No. 15-196

IN THE

Supreme Court of the United States

ELECTRONIC PRIVACY INFORMATION CENTER,
Petitioner,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF

MARC ROTENBERG
Counsel of Record
ALAN BUTLER
T. JOHN TRAN
ELECTRONIC PRIVACY INFORMATION CENTER
1718 Connecticut Ave., NW
Washington, DC 20009
(202) 483-1140
rotenberg@epic.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REPLY BRIEF

The Department of Justice maintains that Exemption 7(F) need not refer to any particular individual. That is the holding of the D.C. Circuit below, contrary to the decision of the Second Circuit in a similar case, which EPIC now asks the Supreme Court to review. Even the Department of Justice seems to be of two minds on this point. Prior to this case, the DOJ Freedom of Information Act Guide described 7(F) as follows:

> Exemption 7(F) permits the withholding of law enforcement-related information necessary to protect the physical safety of a wide range of individuals. This exemption provides broad protection to "any individual" *when disclosure of information about him* "could reasonably be expected to endanger [his] life or physical safety."

DOJ, Office of Info. Policy, *FOIA Guide: Exemption 7(F)* (2004) (emphasis added).[1]

In the case before the Court, there is no information about any individual at issue. The DOJ position is inconsistent with its prior view of 7(F). Under the agency's own logic, the decision below was

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[1] http://www.justice.gov/oip/foia-guide-2004-edition-exemption-7f.

incorrect as a matter of law and should be reviewed by the Court.

The Department of Homeland Security ("DHS") in its Brief in Opposition ("BIO") does not dispute that this case concerns an important question of federal law. Instead the DHS defends the lower court's expansive interpretation of a narrow Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), exemption because it includes the term "any." BIO at 6–8. The DHS further relies on a mistaken inference about the purpose of the 1986 amendments that has no support in the legislative history. BIO at 9–10. And finally, the DHS argues, contrary to well-established jurisprudential principles, that there is no circuit split. BIO at 11–12.

The DHS misconstrues the precedential effect of the Second Circuit's decision in *ACLU v. Department of Defense*, 543 F.3d 59 (2d Cir. 2008), *vacated and remanded on other grounds*, 558 U.S. 1042 (2009). The decision below creates a split over the scope of records subject to the FOIA, and the court's interpretation of Exemption 7(F) is much broader than any previous case. In fact, other lower court decisions are consistent with the Second Circuit's construction, which the District Court followed below.

This Court should grant the Writ of Certiorari in this case for four reasons:

1. The lower court opinion has created a direct conflict between the D.C. Circuit and the Second Circuit, and the court's

interpretation is not consistent with any other lower court opinions.

2. There are competing public safety claims in this case that weigh in favor of disclosure; DHS argues that it needs to shut down cell phones services for public safety reasons, but the FCC has warned that cell phone shut downs pose a substantial risk to public safety.
3. The lower court opinion is contrary to well-established canons of statutory construction.
4. The agency's interpretation of the relevant provision is contrary to the interpretation it set out in the federal FOIA manual.

I. The opinion below has created a split over the interpretation of the FOIA and has no supporting precedent.

The DHS is wrong as a matter of law about the precedential value of the Second Circuit's interpretation of Exemption 7(F) in *ACLU v. DOD*. BIO at 11. The D.C. Circuit and other appellate courts have stated that "when the Supreme Court vacates a judgment" in a GVR order[2] "without addressing the merits of a particular holding," that holding "continues to have precedential weight, and in the absence of contrary authority" the lower courts will not "disturb it." *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 815–16 (D.C. Cir. 2015) (internal quotation marks omitted), petitions for cert. filed, 84 U.S.L.W. 3202 (U.S. Oct. 6, 2015) (No. 15-423), ___ U.S.L.W. ___ (U.S. Nov. 27, 2015) (No. 15-698); *see also Hughes*

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[2] An order Granting Certiorari, Vacating, and Remanding is "not a final determination on the merits." *Tyler v. Cain,* 533 U.S. 656, 666 n.6 (2001) (quoting *Henry v. Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam)). Instead, it "simply indicate[s] that, in light of 'intervening developments,' there [is] a 'reasonable probability' that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation." *Id.* (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)).

Aircraft Co. v. United States, 140 F.3d 1470, 1473 (Fed. Cir. 1998); *United States v. M.C.C. of Fla., Inc.,* 967 F.2d 1559, 1562 (11th Cir. 1992).

Rather than refer to the detailed analysis of the precedential value of appellate decisions following a GVR order from this Court, the DHS cites a footnote in a case with an entirely different procedural posture, *County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979). BIO at 11.

When this Court vacated and remanded the Second Circuit judgment, it did not disturb the Second Circuit's Exemption 7(F) analysis. *ACLU v. DOD*, 558 U.S. at 1042. The Court's order focused instead on a new statutory regime established by Congress to protect Defense Department records. *Id*. As Justice Powell and Chief Justice Burger explained in *Davis*, the "expressions of the court below on the merits, if not reversed, will continue to have precedential weight." *County of Los Angeles v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Powell, J. dissenting). *See also Brown v. Kelly*, 609 F.3d 467, 476–77 (2d Cir. 2010) (noting that while a vacated decision "[was] not technically binding," concluded it was "persuasive authority").

