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 FOR PETITIONER

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QUESTIONS PRESENTED

Exemption 4 of the Freedom of Information Act protects from mandatory disclosure all "confidential" private-sector "commercial or financial information" within the Government's possession. 5 U.S.C. § 552(b)(4). The Circuits have adopted a definition of "confidential" that departs from the term's ordinary meaning, holding that this exemption applies only if disclosure is "likely * * * to cause substantial harm to the competitive position of" the source of the information. *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The D.C. Circuit fashioned this atextual test from its own sense of FOIA's purposes based on the legislative history of witness testimony in a congressional hearing about a predecessor bill from a prior Congress. The amorphous test has produced at least five different splits as the Circuits have grappled with what constitutes a likelihood of substantial competitive harm. The questions presented are:

1. Does the statutory term "confidential" in FOIA Exemption 4 bear its ordinary meaning, thus precluding mandatory disclosure of all "commercial or financial information" that is privately held and not publicly disseminated, regardless of whether a party establishes substantial competitive harm from disclosure?

2. Alternatively, if the Court retains the substantial-competitive-harm test, is that test satisfied when the party opposing disclosure establishes a reasonable possibility that disclosure might injure financial or commercial interests?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Food Marketing Institute was an intervenor-defendant in the U.S. District Court for the District of South Dakota and the appellant in the U.S. Court of Appeals for the Eighth Circuit.

The U.S. Department of Agriculture was the defendant in the district court but was not a party to the Eighth Circuit appeal.

Respondent Argus Leader Media was the plaintiff in the district court and the appellee in the Eighth Circuit.

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition remains accurate.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's judgment (Pet. App. 1a-6a) is reported at 889 F.3d 914 (8th Cir. 2018). The court of appeals' judgment (Pet. App. 7a-8a) and order denying rehearing *en banc* (Pet. App. 85a-86a) are unreported.

The district court's memorandum opinion and order (Pet. App. 9a-21a) is reported at 224 F. Supp. 3d 827 (D.S.D. 2016). The district court's judgment (Pet. App. 22a-23a) and order granting FMI's motion to intervene (Pet. App. 71a-78a) are unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on May 8, 2018. The court denied rehearing *en banc* on July 13, 2018. The petition for a writ of certiorari was filed on October 11, 2018, and granted on January 11, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In relevant part, the Freedom of Information Act provides:

(a) Each agency shall make available to the public information as follows:

* * *

(8)(A) An agency shall—

(i) withhold information under this section only if—

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); * * *

* * *

(b) This section does not apply to matters that are—

* * *

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* * * .

5 U.S.C. § 552(a)(8)(A)(i)(I), (b)(4).

For the Court's convenience, Subsections (a)(8) and (b) of the Freedom of Information Act are reprinted in their entirety in the Appendix, *infra*.

PRELIMINARY STATEMENT

Exemption 4 of FOIA protects from mandatory disclosure all "confidential" information that is "commercial or financial" and "obtained from a person." 5 U.S.C. § 552(b)(4). The issue before this Court is straightforward: what does "confidential" mean?

Petitioner FMI contends that this word bears its ordinary meaning—something is "confidential" if it is kept private and not publicly disclosed. This Court's precedents along with well-established rules of statutory construction

dictate that result: "Confidential" is an unambiguous word with a longstanding, ordinary meaning.

The atextual alternative, crafted decades ago by the D.C. Circuit and adopted by the court below, is to define "confidential" as having two separate and necessary prongs:

(1) The information is kept private and not publicly disclosed; *plus*

(2) "Substantial competitive harm" would likely result if the information is not kept private and is publicly disclosed.

See *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

But everything after the "plus" is logically implausible—the first prong alone defines the term "confidential." Worse, everything after the "plus" is extratextual. Congress chose not to give "confidential" a different definition for FOIA; it chose to use an ordinary term in common usage. "Confidential" means confidential; that is enough to decide this case.

Furthermore, this atextual test is unworkable, unduly complex, and unpredictable. There is no serious argument that Congress itself endorsed a reading that so departs from the words that it used. All that the lower courts have left is circuit-level *stare decisis*, which of course does not bind this Court.

This Court should therefore repudiate *National Parks* and clarify that "confidential" in FOIA Exemption 4 bears its ordinary meaning.

STATEMENT

I. FACTUAL BACKGROUND

A. The Supplemental Nutrition Assistance Program (SNAP)—formerly, the Food Stamp Program—is a federal program that provides nutritious food to low-income families through normal economic channels. 7 U.S.C. § 2011. The federal government funds SNAP benefits and splits the costs of administering the program with the states, which distribute benefits.[1]

SNAP beneficiaries use electronic benefit transfer (EBT) cards, which resemble ordinary debit cards, to redeem food items from eligible retailers. JA49. Each state selects and contracts with a commercial entity to be its EBT processor. JA78. When the SNAP beneficiary uses the EBT card at the store, the sale information is electronically transferred to the state's EBT processor, which verifies eligibility for the purchase and approves or denies the transaction.[2] JA76-77; JA89-JA90, JA108-109. The typical EBT-processor contract that USDA entered into evidence—the 2009 contract from Arkansas—requires that the EBT processor treat the transactions confidentially. Def's Tr. Ex. 202 at 74-75.

EBT processors send each individual retail location's daily SNAP-redemption totals to the Food Nutrition Service (FNS), an agency within the U.S. Department of Agriculture (USDA). JA78-79. FNS loads the retailers' information into its Store Tracking and Redemption System (STARS), a database that FNS uses to house retailer application information, monitor a retailer's SNAP

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[1] SNAP, https://www.fns.usda.gov/snap/short-history-snap (last visited Feb. 14, 2019)

[2] Some retailers submit information directly to the state's EBT processor; most contract with a third-party commercial point-of-sale processor of their choice that acts as an intermediary with the state's EBT processor. JA76-77.

compliance, and manage retailer participation in SNAP.[3] JA74-75, JA79.

Although the STARS database contains store-level SNAP redemption data, FNS does *not* use this store-level data to pay retailers. JA79. The redemption data is not a record of Government payments. Reporter's Record I:37-38. Instead, the EBT processors make payments to the retailers' designated bank accounts, which may be associated with multiple stores. Reporter's Record I:38-39. The EBT processors make this payment through an Automated Clearing House file routinely used for many types of electronic financial transactions, and this file "does not reflect payment information by store location." JA81; see also JA108-109. The federal government later repays the EBT processors. JA81-82; see also JA108-109.

Substantial amounts of SNAP data, including information about program costs, are publicly available. USDA "release[s] aggregated redemption information at the nation, regional, state, county, zip code, and store-type level." JA89. Anyone can also view monthly and annual SNAP costs on a national and state level on USDA's website.[4]

USDA does not, however, disclose retailer data regarding the amount of SNAP redemptions at an individual store. For 40 years, the department has withheld this data based on its official interpretation of 7 U.S.C. § 2018(c). Section 2018(c) requires SNAP-applicant retail food

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[3] The EBT processor also sends a file to the Anti-Fraud Locator using EBT Retailer Transactions ("ALERT") system that "contains the detailed transactions that occurred at retailers in each state." JA79. The Government uses this information to detect fraud. JA80. Argus Leader did not request the ALERT-system information, *see* JA41-42, which is not at issue in this case.

[4] SNAP, https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap (last visited Feb. 13, 2019).

stores to submit certain information to USDA related to SNAP. It further provides that "[r]egulations issued pursuant to [the Act] shall provide for safeguards which limit the use or disclosure of information obtained under * * * this subsection to purposes directly connected with administration and enforcement of the Act or the regulations * * *." *Ibid.* USDA first incorporated this policy into its rules in 1978, explicitly prohibiting the disclosure of information from retailers regarding "their redemptions of coupons." 43 Fed. Reg. 43,272, 43,275 (Sept. 22, 1978). The current regulations, codified at 7 C.F.R. § 278.1(q), permit limited disclosures of retailers' information to law enforcement and to certain government agencies and their associated contractors. USDA has thus had "a long-standing policy regarding treatment of this data as confidential" pursuant to this rule, and retailers have participated in SNAP "under the expectation that such data would be protected." JA71-72.

B. Respondent Argus Leader is a newspaper in Sioux Falls, South Dakota. In 2011, an Argus Leader reporter filed a FOIA request for SNAP data. JA41-42. For each SNAP retailer nationwide, Argus Leader requested from the "STARS database for fiscal years 2005 through 2010" the store identifier, name, address, type, and "yearly redemption amounts, or EBT sales figures, for each store." JA41. The request implicates approximately 321,000 retailer locations. JA87. USDA released most of the requested information but withheld the store-level SNAP sales data. Pet. App. 26a.

II. PROCEEDINGS BELOW

A. The lawsuit and initial litigation

After USDA refused to disclose store-level SNAP sales data, Argus Leader filed suit in the U.S. District Court for the District of South Dakota. USDA asserted that it could withhold the information under FOIA

Exemptions 3, 4, and 6. Pet. App. 10a.

