No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA D/B/A ARGUS LEADER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS, AMERICAN FARM BUREAU FEDERATION, ANIMAL AGRICULTURE ALLIANCE, FUR INFORMATION COUNCIL OF AMERICA, NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH, PET INDUSTRY JOINT ADVISORY COUNCIL, PINNACLE PET, PROTECT THE HARVEST, THE UNITED STATES ASSOCIATION OF REPTILE KEEPERS, AND THE ZOOLOGICAL ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should the Court restore the word "confidential" in Exemption 4 of the Freedom Information Act, 5 U.S.C. § 552(b)(4), to its plain meaning, or should it affirm the atextual meanings provided to it by the D.C. Circuit in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) and *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280 (D.C. Cir. 1983)?

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are national businesses, associations and organizations whose members and stakeholders work with and care for animals in their respective businesses, vocations, industries and fields. As such, *amici* and their members and stakeholders regularly provide information, on both a required and a voluntary basis, to various federal agencies that regulate animal and wildlife use, care and maintenance. This case is important to *amici* because they and their members have been, and will continue to be, subjected to negative financial and reputational consequences as a result of the government's release of their confidential information due to the D.C. Circuit's atextual interpretation of the word "confidential" in Exemption 4 of the Freedom of Information Act, which courts around the country have adopted.

The Alliance of Marine Mammal Parks & Aquariums ("AMMPA") is a 501(c)(4) nonprofit international association and accrediting body for marine parks, aquariums and zoos dedicated to the highest standards of care for marine mammals and their conservation in the wild. AMMPA's 65 members, which include both for-profit and nonprofit entities, advance the objectives of marine

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1. Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

mammal conservation through public display, education, research, and the rescue and rehabilitation of injured, orphaned, and distressed animals in the wild.

The American Farm Bureau Federation ("AFBF"), headquartered in Washington, D.C., was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all fifty states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, the AFBF regularly participates in litigation, including as *amicus curiae* in this and other courts, to represent its members.

The Animal Agriculture Alliance is a 501(c)(3) industry-united nonprofit organization that connects food industry stakeholders; engages with food chain influencers; promotes consumer choice by helping people better understand modern animal agriculture; and protects the future of animal agriculture. Its members include farmers, ranchers, food companies, feed and animal nutrition companies, veterinarians, animal scientists, agricultural associations and other allied stakeholders.

The Fur Information Council of America ("FICA") is a not-for-profit organization that protects and promotes the interests of the U.S. fur industry. While its more than 100 members include some of the nation's largest fur retailers, manufacturers, wholesalers, fashion designers, auction houses, and other U.S. exporters of furbearing skins and products, approximately 85% of FICA's members

are small, family-run businesses. FICA provides the public with information on the fur industry, wildlife conservation and responsible animal care to which the fur industry is committed. Part of FICA's mission is to protect the interests of the U.S. fur industry by providing its membership with support to counter distortions and misrepresentations made by anti-animal use groups.

The National Association for Biomedical Research ("NABR") is a 501(c)(6) nonprofit association dedicated to sound public policy for the humane use of animals in biomedical research, education and testing. NABR has 330 member organizations, including pharmaceutical companies, biotechnology companies, universities, medical schools and other life science organizations engaged in or having a stake in humane animal research.

The Pet Industry Joint Advisory Council is a 501(c)(6) nonprofit dedicated to promoting responsible pet ownership and animal welfare, fostering environmental stewardship and ensuring the availability of pets.

Pinnacle Pet is a national pet supplier. Dedicated to pet wellness, Pinnacle Pet provides customized care of its animals from breeder to pet store.

Protect the Harvest is a nonprofit organization that works with stakeholders to educate the general public about agriculture and promote favorable food security policies.

The United States Association of Reptile Keepers ("USARK") is a registered 501(c)(6) nonprofit membership organization representing reptile breeders, hobbyists,

conservationists, academics, pet owners, scientists, and businesses that provide the reptile community with equipment, feed, transportation, and specialized veterinary and other services. USARK is an education, conservation and advocacy organization for herpetofauna promoting awareness, responsible care, and professional unity for all manners of reptile species. As part of this mission, the organization supports responsible private ownership of, and trade in, reptiles and amphibians, as well as promulgates and endorses responsible caging standards, sound husbandry, escape prevention protocols, and an integrated approach to vital conservation issues.

The Zoological Association of America ("ZAA") has more than 60 accredited members, with accreditation predicated on the promotion of the highest standards of animal welfare as well as public and staff safety. ZAA's work includes animal ambassador programs, classroom education and, with wildlife management professionals around the globe, the conduct and support of research in behavioral sciences and genetics and the exchange of information and training on husbandry, nutrition, best management practices and veterinary care.

