No. 09-1279

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Petitioners,

v.

AT&T, INC., et al.,

Respondents.

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

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF THE PETITIONERS

MARC ROTENBERG
Counsel of Record
JOHN VERDI
AMIE STEPANOVICH
ELECTRONIC PRIVACY
INFORMATION
CENTER (EPIC)
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140

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INTEREST OF THE *AMICI CURIAE*[1]

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.

EPIC has participated as *amicus curiae* in many cases before this Court and other courts concerning privacy, new technologies, and Constitutional interests. These cases include *Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 873 (9th Cir. 2008), *cert. granted,* 130 S. Ct. 1755 (U.S. Mar. 8, 2010) (No. 09-530); *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010); *Doe v. Reed*, 130 S. Ct. 2811 (2010); *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009); *Herring v. United States*, 129 S. Ct. 695 (2009); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008); *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*, 537

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. *Amici* lodged with the Court Petitioners' and Respondents' letters of consent contemporaneous with the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party. EPIC Appellate Advocacy Fellow Conor Kennedy participated in the preparation of this brief.

U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); *S.E.C. v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010); *IMS Health Inc. v. Sorrell*, 631 F. Supp. 2d 434 (D. Vt. 2009), *appeal docketed*, No. 09-1913 (2nd Cir. 2010); *Harris v. Blockbuster Inc.*, 622 F. Supp. 2d 396 (N.D. Tex. 2009), *appeal docketed*, No. 09-10420 (5th Cir. 2009); *National Cable and Telecommunications Association v. Federal Communications Commission*, 555 F.3d 996 (D.C. Cir. 2009); *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008); *Bunnell v. Motion Picture Association of America*, No. 07-56640 (9th Cir. filed Nov. 12, 2007); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005); *Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010); *G.D. v. Kenny*, 984 A.2d 921 (N.J. Super. Ct. App. Div. 2009), *cert. granted*, 992 A.2d 793 (2010) (No. 65,366); *Commonwealth v. Connolly*, 913 N.E.2d 356 (2009); and *State v. Raines*, 857 A.2d 19 (Md. 2003).

EPIC has a longstanding interest in personal privacy, government transparency, and the proper application of freedom of information laws. EPIC routinely testifies in Congress on these topics, publishes books on these topics,[2] and maintains

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[2] LITIGATION UNDER THE OPEN GOVERNMENT LAWS (2010)(Harry A. Hammitt et al eds., 2010); THE PRIVACY LAW SOURCEBOOK: UNITED STATES LAW, INTERNATIONAL LAW, AND RECENT DEVELOPMENTS 2004 (Marc Rotenberg ed., 2004).

several popular web sites devoted to these topics.[3] The EPIC Advisory Board includes distinguished legal scholars and technical experts whose work is focused on these topics.

The promotion of open government and the protection of personal privacy are both critical to purpose and functioning of the FOIA. EPIC supports the right of individuals to assert personal privacy interests in records held by federal agencies as the statute allows. Consistent with the purposes of the Act, EPIC rejects the interpretation that institutional "persons" – corporations, state governments, foreign sovereigns – have "personal privacy" interests. EPIC therefore opposes the use of FOIA Exemption 7(C)'s "personal privacy" safeguards to prevent the disclosure of agency records concerning corporations that would otherwise be made available to the public. The Third Circuit's determination in the present case contradicts decades of clear consensus among academic and technical experts that "personal privacy" rights apply only to individuals. Moreover, a survey of other privacy statutes makes clear that corporations do not have, and may not assert, "personal privacy" interests.

If upheld, the Third Circuit's interpretation of "personal privacy" would stand as an outlier, untethered to common understanding, legal scholarship, technical methods, or privacy law.

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[3] *E.g.* Privacy.org Homepage, http://www.privacy.org; EPIC Homepage, http://www.epic.org; Privacy Coalition Homepage, http://www.privacycoalition.org.

Technical Experts and Legal Scholars

Dr. Alessandro Acquisti
Associate Professor of Information Technology and Public Policy, Carnegie Mellon University

Steven Aftergood
Senior Research Analyst, Federation of American Scientists

Grayson Barber, Esq.
Grayson Barber, LLC

Ann Bartow
Associate Professor of Law, University of South Carolina School of Law

Christine L. Borgman
Professor & Presidential Chair in Information Studies, UCLA

Bill Coleman
Founder, CEO & Chairman, Cassatt Corporation

Simon Davies
Director General, Privacy International

Dr. David Flaherty
Former Information and Privacy Commissioner, British Columbia, Canada

Philip Friedman, Friedman Law Offices, PLLC

Aziz Huq
Professor, University of Chicago Law School

Deborah Hurley, Consultant

Jerry Kang
Professor of Law, UCLA; Professor of Asian American Studies (by courtesy), UCLA; Korea Times–Hankook Ilbo Chair in Korean American Studies, UCLA

Ian Kerr
Associate Professor, Canada Chair of Ethics, Law, and Technology, University of Ottawa

Chris Larsen, CEO and Co-Founder, Prosper Marketplace, Inc.

