IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4024

AT&T INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

REPLY BRIEF FOR PETITIONER

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INTRODUCTION AND SUMMARY

The FCC's *per se* rule foreclosing corporations from invoking the "personal privacy" protections of Exemption 7(C) cannot be squared with the statutory text. The statute expressly defines "person" to include corporations; it follows as a matter of basic grammar and usage that "personal" should likewise be understood to encompass corporations. Moreover, where Congress intends to refer only to natural persons – as the FCC claims it did here – it uses the more narrow term "individual." Indeed, in multiple contexts Congress has protected "individual privacy." That Congress chose the broader term "personal privacy," in a statute that defines "person" to include corporations, is dispositive.

I. The FCC's initial response to these arguments is to contend that this Court has no jurisdiction to entertain them, supposedly because the *Order* rests on an unappealed "alternative" ground – *i.e.*, AT&T's alleged failure to request confidentiality. In truth, paragraph 11 of the *Order* makes clear that the FCC denied AT&T's confidentiality request solely on the basis of its extra-statutory *per se* rule, not on the basis of the alternative ground identified in the FCC's brief. AT&T highlighted this paragraph in its opening brief, but the FCC fails even to acknowledge it, much less does the agency explain how it can possibly be read to support the claim that the *Order* rests on an alternative ground.

CompTel is likewise wrong in disputing this Court's jurisdiction. CompTel claims that AT&T's challenge to the *Order* must be brought in district court, rather than a court of appeals. But CompTel can find no case in which a district court accepted jurisdiction over a reverse-FOIA claim involving the FCC, or where a court of appeals refused to exercise jurisdiction over such a claim. The Hobbs Act is clear that challenges to FCC orders issued under the Communications Act must be brought in a court of appeals. That principle plainly applies to AT&T's claim that, by denying AT&T's request for confidentiality, the FCC violated its own rules and the Administrative Procedure Act.

II. On the merits, neither the FCC nor CompTel provides any persuasive defense of the agency's *per se* rule foreclosing corporations from invoking Exemption 7(C).

The FCC's attempt to harmonize its rule with the text of the statute, which it relegates to the back of its brief, is based primarily on counsel's assertion that most people would not understand the term "personal privacy" in Exemption 7(C) to encompass corporate privacy interests. But most people would not understand the word "person" to refer to corporations either, yet there is no dispute that the relevant statutory definition mandates that result. The FCC seeks to avoid that uncomfortable fact by claiming that the relevant definition of "person" is "special" and therefore should not be understood to apply to the adjectival form of

that term. But that position runs headlong into a century and a half of legal usage, acknowledged by Congress and the Supreme Court, recognizing that "person" in a statutory text ordinarily includes corporations. That the adjectival form of that term likewise encompasses corporations flows as a matter of basic usage and is corroborated by the fact that, when Congress seeks to restrict a provision to natural persons, it uses the term "individual."

The FCC's reliance on judicial precedent is misplaced. The bulk of the decisions the FCC cites establish only that Exemption 7(C) applies to individuals, a point which is not in dispute. Those cases did not involve, and thus did not address, whether corporations can invoke Exemption 7(C). The FCC also misreads *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), which, as AT&T has explained, held that the term "personal privacy" can encompass corporations. As for the Exemption 7(C) cases that predate *Judicial Watch*, the FCC, while highlighting AT&T's statement that certain language in them may be "wrong," offers no reason to believe they are right. In fact, as AT&T has explained, to the extent these decisions suggest that Exemption 7(C) is limited to "intimate details," they are based on legislative history addressing limiting language in Exemption 6 that is not present in Exemption 7(C). The FCC does not acknowledge or dispute this argument.

Finally, the FCC has no good answer to the fact that, in numerous areas of law, corporations have been extended rights as "persons," including privacy. The FCC responds by emphasizing the Supreme Court's statement that the "statutory meaning of privacy under the FOIA is . . . not the same as" privacy interests "protected by the Constitution." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 n.13 (1989). But, as the Supreme Court itself has made clear, that statement means that the privacy interests protected by the FOIA are *broader* than those in the Constitution.

III. The FCC provides no substantial reason to remand this case to the agency. A remand is not necessary because CompTel has never alleged, much less submitted evidence of, FCC impropriety as a basis for disclosure. Under these circumstances – where CompTel seeks access to AT&T documents that shed no light on the workings of government and that are in the hands of the government only through the happenstance of a law-enforcement investigation – the case law is uniform that CompTel may not use Exemption 7(C) to compel disclosure.

ARGUMENT

I. THERE ARE NO VALID THRESHOLD OBJECTIONS TO AT&T'S PETITION FOR REVIEW

A. There is No "Alternative Basis" for the *Order*

The FCC seeks to insulate its *per se* rule that corporations may not invoke Exemption 7(C) from judicial review by contending that the *Order* rests on an

independent ground – *i.e.*, AT&T's purported failure properly to request confidential treatment at the time it submitted the documents at issue. Because AT&T's opening brief in this Court did not challenge this supposed "independent and alternative basis" for the *Order*, the FCC argues, the *Order* should be upheld on that basis alone. *See* FCC Br. 13-14.

This argument rests on a flagrant misreading of the *Order*. Although the FCC's brief asserts (at 11) that the agency "held" that AT&T's purported failure properly to request confidentiality was an "independent" basis for decision, in fact the Commission said only that this supposed failure "would" justify rejection of AT&T's application for review – not that it did. *Order* ¶ 6 (A10) (AT&T's supposed "failure to comply with our rules would alone justify the denial of SBC's request for confidential treatment"). Indeed, as AT&T noted in its opening brief (at 11 n.6) – and as the FCC simply ignores – after addressing in detail AT&T's confidentiality claim *on the merits*, the agency summed up the *Order* as follows:

> For all the reasons discussed above, we find that Exemption 7(C) has no applicability to corporations such as [AT&T]. Accordingly, we deny [AT&T's] application for review.

