No. 09-1279

IN THE
# Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
*Petitioners,*

v.

AT&T INC. AND COMPTEL,
*Respondents.*

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

## REPLY BRIEF OF RESPONDENT COMPTEL IN SUPPORT OF PETITIONERS


ADINA H. ROSENBAUM
MICHAEL H. PAGE
Public Citizen
Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

MARY C. ALBERT
*Counsel of Record*
COMPTEL
900 17th Street NW
Suite 400
Washington, DC 20006
(202) 296-6650
malbert@comptel.org

Counsel for COMPTEL


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## REPLY BRIEF OF COMPTEL

At issue in this case is the meaning of the term "personal privacy" in Exemption 7(C). Despite AT&T's claims that "common legal usage" demonstrates that corporations have "personal privacy" interests, AT&T Br. 9, AT&T does not cite a single instance outside of this case in which anyone has ever used the term "personal privacy" to refer to corporate interests in confidentiality.

Nonetheless, AT&T contends it is "plain" that the term "personal privacy" in Exemption 7(C) includes corporate interests. AT&T rests its argument on a supposedly "basic principle of grammar and usage": that when Congress provides a technical definition for a noun used in a statute, it "necessarily," albeit silently, defines any adjective whose dictionary definition includes "of or pertaining to" that noun's ordinary meaning. AT&T Br. 14, 16. Not surprisingly, AT&T can cite no court besides the court below that has ever applied this supposedly basic "principle," the adoption of which would unsettle the meaning of words throughout the U.S. Code, leading to absurd results.

For over 35 years, it has been well understood that Exemption 7(C) protects only individual privacy interests. This interpretation is derived from the meaning of "personal privacy" and is confirmed by reading Exemption 7(C) in the context of FOIA's other exemptions, which include a separate exemption for commercial interests in confidentiality and which only otherwise refer to "personal privacy" in the context of records such as personnel and medical files. It is also supported by FOIA's legislative history and by the purposes of FOIA and Exemption 7(C). As these tools of statutory interpretation confirm,

"personal privacy" in Exemption 7(C) does not include corporate interests.

### A. The APA's Definition of "Person" Does Not Displace the Ordinary Meaning of "Personal Privacy."

COMPTEL demonstrated in its opening brief that the ordinary meaning of "personal privacy," as derived from its component words and as reflected in its use by both this Court and Congress, includes only the privacy of human beings. See COMPTEL Br. 9-14. In response, AT&T contends that because "person" is defined in the APA to include corporations and because "personal" is the "adjective form" of person, "personal" "necessarily" also includes corporations. AT&T Br. 14. Despite AT&T's insistence that "the adjective form of a noun draws its meaning from the noun," *id.* at 16, AT&T is unable to cite a single authority or court besides the Third Circuit that has *ever* stated or applied the "basic principle of grammar and usage," *id.*, that when Congress defines a noun, it automatically defines the "adjective form" of the noun, such that courts must ignore the adjective's ordinary meaning, statutory context, and all other tools of statutory interpretation in interpreting the adjective.[1] Nor is this

[1]Even the concurrence in *Delaware River Stevedores v. DiFidelto*, 440 F.3d 615 (3d Cir. 2006), the only source AT&T and the court below cite for the proposition that "a statute which defines a noun has thereby defined the adjectival form of that noun," *id.* at 623 (Fisher, J., concurring, and disagreeing on this point with the majority, which considered the adjective undefined), referred to this proposition not as a rule but as an "inference" and proceeded to find that other factors in that case made the adjective at issue there ambiguous.

"principle" apparently known by Congress, which, as COMPTEL showed in its opening brief, regularly defines variants of defined terms when it wants the variants to reflect the same meaning as the defined term. *See* COMPTEL Br. 16.

