

No. 25-1035

In the Supreme Court of the
United States

—————
NATHANIEL J. BUCKLEY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE.,

Respondents.

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

**BRIEF OF THE CATO INSTITUTE AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONERS**

—————
Steve Art
Counsel of Record
Matt Topic
Justin Hill
Aaron Tucek
Annalise Wagner
LOEVY AND LOEVY
311 N. Aberdeen St., 3rd Floor
Chicago, IL 60607
steve@loevy.com

April 2, 2026

QUESTION PRESENTED

The Freedom of Information Act (FOIA), codified at 5 U.S.C. § 552, 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.”

The question presented is:

Whether “records or information compiled for law enforcement purposes” in 5 U.S.C. § 552(b)(7) encompasses all records or information compiled by a law enforcement agency, even those not compiled for law enforcement purposes.

TABLE OF CONTENTS

QUESTION PRESENTED ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE*..... 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 3

 I. THE PER SE RULE INTERFERES
 WITH DEMOCRATIC GOVERNANCE..... 4

 II. THE LONG HISTORY OF THE FEDERAL
 GOVERNMENT SURVEILLING
 CONSTITUTIONALLY PROTECTED
 ACTIVITIES UNDERSCORES THE NEED
 TO REJECT THE PER SE RULE..... 8

 III. THE CIRCUIT SPLIT RESULTS IN THE
 PUBLIC HAVING DIFFERENT DEGREES
 OF ACCESS TO GOVERNMENTAL
 INFORMATION..... 13

CONCLUSION 16

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page(s)</u> |
|--|----------------|
| <i>Campbell v. U.S. Dep’t of Just.</i> , 164 F.3d 20 (D.C. Cir. 1998)..... | 3, 5 |
| <i>Dep’t of Air Force v. Rose</i> , 425 U.S. 352 (1976) | 15 |
| <i>Dep’t of Interior v. Klamath Water Users Protective Ass’n</i> , 532 U.S. 1 (2001) | 5 |
| <i>F.B.I. v. Abramson</i> , 456 U.S. 615 (1982) | 4 |
| <i>Food Mktg. Inst. v. Argus Leader Media</i> , 588 U.S. 427 (2019) | 3 |
| <i>Halpern v. F.B.I.</i> , 181 F.3d 279 (2d Cir. 1999) | 5, 7 |
| <i>Human Rts. Def. Ctr. v. U.S. Park Police</i> , 126 F.4th 708 (D.C. Cir. 2025)..... | 14 |
| <i>Inter-Coop. Exch. v. U.S. Dep’t of Com.</i> , 36 F.4th 905 (9th Cir. 2022)..... | 6 |
| <i>Jordan v. U.S. Dep’t of Just.</i> , 668 F.3d 1188 (10th Cir. 2011)..... | 3, 13, 14 |
| <i>Milner v. Dep’t of Navy</i> , 562 U.S. 562 (2011) | 6 |

| | |
|---|----------|
| <i>Nat'l Archives & Recs. Admin. v. Favish</i> , 541 U.S. 157 (2004) | 2 |
| <i>NLRB v. Robbins Tire & Rubber Co.</i> , 437 U.S. 214 (1978) | 5 |
| <i>Shaw v. F.B.I.</i> , 749 F.2d 58 (D.C. Cir. 1984) | 5 |
| <i>U.S. Dep't of Just. v. Reporters Comm. for Freedom of the Press</i> , 489 U.S. 749 (1989) | 14, 15 |
| <u>Statutes</u> | |
| 5 U.S.C. § 552 | ii |
| 5 U.S.C. § 552(b)(7) | ii, 2, 3 |
| <u>Other Authorities</u> | |
| CATO INST., <i>American Big Brother</i> (last accessed April 1, 2026) Available at https://www.cato.org/american-big-brother | 8 |
| CATO INST., <i>American Big Brother: 1908, BoI Created</i> (last accessed April 1, 2026) Available at https://www.cato.org/american-big-brother#charles_bonaparte | 8 |

