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IN THE SUPREME COURT OF THE UNITED STATES

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FEDERAL COMMUNICATIONS COMMISSION, :

ET AL., :

Petitioners : No. 09-1279

v. :

AT&T INC., ET AL. :

- - - - - x

Washington, D.C.

Wednesday, January 19, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:18 a.m.

APPEARANCES:

ANTHONY A. YANG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioners.

GEOFFREY M. KLINEBERG, ESQ., Washington, D.C.; on behalf of Respondents.

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P R O C E E D I N G S

(10:18 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 09-1279, Federal Communications Commission v. AT&T, Inc.

Mr. Yang.

ORAL ARGUMENT OF ANTHONY A. YANG

ON BEHALF OF PETITIONERS

MR. YANG: Mr. Chief Justice, and may it please the Court:

The court of appeals has held that FOIA's statutory protection for personal privacy in Exemption 7(C) extends beyond the privacy of individuals and protects the so-called personal privacy of corporations. That holding is inconsistent with the text of Exemption 7(C), FOIA's broader context, and the statute's drafting history, and would lead to anomalous results.

The word "personal," standing alone, refers to individual -- an individual human being. "Privacy," standing alone, and even more so in the context of the phrase "invasion of privacy," invokes purely individual concepts. And the sum of those terms -- that is, the statutory phrase used in FOIA, "personal privacy" -- is greater than the sum of its parts. It's long been well

1 settled that corporations have no personal privacy.

2 JUSTICE ALITO: Isn't it true that there are
3 contexts in the law in which the word "personal" is used
4 to refer to a corporation? For example, you could refer
5 to personal jurisdiction over a corporation, couldn't
6 you?

7 MR. YANG: There are -- the term "personal"
8 is sometimes used as a term of art, and I think personal
9 jurisdiction is one of those. It is the modern, shorter
10 term of art for jurisdiction in personam and reflects a
11 distinction drawn still in the law between cases brought
12 in personam and cases brought in rem.

13 That -- the evolution of that term in the
14 law as a term of art does not reflect what the ordinary
15 meaning of "personal" is. It is just the same as the
16 term "personal property," which also invokes
17 long-established traditional distinctions between
18 property that could be recovered in rem or in real
19 actions versus property that might be recovered in
20 actions in personam.

21 So -- and, in fact, I think it -- it is
22 important to note that there are -- although maybe there
23 are some instances that -- I think there's one instance
24 that AT&T cites in its brief. Nothing -- it never cited
25 any use of the term "personal" to mean corporate or

1 pertaining to a corporation. And when -- when you --

2 JUSTICE GINSBURG: What about -- what about
3 personal appearances?

4 MR. YANG: A personal appearance, I think
5 that -- that supports our position as well. If you're
6 making a personal appearance, it is not something that a
7 corporation does. A corporation is a -- a legal
8 construct. It doesn't exist as a thing that can make an
9 appearance.

10 JUSTICE ALITO: Well, in ordinary speech,
11 the term "personal" is not -- the term "person" is not
12 used to refer to a corporation. That's legalese. But
13 in -- but since the -- the Administrative Procedure Act
14 defines a person to include a corporation, why is it
15 relevant here or dispositive here to look to the
16 ordinary usage of term "personal" as opposed to the way
17 it's -- it's used in the law? And in the law, it is
18 sometimes used to refer to a corporation.

19 MR. YANG: Well, I think that -- that point
20 actually reinforces our position, because although
21 "person" is used in certain legal contexts to refer
22 to artificial persons and corporations and the like,
23 "personal" is not.

24 And "personal," as we explained in our
25 brief, is not simply a grammatical alteration, an

1 inflection of the term "person." It has existed in its
2 own right since the late 1300s and has developed meaning
3 that is unique to the term "personal," which --

4 JUSTICE GINSBURG: Mr. Yang, can we go back
5 first to this. The request came in and, as I understand
6 it, the Commission said there are two exemptions: The
7 one for trade secrets, commercial, financial
8 confidential information; and then there was one with
9 Exemption 7 itself, but as to the employee.

10 MR. YANG: Correct. There was an additional
11 exemption, Exemption 5, which protected internal
12 government communications.

13 JUSTICE GINSBURG: How does the -- does the
14 Commission, unaided by AT&T, go through the papers and
15 decide what would be embarrassing for an AT&T employee,
16 as distinguished from the corporation?

17 MR. YANG: How does it do that?

18 JUSTICE GINSBURG: Yes.

19 MR. YANG: Well, I -- I don't think the
20 touchstone is necessarily embarrassment. What the
21 government does, following this Court's decision in
22 Reporters Committee is tries to determine whether there
23 is a personal privacy interest about individuals, and
24 that is information that pertains to particular
25 individuals.

1 For instance, in this Court's decision in
2 DOD v. FLRA the Court explained, although an agency
3 released the name of individuals, it could properly
4 withhold the addresses, the home addresses, of those
5 individuals, even though that might be publicly
6 available in phone books, because individuals have at
7 least some small personal privacy interest in that.

8 So what the agency will do is try to
9 identify information pertaining to individuals and then
10 will conduct -- if there is certain information, will
11 try to conduct a balancing to determine whether there is
12 a public interest in disclosure, that is whether
13 revealing this would disclose information against the
14 government.

15 JUSTICE KENNEDY: Well, in that instance
16 does the corporation have standing to raise that
17 objection on the employee's behalf?