Moreover, AT&T's rule of grammar does not withstand examination. What AT&T apparently means in saying that "personal" is the "adjective form" of "person" is that dictionary definitions of "personal" include "[o]f or pertaining to a particular person." AT&T Br. 9 (citing *Webster's New Int'l Dictionary* 1828 (2d ed. 1950)). According to AT&T, because some dictionaries define "personal" as "of or relating to a particular person," and because the APA defines "person" to include an "individual, partnership, corporation, association, or public or private organization," 5 U.S.C. § 551(2), "personal" in the APA must mean "'of or pertaining to a particular' 'individual, partnership, corporation, association, or public or private organization.'" AT&T Br. 15. But when Congress defines a word "for the purpose" of a statute, as it did in the APA, 5 U.S.C. § 551, it is defining the word whenever it is used *in that statute*, not whenever it is used in a dictionary definition of another word in the statute.[2] Likewise, when the dictionary uses the word "person" in defining "personal," it is using the ordinary meaning of

[2]For example, FOIA uses the term "individual," *see, e.g.*, 5 U.S.C. § 552(b)(7)(F), and dictionary definitions of "individual" include "a particular person." *Webster's Third New Int'l Dictionary* 1152 (1961). But even AT&T agrees that the word "individual" in FOIA does not refer back to the APA's definition of "person." AT&T Br. 30-31.

that word, not the word as it is defined in the APA. Thus, when dictionaries define "personal" as "of or relating to a particular person," they are using the ordinary meaning of "person," which AT&T concedes is a human being. AT&T Br. 16.

Indeed, as COMPTEL demonstrated in its opening brief (at 17-20), interpreting "personal" solely according to the statutory definition of "person" would lead to absurd results. AT&T attempts to distinguish two examples COMPTEL used—"personal injury" and "personal property"—by asserting that those phrases are terms of art in which "personal" is *not* the "adjective form" of "person." AT&T Br. 41. But the first definition of "personal injury" in the dictionary AT&T cites includes "any harm caused to a person." *Black's Law Dictionary* 857 (9th ed. 2009).[3] Thus, if one accepts AT&T's concept of "adjective forms of nouns," "personal" is being used as the "adjective form" of "person" in "personal injury," relating the injury directly to a "person." Accordingly, under AT&T's theory, "personal injury" should include "corporate injury" in statutes that define "person" to include corporations. In any event, AT&T's efforts to distinguish "personal injury" and "personal property"

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[3]AT&T skips the first definition of "personal injury" in *Black's* and cites subsequent definitions to state that "'personal injury' generally refers to 'bodily injury' or 'mental suffering.'" AT&T Br. 41. True, but that only shows, as COMPTEL pointed out in its opening brief (at 11), that the term "personal" connects the words it modifies with particularly human interests. Although AT&T relies on definitions of "personal injury" that include "bodily injury," it ignores definitions of "personal" that include "bodily." *See, e.g.*, *Webster's Third New Int'l Dictionary* 1686 (1961).

show that even AT&T recognizes that "personal" does not, in fact, always mean "of or relating to a person" where a statute defines "person" to include corporations. *See generally* COMPTEL Br. 11 (citing definitions of "personal").

Moreover, although COMPTEL used "personal property" and "personal injury" as examples precisely because they have well-known meanings, and therefore clearly demonstrate the absurdity of rigidly interpreting "personal" according to a statutory definition of "person," they were just examples: The ludicrous ramifications of AT&T's rule extend beyond terms it can dismiss as terms of art, and even beyond phrases that include the word "personal." For example, AT&T would presumably consider "commercial" to be the "adjective form" of "commerce"; 42 U.S.C. § 6291(17) defines "commerce" for the purposes of an energy conservation program for consumer products as interstate commerce or commerce that affects interstate commerce; and the term "commercial refrigerator" is not a term of art. Nonetheless, it would be absurd to interpret "commercial refrigerator" when used in the context of that energy conservation program, *id.* § 6291(40), to mean refrigerators that affect inter-state commerce. Similarly, AT&T would presumably consider "licensed" to be the "adjective form" of "license," and 15 U.S.C. § 662(7) defines "license" for the purposes of the small business investment program to be a certain type of license issued by the Small Business Administration. Yet it would be nonsensical to interpret the requirement in 15 U.S.C. § 696(3)(E)(ii) that certain property provided as collateral for a loan have been appraised by a "State licensed or certified appraiser" to

mean that the appraiser should have received from a State a license issued by the Small Business Administration. AT&T's new "principle" of statutory interpretation would unsettle the meaning of well-understood words throughout federal statutes and regulations. This Court should reject AT&T's invitation to replace existing tools of statutory interpretation with a formalistic rule that would have far-reaching, unreasonable results.

