No. 25-_____

IN THE

Supreme Court of the United States

NATHANIEL J. BUCKLEY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Freedom of Information Act requires federal agencies to make information available to the public upon request unless the information falls within one of nine exemptions. Exemption 7 covers certain "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7).

The question presented is:

Whether "records or information compiled for law enforcement purposes" encompasses all records or information compiled by a law enforcement agency, even those not compiled for law enforcement purposes.

RELATED PROCEEDINGS

Buckley v. U.S. Department of Justice, No. 19-cv-319F (W.D.N.Y. Nov. 18, 2021)

Buckley v. U.S. Department of Justice, No. 19-cv-319F (W.D.N.Y. Sep. 28, 2023)

Buckley v. U.S. Department of Justice, No. 19-cv-319F (W.D.N.Y. Nov. 5, 2024)

Buckley v. U.S. Department of Justice, No. 24-3192-cv (2d Cir. Oct. 14, 2025)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nathaniel J. Buckley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-8a) is unpublished but available at 2025 WL 2911011. The district court's opinions (Pet. App. 9a-18a, 19a-70a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2025. Pet. App. 1a. On December 19, 2025, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including February 11, 2026. On February 4, 2026, Justice Sotomayor again extended the time within which to file a petition for a writ of certiorari to and including February 26, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appendix to this petition reproduces the relevant provisions of the Freedom of Information Act (FOIA) (codified, as amended, at 5 U.S.C. § 552).

INTRODUCTION

The Freedom of Information Act (FOIA) gives the public the right to access records from any federal agency, subject to nine limited exemptions. Exemption 7 allows the Government to withhold certain "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). Five circuits have a per se rule that any documents compiled *by* a law enforcement *agency* are automatically compiled *for* law enforcement *purposes*—no further analysis required. In those circuits, an FBI agent could even admit that he compiled a dossier to sell to a private party, to intimidate or bully, or for some other non-law enforcement purpose—and Exemption 7 would still apply. Indeed, in this case, Petitioner Nathaniel Buckley argued that the records in question were gathered in the course of an investigation that was not aimed at a law enforcement purpose, but the district court held that it wouldn't matter even if true, and the Second Circuit affirmed. Pet. App. 40a-41a.

Three circuits, by contrast, reject the per se rule. The Second Circuit itself acknowledged that there is "much to be said" for those circuits' "contrary approach." Pet. App. 4a n.2 (citations omitted). That was a considerable understatement. By its plain terms, Exemption 7 asks about the "purpose[]" for which specific records were compiled—not the nature of the agency that compiled them. And as then-Judge Scalia put the point, "[o]bviously," documents from an investigation conducted, for instance, "for purposes of harassment" aren't documents "compiled for law enforcement purposes." *Shaw v. FBI*, 749 F.2d 58, 63 (D.C. Cir. 1984).

Because the circuits are intractably split over an important and recurring question, and because the per se rule cannot be squared with the plain text of FOIA, this Court should grant certiorari and reverse.

STATEMENT OF THE CASE

A. Legal background

1. Passed in 1966 to "hold the governors accountable to the governed," FOIA requires agencies to disclose requested records. *NLRB v. Robbins Tire*, 437 U.S. 214, 242 (1978). Agencies may only withhold records that "fall within one of nine exemptions," which are "explicitly made exclusive." *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (citation and internal quotation marks omitted). "The Government bears the burden of establishing that [an] exemption applies." *DOJ v. Landano*, 508 U.S. 165, 171 (1993).

Exemption 7, the provision at issue in this case, applies to "records or information compiled for law enforcement purposes . . . to the extent that the production" of such records could result in one of six specified consequences. 5 U.S.C. § 552(b)(7). Thus, "judicial review of an asserted Exemption 7 privilege requires a two-part inquiry." *FBI v. Abramson*, 456 U.S. 615, 622 (1982). First, the agency must meet the "threshold requirement" by showing that the requested material was "compiled for law enforcement purposes." *Id.* at 623. Second, "the agency must demonstrate that release of the material would have one of the six results specified in the Act." *Id.* at 622. This case concerns the threshold requirement.

