal" was inapplicable, *id.* at 245, and found no other "possible interpretation" that might reach the corporate officer's use of his credit card for corporate purposes. *Id.* at 243-244; cf. *id.* at 238 (contrasting "personal expenses" with the corporation's "business-related expenses").

American Express illustrates that AT&T's broad "grammatical imperative," if adopted, would risk untold mischief within the United States Code. As of 2009, there were nearly two thousand provisions in the United States Code that use the term "personal," many of which appear in statutory contexts that either specifically define "person" or would be governed by the Dictionary Act's definition of "person" (1 U.S.C. 1). See, *e.g.*, 15 U.S.C. 1681a(b) and (d)(1)(A), 7006(1) and (8) ("personal * * * purposes"); 42 U.S.C. 7602(e) and (h) ("personal

comfort and well-being"); 47 U.S.C. 153(2) and (32) ("personal aim") (renumbered in 2010 as Section 153(3) and (39)); cf. POGO Amicus Br. 30 & App. G (finding nearly 1700 references in 1992; listing illustrative phrases). Congress would have had no reason to expect that "personal" in such provisions would be construed beyond its standard, individual-focused meaning.

b. To support its position, AT&T cites (Br. 14 n.5) a handful of cases that supposedly define an adjective based on a "corresponding noun." But the only decision of this Court cited by AT&T simply construed the past-participle inflection (compiled) of a *verb* (compile) to interpret a participial phrase (which serves an adjective-like function). See *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 153-155 (1989) (interpreting "compiled for law enforcement purposes"). AT&T's other cases construe an adjective in context[3] or by adopting its ordinary meaning in dictionaries.[4] None transfers a noun's statutory definition to an adjective having its own established meaning or otherwise supports AT&T's noun-adjective "imperative."

AT&T identifies (Br. 19-20) only two uses of "personal" in conjunction with corporations in legal contexts, neither of which is relevant here. First, the term "per-

[3] *Environmental Def. Fund, Inc.* v. *EPA*, 82 F.3d 451, 462 n.16 (D.C. Cir. 1996) (concluding that "'vehicular' is best understood in this sentence as the adjectival form" of a "term used throughout the rule-making," *i.e.*, "motor vehicle").

[4] *Knight* v. *Spencer*, 447 F.3d 6, 13 n.2 (1st Cir. 2006) ("The *Random House Dictionary of the English Language* (2nd ed.1987) defines prototypical as the adjectival form of 'prototype.'"); *Froehly* v. *T. M. Harton Co.*, 139 A. 727, 729-730 (Pa. 1927) (explaining that state statute uses "seasonal" in its "conventional sense" and that its meaning is "apparent" and reflected in a dictionary entry).

sonal jurisdiction" is simply a shorter, modern term of art for "jurisdiction *in personam*," that is, a *court*'s power to adjudicate and enter judgment in an "action *in personam*" as opposed to an "action *in rem*." See *Black's Law Dictionary* 33-34, 930 (9th ed. 2009) (defining "personal jurisdiction" and "action" *in personam* and *in rem*); *id.* at 862 (*in personam* means "against a person" in Latin); *Shaffer* v. *Heitner*, 433 U.S. 186, 199 (1977); see also *Burnham* v. *Superior Court*, 495 U.S. 604, 609, 616-618 (1990); Gov't Br. 46. The term "personal jurisdiction" thus evolved to reflect the nature of the associated court action, much like the evolution of "personal property." See 11 *OED* 600 (definition 6.b under "personal") ("personal property" refers to things historically "recoverable * * * by a personal action" (*i.e.*, an "*actio in personam*") as opposed to "things recoverable * * * by a real action" (an "*actio in rem*")); cf. AT&T Br. 41 (arguing that "personal property" is a term of art). Both "personal jurisdiction" and "personal property" are used in connection with corporations not because "personal" refers to corporations, but because corporations can own non-real property and be sued other than in actions *in rem*.

Second, AT&T cites to a late 19th-century decision that used the term "personal privilege" to describe a corporation's non-transferable tax exemption under state law. See *Mercantile Bank* v. *Tennessee*, 161 U.S. 161, 171 (1896). But *Mercantile Bank* did not use "personal" to reflect a special (state-law) definition of "person." It appears to have used "personal" simply to invoke by linguistic analogy an *individual*-specific meaning of that term in order to convey the non-transferable nature of the exemption. Cf. *Webster's* 1686 (defining "personal" to mean "exclusively for a given individual" (def. 6)); 11

OED 599 (def. 4). That use of "personal privilege" cannot support the weight of AT&T's case here.