18 MR. YANG: Well, I think the corporation to
19 the -- in a reverse FOIA case, for instance, which what
20 is we have here, where the corporation is alleging that
21 the government's decisionmaking process is arbitrary and
22 capricious, it has Article III standing to resist the
23 disclosure of documents. If you're using standing kind
24 of like a Fourth Amendment concept of standing, I don't
25 think that --

1 JUSTICE KENNEDY: Well, as an administrative
2 matter, can the corporation make a FOIA objection on
3 behalf of its employees.

4 MR. YANG: It can make an objection on its
5 own behalf, which is to say that the government has not
6 properly gone through the decision-making process.

7 JUSTICE KENNEDY: That's the next -- that
8 was going to be my next question: So the corporation
9 can raise FOIA on its own behalf?

10 MR. YANG: It's actually -- let me take a
11 step back. FOIA actions are actions which seek to
12 increase the amount of documents that the government has
13 released pursuant to a FOIA request.

14 We have also reverse FOIA actions, which are
15 actions under the APA and here under the Hobbs Act's
16 review provisions, that would give the court of appeals
17 jurisdiction. When there's a reverse FOIA action, the
18 claim is that the agency's final agency action is
19 somehow arbitrary, capricious, and not -- or contrary to
20 law. So in this case, the FCC has certain regulations
21 which govern its processing of FOIA requests. And
22 AT&T's claim, as we understand it, is that the FCC did
23 not comply with its regulations and, therefore, its
24 decision was arbitrary capricious because its
25 regulations required that it consider the personal

1 privacy interest of individuals.

2 I should note that, with respect to
3 Exemption 6 or Exemption 7(C) the government itself
4 invokes personal privacy of individuals. That's what we
5 do when we process FOIA requests, because individuals
6 normally don't get any notice that there has been a FOIA
7 request. The government simply processes it and asserts
8 those rights, in the sense that they're rights, asserts
9 those interests on behalf of corporations -- on behalf
10 of individuals.

11 Going back to the text of the statute, the
12 term "privacy" and particularly an invasion of privacy
13 invokes concepts that back to Warren and Brandeis's
14 right of privacy, their article which explained that or
15 identified in the law certain human dignitary interests
16 that they gave the label privacy.

17 CHIEF JUSTICE ROBERTS: Privacy certainly
18 isn't as limited as you argue "person," "personal," is.
19 Corporations have private property. They have private
20 documents. The concept certainly applies in the
21 corporate context as it does in the individual.

22 MR. YANG: I think the term "privacy," its
23 ordinary meaning, not the only meaning but the ordinary
24 and the commonly used meaning, does invoke individual
25 concepts. When corporations or other entities are at

1 issue, normally the more appropriate word would be
2 "confidentiality" or "secrecy." Those concepts --

3 CHIEF JUSTICE ROBERTS: You don't have
4 confidential property or secret property. You have
5 private property.

6 MR. YANG: Well, true. But it's is not
7 privacy. When we're talking about the right of privacy,
8 those -- that word we think, again going back to Warren
9 and Brandeis and up through the fifties and sixties when
10 Prosser was elaborating the law of torts in his
11 groundbreaking article on privacy, those concepts
12 applied only to individuals, and particularly when you
13 combine the terms.

14 The Restatement makes clear, and back to
15 Prosser it was clear, that corporations have no right of
16 personal privacy. So when Congress in 1974 was enacting
17 Exemption 7(C), there would have been no basis for it to
18 conclude that the rights that it was conferring through
19 the phrase "personal privacy" would confer rights not --
20 beyond individuals, to corporations, and by necessarily
21 implication, if AT&T is correct, foreign governments,
22 State governments, local governments. There's no
23 predicate for those types of entities having personal
24 privacy in the law.

25 JUSTICE SCALIA: Our cases assert, do they

1 not, that the exceptions to FOIA should be narrowly
2 construed?

3 MR. YANG: There are cases --

4 JUSTICE SCALIA: And we've said that on a
5 number of cases.

6 MR. YANG: In certain contexts, this Court
7 has indicated that exceptions are to be narrowly
8 construed. We think that, when read in context, those
9 cases and other cases of this Court explain that FOIA's
10 exemptions are to be given meaningful reach, because
11 what Congress was trying to do in FOIA -- - and this is
12 somewhat against our interest in this case and we
13 explain it more fully in our brief in Millner, which is
14 currently pending to the Court -- what Congress was
15 trying to do in FOIA was to establish a general
16 principle of disclosure, but in the exceptions it
17 identified very important interests that warranted an
18 exception from those general rules. And to narrowly
19 construe the exceptions we think would distort rather
20 than advance congressional purpose in enacting FOIA.

21 JUSTICE ALITO: Suppose Congress had used
22 the phrase "privacy of a person," "privacy of any
23 person." Would you make the same argument?

24 MR. YANG: Our argument would be a little
25 different, particularly in the context of Exemptions 6

1 and 7(C), where the phrase would be "an invasion of
2 privacy of any person."