2. The text at issue in this case—"compiled for law enforcement purposes"—has not changed since FOIA's

enactment in 1966. Pub. L. No. 89-487, 80 Stat. 250, 251 (1966). As originally enacted, Exemption 7 covered all "investigatory files compiled for law enforcement purposes." *Id.* Congress amended that text into its current form in two steps.

First, in 1974, Congress narrowed the scope of Exemption 7 by adding the second part of the two-part inquiry. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 156-57 (1989).

Then, in 1986, to "resolve any doubt that law enforcement manuals" and other internal policies could be withheld, S. Rep. No. 98-221, at 23 (1983), Congress adjusted the threshold requirement's language by replacing "*investigatory records* compiled for law enforcement purposes" with "*records or information* compiled for law enforcement purposes." *Compare* Pub. L. No. 93-502, § 2(b), 88 Stat. 1563 (emphasis added), *with* Pub. L. No. 99-570, § 1802(a), 100 Stat. 3207-48 (emphasis added). Congress clarified that it did not intend to "affect the threshold question of whether 'records or information' . . . were 'compiled for law enforcement purposes.'" S. Rep. No. 98-221, at 23 (1983).

B. Factual and procedural background

1. Petitioner Nathaniel Buckley co-owns a bookstore in Buffalo, New York. Mr. Buckley is involved in political activism for anti-war and environmental causes, and the bookstore frequently hosts speakers and screens documentaries critical of the Government, and particularly the FBI. Pet. App. 22a.

2. After finding out that undercover FBI agents were monitoring bookstore events, Mr. Buckley

submitted a FOIA request seeking records relating to himself, his lawyer, and several friends, colleagues, and family members.

After three years and multiple rounds of administrative appeals, the FBI identified 58 pages of information responsive to Mr. Buckley's request. Pet. App. 3a. The FBI turned over only three pages in full. The remaining pages were either heavily redacted (some to the point where only one word on the page was visible) or withheld altogether. The only justification the FBI gave for withholding information was a form letter with boxes checked next to the claimed statutory exemptions. Pet. App. 24a; C.A. J.A. A-71-72. The FBI invoked Exemption 7 for every one of the 55 pages it failed to release in full. *Id.* A-109-10. And 14 pages were redacted based solely on Exemption 7. *Id.*

3. After exhausting his administrative appeals, Mr. Buckley filed an action in the Western District of New York. C.A. J.A. A-5-7.

To support its invocation of Exemption 7, the FBI relied on form declarations from David Hardy and Michael Seidel. C.A. J.A. A-15-55, A-149-57. Hardy was a Section Chief of the FBI's records division. *Id.* A-15. He was based in Winchester, Virginia and supervised 243 employees across 12 FBI offices. *Id.* Seidel was Hardy's successor. *Id.* A-149. The vast majority of the two declarations consisted of boilerplate language. Only two paragraphs addressed Exemption 7's threshold question, and those two paragraphs contained virtually no information specific to Mr. Buckley. *Id.* A-32-33, A-151-52.

Mr. Buckley argued that the FBI's affidavits did not establish that the records in question were

"compiled for law enforcement purposes." Pet. App. 36a-37a. He also submitted an affidavit outlining evidence that the records were compiled for a non-law-enforcement purpose—that the Government was surveilling him in order to chill his protected First Amendment activity. C.A. J.A. A-112-48. Mr. Buckley appended three news articles suggesting that the FBI had investigated him and his co-owner because of their protected political activities. *Id.*

The district court granted the FBI's motion for summary judgment with respect to its invocation of Exemption 7. Pet. App. 21a. Applying Second Circuit precedent, the court held that it was irrelevant whether the investigation was designed to target "political activists" for their "political activities." *Id.* 40a. The FBI's purposes for compiling the documents were "not proper subjects for judicial review." *Id.* 39a (quoting *Halpern v. FBI*, 181 F.3d 279, 296 (2d Cir. 1999)).[1]