Rebecca MacKinnon
Visiting Fellow, Princeton Center for Information Technology Policy

Gary T. Marx
Professor Emeritus of Sociology, MIT

Mary Minow, LibraryLaw.com

Pablo G. Molina
CIO, AVP of IT and Adjunct Professor, Georgetown University

Dr. Peter G. Neumann
Fellow of AAAS, ACM, IEEE, SRI International

Helen Nissenbaum
Professor, Media, Culture & Communication, NYU

Ray Ozzie
Chief Software Architect, Microsoft

Deborah C. Peel, MD, Founder and Chair, Patient Privacy Rights

Chip Pitts
Lecturer, Stanford Law School and Oxford University

Bruce Schneier
Security Technologist

Dr. Barbara Simons
IBM Research (retired)

Frank M. Tuerkheimer
Professor of Law, University of Wisconsin Law School

Edward G. Viltz
www.InternetCC.org

(Affiliations are for identification only)

SUMMARY OF THE ARGUMENT

The Solicitor General's brief makes clear that the FOIA exemption for "personal privacy" protects the interests of individuals, not corporations. This is evident, as the brief argues, from the text of the Act, the drafting history, the uniform interpretation of the provision, and the fact that the Third Circuit's analyses does not withstand scrutiny and would lead to bizarre results.

Amicus curiae EPIC sets forth the views of legal scholars and technical experts, as well as a survey of related privacy law, in support of Petitioner to underscore that it is also the view of these scholars and experts that the decision below is contrary to widespread understanding, and almost nonsensical.

ARGUMENT

I. According to Legal Scholars, the Phrase "personal privacy" Refers to Individuals, but Not Corporations

The cornerstone of the modern understanding of "privacy" in American law is the 1890 article by Samuel D. Warren and Louis D. Brandeis. The article begins:

> That the *individual* shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. [4] (emphasis added)

And continues:

> Recent inventions and business methods call attention to the next step which must be taken for the *protection of the person*, and for securing to the *individual* what Judge Cooley calls the right "to be let alone."[5] (emphasis added)

Brandeis and Warren explain that their "purpose is to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the *individual*; and, if it does, what the nature and extent of such protection is."[6]

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[4] Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

[5] *Id.* at 195.

[6] *Id.* at 197.

(emphasis added). The authors note that "[t]he common law secures to each *individual* the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others." (emphasis added). And they find that "[i]n every such case the *individual* is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent."[7] (emphasis added).

In all, the word "individual" appears 26 times in the article "The Right to Privacy;" the word "corporation" does not appear once.

If it was not obvious that in American law "privacy" would refer to the claims of individuals, in 1928, Justice Brandeis famously described the right of privacy as "the most comprehensive of rights and the right most valued by civilized men," a natural outgrowth of recognizing "the significance of man's spiritual nature, of his feelings and of his intellect."[8] "They knew," Brandeis wrote of the framers who crafted the nation's founding document, "that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations."[9]

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[7] *Id.* at 199.

[8] *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[9] *Id.*

Although AT&T had filed a brief in support of Olmstead in that case,[10] Justice Brandeis did not speak to the corporation's interest; he spoke to the claim of the individual whose personal communications were subject to disclosure without a warrant.

Since *The Right to Privacy* article, and the *Olmstead* dissent, legal scholars have described a modern conception of privacy, a robust, vital right tied to the intricacies of human flourishing and individual autonomy. A rigorous focus on the interest and rights of living, breathing legal subjects spans the spectrum of privacy law commentary, covering financial disclosure,[11] state government databases,[12] national security, and a wide range of

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[10] Brief for American Telephone and Telegraph Company et. al. as Amicus Curiae Supporting Petitioners, *Olmstead*, 277 U.S. 438.

[11] CHRISTOPHER WOLF, PROSKAUER ON PRIVACY: A GUIDE TO PRIVACY AND DATA SECURITY LAW IN THE INFORMATION AGE § 2:1.1 (1st ed. 2007) ("An individual's level of financial information privacy depends on where he or she lives, what rights that person has chosen to exercise, and whether there is a superior need for information asserted by the government.").

[12] Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 73 (2006) ("Confidence in government at all levels is best sustained by access to the information necessary to promote the vigorous public discussion that a well-functioning democracy requires. However, when dealing with information that individuals reasonably expect to remain private and to not be published by the government, there should be a

other topics.[13] In one of the most influential taxonomies of privacy, Dean Prosser described a "complex of four" privacy torts: intrusion, upon seclusion, public disclosure of private facts, publication of information that places an individual in a false light, and the appropriation of a person's name or likeness.[14] Prosser's articulation was set out in the Restatement of Torts and became the basis for privacy rights in both common law and statute. But no court has ever held that a corporation may sue under the classic privacy torts.[15] As the Restatement

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presumption that such information will remain confidential unless there is an overriding justification for its disclosure.").

[13] *See e.g.,* David Flaherty, *Privacy Impact Assessments: An Essential Tool for Data Protection*, Presentation to the Annual Meeting of Privacy and Data Protection Officials (Sep. 28, 2000), http://www.rogerclarke.com/DV/PIAsFlaherty.html ("The essential goal is to describe personal data flows as fully as possible so as to understand what impact the innovation or modification may have on the personal privacy of employees or customers and how fair information practices may be complied with.").

[14] William L. Prosser, *Privacy,* 48 CALIF. L. REV. 383-388-89 (1960).