### B. AT&T Cites No Authority in Which "Personal Privacy" Is Used to Refer to Corporate Interests.

AT&T devotes the largest section of its brief to arguing that corporations can have "privacy" interests. *See* AT&T Br. 18-30. The relevant term in Exemption 7(C), however, is not just "privacy." It is "personal privacy." Notably, despite AT&T's insistence that "[c]ommon legal usage belies the government's claim that the words 'personal privacy' cannot be used in connection with corporations," *id.* at 9, AT&T does not cite a single instance, either in legal usage or elsewhere, in which anyone has ever used the term "personal privacy" to refer to corporate interests in confidentiality.

Rather than focus on the meaning of the term at issue in this case, AT&T takes its reader on a journey into concepts of corporate personhood and corporate constitutional rights, touching on the First, Fourth, Fifth, and Fourteenth Amendments, including the Due Process Clause, Equal Protection Clause, and Double Jeopardy Clause. But this case is not about whether corporations are "persons"—all parties agree that the APA defines them to be for FOIA purposes, 5 U.S.C. § 551(2)—nor is it about what constitutional provisions apply to them. It is

about what Congress intended in using the words "personal privacy" in Exemption 7(C). That corporations are sometimes considered "persons" or that they have certain constitutional rights does not answer the question whether the term "personal privacy" encompasses corporate interests in confidentiality.

In any event, the constitutional provisions on which AT&T relies cannot carry the weight that AT&T places on them. AT&T devotes pages to discussing "corporate privacy interests under the Fourth Amendment." AT&T Br. 21-23. But the word "privacy" is used to describe many different interests. *See, e.g.*, William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960) (noting that, even just in the context of torts, "[t]he law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common"); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477, 477-78 (2006) (noting that privacy suffers from an "'embarrassment of meanings'" and setting forth a new taxonomy of privacy (citation omitted)). The "right to privacy" protected by the Fourth Amendment is connected to the right to be free from certain governmental intrusions onto "persons, houses, papers, and effects." U.S. Const. Am. IV. That interest is a far cry from the "personal privacy" interests protected by Exemption 7(C), which involve public disclosure of personal information, not "unreasonable searches and seizures." *Id.* That, in a different context, the word "privacy"—unconnected to the word "personal" and referring to a different underlying interest—has sometimes been used in connection with corporations does not change the fact that the word

privacy on its own generally connotes individual interests, let alone say anything about the meaning of "personal privacy."

AT&T's discussion of the Double Jeopardy Clause is even further afield. AT&T strenuously argues that corporations are protected by the Double Jeopardy Clause, apparently on the theory that if corporations are protected by the Double Jeopardy Clause, it would make sense for them also to be protected by Exemption 7(C) because the Double Jeopardy Clause is intended to protect defendants from embarrassment and Exemption 7(C) is intended to protect people such as witnesses from embarrassment. AT&T's logic does not hold up. The purpose of the Double Jeopardy Clause is not primarily to protect defendants from embarrassment, but to keep the government from being able to use second trials for the same offense as "a potent instrument of oppression." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); *see also id.* (explaining that Double Jeopardy Clause prohibits the government from making repeated attempts to convict defendants, thereby subjecting them to "embarrassment, expense and ordeal," "a continuing state of anxiety and insecurity," and the enhanced "possibility that even though innocent [they] may be found guilty" (citing *Green v. United States*, 355 U.S. 184, 187-88 (1957)). Because the purpose of the Clause is not simply to prevent embarrassment, whether corporations are covered by it says nothing about whether corporations can feel embarrassed, let alone about whether Congress intended the words "personal privacy" in Exemption 7(C) to apply to corporate interests.