4. The Second Circuit affirmed. Pet. App. 1a-8a. The court explained that under Second Circuit precedent, Exemption 7's threshold requirement is always satisfied "[w]hen records are sought from a law enforcement agency." *Id.* 4a. Thus, courts cannot "engage in a factual inquiry" regarding the law enforcement purpose. *Id.* (internal quotation omitted). The court noted that "[o]ther circuits take a contrary approach." *Id.* 4a n.2 (citations omitted). Although the panel acknowledged that there was "much to be said"

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[1] The court also held that the records were "compiled in the course of an FBI investigation." Pet. App. 38a. That holding was unnecessary; the requirement that the records be "investigatory" was deleted from Exemption 7 in 1986. *See supra* 3-4.

for the "position" taken by those circuits, it was "bound by" circuit precedent to apply the per se rule. *Id.*

REASONS FOR GRANTING THE WRIT

I. There is an intractable and acknowledged split on the question presented.

As the Second Circuit acknowledged, the circuits take "contrary approach[es]" to interpreting the phrase "law enforcement purposes" in Exemption 7. Pet. App. 4a n.2. Five circuits adopt the per se rule that when the statute says "compiled *for* law enforcement *purposes*," it actually means compiled *by* law enforcement *agencies*. Three other circuits reject the per se rule, recognizing that some documents compiled by law enforcement agencies have no law enforcement purpose and thus cannot satisfy Exemption 7's threshold requirement.

Circuits on both sides of the split recognize its existence. *See, e.g.*, *ACLU of N. Cal. v. FBI*, 881 F.3d 776, 778 n.2 (9th Cir. 2018) (acknowledging disagreement with "[o]ther circuits" that "apply a 'per se' rule"); *Jordan v. DOJ*, 668 F.3d 1188, 1193-94 (10th Cir. 2011) (surveying the circuit split and concluding "that the per se rule is the proper approach"). And with eight circuits having weighed in over the course of a half century, further percolation is unnecessary.

A. Five circuits adopt the per se rule.

1. The First Circuit originated the per se rule over four decades ago, holding that the "records of law enforcement agencies are inherently records compiled for 'law enforcement purposes' within the meaning of Exemption 7." *Irons v. Bell*, 596 F.2d 468, 475 (1st Cir. 1979). In *Irons*, the court reached this result despite

concluding that the FBI "lack[ed] even a colorable claim to a law enforcement purpose" for the requested records, which documented the agency's surveillance of a civil rights organizer. *Id.* at 472. Solely for "policy reasons," the First Circuit read "law enforcement purpose" in the statute to be "a description of the type of agency the exemption is aimed at." *Id.* at 474. In the First Circuit, therefore, *all* FBI files "bask under" the "prophylactic umbrella" of the per se rule. *Curran v. DOJ*, 813 F.2d 473, 475 (1st Cir. 1987).

The Sixth Circuit has also "adopted a per se rule under which any documents compiled by a law enforcement agency fall within" Exemption 7. *Rugiero v. DOJ*, 257 F.3d 534, 550 (6th Cir. 2001); *see also Jones v. FBI*, 41 F.3d 238, 246 (6th Cir. 1994) (adopting per se rule); *ACLU of Mich. v. FBI,* 734 F.3d 460, 466 (6th Cir. 2013) (reaffirming that "records compiled by the FBI *per se* satisfy" the law enforcement purpose requirement). In *Jones*, the plaintiff, a political activist, argued that the FBI had investigated him solely for his political beliefs and therefore that its records were not "compiled for law enforcement purposes." 41 F.3d at 246. "Applying the *per se* rule," however, the Sixth Circuit refused to address the plaintiff's argument. *Id.* The court instead concluded that the FBI could claim the exemption regardless of whether the records were compiled for law enforcement purposes. *Id.*