Exemption 3 allows an agency to withhold information when another federal statute prohibits disclosure. 5 U.S.C. § 552(b)(3). The district court granted USDA's motion for summary judgment on the grounds that 7 U.S.C. § 2018(c) limits the use or disclosure of information submitted by applicants and participating SNAP retailers to purposes directly connected to administering or enforcing the Food and Nutrition Act of 2008. Pet. App. 49a. The Eighth Circuit reversed, concluding that § 2018(c) did not apply because retailers did not themselves submit their information directly to the Government, but instead used third-party EBT processors. *Id.* at 54a.

B. Proceedings in the district court

1. On remand, USDA pressed its separate argument that Exemption 4 protects store-level SNAP sales data.[5] Pet. App. 10a. That provision exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

To determine whether information is "confidential" under FOIA Exemption 4, the Eighth Circuit applied the D.C. Circuit's approach from *National Parks*, 498 F.2d at 770. Under that test, Exemption 4's applicability turns not on whether the information is in fact held as "confidential" (the term in the statute) but on whether disclosure would likely "'cause substantial [competitive] harm,'" Pet. App. 16a—a standard invented by *National Parks* and absent from FOIA's text. After denying USDA's summary-judgment motion, *id.* at 10a, the district court held a bench trial to assess the competitive harms associated with releasing the requested data, *id.* at 11-13a, 87a.

The trial lasted two days. USDA employees testified

[5] USDA did not pursue its Exemption 6 argument.

how the agency receives store-level sales data from the retailers through the EBT processors, maintains that information in STARS, and does not publicly disclose or release that data. JA76-82, JA89-90. Industry witnesses from a cross-section of SNAP retailers, including a supermarket chain, a large department store, a wholesale grocer, a convenience store, and the National Grocers Association, testified that retailers consistently protect store-level sales data and participate in SNAP with the understanding that such data will remain confidential. Pet. App. 11a-12a, 88a-89a; see also JA93-98. USDA's expert witness was the vice president of a consumer-research firm that performs market analysis, site location, and forecasting research in the food industry, and who testified regarding the competitive consequences for that industry of publicly releasing store-level SNAP data. Pet. App. 13a.

These witnesses confirmed that retailers keep their store-level SNAP-redemption data confidential, and they explained some of the commercial motivations supporting that practice. JA93-98 Releasing store-level data would directly threaten stores' competitive positions, they explained, by revealing key information about sales and clientele that competitors otherwise cannot access. *Ibid.* To make critical decisions regarding store locations and sales strategies, retailers use models of consumer behavior. Reporter's Record II:388-391. An important component of these models is competitors' estimated sales volume—something that is time-consuming and expensive to generate. *Id.* at II:389-391. The models' accuracy increases *significantly* when using actual sales data rather than mere estimates. *Id.* at II:391.

USDA's expert testified that the disclosure of store-level SNAP data—information that is currently unavailable in the market—would thus create a "windfall" for his company and other data-analysis firms. Reporter's Record II:393-396. USDA's witnesses unanimously agreed

that this disclosure would cause substantial competitive harm to the retailers. For example, stores with high SNAP redemptions would see increased competition from existing competitors for those SNAP customers, *id.* at II:324; new market entrants would use SNAP data to determine where to build their stores—a decision fraught with risk and uncertainty when sales data is unknown, *id.* at I:252-253; and SNAP-redemption data could also be used to understand a retailer's overall sales, a highly valuable figure that competitors currently expend substantial resources trying to estimate, *id.* at II:394-397; see also Pet. App. 11a-13a, 18a.

In addition, retailers testified to their concerns that their SNAP-beneficiary customers may be stigmatized by the release of store-level SNAP data, to the detriment of those customers and the retailers that serve them. *Id.* at I:176, I:194. Some non-SNAP customers may avoid high-SNAP stores, and even SNAP customers may prefer to avoid "that limelight" of shopping at a high-SNAP-sales store. *Id.* at I:194. Such singling-out was one of the harms the Government hoped to eliminate when it replaced SNAP beneficiaries' food-stamp coupons with more discreet EBT cards. *Id.* at I:254.

These commercial risks are exacerbated by the famously fierce competition and notoriously narrow profit margins in the food-retail industry, which force retailers to rely on high sales volumes for profitability. Pet. App. 12a, 17a-18a. Moreover, in recent years, traditional grocers have also faced unprecedented competition from superstores like Costco, new low-price format stores like Lidl, upscale organic format stores like Whole Foods, non-grocers like the Dollar Store, and even online retailers like Amazon. Reporter's Record I:247-249. Confidentiality of SNAP-redemption data is consequently critical to retailers, so much so that the National Grocers Association's President testified that some retailers may rethink their

participation in SNAP altogether if this sensitive information is released. *Id.* at II:294.

Argus Leader presented no fact witnesses. Two expert witnesses testified on its behalf, neither of whom works in the food-retail industry. JA100, JA106. These witnesses acknowledged the competitive nature of the industry, and they did not dispute that retailers do not publicly disclose store-level SNAP data. Reporter's Record II:350, II:366. They contended, however, that because retailers currently make decisions using their own data and publicly available demographic data, adding previously-unavailable store-level SNAP data would have only a limited competitive impact. Pet. App. 12a-13a; see also JA102-103, JA107.

2. Following the bench trial, the district court entered judgment in favor of Argus Leader. Pet. App. 22a. Though there was no dispute that retailers prize the information's confidentiality, and despite finding in accordance with all the testimony that "competition in the grocery business is fierce," *id.* at 17a, the district court concluded that "any potential competitive harm from the release of the requested SNAP data is speculative at best," *id.* at 19a. Given the Eighth Circuit's adoption of the *National Parks* test for FOIA Exemption 4, this level of competitive harm did not, in the district court's view, rise to the level where the SNAP data could be treated as "confidential" under Exemption 4. *Id.* at 20a.[6]

3. Shortly after the district court issued its ruling,

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[6] The district court also found, following post-trial briefing by both parties on the issue, that the requested store-level sales data was information "obtained from a person" under Exemption 4. Pet. App. 16a. As the Eighth Circuit noted, neither party contested that finding on appeal, and the Eighth Circuit proceeded on that understanding. *Id.* at 2a n.2. Any argument to the contrary therefore has been forfeited.

USDA informed retailers that it intended to abide by the district court's judgment and release the store-level SNAP data, Pet. App. 72a, signaling that it would not appeal and notifying affected retailers so they could consider "possible judicial intervention."[7] Petitioner Food Marketing Institute (FMI)—a trade association whose members operate tens of thousands of retail food stores, many of which participate in SNAP—immediately moved to intervene and then appeal the judgment. *Id.* at 72a-73a. FMI had previously assisted USDA with the case, including by submitting a declaration in support of USDA's Exemption 4 summary-judgment motion. Dist. Court Doc. 59-4 Ex. D1.

The district court granted FMI's motion to intervene and stayed its judgment pending appeal. Pet. App. 77a-78a.[8] Once FMI became a party, USDA informed the court that it would continue withholding the requested documents pending resolution of FMI's appeal and asked the district court to deny Argus Leader's motion to compel immediate disclosure as moot. District Court Doc. 148 at

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[7] USDA posted a notice on its website: "This notification is provided to your firm to comply with 1 C.F.R. 1.12(d) * * * in order that the matter may be considered for possible judicial intervention." SNAP Retailer Data, https://web.archive.org/web/20170121025513/https://www.fns.usda.gov/snap-retailer-data (published Jan. 18, 2017; last visited Feb. 15, 2019).

[8] Before the district court, Argus Leader opposed FMI's motion to intervene because it contended that FMI should have intervened earlier. The district court rejected that argument, and no party challenged the intervention on appeal. Argus Leader's brief in opposition suggested that FMI may not have Article III standing. BIO 28. FMI's standing is secure: FMI's members seek to keep SNAP-redemption data about their individual stores confidential, the judgment below compels release of that information, and reversal would eliminate that mandatory disclosure so that USDA could withhold it as it has long promised to do.

2. USDA also moved to amend a protective order so that FMI would have access to sealed portions of the record in prosecuting the appeal. District Court Doc. 154.

C. Proceedings in the court of appeals

The Eighth Circuit affirmed. FMI urged reversal of the district court's opinion, asserting that "confidential" in Exemption 4 should be given its plain meaning, consistent with this Court's precedents. It was undisputed at trial that neither USDA nor the retailers publicly disclose retailers' store-level SNAP sales data, and that retailers expected their information to be kept confidential by the Government. Pet. App. 11a-13a, 88a-89a; JA88-89; JA94-95. The court of appeals, nevertheless, disposed of this argument in a single footnote: it would not consider the plain meaning of the word "confidential" because doing so purportedly "would swallow FOIA nearly whole," and conflict with what the court of appeals believed to be this Court's guidance that FOIA exemptions should be narrowly construed. *Id.* at 4a n.4.