In contrast to the great "weight of . . . authority" it finds in the Fourth Amendment and Double Jeopardy Clause, AT&T Br. 25, AT&T dismisses any reference to the common law, noting that "[t]he question of the statutory meaning of privacy under the FOIA is . . . not the same as the question whether a tort action might lie for invasion of privacy." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 n.13 (1989). AT&T misses the point. No one is claiming that the common law, on its own, conclusively demonstrates the meaning of "personal privacy" in Exemption 7(C). But the Restatement's limitation of actions for "invasion of privacy" (except for appropriation of name or likeness) to individuals, *see* Restatement (Second) of Torts § 652I (1977), and its recognition that a corporation "has no personal right of privacy," *id.* at Comment C, shed light on what Congress intended when it used the term "invasion of personal privacy" in Exemption 7(C).

AT&T also takes issue with the Government's (and by implication COMPTEL's) citation to *United States v. White*, 322 U.S. 694 (1944), in which this Court stated that because the privilege against self-incrimination is purely personal, it cannot be asserted by a corporation. AT&T claims that *White* only meant that a corporate representative cannot assert the privilege on behalf of the corporation. AT&T Br. 28 n.8. *White*, however, specifically states that "[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals." 322 U.S. at 699. "Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation." *Id.* AT&T also argues

at length that the privilege against compulsory self-incrimination has changed since *White* to not cover documents' contents. But that change has not affected the Court's different treatment of corporations and natural people under the privilege. *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (noting that "[c]ertain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations" (citing *White*, 322 U.S. at 698-701)). In any event, *White* is relevant not because this Court's understanding of the privilege against compulsory self-incrimination informs the scope of Exemption 7(C), but because this Court's understanding of the meaning of "personal" informs the scope of the exemption. Although this Court's understanding of the privilege might have changed since *White*, there is no indication that its understanding of "personal" has changed.

### C. The Context, Structure, History, and Purposes of FOIA All Demonstrate That "Personal Privacy" in Exemption 7(C) Refers Solely to the Privacy of Individuals.

Traditional tools of statutory construction confirm that "personal privacy" in Exemption 7(C) refers solely to human interests. The exemption's "personal privacy" language was borrowed from and intended to provide the same protections as identical language in Exemption 6, which applies only to individuals. FOIA contains a different exemption, Exemption 4, that applies to commercial interests in confidentiality. And interpreting "personal privacy" to protect only individuals furthers the purposes of both FOIA overall and of the amendment that added Exemption 7(C) to the statute. AT&T's argument

that "personal privacy" should not be given its ordinary meaning in Exemption 7(C) fails.

**1.** ***Exemption 7(F) and the Privacy Act.*** AT&T notes that both FOIA Exemption 7(F) and the Privacy Act use the noun "individual" to refer to a human being and argues that Congress could have used that word in Exemption 7(C) as well. AT&T Br. 30. No one questions that because of the APA's definition of "person," the nouns "person" and "individual" have different meanings in both FOIA and the Privacy Act, with the noun "individual" referring solely to humans and the noun "person" also including corporations and associations. Because Exemption 7(C) does not use *either* noun, however, their different meanings are irrelevant.

AT&T grasps onto the Privacy Act's use of the term "individual privacy" and implies that if Congress had wanted to limit Exemption 7(C) to human privacy rights, it could have used that term instead. But AT&T's argument *assumes* that corporations have "personal privacy" interests. If, as COMPTEL has demonstrated, "personal privacy" includes only human privacy interests, then Congress did not *need* to use the term "individual privacy" to indicate its intention to cover only human privacy interests because the term it chose to use also only refers to human privacy interests.