The Eighth Circuit also applies the per se rule, "agree[ing]" with the First Circuit's decision in *Irons*. *Kuehnert v. FBI*, 620 F.2d 662, 666 (8th Cir. 1980). In *Kuehnert*, the plaintiff sought access to documents from an FBI investigation into his associations with the American Friends Service Committee and other political organizations. The Eighth Circuit could not

"discern any threshold connection between the organization and activities being investigated and violations of federal law." *Id.* The court nonetheless exempted the documents from disclosure because all "records of a criminal law enforcement agency" necessarily "meet exemption 7's threshold requirement of having been 'compiled for law enforcement purposes.'" *Id.* at 667.[2]

Finally, in 2011, the Tenth Circuit concluded that "the per se rule is the proper approach" after surveying what was already a mature 4-3 split and considering the arguments on both sides. *Jordan*, 668 F.3d at 1193-94. As that court explained more recently, it too "employs a per se rule whereby all information compiled by" an agency whose primary function is law enforcement is "inherently compiled for law enforcement purposes." *Friends of Animals v. Bernhardt*, 15 F.4th 1254, 1267 (10th Cir. 2021).

2. The Second Circuit applied the "per se rule" in this case, holding as a matter of law that all records compiled by a law enforcement agency are "compiled for law enforcement purposes." Pet. App. 4a. The Second Circuit's rule, like four other circuits', "leave[s] no room" for a court to assess whether the FBI in fact

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[2] Although *Kuehnert* predates the 1986 amendments to Exemption 7, courts in the Eighth Circuit continue to apply the per se rule. *See, e.g.*, *Guillen v. DHS*, 2021 WL 4482985, at *8 (D. Minn. Sept. 30, 2021); *Kuntz v. DOJ*, 2020 WL 6324343, at *11 (D.N.D. Aug. 14, 2020), *report and recommendation adopted*, 2020 WL 6324340 (D.N.D. Sept. 9, 2020).

had a law enforcement purpose. *Ferguson v. FBI*, 957 F.2d 1059, 1070 (2d Cir. 1992).

B. Three circuits reject the per se rule.

Three circuits, in contrast, have rejected the per se rule as contrary to Exemption 7's plain text.

1. Start with the D.C. Circuit, where most FOIA cases are litigated. That court has considered and rejected the per se rule, holding that "[i]t is not for this court to rewrite a statute." *Pratt v. Webster*, 673 F.2d 408, 416 n.17 (D.C. Cir. 1982) (disagreeing with *Irons*). Exemption 7 asks whether the files at issue were compiled for a law enforcement *purpose*; it thus "would not protect the files of an [FBI] inquiry explicitly conducted, for example, for purposes of harassment." *Shaw v. FBI*, 749 F.2d 58, 63 (D.C. Cir. 1984) (Scalia, J.).

So, in the D.C. Circuit, "FBI records are not law enforcement records simply by virtue of the function that the FBI serves." *Vymetalik v. FBI*, 785 F.2d 1090, 1095 (D.C. Cir. 1986). Instead, the FBI must "'supply facts' in sufficient detail" to enable a court to "identify a law enforcement purpose underlying withheld documents." *Campbell v. DOJ*, 164 F.3d 20, 32 (D.C. Cir. 1998) (quoting *Quiñon v. FBI*, 86 F.3d 1222, 1229 (D.C. Cir. 1996)).

In *Campbell*, for instance, the Government invoked Exemption 7 to withhold FBI records on the writer James Baldwin. 164 F.3d at 32-33. Attempting to meet the threshold requirement, the Government submitted "only two facts": First, the files were "stored inside a folder with an official-sounding label," which the court found "insufficient." *Id.* at 32. Second, an agent declared that "Baldwin was associating with persons and organizations which were believed to be a

threat to the security of the United States." *Id.* (internal quotation marks omitted). But the court held that the Government could not rely on this vague assertion to withhold "files collected over many years on different topics in different contexts." *Id.* at 32-33. It explained that even if the FBI can "justify its investigation of a person," that does not mean "all documents related to that person are exempt from FOIA." *Id.* at 33.