[15] Scott A. Hartman, *Privacy, Personhood, and the Courts: FOIA Exemption 7(c) in Context,* ___ YALE L.J. 379-388 (2010), available at http://ssrn.com?abstract-1684498. *See, e.g.*, *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 594 (Ind. 2001) (holding that a university, as an artificial entiry, could not assert a privacy claim for appropriations against a former employee who attached its name to his website.)

explains: "A corporation, partnership or unincorporated association has no personal right of privacy."[16]

In 1968 Professor, and later Solicitor General, Charles Fried set out a powerful articulation of this right. He wrote, "privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust."[17] He concludes:

> The concept of privacy requires, as we have seen, a sense of control and a justified acknowledged power to control aspects of one's environment . . . A legal right to control is control which is the least open to question and argument; it is the kind of control we are most serious about. As we have seen, privacy is not just an absence of information abroad about ourselves; it is a feeling of security in control over that information. By using the public, impersonal and ultimate institution of law to grant persons this control, we at once put the right to control as far beyond question as we can and at the same time show how seriously we take this right.[18]

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[16] RESTATEMENT (SECOND) OF TORTS §652I cmt. c.

[17] Charles Fried, Privacy, 77 YALE L.J. 475-93 (1968), reprinted in
PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 203, 205.
(ed. Ferdinand D. Schoeman 1984).

[18] *Id.* at 219.

More recently, Professor Jerry Kang, a prominent legal scholar, has described the core human interests underlying the right to privacy. First, privacy helps individuals avoid the embarrassment that accompanies the disclosure of certain personal details. Second, privacy helps to preserve human dignity, respect, and autonomy. Finally, privacy helps individuals construct intimacy with others.[19] Prominent privacy scholars have elaborated upon each of these purposes in order to "identify and animate the compelling ways that privacy violations can negatively impact the lives of living, breathing human beings," as Professor Ann Bartow put it:[20]

The embarrassment that results from privacy incursions is uniquely detrimental to humans, with irreparable effects on individuals. As Professor Julie E. Cohen has written:

> The point [of privacy regulation] is not that people will not learn under conditions of no-privacy, but that they will learn differently, and that the experience of being watched will constrain, ex ante, the acceptable spectrum of belief and behavior.[21]

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[19] Jerry Kang, *Info. Privacy in Cyberspace Transactions,* 50 STAN. L. REV. 1193, 1212–16, 1260 (1998).

[20] Ann Bartow, *A Feeling of Unease About Privacy Law,* 155 U. PA. L. REV. PENNUMBRA, 52 (2007).

[21] Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1425 (2000).

Professor Cohen cites cognitive psychology research to demonstrate that embarrassment stunts social development and growth, neither of which is fungible or replaceable in human beings.[22] Professor Jeffrey Rosen also observes: "knowledge of private information poses special threats to individuals' ability to structure their lives in unconventional ways."[23] Professor Helen Nissenbaum does as well:

> [I]nsofar as privacy, understood as a constraint on access to people through information, frees us from the stultifying effects of scrutiny and approbation (or disapprobation), it contributes to material conditions for the development and exercise of autonomy and freedom in thought and action.[24]

Privacy expert and attorney Robert Ellis Smith accentuates the connection between this kind of freedom and the productive capacity specific to human beings: "Without privacy, everyone resembles everyone else. A number will do, not a name or personality. Without privacy, individuality perishes."[25]

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[22] *Id.* at 1425, n.195.

[23] Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2121 (2001).

[24] HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 82 (2010).

[25] ROBERT ELLIS SMITH, OUR VANISHING PRIVACY AND WHAT YOU CAN DO TO PROTECT YOURS 4 (1993).

Professor Anita Allen-Castellitto extends it further, demonstrating that limiting the disclosure of embarrassing personal information strengthens the individual's capacity to experiment and comply with cross-cutting social roles, both in public and behind closed doors:

> Privacy has value as the context in which individuals work to make themselves better equipped for their familial, professional, and political roles. With privacy, I can try to become competent to perform and achieve up to my capacities, as well as to try out new ideas and practice developing skills.[26]

As noted international privacy expert David Falherty has explained:

> The ultimate protection for the individual is the constitutional entrenchment of rights to privacy and data protection. One can make a strong argument, even in the context of primarily seeking to promote data protection, that having an explicit entrenched constitutional right to personal privacy is a desirable goal in any Western society that has a written constitution and a bill of rights. The purpose of creating a constitutional right to privacy is not to leave data protection solely to the court except for the interpretation of the necessary statutes in statutes cases of conflict, but to allow

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[26] Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 739-40 (1999).

> individuals to assert privacy claims that extend beyond the act.[27]

A second set of uniquely human interests underlying the right to privacy are interconnected: dignity, respect, and autonomy. Professor Francesca Bignami urges that "[e]ven in a world in which, thanks to technology, acquiring knowledge about others is virtually effortless, personal autonomy must be respected."[28] Professor Rosen explains how the term applies to privacy law: "autonomy concerns the individuals' ability to maintain a sphere of immunity from social norms and regulations."[29] As Professor Nissenbaum has written:

> [E]ven when we are uncertain whether or not we are being watched, we must act as if we are. When this happens, when we have internalized the gaze of the watchers and see ourselves through their eyes, we are acting according to their principles and not ones that are truly our own.[30]

Professor Gary T. Marx has written:

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[27] David H. Flaherty, PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES 376 (1998).

[28] Francesca Bignami, *The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts*, 41 CORNELL INT'L L.J. 211, 223 (2008).

[29] Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2121 (2001).

[30] HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 82 (2010).