SUMMARY OF THE ARGUMENT

"Confidential information" has a plain meaning: "Knowledge or facts not in the public domain but known to some . . . ." Black's Law Dictionary 361 (10th Ed. 2014). That is what the term means wherever it is not defined otherwise, including in the Freedom of Information Act ("FOIA")'s Exemption 4, 5 U.S.C. § 552(b)(4). Exemption 4 exempts from mandatory FOIA disclosure materials that are "trade secrets and commercial or financial information

obtained from a person and privileged or confidential." Pursuant to the plain meaning of "confidential," application of Exemption 4 to "confidential" material of a "commercial or financial" nature should be determined simply by the declaration of the party whose confidential information is at issue that the information has been kept confidential and not released by that party into the public domain. Such information should then be disclosed only if the requester can demonstrate otherwise.

Yet, despite the plain language of the statute and the clear meaning of the word, the D.C. Circuit, in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), created an atextual "substantial competitive harm" test out of whole cloth that heightened the standard by which commercial and financial materials would be considered confidential for purposes of applying Exemption 4. Later, in *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280 (D.C. Cir. 1983), the D.C. Circuit added one caveat to its test that disallowed reputational harm as a basis to establish competitive harm, and another that further limited application of Exemption 4 only to harm flowing from the affirmative use of proprietary information specifically by "competitors." These heightened *Public Citizen* standards had no basis in the text of FOIA or in its legislative history. Instead, the D.C. Circuit's source for this new interpretation of Exemption 4 was a citation-free paragraph in a University of Wisconsin Law Review article.

The results of the D.C. Circuit's atextual and unsupported precedents have been incredibly damaging to *amici*, their members and similarly situated entities.

Activist groups opposed to *amici* rely on *National Parks* and *Public Citizen* to obtain *amici*'s confidential information from the government. They then go on to misuse and publicly disseminate that confidential information in attempts to drive *amici* and their members out of business, by causing them reputational and economic harm.

Additionally, the misinterpretation of Exemption 4 by *National Parks* and *Public Citizen* – and other Circuits following their precedent – has fostered costly and prolonged FOIA lawsuits, often leading to patently unjust outcomes, with the disclosures of plainly confidential commercial information. The misinterpretation has also promoted the multiplicity of parallel lawsuits in different jurisdictions to obtain the same confidential information of private parties pursuant to FOIA.

The exploitation of FOIA in this manner, and the resulting explosion of FOIA requests by activist groups, can and should be remedied by this Court. The Court should take this opportunity to overrule *National Parks* and *Public Citizen* once and for all. The government and the lower courts should be instructed to apply the plain meaning of confidential in Exemption 4. Such a move would ensure that FOIA will no longer be used as a weapon in the hands of those who wish to cause harm by wrongfully receiving confidential commercial and financial information of private persons.

ARGUMENT

I. THE WORD "CONFIDENTIAL" MEANS "CONFIDENTIAL"

5 U.S.C. § 552(b)(4) ("Exemption 4") exempts from mandatory disclosure under the Freedom of Information Act ("FOIA") materials that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The word "confidential" in this sentence is not defined. It need not be. "Confidential" means "confidential."

Despite the plain language of Exemption 4, the D.C. Circuit in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) chose to create an atextual test, defining the term "confidential" as requiring the government to prove that providing the information under FOIA likely would result in "substantial competitive harm." *See* Pet. Brief, at 3.[2] Notwithstanding *National Parks* and its widespread adoption by other Circuit Courts, the word "confidential" does not mean "confidential but only if disclosure likely results in substantial competitive harm" – not in Exemption 4, nor anywhere else.

National Parks creates an entirely atextual burden on private parties who seek nothing more than to protect their own confidential information. It similarly burdens the government agencies usually tasked with trying to

2. The D.C. Circuit's Exemption 4 test applies only *sometimes*, *i.e.*, when the material was compulsorily provided to the government, as opposed to when it was voluntarily provided. *See* Pet. Brief, at 14.

protect this third-party information. In rejecting the lower courts' *National Park* precedent, this Court need not look beyond the statute's plain text.

Should this Court agree with Petitioner Food Marketing Institute ("Petitioner" or "FMI") and *amici* that the word "confidential" means what it says, the inevitable question for the Court to decide will likely become: post-*National Parks*, how will the government, or a party whose confidential information is being requested pursuant to FOIA, demonstrate that confidential material is, in fact, confidential?

Amici submit that the answer is straightforward. Confidential materials are those that a party treats as confidential in its regular course of business and does not release to the public – *for whatever reason*. "Confidential information" has a plain, unambiguous meaning: "Knowledge or facts not in the public domain but known to some . . . ." Black's Law Dictionary 361 (10th Ed. 2014). Thus, if the material is treated by the submitting party as private, and has not been disclosed by the party to the public, it should be considered "confidential" for Exemption 4 purposes. Proof of the confidential nature of the material at issue should be established by way of declaration(s) from the party who provided the commercial information to the government, whether voluntarily or through government mandate, or from whom the information was obtained by the government in the course of its own inspections of a party's facility or by way of communications between the private party and the government. The burden then should shift to the party requesting the information under FOIA to prove that the confidential information is not, in fact, confidential.