2. The Third Circuit also "reject[s]" the "per se rule." *Abdelfattah v. DHS*, 488 F.3d 178, 185 (3d Cir. 2007). In that circuit, records do not qualify as "compiled for law enforcement purposes" simply because they are compiled by a law enforcement agency. Rather, the law enforcement agency must "articulate a connection between the responsive documents and a legitimate law enforcement concern." *Id.* In *Abdelfattah*, the FBI supplied summaries of the withheld documents with no explanation, "merely not[ing] that the documents were 'compiled for law enforcement purposes' without providing any further detail." *Id.* at 186. The Third Circuit said it would "not extrapolate such a purpose" from document summaries, even summaries that "arguably suggest[ed]" the documents "were compiled for law enforcement purposes." *Id.*

3. The per se rule doesn't govern in the Ninth Circuit, either. *ACLU of N. Cal v. FBI*, 881 F.3d 776, 778 n.2 (9th Cir. 2018). It is not enough for a law enforcement agency to simply assert that records were compiled for law enforcement purposes; the agency must provide "sufficient evidence in the record to warrant a finding" of such a purpose. *Church of Scientology of Cal. v. Dep't of Army*, 611 F.2d 738, 748

(9th Cir. 1979), *overruled on other grounds by Animal Legal Def. Fund v. FDA*, 836 F.3d 987 (9th Cir. 2016).

And the Ninth Circuit does not allow the Government to invoke Exemption 7 if the record suggests that "the asserted [law enforcement] purpose is pretextual or wholly unbelievable." *Rosenfeld v. DOJ*, 57 F.3d 803, 808 (9th Cir. 1995) (internal quotation marks omitted). For instance, in *Rosenfeld*, the Ninth Circuit held that documents from two investigations had to be disclosed, even though the FBI asserted a law enforcement purpose for each. *Id.* at 806. It claimed the first investigation, into the Chancellor of the University of California, was initiated because he had access to a nuclear laboratory—but FBI notes made clear that J. Edgar Hoover simply "disagreed with his politics." *Id.* at 809. And it claimed the second was because the leaders of the subject political organization "had communist leanings"—but the investigation continued well after the FBI concluded the organization was "not controlled by communists." *Id.* at 811. Because the FBI's asserted "law enforcement purposes" were simply "pretext," the Ninth Circuit held it could not invoke Exemption 7. *Id.* at 810.

II. This case presents a frequently recurring issue of national importance.

Exemption 7 is invoked thousands of times each year. U.S. Dep't of Just., *2024 Annual FOIA Report Summary* 9-10 (Apr. 28, 2025). In 2024, 613,538 FOIA requests were denied either in full or in part, and over 56% of denials were based on Exemption 7. *Id.* That number is only growing: The number of FOIA requests has doubled in the last decade and now sits at 1.5 million annually. *Id.* at 3. Even assuming that only a

minuscule percentage of those denials involved records that were not, in fact, compiled for a law enforcement purpose, the question presented recurs frequently.

And the question presented here affects a critical segment of FOIA requests. Our Nation's law enforcement agencies have at times engaged in investigations or other activities that were not based on any law enforcement purpose. FOIA requests have uncovered records regarding the FBI spying on peaceful civil-service organizations, ATF surveilling Second Amendment advocates, and DHS monitoring journalists—records that have led to congressional inquiries and internal investigations.[3] Under the per se rule, the agencies would be free to refuse to release documents about any of those incidents.

In light of the significance of the records in question, this Court has recognized that the proper construction of FOIA's Exemption 7 presents an "important question of federal statutory law" meriting certiorari. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978); *see DOJ v. Landano*, 508 U.S. 165, 171 (1993). And it has specifically noted the significance of Exemption 7's threshold requirement.