2. When the term "personal" is added to "privacy" to form the term ("personal privacy") actually used in Exemption 7(C), that term invokes even more clearly background principles that apply exclusively to individuals. Gov't Br. 18-20. Indeed, it is well established that a "corporation * * * has no personal right of privacy." Restatement (Second) of Torts § 652I cmt. c, at 403 (1977) (Restatement).

AT&T contends (Br. 18-30) that "common legal usage" supports its view that corporations have "personal privacy." But its argument (Br. 18-19) that corporations are deemed "persons" in many legal contexts does not show that corporations are deemed to have "personal" traits, much less "personal privacy." And although FOIA's privacy exemptions can exceed the scope of common-law and constitutional protections (AT&T Br. 25-26), that is so only in respect to individuals, who are the only subjects of the privacy exemptions to begin with. The settled understanding that "personal privacy" refers only to individuals undoubtedly formed the backdrop for Congress's adoption of that phrase in Exemption 7(C). Gov't Br. 24.

AT&T asserts (Br. 26) that corporations possess common-law "privacy interests," but it fails to proffer any persuasive authority. AT&T cites the Restatement's recognition (in § 561) that a corporation may be defamed with respect to its "business reputation," Restatement § 561 cmt. b, at 159, but the Restatement makes clear that a "corporation is regarded as having no reputation in a *personal* sense." *Id.* App. § 561 reporter's note, at 335 (emphasis added). Moreover, defamation is premised on the tendency to harm reputation in

the eyes of *others* (sometimes with consequent monetary harm), and it therefore is doctrinally distinct from an invasion of privacy, which focuses on the offense that would reasonably be felt by the injured *individual*. See *id.* § 559 & cmts. d-e, at 156-158; *id.* § 652E cmts. b-c, at 395-396.

AT&T fares no better by relying (Br. 26) on unsupported dicta in a non-precedential Ohio trial court decision (concerning the privacy of public officials) and on a decision of a California Court of Appeal suggesting that corporations enjoy "zones of privacy." The California decision, for instance, concerns only economic damages to a partnership, and the dicta that AT&T quotes is inconsistent with the established view that corporations lack the type of "personal" traits underlying the "right to privacy." See *Felsher* v. *University of Evansville*, 755 N.E.2d 589, 594-595 & n.10 (Ind. 2001) (discussing the California decision). The California Court of Appeal thus later concluded that a common-law "right to privacy * * * pertain[s] only to individuals," holding that corporations have no "viable cause of action for invasion of privacy" because they have "no 'feelings' which may be injured in the sense of the tort." *Ion Equip. Corp.* v. *Nelson*, 110 Cal. App. 3d 868, 878-879 (Cal. Ct. App. 1980).[5]

Although AT&T admits that corporations have no emotions, Br. 25, it argues that corporations can suffer harm to legitimate interests (like reputation) and that it

[5] The academic commentary on which AT&T relies (Br. 26-27) acknowledges that "courts and others confronted with opportunities to consider corporate privacy rights have repeated the rule against them." Anita L. Allen, *Rethinking the Rule Against Corporate Privacy Rights*, 20 J. Marshall L. Rev. 607, 607 (1987); *id.* at 610-611. It lends AT&T no meaningful support.

is "common to speak of corporations * * * as being 'embarrassed,' 'harassed,' and 'stigmatized.'" Br. 42-43, 55; see *id.* at 42 (citing decisions indicating that Exemption 7(C) protects *individuals* from embarrassment, harassment, and reputational harm). Saying that "a corporation has been 'embarrassed,'" in AT&T's view, "is just another way of saying that its reputation has been damaged." *Id.* at 55. AT&T misses the point. The fact that corporations may be described metaphorically as experiencing emotions does not mean that they actually possess the emotional traits that animate "personal privacy" rights. See Gov't Br. 18-19. And legitimate property interests—even those that may involve rights to confidentiality—have not been labeled as interests in "personal privacy."