This proposed test is simple and straightforward. Indeed, it is similar to a standard used to protect confidential information in trial courts by way of a protective order. In both instances, the parties are expected to mark materials as confidential only when they truly are so. If a document marked confidential was previously disseminated within the public domain, the opposing party has the ability to challenge the designation by demonstrating that the information was not kept private.[3]

Most importantly, *amici's* proposed test does not ignore the plain language of Exemption 4. This alone makes it more palatable to an appropriate application of FOIA than the current "substantial competitive harm" test prevalent among the lower courts.

II. THE COURT SHOULD ENSURE THAT THE LEGACY OF *NATIONAL PARKS* IS OVERRULED

A. The Court Should Overrule the D.C. Circuit's Law Review-Inspired Precedent of *Public Citizen Health Research Group*

Amici urge the Court not only to overrule *National Parks* but to ensure that its progeny, including *Public Citizen Health Research Group v. Food & Drug*

3. For the purpose of this test, any materials previously released under FOIA pursuant to the old *National Parks* test should not be considered in the public domain. For example, if a category of information was released pursuant to *National Parks* in the past and is now in the public domain, any update to that information should not be released under a post-*National Parks* test.

Administration, 704 F.2d 1280 (D.C. Cir. 1983), is laid to rest. In a footnote near the end of its opinion in *Public Citizen*, the D.C. Circuit

> emphasize[d] that "[t]he important point for competitive harm in the FOIA context . . . is that it be limited to harm flowing from the affirmative use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws."

704 F.2d at 1291 n. 30 (emphasis in original). The quoted language comes from a University of Wisconsin Law Review article by Mark Q. Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*. *See* 1981 Wis. L. Rev. 207, 235-36 (hereinafter, "*Secrets and Smokescreens*"). Grounded on nothing more than the conjecture of the article's author for this "important point for competitive harm in the FOIA context" which *Public Citizen* embraced without any reference to case law, legislative history or analysis, *Secrets and Smokescreens* effectively established two new requirements for information to qualify as "confidential" under Exemption 4.

First, *Secrets and Smokescreens* posited that for information to be "confidential" under Exemption 4, the harm must "flow[] from the affirmative use of [the]

proprietary information by *competitors*." *Secrets and Smokescreens* at 235 (emphasis in original) (citing nothing). Second, the article summarily concluded that reputational harm of the party whose information would be disclosed does not count in the Exemption 4 "confidential" analysis, stating that competitive harm cannot "flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations . . . ." *Secrets and Smokescreens* at 235 (citing nothing).[4]

Nothing in the legislative history of FOIA – even in any of the attenuated legislative history relied on by the D.C. Circuit – required or implied that the limitations imposed by the author of *Secrets and Smokescreens* should be applied to Exemption 4.[5] Yet, *Public Citizen*, relying on

4. As to *Secrets and Smokescreens*' unilateral exclusion of reputational harm from the Exemption 4 analysis, one critic has noted: "The author cites no cases or authority for this statement, nor does he provide any data or reference to social-science research on reputational effects. There is no other context given to his assertion of what competitive harm does or does not include. And yet it is this quote to which the D.C. Circuit [in *Public Citizen*] refers two years later in what has become a widely-cited – if purely dicta – comment regarding reputational harm." Kathleen Vermazen Radez, *The Freedom of Information Act Exemption 4: Protecting Corporate Reputation in the Post-Crash Regulatory Environment*, 2010 Colum. Bus. L. Rev. 632, 658 (2010) (citations omitted).

5. Indeed, "[b]oth the House and Senate reports on the FOIA bills provide that [Exemption 4] is intended to protect information which customarily would not be released to the public by the person from whom it was maintained. It seems clear that Congress intended Exemption 4 to maintain the status quo: business information which industry customarily held in confidence would continue to be exempt from mandatory disclosure

nothing other than *Secrets and Smokescreens*, imposed those restrictions. *National Parks* at least purported to rely on legislative history in expanding the statutory language. *See* Pet. Brief, at 24-26. *Public Citizen* did no such thing. Instead, in *Public Citizen* the D.C. Circuit radically expanded its already atextual definition of "confidential" based on a single academic's assumptions.[6]

Since *Public Citizen*, even courts outside the D.C. Circuit have applied the "law" of *Secrets and Smokescreens* without analyzing from where or how that "law" came to be. For example, in *Watkins v. U.S. Bureau of Customs & Border Prot.*, 643 F.3d 1189 (9th Cir. 2011), the Ninth Circuit took *Secrets and Smokescreens*, quoted without reservation by *Public Citizen*, as settled law. *See* 643

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under FOIA." Thomas L. Patten and Kenneth W. Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Admin. L. Rev. 193, 197 (1977) (citations to House and Senate Reports omitted) (hereinafter, "Patten and Weinstein").

6. *Amici* recognize that members of the Court have expressed differences of opinion as to the utility of legislative history in the subsequent interpretation of a statute. *Compare Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 782 (J. Sotomayor, concurring) (2018) ("Legislative history is of course not the law, but that does not mean it cannot aid us in our understanding of a law."), *with id.* at 783-84 (J. Thomas, concurring in part and in the judgment) ("I join the Court's opinion only to the extent it relies on the text of the Dodd–Frank Wall Street Reform and Consumer Protection Act . . . I am unable to join the portions of the Court's opinion that venture beyond the statutory text."). In this case, where both the statute itself and its legislative history were ignored in the D.C. Circuit's interpretation of Exemption 4, all of the Court's members should be comfortable overruling *Public Citizen*'s law review-inspired precedent.