FMI separately urged reversal on the basis that disclosing the requested information would result in enough competitive harm to trigger Exemption 4's protection under even the atextual *National Parks* test. But like the district court, the court of appeals reasoned that, while the requested data might make models marginally more accurate, the evidence did not show that "this marginal improvement in accuracy is likely to cause *substantial* competitive harm." Pet. App. 5a. The panel emphasized that even if there was a "likelihood of commercial usefulness"—in other words, that third parties indeed could exploit information that their competitors had confidentially submitted to the Government—that was insufficient to trigger Exemption 4 because it was "not the same as a likelihood of substantial competitive harm." *Ibid.* The panel did not address the precedents from other Circuits

that FMI relied on in support of its position. See *id.* at 5a-6a.

The Eighth Circuit denied both FMI's petition for rehearing *en banc*, Pet. App. 85a-86a, and its motion to stay issuance of the mandate, *id.* at 79a-80a.

D. This Court's recall and stay of the Eighth Circuit's mandate

FMI filed an application with this Court to recall the Eighth Circuit's mandate and stay the judgment, arguing that all of the recall-and-stay factors were satisfied: (1) there was a reasonable probability that the Court would grant certiorari; (2) there was a fair prospect that the Court would reverse the Eighth Circuit's judgment; (3) absent a stay, FMI's members would suffer irreparable harm; and (4) the balance of equities favored a stay. The Court issued an order that recalled the Eighth Circuit's mandate and stayed its judgment pending resolution of FMI's petition and issuance of this Court's judgment. Pet. App. 82a. The Eighth Circuit issued an order to the same effect. *Id.* at 83a-84a. This Court then granted certiorari.

SUMMARY OF ARGUMENT

Store-level SNAP-redemption data is not subject to mandatory disclosure under FOIA. That data satisfies Exemption 4 because it is "commercial or financial information" that is "confidential"—information that is held privately and not public disseminated.

I. A. The plain text of Exemption 4 is sufficient to resolve this case and reverse the judgment below. The word "confidential" is unambiguous. When Congress enacted it as part of FOIA in 1966, that word meant what it still means today—something that is private and not publicly disclosed.

An instruction to "keep this confidential" leaves no doubt that public release is not authorized. Popular and legal dictionaries confirm this meaning. So do cases from

this Court—including one defining "confidential" *in another FOIA exemption*. See *U.S. Department of Justice* v. *Landano*, 508 U.S. 165, 173 (1993) (Exemption 7). Courts construing Exemption 4 soon after its enactment—including the D.C. Circuit—adopted the plain meaning of "confidential." And the Senate and House Reports issued with FOIA confirm this construction.

B. Eight years after FOIA's enactment, the D.C. Circuit deviated from its prior plain-text reading of "confidential," and other Circuits reflexively followed. *National Parks & Conservation Association* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) imposed an additional requirement absent from Exemption 4's text—that commercial information will not be deemed "confidential" unless a showing of substantial competitive harm is made.

National Parks reached that result only by disregarding *both* the plain text *and* oft-cited legislative history (the Senate and House Reports). Instead, *National Parks* relied on the weakest form of legislative history: witness statements in Senate subcommittee hearings from a prior Congress that considered an unenacted predecessor bill to FOIA.

The *en banc* D.C. Circuit retained the substantial-competitive-harm test nearly two decades later, but only because it was yoked by *stare decisis*. It refused to apply that test to information *voluntarily* submitted to the Government. For such information, it returned to the plain meaning of "confidential." Typically, a given word used multiple times in a statute bears the same meaning—but the D.C. Circuit has given "confidential" *two* different meanings for its *single* appearance in Exemption 4.

No other reasons warrant endorsing *National Parks*. *Stare decisis* does not bind this Court to circuit precedents. Policy arguments—that giving "confidential" its plain meaning would undermine FOIA's pro-disclosure

purpose—fail given the unambiguous text and because Exemption 4 reflects Congress's purpose just like any other FOIA provision. Nor has Congress endorsed *National Parks*: It has never amended or reenacted Exemption 4 since FOIA's 1966 promulgation. *National Parks* is affirmatively wasteful, unworkable, and unpredictable; ending its reign would save substantial governmental and judicial resources, aiding FOIA requesters and submitters alike.

C. The plain meaning of "confidential" covers store-level SNAP-redemption data. Retailers carefully and uniformly guard that data. They know how their competitors would use it, for example, in determining ideal locations for new grocery stores. At the least, SNAP data must be treated as "confidential" because USDA's long regulatory history assured retailers that the agency would hold SNAP-redemption data confidential and that releasing it would trigger criminal sanctions. Retailers who confide in the Government under such circumstances should be able to rely on the resulting confidentiality.

II. Even if the Court chooses to leave *National Parks* intact, it should nonetheless reverse the judgment below. *National Parks* has generated division among the Circuits regarding what qualifies as substantial competitive harm. The Eighth Circuit could deny Exemption 4 status to SNAP-redemption data only by requiring heightened proof of specific resulting harm. A proper standard, reflected in other Circuits' cases, would ask if there is a reasonable possibility that disclosure may injure a commercial or financial interests, either directly or indirectly. That objective standard is far easier and less costly to apply than the current regime. And it would align the substantial-competitive-harm test with, for example, the requisite showing to establish a competitive injury under the Robinson-Patman Act.

ARGUMENT

I. "CONFIDENTIAL" COMMERCIAL INFORMATION IN FOIA EXEMPTION 4 COVERS ALL INFORMATION KEPT PRIVATE AND NOT PUBLICLY DISCLOSED

In Exemption 4, Congress exempted "confidential" commercial information from mandatory disclosure under FOIA. Congress neither provided nor authorized any further gloss on that commonly used and understood word. No justification for departing from the plain text—policy, legislative history, or otherwise—withstands scrutiny. The Court should hold that the word "confidential" in Exemption 4 means the same thing that "confidential" means elsewhere: something kept private and not publicly disclosed.

A. This Court's precedents require a plain-text interpretation of "confidential" in Exemption 4

Both as a matter of this Court's general statutory-construction principles and its specific FOIA case law, "confidential" should be given its ordinary meaning: information that is kept private and not publicly disclosed. In fact, this Court *already has* given "confidential" that meaning in a variety of contexts, including when it considered a separate FOIA exemption using that word.

1. Both in dictionaries and case law, "confidential" uniformly means "private and not publicly disclosed"

This Court has repeatedly instructed that all statutory construction begins with the text and goes no further when statutory language is plain. See, *e.g.*, *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016). Words must be understood according to "their ordinary meaning at the time Congress enacted the statute." *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 535 (2019) (internal quotation marks and modifications omitted).

These principles govern the construction of FOIA's exemptions, just like they govern all unambiguous statutory provisions. As the Court put it when considering Exemption 4's neighbor, "[w]e * * * simply interpret Exemption 5 to mean what it says." *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 804 (1984); see also *Milner* v. *Dep't of the Navy*, 562 U.S. 562, 569 (2011) (giving "personnel" in Exemption 2 its plain meaning); *Dep't of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001) (seeking "textual justification" for proposed interpretation of Exemption 5); *U.S. Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 154 (1989) (declining to "read into the FOIA [language] that Congress did not itself provide"); cf. *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 136 S. Ct. 383, 383 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (describing the Court's repeated practice of "reject[ing] interpretations of * * * FOIA exemptions that diverge from the text").[9]

Interpreting Exemption 4 is a straightforward matter of statutory interpretation. "Confidential" has a well-defined ordinary meaning, and Congress did not provide a different definition when it enacted the statute in 1966. See 5 U.S.C. § 552. Both general-use and legal dictionaries at that time defined "confidential" as that which was private and not publicly disclosed. The term has not been susceptible to change—dictionaries before and after that period confirm that this meaning is both long-standing and universal:

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[9] All citations to *New Hampshire Right to Life* v. *Department of Health and Human Services*, 136 S. Ct. 383 (2015), in this brief are to this dissent from denial of certiorari, which was the only opinion in the case.

Noah Webster, An American Dictionary of the English Language 246 (Merriam 1852)	"[T]o be treated or kept in confidence; private; as, a *confidential* matter."
Black's Law Dictionary 370 (4th ed. 1951)	"Intrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret."
The Oxford Universal Dictionary on Historical Principles 367 (3d ed. 1955)	"Enjoying another's confidence; entrusted with secrets[.]"
1 Webster's New Int'l Dictionary 560 (3d ed. 1960)	"Communicated in confidence; of the nature of confidence; secret," a "communication in confidence of private matters[.]"
Webster's Seventh New Collegiate Dictionary 174 (1963)	"private; secret"
Black's Law Dictionary 370 (rev. 4th ed. 1968)	"Intrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret."

Ballentine's Law Dictionary 244 (3d ed. 1969)	*Confidential communications*: "Communications made in confidence; communications made to such persons that the law regards them as privileged beyond forcing a disclosure thereof."
Webster's Third International Dictionary 476 (1981)	"[N]ot publicly disseminated"; "conveyed [and] acted on * * * in confidence"
Black's Law Dictionary 339 (9th ed. 2009)	"[M]eant to be kept secret[.]"
Merriam-Webster Online Dictionary (2019)	"Communicated, conveyed, acted on, or practiced in confidence : known only to a limited few : not publicly disseminated : private, secret[.]"