3. In AT&T's view (Br. 20-25), a corporation's rights under the Fourth Amendment and Double Jeopardy Clause are "closely analogous" to the privacy interests protected by Exemption 7(C). That is incorrect.

a. Fourth Amendment rights are not materially similar to "personal privacy" rights under FOIA. This Court has recognized the Fourth Amendment rights of corporations in order to safeguard individuals who conduct business in the corporate form and restrain unreasonable government searches and seizures. Such rights serve a *derivative* function and do not protect "personal privacy" interests of corporations. Gov't Br. 47-49. But even if the Fourth Amendment is regarded as independently recognizing corporate interests, those interests would be inapposite here. Cf. *Associated Press* v. *United States Dep't of Def.*, 554 F.3d 274, 287 (2d Cir. 2009) (A "Fourth Amendment reasonable expectation of privacy is not the measure by which we assess [individuals'] personal privacy interest protected by FOIA."); *Judicial Watch, Inc.* v. *Department of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (similar). The Fourth Amendment "protects individual privacy against certain kinds of *governmental* intrusion." *Katz* v. *United States*, 389 U.S. 347, 350 (1967) (emphasis added). It does not address the question in Exemption 7(C): Whether corporations have a personal privacy right to keep information (lawfully in government possession) from *non-federal* persons.

Moreover, the "reasonable expectation of privacy" relevant to Fourth Amendment analysis merely reflects what "society is prepared to recognize as 'reasonable'" for government searches and seizures. *Oliver* v. *United States*, 466 U.S. 170, 177-178 (1984) (quoting *Katz*, 389 U.S. at 360-361 (Harlan, J., concurring)). The Court accordingly has emphasized that Fourth Amendment protections cannot "be translated into a general constitutional 'right to privacy'" and "often have nothing to do with privacy at all." *Katz*, 389 U.S. at 350. The Fourth Amendment likewise does not furnish the measure of "personal privacy" under FOIA: A "person's *general* right to privacy" is "left largely to the law of the individual States," *id.* at 350-351 & n.6 (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)), and, as explained, corporations do not have "personal privacy" at common law. See pp. 10-11, *supra*. Cf. *California* v. *Greenwood*, 486 U.S. 35, 43-44 (1988) (Fourth Amendment protections are not defined by state law reflecting common-law privacy concepts).

b. AT&T's reliance (Br. 23-25) on the Double Jeopardy Clause is equally unavailing. This Court has indicated that the Double Jeopardy Clause protects against "embarrassment" and a continuing "anxiety" and "inse-

curity," but it has done so in referring to individuals, as AT&T's authorities confirm. See, *e.g.*, *Yeager* v. *United States*, 129 S. Ct. 2360, 2365-2366 (2009) (stating that the government should be prohibited from another attempt to "convict an individual" in part because of such emotional costs) (citation omitted); see also Gov't Br. 49 (discussing cases). To the extent the Double Jeopardy Clause prevents the government from improving its case against a corporate defendant by engaging in successive prosecutions, see *ibid.*, that hardly supports AT&T's view that it also protects corporate interests similar to "personal privacy" rights.

c. In fact, another component of the Fifth Amendment is to the contrary. Although the privilege against self-incrimination is not "a general protector of privacy," this Court has stated that one of its animating purposes is "protecting personal privacy." *Fisher* v. *United States*, 425 U.S. 391, 399, 401 (1976). As AT&T appears to admit, the Fifth Amendment gives only individuals—not corporations—the right to refuse to "produce private papers in their possession" when doing so would constitute an implicit, self-incriminatory act. *Id.* at 398, 414; see *United States* v. *Hubbell*, 530 U.S. 27, 36 & n.19 (2000); *Braswell* v. *United States*, 487 U.S. 99, 109-110 (1988); *id.* at 119-120 (Kennedy, J., dissenting) (Fifth Amendment privilege is an "explicit right of a natural person, protecting the realm of human thought and expression"). This Court has held that corporations are not entitled to such a right because it is a "purely personal" one and corporate records "embody no element of personal privacy." Gov't Br. 50 (citations omitted). Nothing suggests that the Court's conclusion in this regard is mistaken.

In the end, AT&T cannot identify any context—legal or otherwise—in which the term "personal" is used to mean "of or pertaining to" a corporation (Br. 14-15), much less a context in which a corporation is deemed to possess "personal privacy." Those failures are fatal to AT&T's contention that Exemption 7(C)'s text protects corporate interests in "personal privacy."