This Court has recognized that courts may leave intact their legal conclusions on remand. *See Stutson v. United States,* 516 U.S. 193, 196–98 (1996) (acknowledging that the lower court might reach the same result on remand despite the order to remand and consider intervening precedent); *see also* Robert L. Stern, et al., Supreme Court Practice 319 (8th ed. 2002) (when the Supreme Court issues a GVR, "the

lower court is being told simply to reconsider the entire case in light of the intervening precedent—which may or may not compel a different result.").

The Second Circuit has not discussed the precedential effect of vacated opinions in detail, but the D.C. Circuit has conclusively established that such opinions do carry precedential weight. *See Helmerich*, 784 F.3d at 815–16; *Action All. of Senior Citizens v. Sullivan,* 930 F.2d 77, 83–84 (D.C. Cir. 1991) ("Although the Supreme Court vacated our prior opinion, it expressed no opinion on the merit of these [prior] holdings. They therefore continue to have precedential weight, and in the absence of contrary authority, we do not disturb them." (internal citation omitted)); *Edmond v. USPS Gen. Counsel,* 949 F.2d 415, 424 n. 17 (D.C. Cir. 1991) ("Although vacated because of an intervening Supreme Court decision covering immunity, the *Briggs* opinion retains precedential weight on other issues.").

The subsequent proceedings in *ACLU v. Department of Defense* make clear that the Second Circuit's decision has precedential effect. 40 F. Supp. 3d 377 (S.D.N.Y. 2014) (citing *ACLU v. DOD*, 543 F.3d 59). The district court rejected the agency's argument that records should be withheld under 7(F), following the Second Circuit's interpretation from the prior vacated ruling. *ACLU v. DOD*, 40 F. Supp. 3d at 382 n.3. Indeed, other courts in the Second Circuit recognize the decision as precedential. *See Long v. OPM*, 692 F.3d 185, 197 (2d Cir. 2012); *Allard K. Lowenstein Int'l Human Rights Project v. DHS*, 626 F.3d 678, 681 (2d Cir. 2010); *New York*

Times Co. v. DOJ, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012).

The DHS's reliance on *County of Los Angeles v. Davis* is also misplaced because the judgment in that case was vacated for mootness under *United States v. Munsingwear*, 340 U.S. 36, 39–40 (1950). The *Munsingwear* vacatur doctrine is based on a fairness principle and intended to ensure that a party does not lose the opportunity for judicial review of an adverse decision due to actions or circumstances beyond her control. *See U.S. Bancorp Mortg. Co. v. Bonner Mall Partn.*, 513 U.S. 18, 23–25 (1994). In contrast, this Court vacated the Second Circuit's judgment for reconsideration in light of intervening Congressional action. *ACLU v. DOD*, 558 U.S. at 1042.

In trying to downplay the impact of the D.C. Circuit's rewriting of the FOIA, the DHS rests on an entirely unsupported assertion that other federal courts have issued "holdings" that are "consistent" with the interpretation of the lower court. BIO at 11–12. But the DHS has not cited any decisions that are consistent with the lower court's overly broad construction of Exemption 7(F) because no such decisions exist. Prior cases interpreting Exemption 7(F) are consistent with EPIC's position because they all involved situations where agencies withheld records related to specific, identifiable individuals. *See, e.g., Boehm v. FBI*, 948 F. Supp. 2d 9, 36 (D.D.C. 2013) (concerning "identifying information about informants and individuals who work for the government"); *Brestle v. Lappin*, 950 F. Supp. 2d 174

(D.D.C. 2013) (concerning individuals who were cooperating with a Bureau of Prisons investigation); *Quinto v. DOJ*, 711 F. Supp. 2d 1 (D.D.C. 2010) (concerning individuals who were identified or referenced in law enforcement communications). *See also ACLU v. DOD*, 543 F.3d at 82 ("[V]virtually every court having occasion to interpret exemption 7(F) has been called upon to determine whether the disclosure of law enforcement records could reasonably be expected to endanger the life or physical safety of any individuals who participated in some way in the investigation, be they law enforcement employees, informants, or witnesses, or others associated in some way with those persons.").

II. The opinion below improperly expanded the scope the exemption and is contrary to the structure and purpose of the FOIA.

The DHS argues that the lower court's reading of Exemption 7(F) was correct because Congress would not have limited the scope of the exemption "simply to promote FOIA's general interest in public disclosure of certain agency records." BIO at 7–9. But the interest of public disclosure is precisely why this Court has repeatedly emphasized that FOIA exemptions "must be narrowly construed." *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (internal quotation marks omitted). By ignoring that clear command and rendering term "individual" in Exemption 7(F) superfluous, the court below went against the basic structure and purpose of the FOIA. If Congress had intended to create an unbounded "public safety" exemption in the FOIA, it would have

done so clearly. Congress, after all, does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). Indeed, a glancing review of the statute shows that Congress expressly limited 7(F) in two ways: (1) by establishing the "threshold test" for all Exemption 7 claims, and (2) by focusing subsection (F) on risks to an "individual" identified or otherwise mentioned in a law enforcement record. 5 U.S.C. § 552(b)(7).