> When the self can be technologically invaded without permission and even often without the knowledge of the person, dignity and liberty are diminished. Respect for the *individual* involves not causing harm, treating persons fairly through the use of universalistically applied valid measures, offering meaningful choices and avoiding manipulation and coercion. These in turn depend on being adequately informed.[31] (emphasis added).

Professor Allen writes that statutory privacy protections are intended to remedy "damage[d] feelings and sensibilities" – a purpose that is inapplicable to corporate entities that are incapable of experiencing hurt feelings.[32]

Former OECD Official and Director of the Harvard Information Infrastructure Project Deborah Hurley adds that:

> Protection of privacy and personal data are important because they go profoundly to our sense of self, individual integrity, and autonomy and to our ability to express ourselves, to communicate with others, and to

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[31] Gary T. Marx, *Murky Conceptual Waters: the Public and the Private* (2001), http://web.mit.edu/gtmarx/www/murkypublicandprivate.html

[32] Anita L. Allen, PRIVACY LAW AND SOCIETY 113 (2007).

> participate in the collective, all deep human needs.[33]

Widely renowned privacy advocate Simon Davies has said that the right to privacy is simply:

> . . . the right to protect ourselves against intrusion by the outside world. It is the measure we use to set limits on the demands made by organizations and people. It is the right we invoke to defend our personal freedom, our autonomy and our identity. It is the basis upon which we assess the balance of power between ourselves, and the world around us.[34]

Professor Pamela Samuelson accounts for comparatively stronger privacy protections in Europe with reference to the ultimate loss of dignity, respect, and autonomy: genocide.

> Europeans have more of a civil libertarian perspective on personal data protection in part because of certain historical experiences they have had. One factor that enabled the Nazis to efficiently round up, transport, and seize assets of Jews (and others they viewed as "undesirables") was the extensive repositories of personal data available not only from public sector but also from private sector sources. Europeans may realize more

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[33] Deborah Hurley, *A Whole World in One Glance: Privacy as a Key Enabler of Individual Participation in Democratic Governance,* 1 International Journal of Internet Technology and Secured Transactions 2 (2007).

[34] SIMON DAVIES, BIG BROTHER 23-24 (1996).

> than most Americans the abusive potential for reuses of personal data that may initially have been provided to a particular entity for a specific, limited purpose.[35]

Finally, privacy law scholars highlight human beings' special relationship with the intimate details of their personal lives, which the right to privacy protects. Professor Allen has written that privacy is an essential precursor to "intimate relationships on which workable family and community life depend."[36] Professor Rosen explains:

> If individuals cannot form relationships of trust without fear that their confidences will be betrayed, the uncertainty about whether or not their most intimate moments are being recorded for future exposure will make intimacy impossible; and without intimacy, there will be no opportunity to develop the autonomous, inner-directed self that defies social expectations rather than conforms to them.[37]

Professor Nissenbaum expands this point.

> There are two sides to this coin: our closest relationships of love and friendship are defined by our willingness to share information, yet we signal our trust in and

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[35] Pamela Samuelson, *Privacy As Intellectual Property?,* 52 STAN. L. REV. 1125, 1143-44 (2000).

[36] Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 739 (1999).

[37] *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2123-24 (2001).

> respect for others by not insisting that they relinquish control over information to us.[38]

Implicit in these accounts of privacy's purposes is a particular understanding of privacy's subject. "While corporations clearly have an interest in maintaining the confidentiality of certain information, *that interest is not a privacy interest*."[39] (emphasis added). The structure of corporate law makes clear that the purposes of privacy could not apply to corporations. This is not because corporations are not legal subjects, but instead because corporate and securities laws seek to harness scrutiny as a means of ensuring accountability. For corporations, being subject to the gaze of the world is oftentimes the point. Within that structure, the trade secrecy framework operates to protect a more narrowly defined category of secrets in ways that serve the goals of innovation and good stewardship of corporate assets.

Professor Chip Pitts, co-author and editor of the leading legal textbook on corporate social responsibility, thus highlights that far from enshrining corporate privacy rights, the clear trend of the law in the United States and abroad is to require ever greater *transparency* from corporations as a vital means of promoting corporate accountability –

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[38] HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 84 (2010).

[39] Scott A. Hartman, *Privacy, Personhood, and the Courts: FOIA Exemption 7(c) in Context,* ___ YALE L.J. 379, 384 (2010), available at http://ssrn.com?abstract-1684498.

including for violations of privacy and other human rights held by individuals, not artificial entities.[40]

In sum, scholars in the privacy field are engaged in a rich discussion about the scope of a legal right that concerns the interests of individuals. They explore the various dimensions and settings of privacy claims, the competing claims, the ties to autonomy, personal development, and the political state. On many of these issues, there are differences and disagreements. But as to the central focus of the field – that privacy concerns claims of individuals – there is unanimity.

II. According to Technical Experts, the Phrase "personal privacy" Refers to Individuals, but Not Corporations

Given the specific threats posed to privacy by the emergence of modern computing, it is not surprising that experts in computer security have contributed to the formulation of the modern privacy right.

Willis Ware, a pioneering figure in the computer field whose work contributed directly to the Privacy Act of 1974, wrote "*Privacy* is an issue that concerns the computer community in connection with maintaining personal information on individual

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[40] *See generally* PITTS, CHIP (ed.), KERR, JANDA, & PITTS, CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS. (Butterworths/LexisNexis 2009) (chapter seven, on the legal principle of transparency).

citizens in computerized record-keeping systems."[41] (emphasis in the original). Medical privacy expert Latanya Sweeney focuses on the very same interests in her cutting edge research about patient records.