B. FOIA's Broader Structure Confirms That Exemption 7(C) Protects Only Individuals

FOIA's broader structure, including Exemption 6's parallel protection for "personal privacy" and Exemption 4's protection for information from corporations, confirms that Exemption 7(C) safeguards only individual interests. Gov't Br. 20-27.

1. AT&T argues (Br. 32-38) that Exemption 6 does not exclude corporations from its own "personal privacy" protections and therefore does not support the view that Exemption 7(C) does. AT&T emphasizes (Br. 32-34) Attorney General Clark's 1967 guidance regarding Exemption 6, which described the legislative history as explaining the Exemption's purpose as protecting "private and personal information" the release of which would constitute an unwarranted invasion of the "privacy of any person." U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36 (1967). The guidance then concluded that the statutory definition of "person" extends that protection to corporations. *Ibid.*; see *id.* at 19. The Attorney General misread the relevant legislative history, which referred to "individuals," see Gov't Br. 35 n.10, and did not have the benefit of subsequent commentary and judicial decisions explaining why Exemption 6 protections are limited to individu-

als, let alone the drafting history of the 1974 amendments enacting Exemption 7(C). See *id.* at 22-24, 27-34.

The 1967 analysis was regrettably flawed, but it was promptly discredited, never followed by any court, and appropriately corrected by Attorney General Levi in 1975 upon the enactment of Exemption 7(C). Gov't Br. 35 n.10; cf. 3 U.S. Dep't of Justice, Office of Information and Privacy, *FOIA Update* No. 4, at 5 (1982) <http://www.justice.gov/oip/foia_updates/Vol_III_4/page7.htm> ("FOIA's privacy exemptions provide personal privacy protection and cannot be invoked to protect the interests of a corporation."). Even today, AT&T and its amici are unable to identify even one FOIA case or commentator that has ever followed the 1967 guidance on this point or otherwise concluded that corporations have "personal privacy" under FOIA.[6] AT&T thus provides no persuasive reason for preferring the Attorney General's 1967 guidance over the Attorney General's subsequent views informed by the wisdom of history and precedent that specifically address FOIA's privacy exemptions.

AT&T dismisses (Br. 35-36) as "snippets" the legislative history and related decisions of this Court and other courts that repeatedly confirm that Exemption 6 protects only individuals. See Gov't Br. 20-24. Those sources are incompatible with AT&T's position: They explain why AT&T's textual analysis is flawed and demonstrate that the Exemption's balancing test must be grounded in the "individual's right of privacy," *United States Dep't of State* v. *Ray*, 502 U.S. 164, 175 (1991) (quoting holding in *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976)). See Gov't Br. 20-24. AT&T also contends (Br. 38) that statements by Exemption 7(C)'s sponsor, Senator Hart, establishing that Exemption 7(C)'s "personal privacy" protections were drawn directly from Exemption 6, are unreliable. The contrary is true. A "sponsor's statement[s] to the full Senate carries considerable weight," *Corley* v. *United States*, 129 S. Ct. 1558, 1569 (2009), and this Court on two separate occasions has specifically relied on Senator Hart's statements in construing FOIA's 1974 amendments. See *FBI* v. *Abramson*, 456 U.S. 615, 626-627 nn.9, 11 (1982); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 226-233 (1978).

[6] The one FOIA decision AT&T cites (Br. 34) clearly concludes that the "private interest involved" was "the individual's right of privacy" under Exemption 6, *i.e.*, a "privacy interest" in the names and addresses of the companies that "extend[ed] to all such employees" who could face "harassment or violence" at those companies. *Judicial Watch, Inc.* v. *FDA*, 449 F.3d 141, 153 (D.C. Cir. 2006) (citation omitted); see Gov't Br. 39-40.

AT&T further contends (Br. 36-37) that even if Exemption 6 protects only individuals, it is consistent with Exemption 7(C)'s application to corporations because Exemption 6 applies to information in "personnel and medical files and similar files" that would not implicate corporate privacy interests. But Exemption 6's reference to such files reinforces the conclusion that "personal privacy" refers only to the interests of individuals—both in Exemption 6 itself and also in Exemption 7, which covers such information in a specific type of records (those compiled for law enforcement purposes).