3 We think, particularly when we're talking
4 about invasions of privacy, even though a corporation
5 might have a broader definitional meaning in context,
6 Congress in that case would still, we think, be
7 referring to individuals. But, of course, that's not
8 this case. That would make it a little more difficult.
9 We think we would probably still prevail on that
10 reading. But --

11 JUSTICE GINSBURG: What about the Privacy
12 Act? The Privacy Act undoubtedly concerns individuals,
13 human individuals --

14 MR. YANG: Correct.

15 JUSTICE GINSBURG: -- not artificial beings.
16 But it uses the words "individual privacy."

17 MR. YANG: Well, it actually uses both
18 phrases. It uses, as we explain in our brief, the
19 phrase "personal privacy" to explain that that's what
20 the act was protecting. And then within the operative
21 portions of the act, it uses "individual," but it does
22 so for a very specific reason. Congress was intending
23 to protect a subset of individuals and it defined the
24 term "individual" to mean U.S. citizens and lawful
25 permanent residents.

1 So not all individuals would be protected by
2 the Privacy Act. Now, Congress did that, not because
3 had it used the phrase "personal privacy" it would have
4 been extending rights to corporations and foreign
5 governments, but because personal privacy would have
6 been too broad in that it would have -- even though it
7 would have been limited to individuals, it would have
8 included a set of individuals that Congress wanted to
9 exclude, that is, everybody who is not a U.S. citizen or
10 lawful permanent resident.

11 JUSTICE SOTOMAYOR: Can I ask you a
12 question. I'm not sure I understood your response to
13 Justice Scalia. If there is ambiguity, if a term can be
14 given two meanings, and it's not clear -- and I know
15 you're challenging the clarity question here -- I
16 thought that Congress's intent to have full disclosure
17 would necessarily mean that where there's ambiguity as
18 to the meaning of an exception then we should change the
19 narrowest meaning.

20 MR. YANG: Well, I think we disagree, and I
21 think this is why. No legislation pursues its primary
22 goal at all costs, and the FOIA exceptions that are at
23 issue here protect very important values that Congress
24 deemed to warrant exceptions from the rule. So if the
25 Court were to put a thumb on one scale of that balance

1 that Congress has tried to strike, after using all the
2 normal tools of construction, we think that would
3 distort rather than advance the intent --

4 JUSTICE SCALIA: I don't understand that.
5 We're not putting a thumb on the scale. We're taking
6 account of the fact that -- that Congress has many
7 objectives in any legislation and that the limitations
8 are as important as the substantive end. Nonetheless,
9 when, having applied all of that, you end up with, gee,
10 I don't know; it is ambiguous, you say even in that
11 situation, we don't apply the rule that --

12 MR. YANG: Well, if you were to get -- after
13 using all the normal tools that the court does and
14 you're on --

15 JUSTICE SCALIA: That's what ambiguity
16 means. It means --

17 MR. YANG: That's usually a very rare
18 instance, that you are exactly at equipoise. And we
19 certainly aren't relying on narrow construction in this
20 case.

21 JUSTICE SCALIA: Okay. The government wants
22 to abandon the principle that we've set forth in our
23 cases --

24 MR. YANG: Well, we think --

25 JUSTICE SCALIA: -- that exceptions to FOIA

1 are to be narrowly construed. The government does not
2 support that.

3 MR. YANG: We do not embrace that principle.

4 JUSTICE SCALIA: Even though we did?

5 MR. YANG: Well, we think that those
6 cases -- there are two lines of this Court's decisions.
7 Sometimes the Court explains that exceptions are
8 narrowly construed and sometimes the Court explained
9 that its decisions have given -- its decisions have
10 given the exception practical reach in order to strike
11 the appropriate balance that Congress has tried to
12 strike in FOIA.

13 Now, let me just say, our narrow
14 construction to the extent the Court would want to
15 reaffirm it here -- we're not advancing that -- would
16 only help the government's position.

17 JUSTICE GINSBURG: Your argument is based on
18 a case that will come before us. So -- but in this case
19 it is to your interest to say, yes, that has been --
20 that has been set forth as precedent, that FOIA
21 exceptions are to be narrowly construed.

22 MR. YANG: Well, the government has broader
23 interests beyond a single case and we think that, again,
24 we're not embracing strict construction in this case.
25 But again, that would only help the government's

1 position if you were to disagree.

2 JUSTICE SCALIA: Well, I'm not going to help
3 the government's position if the government doesn't want
4 to be helped. I'm happy to leave you where you put
5 yourself.

6 MR. YANG: And we accept that in this case,
7 and we think that the language of the text, particularly
8 when read in context in light of the statutory history,
9 and particularly when you take a look at what's gone on
10 since 1974 -- I mean, in the more than 35 years since,
11 there has been uniform agreement that Exemption 6 and
12 7(C) apply only to individuals.

13 CHIEF JUSTICE ROBERTS: I suppose -- I
14 suppose families have rights of personal privacy, don't
15 they?

16 MR. YANG: Well, in certain contexts family
17 members, as this Court decided in Favish, can have a
18 right to personal privacy. But the Court in Favish
19 recognized that that was a very, you know, significant
20 departure from the prior understanding that the right of
21 personal privacy in FOIA protects information about the
22 individual, him or herself, and recognized that there is
23 another strain of personal privacy which from
24 longstanding traditions in terms of -- within our
25 society, the Court could draw on in saying that personal

1 privacy should also protect, at least in the context
2 of --

3 CHIEF JUSTICE ROBERTS: So in some
4 contexts -- in some contexts, personal privacy does go
5 beyond the individual?

6 MR. YANG: No, still it is individual. I
7 mean, those are individual members of the family.

8 CHIEF JUSTICE ROBERTS: Aggregations of
9 individuals?

10 MR. YANG: Well, no. I think an individual
11 member of the family has a personal privacy interest by
12 virtue of the relationship to the decedent in Favish.