Order ¶ 11 (A13). The absence of any reference to AT&T's alleged failure properly to request confidentiality – in the very paragraph that describes the basis for the agency's decision – is dispositive evidence that the agency did not in fact rely on that failure as grounds to reject AT&T's claim.

That reading, moreover, is confirmed by the FCC's brief. In contrast to the inaccurate characterization of the *Order* in the argument section of the FCC's brief, the background section concedes the *Order* found only that AT&T's failure to request confidentiality "*could . . . have* justified denial of AT&T's confidentiality request" – not that it did so. FCC Br. 8 (emphasis added).[1]

Because it is thus clear that the FCC did not deny AT&T's application for review on the "independent and alternative" basis the agency now proffers, the *Order* cannot be upheld on that basis. It is a bedrock principle of administrative law that agency action can be upheld only on the basis of the rationale set out in the order under review. *See, e.g.*, *W.R. Grace & Co. v. EPA*, 261 F.3d 330, 338 (3d Cir. 2001) ("an agency's order must be upheld on the same basis articulated in the order by the agency itself"). *See generally SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Applied here, that principle compels rejection of the FCC's threshold argument.

[1] The FCC had good reason not to rely on this rationale, because it is wrong. Under the FCC's rules, "records listed in [§ 0.457] are not routinely available for public inspection." 47 C.F.R. § 0.457. Section 0.457 deems "[i]nvestigatory records compiled for law enforcement purposes" not routinely available for public inspection. *Id.* § 0.457(g). Because AT&T submitted its documents within the context of a law-enforcement investigation, a separate request for confidential treatment was unnecessary. *See id.* § 0.459(a) ("[i]f the materials are specifically listed in § 0.457," request for confidential treatment "is unnecessary").

B. Subject-Matter Jurisdiction Lies in this Court

CompTel – but, tellingly, not the FCC, which expressly acknowledges jurisdiction, *see* FCC Br. 1 – challenges the Court's subject-matter jurisdiction over AT&T's petition for review. As CompTel sees it, the *Order* was issued under the FOIA, not the Communications Act. CompTel contends that, as a result, 47 U.S.C. § 402(a) – which establishes exclusive Hobbs Act jurisdiction in the courts of appeals over "[a]ny proceeding to . . . set aside . . . any order of the Commission under [the Communications] Act" – is inapplicable. *See* CompTel Br. 5-8.

CompTel is wrong to contend that the *Order* was issued under the FOIA, rather than "under [the Communications] Act." The *Order* addressed AT&T's application for review of the Enforcement Bureau's disclosure order, in which AT&T asked the Commission *not* to disclose documents that AT&T claimed fell within a FOIA exemption. *See* A47-54. Although CompTel claims that in rejecting AT&T's argument the FCC was acting "under the FOIA," that is not possible: the FOIA itself does not prevent the disclosure of documents that fall within the scope of an exemption. *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1184-85 (8th Cir. 2000) (reverse FOIA actions "actually are brought under the APA" because "FOIA, as solely a disclosure statute," does not "prohibit disclosure"). Rather, such disclosure is prohibited, if at all, by "something independent of the FOIA [that] prohibits disclosure." *Id.* at 1185.

Here, the "something independent" are agency regulations incorporating the FOIA exemptions. AT&T's claim thus was (and remains) that the agency's regulations, insofar as they establish that documents that fall within a FOIA exemption will not be disclosed, compelled the FCC to withhold AT&T's documents. *See* AT&T Br. 45-46 (citing 47 C.F.R. § 0.457(g)). Importantly, the FCC issued those rules pursuant to its authority under the Communications Act. *See* Order, *Amendment of Part O, Rules and Regulations to Implement P.L. 89-487*, 8 F.C.C. 2d 908, ¶ 3 (1967) (authority for confidentiality rules is "contained in sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, and Public Law 89-487"); 47 C.F.R. § 0.461 (identifying provisions of Communications Act as authority for confidential treatment review procedures). And there can be little doubt that an FCC decision applying its own regulations – regulations that in turn were issued under the Communications Act – is an order "under [the Communications] Act" for purposes of 47 U.S.C. § 402(a). *See Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1519 (2007) ("to violate a regulation that lawfully implements [the Communications Act's] requirements *is* to violate the statute").[2]

[2] Even if the *Order* was issued "under" the FOIA in addition to the Communications Act, the specific mechanism for review of FCC orders in the Hobbs Act establishes jurisdiction in this Court. *See Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989) (collecting "several cases [that] address[ed] . . . where review of agency action allegedly contrary to a statutory

Moreover, the case law is uniform that jurisdiction to review final FCC orders is exclusively in the courts of appeals. *See FCC v. ITT World Communications, Inc.* 466 U.S. 463, 468 (1984) ("Exclusive jurisdiction for review of final FCC orders . . . lies in the Court of Appeals."); *In re FCC*, 217 F.3d 125, 139-40 (2d Cir. 2000) ("[e]ach statutory provision that governs appeals and petitions for review from FCC decisions is broadly phrased," establishing that "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals"). That principle applies equally to reverse-FOIA actions challenging final FCC orders. *See Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 277 (D.C. Cir. 1997) (addressing merits of petition for review "of a[n] [FCC] order rejecting [petitioner's] claim that material it submitted to the Commission was protected from public disclosure by," *inter alia,* "Exemptions 4 and 6 of the [FOIA]"). CompTel can point to no contrary authority holding that district courts have jurisdiction over reverse-FOIA actions involving the FCC.[3]

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mandate other than the agency's organic statute should lie" and explaining that "[t]he courts uniformly hold that statutory review in the agency's specially designated forum prevails over general federal question jurisdiction in the district courts"); *Connors v. Amax Coal Co.*, 858 F.2d 1226, 1231 (7th Cir. 1988).