F.3d at 1195 ("Competitive harm analysis 'is . . . limited to harm flowing from the affirmative use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position . . . .'") (quoting *Public Citizen*, 704 F.2d 1280, 1291 n. 30). Since *Watkins*, courts throughout the Ninth Circuit have referenced and relied on *Secrets and Smokescreens* in granting overbroad FOIA requests that a plain reading of Exemption 4 would have rejected. *See*, *e.g.*, *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. CV-16-00527-TUC-BGM, 2018 WL 1586648, at *4 n. 2 (D. Ariz. Mar. 30, 2018); *Edelman v. U.S. Sec. & Exch. Comm'n*, No. 315CV02750BENBGS, 2017 WL 4286939, at *6 (S.D. Cal. Sept. 27, 2017); *AIDS Healthcare Found. v. U.S. Food & Drug Admin.*, No. CV1107925MMMJEMX, 2014 WL 10983763, at *6 (C.D. Cal. Feb. 13, 2014).

In fact, the district court below in *this* case relied on the definition of "competitive harm" invented by *Secrets and Smokescreens*. The district court held: "Competitive harm is limited to 'harm flowing from the use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations.'" *Argus Leader Media v. U.S. Dep't of Agric.*, 224 F. Supp. 3d 827, 833 (D.S.D. 2016) (quoting *Public Citizen*, 704 F.2d at 1291 n. 30). This case, therefore, presents a prime opportunity not only to overrule the Exemption 4 test of *National Parks*, but also to do away with the reputational harm test contained in *Public Citizen*.

B. Reputational Harm Causes Real Damage

Under the current *National Parks* and *Public Citizen* tests, Exemption 4 provides *amici*'s confidential information with scarce protection. *Amici*'s detractors[7] often proudly and loudly announce that the goal of their receipt of the confidential materials of *amici* is to reputationally embarrass and economically harm them and their suppliers and vendors.[8] Nevertheless, applying *National Parks* and *Public Citizen*, lower courts regularly find that *amici*'s confidential materials *may* be publicly disclosed, either because *amici*'s detractors are not "competitors" of *amici*, or because reputational harm is not protected by Exemption 4.

One case in point of reputational harm causing real damage is demonstrated by the testimony presented in 2018 by Dr. Rae Stone, who testified on behalf of *amicus* AMMPA before the Senate Subcommittee on Oceans Atmosphere, Fisheries, and Coast Guard. *See Enhancing the Marine Mammal Protection Act: Before the Subcomm. on Oceans, Atmosphere, Fisheries, and Coast Guard of the S. Comm. on Commerce, Science, and Transportation*, 115th Cong., p. 6 (April 25, 2018)

7. These detractors include organizations such as People for the Ethical Treatment of Animals ("PETA"), the Center for Biological Diversity ("CBD"), the Animal Legal Defense Fund ("ALDF"), the Humane Society of the United States ("HSUS") and like-minded groups.

8. *See, e.g.*, *Stop Air France From Shipping Monkeys to Their Deaths!*, https://headlines.peta.org/air-france-stop-shipping-monkeys/ ("Air France even canceled an individual shipment of monkeys after a public outcry by PETA and its supporters.").

(statement of Rae Stone, President & Partner, Dolphin Quest), https://www.commerce.senate.gov/public/index.cfm/2018/4/enhancing-the-marine-mammal-protection-act ("Stone Testimony"). Dr. Stone testified about confidential information required to be submitted by AMMPA members to the National Marine Fisheries Service ("NMFS") for its marine mammal inventory maintained pursuant to the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361, *et seq.*

The MMPA requires that NMFS maintain in the inventory, among other things, "[t]he name of the marine mammal or other identification . . . [t]he estimated or actual birth date of the marine mammal . . . [and the] date of death of the marine mammal and the cause of death when determined." 16 U.S.C. § 1374(c)(10)(A), (B), (H). This confidential commercial information is routinely sought by activists under FOIA. The activists use the FOIA information in order to promote and often exaggerate the deaths of animals in zoos, marine mammal parks and similar facilities and "unambiguously say their goal is to end the use of animals in zoological facilities, agriculture, and other sectors." *See* Stone Testimony, p. 6. Notwithstanding these threats, the D.C. Circuit's "competitors" test means this confidential information that *amici* are required to turn over to the government is provided no protection under *Public Citizen*'s Exemption 4 standard.