- CATO INST., *American Big Brother: 1909-2013, BoI Develops Informants in Socialist Political Circles, Subverts Socialist Party of America* (last accessed April 1, 2026) Available at https://www.cato.org/american-big-brother#eberstein_letter_boi..... 9
- CATO INST., *American Big Brother: 1917-1921, Labor organizers and conscientious objectors harassed* (last accessed April 1, 2026) Available at https://www.cato.org/american-big-brother#bridge_poster 9
- CATO INST., *American Big Brother: 1919-1920, Palmer Raids Target Anarchists, Leftists for Prosecution, Deportation* (last accessed April 1, 2026) Available at https://www.cato.org/american-big-brother#a_mitchell_palmer..... 9
- CATO INST., *American Big Brother: 1919-Today, FBI political surveillance and harassment of African-Americans* (last accessed April 1, 2026) Available at https://www.cato.org/american-big-brother#Marcus_Garvey 10
- CATO INST., *American Big Brother: 1920-1976, FBI spies on ACLU* (last accessed April 1, 2026) Available at https://www.cato.org/american-big-brother#crystaleastman_v2 10

- CATO INST., *American Big Brother: 1921-2006, FBI spies on Quakers* (last accessed April 1, 2026) Available at <https://www.cato.org/american-big-brother#TR-CO%20cartoon>..... 10
- CATO INST., *American Big Brother: 1955-1968, FBI Harassment of Martin Luther King, Jr.* (last accessed April 1, 2026) Available at <https://www.cato.org/american-big-brother#mlk> 10
- CATO INST., *American Big Brother: 1956-1971, COINTELPRO* (last accessed April 1, 2026) Available at <https://www.cato.org/american-big-brother#hoover> 10
- CATO INST., *American Big Brother: 1993-2006, FBI Surveils Arab/Muslim Americans in Illinois* (last accessed April 1, 2026) Available at https://www.cato.org/american-big-brother#being_watched..... 11
- CATO INST., *American Big Brother: 2002-2008, FBI & NSA Surveil Muslim and Arab-American Leaders* (last accessed April 1, 2026) Available at https://www.cato.org/american-big-brother#faisal_gill 11
- L. BRANDEIS, *OTHER PEOPLE’S MONEY* 62 (National Home Library Foundation ed. 1933) 6

- Matthew Cavedon, *Revelation that Biden’s FBI Spied on Republican Senators Reveals Need to Tighten Surveillance Laws*, CATO INST. (Oct. 8, 2025) Available at <https://www.cato.org/blog/revelation-bidens-fbi-spied-republican-senators-reveals-need-tighten-phone-surveillance-laws>..... 12
- Patrick G. Eddington, *Does the FBI Spy on FOIA Requesters?*, DEFENDING RIGHTS & DISSENT (March 18, 2021) Available at <https://www.rightsanddissent.org/news/does-the-fbi-spy-on-foia-requesters/>..... 11
- Patrick G. Eddington, *FBI “Assessments”: Cato FOIA Lawsuit Edition*, CATO INST. (April 16, 2021) Available at <https://www.cato.org/blog/fbi-assessments-cato-foia-lawsuit-edition>..... 12
- Patrick G. Eddington, *Sunshine Week 2024 Forecast: Heavily Redacted with Political Surveillance Expected*, ORANGE COUNTY REGISTER (March 10, 2024) Available at <https://www.ocregister.com/2024/03/10/sunshine-week-2024-forecast-heavily-redacted-with-political-surveillance-expected/>..... 12

INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files amicus briefs, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case interests Cato because of the importance of protecting the constitutional rights of individuals who may be subject to unwarranted government surveillance.

¹ Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party has authored this brief in whole or in part and that no one other than *amicus* and its counsel has made any monetary contribution to the preparation and submission of this brief. *Amicus* certifies that notice of their intent to file this brief was given to counsel for Mr. Buckley more than 10 days prior to the filing deadline and to the United States Department of Justice on April 1, 2026.

SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to clarify that Exemption 7 of the Freedom of Information Act (FOIA) means what it says. FOIA gives the public a means to “know what their Government is up to,” *Nat’l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 171 (2004) (quotation omitted), in all but nine narrow circumstances, including when “records or information” sought were “compiled for law enforcement purposes,” 5 U.S.C. § 552(b)(7). Some courts, including the Second Circuit, interpret this to mean that agencies can withhold *all* information compiled by law enforcement *agencies*, regardless of the purpose. This read is incorrect and carries troubling consequences for our democracy.

Amicus has long been involved in researching and publishing information on federal surveillance and harassment of American citizens across the political spectrum. The Second Circuit’s interpretation of Exemption 7 frustrates this work, which amicus submits is essential to the functioning of democratic society. This brief highlights the consequences of the Second Circuit’s misguided approach, and encourages this Court to resolve a circuit split that threatens government transparency and accountability.