[3] CompTel's distinction of *Bartholdi* (at 7) is wrong. There, a party "petition[ed] for review of a[n] [FCC] order rejecting [a] claim that material it submitted to the Commission was protected from public disclosure by," *inter alia*, "Exemptions 4 and 6 of the [FOIA.]" 114 F.3d at 277. The D.C. Circuit rejected the merits of the submitting party's arguments, *see id.* at 281-83, without questioning its subject-matter jurisdiction.

II. FOIA EXEMPTION 7(C) APPLIES TO CORPORATIONS

A. The Text and Structure of the FOIA Compel the Conclusion that Corporations May Invoke the Protections of Exemption 7(C)

1. The text and structure of the FOIA make clear that there is no *per se* rule foreclosing corporations in all cases from invoking the "personal privacy" protections of Exemption 7(C). Congress defined "person" for purposes of the FOIA to include "corporation[s]," 5 U.S.C. § 551(2), and it is a "grammatical imperative[ ]" that "a statute which defines a noun has thereby defined the adjectival form of that noun." *Delaware River Stevedores v. DiFidelto*, 440 F.3d 615, 623 (3d Cir. 2006) (Fisher, J., concurring). When Congress intends to limit a provision to natural persons, moreover, Congress uses the term "individual," as it did in the Privacy Act and in FOIA Exemption 7(F), *see* AT&T Br. 20-22, as well as elsewhere in the United States Code, *see*, *e.g.*, 20 U.S.C. § 9871(e)(2)(C)(ii)(II) (requiring regulations to "safeguard[] individual privacy" in connection with educational database); 49 U.S.C. § 5331(d)(1) (requiring alcohol and drug testing programs to "promote . . . individual privacy"). And, as the FCC concedes, there is nothing unusual about protecting a corporation's "privacy" interests. *See* FCC Br. 29-30. On its face, Exemption 7(C) is thus naturally read to apply to corporations.

2. Although it has long been established that "[s]tatutory interpretation *begins* with the language of the statute," *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3d Cir. 1986) (emphasis added), the FCC

leaves its analysis of the statutory text for the back of its brief, and for good reason: None of its statutory arguments calls into question the statute's plain meaning.

First, the FCC contends (at 24-25) that Exemption 7(C) should be interpreted in its ordinary, "'everyday sense[ ],'" and it observes without support that "few, if any people, would understand a corporation to have 'personal privacy.'" But the ordinary-meaning canon the Commission invokes applies only when a statutory term is undefined: "[w]hen a statute includes an explicit definition, [courts] must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). Here, Congress has defined "person" to include "corporation[s]," 5 U.S.C. § 551(2), and, again, it is a "grammatical imperative[]" that "a statute which defines a noun has thereby defined the adjectival form of that noun." *DiFidelto*, 440 F.3d at 623 (Fisher, J., concurring).

Moreover, the FCC's *ipse dixit* assertion that "few" people would understand the term "personal privacy" to encompass corporations ignores the fact that, in legal parlance, the "ordinary" understanding of "person" and "personal" includes corporations. As AT&T has explained, corporations have long been understood to be rights-bearing "persons" in many areas of the law. *See* AT&T Br. 29-33 (collecting authority). Indeed, "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of

constitutional and statutory analysis." *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 687 (1978). In recognition of that, the federal Dictionary Act has long provided that, "unless the context indicates otherwise," "[i]n determining the meaning of any Act of Congress . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

Nor is it plausible to contend that, whereas the noun "person" presumptively includes corporations, the adjective "personal" somehow excludes them. Any such suggestion is belied by Congress's express recognition that "personal" jurisdiction applies to corporations, *see* 28 U.S.C. § 1391(c) (venue is proper for a "corporation . . . in any judicial district in which it is subject to personal jurisdiction"), as well as by longstanding legal usage, *see, e.g.*, *Mercantile Bank v. Tennessee*, 161 U.S. 161, 171 (1896) (an "exemption from taxation contained in [a revenue act] was a *personal* privilege in favor of the corporation therein specifically referred to, and it did not pass with the sale of that charter") (emphasis added).

Despite all of this, the FCC contends that Congress's definition of "person" to include corporations in this context is "special and unusually broad" and, coupled with the FOIA's use of "personal" in Exemption 7(C) without such a "special" definition, provides evidence that Congress intended to *exclude* corporations from the scope of Exemption 7(C). *See* FCC Br. 26. That is absurd.

Far from being "special" or "unusually broad," the definition of "person" to include corporations comports with 140 years of legal usage in this country, and its use of "personal" must accordingly be understood to incorporate that tradition. Indeed, the FCC's argument reduces to the claim that, whenever Congress uses variations of a defined term in a statutory text, without expressly defining each specific variation, it necessarily means the *opposite* of the definition. The FCC provides no authority for such a far-reaching and counterintuitive principle of statutory interpretation, and we are aware of none.