This Court already has given "confidential" its ordinary meaning *when used in a FOIA exemption.* Congress used that same word in Exemption 7—just a few paragraphs after Exemption 4—and this Court authoritatively applied its common meaning in *U.S. Department of Justice* v. *Landano*, 508 U.S. 165, 173 (1993).[10] In its decisions, this Court has consistently and over the course of many decades described what is "confidential" according to that term's plain meaning—private information that is not publicly disclosed.[11] In *Landano*, too, the Court did not

[10] Exemption 7 permits the Government to withhold information that "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D).

[11] Thus, the requirement that census takers "take an oath not to

impose an unusual or hypertechnical definition, and even observed that the word "is not limited to complete anonymity or secrecy." *Ibid.* (citing Webster's Third New Int'l Dictionary 476 (1986)). And *Landano* construed "confidential" by contrasting it to *public* disclosure, just as it has done in non-FOIA cases:

> A statement can be made "in confidence" even if the speaker knows the communication will be shared with limited others, as long as the speaker expects that the information will not be published indiscriminately.

Ibid. Consequently, "[a] source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes." *Id.* at 174. The Court rejected an alternative definition proposed by one of the parties, as it "relie[d] extensively on legislative history" to modify the word's ordinary meaning. *Id.* at 178.

Landano's construction of FOIA Exemption 7 reinforces a plain-text interpretation of "confidential" in Exemption 4. "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994).

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disclose" certain information is what ensures the "confidentiality of data[.]" *Baldrige* v. *Shapiro*, 455 U.S. 345, 356 (1982). A "confidential" portion of a presentence report was one "not disclosed to defense counsel." *Gray* v. *Netherland*, 518 U.S. 152, 182 (1996) (internal quotation marks and citation omitted). Likewise, where a "report was a confidential document," it "should be shown to no one." *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 534 (1961). Conversely, the presumption that marital communications are "confidential * * * may be overcome by proof of facts showing that they were *not* intended to be private." *Pereira* v. *United States*, 347 U.S. 1, 6 (1954) (emphasis added).

This Court has applied this principle to FOIA exemptions. It gave "personal privacy" the same plain meaning in both Exemptions 6 and 7(C). See *FCC* v. *AT&T, Inc.*, 562 U.S. 397, 407-408 (2011). And when the Court considered the definition of "personnel" in Exemption 2, it noted its previous plain-text definition when Exemption 6 used that term: Exemption 6 is "just a few short paragraphs down from Exemption 2," which justified the same definition in both places. *Milner*, 562 U.S. at 570. Exemption 4's use of "confidential" is "just a few short paragraphs" up from Exemption 7's use of that term, and it should be read the same in both places.

Notably, before *National Parks*, courts that interpreted Exemption 4 generally reached this same ordinary-meaning result and gave "confidential" its plain-text definition. *Sterling Drug, Inc.* v. *FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971), for example, concluded that market shares and sales figures of certain products were "confidential" under Exemption 4, reasoning that the information was not customarily released by the submitter and the Government agency indicated it would treat the information as confidential. See also, *e.g.*, *Gen. Servs. Admin.* v. *Benson*, 415 F.2d 878, 881 (9th Cir. 1969) (agreeing that Exemption 4 is "meant to protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential"). These cases were interpreting the same plain text: Congress has not changed Exemption 4's text or reenacted that statutory provision since its initial adoption in 1966.

Finally, if all of the above did not settle the question of what "confidential" means, ordinary use confirms the breadth of the term—that when Exemption 4 says "confidential" commercial or financial information obtained from a person, it means *all* such information that is kept

private and not publicly disclosed. 5 U.S.C. § 552(b)(4). For example, an attorney's duty of confidentiality extends to all of his client's information—not just information whose disclosure would "cause substantial competitive harm" (or "substantial litigation harm," or any other harm) to the client. See ABA Model Rule of Professional Conduct Rule 1.6. Likewise, someone who reveals her salary in confidence to an adviser would hardly be mollified if the adviser, after sharing that information with multiple acquaintances, brushed off the breach of confidence by pointing out that no substantial competitive harm was likely to result—no job loss, diminution of salary, foregone bonus, or inability to compete for new positions. Nor would anyone need to demand a definition of "confidential" to understand what was asked when told to "keep this confidential."

2. Legislative history only confirms the plain-text meaning

Given the long- and well-established definition of "confidential," there can be no meaningful dispute over what Congress meant when it used the word in Exemption 4. Accordingly, this Court need not consider legislative history. Regardless, the Senate and the House Reports accompanying the bill that became FOIA only confirm that Congress intended the plain-text meaning of "confidential." Cf. *EPA* v. *Mink*, 410 U.S. 73, 81 (1973) (consulting these reports in interpreting Exemptions 1 and 5); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 (1975) (consulting Senate Report to determine whether Exemption 5 applied).

The Senate Report explains that Exemption 4 gives federal agencies discretion to withhold non-governmental commercial or financial information that "would customarily not be released to the public by the person from whom it was obtained." S. Rep. 813, 89th Cong., 1st Sess.

9 (1965) (hereinafter S. Rep. 813). The House Report's definition is nearly identical: Exemption 4 "exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government." H.R. Rep. 1497, 89th Cong., 1st Sess. 10 (1965) (hereinafter H.R. Rep. 1497). This report also specifies that the exemption applies to "information which is given to an agency in confidence, since a citizen must be able to confide in his Government," and "where the Government has obligated itself in good faith not to disclose documents or information which it receives * * *." *Ibid.* These definitions corroborate that Congress said what it meant, and meant what it said, when using the term "confidential" in FOIA Exemption 4.[12]

* * *

The foregoing argument is sufficient to decide the case. But because Exemption 4 has long been burdened by the *National Parks* test that bears little resemblance to the statutory text, FMI now turns to that test and its numerous deficiencies.

B. The *National Parks* test is inconsistent with Exemption 4's text

The court below disregarded Exemption 4's plain text because the Eighth Circuit has adopted the atextual *National Parks* test for interpreting the statute. That was error.

1. National Parks *led the Circuits to an atextual interpretation of "confidential"*

a. In *National Parks*, the D.C. Circuit abandoned the plain text of Exemption 4. The court lamented—as if Congress could not *possibly* have meant what it said—that, "[u]nfortunately, the statute contains no definition of the

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[12] *National Parks*' use of much weaker legislative history is addressed in Part I.B.1, *infra*.

word 'confidential.'" 498 F.2d at 766. It then proceeded to fashion an erroneous, yet subsequently widely adopted, test for what is "confidential" under Exemption 4. In addition to being information that is not customarily disclosed by the submitter, the court imposed a second and *additional* requirement:

> commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. at 770 (footnote omitted).

National Parks came from an era when many courts were less than rigorous about statutory text, and *National Parks* exemplifies this approach. It began by acknowledging precedents, like *Sterling*, that had adopted the plain text. *Id.* at 766. "In the past," the court acknowledged, "our decisions concerning [Exemption 4] have been guided by" the Senate Report described above, *supra* pp. 22-23, which accompanied the bill that became FOIA; this report confirmed the plain text by stating: "This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would *customarily not be released to the public by the person from whom it was obtained*." 498 F.2d at 766 (quoting S. Rep. 813 at 9).

National Parks then sharply deviated from the D.C. Circuit's past practice. "Whether particular information would customarily be disclosed * * * is not the only relevant inquiry in determining whether that information is 'confidential' for purposes of [Exemption 4]." *Id.* at 767.

The panel then decreed that "[a] court must *also* be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." *Ibid.* (emphasis added). This was not a minor tweak: "[T]he D.C. Circuit radically departed from prior judicial interpretations" of Exemption 4 that had relied on the plain meaning of "confidential." Richard L. Rainey, *Stare Decisis and Statutory Interpretation: An Argument for a Complete Overruling of the* National Parks *Test*, 61 Geo. Wash. L. Rev. 1430, 1435 & n.29 (1993).

The court purported to find Exemption 4's legislative purpose not in the statute's text, but from a selection of statements made during a 1963 Senate subcommittee hearing. *National Parks*, 498 F.2d at 767-770. The bill then under consideration was "the predecessor of the bill which became law." *Id.* at 768. *That* unenacted bill, considered by the *prior Congress*, contained *no exemption* for trade secrets or commercial or financial information, and witnesses testified to the necessity of such an exemption. Several of them urged the inclusion of an exemption that would "protect[] persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *Ibid.*

Based on these statements, the court narrowed the unambiguous word "confidential" to confidential information whose disclosure is "likely to cause substantial harm to his competitive position." *Id.* at 770. The D.C. Circuit also held, based on the same legislative history excerpts, that information may be "confidential" based on the *Government's* interest (rather than private interests)—for instance, "if disclosure of the information is likely * * * to impair the Government's ability to obtain necessary information in the future." *Ibid.* It "express[ed] no opinion as to whether other governmental interests are embodied in this exemption." *Id.* at 770 n.17.

b. To put it mildly, *National Parks*' use of legislative history is at odds with this Court's precedents. *Weber Aircraft* rejected exploiting FOIA's legislative history to achieve policy goals beyond the plain text's reach:

> [T]he legislative history of [FOIA] Exemption 5 does not contain the kind of compelling evidence of congressional intent that would be necessary to persuade us to look beyond the plain statutory language.