> While law enforcement and counter-terrorism objectives encourage the development of algorithms that learn sensitive information from volumes of disparate data left behind as people conduct their daily affairs, the potential for serious harm to innocent individuals evokes grave privacy concerns.[42]

More recently, experts in the field of cryptography and computer security have stated:

> Privacy is at the very soul of being human. . . . Privacy is the right to autonomy, and it includes the right to be let alone. Privacy encompasses the right to control information about ourselves, including the right to limit access to that information. The right to privacy embraces the right to keep confidence confidential and to share them in private conversation. Most important, the

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[41] R. Turn and W.H. Ware, "Privacy and Security Issues in Information Systems," in D. Johnson and J. Snapper, ETHICAL ISSUES IN THE USE OF COMPUTERS 133 (1976); *see also* U.S. Dep't. of Health, Education, and Welfare, *Secretary's Advisory Committee on Automated Personal Data Systems, Records, Computers, and the Rights of Citizens* (1973).

[42] Latanya Sweeney, *Privacy-Enhanced Linking*, Carnegie Mellon University, School of Computer Science Technical Report CMU-ISRI-05-136 (2005).

> right to privacy means the right to enjoy solitude, intimacy, and anonymity.[43]

As Security Technologist Bruce Schneier has explained, "Privacy is an inherent human right, and a requirement for maintaining the human condition with dignity and respect."[44]

In a seminal article on the future of privacy, computer scientist David Chaum explicitly distinguished the privacy rights of individuals from those asserted by corporations as organizations:

> The choice between keeping information in the hands of individuals or of organizations is being made each time any government or business decides to automate another set of transactions. In one direction lies unprecedented scrutiny and control of people's lives, in the other, secure parity between individuals and organizations. The shape of society in the next century may depend on which approach predominates.[45]

This view of individual technical experts – that privacy protects the interests of individuals – is routinely reflected in the reports of the National

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[43] WHITFIELD DIFFIE & SUSAN LANDAU, PRIVACY ON THE LINE: THE POLITICS OF WIRETAPPING AND ENCRYPTION 126 (1998).

[44] Bruce Schneier, The Eternal Value of Privacy, Wired: Security Matters, http://www.wired.com/politics/security/commentary/securitymatters/2006/05/70886/ (May 18, 2005).

[45] David Chaum, *Achieving Electronic* Privacy, SCI. AM., Aug. 1992, at 96.

Academies of Science concerning privacy. As one recent report states:

> Privacy is a growing concern in the United States and around the world. The spread of the Internet and the seemingly boundaryless options for collecting, saving, sharing, and comparing information trigger consumer worries. Online practices of business and government agencies may present new ways to compromise privacy, and e-commerce and technologies that make a wide range of personal information available to anyone with a Web browser only begin to hint at the possibilities for inappropriate or unwarranted intrusion into our personal lives.[46]

There are many fields in computer science that concern a broader range of interests, including those of corporations. But when technical experts speak of "personal privacy," they are referring to individuals, but not corporations.

III. A Survey of Privacy Laws Makes Clear that the Phrase "personal privacy" Refers to Individuals, but Not Corporations

It is not unreasonable to begin an examination of the meaning of key terms in law by beginning with the primary source on which many lawyers and court's rely. Black's Law Dictionary uses the term "privacy" only for individuals, not for corporations:

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[46] THE NATIONAL ACADEMIES, ENGAGING PRIVACY AND INFORMATION TECHNOLOGY IN A DIGITAL AGE (2007).

> **Privacy law (1936).** 1. A federal or state statute that protects a person's right to be left alone or that restricts public access to personal information such as tax returns and medical records. 2. The area of legal studies dealing with a person's right to be left alone and with restricting access to personal information such as tax returns and medical records.
>
> **personal, adj (14c).** 1. Of or affecting a person.[47]

In fact, in more than a dozen examples, Black's sets out definitions that focus on the claims of individuals and not corporations.[48]

Privacy statutes mirror Black's definition, consistently protecting individual rights, but not rights of corporations.

A. Privacy Statutes Consistently Protect Individual Rights, but Not Rights of Corporations

The Freedom of Information Act is part of a broad framework of privacy legislation built around

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[47] BLACK'S LAW DICTIONARY, 9th Ed., for the iPhone/iPad/iPod Touch. Version 2.0.0.

[48] *Id. See, e.g,* "privacy act," "zone of privacy," "autonomy privacy," "right of privacy," "right to privacy," "privacy privilege," "Privacy Act of 1974," "invasion of privacy," "informational privacy," "marital-privacy doctrine," "Video Privacy Protection Act," "invasion of privacy by intrusion," "invasion of privacy by false light," "invasion of privacy by appropriation," "invasion of privacy by public disclosure."

the protection of individuals. Throughout the history of the United States, Congress has passed privacy laws that have been aimed at creating and developing an individual right of privacy, not a right for corporations or other non-natural persons.[49]