13 Let me go back. Just, I think I would be
14 remiss if I didn't remark upon this Court's decision --

15 JUSTICE SCALIA: Excuse me.

16 To go back to the Chief's question, you do
17 not deny that the individuals who form the corporation,
18 the officers and the employees, are protected by the
19 right of personal privacy and indeed you will -- you
20 will edit any FOIA responses to protect those
21 individuals, even though there are many of them, right?

22 MR. YANG: Correct. If there were --

23 JUSTICE SCALIA: But as individuals, not as
24 the corporation.

25 MR. YANG: As individuals, because the

1 information pertains to them.

2 Now, going to the American Express case,
3 which we explained in our reply, I think that is fatal
4 to the proposition that -- the proposition of AT&T that
5 there's a grammatical imperative that adjectives take
6 the meaning of the related noun.

7 In American Express, the Court construed the
8 Truth in Lending Act, which includes the definition of
9 "person" to include, for instance, corporations. It
10 then went on to construe a term, "consumer," which
11 concerns transactions primarily for personal, family,
12 household, or at the time agricultural purposes. The
13 Court explained that a transaction, the transaction that
14 was conducted for a corporation's business purposes,
15 that it could not -- there was -- "It did not fall
16 within any of the purposes specified" -- that was a
17 quote -- in the definition of consumer. That is, it did
18 not concern personal purposes. We think that's fatal.

19 The Court, in fact, said it was the only
20 possible conclusion and that there was no other possible
21 interpretation of the statutory phrase. After repeating
22 the enumeration of those four factors three times and
23 then on the very next page saying corporate -- a
24 transaction for corporate business purposes could not
25 be fit within that definition.

1 Finally, I'd like to remark upon the
2 anomalies that this Court would set us forth upon if it
3 were to decide that corporations have personal privacy.

4 At least in the context of individuals,
5 there's an established body of law and societal
6 understanding of what a person, an individual, might
7 have a personal privacy interest in. But if we expand
8 personal to include corporations, foreign governments,
9 State governments, local governments, defining what
10 would be personal privacy of those institutions would
11 require an extraordinary exercise, a simple policy
12 judgment on the part of the agency first and then the
13 Court.

14 And this Court in Favish was careful to
15 explain that that type of decisionmaking would be
16 improper and that appropriate guides to limit and make
17 objective a court and agency's decisionmaking is
18 required.

19 Congress provided no benchmarks, never
20 addressed corporate, foreign governments, or any other
21 non-human entity in the context of personal privacy.

22 And again, for 36 years there's been uniform
23 agreement that personal privacy applies in this context
24 only to corporations.

25 If there are no further questions --

1 JUSTICE SOTOMAYOR: So if an individual has
2 been -- individual human being has been investigated by
3 the FBI and a FOIA request is made for records related
4 to that investigation, would the name of the individual
5 not be turned over?

6 MR. YANG: Well, if someone is asking for an
7 investigation of Tony Yang --

8 JUSTICE SOTOMAYOR: Yes.

9 MR. YANG: Our -- I don't -- I can't say
10 definitively, but I think I can probably answer that,
11 that even answering the question of whether there is a
12 responsive record answers the question.

13 JUSTICE SOTOMAYOR: Well, that's the point.
14 So really your adversary is saying that the same harm
15 that occurs to an individual -- putting aside the
16 difficulty of defining privacy more broadly, but the
17 same harm that occurs to an individual who is disclosed
18 to have been the target of an investigation is an
19 identical privacy right of a corporation; or a
20 corporation has the same negative effects on the
21 individual.

22 So I think they would concede that privacy
23 might need to be defined differently for corporations.
24 They're simply saying this privacy interest is not.

25 MR. YANG: Well, the key point is that we

1 don't deny that corporations have some interest in
2 confidentiality that exists out there. For instance,
3 AT&T has relied upon the common law of defamation where
4 a corporation's business interests, business reputation,
5 is implicated. But even --

6 JUSTICE SOTOMAYOR: They pled guilty
7 already. So it is hard to imagine how much
8 exponentially more damaging --

9 MR. YANG: Well, to be fair to AT&T, there
10 was a settlement agreement in which they did not admit
11 any wrongdoing.

12 JUSTICE SOTOMAYOR: But that presupposes
13 some sort of investigation. So that's public knowledge.

14 MR. YANG: That is public knowledge. But I
15 think the key point is that the corporate -- a
16 corporation's interests in maintaining its business
17 reputation has been not regarded as a personal privacy
18 interest. It's true that they have interests and FOIA
19 protects those interests, for instance, interests in
20 confidential, commercial or financial information under
21 Exemption 4.

22 So really we come back to the key point,
23 which is when Congress used the phrase "personal
24 privacy" it would have had no reason in 1974, or even
25 now, to think that term would have referred to

1 corporations. The fact that corporations have other
2 interests and other rights that might be legitimate is
3 kind of beside the point because those interests are not
4 referred to in the law or otherwise as personal privacy
5 interests.