The FCC's upside-down reading of the statutory definitions is even more far-fetched in light of the evidence that Congress knows how to exclude non-natural persons when it so intends by using "individual," as it did in the Privacy Act, in Exemption 7, and elsewhere in the United States Code. *See* AT&T Br. 20-21; *supra* p. 10. The FCC has no answer to this point, other than to refer to various congressional findings establishing that the term "personal privacy" encompasses an individual's privacy rights. *See* FCC Br. 28-29. But no one is disputing that the term "personal" (whether used in the FOIA, the Privacy Act, or elsewhere) encompasses individuals. The question is whether it *also* encompasses corporations, particularly when the statute expressly defines "person" to do so. Whereas the generic congressional findings on which the FCC relies are irrelevant to that question, the juxtaposition between Congress's use of the narrow term

"individual" in the Privacy Act and elsewhere and the FOIA's use of the broader term "personal" is compelling evidence that Congress knew how to confine the statute's coverage to natural persons when it intended. That it did not do so in Exemption 7(C) is compelling evidence that the FCC's *per se* rule is wrong.

Second, the FCC maintains (at 25) that AT&T's reading would render the word "personal" in Exemption 7(C) surplusage, purportedly because there is no reason for Congress to have used "personal" to modify "privacy" in Exemption 7(C) other than to exclude corporations. But, contrary to the FCC's apparent understanding, the FOIA's definition of "person" is a term not merely of inclusion (including, for example, corporations) but also of exclusion: "'person' includes an individual, partnership, corporation, association, or public or private organization *other than an agency*." 5 U.S.C. § 551(2) (emphasis added); *see Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780 (2000) (noting "longstanding interpretive presumption that 'person' does not include the sovereign"). Congress's use of the adjectival form of the word "person" in Exemption 7(C) therefore evinces Congress's intent not only to include the privacy rights of entities encompassed within the statutory definition, but also to *exclude* any claims raised by entities excluded from the definition – *i.e.*, by agencies. That reading of Exemption 7(C), in which government agencies are not permitted to resist disclosure on the grounds of an unwarranted invasion of agency privacy, is

sensible in light of the special protections for agencies set forth in Exemptions 5, 7(A), 7(E), and 7(F). AT&T's interpretation of Exemption 7(C) thus gives effect to all of the statute's terms, and, unlike the FCC's interpretation, it does so in a manner consistent with the statute's defined terms.

Third, the FCC points (at 25-26) to other FOIA provisions that apply to non-natural persons, which, the FCC says, supports reading Exemption 7(C) as limited to natural persons. The FCC emphasizes, for example, that in § 552(b)(7)(D), Congress provided that the term "confidential source" includes "a State, local, or foreign agency or authority or any private institution." *Id*. But that provision does not use the word "person" or "personal" and it thus sheds no light on Congress's intent with respect to the meaning of Exemption 7(C). The FCC also points to a recent amendment to § 552(a)(4)(A)(ii) – which limits fees for FOIA requests by, among others, "representative[s] of the news media" – that clarifies that "representative" includes "any person or entity." *Id*. But that cannot possibly help the FCC: it is beyond peradventure that "person" includes corporations and other non-natural entities, *see* 5 U.S.C. § 551(2); Congress's reference to "person" and "entity" in § 552(a)(4)(A)(ii) must therefore be read as reflecting nothing more than an intent to be doubly sure the provision is so construed.

Fourth, the FCC relies (at 27-28) on Exemption 6, which protects "personnel and medical files and similar files the disclosure of which" could amount to an

"invasion of personal privacy." 5 U.S.C. § 552(b)(6). "Personnel and medical files," the FCC says, pertain only to individuals, and thus Exemption 6 cannot logically apply to corporations. If the "personal privacy" protections of Exemption 6 apply only to individuals, the FCC reasons, the "personal privacy" protections of Exemption 7(C) should likewise be so construed.

But, for one thing, the FCC is wrong to contend that Exemption 6 cannot apply to corporations: the D.C. Circuit has interpreted it to do precisely that. *See* AT&T Br. 27-28; *see infra* pp. 21-22. In any event, even if Exemption 6 were inapplicable to corporations, it would only be because the exemption is limited to "personnel" and "medical" files and the like. Exemption 7(C) protects "records or information compiled for law enforcement purposes," a term the FCC concedes (at 15) encompasses corporate records. Any limitation reflected in the "personnel" or "medical" files language in Exemption 6 cannot plausibly be applied to Exemption 7(C), which includes no comparable limiting language. *See* AT&T Br. 37-38.

Finally, the FCC asserts (at 15) that AT&T's construction of Exemption 7(C) would "result in a dramatically expansive reading of that exemption." But Exemption 7(C) protects only "unwarranted" invasions of personal privacy, thus inviting a balancing of the public interest in disclosure against the privacy interests at stake. *See* AT&T Br. 34. Agencies and courts faced with FOIA questions routinely engage in such balancing, without the parade of horribles the FCC

predicts. *See, e.g.*, *Computer Prof'ls for Soc. Responsibility v. Secret Serv.*, 72 F.3d 897, 904-05 (D.C. Cir. 1996). Moreover, reading Exemption 7(C) consistent with its text does not mean that corporate privacy interests would be afforded the same treatment as individual privacy interests in all cases. *See* AT&T Br. 34.

B. The Purposes of Exemption 7(C) Foreclose an Interpretation that Categorically Excludes Corporations

1. Exemption 7(C) reflects Congress's judgment that "[s]uspects, interviewees and witnesses have a privacy interest because disclosure . . . may result in embarrassment or harassment." *Davin v. United States Dep't of Justice*, 60 F.3d 1043, 1058 (3d Cir. 1995); *see McDonnell v. United States*, 4 F.3d 1227, 1255 (3d Cir. 1993). Exemption 7(C) also guards against the "potential disruption in the flow of information to law enforcement agencies" caused by a fear "of the prospect of disclosure." *FBI v. Abramson*, 456 U.S. 615, 630 (1982).