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[49] Privacy Act of 1974, 5 U.S.C. § 552a (2010); Federal Education Rights and Privacy Act, 20 U.S.C. § 1232g (2010); Cable Communications Policy Act of 1984, 47 U.S.C. § 551 (2010); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2010); Employee Polygraph Protection Act 29 U.S.C. §§ 2001 – 2009 (2010); Right to Financial Privacy Act, 12 U.S.C. §§ 3401 – 3422 (2010); Privacy Protection Act, 42 U.S.C. § 2000aa (2010); Telephone Consumer Protection Act, 47 U.S.C. § 227 (2010); Driver's Privacy Protection Act, 18 U.S.C. §§ 2721 – 2725 (2010); No Child Left Behind Act, 20 U.S.C. § 1232h (2010); Telecommunications Act of 1996, 47 U.S.C § 222 (2010); Video Voyeurism Prevention Act, 18 U.S.C. § 1801 (2010); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 §§ 262, 264; 45 C.F.R. §§160-164; E-Government Act of 2002, 44 U.S.C. § 101 (2010); Homeland Security Act of 2002, 6 U.S.C. § 460 (2010); Genetic Information Nondiscrimination Act, Pub. L. 110-233 (2008); Financial Services Modernization Act, Pub. L. No. 106-102 (1999), codified at 15 U.S.C. §§ 6801-6809 (2010); Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501 – 6506 (2010); Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681y (2010). *But c.f.* Stored Communications Act, 18 U.S.C. §§ 2701 – 12 (2010). *See generally,* THE PRIVACY LAW SOURCEBOOK: UNITED STATES LAW, INTERNATIONAL LAW, AND RECENT DEVELOPMENTS 2004 (Marc Rotenberg ed., 2004).

The primary source of privacy legislation in the United States is the Privacy Act of 1974.[50] With the Privacy Act, Congress recognized that "in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies."[51] The Act, among other things, prevents an administrative agency from disclosing "any record . . . except pursuant to a written request by, or with the prior written consent of, the *individual* to whom the record pertains."[52] (emphasis added). The Act also allows an individual to "gain access to his record or to any information pertaining to him," and requires agencies to retain only "such information about an *individual* as is relevant and necessary." (emphasis added). The statute does not once mention a "corporation" or an "organization."

Agencies were further restricted in their use of personal information in the E-Government Act of 2002, which requires an agency to create Privacy Impact Assessments whenever it is "developing or procuring information technology that collects, maintains, or disseminates information that is in an identifiable form; or initiating a new collection of information that . . . includes any information in an identifiable form permitting the physical or online contacting of a specific individual."[53] Also passed in

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[50] 5 U.S.C. § 552a (2010).

[51] Pub. L. No. 93-579 § 2 (1974).

[52] 5 U.S.C. § 552a(b).

[53] 5 U.S.C. §552b (2010).

2002 was the U.S. Homeland Security Act, which, among other things, prohibited agencies from implementing the Terrorism Information and Prevention System ("TIPS")[54] and explicitly denied authorization of any "national identification system or card."[55] TIPS was supposed to be a "nationwide program giving millions of American truckers, letter carriers, train conductors, ship captains, utility employees, and others a formal way to report suspicious terrorist activity."[56]

Passed in the same year as the Privacy Act is the Family Educational Rights and Privacy Act ("FERPA").[57] FERPA serves to protect the privacy interests of specific individuals, students in this case, by preventing any "educational agency or institution" that receives public funding from "releasing, or providing access to, any personally identifiable information in education records other than directory information."[58]

In 2001, Congress expanded individual student privacy in the No Child Left Behind Act, prohibiting any requirement for a student to "submit to a survey, analysis, or evaluation that reveals information concerning (1) political affiliations or beliefs of the

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[54] 6 U.S.C. § 460 (2010).

[55] 6 U.S.C. § 554 (2010).

[56] American Library Association: Terrorism Information and Prevention System, http://www.ala.org/ala/aboutala/offices/oif/ifissues/terrorisminformationprevention.cfm (last visited Nov. 11, 2010).

[57] 20 U.S.C. § 1232g (2010).

[58] 20 U.S.C. § 1232g(b)(2).

student or the student's parents, (2) mental or psychological problems of the student or the student's family, (3) sex behavior or attitudes, (4) illegal, anti-social, self-incriminating, or demeaning behavior, (5) critical appraisals of other individuals with whom respondents have close family relationships, (6) legally recognized privileged or analogous relationships . . . , (7) religious practices, affiliations, or beliefs of the student or the student's parent, or (8) income, without the prior consent of the student."[59]

Many other statutes reflect purposes similar to the Privacy Act, namely to assign a range of responsibilities associated with the collection and use of personally identifiable information so as to protect the interests of the individual. The Cable Communications Policy Act of 1984 prevents cable operators from collecting "personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned."[60] In the Video Privacy Protection Act, Congress created liability against "a video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider."[61] Congress passed the Employee Polygraph Protection Act in 1988, generally prohibiting employers from (1) requiring or suggesting that an employee or prospective employee "submit to any lie detector test," (2) using "the results of any lie detector test," or

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[59] 20 U.S.C. § 1232h(b).

[60] 47 U.S.C. § 551(b)(1) (2010).

[61] 18 U.S.C. § 2710(b)(1) (1988).