ARGUMENT

FOIA provides fair and equal access to governmental information, except in nine narrowly-construed circumstances set forth in the statutory text. One such circumstance is found in Exemption 7, which asks whether particular “records or information” were “compiled for law enforcement purposes.” *See* 5 U.S.C. § 552(b)(7). Courts are split over how to interpret Exemption 7 in practice.

Some courts employ the “per se” rule. *See Jordan v. U.S. Dep’t of Just.*, 668 F.3d 1188, 1193 (10th Cir. 2011). This approach adds gloss to Exemption 7’s plain text, as it assumes that all documents compiled by “law enforcement agencies” are “inherently records compiled for law enforcement purposes.” *Id.* (quotation and citation omitted). But this Court has rebuked interpretations of FOIA exemptions that “create a phrase that does not appear in the statute.” *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 438 (2019).

The better interpretation of the statute does what Exemption 7’s plain text commands. *See, e.g., Campbell v. U.S. Dep’t of Just.*, 164 F.3d 20, 32 (D.C. Cir. 1998). In Circuits that have rejected the per se test, the federal government can pass Exemption 7’s threshold only where there is a connection “between the withheld material and a legitimate law enforcement purpose.” *Id.* In other words, the government must demonstrate that the withheld “records or information” were “compiled for law enforcement purposes”—precisely what the statute commands. 5 U.S.C. § 552(b)(7).

These competing statutory interpretations have significant consequences for access to governmental information. The government very well could justify withholding documents related to corruption and governmental malfeasance in a “per se” jurisdiction while being unable to restrict disclosure of those same documents in a jurisdiction that has rejected the per se approach. Given that the Courts of Appeals are split over which approach to apply, production of such information will necessarily vary depending on the jurisdiction in which the request is submitted. This, in turn, gives the public varying levels of access to governmental information. Some requestors will get the full picture, while others will be left with fragments. The difference in production is particularly concerning because it implicates information that most deserves transparency. In light of the important issues at stake and disagreement among circuits, this Court should resolve this debate and reject the atextual and misguided per se rule once and for all.

I. THE PER SE RULE INTERFERES WITH DEMOCRATIC GOVERNANCE.

In practice, the per se rule shields documents compiled by a “law enforcement” agency for reasons unrelated to law enforcement. Categorically allowing law enforcement agencies to withhold these documents undermines the “functioning of a democratic society” that FOIA is meant to safeguard. *F.B.I. v. Abramson*, 456 U.S. 615, 621 (1982) (quoting

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)).

In non-per se jurisdictions, in order to surmount Exemption 7's threshold requirement, an agency must show that the withheld documents serve a law enforcement purpose. *E.g.*, *Campbell*, 164 F.3d at 32. If the agency cannot make that showing—for instance, if an investigation was conducted “for purposes of harassment”—the documents will be disclosed, so long as no separate exemption applies. *Shaw v. F.B.I.*, 749 F.2d 58, 63 (D.C. Cir. 1984) (Scalia, J.).

By contrast, under the per se rule, so long as the agency explains that it is a “law enforcement” agency (like the FBI), it will surmount Exemption 7's threshold. *Halpern v. F.B.I.*, 181 F.3d 279, 296 (2d Cir. 1999) (explaining that “all records of investigations compiled by the FBI are for law enforcement purposes” and “the purpose or legitimacy” of creation of records “are not proper subjects for judicial review”).

This difference is consequential. First, it is critical that the public have access to documents produced by law enforcement agencies for purposes unrelated to law enforcement. FOIA envisions “a new conception of Government conduct” subject to “a general philosophy of full agency disclosure.” *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 (2001) (quotation marks omitted). Such disclosure serves as a “check against corruption and . . . hold[s] the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Accordingly, this Court has “insisted” that FOIA's exemptions to disclosure must “be given a

narrow compass.” *Milner v. Dep’t of Navy*, 562 U.S. 562, 571 (2011) (quotation marks omitted).

Permitting government misdeeds to be shielded from the public based on a broad and atextual reading of Exemption 7 turns the statute on its head. If a law enforcement agency is using the government’s resources and authority for improper purposes, the public is entitled to know. Likewise, the threat that governmental abuses will be made public if they occur can head off any temptation to improperly exercise executive power. At bottom, public access to information about potential abuses of power is an essential tool to stymie those abuses. *See Inter-Coop. Exch. v. U.S. Dep’t of Com.*, 36 F.4th 905, 910 (9th Cir. 2022) (emphasizing “the importance of government transparency in maintaining a functional democratic polity, where the people have the information needed to check public corruption, hold government leaders accountable, and elect leaders who will carry out their preferred policies” (quotation marks omitted)); L. BRANDEIS, *OTHER PEOPLE’S MONEY* 62 (National Home Library Foundation ed. 1933) (“Sunlight is said to be the best of disinfectants[.]”).