6 I'd like to reserve the balance of my time.

7 CHIEF JUSTICE ROBERTS: Thank you, Mr. Yang.

8 MR. YANG: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Klineberg.

10 ORAL ARGUMENT OF GEOFFREY M. KLINEBERG

11 ON BEHALF OF RESPONDENTS

12 MR. KLINEBERG: Thank you,

13 Mr. Chief Justice, and may it please the Court:

14 The question in this case is whether any
15 organization, including not only business corporations
16 like AT&T, but also nonprofit organization and political
17 associations, should be categorically excluded from
18 protection under Exemption 7(C), such that this
19 exemption will now offer less protection for privacy
20 interests than the Constitution and the common law.

21 This Court has consistently held that the
22 privacy protections under FOIA are broader and the text
23 supports that position.

24 JUSTICE GINSBURG: Do you include in this
25 the people, the persons that you say are shielded by

1 this privacy exemption, as Mr. Yang said, foreign
2 governments, State and local governments, those have
3 all? Those all fall under the APA definition of person.

4 MR. KLINEBERG: Justice Ginsburg, they do.
5 And we would agree that as a matter of statutory
6 construction, the concept of personal privacy does apply
7 to those, those other categories of actors. Now,
8 whether once that privacy interest is balanced against
9 the public's interest in disclosure -- that balance may
10 well be different with respect to public or foreign
11 entities.

12 But -- but certainly they -- they have a
13 right to personal privacy under the terms of the
14 statute.

15 JUSTICE GINSBURG: Can you give us an idea
16 of -- the corporation has been shielded by Exemption 4
17 for its confidential, financial information, trade
18 secrets; and its employees have been protected under
19 Exemption 7.

20 What is it, what would be -- would fall
21 within this privacy exception that would not be
22 confidential business information or relate to employees
23 of the corporation?

24 MR. KLINEBERG: Justice Ginsburg, we -- I
25 could give you two categories or kinds of examples. One

1 is, for example, a series of e-mails among corporate
2 officers -- granted, whose own personal names and
3 identifying information have been redacted -- but in
4 those e-mails, they may engage in a frank exchange about
5 the competence and intelligence of a would-be regulator
6 of the corporation. Or a -- disparaging comments
7 about --

8 JUSTICE SCALIA: Excuse me. Why does that
9 related to their privacy? I don't understand that. Why
10 does that relate to the corporation's privacy interest?
11 Anything that would embarrass the corporation is -- is a
12 privacy interest?

13 MR. KLINEBERG: Well, Justice Scalia, the --
14 the answer is simply that these were communications,
15 conversations, that were occurring with an expectation
16 of privacy by the individuals involved on behalf of
17 their employer, and to the extent that they could be
18 used to harm the reputation or the customer goodwill of
19 -- of the company, they do indeed have a -- a personal
20 privacy interest --

21 JUSTICE SCALIA: Anything that hurts the --
22 the -- the image or the goodwill of the company?

23 MR. KLINEBERG: Your Honor, everything that
24 with -- that is intended to be private is certainly
25 subject to the balancing that we're asking for under

1 Exemption 7(C), indeed that Congress provided; that if
2 it is -- it's an interest in personal privacy, then it
3 is to be balanced to determine whether the disclosure of
4 that document is unwarranted.

5 JUSTICE SCALIA: Mr. Klineberg, can you give
6 me any example of -- your -- your brief talks a lot
7 about the adjective "personal." But we're not talking
8 just about the adjective "personal." We're talking
9 about the phrase "personal privacy."

10 "Personal," yes, can indeed apply to
11 corporations sometimes; but there are certain phrases
12 where it certainly does not. For example, you talk
13 about personal characteristics. That doesn't mean the
14 characteristics of General Motors. You talk about
15 personal qualities. It doesn't mean the qualities of
16 General Motors. You talk about a point of personal
17 privilege. It's not a privilege of a corporation.

18 And I think personal privacy is the same
19 thing. Can you give me any examples in common usage
20 where people would refer to the personal privacy of a --
21 of a corporation? It's a very strange phrase to me.

22 MR. KLINEBERG: Your Honor, as Justice Alito
23 asked my -- my colleague earlier, the -- the whole
24 concept of -- of "person" as including a corporation
25 would surprise many people, the proverbial person on the

1 street.

2 JUSTICE SCALIA: Yes. I'm not talking about
3 that. I'll grant you that -- that "personal" could
4 refer to a corporation, although the government
5 distinguishes it by etymology and so forth. Never mind
6 that. I'm talking about personal privacy. Do you have
7 any examples from the New York Times, from, you know,
8 Boswell, from anywhere, that anybody refers to the
9 interests of a corporation as the "personal privacy" of
10 General Motors?

11 I cannot imagine somebody using the phrase
12 like that.

13 MR. KLINEBERG: Your Honor, we're -- we're
14 not aware of that phrase being used certainly in any
15 statutory context --

16 JUSTICE GINSBURG: But you were about to
17 give a second example of where, even though it hasn't,
18 "personal privacy" hasn't been used. But you said one
19 example is the two officials who are saying unpleasant
20 things about a regulator; and what was your other
21 example?

22 MR. KLINEBERG: Well, there's a -- there's a
23 sub-example within that category which is the
24 disparaging of an important customer, some unpleasant
25 comments about an important customer of the corporation

1 that could then be used quite -- quite clearly by a --
2 by a competitor to -- to harm the goodwill of the -- of
3 the corporation with respect to that customer.

4 But there is indeed another whole category
5 of documents that goes beyond the -- the context of
6 AT&T's interest here; and the example is internal
7 documents within, say, an environmental nonprofit
8 organization talking about their political strategies
9 for defeating an amendment to the Clean Air Act.