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[3] *See* Chip Gibbons, *Still Spying on Dissent: The Enduring Problem of FBI First Amendment Abuse*, Defending Rights and Dissent 4-13 (2019), https://perma.cc/EPG8-7JM7; Patrick G. Eddington, *Does the FBI Spy on FOIA Requesters?*, CATO Institute (Mar. 18, 2021), https://perma.cc/RJQ9-JPAP; Aidan Johnston, *ATF's Illegal Gun Owner Registry*, Gun Owners of America (May 2022), https://perma.cc/8KG7-M5DP; U.S. Senate Committee on Homeland Security & Governmental Affairs, *Chairman Paul Seeks Information from ATF on Secret Firearm Surveillance Program* (Apr. 10, 2025), https://perma.cc/LU3P-E7HZ.

See John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989). The question presented here warrants review as well.

III. The decision below is incorrect.

The per se rule rewrites the statute to exempt information compiled *by* law enforcement *agencies*, rather than information compiled "*for* law enforcement *purposes*." That can't be right.

1. Section 552(b)(7) exempts from FOIA disclosure "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). At the time FOIA was enacted, as today, "purpose" meant "the reason for which something exists or is done." The Random House Dictionary of the English Language 1167 (Jess Stein & Laurence Urdang eds., 1973). "Law enforcement" is a phrasal adjective that modifies—and therefore limits—"purposes." *See* The Chicago Manual of Style §§ 5.92-5.93, p. 171 (15th ed., 2003); *see also Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018) ("Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality."). Thus, by its terms, Section 552(b)(7) applies only where law enforcement is a "reason for the compilation" of the requested information, not when some other purpose motivated the compilation. *See Milner v. Dep't of Navy,* 562 U.S. 562, 584 (2011) (Alito, J., concurring).

But law enforcement agencies sometimes compile records for purposes other than law enforcement. Then-Judge Scalia thought it "[o]bvious[]" that an investigation "explicitly conducted, for example, for purposes of harassment" is not one undertaken "for

law enforcement purposes." *Shaw v. FBI*, 749 F.2d 58, 63 (D.C. Cir. 1984).

That's consistent with how the phrase "law enforcement purposes" is used in other settings. When this Court uses that phrase, it doesn't mean just any action taken by a law enforcement agency. For instance, police officers do not act with a "law enforcement purpose" when they invite reporters to ride along with them. *Wilson v. Layne*, 526 U.S. 603, 612-13 (1999). Even where a law enforcement agency is the one seeking "good public relations for the police" or "accurate reporting on police issues," those goals don't become "law enforcement purposes." *Id.*[4]

2. Had Congress wanted to create a categorical exemption from FOIA for law enforcement agencies, it knew how to do so. Exemption 7(D) asks about information "compiled *by* a criminal law enforcement *authority*." 5 U.S.C. § 552(b)(7)(D) (emphasis added). Other provisions of FOIA exempt certain records "maintained *by* a criminal law enforcement *agency*" and "maintained *by* the Federal Bureau of Investigation." 5 U.S.C. §§ 552(c)(2), (3) (emphasis added). In fact, more than twenty other provisions of FOIA apply to information "maintained by" an agency

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[4] *See also Caniglia v. Strom*, 141 S. Ct. 1596, 1600 (2021) (Alito, J., concurring) (characterizing police officers' "community caretaking" checks as being conducted "for non-law-enforcement purposes"); *California v. Ciraolo*, 476 U.S. 207, 211-212 (1986) (noting that "casual, accidental observation," even when carried out by law enforcement officers, is not "motivated by a law enforcement purpose"); *Florida v. Royer*, 460 U.S. 491, 504-05 (1983) (finding, where officers were not motivated by "reasons of safety and security," that a detention did not further "legitimate law enforcement purposes").

or depend on actions taken "by the agency."[5] But Congress drafted Exemption 7 differently.