The per se rule also risks chilling public inquiries into abuses of government power. If it appears to the public that all documents produced by law enforcement agencies are exempted from disclosure under FOIA, citizens who suspect government corruption or abuses may believe a FOIA request is not worth the effort. For this reason, too, the per se approach frustrates FOIA’s important contribution to the functioning of our democracy.

Separately, even where documents are, in fact, created for a law enforcement purpose, and not ultimately disclosed, there is value in requiring an agency to provide evidence (which will be subject to judicial review) confirming as much. Judicial confirmation that law enforcement officials are operating legitimately ensures that FOIA continues to serve as a “check against corruption.” *Robbins Tire & Rubber Co.*, 437 U.S. at 242. As noted, the per se rule permits law enforcement agencies to pass Exemption 7’s threshold showing in every case, without any case- or document-specific justification. *E.g.*, *Halpern*, 181 F.3d at 296. As a result, a requester has no way to know whether the withheld documents in fact served a law enforcement purpose, or, on the other hand, whether they were a result of corruption or harassment. Even where there was nothing improper about an agency’s investigation, so long as the per se rule governs, a requester will be left wondering whether the agency’s actions were above board. The result is that the per se rule deprives citizens of their ability to “know what their Government is up to” which this Court has described as “a structural necessity in a real democracy.” *Favish*, 541 U.S. at 171–72 (quotation omitted).

II. THE LONG HISTORY OF THE FEDERAL GOVERNMENT SURVEILLING CONSTITUTIONALLY PROTECTED ACTIVITIES UNDERSCORES THE NEED TO REJECT THE PER SE RULE.

Americans have good reason to fear that federal agencies will hide behind the per se rule to shield abuses of power from public view. A central pillar of the work of amicus involves documenting federal efforts to surveil and harass Americans engaged in the lawful exercise of their constitutional rights. *See* CATO INST., *American Big Brother* (last accessed April 1, 2026).² FOIA has been instrumental in this effort by amicus and others to shine a light on government misdeeds.

Unfortunately, the targeting of those with whom federal bureaucrats disagree has a long history in the modern United States. This history stretches all the way back to the earliest days of the FBI. In November 1908, shortly after the creation of the “Bureau of Investigation” (which was later renamed the Federal Bureau of Investigation in 1935), federal agents interrogated a *Boston Post* reporter at the behest of the Colombian government because of a story he wrote about a group of Americans allegedly violating U.S. neutrality laws. CATO INST., *American Big Brother: 1908, BoI Created* (last accessed April 1, 2026).³

² Available at <https://www.cato.org/american-big-brother>.

³ Available at https://www.cato.org/american-big-brother#charles_bonaparte.

From that starting point, federal investigation of constitutionally protected speech and expression has become a recurring problem. The later years of the Woodrow Wilson administration following World War I saw federal surveillance infrastructure begin to flourish. This period included not only the First Red Scare and the infamous Palmer Raids, but the beginning of a decades-long effort to investigate and infiltrate various activist groups and organizations. *See* CATO INST., *American Big Brother: 1919-1920, Palmer Raids Target Anarchists, Leftists for Prosecution, Deportation* (last accessed April 1, 2026)⁴; CATO INST., *American Big Brother: 1917-1921, Labor organizers and conscientious objectors harassed* (last accessed April 1, 2026)⁵; CATO INST., *American Big Brother: 1909-2013, BoI Develops Informants in Socialist Political Circles, Subverts Socialist Party of America* (last accessed April 1, 2026).⁶

These trends in domestic surveillance continued and picked up steam as the United States emerged from World War II and entered the turbulent years of the Cold War. As the nation grappled for influence with the Soviet Union abroad and contended with movements for civil rights at home, federal law enforcement agencies continued to monitor constitutionally protected expression with vigor. During this period, the FBI surveilled such outspoken

⁴ Available at https://www.cato.org/american-big-brother#a_mitchell_palmer.

⁵ Available at https://www.cato.org/american-big-brother#bridge_poster.