465 U.S. at 802. The Court concluded the opinion this way: "We therefore simply interpret Exemption 5 to mean what it says." *Id.* at 804.

But even if legislative history *could* transcend unambiguous text, this Court—unlike *National Parks*—accords no significance to comments "not made by a Member of Congress" and not "included in the official Senate and House Reports." *Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986). If legislative history is considered in interpreting Exemption 4, those official reports discussed above—not "passing references" from a hearing transcript—warrant greater weight.[13]

Moreover, even the snippets of testimony that the D.C. Circuit pulled from the Senate subcommittee hearing transcript do not support the substantial-competitive-harm test that the court ultimately formulated. Statements about a narrow problem that *may* have contributed to Exemption 4's eventual adoption—that is, the possibility that the Government might disclose competitively

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[13] *U.S. Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982) (refusing to narrowly construe FOIA Exemption 6 based on isolated statements in the legislative history, particularly where the official Senate and House reports indicated that Congress intended the phrase "similar files" in that exemption to have "a broad, rather than a narrow, meaning" (quoting H.R. Rep. 1497 at 11, and citing S. Rep. 813)).

valuable information belonging to a private party—hardly prove that Congress intended the exemption to address *only* that specified problem.[14] At most, this testimony suggests that Congress would have been surprised if its exemption did *not* protect instances of substantial competitive harm. See *Weber Aircraft*, 465 U.S. at 800 (holding "that a privilege that was mentioned in the legislative history of Exemption 5 is incorporated by the exemption—*not that all privileges not mentioned are excluded.*") (emphasis added).

National Parks disregarded both plain text and even clear legislative history in favor of some of the weakest legislative history imaginable—*witness* statements at a *subcommittee* hearing of a *prior* Congress about an *unenacted* bill. *National Parks* could be a casebook example of an oft-repeated critique of legislative history's misuse: "Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'" *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (quotation and punctuation omitted).

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[14] Even if Congress's true and exclusive purpose *was* to protect parties from substantial competitive harm, protecting *all* confidential commercial information is a logical way to ensure that its purpose could not be defeated. That standard, reflected in the text, prevents "false negatives." After all, when the Government requested rehearing in *National Parks*, it pointed out that the Government expressed concern about errors because it is not intimately familiar with every business or industry from which it obtains information. Appellees' Pet. for Reh'g and Suggestion of Reh'g *En Banc* at 6-7, No. 73-1033. This very case illustrates why Congress would have wisely created a buffer zone *even if* it only cared about "substantial competitive harm."

2. National Parks *has been widely criticized—including by the court that invented it*

Unsurprisingly, therefore, *National Parks* has attracted prominent critics from the start.

After the panel issued its opinion, the Government unsuccessfully requested rehearing, noting its conflict with prior cases that gave "confidential" its plain meaning. Appellees' Pet. for Reh'g and Suggestion for Reh'g *En Banc* at 3-4, No. 73-1033 (filed May 28, 1974). It also issued a prescient warning about the new test's costs and risks. The Government receives information "of almost infinite variety from a multitude of firms and individuals engaged in business ventures of all types" with which it is not necessarily familiar, this creates "a high risk that the government will fail" to accurately meet the *National Parks* test—even where "competitive harm would indeed result from disclosure." *Id.* at 6-7. The decision was thus also "manifestly unfair to the many businesses and individuals who submit trade secrets, and commercial and financial information to the government in confidence." *Id.* at 7.

Several years later, D.C. Circuit Judge Randolph, joined by Judge Williams, again sounded the alarm and urged the court to revisit the test, decrying it as "fabricated, out of whole cloth." *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 931 F.2d 939, 947 (D.C. Cir. 1991) (Randolph, J., concurring), *vacated*, 942 F.2d 799 (1991). Judge Randolph pointed out that in "ordinary usage," the term "confidential" means "conveyed [and] acted on * * * in confidence" and "not publicly disseminated." *Ibid.* (quoting Webster's Third Int'l Dictionary 476 (1981)). He also criticized the judicially created "substantial harm test," observing that "[i]nformation not customarily revealed to the public is no less confidential when disclosing it would cause only discomfort rather than

objectively measurable harm." *Id.* at 948. "If this were a question of first impression," Judge Randolph wrote, "I would apply the common meaning of 'confidential' and reject this test, which has spawned a good deal of litigation including this case, now about to make its third trip to the district court." *Ibid.*

Following Judge Randolph's criticism in *Critical Mass*, the Government again sought—and this time obtained—rehearing *en banc*. It again argued that "confidential" should be restored to its "normal definition," and emphasized that over the past two decades "the *National Parks* test [had] proven to be both burdensome to the agencies and courts that must apply it and inherently unpredictable in its applications." Appellees' Pet. for Reh'g and Suggestion of Reh'g *En Banc* at 10, 14, No. 90-5120 (filed June 14, 1991).

A 7-4 D.C. Circuit majority upheld *National Parks*—but in a way that emphasized its displeasure with the atextual, yet "well established" test. *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871, 876-877 (D.C. Cir. 1992) (*en banc*). "Whatever our individual opinions as to the merits of the two-part test," the court stated, "we accept the wisdom of Justice Brandeis's observation, some sixty years ago, that '*stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *Id.* at 877 (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932)).[15]

The *en banc* court further repudiated the soundness of the *National Parks* definition of "confidential" by "confin[ing]" that definition to cases where the submitter was

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[15] As described in Part II, *infra*, even this defense of *National Parks* was mistaken. Asking whether information is "likely" to cause "substantial competitive harm" has led to unpredictable results and multiple circuit splits.

required to share information with the Government. *Id.* at 880. In so doing, it *rejected* the *National Parks* definition in the context of information *voluntarily* submitted to the Government, deeming it "confidential" and thus protectable when it would satisfy the ordinary definition—or, as the *en banc* court put it, if it "would customarily not be released to the public by the person from whom it was obtained." *Id.* at 878 (quoting *Sterling*, 450 F.2d at 709). In other words, when not constrained by *stare decisis*, the court gave "confidential" its dictionary definition—turning back to *Sterling*, the case that *National Parks* had disregarded.

To be clear, nothing in Exemption 4 turns on whether information is "voluntarily" provided to the Government—the exemption is categorical and the word "confidential" appears in it only once. In the D.C. Circuit, therefore, the *same word* means vastly different things *in its single appearance* in Exemption 4.[16]

Exemption 4 has thus far escaped this Court's review, but in 2015, two Members of the Court criticized *National Parks* in a dissent from the denial of certiorari. See *N.H. Right to Life*, 136 S. Ct. at 384-385. The dissent observed that this Court has "rejected interpretations of other FOIA exemptions that diverge from the text." *Id.* at 383. Notably, the Government—the party opposing certiorari in *New Hampshire Right to Life*—conceded "that every court that has adopted the *National Parks* definition of 'confidential' information has turned its back on the statutory text." *Id.* at 385 n.*.[17] At least for the time being, the

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[16] Additional inconsistencies across the country have appeared because most courts have not adopted this variation. Pet. 28-29.

[17] The Government again advocated giving "confidential" in Exemption 4 its ordinary meaning: "information that is 'not publicly disseminated' or that is 'communicated, conveyed, acted on, or practiced in confidence.'" U.S. Br. in Opp'n 9, *N.H. Right to Life* v. *Dep't of Health*

dissent regretted, denying certiorari "perpetuate[d] an unsupported interpretation of an important federal statute and further muddie[d] an already amorphous test." *Id.* at 385.

3. National Parks' *policy justifications cannot overcome the plain text*

a. While *National Parks* did not primarily defend itself based on FOIA's purported pro-disclosure purposes, that is often how it is defended—expressly or by implication. The court below, for example, worried that giving "confidential" its ordinary meaning might "swallow FOIA nearly whole." Pet. App. 4a n.4. *Of course* FOIA is pro-disclosure. "But no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (*per curiam*). The FOIA exemptions express limits on FOIA's general purpose. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id.* at 525-526; accord, *e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

FOIA thus reflects a general philosophy of full agency disclosure "*unless* information is exempted under clearly delineated statutory language." *U.S. Dep't of Def.* v. *Fed. Labor Relations Auth.*, 510 U.S. 487, 494 (1994) (citation omitted) (emphasis added). Congress expressed limits in FOIA by enacting an entire subsection of exemptions—5 U.S.C. § 552(b). These are "limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it." *Nat'l Archives & Records Admin. & Human Servs.*, No. 14-1273 (quoting Webster's Third New Int'l Dictionary 476 (1961) and citing H.R. Rep. 1497 at 10).

v. *Favish*, 541 U.S. 157, 172 (2004); see also, *e.g.*, *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982).[18]

FOIA's nine exemptions are consequently no less a part of the statute's design than its general-disclosure mandate. As this Court put it in *Milner* when discarding an atextual test in favor of a plain-meaning interpretation of Exemption 2, enforcing an exemption as written "gives the exemption the [meaning] Congress intended." 562 U.S. at 572. Just last year, the Court held that exemptions in the Fair Labor Standards Act must be given a "fair reading," not an unduly constricted one, as they "are as much a part of FLSA's purpose" as its other provisions. *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018); see also, *e.g.*, *Weber Aircraft*, 465 U.S. at 798 ("The plain language of [Exemption 5] itself, as construed by our prior decisions, is sufficient to resolve the question presented.").[19]

Earlier this Term, the Court again reinforced that statutory limits are no less a part of a statute than its

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[18] Congress explained this duality in the legislative history (the part that this Court has routinely cited): that it had deliberately designed and negotiated a complex statutory framework balancing "the opposing interests" of freedom of information and "important rights of privacy with respect to certain information in Government files." S. Rep. 813 at 3.