Further, the NMFS inventory "information" the activists obtain often is inaccurate, and is used by them to promote further inaccuracies and to cause *amici* reputational (and, thereby, economic) harm. For example, detractors of marine mammal park Dolphin Quest used

FOIA to receive confidential information about Dolphin Quest, and then misused that confidential information to make false claims about the facility. As Dr. Stone observed:

> A committee [in the Hawaii legislature] was considering legislation that sought to ban the transfer of cetaceans in human care "for breeding or entertainment purposes." Not only did animal extremists supporting this bill say they used "research" gleaned from the NMFS inventory to support this legislation, the bill sponsors included inaccuracies from the NMFS inventory in the actual bill text. *The information about Dolphin Quest from the inventory that was the basis of this "research" was grossly inaccurate and referenced animals that were never at Dolphin Quest and died before Dolphin Quest was even founded.*

Stone Testimony, p. 6 (emphasis added).

III. THE CURRENT EXEMPTION 4 TEST OFTEN LEADS TO PROLONGED LITIGATION AND ABSURD RESULTS

The confidential information *amici*'s detractors seek often includes: (1) the numbers and locations of animals and animal products kept in the regular course of business,[9] (2) the total number of animals purchased and sold, and the gross revenues of those sales,[10] and (3)

9. *See infra*, Section III.A.

10. *See infra*, Section III.B.

information regarding the import and export of animals.[11] All the above categories of confidential materials have been publicly disclosed pursuant to *National Parks* and *Public Citizen*, despite their being of a "commercial or financial" nature, and thus covered by a plain language reading of Exemption 4.

What is more, the government, and/or private persons (such as *amici*) who wish to protect this information from disclosure, must spend time and money in protracted FOIA litigation that under the current prevalent precedents, *amici* and the government regularly lose despite the confidentiality of the documents and materials at issue. The following are but two examples of years-long cases in which *amici*, their members and similarly situated entities were harmed – and continue to be harmed – by the current Exemption 4 test which failed to protect their private, confidential commercial information against public dissemination.

A. *Animal Legal Defense Fund v. U.S. Food & Drug Administration*

In 2012, the Animal Legal Defense Fund ("ALDF") filed suit against the U.S. Food & Drug Administration (the "FDA"). ALDF argued that the FDA wrongly relied on Exemption 4 to prevent the release of confidential materials "related to egg production in Texas." *See Animal Legal Defense Fund v. U.S. Food & Drug Admin.*, Case No. 12-cv-04376-EDL (N.D. Cal., filed August 20, 2012) (the "ALDF Case"), Complaint, ECF No. 1, p. 1. Those confidential materials were provided to the FDA by persons and companies who worked in the egg industry. *Id.*

11. *See infra*, Section IV.

Basing their protection under Exemption 4, the FDA refused to release the following five categories of information: "(1) total hen population; (2) total number of hen houses; (3) total number of floors per hen house; (4) total number of cage rows per hen house; and (5) total number of cage tiers per hen house." ALDF Case, Magistrate Judge's Findings of Fact & Conclusions of Law, ECF No. 169, p. 1 ("ALDF Opinion"). All this information was received by the FDA from private parties. *Id.* And, there was "no dispute that the information that the FDA redacted . . . is 'commercial or financial information' that may be protected from disclosure if Exemption 4 otherwise applies." *Id.* at 13.

Nevertheless, the FDA was forced to spend nearly eight years litigating what should have been – pursuant to a plain reading of Exemption 4 – a very simple case, and which, under a plain reading of the statute, would almost certainly have resulted in summary dismissal. As it was, after years of motion practice, and multiple pre-trial appeals and remands, the magistrate assigned to the case held a four-day bench trial in April 2018 on the issue whether the confidential commercial materials ALDF requested should be considered "confidential" under Exemption 4.

On January 23, 2019, the magistrate issued its Findings of Fact and Conclusions of Law. *See* ALDF Opinion. In its findings, the magistrate concluded that Exemption 4 did not apply to the majority of the withheld information, despite the fact that the private parties that provided the commercial information to the FDA themselves treated the information as confidential – similar to the case at bar.

Following the reasoning of *National Parks* and *Public Citizen*, the magistrate held that "no likelihood of substantial competitive harm arises from the release of the total number of hen houses, total number of floors per hen house, total number of cage rows per hen house, and the total number of cage tiers per hen house." ALDF Opinion, p. 2. In so doing, the magistrate specifically relied on *Public Citizen*, 704 F.2d at 1291 n. 30, as adopted by the Ninth Circuit in *Watkins*, 643 F.3d at 1195, for the proposition that "Competitive harm analysis 'is limited . . . to harm flowing from the affirmative use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position." ALDF Opinion at 13 (emphasis in ALDF Opinion). Forty years of misguided D.C. Circuit precedent should not blind this Court to the absurdity of this result.[12]

The sheer length of the ALDF Case, which has been ongoing since 2012 and may continue for some time longer, is by no means uncommon in a FOIA litigation. Such undue burden in time and expense to the government in attempting to prove "substantial competitive harm" provides the Court with another consideration for returning "confidential" to its plain meaning. The government should not be forced to focus its resources in order to prove whether an admittedly confidential item would cause "substantial competitive harm" if publicly released. Instead, if the test was based on a plain language reading of the term confidential, the

12. As of the date of this filing, the judgment in the ALDF Case is stayed pending FDA's receipt of approval from the Solicitor General to appeal the case to the Ninth Circuit. *See* ALDF Case, ECF No. 172.

government would easily be able to discern whether the commercial or financial material at issue was truly treated by the submitting party as confidential. All that would be necessary would be the submission of declarations to that effect.