2. AT&T takes issue (Br. 39-40) with the government's submission that Exemption 4's protection for trade secrets and confidential commercial and financial information of corporations further reinforces the conclusion that Exemption 7(C) does also not apply to corporations (see Gov't Br. 24-27), because Exemption 4, as

construed by the lower courts, does not protect corporate reputational interests. AT&T's argument confirms the error of its position. Exemption 4 shows that where Congress wanted FOIA to protect the types of interests a corporation has in keeping its affairs secret, it did so in express and carefully circumscribed terms. See Gov't Br. 24-27. Indeed, AT&T similarly claims (Br. 56) that Congress protected "the federal government's own privacy interests" in five other exemptions, but the carefully crafted text of those provisions similarly demonstrates that they protect specific interests, not a general "privacy" right. To the extent the information AT&T seeks to protect in this case falls outside of Exemption 4 or other Exemptions, that reflects Congress's judgment about the specific interests that warrant exemptions from FOIA, not that Congress intended to recognize an unprecedented notion that corporations have "personal privacy."

3. AT&T contends (Br. 30-31) that Exemption 7(C)'s "personal privacy" protection extends beyond individuals because Congress has used the term "individual" in other places. AT&T points to Congress's 1986 expansion of Exemption 7(F)'s protections for "life and physical safety" to "any individual" and to the appearance of "individual" with "privacy" in certain non-FOIA provisions that Congress enacted long after Exemption 7(C). Those distinct provisions provide no reliable basis for inferring Congress's intent years earlier regarding the very different text of Exemption 7(C). See *Doe* v. *Chao*, 540 U.S. 614, 626-627 (2004). In any event, AT&T fails to respond to our contention that if Congress had wanted to safeguard corporations and other specially defined "persons," it would have followed the more natural path it took in Exemptions 4 and 7(B), by enacting

text to protect the privacy "of any person." Gov't Br. 25, 41-42.

AT&T similarly disputes (Br. 30, 32) that Congress's use of "personal privacy" to protect only individuals in Exemption 7(C) is supported by its identical use of the term in the Privacy Act. See Gov't Br. 32-33. Although the Privacy Act expressly limits its protections to "individuals," Congress defined and used that term in the Privacy Act not because "personal privacy" otherwise would have extended protections to non-natural entities, but because Congress wanted to shield only a *subset* of the individuals whose personal privacy might be affected by government recordkeeping. See 5 U.S.C. 552a(a)(2) (defining "individual" to mean only United States citizens and lawful-permanent-resident aliens); H.R. Rep. No. 1416, 93d Cong., 2d Sess. 11 (1974); cf. Gov't Br. 32 n.7.

C. FOIA's Drafting History Reinforces The Conclusion That "Personal Privacy" Protects Only Individuals

Exemption 7(C)'s 1974 drafting history similarly reveals Congress's intent to protect only individuals from invasions of "privacy." Gov't Br. 27-34. AT&T argues (Br. 46-53) that this history does not address the question presented and that statutes can apply beyond their contemplated scope. Here, however, the statute's drafting history, which reveals a consistent emphasis on the privacy rights of individuals, strongly indicates that Exemption 7(C) protects only those interests.

Congress had little reason to explain specifically that corporate interests would not be protected, because the congressional debate addressed "personal privacy"—a term that has never been applied beyond individuals. Had Congress intended to protect corporations and for-

eign, state, and local governmental entities in Exemption 7(C), its choice of the term "personal privacy" would have been an entirely surprising way to do so. Congress "does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Assns.*, 531 U.S. 457, 468 (2001). Exemption 7(C) is no exception.

D. AT&T's Position Is Unprecedented

AT&T does not appear to dispute that it has failed to offer "even a scintilla of evidence that Congress, the Executive, the Judiciary, or any private entity ever previously thought that corporations would have 'personal privacy' *under Exemption 7(C)*." Gov't Br. 41 (emphasis added). Although AT&T notes (Br. 53) that some elements of the Attorney General's 1967 guidance regarding Exemption 6 can be read to support its position, that guidance was promptly criticized (and never followed by the courts) long before Congress considered Exemption 7(C) in 1974. AT&T thus argues (Br. 49-53) that the entire 36-year corpus of court decisions, analysis, and commentary since Exemption 7(C)'s enactment should be disregarded as irrelevant.