These purposes weigh in favor of reading Exemption 7(C) to encompass corporations. Corporations are routinely involved as suspects or cooperating parties (or both) in investigations and routinely face embarrassment, harassment, and stigma as a result. *See* AT&T Br. 24-26 & n.7 (collecting sources). And corporations can be important sources of information for law-enforcement agencies – this case, which began with AT&T's voluntary disclosure, is an example. The FCC's *per se* rule could deter such voluntary disclosures and thereby imperil the "flow of information to law enforcement agencies." *Abramson*, 456 U.S. at 630.

2. The FCC does not dispute that disclosure of law-enforcement records can harm a corporation through harassment, reprisal, or reputational harm, nor does it dispute that its *per se* rule could compromise the flow of information to government agencies.

Instead, the FCC says only that *other* FOIA exemptions protect against these harms, and it observes that in this case the FCC redacted the names of individuals (under Exemption 7(C)) and certain competitively sensitive information (under Exemption 4). *See* FCC Br. 29; *see also* AT&T Br. 8 n.4, 26 n.8 (discussing these redactions). But the narrow redactions made by the FCC are not sufficient to fulfill Exemption 7(C)'s purposes. *All* of the AT&T records at issue here "were compiled for law-enforcement purposes." FCC Br. 15. *All* of those records thus relate to alleged violations of federal law, and, even as redacted, continue to reveal details of AT&T's alleged wrongdoing. That the FCC employed *other* FOIA exemptions to protect against *other* harms does nothing to guard against the specific harms against which Exemption 7(C) was designed to protect.

C. The FCC's Reliance on Legislative History is Misplaced

The FCC also posits that scattered references in the legislative histories of Exemptions 6 and 7 to "individuals" support the conclusion that, when Congress included the phrase "personal privacy" in the statutory text, it intended to protect only "individual privacy." *See* FCC Br. 29-32; *see also* CompTel Br. 15-16.

The legislative history the FCC cites establishes at most that Congress had *a* concern with protecting individual privacy rights in enacting Exemption 7(C). That says nothing about whether Exemption 7(C) also applies to corporations. There is no "require[ment] that every permissible application of a statute be expressly referred to in its legislative history." *Moskal v. United States*, 498 U.S. 103, 111 (1990); *see Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("[i]n ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark"); *Riegel v. Medtronic, Inc.* 128 S. Ct. 999, 1009 (2008) ("[t]he operation of a law enacted by Congress need not be seconded by a committee report on pain of judicial nullification").

That principle controls here. As AT&T has explained, the text of Exemption 7(C) – especially read in light of the statutory structure and Exemption 7(C)'s purposes – encompasses corporations. *See* AT&T Br. 18-26; *supra* pp. 10-18. That Congress's primary focus in enacting that language may have been the protection of individual privacy rights provides no basis for refusing to apply the terms of Exemption 7(C) as written. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."); *Brogan v. United States*, 522 U.S. 398, 403 (1998) ("reach of a statute often exceeds the precise evil to be eliminated").

The statement in the 1974 Attorney General's memorandum that Exemption 7(C) does not "seem" to apply to corporations is likewise of no help to the FCC. *See* FCC Br. 32-33. In *Benavides v. DEA*, 968 F.2d 1243 (D.C. Cir. 1992), the court rejected a similar attempt to "limit[]" the scope of a FOIA provision to the "situation the [Attorney General's] memorandum describes." *Id.* at 1247. The court explained that such memoranda are "not part of the legislative history of the enacting Congress" and are "entitled to be taken seriously only to the extent that [they] make[ ] persuasive arguments." *Id.* at 1248. The memorandum the FCC cites here makes no arguments at all, much less persuasive ones, in support of its tentatively asserted view regarding the scope of Exemption 7(C). It therefore provides no basis to depart from the statutory text.[4]

D. Judicial Precedent Supports the Conclusion that Exemption 7(C) Applies to Corporations

Ultimately, the FCC's defense of its *per se* rule rests, not on the text or structure of the statute, but rather on the agency's claim that its rule is grounded in precedent. "Federal courts have uniformly interpreted Exemption 7(C) to protect *individual* privacy interests," the FCC claims, "and all courts to have addressed the

[4] Contrary to the FCC's claim (at 33-34), Congress's failure to amend the FOIA to reiterate that Exemption 7(C) should be read to encompass corporations should be given no weight. *See United States v. Craft*, 535 U.S. 274, 287 (2002) ("congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction") (internal quotation marks and alterations omitted); *Rapanos v. United States*, 547 U.S. 715, 749 (2006).

question have held that the exemption does not apply to corporations." FCC Br. 15-16. The first proposition on which the FCC places so much reliance is in fact irrelevant, and, as to the second, the FCC is wrong.

1. The FCC relies, first, on decisions that observe (in varying degrees of detail) that the personal privacy protections of Exemption 7(C) apply to "individuals." *See* FCC Br. 15-17 & n.7; *see also* CompTel Br. 18-20. These cases are uniformly beside the point. As noted above, *see supra* p. 13, no one disputes that Exemption 7(C)'s protection of "personal privacy" encompasses the privacy rights of individuals. It is therefore unremarkable – and irrelevant to the question presented here – that courts have discussed individuals when, on the facts before them, an individual's privacy interest was at stake. *See, e.g.*, *Reporters Committee*, 489 U.S. at 757 (involving "criminal records of four members of the Medico family"); *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 359 (3d Cir. 1985) (involving individuals "who cooperated in the investigation of plaintiff's [OSHA] complaints").