Indeed, in addition to using the term "individual privacy," the Privacy Act uses the term "personal privacy." *Privacy Act of 1974*, Pub. L. No. 93-579, § 2(B), 88 Stat. 1896. AT&T concedes that when Congress used "personal privacy" in the Privacy Act it "intended to address only the . . . privacy of individuals." AT&T Br. 32. Given that

Congress used "personal privacy" and "individual privacy" interchangeably in the Privacy Act, no intent to cover corporate interests can be read into Congress's use of "personal privacy" instead of "individual privacy" in Exemption 7(C).

**2. *Exemption 6.*** When Congress enacted Exemption 7(C), it borrowed the term "personal privacy" from Exemption 6, which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). As Senator Hart, who introduced the amendment that included Exemption 7(C), explained, "[b]y adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." 120 Cong. Rec. 17033 (May 30, 1974) (Statement of Sen. Hart).

In enacting Exemption 6, Congress sought to "'protect[] an individual's right of privacy'... by preventing 'the disclosure of [information] which might harm the individual.'" *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 601 (1982) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)); *see also id.* at 599 (Exemption 6 "seeks to protect individuals"); H.R. Rep. No. 1497, at 11 (explaining that the exemption was "intended to cover detailed Government records on an individual which can be identified as applying to that individual"). Accordingly, and consistent with the ordinary, well-understood meaning of the term, "personal privacy" in Exemption 6 has long been recognized as referring solely to individual interests. *See, e.g., Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1228 (D.C. Cir. 2008) ("It is clear that businesses

themselves do not have protected privacy interests under Exemption 6."); *Sims v. CIA*, 642 F.2d 562, 573 n.47 (D.C. Cir. 1980) ("Exemption 6 is applicable only to individuals."); *Wash. Post Co. v. U.S. Dep't of Agric.*, 943 F. Supp. 31, 37 n.6 (D.D.C. 1996) ("[C]orporations, businesses and partnerships have no privacy interest whatsoever under Exemption 6."); *Ivanhoe Citrus Ass'n v. Handley*, 612 F. Supp. 1560, 1567 (D.D.C. 1985) ("It is well-established . . . that neither corporations nor business associations possess protectible privacy interests [under Exemption 6]."); *see also, e.g.*, U.S. House of Reps., 103d Cong., 1st Sess., Report No. 103-104, *First Report by the Committee on Gov't Reform: A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records* 14 (May 1993) ("Corporations and other legal persons have no privacy rights under the sixth exemption."); U.S. Dep't of Justice, *FOIA Update*, Vol. III, No. 4, at 5 (May 1982) ("It is well settled that the FOIA's privacy exemptions provide personal privacy protection and cannot be invoked to protect the interests of a corporation or association.").

In the face of the vast authority recognizing that "personal privacy" in Exemption 6 refers solely to individual interests, AT&T devotes pages to a single source, the Attorney General's 1967 memorandum on FOIA, which referred to Exemption 6 as protecting the "privacy of any person" and stated that "person" includes corporations. U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36-37 (1967). Exemption 6, of course, does not actually refer to the "privacy of any person." And although, in *National Archives and Records*

*Administration v. Favish*, 541 U.S. 157, 169 (2004), the Court noted that "the Attorney General's *consistent* interpretation" of Exemption 6 as protecting families formed part of the background against which Congress legislated when it enacted Exemption 7(C), *id.* (emphasis added), here, the Attorney General quickly abandoned its initial opinion of how to interpret "personal privacy." *See, e.g.*, U.S. Dep't of Justice, *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9 (1975) (explaining that "the phrase 'personal privacy' pertains to the privacy interests of individuals"). In any event, by the time Congress enacted the 1974 amendments, the notion that FOIA's "personal privacy" language might apply to corporate interests had been rejected. *See Wash. Research Project, Inc. v. Dep't of Health, Educ., & Welfare*, 366 F. Supp. 929 (D.D.C. 1973), *aff'd in part on other grounds*, 504 F.2d 238 (D.C. Cir. 1974) (explaining that "the right of privacy envisioned in the Act is personal and cannot be claimed by a corporation or association").[4]

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[4]AT&T also implies that in *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 153 (D.C. Cir. 2006), the D.C. Circuit applied Exemption 6 to corporate interests. But although the redacted information in *Judicial Watch* included names and addresses of companies that worked on developing mifepristone (RU-486), the reason that information was redacted was not to protect the companies' privacy, but the privacy of the companies' employees. *See id.* (explaining that the declarations in the case "describe websites that encourage readers to look for mifepristone's manufacturing locations and then kill or kidnap employees" and that the "privacy interest extends to all . . . employees [associated with mifepristone]"). Indeed, the case refers to the interest to be

(continued...)