For instance, AT&T criticizes (Br. 50) the Attorney General's 1975 FOIA Memorandum as making "no arguments at all, much less persuasive ones." That is incorrect. See Gov't Br. 34-35 & n.10. And although the memorandum states that "personal privacy" does not "seem" to apply to corporations, that caution was warranted because of the more complicated "personal privacy" issues involving certain closely held corporations. See Gov't Br. 36 n.11.

AT&T ignores the treatises by scholars confirming that Exemption 7(C)'s "personal privacy" applies only to individuals. Gov't Br. 38-39. And while AT&T correctly

observes (Br. 53) that then-Professor Scalia's 1981 testimony did not expressly mention "Exemption 7(C)" in such terms, that testimony unmistakably states that corporations have no "privacy" protections recognized by the 1974 Amendments to Exemption 7, of which Exemption 7(C)'s "personal privacy" provisions are a part. See Gov't Br. 39.

Finally, AT&T asserts (Br. 50-52) that the decisions of this Court and the courts of appeals are unhelpful because their conclusions that Exemptions 6 and 7(C) protect the same privacy interests were not made in cases involving "corporate privacy" and that other decisions involve dicta. In fact, those decisions reflect what the courts have long recognized, based on FOIA's text and drafting history: that FOIA's privacy balance is and has always been based on an *individual*'s interest in personal privacy. Gov't Br. 35-37.

E. AT&T's Interpretation Would Produce Anomalous Results

AT&T's contention that the term "personal privacy" in Exemption 7(C) protects corporate interests would produce highly anomalous results. In practice, it would be exceedingly difficult for federal agencies and courts to identify the parameters of a corporation's or a foreign or domestic government's so-called "personal privacy" interests because no relevant legal principles provide objective benchmarks for defining any such interests. Had Congress intended to authorize courts to engage in such an unbounded exercise of policy-making authority in deciding whether institutions have a valid "personal privacy" interest in withholding information from public scrutiny, it surely would have given some indication of

its intent and supplied some framework for doing so. Gov't Br. 50-54.

AT&T errs in arguing (Br. 54-56) that Fourth Amendment and common-law defamation principles would offer the necessary guidance. Fourth Amendment principles largely turn on the nature of the physical locations in question and the justification for a government search or seizure, and would be of little help in assessing the disclosure of records already in the government's possession, based on the content of those records. Fourth Amendment principles do not reflect a general interest in keeping government information from public disclosure, cannot be translated into a general right to privacy, and may have little to do with privacy at all. See pp. 12-13, *supra*. Similarly, defamation for corporations concerns potential harms to a corporation's business reputation resulting from the negative reaction of others to *untruthful* factual statements (where the statement's maker knew of its falsity or acted negligently or recklessly in failing to ascertain its falsity). See pp. 10-11, *supra*; Restatement §§ 566, 580B, 581A. Requiring agencies and courts to determine whether the factual statements in each responsive agency record are true or false would ultimately impose an unmanageable burden on the FOIA process to identify the scope of a property (not privacy) interest.

Significantly, AT&T fails altogether to identify any relevant "personal privacy" predicates for governmental entities. It asserts (Br. 56) that Congress protected the federal government's "privacy interests" in five carefully delineated exemptions (concerning such matters as classified information and internal personnel rules and practices), but those provisions do not refer to "privacy"

and cannot plausibly be deemed to concern "personal privacy." The fact that Congress enacted those specific exemptions for the federal government does not suggest that it would have intended analogous outcomes for, say, foreign governments. And lacking such guidance, agencies and the courts would be left to define "personal privacy" based on policy considerations without any direction from Congress.

Congress certainly did not intend that extraordinary result. Exemption 7(C) has never been applied to protect corporate and foreign, state, and local government interests.[7] Nothing suggests that Congress intended to confer such unprecedented and expansive protections to institutions under the rubric of "personal privacy."

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

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[7] AT&T's concern (Br. 43) that protecting only individual interests will "chill" corporate cooperation with federal law-enforcement agencies is misplaced. There is no reason to believe that such chill will result from reaffirming the scope of Exemption 7(C) that has governed the administration of FOIA requests since its enactment in 1974.