No. 25-1035

IN THE

Supreme Court of the United States

NATHANIEL J. BUCKLEY,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. There is a split over the per se rule 2

II. The question presented is important....................5

III. This case is an excellent vehicle 7

CONCLUSION..10

TABLE OF AUTHORITIES

Page(s)

Cases

Abdelfattah v. U.S. Dep't of Homeland Sec.,
488 F.3d 178 (3d Cir. 2007)................................3, 4

Am. C.L. Union of N. Cal. v. Fed. Bureau of Investigation,
881 F.3d 776 (9th Cir. 2018).................................3

Ames v. Ohio Dep't of Youth Servs.,
145 S. Ct. 1540 (2025)...8

Chiaverini v. City of Napoleon,
602 U.S. 556 (2024)...9

Church of Scientology of Cal. v. I.R.S.,
484 U.S. 9 (1987)..7

Davin v. U.S. Dep't of Just.,
60 F.3d 1043 (3d Cir. 1995)...................................4

Irons v. Bell,
596 F.2d 468 (1st Cir. 1979)...............................1, 6

Jones v. FBI,
41 F.3d 238 (6th Cir. 1994)...................................4

Jordan v. U.S. Dep't. of Justice,
668 F.3d 1188 (10th Cir. 2011)..........................3, 4

Keys v. U.S. Dep't of Just.,
830 F.2d 337 (D.C. Cir. 1987)............................3, 4

Kuehnert v. FBI,
620 F.2d 662 (8th Cir. 1980).................................3

Milner v. Dep't of Navy,
562 U.S. 562 (2011)...7

N.L.R.B. v. Robbins Tire & Rubber, Co.,
437 U.S. 214 (1978) 5

Pratt v. Webster,
673 F.2d 408 (D.C. Cir. 1982) 3, 4

Rosenfeld v. U.S. Dep't of Justice,
57 F.3d 803 (9th Cir. 1995) 5

Rugiero v. U.S. Dep't of Just.,
257 F.3d 534 (6th Cir. 2001) 3, 4

Shaw v. FBI,
749 F.2d 58 (D.C. Cir. 1984) 4, 5

Thompson v. United States,
145 S. Ct. 821 (2025) 8

U.S. Dep't of Justice v. Landano,
508 U.S. 165 (1993) 6

Van Buren v. United States,
141 S.Ct. 1648 (2021) 6

Williams v. FBI,
730 F.2d 882 (2d Cir. 1984).................................6

Constitutional Provision

U.S. Const., amend. I..8

Statutes

5 U.S.C. § 552(a)(4)(B) 7

5 U.S.C. § 552(a)(4)(B)(b) 6

5 U.S.C. § 552(b)(7)..3

18 U.S.C. § 1014..8

Freedom of Information Reform Act of
1986, Pub. L. No. 99-570, § 1802, 100
Stat 3207...1, 2, 3, 7

Briefs

Brief in Opposition, *Chiaverini v. City of Napoleon*, No. 23-50 (Oct. 20, 2023) 9

Brief in Opposition, *Maxwell v. Thomas*, No. 25-5930 (Apr. 16, 2026) 9

Petition for a Writ of Certiorari, *Milner v. Dep't of Navy*, No. 09-1163 (March 22, 2010), ...7

INTRODUCTION

This case meets all the criteria for certiorari. There is a square split, as the court below and at least two other courts have acknowledged. Pet. 7. This case is a clean vehicle. Pet. 18-20; Pet App. 4a. And the decision below is wrong: The per se rule it applied is entirely atextual, invented in another era of statutory interpretation, when a court could admit it relied on "policy reasons" to interpret the phrase "records or information compiled *for* law enforcement *purposes*" to mean records or information compiled *by* a law enforcement *agency*. *See* 5 U.S.C. § 552(b)(7) (emphasis added); *Irons v. Bell*, 596 F.2d 468, 474 (1st Cir. 1979); Pet. 14-17. Indeed, even the decision below conceded there was "much to be said" against the per se rule. Pet. App. 4a n.2.