10 As an example, those political strategies
11 that were shared internally by -- by members of the
12 organization without any intent to -- to have them
13 become public would become subject to -- to automatic
14 disclosures, categorical disclosure, were the government
15 to prevail in this case.

16 CHIEF JUSTICE ROBERTS: Do you think it's --
17 how does that work? If you have the president of the
18 environmental organization says something about whatever
19 it is, we can lobby this guy to get this change, is he
20 able to protect that on the grounds of his personal
21 privacy, even though the embarrassment would go to the
22 -- the organization as a whole?

23 MR. KLINEBERG: Mr. Chief Justice, I believe
24 the answer is in most cases yes, that in -- that the
25 identity of the -- the specific speaker and any

1 identifying information corresponding to him or her
2 would be protected.

3 CHIEF JUSTICE ROBERTS: Why is it such a big
4 deal, then, to extend that to the organization as a
5 whole, if the individual's privacy is already going to
6 be protected?

7 MR. KLINEBERG: Indeed, Your Honor, I think
8 that is -- that is our position, that -- that the
9 personal privacy of the corporation is -- is affected by
10 such disclosure.

11 CHIEF JUSTICE ROBERTS: No. I mean
12 you're -- you're already protected, at least to a
13 significant extent, because the individual officers
14 would be able to assert a privacy interest, to the
15 extent at least that what you find embarrassing to -- to
16 the corporation is also individually embarrassing to
17 them.

18 MR. KLINEBERG: Right. But the -- but the
19 redactions that would occur would in all likelihood
20 simply be redactions of their names and perhaps their
21 titles, but their -- the substance of their comments
22 would certainly be -- would be disclosed under the
23 government's view.

24 JUSTICE BREYER: Are there any examples that
25 you have? That is, in the last 35 years have there been

1 any instance where the Justice Department or some other
2 law enforcement agency compiled a file for law
3 enforcement purposes, that in that file there were, for
4 whatever reasons, a bunch of conversations about the
5 organization's strategy, and it did not interfere to
6 release it with -- with anybody's personal privacy, but
7 it might interfere with that organization's strategy, so
8 the organization, whatever it was, the NRDC or
9 something, was very upset about it?

10 Did you find a single example or a thousand
11 examples? Or how many examples did you find of that
12 happening?

13 MR. KLINEBERG: Well, Justice Breyer, one of
14 the -- one of the things that has puzzled us in this
15 case is why -- why it has taken 35 years --

16 JUSTICE BREYER: Well, one reason might be
17 that this has really never been a problem because all
18 the legitimate -- or most of them, anyway -- that these
19 organizations that have interests in privacy are
20 actually taken care of by the other 17 exemptions here.

21 JUSTICE SCALIA: Another reason might be
22 that personal -- nobody ever thought that
23 personal privacy would cover this.

24 JUSTICE BREYER: This may be the first.
25 That's why I want to know, is there -- one of the things

1 you would have looked for is an example of a real
2 problem of the kind you're talking about. I'm not
3 saying you don't have one. I would just like to know if
4 you found any, and what they are, so I could read them.

5 MR. KLINEBERG: Your Honor, we haven't found
6 anything specific to the -- in response to your
7 question.

8 But I -- I will say that one of the
9 explanations for why this issue has become more
10 important today than maybe it has been in the recent
11 past, there really are three reasons. One is that
12 Exemption 4, which Mr. Yang discussed, has been
13 increasingly narrowed by the courts of appeals to the
14 point where they specifically say, and indeed the
15 government concedes, that -- that the reputational
16 concerns and the harm to customer goodwill is not the
17 sort of harm that Exemption 4 guards against.

18 And so that has become increasingly clear
19 among the courts of appeals, that the interests in
20 confidentiality that we're talking about under exception
21 7(C) --

22 JUSTICE BREYER: One possible reason you
23 don't find them is because it is very rare that a law
24 enforcement agency is going to try to subpoena the top
25 strategy of the -- of the NRDC, confidential strategy.

1 There might not be too many such records.

2 It -- another reason might be that they
3 don't really care. Another reason might be -- I don't
4 know.

5 But if you haven't found any examples, what
6 we're back to -- or -- and maybe there are actual
7 examples of that -- of what you said to Justice Ginsburg
8 of the other instance, where the -- what was that first
9 one?

10 MR. KLINEBERG: Right.

11 JUSTICE BREYER: I'd like to know about the
12 example. What was the first one again?

13 MR. KLINEBERG: Well, the -- the first one
14 was comments about a regulator --

15 JUSTICE BREYER: They're worried about
16 saying something mean about a regulator. Okay. Yeah,
17 fine. Are there examples of that? Is this the first
18 one and what's the empirical statement?

19 MR. KLINEBERG: Your Honor, it is a -- I
20 cannot point you to specific examples. They're --
21 they're sort of hard to -- hard to find in the -- in the
22 sense that they are -- that they're not typically
23 litigated, and they certainly haven't been litigated
24 under -- under this -- under this exemption before.

25 But -- but I think the other explanation for

1 why this matters today in a way that it might not have
2 mattered so much before, two -- two other reasons: One
3 is that -- that increasingly, FOIA is being used by --
4 by competitors and legal adversaries to obtain
5 information, not about what the government is doing, not
6 about what the government is up to, but about what
7 evidence the government might have gathered from private
8 parties.