B. *Jurewicz v. U.S. Department of Agriculture*

In the ALDF Case, the magistrate held that the "use of disclosed information by an individual who is not a competitor does not implicate Exemption 4." ALDF Opinion at 13. In doing so, the magistrate relied on *Jurewicz v. United States Department of Agriculture*, 741 F.3d 1326 (D.C. Cir. 2014). *Jurewicz* stemmed from FOIA requests made by an animal activist group, the Humane Society of the United States ("HSUS") in 2009. *Id.* at 1330. HSUS was looking to obtain confidential information "relating to the[] gross revenue and business volume" of certain dog breeders and dealers in Missouri. *Id.* at 1329. Particularly, HSUS wanted "copies of Form 7003s" submitted to the U.S. Department of Agriculture's Animal and Plant Inspection Service ("APHIS"). *Id.* "Form 7003 asks for (1) the total number of animals purchased and sold in the last year; (2) the gross revenue from regulated activities; and (3) for dealers that are not breeders, the difference between the purchase price and sale price of the animals sold." *Id.* This confidential information is provided by dog breeders and dealers to APHIS on a yearly basis, pursuant to 7 U.S.C. § 2134 and 9 C.F.R. § 2.5(b).[13]

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13. APHIS's Form 7003 is found at the following link: https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/SA_Regulated_Businesses/SA_Request_License_Registration_Application_Kit.

A group of the breeders and dealers whose records were set to be released challenged the release in federal court in this reverse-FOIA case. They alleged, among other things, that their commercial information found on Form 7003 should be protected from disclosure under Exemption 4. The D.C. Circuit rejected the challenge. Following *National Parks* and *Public Citizen*, the D.C. Circuit held that the challengers needed to "show[] both actual competition and a likelihood of substantial competitive injury." *Id.* at 1331. "Exemption 4," the *Jurewicz* court held, "does not guard against mere embarrassment in the marketplace or reputational injury" and "must flow from the affirmative use of proprietary information by competitors." *Id.* (quotations omitted).

It is inconceivable that a small business's total sales and gross revenues would not be considered confidential commercial and financial information. Yet, to the *Jurewicz* court's mind, these facts were of no moment. Instead, the only thing that mattered was whether the law review-inspired test of *Secrets and Smokescreens* was met. Because it was not, the information was released after five years of litigation.[14] This illogical and inequitable result

14. Another consideration for returning "confidential" to its plain meaning in Exemption 4, is the undue burden in time and expense to submitters in attempting to prove "substantial competitive harm" versus being able to make a simple showing that their confidential information is not normally made publicly available by them. *See* Patten and Weinstein at 200 (proof of competitive harm "obviously would be difficult and costly to present"). Activist groups are, on the whole, much better-funded than the many small business members of *amici*. The latter do not have the same resources to protect their confidential information from disclosure, as compared to their detractors

is inconsistent with the text of Exemption 4 and should not be allowed to be repeated in the future by continued application of the *National Parks* and *Public Citizen* tests.

IV. WITH NO UNIFORM UNDERSTANDING OF "CONFIDENTIAL," MANY LAWSUITS ARE OFTEN FILED IN DIFFERENT CIRCUITS IN ORDER TO RETRIEVE THE SAME CONFIDENTIAL INFORMATION

Because the interpretation of the word "confidential" in Exemption 4 has not been definitively ruled on by this Court, parallel – indeed, often virtually identical – court proceedings involving FOIA requests for substantially the same information will have potentially conflicting outcomes. Gamesmanship is the primary likely reason multiple lawsuits are filed by closely aligned and related activist groups in different Circuits in order to retrieve the *same* confidential information of the *same* private parties. Plaintiffs using FOIA to obtain documents of private parties know that at least *some* district courts and Circuits will likely follow the D.C. Circuit's wide-ranging precedent in *National Parks* and *Public Citizen* – and will thereby ignore the actual confidential nature of the materials being FOIA'd.

Even if those parties lose in one Circuit, if they win in another the first loss will not matter. If even one Circuit retains the D.C. Circuit's expansive tests as to what

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who seek such information under FOIA. *Cf. Kuehl v. Sellner,* 887 F.3d 845, 856 (8th Cir. 2018) (expressing concern about "plaintiffs' attempt, assisted as it is by at least five of such [animal-rights] organizations, as evidenced by their corporate-level-counsel amici briefs . . . to close small, privately owned zoos.").

"confidential" information is, the defendants will lose, as the materials being sought will simply be FOIA'd from that jurisdiction. This Court has the power to remedy this injustice, and to stop once and for all this gamesmanship. Only a uniform test of what the term "confidential" means and how it is applied in Exemption 4 can prevent such abuse.