The Government doesn't meaningfully contest any of this. The Government concedes that the circuits take "different approach[es]" to Exemption 7's threshold inquiry. BIO 21. It concedes that the "difference between the two approaches could produce different results" in at least a "subset of Exemption 7 cases." BIO 23. It concedes that Mr. Buckley raised "arguments about Exemption 7's threshold requirement" both in the district court and on appeal. BIO 20. And it conspicuously declines to mount any defense of the per se rule. Indeed, it cannot even bring itself to say that the rule it asked the Second Circuit to apply is correct.

The Government's concessions have it right. This case is an ideal vehicle to resolve a square split. The Second Circuit's decision is wrong. And none of the Government's quibbles diminish the need for review. In particular, the Government devotes most of its brief

to arguing that it would prevail even without the per se rule—an argument the Government never made below, based on factual assertions the Government never put before the lower courts. That new argument is a matter to be litigated on remand—not a reason to deny certiorari.

This Court should grant the petition and reverse.

ARGUMENT

I. There is a split over the per se rule.

The Government acknowledges that the per se circuits don't ask—as other circuits do—whether records are compiled "for law enforcement purposes." BIO 21. But it tries to muddy the contours of the split. The Government suggests that because courts in the per se circuits sometimes ask whether records are "investigatory," they are functionally doing the "for law enforcement purposes" analysis. *Id.* 21-23. The Government is wrong.

Some context is in order. Recall that Exemption 7's threshold inquiry used to have two separate steps. Pet. 3-4. First, a court would ask whether records were "investigatory." 5 U.S.C. § 552(b)(7) (1964 Supp. III); *see Pratt v. Webster*, 673 F.2d 408, 413 (D.C. Cir. 1982); *Kuehnert v. FBI*, 620 F.2d 662, 666 (8th Cir. 1980). Second—and separately—a court would ask whether the records were "compiled for law enforcement purposes." *Id.* In 1986, Congress deleted that first step from the statute. Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat 3207 (codified as 5 U.S.C. § 552(b)(7)). As every circuit that has actually considered the question has recognized, there's no longer a

requirement that records be "investigatory" to satisfy Exemption 7's threshold.[1]

Accordingly, the only threshold question under Exemption 7 is now whether the records at issue were "compiled for a law enforcement purpose." The decision below answered that question by applying the Second Circuit's per se rule: "When records are sought from a law enforcement agency," the Second Circuit is barred from considering an argument that the records at issue were not compiled "for legitimate law enforcement purposes." Pet. App. 4a.

In the course of issuing its holding, the court also referenced the vestigial "investigatory" requirement, stating that courts "must assume that all *investigatory* records of the FBI were compiled for law enforcement purposes." *Id.* (emphasis added). The Government seems to suggest that courts consistently apply this vestigial "investigatory" requirement and that the requirement is sufficiently similar to an inquiry into "law enforcement purposes" that the split isn't much of one. *See* BIO 21-22. That argument fails at every step.

To start, the Government is simply wrong to suggest that courts are still applying the vestigial "investigatory" requirement with any consistency. *See* BIO 21. Its cites for that proposition include one case that expressly declined to apply the "investigatory" requirement and three others that have been

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[1] *See Am. C.L. Union of N. Cal. v. FBI*, 881 F.3d 776, 779 (9th Cir. 2018); *Jordan v. DOJ*, 668 F.3d 1188, 1197 (10th Cir. 2011); *Abdelfattah v. DHS*, 488 F.3d 178, 185 (3d Cir. 2007); *Rugiero v. DOJ*, 257 F.3d 534, 550 (6th Cir. 2001); *Keys v. DOJ*, 830 F.2d 337, 340 (D.C. Cir. 1987).

superseded by circuit precedent removing the "investigatory" requirement.[2]

Moreover, the vestigial "investigatory" requirement is not the same as the "for law enforcement purposes" requirement. An investigation may be conducted for purposes other than law enforcement—to harass, suppress disfavored voices, or facilitate corruption, among other things. *See, e.g.*, *Shaw v. FBI*, 749 F.2d 58, 63 (D.C. Cir. 1984) (Scalia, J.) (even records compiled with a "plausible criminal investigatory reason" may still be for "purposes of harassment"); Cato Amicus Br. 8-13; *Van Buren v. United States*, 141 S. Ct. 1648, 1664 (2021) (Thomas, J., dissenting) (police officer looked up license plate information "for personal gain, not for a valid law enforcement purpose").