(3) taking employment action, including to "discharge, discipline, discriminate against in any manner, or deny employment or promotion to," any employee who refuses to take a lie detector test or institutes or testifies in a proceeding under or related to this Act.[62]

Congress expanded the statutory privacy rights of individuals in 1978 to include a prohibition on the Government's authority to obtain copies of, access to, or information contained in the financial records of a customer from a financial institution without following certain notice and challenge procedures.[63] Though it must have been clear that public corporations and organizations with bank accounts would have an interest in keeping these records confidential, Congress unambiguously chose to protect only the privacy of records for "individuals" or small partnerships with "five or fewer individuals."[64] The Financial Services Modernization Act, also known as the Gramm-Leach Bliley Act ("GLBA"), was passed in 1999.[65] GLBA consolidates financial institutes and allows these institutions to share consumer information with their affiliates for sales and promotional purposes.[66] In order to protect consumer privacy, the GLBA requires financial

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[62] 29 U.S.C. § 2002(1)-(4) (1988).

[63] Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 (2010).

[64] 12 U.S.C. § 3401(4) (2010).

[65] Pub. L. No. 106-102 (1999), codified at 15 U.S.C. §§ 6801-6809 (2010).

[66] *Id.*

institutions to "protect the security and confidentiality of . . . customers' nonpublic personal information" by giving customers the right to opt-out of having their personal information sold to third parties.[67] Institutions also must prevent fraudulent access to personal customer information and provide privacy policy notices.[68] These protections are designed to protect the privacy of data that a customer provides to his or her financial institution, not the institution itself.

In 1980, Congress passed the Privacy Protection Act, which rendered it unlawful for "a government officer or employee . . . to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication . . . ."[69] Again, Congress unambiguously placed the privacy interest with the individual who created the work product, and not with an employer broadcast or communication corporation.[70] Similar prohibitions on the government come from the 1994 Driver's Privacy Protection Act.[71] This Act prevents the government from disclosing any "personal information . . . about any *individual* obtained by the department in connection with a motor vehicle record" or "highly restricted personal information . . . about any individual obtained by the

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[67] 15 U.S.C. § 6801(a).

[68] 15 U.S.C. § 6802(a).

[69] 42 U.S.C. § 2000aa(a) (2010).

[70] *See id.*

[71] 18 U.S.C. §§ 2721-2725 (2010).

department in connection with a motor vehicle record."[72] (emphasis added).

The Health Insurance Portability and Accountability Act ("HIPAA"), enacted in 1996, was adopted to ensure health care providers protect the privacy of individuals' health records and data.[73] HIPAA includes privacy protections for "individually identifiable health information."[74] That term is defined in the Act as "any information, including demographic information collected from an individual, that . . . relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and identifies the individual; or with respect to which there is a reasonable basis to believe that the information can be used to identify the individual."[75] The Genetic Information Nondiscrimination Act ("GINA") of 2008[76] further protected health information of individuals. GINA provides that "a group health plan . . . shall not request or require an *individual* or a family member . . . to undergo a genetic test."[77] (emphasis added). In addition, health insurers also may not "request, require or purchase

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[72] 18 U.S.C. § 2721(a)(1)-(2) (1994).

[73] Pub. L. No. 104-191 §§ 262, 264; 45 C.F.R. §§160-164.

[74] 42 U.S.C. § 1320d (2010).

[75] 42 U.S.C. § 1320d(6).

[76] Pub. L. 110-233 (2008).

[77] Pub. L. 110-233 § 110(c)(1).

genetic information for underwriting purposes."[78] Since corporations and organizations cannot possess genetic information, the privacy interests protected by this statute, again, are exclusive to individuals.

The Telephone Consumer Protection Act was passed in 1991 to protect privacy rights in telephone solicitations. The Act created a private right of action against anyone who would "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice . . . without the prior express consent of the called party."[79] In passing the statute, Congress emphasized the intrusive nature of such automated phone calls into the home.[80] In the statute, Congress strictly limited the prohibition to residential calls and calls to emergency telephone lines that may pose a "risk to public safety."[81]

The Video Voyeurism Protection Act was passed more than a decade later, in 2004, in response to a new threat to safety and security. The Act creates recourse against one who, on federal lands, "has the intent to capture an image of a private area of an *individual* without their consent, and knowingly does so under circumstances in which the *individual* has a reasonable expectation of privacy."[82] (emphases added). The references to an individual in this act are bolstered by the impossibility of a non-natural person possessing a violable privacy interest in this case.

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[78] Pub. L. 110-233 § 110(d)(1).

[79] 47 U.S.C. § 227(b)(1)(B) (2010).

[80] Pub. L. 102-243 § 2 (1991).

[81] 47 U.S.C. § 227(b)(1); Pub. L. 102-243 § 2.

[82] 18 U.S.C. § 1801(a) (2010).

In contrast, when dealing with a corporation or organization's proprietary information, statutes typically use the term "confidentiality," as opposed to "privacy." For example, the Telecommunications Act of 1996 addresses concerns with Consumer Proprietary Network Information ("CPNI"), including calling patterns, billing records, and unlisted telephone numbers of service subscribers.[83] The Act provides that "every telecommunication carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers."[84] Compare this language to the Act's provision under the heading "privacy requirements for telecommunications carriers," which addresses the customer's interest in their own data, preventing telecommunications carriers from using that information outside the "provision of . . . the telecommunications service from which such information is derived, or . . . services necessary to, or used in, the provision of such telecommunications service."[85]

B. Even When a Privacy Statute Defines "Person" to Include Corporations, "Personal" Still Refers Only to Individuals

Congress often defines the term "person" within statutes in order to encompass "natural persons," "corporations," "organizations," and other entities.

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[83] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); 47 U.S.C. § 222(h)(1).