2. The FCC is likewise incorrect in asserting that courts have uniformly concluded that the "personal privacy" protections of the FOIA do not apply to corporations. In *Judicial Watch*, the D.C. Circuit held that the "personal privacy" protections of Exemption 6 apply to "private individuals *and companies* who

worked on the approval" of an abortion-related drug. 449 F.3d at 152 (emphasis added).

The FCC claims *Judicial Watch* applied Exemption 6 to protect the privacy rights of "individual[s]," not "a corporation." FCC Br. 21-22. In fact, the *Judicial Watch* court held that Exemption 6 protected, among other things, information regarding "companies" that worked on approval of an abortion-related drug and "all business partners associated with the manufacturing of the drug." 449 F.3d at 152. The FCC speculates that the only reason the court did so was to protect the safety of employees that worked at those companies, but the decision itself does not support that reading. The court rejected the argument that the corporate information at issue was unprotected – and, in doing so, rejected the theory that the information could not be protected because it was not "about an individual" as based on a "crabbed reading of the statute" – because the privacy protections of Exemption 6 were broad enough to encompass the information at issue. *Id.*

The FCC argues in the alternative that AT&T, which filed its application for review in 2005 before the *Judicial Watch* opinion was issued, did not present it to the Commission in the proceedings below. *See* FCC Br. 19-20 (citing 47 U.S.C. § 405(2), which forecloses petitions for review that rely on "questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass"). But the operative "question of law" here is whether corporations can invoke the

protections of Exemption 7(C), which the Commission obviously had ample opportunity to, and did, address. *See Order* ¶¶ 7-11 (A10-13); A28-34; A47-54. *Judicial Watch* is a new case citation in support of AT&T's position on that question, not a distinct "question of law" barred by § 405. *See Southwestern Bell Tel. Co. v. FCC*, 100 F.3d 1004, 1007-08 (D.C. Cir. 1996); *Time Warner Entm't Co. v. FCC*, 144 F.3d 75, 81 (D.C. Cir. 1998).

Nor is it correct to say that AT&T took a position below that is "diametrically opposed" to its position here. *See* FCC Br. 20. In the portion of AT&T's pleading on which the FCC relies, AT&T explained that, even if Exemption 6 is confined to individual privacy rights, it does not follow that Exemption 7(C) should be likewise confined. Exemption 6, AT&T explained, is limited to such records as "personnel file[s]" and "medical file[s]," both of which "might reveal personal private information pertaining to [an] individual," whereas Exemption 7(C) is broader. *See* A52. AT&T has made the same argument in this Court. *See* AT&T Br. 37-38; *supra* p. 16. Contrary to the FCC's suggestion, there is no inconsistency between that argument and the claim that, if the term "personal privacy" in Exemption 6 *is* understood to encompass corporations – as the D.C. Circuit held in *Judicial Watch* – then the term "personal privacy" in Exemption 7(C) should likewise be construed to encompass corporations.

3. Finally, the FCC attempts to defend the *Order* on the basis of cases – principally *Washington Post* – that the FCC characterizes as establishing that Exemption 7(C) applies only to "intimate details." *See* FCC Br. 18-19; *see also Order* ¶ 7 (A10-11). But AT&T has already explained at length why the reasoning and result of these decisions do not support the FCC's *per se* rule. *See* AT&T Br. 35-38. Tellingly, the FCC all but ignores these arguments. With respect to *Washington Post*, for example, the Commission overlooks that, unlike the *Order*, *Washington Post* does not impose a *per se* rule foreclosing corporations from invoking Exemption 7(C). *See id*. at 36. Nor does the FCC respond to AT&T's explanation that the language in *Washington Post* and elsewhere emphasizing Congress's desire to protect "intimate details" traces to legislative history regarding Exemption *6's* protection of "personnel and medical files and similar files," which are terms that do not appear in Exemption 7(C). *See id*. at 36-37. Any suggestion in the case law that Exemption 7(C)'s very different language should be limited to "intimate details" accordingly finds no basis in the statute or its legislative history.

E. Corporations' Privacy Interests and Other Constitutional Rights Support AT&T's Interpretation of Exemption 7(C)

Finally, AT&T's opening brief established that the FCC's *per se* rule is out-of-keeping with established law recognizing that corporations are "persons" entitled to invoke a wide range of constitutional provisions, including those related

to "privacy." *See* AT&T Br. 29-33 (citing, *inter alia*, *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353-54 (1977) (Fourth Amendment privacy); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784 (1978) (First Amendment); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28-29 (1889) (Due Process Clause); *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (Equal Protection Clause); *Consolidated Edison Co. v. Pataki*, 292 F.3d 338, 349 (2d Cir. 2002) (Bill of Attainder Clause)). Indeed, even as the Supreme Court announced that the Double Jeopardy Clause guards against "embarrassment" and "anxiety" – precisely the concerns the FCC has said are protected by Exemption 7(C), *see Order* ¶ 8 (A11-12) – the Court further held that corporations are entitled to invoke its protections. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (internal quotation marks omitted).

The FCC dismisses all of this precedent – indeed, it declines to mention most of it – based on the Supreme Court's statement in *Reporters Committee* that the "statutory meaning of privacy under the FOIA is . . . not the same as" whether such an interest in privacy is "protected by the Constitution." 489 U.S. at 762 n.13; *see* FCC Br. 29-30; CompTel Br. 23. The FCC misunderstands the import of that statement, which in fact strengthens AT&T's position here.

The issue in *Reporters Committee* was whether an individual had a privacy interest in a "rap sheet." 489 U.S. at 762. The Court rejected the "cramped notion

of personal privacy" that would result in disclosure of the rap sheet, even when its various details "ha[d] been previously disclosed to the public." *Id.* at 762-63. At the same time, in the passage the FCC highlights, the Court cautioned that its decision to recognize a "personal privacy" interest in the rap sheet for purposes of the FOIA did not mean a party has a privacy interest in a rap sheet "protected by the Constitution" or the common law. *Id.* at 762 n.13.