Finally, the Government's defense of the Second Circuit is an odd one. Never mind that the Second Circuit ignored the "law enforcement purposes" requirement written into the text of the statute, the Government seems to say. It applied a *different*—also now atextual—requirement that the records be "investigatory." The Government seems to be suggesting that ignoring the text of the current statute in two different ways is close enough to construing the statute as written. But that's not how statutory construction is done, and regardless, it does nothing to diminish the longstanding and acknowledged split.

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[2] *See Jordan*, 668 F.3d at 1197 (cited at BIO 21); *Pratt*, 673 F.2d at 413 (cited at BIO 21-22) (superseded by *Keys*, 830 F.2d at 340); *Davin v. DOJ*, 60 F.3d 1043, 1056 (3d Cir. 1995) (cited at BIO 22) (superseded by *Abdelfattah*, 488 F.3d at 185); *Jones v. FBI*, 41 F.3d 238, 245-46 (6th Cir. 1994) (cited at BIO 21) (superseded by *Rugiero*, 257 F.3d at 550).

II. The question presented is important.

1. The Government concedes that—even on its telling of the split, and certainly on petitioner's—"the difference between the two approaches could produce different results" in at least a "subset" of cases. BIO 23. But the Government argues that subset is small.

Frequency, however, is not the same as importance. One would certainly hope that in the "mine run" of cases, BIO 22, law enforcement agencies act for law enforcement purposes. But the public's need to know is at its apex in the unusual cases where a law enforcement agency does *not* act for a law enforcement purpose. *See supra* at 4. In other words, the "subset" of cases over which the Government concedes the circuits differ are those where FOIA's disclosure requirement acts as a "check against corruption" and "hold[s] the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber, Co.*, 437 U.S. 214, 242 (1978).

2. Even where records are ultimately withheld, the difference between the circuits still matters. The Government "bears the burden of establishing that [an] exemption applies." *DOJ v. Landano*, 508 U.S. 165, 171 (1993); 5 U.S.C. § 552(a)(4)(B)(b). In the per se circuits, the Government is not put to that burden: It needn't "illustrate even an ephemeral possibility of enforcement of federal laws" before it is allowed to withhold records. *Irons v. Bell*, 596 F.2d 468, 476 (1st Cir. 1979); *see, e.g.*, *Williams v. FBI*, 730 F.2d 882, 883 (2d Cir. 1984) (disregarding affidavits suggesting that requestor "could not have been credibly regarded as posing any threat whatsoever"). In circuits that reject the per se rule, by contrast, there is meaningful scrutiny of the Government's purpose for compiling

the records (in camera, at the very least, and sometimes in the public eye).[3]

III. This case is an excellent vehicle.

The Government doesn't dispute that the question presented was both pressed and passed upon below. *See* BIO 20. Nor does it dispute that the Second Circuit's application of the per se rule was outcome-determinative. *See* Pet. App. 4a. Instead, the Government raises a series of arguments about what might happen on remand *if* this Court rejects the per se rule. Those arguments are irrelevant and, in any case, unconvincing.

First, the Government spends pages arguing over how a court should ascertain the purpose for which a record was compiled if the per se rule no longer governs. *See, e.g.*, BIO 11-12, 15-17, 18-20. It addresses questions about mixed motives, illegal

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[3] The Government also notes that "*every* FOIA requestor is entitled to bring suit in the District of Columbia," which rejects the per se approach. BIO 23 (citing 5 U.S.C. § 552(a)(4)(B)). It does not suggest that fact diminishes the importance of this case, and with good reason: In other FOIA cases, this Court has not hesitated to grant certiorari even where the requestor could, in theory, have filed in a more favorable circuit. *See, e.g.*, Pet. at 30, *Milner v. Dep't of Navy*, 562 U.S. 562, 566-67 (2011) (No. 09-1163) (petitioning successfully for certiorari in Exemption 2 case out of Ninth Circuit, even though requestor could have filed in D.C. Circuit, which had a more favorable rule); *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 11, 13 n.1 (1987) (granting certiorari in Exemption 7(D) case out of D.C. Circuit, even though requestor lived in California and could have filed under Ninth Circuit's more favorable rule). That's presumably to honor Congress's wish to provide a venue in a requestor's home district, such that even parties without the resources to file in the D.C. Circuit could still litigate FOIA cases.

investigations, and how much weight the FBI can legitimately give a tip. *Id.* But Mr. Buckley simply asks this Court to hold that the statute means what it says: A court must ask whether records were, in fact, compiled "for law enforcement purposes." Pet. i. How, exactly, that inquiry should play out in this case is a question for remand. This Court routinely grants certiorari simply to reject an erroneous legal test without wading into a respondent's arguments about why it should prevail under a different rule.[4] It should do the same here.