[84] 47 U.S.C. § 222(a) (2010).

[85] 47 U.S.C. § 222(c)(1).

However, even in these statutes, the term "personal," when grouped with a noun, such as "personal privacy," is still used to refer to the rights of an individual.

In 1970, Congress passed the Fair Credit Reporting Act ("FCRA").[86] The Act protects individuals from misuse of personal information by Credit Reporting Agencies by only allowing disclosure of personal information to persons whom they have reason to believe intend to use the information to evaluate an application for credit, employment, insurance, license, or governmental benefit.[87] For purposes of the FCRA, Congress defined "person" to include "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity."[88] This is a very broad definition, and mandates that every use of the word "person" is to be inclusive of each entity described, such as "communication of that information among persons related by common ownership or affiliated by corporate counsel," and "the person who makes the communication."[89] This is compared with the statute's use of the term "individual," such as in the definition of "medical information," to include "the

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[86] 15 U.S.C. §§ 1681-1681y (2010).

[87] 15 U.S.C. § 1681b.

[88] 15 U.S.C. § 1681a(b).

[89] 15 U.S.C. § 1681a(d)(2)(A)(iii); 15 U.S.C. § 1681a(o)(5)(C).

past, present, or future physical, mental, or behavioral health or condition of an individual."[90]

The treatment of language in regard to these terms is identical to that used in the Freedom of Information Act. The FCRA then goes on use the term "personal characteristics" twice: in the definition of "consumer report," within a list of information that could bear "on a consumer's credit worthiness,"[91] and again in the definition of "investigative consumer report," within a list of "information on a consumer's character."[92] In this case it is obvious that even though "person" can include a range of entities, "personal," obviously can only logically refer to an individual and not a "person" as defined by the statute.

As previously mentioned, the Driver's Privacy Protection Act ("DPPA") prevents the government from disclosing any "personal information . . . about any *individual* obtained by the department in connection with a motor vehicle record" or "highly restricted personal information . . . about any individual obtained by the department in connection with a motor vehicle record."[93] (emphasis added). The DPPA defines "person" to encompass "an individual, organization, or entity, but . . . not include[ing] a

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[90] 15 U.S.C. § 1681a(i)(1)(A).

[91] 15 U.S.C. § 1681a(d)(1). The term "consumer" is explicitly defined to mean an individual. 18 U.S.C. § 1681a(c).

[92] 15 U.S.C. § 1681a.

[93] 18 U.S.C. § 2721(a)(1)-(2) (1994).

State or agency thereof."[94] However, "personal information" is defined without regard for the more expansive definition of "person," and only includes "information that identifies an individual."[95]

The Children's Online Privacy Protection Act ("COPPA") states that it is "unlawful for an operator of a website or online service directed to children…to collect personal information from a child."[96] Personal Information is defined to include "individually identifiable information about an *individual* collected online, including (A) a first and last name, (B) a home or other physical address including a street name and name of a city or town, (C) an e-mail address, (D) a telephone number, (E) a Social Security number, (F) any other identifier that the Commission determines permits the physical or online contacting of a specific individual, or (G) information concerning the child or the parents of the child that he website collects online from the child and combines with an [other] identifier."[97] (emphasis added). As used in this definition, it is clearly and unambiguous that "personal information" refers to information solely about an individual. However, COPPA goes on to define "person" to include "any individual, partnership, corporation, trust, estate, cooperative, association, or other entity."[98] This separation of

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[94] 18 U.S.C. § 2725(2).

[95] 18 U.S.C. § 2725(3)-(4).

[96] Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501 – 6506, 6502(a)(1) (2010).

[97] 15 U.S.C. § 6501(8).

[98] 15 U.S.C. § 6501(11).

meaning demonstrates the difference in Congress' treatment of the two terms.

Recently, in 2002, Congress passed the Federal Hazardous Substances Act to address and prohibit, among other things, "the introduction or delivery for introduction into interstate commerce of any misbranded hazardous substance or banned hazardous substance."[99] The statute uses the relevant terms in an area outside of the privacy realm, though Congress uses the same treatment in distinguishing the meaning of the terms "person" and "personal."[100] The Act provides an expansive definition of "person," for it to reference "an individual, partnership, corporation, and association."[101] However, the statute later defines "hazardous substance" to include, in part, "any substance or mixture which . . . generates pressure through decomposition, heat, or other means, if such substances or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children."[102]

In this definition, as in other privacy laws, the word "personal" can only be logically understood to reference the injury to an individual: a non-natural

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[99] Federal Hazardous Substances Act, 15 U.S.C. §§ 1261 – 1278a, 1263(a) (2010).

[100] *See* 15 U.S.C. § 1261.

[101] 15 U.S.C. § 1261(e).

[102] 15 U.S.C. § 1261(f)(1)(A)(vi).

person simply cannot experience the types of injuries the statute categorizes as "personal."

CONCLUSION

If upheld, the Third Circuit's interpretation of "personal privacy" would stand as an outlier, untethered to common understanding, legal scholarship, technical methods, or privacy law.

Amici respectfully request this Court to grant Petitioners' motion to reverse the decision of the lower court.

Respectfully submitted,

MARC ROTENBERG
JOHN VERDI
AMIE STEPANOVICH
ELECTRONIC PRIVACY
INFORMATION
CENTER (EPIC)
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
p: (202) 483-1140
f: (202) 483-1248
rotenberg@epic.org

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