⁶ Available at https://www.cato.org/american-big-brother#eberstein_letter_boi.

mainstream organizations—and frequent litigants before this Court—as the American Civil Liberties Union, the AFL-CIO, and the NAACP. *See* CATO INST., *American Big Brother: 1920-1976, FBI spies on ACLU* (last accessed April 1, 2026).⁷ The FBI dedicated particular effort to harassing activists advocating for racial equality and an end to Jim Crow segregation. *See* CATO INST., *American Big Brother: 1919-Today, FBI political surveillance and harassment of African-Americans* (last accessed April 1, 2026)⁸; CATO INST., *American Big Brother: 1955-1968, FBI Harassment of Martin Luther King, Jr.* (last accessed April 1, 2026)⁹; CATO INST., *American Big Brother: 1956-1971, COINTELPRO* (last accessed April 1, 2026).¹⁰

Disfavored or minority religions also have been subjected to federal surveillance. Over the last century, federal agencies have surveilled and harassed Quaker, Jewish, and Muslim groups, among others. *See* CATO INST., *American Big Brother: 1921-2006, FBI spies on Quakers* (last accessed April 1, 2026)¹¹; CATO INST., *American Big Brother: 1920-1976, FBI spies on ACLU* (last accessed April 1, 2026) (the

⁷ Available at https://www.cato.org/american-big-brother#crystaleastman_v2.

⁸ Available at https://www.cato.org/american-big-brother#Marcus_Garvey.

⁹ Available at <https://www.cato.org/american-big-brother#mlk>.

¹⁰ Available at <https://www.cato.org/american-big-brother#hoover>.

¹¹ Available at <https://www.cato.org/american-big-brother#TR-CO%20cartoon>.

American Jewish Congress)¹²; CATO INST., *American Big Brother: 1993-2006, FBI Surveils Arab/Muslim Americans in Illinois* (last accessed April 1, 2026)¹³; CATO INST., *American Big Brother: 2002-2008, FBI & NSA Surveil Muslim and Arab-American Leaders* (last accessed April 1, 2026).¹⁴

Similarly, press organizations have sometimes fallen under surveillance, perhaps even *because* of their activities submitting FOIA requests. Take, for example, the experience of the National Security Archive, a widely respected government oversight nonprofit, FOIA watchdog, center for investigative journalism, and international affairs research institute. In response to a FOIA request submitted in 2019, amicus learned that the FBI monitored the Archive's activities from 1989 through at least August 2004. Patrick G. Eddington, *Does the FBI Spy on FOIA Requesters?*, DEFENDING RIGHTS & DISSENT (March 18, 2021).¹⁵ This monitoring "appears to have involved electronic and/or physical surveillance and possibly the use of 'mail covers' by the Postal Service." *Id.*

Even today, amicus has evidence that such surveillance continues and impacts groups across the political spectrum. Last fall, Senator Chuck Grassley

¹² Available at https://www.cato.org/american-big-brother#crystaleastman_v2.

¹³ Available at https://www.cato.org/american-big-brother#being_watched.

¹⁴ Available at https://www.cato.org/american-big-brother#faisal_gill.

¹⁵ Available at <https://www.rightsanddissent.org/news/does-the-fbi-spy-on-foia-requesters/>.

revealed that the FBI had obtained call logs of nine sitting Republican senators. *See* Matthew Cavedon, *Revelation that Biden’s FBI Spied on Republican Senators Reveals Need to Tighten Surveillance Laws*, CATO INST. (Oct. 8, 2025).¹⁶ And in recent years, investigations by amicus—often relying on information obtained in response to FOIA requests—have shown the FBI continues to maintain files on such diverse groups as the Albany, New York chapter of the League of Women Voters and the Denver, Colorado chapter of the International Rescue Committee. *See* Patrick G. Eddington, *FBI “Assessments”*: *Cato FOIA Lawsuit Edition*, CATO INST. (April 16, 2021)¹⁷; Patrick G. Eddington, *Sunshine Week 2024 Forecast: Heavily Redacted with Political Surveillance Expected*, ORANGE COUNTY REGISTER (March 10, 2024).¹⁸

Importantly, amicus emphasizes that the Court need not adopt a position with respect to any of these allegations of federal overreach to take and decide this case. The task of deciding whether and how much domestic surveillance our laws ought to tolerate falls squarely to the political branches to decide. But elected leaders, and the broader public to which they are accountable, cannot engage in informed debate on

¹⁶ Available at <https://www.cato.org/blog/revelation-bidens-fbi-spied-republican-senators-reveals-need-tighten-phone-surveillance-laws>.