[19] The Court has occasionally stated—and the Eighth Circuit repeated—that FOIA exemptions should be construed "'narrowly.'" Pet. App. 4a n.4 (quoting *Milner*, 562 U.S. at 565). But its holdings have always been to construe them *accurately*. Whatever else might be meant by a "narrow" construction, it does not mean a contra-textual construction or a construction that violates an exemption's plain meaning—and that principle explains *Milner* itself. See *infra* Part I.B.4 (discussing *Milner*'s rejection of extra-textual tests). *National Parks* construed Exemption 4 not "narrowly" but wrongly. As the Retail Litigation Center's certiorari-stage *amicus* brief shows, moreover, there is little reason for the Court to reiterate a FOIA-specific narrow-construction canon that can only confuse lower courts.

larger purpose. In *New Prime*, a litigant had invoked the Federal Arbitration Act's undoubtedly pro-arbitration purposes to enforce an arbitration agreement—despite the particular agreement escaping that statute's plain text. If this case's parties and FOIA are substituted in for the Arbitration Act, the analysis in *New Prime* applies equally here:

> Unable to squeeze more from the statute's text, [Argus Leader] is left to appeal to its policy. * * * But often and by design it is hard-fought compromise, not cold logic, that supplies the solvent needed for a bill to survive the legislative process. * * * If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to take account of legislative compromises essential to a law's passage and, in that way, thwart rather than honor the effectuation of congressional intent. By respecting the qualifications of [Exemption 4] today, we respect the limits up to which Congress was prepared to go when adopting the [Freedom of Information Act].

New Prime, 139 S. Ct. at 543.

b. Appeals to policy are also misguided. FOIA will hardly cease to serve its larger purpose if Exemption 4 is applied as written.

FOIA's purpose, in part, is to contribute to "public understanding of the operations or activities *of the government*." *Fed. Labor Relations Auth.*, 510 U.S. at 495 (citation omitted). Exemption 4 plays a discrete and important role in this scheme: it shields from mandatory disclosure "confidential" information that is "commercial or financial" and that the Government has obtained from non-governmental third parties. Even then, it does not drain the Government of all discretion to disclose the information if

it determines that doing so is appropriate and not contrary to other law. 5 U.S.C. § 552(a)(8), (b)(4).

Indeed, instead of *furthering* the purposes of FOIA in increasing transparency regarding governmental activities in certain areas, decreasing the protection Congress provides for non-governmental information has created a troubling anomaly. Although FOIA seeks to improve *public* understanding of *the Government*, in practice, commercial for-profit interests have dominated FOIA requests and lawsuits. Margaret B. Kwoka, *FOIA, Inc.*, 65 Duke L.J. 1361, 1380-81 (2016). One recent empirical study of selected agencies observed the "relative paucity of news media requests," and concluded that "at the studied FOIA offices, the staff and resources are primarily serving commercial interests, not the public's interest in knowing what its government is up to." *Id.* at 1381. At the Defense Logistics Agency, for example, 96% of all requests were made by commercial entities; fewer than 1% of requests came from the news media. *Id.* at 1401. Interestingly, the study revealed that a disproportionate number of FOIA requests come from information resellers—that is, commercial entities who request information from the Government and then offer the information as part of a subscription service. *Id.* at 1381.

Then-Professor Scalia was prescient about this point. FOIA and subsequent amendments, he explained,

> were promoted as a means of finding out about the operations of government; they have been used largely as a means of obtaining data in the government's hands concerning private institutions. They were promoted as a boon to the press, the public interest group, the little guy; they have been used most frequently by corporate lawyers.

Antonin Scalia, *The Freedom of Information Act Has No*

Clothes, 5 Regulation 14, 16 (1982).

c. Of course, FMI, Argus Leader, *amici*, and even Members of this Court may disagree about what policy FOIA *should* pursue, and the best means it could adopt to do so. But "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences." *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2074 (2018). As this Court said in another FOIA exemption case: "If the public interest suffers by reason of [exemption from disclosure], the remedy is for Congress to require [disclosure]." *Renegotiation Bd.* v. *Grumann Aircraft Eng'g Corp.*, 421 U.S. 168, 191 (1975) (Exemption 5).

Importantly, Congress enacted an Exemption that provides categorical protection for all confidential commercial information that was obtained from a person. If Congress instead intended the court to balance competing interests in deciding whether confidential information could be withheld, it would have said so—just as it did in several other FOIA Exemptions.[20] Similarly, if Congress intended to protect only confidential information whose disclosure would cause substantial competitive harm, instead of protecting *all* confidential commercial information, then it could easily have said that, too. This is not just by hypothesis—Congress has on several occasions explicitly restricted the disclosure of confidential information whose disclosure would cause competitive or other

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[20] *E.g.*, *U.S. Dep't of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 776 (1982) ("unwarranted invasion of personal privacy" standard in Exemption 7(C) generally requires a balancing test); *U.S. Dep't of Def.* v. *Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (Exemption 6's "clearly unwarranted invasion" of personal privacy standard requires a balancing "of the public interest in disclosure against the interest Congress intended the exemption to protect.").

types of harm.[21]

"Confidential" in Exemption 4 means confidential—nothing else. The purpose of protecting confidentiality or the expected results of confidentiality's violation are separate inquiries grounded in Congress's policy choices. The D.C. Circuit had no authority to circumvent the language that Congress chose to reflect its independent judgment.[22] This Court should interpret the law according to its terms, and let Congress respond if in its view conditions today warrant the substantial-competitive-harm test—or some other test entirely.

4. No other arguments support retaining National Parks' *atextual and unworkable reading of Exemption 4*

Without text, legislative history, or policy, what else could justify retaining *National Parks*? The *en banc* D.C. Circuit cited three reasons that—despite its obvious discomfort with the substantial-competitive-harm definition,

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[21] *E.g.*, 2 U.S.C. § 603 (1974) ("commercial information * * * obtained by the Government on a confidential basis * * * [that] is required to be kept secret in order to prevent undue injury to the competitive position of such person"); 42 U.S.C. § 5413 (1974) (information "which * * * if disclosed, would put the person furnishing such information at a substantial competitive disadvantage, shall be considered confidential"); 15 U.S.C. § 4019 (1982) (prohibiting disclosure of commercial information "if the information is * * * confidential and if the disclosure of the information would cause harm to the person who submitted the information").

[22] The second prong of the *National Parks* test— information is "confidential" if its disclosure would be likely "to impair the Government's ability to obtain necessary information in the future," 498 F.2d at 770—is not at issue in this case but fares no better on plain-text review. Whether particular information is confidential cannot, as a matter of logic, depend on the distinct inquiry whether its disclosure would threaten the Government's ability to obtain other information in the future.

see *supra* Part I.B.2.b—led it to apply *stare decisis*: (a) other Circuits' adoption of *National Parks*; (b) Congress's supposed cognizance of that case; and (c) the conclusion that the test had not proven "so 'unworkable' in practice as to constitute a 'positive detriment to coherence and consistency in the law.'" *Critical Mass*, 975 F.2d at 877-878.

Principles of *stare decisis*, of course, do not bind this Court's review of lower courts' erroneous statutory interpretations. Regardless, the justifications that led the D.C. Circuit to retain *National Parks* have proven wholly inadequate.

a. Broad use of *National Parks* cannot overcome that precedent's utter infidelity to the statutory text. "[*T*]*his* Court's responsibility [is] to say what a statute means," and lower courts then must "respect that understanding of the governing rule of law." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994). In FOIA, as in many other contexts, this Court has rejected longstanding and widely shared—yet atextual or otherwise erroneous—statutory interpretations.

Milner, for example, abrogated extratextual tests for FOIA Exemption 2 that the D.C. Circuit had developed, replacing them with a plain-text interpretation of the exemption based on dictionary definitions of "personnel." 562 U.S. at 579-580 (abrogating *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (*en banc*)). "Our consideration of Exemption 2's scope starts with its text," the Court explained, regardless of whether an atextual decision had become entrenched in the courts below. *Id.* at 569; see also, *e.g.*, *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191, 196 (1994) (rejecting dissent's argument that a widespread, previously "settled construction * * * should not be disturbed" and replacing a broadly adopted lower-court interpretation of aiding-and-abetting

liability in securities actions with a plain-text interpretation).