Second, the Government claims Mr. Buckley "does not dispute that the investigation was conducted to determine whether a crime had been, or was being, committed." BIO 24. That's just not true. Mr. Buckley acknowledged that an "investigation was conducted"—but vigorously contests that the investigation was intended "to determine whether a crime had been . . . committed." *Id.* Mr. Buckley instead maintained throughout that the investigation was being conducted to harass him "as a result of [his] First Amendment protected activities." *See* C.A. J.A. A-113 ¶6; *see also* Pl. Opp. to Mot. for Summ. J. 3, ECF No. 20 ("[T]he records generated pertaining to Buckley stem from political and *not* legitimate concerns that federal laws may have been violated.").

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[4] *See, e.g., Ames v. Ohio Dep't of Youth Servs.*, 145 S. Ct. 1540, 1547-48 (2025) (rejecting atextual reading of Title VII without considering the respondent's "alternative arguments" under a proper reading of the statute); *Thompson v. United States*, 145 S. Ct. 821, 828 (2025) (rejecting atextual reading of 18 U.S.C. § 1014 without considering the Government's request to "affirm on the alternative basis" that the defendant was guilty even under a proper reading of the statute).

Third, the Government complains that Mr. Buckley's "arguments about Exemption 7's threshold requirement totaled less than two pages in district court and barely two pages on appeal." BIO 20. But that's because under the Second Circuit's binding precedent, such arguments didn't matter. As the Government summarized the Second Circuit's rule below: "[A]ll records of investigations compiled by the FBI are for law enforcement purposes"—the "purpose or legitimacy" of the investigation "are not proper subjects for judicial review." U.S. C.A. Br. 14 (citations omitted). The Government can't fault Mr. Buckley for not making the full case for how he would win in a circuit that actually *would* examine the purpose of an investigation. It was enough for him to preserve his objection to the Second Circuit's erroneous rule—which all agree he did.

Fourth, the Government insinuates that the magistrate judge did not apply the per se rule and instead actually evaluated the purpose for which records were compiled. BIO 11-12, 30. As a threshold matter, the magistrate judge's opinion would pose no obstacle to certiorari; the relevant question is what test the *Second Circuit* applied, and the Government makes no argument that the Second Circuit considered the actual purpose for which records were compiled.[5] In any event, the magistrate judge applied the per se rule: "Importantly, an agency's statement

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[5] The Court thus often grants certiorari even where a respondent objects that it would prevail on a different basis adopted by the district court but not the court of appeals. *See, e.g.*, BIO at 4-5, 8-9, *Maxwell v. Thomas*, No. 25-5930 (Apr. 16, 2026); BIO at 23-24, *Chiaverini v. City of Napoleon*, 602 U.S. 556 (2024) (No. 23-50) (same).

that records were compiled as a part of an investigation suffices to establish that records were compiled for law enforcement purposes without further factual findings." Pet. App. 38a.

Finally, the Government argues that the records in this case were, in fact, compiled "for law enforcement purposes," such that they would be withheld even absent the per se rule. *See* BIO 24-26. But the Government does not dispute that the affidavits it has submitted to date don't prove as much; District of D.C. courts have rejected affidavits drafted by the very same affiants, and with roughly the same information, as the ones in this case. *See* Pet. 19 & n.6. Instead, the Government lards its BIO with a half-dozen extra-record sources—reports by non-profit organizations, testimony from a single witness at a Senate hearing, and an article from the local newspaper of Warren, Pa. BIO 2-5.

There will be time enough for the Government to present (and try to establish the admissibility of) this evidence on remand. All Mr. Buckley asks of this Court is to reject the per se rule and remand to allow him to make his case.

CONCLUSION

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

Respectfully submitted,

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