9 JUSTICE GINSBURG: Is that a reason to
10 change what was the understanding of Exemption 7? One
11 of the items that doesn't work in your favor was the
12 attorney general's memorandum at the time of the '74
13 amendments.

14 MR. KLINEBERG: Well, actually, Justice
15 Ginsburg, at the time of the '74 amendments the only
16 existing attorney general memorandum was that of
17 Attorney General Clark, which read "personal privacy" --

18 JUSTICE GINSBURG: I'm talking about the --
19 Attorney General Levi.

20 MR. KLINEBERG: Right, and that -- that was
21 issued subsequent to the amendments in 1974, and that
22 was an -- an interpretive gloss on the recent
23 amendments.

24 JUSTICE GINSBURG: Yes, that's what I meant.

25 MR. KLINEBERG: Right. And so at the time

1 that Congress enacted the amendments, both under the
2 Privacy Act as well as Exemption 7(C), the -- the only
3 existing statement about what personal privacy might
4 mean would be -- would have been Attorney General
5 Clark's understanding that personal privacy can in fact
6 incorporate interests of corporations.

7 JUSTICE SCALIA: But if Attorney General
8 Levy's description, which was -- which was issued for
9 the purpose of telling all the agencies of the Federal
10 government what this new statute meant -- and it had a
11 lot of ambiguities in it -- if that was wrong about --
12 about this subject, you would have thought somebody
13 would have objected.

14 I mean, did some members of Congress who --
15 who had passed FOIA say, this is outrageous; what about
16 the personal privacy of General Motors? I'm not aware
17 of any objections along those lines.

18 MR. KLINEBERG: Well, Your Honor, the --
19 Attorney General Levy's memorandum did not go into a
20 long discussion or description of the analysis. It
21 simply said it does not appear or does not seem to apply
22 to corporations. And it's absolutely true. This is
23 not -- this issue hasn't -- hasn't really been litigated
24 and presented.

25 But our position is that there's nothing in

1 the plain language that would indicate that Congress
2 intended to categorically exclude corporations. It is
3 certainly true that the legislative history at the time,
4 as the government spends quite a bit of time exploring,
5 does suggest that what was -- what was in most people's
6 minds was protection of individual privacy. But there
7 is no indication that they intended --

8 JUSTICE SCALIA: Is it the burden of the
9 government to show that they intended to exclude
10 corporations, or is it your burden to show that this
11 exception was meant to include corporations? I would
12 think the latter is where the burden lies in this case.

13 MR. KLINEBERG: Well, Justice Scalia, our --
14 our burden is to -- is to defend our view of the
15 statute.

16 JUSTICE SCALIA: Well, but if you're asking
17 the government to show that the -- there was an intent
18 to exclude corporations, I don't think that's their
19 burden. I think it's your burden to show that this
20 exemption was intended to include corporations.

21 MR. KLINEBERG: I agree, Your Honor, that we
22 are -- our burden is to demonstrate to you why the words
23 "personal privacy" in the statute apply to corporations.
24 I think one of the background facts is that there is no
25 indication that anyone thought that it was not to be

1 included. But let me --

2 CHIEF JUSTICE ROBERTS: Counsel, your
3 central argument is that because "person" is defined to
4 include corporation, "personal" in the same statute must
5 include corporate.

6 I tried to sit down and come up with other
7 examples where the adjective was very different from the
8 root noun. It turns out it is not hard at all. You
9 have craft and crafty. Totally different. Crafty
10 doesn't have much to do with craft. Squirrel,
11 squirrely. Right? I mean, pastor -- you have a pastor
12 and pastoral. Same root, totally different.

13 So I don't understand -- I don't think
14 there's much to the argument that because "person" means
15 one thing, "personal" has to be the same relation.

16 MR. KLINEBERG: Mr. Chief Justice, let me
17 try to explain precisely what our proposed rule of
18 construction is, because I think there's been some
19 confusion and I -- and I think the government has -- has
20 not properly characterized it, and certainly in their
21 reply brief.

22 We do not agree, we do not sign on to, the
23 term "grammatical imperative," because our concern with
24 that phrase is that it might suggest that the rule is to
25 be applied regardless of the consequences, and that is

1 not our you position.

2 Our position is that where the adjective
3 means "of or relating to a term that Congress has
4 expressly defined," that definition should be applied,
5 so long as it makes sense to do so in light of the text
6 and structure of the statute as a whole.

7 So in this case, Your Honor, "personal"
8 does -- is defined -- when you open up the dictionary,
9 the very first definition is "of or relating to a
10 particular person." "Person" is, then, defined by
11 Congress as -- to include not only individuals, but --
12 but corporations and other associations.

13 So in this particular context, it makes
14 perfect sense to look to --

15 JUSTICE GINSBURG: Mr. Klineberg, you have
16 read the brief of the Project on Government Oversight
17 where they give dozens and dozens of examples to show
18 that, overwhelmingly, "personal" is used to describe an
19 individual, not an artificial being. And it is the
20 overwhelming use of personal.

21 MR. KLINEBERG: Justice Ginsburg, we do not
22 dispute that personal is often, even many, many times,
23 used to describe an individual and can only be
24 understood in that context. Indeed, the Truth in
25 Lending Act argument that the government made in its

1 reply brief is a perfect example. The word "personal"
2 there is -- is mentioned alongside personal, family, and
3 household.