Accordingly, the significance that the *en banc* D.C. Circuit accorded to the fact that several Circuits had adopted, while none had rejected, *National Parks*, is immaterial here. *Critical Mass*, 975 F.2d at 876. Moreover, even that perception was and remains misleading. The widespread adoption of *National Parks* is attributable to other lower courts' deference to the D.C. Circuit in this area of the law—not the result of each Circuit's careful, reasoned, and independent analysis of the test and its merits. With one exception,[23] the other Circuits to have adopted *National Parks* have done so reflexively and without engaging in critical analysis,[24] taking its test as a given, and the D.C. Circuit alone has considered it *en banc*—with the less-than-enthusiastic result described above, see *infra* Part I.B.2.b.

b. The D.C. Circuit also erred when it implied that Congress has approved of *National Parks* and when it

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[23] *9 to 5 Org. for Women Office Workers* v. *Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 7-10 (1st Cir. 1983).

[24] See, *e.g.*, *Cont'l Stock Transfer & Tr. Co.* v. *S.E.C.*, 566 F.2d 373, 374 (2d Cir. 1977) (per curiam); *OSHA Data/CIH, Inc.* v. *U.S. Dep't of Labor*, 220 F.3d 153, 162 & n.24 (3d Cir. 2000) (adopting *National Parks* after labeling it the "leading case"); *Westinghouse Elec. Corp.* v. *Schlesinger*, 542 F.2d 1190, 1207 n.68 (4th Cir. 1976) (same); *Cont'l Oil Co.* v. *Fed. Power Comm'n*, 519 F.2d 31, 35 (5th Cir. 1975) (same); *Gen. Elec. Co.* v. *U.S. Nuclear Regulatory Com'n*, 750 F.2d 1394, 1398 (7th Cir. 1984) (applying *National Parks* test without analysis, though noting that Exemption 4 is, "literally," broader); *Madel* v. *U.S. Dep't of Justice*, 784 F.3d 448, 452 (8th Cir. 2015) (reciting and applying the elements of the *National Parks* test); *Pac. Architects & Eng'rs Inc.* v. *U.S. Dep't of State*, 906 F.2d 1345, 1347 (9th Cir. 1990) (same); *Anderson* v. *Dep't of Health & Human Servs.*, 907 F.2d 936, 946 (10th Cir. 1990) (same); *Sharkey* v. *Food & Drug Admin.*, 250 F. App'x. 284, 290 (11th Cir. 2007) (same).

indicated that this justified preserving the test (at least in modified form, given the "voluntary" proviso just described). Exemption 4 has remained unchanged since 1966; Congress has neither amended nor reenacted it. The only relevant question, therefore, is what Congress meant when it enacted that statutory provision. See *New Prime*, 139 S. Ct. at 543. Exemption 4's plain text, not *National Parks*, definitively resolves that question. *Supra* Part I.A.

Critical Mass suggested the opposite by citing the legislative history of a different and later-enacted statute—the Open Meetings Act of 1976. 975 F.2d at 876-877 (citing *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1153 n.146 (D.C. Cir. 1987))). Language in that separate Act mirrored Exemption 4, and a Member of Congress commented that this language was "as interpreted in cases such as *National Parks*." *CNA Fin. Corp.*, 830 F.2d at 1153 n.146 (quoting 122 Cong. Rec. 24, 181 (1976)). But the Conference Report did not mention *National Parks*—it reported that "conferees have agreed to this language with recognition of judicial interpretations of that exemption." *Ibid.* (quoting H.R. Rep. No. 1441). In 1976, the ink was still barely dry on *National Parks*, which was not the only judicial interpretation of Exemption 4 and recognized in only two other Circuits. Moreover, as even the D.C. Circuit candidly acknowledged, this legislative history about the Open Meetings Act "of course [does] not shed[] any light on the intent originally underlying enactment of Exemption 4 of FOIA." *Ibid.*

Argus Leader has relied on other legislative history from after FOIA's passage to suggest that Congress has acquiesced in *National Parks*. It posited that Congress blessed the *National Parks* test in a 1978 committee report. BIO 16. That report came from a House committee—hardly both Houses of Congress after presentment to the President. Moreover, the report did not bless *National Parks*, but expressly stated the opposite: that the

committee was "not prepared at this time to consider the merits of the substantial comparative harm test." *Freedom of Information Act Requests for Business Data and Reverse FOIA Lawsuits*, H.R. Rep. 1382, 95th Cong., 2d Sess. 22 (1978).

Instead, the subcommittee that prepared the report "limited its review primarily to the procedures used by agencies and by courts in deciding cases involving business information under exemption 4," *id.* at 12, and the report noted that the underlying hearings did not "delve deeply into the scope of exemption 4," *id.* at 22. In all events, the opinion of a House committee regarding the meaning of statute enacted by a different Congress over a decade earlier is at best an unreliable tool to interpret the meaning of the language Congress used to enact FOIA in 1966. See, *e.g., Sullivan* v. *Finkelstein*, 110 S. Ct. 2658, 2667 (1990) (Scalia, J., concurring).

c. Finally, *National Parks* has proven to be increasingly unworkable. In its *Critical Mass* petition for rehearing *en banc*, the Government explained that "[d]ozens of federal agencies as well as the courts now devote substantial resources to analyzing whether agency records contain information that is confidential under the *National Parks* test." Pet'n for Reh'g at 3, No. 90-5120. "The burdens imposed by the *National Parks* test needlessly drain administrative and judicial resources in an area of the law in which the Supreme Court has repeatedly referred to Congress' intent to create workable rules." *Ibid.* *Critical Mass* itself "dramatize[d] the practical shortcomings of the *National Parks* test," as the case was being remanded to the district court *for the third time* so that court could hear additional evidence regarding whether Exemption 4 applied. *Id.* at 12.

Even if this Court were to consider the workability of the *National Parks* test in giving authoritative

construction to "confidential," *Critical Mass*'s conclusion in 1992 that the test was not so unworkable in practice as to justify its abandonment, 975 F.2d at 877, is clearly wrong today. The ten Circuits that have now adopted the substantial-competitive-harm test from *National Parks* are unable to consistently apply it. Courts' efforts to parse the D.C. Circuit's language, rather than the statute itself, have yielded splits on every facet of that test. See *N.H. Right to Life*, 136 S. Ct. at 383-385 (dissent describing the *National Parks* test as "nebulous," "convoluted," and "amorphous," with "different limits in different Circuits"). The result is that at least five splits currently divide the Circuits, including regarding what constitutes a likelihood of substantial competitive harm; what kind of actual competition must be shown; whether actual competition can be demonstrated based on possible competition from a hypothetical future competitor or requires a current competitor already participating in the relevant market; whether bad publicity or embarrassment in the marketplace is the type of competitive harm against which Exemption 4 protects; and whether a different test applies to information that a person was obliged to furnish to the Government than to information that was voluntarily provided to the Government. See Pet. 25-29 (collecting cases).[25] A test that purports to unify the Circuits but generates such subsidiary conflict is proof of *un*workability.

The reigning unpredictability flows directly from adopting *National Parks*—and the seeming unity of Circuits adopting this test masks vast disarray. It takes 43 pages for the Department of Justice's guide to Exemption 4 to explore dozens of opinions that have applied the

[25] The certiorari petition in this case, the certiorari-stage Alliance of Marine Mammal Parks & Aquariums *Amicus* Br. 5-11 and Chamber of Commerce *Amicus* Br. 5-9, and the dissent in *New Hampshire Right to Life* have detailed these and additional divisions.

substantial-competitive-harm test, including cataloguing courts' varying approaches, and the different outcomes that courts facing similar fact patterns have reached.[26] Without guidance from Congress or this Court, and attempting to apply the nebulous *National Parks* test, lower courts have "tended to resolve issues of competitive harm on a case-by-case basis rather than by establishing general guidelines."[27] Repudiating *National Parks* and adopting the plain text would instantly eliminate that confusion.

The *National Parks* test also imposes substantial costs on courts, federal agencies, submitters, and requesters of information. If the agency withholds information under Exemption 4 and the requester pursues disclosure in court, the court must review evidence to make a necessarily speculative determination about the potential consequences a particular party of releasing certain information in the context of a specific industry. As *amici* in this case have demonstrated, these procedures are expensive, resource-intensive, time-consuming—and still

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[26] See U.S. Dep't of Justice Guide to the Freedom of Information Act at 305-347 (2014), available at https://www. justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption4_0.pdf (collecting cases). As further evidence of *National Parks*' systemic unpredictability, even panels within the same Circuit, reviewing the same facts, have been unable to apply consistently the substantial-competitive-harm test. *E.g.*, *id.* at 309 (reporting a case in which the D.C. Circuit originally affirmed the district court's determination that Exemption 4 applied but, upon reconsideration following a panel member's death, reversed and remanded on the same record—and observing that this case "well illustrate[s]" the "individualized and sometimes conflicting determinations indicative of competitive harm holdings" (citing *Greenberg* v. *Food & Drug Admin.*, 775 F.2d 1169, 1172-1173 (D.C. Cir. 1985), and *Greenberg* v. *Food & Drug Admin.*, 803 F.2d 1213, 1215, 1219 (D.C. Cir. 1986)).