Such gamesmanship is not merely theoretical. In fact, it is real, and ongoing. To cite one current example: There are now two pending lawsuits in two different jurisdictions, filed months apart, both involving requests to the same government agency pursuant to FOIA for substantially the same information. The clear intent of both of the requestors is to use the confidential information they hope to receive to harm *amici*, their members and others similarly situated. *Amici's* detractors have, at this time, prevailed in district court in one of the two cases, although the case is currently stayed pending appeal. In the other, summary judgment is pending.

The first case was filed by Humane Society International on April 18, 2016, in the District Court for the District of Columbia. *See Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv.*, No. 16-cv-00720 (D.D.C. filed Apr. 18, 2016) (the "HSI Case"). The second was filed less than three months later by another detractor of *amici*, the Center for Biological Diversity, in federal court in Arizona. *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, No. 16-cv-00527, (D. Ariz. filed August 9, 2016) (the "CBD Case").[15]

15. It is unsurprising that the plaintiffs in these two cases chose to file suit in the D.C. Circuit and the Ninth Circuit. Those

The plaintiffs in the two cases had sought, by way of a FOIA request to the Fish and Wildlife Service ("FWS"), records in FWS's electronic Law Enforcement Management Information System ("LEMIS") for the years 2002 through 2010, 2013 and 2014 (the HSI Case), and 2005 to the present (the CBD Case). The requested data sets total tens of thousands of confidential entries relating to imports and exports of animals by private persons and entities of any taxonomic class, whether live, dead, parts or products. In both cases, in response to the activists' requests, FWS withheld certain portions of the LEMIS data under FOIA Exemption 4. HSI and CBD sued – albeit in different jurisdictions.

On March 30, 2018, the district court in the CBD Case granted summary judgment to CBD. 2018 WL 1586648. In articulating the Exemption 4 "confidential" test, the district court explicitly relied on the standard of *Secrets and Smokescreens*, as quoted in *Public Citizen. Id.*, at *4 n. 2. And, in granting CBD's summary judgment motion and directing FWS to provide documents responsive to CBD's FOIA request, the district court relied on *National Park's* atextual definition of the term "confidential,"

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two Circuits have the most generous, consistently pro-plaintiff readings of FOIA's Exemption 4. Both the D.C. Circuit and the Ninth Circuit have held that for FOIA's Exemption 4 to apply, there must be a showing of likely "substantial competitive harm," and that the private party whose confidential materials are threatened to be disclosed must affirmatively show that the plaintiff is a "competitor" (based on the law-review inspired *Secrets and Smokescreens* test). *See Public Citizen*, 704 F.2d at 1291 n. 30; *Watkins*, 643 F.3d at 1195. That plaintiffs chose to file in these two jurisdictions underscores their gamesmanship of the judicial system in order to ensure receipt of confidential materials.

concluding: "Based on the circumstances of this case, the corporate speculations are insufficient to support exemption . . . CBD is entitled to a dataset including the Exemption 4 information at issue." *Id.*

On November 15, 2018, the district court granted *amicus* NABR's Motion to Intervene in that case for the purpose of appealing the district court's judgment to the Ninth Circuit. CBD Case, ECF 91. CBD has filed a Motion for Reconsideration of that Order, which Motion remains pending as of the date of this filing. *See id.*, ECF Nos. 92, 94, 95. In the meantime, the appeal of the CBD Case has been stayed by the Ninth Circuit. Order, *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 18-15997 (9th Cir. Jan. 14, 2019), ECF No. 22.

Meanwhile, in the HSI Case filed in the District of Columbia, which was brought to obtain virtually the same information to use against *amici* as was sought by the plaintiffs in the CBD Case, cross-motions for summary judgment are pending. *See* HSI Case, ECF Nos. 32-36. In its motion for summary judgment, HSI explicitly relied on the district court's ruling in the CBD Case (and failed to mention that the ruling had been stayed by the Ninth Circuit). *See* HSI Motion for Summary Judgment, HSI Case, ECF No. 36, p. 23 ("the Court in CBD analyzed these exact allegations of harm from many of the exact same companies, and held that FWS did not meet its burden to justify nondisclosure, holding that 'the corporate speculations are insufficient to support exemption'") (quoting CBD Case, 2018 WL 1586648 at *4-7). The HSI Case, like the CBD Case, remains pending.

Unless this Court returns the term "confidential" to its proper, textual meaning, there is a strong possibility that

both HSI and CBD will prevail. However, because of the unsettled nature of the term "confidential" in Exemption 4, there also is a possibility that one of the two cases will be resolved in favor of the activist group which made the FOIA request, and the other in favor of FWS. If such a scenario occurs, FWS's victory will be pyrrhic. Once the prevailing activist obtains the FOIA'd documents, those confidential documents will be made public.

As this Court recognized when it issued the stay earlier in the procedural history of this case in Petitioner's favor, once a private party's "confidential" information is provided to another private party by way of a FOIA request, there is no going back. If the defendant loses somewhere, the defendant loses everywhere.