4 And indeed, even in that very same statutory
5 definition of "consumer," the word is referred to as "a
6 natural person." So in that context, it would be absurd
7 or inappropriate to -- to borrow the concept of the
8 definition of "person."

9 All we're saying is when it is not absurd,
10 when it is not -- does not do violence to the statute,
11 under those circumstances, it makes perfect sense to
12 borrow the definition that Congress provided.

13 JUSTICE SOTOMAYOR: What would be similar to
14 medical files as such, under Exemption 6, that uses the
15 same phrase, "unwanted invasion on personal privacy"?
16 So what would your reading do to Exemption 6, and how
17 would we create or even make sense of Exemption 6?

18 MR. KLINEBERG: Your Honor, we don't believe
19 our reading does any -- any damage to this Court's
20 jurisprudence in Exemption 6, and the -- the simple
21 reason is that while the words "personal privacy" in
22 Exemption 6 do mean -- and we agree with the Attorney
23 General Clark in this -- do mean that -- the same thing
24 as it means in Exemption 7(C), but because -- precisely
25 for the reason you said, Justice Sotomayor -- the

1 personnel, medical, and similar files limits the likely
2 scope of that privacy interest to individual, natural --
3 natural persons. And that's simply not because of the
4 words "personal privacy," but because of the company
5 that those words keep in that -- in that particular
6 exemption.

7 JUSTICE SOTOMAYOR: Why? I mean, if you're
8 saying that personal privacy has some overlap with
9 individual privacy -- obviously, it has to if you're
10 going to give meaning to personal privacy -- don't we
11 have to give meaning to "and similar files"? And so
12 what would those be?

13 MR. KLINEBERG: Well, Your Honor, as this
14 Court said in the Washington Post case, the
15 understanding of similar files is defined by the two
16 benchmarks that are expressly provided, right?
17 Personnel and medical. So the kinds of files are
18 limited to the sorts of files in which individual
19 information is likely to be contained. In that case, it
20 was a passport file.

21 Again, our -- our argument is simply that it
22 is that part of Exemption 6 that does the limited work
23 in terms of its scope. The words "personal privacy"
24 mean the same thing in Exemption 6 as -- as they do in
25 Exemption 7(C).

1 The -- the other point that I certainly want
2 to make clear is that our position is that personal
3 privacy is only the first step in the determination
4 whether or not a particular document is disclosed,
5 because if the government prevails, there will be no
6 need even to articulate a public interest in the
7 disclosure of potentially harmful documents. Instead,
8 they will be automatically available to any competitor
9 or legal adversary. And all we are asking for and
10 indeed all that Congress provided for is that the
11 privacy interests be weighed against the public interest
12 in disclosure. And what the FCC did here was to
13 categorically exclude corporations from the protections
14 of Exemption 7(C). And all we are saying is that those
15 interests are legitimate and just need to be balanced.
16 And what the Government's obligations under these
17 circumstances are is that they need to weigh the private
18 interests in the documents against the articulated
19 public interest in disclosure. And that interest, of
20 course, has to do with what the Government is up to,
21 what do these documents tell us about what the
22 Government is doing.

23 And if, as the amici on the Government's
24 side suggests, there are lots of public value and public
25 interest in the disclosure, then that balance is more

1 likely to be weighed in favor of disclosure. All we are
2 asking for, though, is that that balance take place.
3 And what's happened here is that this, as I said, a
4 categorical exclusion that simply is inconsistent with
5 the terms that Congress laid out in exemption 7(C).
6 Congress did not intend for FOIA to be a tool for an
7 organization's adversaries to obtain access to harmful
8 or embarrassing documents compiled for law enforcement
9 purposes where such documents do nothing to open agency
10 action to public scrutiny. If the Government has its
11 way in this case, the result will be what this Court
12 decried in *Favish*, which was that it would be the
13 failure to protect the privacy of citizens against the
14 uncontrolled release of information compiled through the
15 power of the State.

16 If there are no further questions, I urge
17 that the Third Circuit be affirmed.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Yang, you have six minutes left.

20 REBUTTAL ARGUMENT OF ANTHONY A. YANG

21 ON BEHALF OF PETITIONERS

22 MR. YANG: Thank you, Mr. Chief Justice.

23 AT&T appears to have changed or at least
24 modified its position somewhat from the position
25 articulated at page 14 of its brief. There AT&T

1 says, "By expressly defining the noun 'person' to
2 include corporations, Congress necessarily defined the
3 adjective form of that noun, personal, also to include
4 corporations."

5 Now, AT&T has given up on the grammatical
6 imperative that guided exclusively the court of appeals
7 decision in this case, there's nothing left. AT&T can
8 provide no example where the term personal privacy has
9 ever been used to refer to a corporation, much less a
10 foreign government or state or local government in any
11 context, whether it be FOIA, the law generally, or even
12 in common usage.

13 AT&T can provide no example of any problems
14 that have arisen in over 35 years of the Government's
15 consistent administration of this provision. In fact,
16 all indications point in simply one direction. Personal
17 privacy applies only to individuals. The terms personal
18 and the terms privacy do that alone. And together,
19 personal privacy makes that clear.

20 The legislative history, the decisions of
21 this Court pointing to the balance applying only to
22 individuals, individual rights. All point in the same
23 direction.

24 We would ask that the Third Circuit be
25 reversed.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 11:07 a.m., the case in the

4 above-entitled matter was submitted.)

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