As is evident from context, the Supreme Court held that the FOIA's privacy protections are *broader* than the Constitution's. Indeed, the Supreme Court, citing the very language from *Reporters Committee* quoted by the FCC here, has explained that "the statutory privacy right protected by Exemption 7(C) *goes beyond* the common law and the Constitution." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004) (emphasis added). For that reason, the Court said, "[i]t would be anomalous to hold . . . that the [FOIA] provides even less protection than does the common law." *Id.* Just so here: because the Constitution protects the privacy interests of corporations and extends individual rights to corporations in a range of contexts, it would be "anomalous" to hold that Congress meant for the broader privacy protections of the FOIA to be unavailable.

III. DISCLOSURE OF AT&T'S DOCUMENTS WOULD BE "UNWARRANTED"

Because the FCC held that corporations are foreclosed as a rule from invoking Exemption 7(C), it did not decide whether disclosure of AT&T's

documents would be "unwarranted" in this case, *see* 5 U.S.C. § 552(b)(7)(C). As AT&T has explained, although in the ordinary case a remand would be appropriate to permit the agency to balance the privacy interest at stake against the public interest in disclosure, here no balancing is necessary because there is no conceivable interest in disclosure. As a result, this Court can and should determine that disclosure is unwarranted as a matter of law. *See* AT&T Br. 41-43.

The FCC claims there are "fact-intensive" issues the FCC should be permitted to resolve on remand. *See* FCC Br. 34-35. The law is clear, however, that, where Exemption 7(C) applies, the only lawful basis for disclosure of a third-party's documents is if the documents shed light on alleged *government* impropriety. *See Reporters Committee*, 489 U.S. at 780; *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991). Under these standards, moreover, allegations of impropriety must be supported by "evidence." *Favish*, 541 U.S. at 174. Here, there is no allegation, much less evidence of, agency impropriety. Indeed, in related litigation, CompTel expressly acknowledged that it "has not 'alleged' any impropriety by the FCC or any other government agency" as a basis for its FOIA request. Reply Add. 4. In light of the rule of *Reporters Committee*, that should be the end of the matter. *See* AT&T Br. 43-44 (collecting cases).[5]

[5] To the extent the FCC argues that some of the documents at issue are agency documents (at 35), that is beside the point. AT&T does not seek to prevent

The FCC is also wrong (at 36) that Exemption 7(C) can never "justify wholesale concealment of entire records." All of the AT&T documents at issue here are private, internal documents submitted to the FCC in the course of a law-enforcement investigation. There is no need to assess the exact degree of privacy AT&T has in any single document because CompTel's failure to allege *any* legitimate public interest in disclosure uniformly tips the scales in favor of protection. *See Manna v. United States Dep't of Justice*, 51 F.3d 1158, 1166 (3d Cir. 1995) ("Absent proof of [official] misconduct, . . . we need not linger over the balance because something outweighs nothing every time.") (internal quotation marks and alterations omitted); *Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994) (where "a very slight privacy interest would suffice to outweigh the relevant public interest" an "exact" "quantification" of privacy is unnecessary).

CONCLUSION

The Court should grant the petition for review, vacate the *Order*, and direct the FCC not to disclose AT&T's documents. Alternatively, the Court should grant the petition for review, vacate the *Order*, and remand to the FCC.

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the disclosure of the *FCC's* records; it seeks protection only for the documents and information it submitted to the FCC.

Respectfully submitted,

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January 30, 2009

COMBINED CERTIFICATIONS

Bar Membership: Pursuant to Third Circuit LAR 28.3(d) and 46.1(e), I hereby certify that I am a member of the bar of this Court.

Compliance with Fed. R. App. P. 32(a): I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that this brief complies with the applicable type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,841 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font, and accordingly complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6).

Identical Compliance of Briefs: I hereby certify, pursuant to Third Circuit LAR 31.1(c), that the text of the electronic (PDF) version of this brief (filed with the Court on the Court's electronic filing system) is identical to the text in the paper copies of the brief sent to the Court by overnight mail.

Virus Check: I hereby certify, pursuant to Third Circuit LAR 31.1(c), that a virus detection program (Symantec AntiVirus, version 10.1.4.4000) has been run on the electronic version of the brief and that no viruses have been detected.

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January 30, 2009

ADDENDUM

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(e) Authorized activities

. . . .

(2) Grants for statewide P-16 education data systems

. . . .

(C) Privacy and access to data

. . . .

(ii) Use of unique identifiers

. . . .

(II) Regulations

Not later than 180 days after August 9, 2007, the Secretary shall promulgate regulations governing the use by governmental and non-governmental entities of the unique identifiers employed in statewide P-16 education data systems, including, where necessary, regulations requiring States desiring grants for statewide P-16 education data systems under this section to implement specified measures, with the goal of safeguarding individual privacy to the maximum extent practicable consistent with the uses of the information authorized in this Act or other Federal or State law regarding education.

***

49 U.S.C. § 5331. Alcohol and controlled substances testing

***

(d) Testing and laboratory requirements. In carrying out subsection (b) of this section, the Secretary of Transportation shall develop requirements that shall—

(1) promote, to the maximum extent practicable, individual privacy in the collection of specimens;

***

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPTEL,	
Plaintiff,	) Civil Action No. 06CV01718 (HHK)
v.	
Federal Communications Commission,	
Defendant.	