AT&T insists that if Exemption 6 is limited to individuals, it is not because of the term "personal privacy," but "because the exemption applies only to 'personnel and medical files and similar files.'" AT&T Br. 36 (quoting 5 U.S.C. § 552(b)(6)). But corporations, along with individuals, can be discussed in personnel, medical, or similar files. And both Congress and this Court have connected Exemption 6's protection of individuals to its personal-privacy clause, not just its threshold clause. *See, e.g., Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (explaining that the "device adopted" to balance the "individual's right of privacy" against FOIA's goal of opening agency action to the light of public scrutiny was "the limited exemption, where privacy was threatened, for 'clearly unwarranted' invasions of personal privacy"); S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) ("The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the public's right to governmental information.").

Unable to muster any real support for the notion that Exemption 6's "personal privacy" language applies to corporate interests, AT&T asserts that the term "personal privacy" in Exemption 7(C) might include interests not covered by the same term in Exemption 6. AT&T Br. 38. It is a "normal rule of statutory construction," however, "that identical words used in different parts of the same act

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[4](...continued)
weighed on the privacy side of the Exemption 6 balance as "'the individual's right of privacy.'" *Id.* (citation omitted).

are intended to have the same meaning." *Sullivan v. Stroop,* 496 U.S. 478, 484 (1990) (internal quotation marks and citation omitted). "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994).

Moreover, the legislative history shows that Congress intended Exemption 7(C) to protect the same interests as Exemption 6. As Senator Hart explained, "the protection for personal privacy included in [7(C)] . . . is a part of the sixth exemption in the present law." 120 Cong. Rec. 17033 (May 30, 1974) (Statement of Sen. Hart). "By adding the protection language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." *Id.*[5]

In the end, AT&T falls back on the assertion that it is irrelevant whether Congress intended Exemption 7(C) to cover corporations, because the terms of the statute must be "appl[ied] . . . as written." AT&T Br. 49. But FOIA's

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[5]This Court has repeatedly looked to Senator Hart's statements on the Senate floor in interpreting Exemption 7. *See FBI v. Abramson*, 456 U.S. 615, 628 n.11 (1982); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 227-32 (1978). AT&T abridges the quote above, claiming that Senator Hart "said *only* that 'the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption,'" AT&T Br. 38 (emphasis added), and that Senator Hart's statement, therefore, does not show that Exemption 7(C) does not also cover additional interests. As the full quote above demonstrates, however, Senator Hart did not just state that Exemption 6's protections were included in Exemption 7(C); he also stated that Exemption 7(C)'s protections were already part of Exemption 6.

structure and legislative history are in no way at odds with its text. To the contrary, they confirm what the plain language already makes clear: Exemption 7(C) protects only individual interests.

**3.** ***Exemption 4***. Interpreting FOIA's "personal privacy" exemptions in the context of FOIA's other exemptions further confirms that "personal privacy" carries its ordinary meaning in Exemption 7(C). In particular, Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This exemption, rather than the personal-privacy exemptions, is the means through which Congress chose to protect business interests in confidentiality.