The DHS argues that Congress "did not limit Exemption 7(F) to individuals associated directly or indirectly with either 'law enforcement' or a 'law-enforcement investigation.'" BIO at 7–8. But that is precisely the requirement of Exemption 7. Any agency invoking the exemption must first establish that the record at issue was compiled for "law enforcement purposes." 5 U.S.C. § 552(b)(7). *See Pratt v. Webster*, 673 F.2d 408, 414 (D.C. Cir. 1982) (explaining that agency records must "pass the Exemption 7 threshold before any of the six subparts in Exemption 7 may be applied to prevent disclosure").

The DHS is also incorrect that there is "no limiting language" in the exemption. BIO at 7. The FOIA requires that any agency asserting the exemption must demonstrate that disclosure "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). These words have meaning. As the Second Circuit correctly concluded,

> To construe the word "any" to relieve the government of the burden of

> identifying an individual who could reasonably be expected to be endangered would be to read "individual" out of the exemption. In effect, it would convert the phrase "endanger the life or physical safety of any individual" into "endanger life or physical safety."

ACLU v. DOD, 543 F.3d at 70. Congress could have created a tenth exemption in the 1986 FOIA amendments, aimed at broadly protecting "public safety," but it chose not to do so. The opinion below assumed that Congress intended in a minor and technical amendment to transform a previously insignificant FOIA exemption into "an ersatz classification system." *Id.* at 83.

The attempt by the DHS to rely on unrelated and non-contemporaneous statutory language is equally unavailing. BIO at 8 (arguing that Congress could have used the same "identifiable individual" language in the 1986 FOIA amendments as it used in the 1974 Privacy Act). "[T]he mere fact that the words are used in each instance is not a sufficient reason for treating a decision on the meaning of the words of one statute as authoritative on the construction of another statute." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 172–73 (2012) (quoting Rupert Cross, *Precedent in English Law* 192 (1961)).

The DHS also contradicts its own argument by criticizing EPIC's discussion of the 1974 FOIA amendments, which explained the underlying

purpose of Exemption 7. BIO at 10. Congress's intent in enacting the FOIA bears directly on Congress's subsequent amendments to the Act. *See* Scalia & Garner at 173 ("[T]he more connection the cited statute has with the statute under consideration, the more plausible the argument becomes.").

III. This case implicates competing public safety concerns.

There is an urgency to review the lower court's conflicting interpretation of Exemption 7(F) in this case because of the important civil liberties and safety concerns at issue. EPIC originally filed the FOIA request in response to the shutdown of cellular service during a peaceful protest in a California transit ("BART") station. The DHS states in its brief that the BART officials who shut down cellphone service during a peaceful protest in 2011 acted outside the authority of SOP 303. BIO at 2 n.1. But this fact only underscores the public's need to review the DHS policy governing lawful interruption of cell phone service.

The Federal Communications Commission ("FCC") has expressed strong concerns that interruptions of cell phone service pose a threat to public safety. Such decisions by a federal agency could prevent access timely medical and emergency services. FCC, Enforcement Advisory No. 2012-08,

Cell Jammers, GPS Jammers, and Other Jamming Devices (Oct. 15, 2012).[3] The FCC explicitly prohibits the use of "jammers" and other devices that disrupt cell phone service, and has repeatedly issued advisories to state and local government officials (including law enforcement agencies) emphasizing the importance of the prohibition. These techniques "can prevent 9-1-1 and other emergency phone calls" from "getting through to first responders or interfere with" official "communications that are critical to carrying out law enforcement missions." FCC, Enforcement Advisory No. 2014-5, Warning: Jammer Use Prohibited (Dec. 8, 2014).

It is precisely in those circumstances when the DHS contemplates a cellphone shutdown that public access to cellphone service may be most vital. In fact, the policy at issue in this case ("SOP 303") arose in response to concerns raised by a unilateral cell phone service shutdown in the New York subway system in 2004. *Cellphone Cutoff in N.Y. is Questioned*, L.A. Times (July 12, 2005).[4] There, commuters and transit employees were cut off and unable to access 911 service. *Id.*

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[3] Available at https://apps.fcc.gov/edocs_public/attachmatch/DA-12-1642A1.pdf.

[4] http://articles.latimes.com/2005/jul/12/nation/na-nysecurity12.

The government's contention that the public safety analysis in 7(F) weighs only against disclosure of the documents sought is wrong as a matter of history and as a matter of law. Congress "intended FOIA to permit access to official information," such as the records in this case, "long shielded unnecessarily from public view." *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (internal quotation marks omitted).

CONCLUSION

For the reasons stated above, the Court should grant the Petition.

Respectfully submitted,

MARC ROTENBERG
Counsel of Record
ALAN BUTLER
T. JOHN TRAN
ELECTRONIC PRIVACY
INFORMATION CENTER
1718 Connecticut Ave., NW
Washington, DC 20009
(202) 483-1140
rotenberg@epic.org

December 11, 2015