3. Without the text or structure of the statute to stand on, the First Circuit expressly invoked "policy reasons" to justify creating the per se rule. *Irons v. Bell*, 596 F.2d 468, 474 (1st Cir. 1979). It fashioned a "prophylactic umbrella" ensuring that records maintained by the FBI and other law enforcement agencies would always satisfy Exemption 7's threshold requirement. *Curran*, 813 F.2d at 475. The other circuits that have adopted the per se rule have largely relied on *Irons* and its explicitly policy-based rationale, with little or no effort to ground their approach in Exemption 7's text. *See supra* I.A.

This Court has considered and rejected an analogous policy-based argument in the specific context of Exemption 7. *DOJ v. Landano*, 508 U.S. 165 (1993), concerned Exemption 7(D)'s protection of records that "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). The Government "contend[ed] that *all* FBI sources should be presumed confidential" for purposes of the exemption. *Landano*, 508 U.S. at 174. This Court disagreed. Although it "recognize[d] that confidentiality often will be important to the FBI's

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[5] *See, e.g.*, 5 U.S.C. § 552(f)(2)(A) (referring to records or information "maintained by an agency"); *id.* § 552(g)(2) (requiring public disclosure of some systems "maintained by the agency"); *id.* § 552(a)(1)(D) (referring to rules "formulated and adopted by the agency"). *See also* 5 U.S.C. §§ 552(a)(2)(B), 552(a)(2)(E), 552(a)(3)(B), 552(a)(4)(E)(ii)(II), 552(a)(6)(A)(ii), 552(a)(6)(C)(i), 552(a)(6)(C)(iii), 552(a)(6)(E)(i)(II), 552(a)(6)(E)(iii), 552(e)(1)(A), 552(e)(1)(D), 552(e)(1)(E), 552(e)(1)(F), 552(e)(1)(G), 552(e)(1)(I), 552(e)(1)(J), 552(e)(1)(K), 552(e)(1)(N), 552(e)(1)(O), 552(j)(3).

investigative efforts," it held that a "universal" presumption of confidentiality could not be squared with the statutory text. *Id.* at 175. While the "prophylactic rule" urged by the Government would have "serve[d] the Government's objectives" and was easy "to administer," the Court refused to "engraft that policy choice onto the statute that Congress passed." *Id.* at 180-81. It should do the same here.

4. In any event, the purported policy concerns underlying the per se rule are unfounded—as evidenced by decades of experience in the D.C. Circuit, the primary venue for FOIA litigation.

For example, the First Circuit worried about the privacy of confidential informants. *Irons*, 596 F.2d at 475. But even in the D.C. Circuit, the Government does not have to disclose information about confidential informants so long as the information was, indeed, compiled for law enforcement purposes. *See, e.g.*, *Robinson v. Att'y Gen. of the U.S.*, 534 F. Supp. 2d 72, 81 (D.D.C. 2008). And other parts of FOIA provide additional protection to confidential informants, such as Exemption 6, which covers files whose disclosure "would constitute a clearly unwarranted invasion of privacy," whether or not compiled for law enforcement purposes. 5 U.S.C. § 552(b)(6).

The First Circuit also worried that federal judges were poorly positioned to decide whether documents were "compiled for law enforcement purposes." *Irons*, 496 F.2d at 474, 476. But the D.C. Circuit has managed to adjudicate Exemption 7 claims for nearly five decades since it rejected the per se rule.

To be sure, close calls and sensitive questions will invariably arise. But Congress nonetheless chose to

condition Exemption 7 on the "purpose[]" for which records are compiled, and the role of a court "is to apply the statute as it is written—even if [it] think[s] some other approach might 'accord with good policy.'" *Burrage v. United States*, 571 U.S. 204, 218 (2014) (brackets and citations omitted). Courts must give effect to Congress's statutory command, even if it may require difficult line-drawing.