AT&T points out that Exemption 4 does not apply to records just because their release might cause the public to dislike or distrust a company, AT&T Br. 39-41, and argues, therefore, that records the release of which might hurt a company's reputation should be exempt under Exemption 7(C). Just because Exemption 4 does not apply to all of the records AT&T wants to keep secret, however, does not mean that some other exemption does. FOIA contains specific, narrow, *exclusive* exemptions. 5 U.S.C. § 552(d). If records fall outside of those exemptions, they must be disclosed, whether or not AT&T wishes otherwise. Exemption 4 shows that Congress gave thought to which commercial secrecy interests should be protected and which should not, and there is no indication that Congress wished to protect corporations from being disliked by customers or suppliers who learn of their actions. Corporate secrecy interests that fall outside of Exemption

4's protections should not be crammed into an exemption designed for different purposes.

**4.** ***The Purposes of Exemption 7(C)***. Exemption 7(C) protects the "'individual interest in avoiding disclosure of personal matters'" contained in law enforcement records. *Reporters Comm. for Freedom of the Press*, 489 U.S. at 762 (citation omitted); *see also, e.g., Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1058 (3d Cir. 1995) (recognizing privacy interests of "'individuals involved in a criminal investigation'" (citation omitted)); *Bast v. U.S. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981) (balancing the "individual's interest in personal privacy"). Extending the exemption's protections to corporations would not further this purpose.

AT&T contends that Exemption 7(C) is meant to cover the interests of *all* entities mentioned in law enforcement records. But there is no reason to think that, in enacting Exemption 7(C), Congress was concerned about anyone but individuals mentioned in law enforcement records. Nor is there anything incongruous with Congress being particularly concerned about people and whether their privacy has been invaded. There is a qualitative difference between human privacy concerns and corporate interests in confidentiality. For example, notwithstanding AT&T's claims to the contrary, AT&T Br. 55, embarrassment is *not* a synonym for reputational damage; it is the *emotion* one feels when one of a number of things, including reputational harm, take place. *See Webster's Third New Int'l Dictionary* 739 (1961) (defining "embarrass" as "to cause to experience a state of self-conscious distress"). Because they do not experience emotions, corporations

cannot feel embarrassed. Nor can they feel dishonored, or undignified, or fear for their physical safety.

Rather than seeking to create an exemption that would permit withholding of law enforcement records that mention corporations, Congress amended Exemption 7 in 1974 in part to shed light on government investigations into corporate compliance with the law. Senator Hart explained that he introduced the amendment out of "fear that such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption." 120 Cong. Rec. 17033 (May 30, 1974) (Statement of Sen. Hart). AT&T downplays this purpose, noting that even if corporate interests in secrecy are protected under Exemption 7(C), records will be subject to the exemption's balancing test and therefore might be released. There is no indication, however, that, in trying to "plug the loophole" that had been "construed by agencies to preclude access to meat inspection reports, OSHA safety reports, airline safety analyses and reports on medical care in federally supported nursing homes," 120 Cong. Rec. 36626 (Nov. 20, 1974) (statement of Rep. Reid), Congress intended to create a new exemption to cover such records and to require people seeking such records to have to affirmatively explain why the public interest in disclosure outweighs the business's interest in confidentiality.

In an attempt to show why an exemption designed to protect people should be extended to cover corporations, AT&T argues that interpreting "personal privacy" to cover only individuals could "chill voluntary cooperation by corporations and other organizations in law enforcement"

and make corporations "less willing" to report wrongdoing. AT&T Br. 43. But, until the decision below, Exemption 7(C) had been construed to cover only individual interests. AT&T does not explain why interpreting the exemption the way it has always been interpreted would make corporations less willing to cooperate with the government than they have been. And the government itself does not seem concerned that giving "personal privacy" its ordinary meaning will in any way interfere with its law enforcement endeavors.

Congress chose to protect "personal privacy" in Exemption 7(C). The ordinary meaning of that term, FOIA's structure, its legislative history, and the purposes of the statute all demonstrate that only individuals have protected interests under Exemption 7(C). "Personal privacy" and Exemption 7(C) should not be extended to corporate interests.

## CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

Mary C. Albert
*Counsel of Record*
COMPTEL
900 17th St. NW
Suite 400
Washington, DC 20006
(202) 296-6650
malbert@comptel.org

Adina H. Rosenbaum
Michael H. Page
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

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