PLAINTIFF COMPTEL'S OPPOSITION TO THE MOTION OF INTERVENOR-DEFENDANT AT&T FOR SUMMARY JUDGMENT

Plaintiff COMPTEL hereby opposes Defendant-Intervenor AT&T's ("AT&T") Motion For Summary Judgment filed in the above-captioned proceeding. AT&T has failed to show that it is entitled to judgment as a matter of law and for this reason, its Motion must be denied.

As an initial matter, AT&T's Motion is procedurally defective. AT&T devotes the majority of its Memorandum of Law filed in support of the Motion to the argument that the Defendant Federal Communications Commission's ("FCC") Enforcement Bureau erred in its determination that Exemption 7(C) of the Freedom of Information Act ("FOIA"), 5 U.S.C.§552(b)(7)(C), does not shield AT&T's records from disclosure with the exception of the names and other identifying information relating to the individuals mentioned in those records. AT&T has been granted leave to participate in this case as an Intervenor-Defendant. AT&T cannot use COMPTEL's FOIA claim to bootstrap its own "reverse-FOIA" action, which must be filed under the Administrative Procedures Act ("APA"), 5 U.S.C. §706. Even if AT&T had properly brought an appeal of the

Public Citizen Health Research Group v. Federal Drug Administration, 704 F. 2d 1280, 1291 (D.C. Cir. 1983) (competitive harm referenced in Exemption 4 does not include injury to competitive position as might flow from customer or employee disgruntlement, or from embarrassing publicity attendant upon public revelation of illegal conduct). Competitive harm is "harm flowing from the affirmative use of proprietary information by competitors." *CNA Financial Corporation v. Donovan*, 830 F. 2d1132, 1154 (D.C. Cir. 1987).

IV. The Court Should Strike The Conclusions of Law, Speculation and Opinion That AT&T Characterizes As Undisputed Material Facts

In addition to asserting legal arguments that are not sustainable, AT&T has included conclusions of law, speculation and opinions in its Proposed Statement of Undisputed Material Facts. As set forth below, these assertions are neither statements of "fact" nor undisputed and should be stricken.

Paragraphs 16 and 23 of AT&T's "Proposed Statement of Undisputed Material Facts" must be stricken, because they contain conclusions of law that are properly the domain of the Court, and not AT&T. At paragraph 16, AT&T alleges that "it is entitled to the protection of 'personal privacy' provided in Exemption 7(C)." As discussed above, COMPTEL vigorously disputes that AT&T has a "personal privacy" interest. AT&T cited not one case where a corporation or other business entity was found by a court to have a protectible privacy interest under Exemption 7(C). AT&T cannot eliminate the impact of all of the judicial precedent that contradicts its position simply by alleging that its entitlement to the protection of the personal privacy exemption of 7(C) is an undisputed fact. The Court should strike Paragraph 16 of AT&T's statement of undisputed facts.

Similarly, in Paragraph 23, AT&T alleges that release of information relating to the cost and pricing of its services, its billing and invoices procedures and practices and the names of customers, vendors and representatives of customers and vendors "would be likely to result in substantial competitive harm to AT&T." Whether release of the information would be likely to result in substantial competitive harm to AT&T is a question of law for the Court to decide. Accordingly, the Court should strike AT&T's legal conclusion from Paragraph 23.

In Paragraph 17, AT&T speculates that if the documents were released, "AT&T as a corporation and AT&T employees would face public embarrassment, harassment and stigma" and that COMPTEL "could use the documents to make representations regarding how and why AT&T came to submit the arguably improper invoices, and it could further rely on them to make representations regarding the adequacy of AT&T's internal controls." AT&T's thoughts are not undisputed material facts, but rank speculation that should be stricken.

Likewise in Paragraph 18, AT&T continues its irrelevant speculation that "[t]here is no evidence that the documents CompTel seeks would shed any light on alleged impropriety by the FCC or any other government agency." Not having seen any of the documents, COMPTEL has not "alleged" any impropriety by the FCC or any other government agency. Again, AT&T's assertion is not an undisputed material fact and should be stricken.

Finally, at Paragraph 22, AT&T expresses the opinion that "the market for providing telecommunications services is vibrantly competitive. . . .Numerous companies compete aggressively in the marketplace for educational customers." These are neither

statements of fact nor undisputed. The day after AT&T filed its Motion for Summary Judgment, two former AT&T employees pled guilty to mail fraud charges related to a scheme to defraud the E-rate program in connection with funding provided to the Hartford, New London, New Haven and Bridgeport, Connecticut school districts. The fraud included submission of invoices for work never performed and submission of inflated invoices.[29] A "vibrantly competitive" market would not have allowed AT&T to get away with artificially inflating the prices charged to the four largest school districts in Connecticut or to demand payment for work never performed. Paragraph 22 of AT&T's Statement of Undisputed Facts should therefore be stricken.

CONCLUSION

For the foregoing reasons, the Court should deny AT&T's Motion for Summary Judgment and should strike Paragraphs 16, 17, 18, 22 and 23 of AT&T's Proposed Statement of Undisputed Material Facts.

April 13, 2007

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[29] See "Two Rhode Island Men Plead Guilty To Defrauding Federal E-Rate Program," United States Attorney's Office District of Connecticut Press Release dated February 13, 2007, attached as Exhibit A to Plaintiff COMPTEL's Statement of Material Facts As To Which There Is A Genuine Dispute.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief for Petitioner was filed electronically in compliance with Third Circuit LAR 31.1(b) on this 30th day of January 2009. In addition, 10 paper copies of the brief were sent via overnight mail to the Office of the Clerk.

I further certify that, on this date, one copy of the foregoing brief was served on each of the parties listed below by first-class mail, postage prepaid.

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