As Petitioner notes, *stare decisis* has bound the lower courts from remedying the defects inherent in *National Parks* and *Public Citizen*. Pet. Brief, 14. This Court, having never considered (until now) the appropriateness of the D.C. Circuit's antiquated, atextual tests virtually defining the word "confidential" out of the FOIA statute (but only as to Exemption 4), is not similarly bound. By overturning the lower courts' prior precedents, this Court will return the term "confidential" to its plain meaning. That is reason enough to reverse. However, by replacing the lower courts' wrong-headed precedent with a simple test of confidentiality based on the submission of a declaration as to confidentiality, the Court will also prevent gamesmanship by those who wish to wrongly use the flexible *National Parks* and *Public Citizen* tests to their advantage, as the plaintiffs in the CBD Case and HSI Case are currently doing.

V. A RECENT REPORT SHOWS THE PERVASIVE MISUSE OF FOIA BY *AMICI*'S DETRACTORS IN THE ABSENCE OF A MEANINGFUL EXEMPTION 4 TEST

In its *amicus* brief in support of Petitioner's Petition for Certiorari, *amici* referenced an analysis, conducted by *amicus* NABR, of FOIA requests submitted to APHIS in 2015. That analysis found that, in 2015, APHIS received 889 requests for information under FOIA. "Approximately 30 percent (265) of the FOIA requests, which is a 23% increase from [2014], could be identified as submitted by animal rights/animal interest organizations, or individuals that appeared to be associated with such groups." *FY 15: Animal Rights FOIA Requests*, National Association for Biomedical Research (May 19, 2016), https://www.nabr.org/wp-content/uploads/2016/05/FY2015-FOIA-Report-Final.pdf (the "2015 NABR Report"), p. 2.[16] The NABR Report also found that approximately 10% (128) of the 1,273 FOIA requests received by the National Institutes of Health ("NIH") in 2015 came from animal rights/animal interest organizations. *Id.* at p. 5. "Almost all of the 123 requests filed by animal rights groups sought information related to research and research organizations." *Id.* at p. 6.[17]

NABR recently published a similar report for fiscal year 2017. *See A Review of Animal Rights FOIA Requests Fiscal Year 2017*, National Association for Biomedical

16. The estimated cost to APHIS of handling the FOIA requests it received in 2015 was $1,836,896.28. NABR Report, p. 4.

17. The estimated cost to the NIH of handling its FOIA requests in 2015 was $3,621,518.15. NABR Report, p. 6.

Research (Dec. 19, 2018), https://www.nabr.org/wp-content/uploads/2018/12/The-FY2017-FOIA-Report-Final.pdf (the "2017 NABR Report"). The 2017 NABR Report confirms that both FOIA requests in general, and FOIA requests by *amici*'s detractors, have been steadily increasing since 2015.

> For FY 2017, there were 1,647 requests posted to the APHIS FOIA logs; 350 (21%) of those were from animal rights groups or appeared to be from people associated with animal rights groups and 69 (20%) of those requests involved research facilities. ***This is [a] 51% increase in total requests with a 50% increase in requests made by animal rights groups***.

2017 NABR Report, p. 2 (emphasis added). The costs to APHIS for processing and handling FOIA requests in fiscal year 2017 was $2,753,299. *Id.* at p. 4. Of those costs, the government recouped $0. *Id.* at p. 5.

As with APHIS, the total number of FOIA requests and the total number of animal rights-related FOIA requests to NIH also increased in fiscal year 2017. "During FY 2017, the National Institutes of Health (NIH) received a total of 1,363 FOIA requests. Approximately 12% (165) of the requests were submitted by animal rights/animal interest organizations, or individuals identified as being associated with such groups." *Id.* at p. 5. The costs to NIH for processing and handling FOIA requests in fiscal year 2017 was $3,163,391. *Id.* at p. 6. Of this amount, the government recouped 1.7%. *Id.*

Under a plain reading of the statute's text, where a FOIA request is seeking material that is confidential and commercial or financial in nature, the request would and should be summarily rejected. Nonetheless, in light of *National Parks* and *Public Citizen*, detractors of *amici* boldly and unabashedly make hundreds of FOIA requests a year in order to obtain the confidential commercial or financial information of *amici*, their members and similarly situated entities. A plain language reading of Exemption 4 undoubtedly would help remedy this situation.

The word "confidential" in Exemption 4 should be construed to mean that whatever information a party designates and treats as "confidential" and does not, for whatever reason, normally share with the public should be protected from disclosure – including for reasons to safeguard against reputational harm or harassment. FMI is right in urging this Court to restore the word "confidential" to its plain meaning. By doing so, the Court will afford *amici* the Exemption 4 coverage to which they rightfully are entitled under FOIA.

VI. CONCLUSION

Words mean what they say. In the absence of an obvious statutory basis to change the plain language meaning of the word "confidential" – which the D.C. Circuit has never provided, and which does not exist – the plain language meaning of the word should be retained. If Congress wishes to change the language of Exemption 4 to make it more in line with the D.C. Circuit's interpretation, it has the power to do so. The D.C. Circuit does not. This Court should overrule the atextual precedent of *National Parks* and *Public Citizen*, thereby reinvigorating the statute with its plain meaning.

Respectfully submitted,

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