IV. This case is an excellent vehicle for resolving the question presented.

1. The question presented was pressed and passed upon below. Mr. Buckley argued at every stage that the records in question were not "compiled for law enforcement purposes," even though they were compiled by a law enforcement agency. Petr. C.A. Br. 4; C.A. J.A. A-173. At the Second Circuit, Mr. Buckley expressly called for the court to "reconsider[]" the per se rule. Petr. C.A. Br. 5.

The district court and the Second Circuit ruled against Mr. Buckley based on the per se rule. The district court held that, even assuming that the FBI investigated Mr. Buckley solely for his "political activities," rather than for any "law enforcement purposes," it wouldn't matter: "No further judicial review [was] permitted" under the per se rule. Pet. App. 40a (citing *Halpern v. FBI*, 181 F.3d 279, 296 (2d Cir. 1999)). Similarly, because its rule categorically allows withholding "[w]hen records are sought from a law enforcement agency," the Second Circuit refused to address Mr. Buckley's claim that the FBI did not compile the records "for law enforcement purposes." *Id.* 4a.

2. But for the per se rule, Mr. Buckley would likely receive the documents in question. Exemption 7 was the sole basis for withholding 14 pages of Mr. Buckley's file and some part of the basis for withholding some 55 pages more. C.A. J.A. A-109-10. Absent the per se rule, the lower courts would have at least considered Mr. Buckley's argument that he was investigated for political reasons, not for law enforcement purposes. And they would have considered whether the FBI had provided any meaningful evidence of its purpose in monitoring Mr. Buckley.

On the latter front, it's hard to imagine that the FBI's submissions below would have passed muster. The FBI justified its invocation of Exemption 7 with affidavits from two agency records chiefs who had no particular connection to Mr. Buckley's case. C.A. J.A. A-15, A-149. Each affiant addressed the "law enforcement purposes" threshold requirement in a single paragraph with virtually no information specific to Mr. Buckley. *Id.* A-32-33, A-151-52. Courts in the D.C. Circuit, applying the proper test, have rejected declarations by these very affiants as too vague to establish a law enforcement purpose.[6]

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[6] *See Brick v. DOJ*, 293 F. Supp. 3d 9, 12 (D.D.C. 2017) (finding David Hardy statements "so sweeping and vague that they could apply to almost any" FOIA case) (Jackson, J.); *Shapiro v. DOJ*, 37 F. Supp. 3d 7, 29 (D.D.C. 2014) ("Mr. Hardy's averments are too generalized for purposes of Exemption 7."); *Kolbusz v. FBI,* 2021 WL 1845352, at *22 (D.D.C. Feb. 17, 2021), *report and recommendation adopted,* 2023 WL 2072481 (D.D.C. Feb. 17, 2023) (describing the Michael Seidel declaration as "deficiently vague").

3. This case presents a rare opportunity for the court to consider this cleanly presented issue. The question presented has long evaded review because the Government "does not ask" the non-per se circuits to reconsider their precedent, nor does it petition for review after losing in those circuits. *See ACLU of N. Cal. v. FBI*, 881 F.3d 776, 778 n.2 (9th Cir. 2018).[7] Moreover, sophisticated FOIA litigants, like news organizations and nonprofits, have the means to avoid the per se rule altogether by filing in the District of Columbia. That means that this Court's review will only come from a litigant like Mr. Buckley, who does not have the means to file suit outside of his home district and so must litigate in a per se circuit. But those litigants often lack the resources to petition this Court. The Court should not miss the chance to resolve this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[7] *See also Abdelfattah v. DHS*, 488 F.3d 178 (3d Cir. 2007); *Jefferson v. DOJ,* 284 F.3d 172 (D.C. Cir. 2002); *Campbell v. DOJ*, 164 F.3d 20 (D.C. Cir. 1998); *Quiñon v. FBI*, 86 F.3d 1222 (D.C. Cir. 1996); *Davin v. DOJ*, 60 F.3d 1043 (3d Cir. 1995).

Respectfully submitted,

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