¹⁷ Available at <https://www.cato.org/blog/fbi-assessments-cato-foia-lawsuit-edition>.

¹⁸ Available at <https://www.ocregister.com/2024/03/10/sunshine-week-2024-forecast-heavily-redacted-with-political-surveillance-expected/>.

the subject if the federal government is permitted to keep such activities shrouded in secrecy.

In the experience of amicus, the law enforcement exception is often used to try to obfuscate the extent, duration, and underlying reasons for having targeted a particular group for surveillance in the absence of any suspicion of criminal activity. The per se rule supercharges such efforts. Essentially, it employs the federal judiciary in the project of helping the government hide its abuses. Such efforts are contrary to both the spirit and letter of FOIA.

III. THE CIRCUIT SPLIT RESULTS IN THE PUBLIC HAVING DIFFERENT DEGREES OF ACCESS TO GOVERNMENTAL INFORMATION.

In addition to concerns about the per se rule protecting sham investigatory documents from disclosure, the circuit split is consequential because it creates other inconsistencies in how FOIA requests are treated. When federal courts cannot agree on which documents should be produced in response to FOIA requests, the public is given diverging insight into governmental affairs.

Consider, for instance, two FOIA requests filed on either side of the circuit split that sought names of federal officers. *Jordan v. U.S. Dep't of Justice*, 668 F.3d 1188 (10th Cir. 2011), was filed in a “per se” jurisdiction. Petitioner Mark Jordan sought “a

complete list of staff names and titles” at the prison in which he was detained. *Id.* at 1190. Because the Tenth Circuit adopted the “per se” rule and concluded that the Bureau of Prisons was a “law enforcement agency” under Exemption 7, the federal government invoked Exemption 7(F) as a basis to withhold the names of its officers. *Id.* at 1194–98. On this basis, the Tenth Circuit held that the government could withhold the names of federal officers. *Id.* at 1198.

In contrast, *Human Rights Defense Center v. U.S. Park Police*, 126 F.4th 708 (D.C. Cir. 2025), was filed in a jurisdiction that has rejected the per se rule. There, the D.C. Circuit held that the names of federal officers could *not* be redacted. *Id.* at 717. The federal government did not argue that the officers’ names could be withheld under Exemption 7 because that argument was foreclosed—the names were not gathered for a “law enforcement purpose[,]” so Exemption 7 did not apply. The federal government instead resorted to Exemption 6 to justify its withholding. But Exemption 6 is generally less protective of information than Exemption 7. *See U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989) (discussing the relationship between Exemption 6 and 7(c)). And, indeed, that dynamic played out in *Human Rights Defense Center*. The D.C. Circuit held that the names of federal officers could not be redacted. *See* 126 F.4th at 717.

The circuit split can result in disparate disclosures through other inconsistencies. If the federal government cannot take advantage of the “per se rule,” then it must justify any withholdings by showing a “clearly unwarranted invasion of personal privacy” under Exemption 6, rather relying on Exemption 7(c)’s lower standard that requires only that disclosure “reasonably be expected to constitute an unwarranted invasion of personal privacy.” *See Reporters Comm.*, 489 U.S. at 756. Exemptions 6 and 7(d) pose a similar dilemma between conflicting legal standards.

The difference in document production matters. Federal courts are the only backstop for enforcing FOIA’s objective of “pierc[ing] the veil of administrative secrecy” and “open[ing] agency action to the light of public scrutiny.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). When courts are split on how to conduct the de novo review of a FOIA response, the public is left with differing degrees of access to governmental information. The circuit split, in effect, gives requestors different seats at the show. Some have front-row seats to watch their government, while others are stuck behind a pole in the nosebleeds. This is not the “full agency disclosure” that FOIA is meant to provide. *Reporters Comm.*, 489 U.S. at 754 (citation omitted).

CONCLUSION

In sum, the per se rule is unmoored from Exemption 7's text and carries troubling consequences for democratic governance writ large. This Court should reject this misguided approach, grant the petition for certiorari, and ultimately reverse the judgment of the U.S. Court of Appeals for the Second Circuit.

Respectfully submitted,

Steve Art
Counsel of Record
Matt Topic
Justin Hill
Aaron Tucek
Annalise Wagner
LOEVY AND LOEVY
311 N. Aberdeen St., 3rd
Floor
Chicago, IL 60607
steve@loevy.com

April 2, 2026