[27] *Id.* at 309.

sometimes yield the wrong result.[28]

FOIA exemptions "were plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *Mink*, 410 U.S. at 79. *National Parks*' inability to generate consistent, predictable outcomes thus provides further evidence that *National Parks* has been wrong all along. Whether a private party's information must be released by the Government under Exemption 4 currently "rests on judicial speculation about whether disclosure will cause competitive harm." *N.H. Right to Life*, 136 S. Ct. at 384. This Court should not permit *National Parks* to continue its wasteful reign.

C. The data that Argus Leader requested is "confidential" information that can be withheld under Exemption 4

The data that Argus Leader requests fits easily within the ordinary definition of "confidential." Argus Leader has not disputed that retailers carefully safeguard this information or that USDA represented to retailers that it would keep such information confidential pursuant to the agency's longstanding policies. This should not have been a close case, let alone one requiring a trial.

The witnesses uniformly testified at trial that retailers do not publicly disclose store-level SNAP-redemption data and indeed protect it from disclosure. Pet. App. 11a-12a, 88a-89a. As one retailer representative explained, store-level SNAP data is "not something that we disclose or publish. It's not something that's publicly available *in any way*." JA94 (emphasis added). Such information is "personal, confidential, proprietary information to our

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[28] *E.g.*, National Association of Convenience Stores *Amicus* Cert. Br. 14-23; Alliance of Marine Mammal Parks & Aquariums *Amicus* Cert. Br. 11-19; Chamber of Commerce *Amicus* Cert. Br. 10-17.

business, for internal business decisions only." Reporter's Record I:175. As another witness put it, the amount of SNAP sales at any given store is "absolutely" kept private. JA98.

The uncontroverted evidence also demonstrated that the custom of non-disclosure is not limited to the retailers whose representatives testified at trial. USDA's witnesses agreed—and Argus Leader's witnesses did not dispute—that store-level SNAP data is not disclosed in the food-retail industry as a whole, and that this information cannot currently be obtained on the market. JA96, JA98; Reporter's Record II:368-369; *Ctr. for Pub. Integrity* v. *U.S. Dep't of Energy*, 287 F. Supp. 3d 50, 63 (D.D.C. 2018) (relying on declaration that information was routinely protected and would not be released to conclude it was customarily kept confidential for purposes of Exemption 4).

Retailers also testified that they took measures to *protect* the store-level data. See *McDonnell Douglass Corp.* v. *EEOC,* 922 F. Supp. 235, 242 (E.D. Mo. 1996) (reverse-FOIA case relying in part on parties' measures to guard their information, like limiting access to information even within the corporate structure, to conclude information was customarily kept confidential). One retailer described extensive information security training for employees, a closed campus, and computer-network security measures implemented to keep financial data private, specifically including store-level SNAP sales data. JA93-94. Another explained that access to SNAP sales data was limited to "a very tight group of the senior management team." JA98; see also Reporter's Record II:393 (testimony by USDA's expert that disclosure of this information would be a "windfall" to competitors because it is not otherwise available on the market); JA96 (testimony by National Grocers Association President that retailers limit sales data "to as few people as possible within their organization due to the confidential nature of that information").

The EBT processors' contracts provide that those intermediaries shall "treat all information, and in particular information relating to retailers * * * as private or confidential information, as provided under [USDA regulations,] and shall restrict access to and disclosure of such information in compliance with federal and state laws and regulations." Def's Tr. Ex. 202 at 74-75. As such precautions illustrate, JA96, the industry prizes the security of this information, which is why FMI continues to pursue its protection.

The retailers also reasonably expected that the information would be kept confidential even after it was submitted to the Government, based on the Government's representations and course of conduct. USDA's longstanding and public interpretation of the Food Stamp Act was that 7 U.S.C. § 2018 barred the agency from releasing SNAP retailers' redemption information. See *supra* pp. 5-6. The restrictions on disclosure of this information are such that Congress found it necessary to amend the Food Stamp Act to authorize state and local law enforcement to access that data. See H.R. Rep. 271, 99th Cong., 1st Sess. 155 (1985); H.R. Rep. 352, 103d Cong., 1st Sess. 5 (1993).[29]

Andrea Gold, USDA's Retailer Policy and Management Division Director for SNAP, summarized USDA's approach—and the submitters' reliance on it—in an

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[29] After the Eighth Circuit issued its Exemption 3 decision in this case, see *supra* p. 7, Congress amended the Food and Nutrition Act of 2008 again to make its protection of redemption information even more unambiguous, clarifying that retailers submit this data *through* the EBT processor. Agriculture Improvement Act of 2018, Pub. L. 115-334, December 20, 2018, 132 Stat. 4490 (amending § 2018 "in the 1st sentence of subsection (c) by inserting 'records relating to electronic benefit transfer equipment and related services, transaction and redemption data *provided through the electronic benefit transfer system*,' after 'purchase invoices.'" (emphasis added)).

affidavit to the District Court:

> [T]he agency has had a long-standing policy regarding treatment of this data as confidential under 7 C.F.R. § 278.1(q). As retailers participating during the period for which data has been requested did so under the expectation that such data would be protected, and because they are unable to opt out retrospectively, this data will not be released.

JA71-72; see also 79 Fed. Reg. 45,175 ("Throughout the history of [SNAP]," the Government "has operated in accordance with its interpretation of the Act and FNS regulations that the Secretary did not have authority to release this information."). The President of the National Grocers Association confirmed that "when our members signed up for the program, they always felt that it was confidential, private, and it was never going to be released." JA97; see also JA94-95 (similar testimony by retailer representative).

When Exemption 4 is correctly interpreted, it is evident that the information at issue in this case is "confidential." It is not subject to mandatory disclosure under FOIA, and USDA may withhold that information.

II. Even Under *National Parks*' Atextual Test, The Eighth Circuit's Standard For Substantial Competitive Harm Is Erroneous

In *National Parks*, the D.C. Circuit concluded that applying Exemption 4 required an inquiry into "the possibility that disclosure will harm legitimate private * * * interests in secrecy." 498 F.2d at 770. But in the decades since, lower courts interpreting *National Parks* have lost sight of that broad interest. Instead, they have become focused on parsing *National Parks*' language regarding substantial competitive harm, and have developed increasingly burdensome and case-specific requirements to meet that

test. Ultimately, the *National Parks* test, in many Circuits, fails to reliably protect businesses and individuals from harmful disclosure of their information, even as it imposes costly litigation burdens on the courts, government agencies, submitters, and requesters.

The simplest response is scuttling the substantial-competitive-harm test altogether. Short of that, the Court should resolve the inter-circuit (and sometimes intra-circuit) confusion by holding that the test requires only a broad inquiry assessing whether there is a reasonable possibility that commercial or financial interests may be injured, directly or indirectly, by the release of submitted information. In the context of a business, this would ask merely whether there is a reasonable possibility that disclosure will divert sales or profits. While this approach is less capable of uniform application and efficient administration than simply following the plain text of Exemption 4, it would at least allow the federal courts to jettison decades of arbitrary judicial limitations on (1) the sources of harm, (2) the types of harm, and (3) the types of proof permitted. It would also align the standard more closely with what must be shown under, for example, the Robinson-Patman Act to establish substantial competitive injury.

A. Evidence of a reasonable possibility that disclosure might harm commercial or financial interests should satisfy the *National Parks* test

As even *National Parks* acknowledged, Congress intended Exemption 4 to protect the interests of submitters, not just those of the Government. 498 F.2d at 770. The D.C. Circuit summarized the submitters' legitimate interests as avoiding "substantial harm to the[ir] competitive position." *Ibid.* The court charged the district court on remand, however, with a broader inquiry "into the *possibility* that disclosure will harm legitimate private or

governmental interests in secrecy." *Id.* at 770 (emphasis added). Though some courts have understood that *National Parks* did not mandate "a sophisticated economic analysis of the likely effects of disclosure," *Public Citizen Health Research Grp.* v. *Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983), others have narrowly and rigidly parsed what constitutes a likelihood of "substantial competitive harm"—resulting in numerous circuit splits. Pet. 24-31.

Clarifying that the *National Parks* test is met when there is a reasonable possibility of financial or commercial harm—which, in the context of a business, means the possibility of diverted sales or profits—would facilitate uniform application. This proposed test is neither novel nor difficult in application. This Court has recognized a similar "reasonable possibility" test when applying the Robinson-Patman Act, which examines whether there is a reasonable possibility that "substantial competitive injury" may occur. *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220, 222 (1993). Under that test, "[a] hallmark of the requisite competitive injury * * * is the diversion of sales or profits." *Volvo Trucks N. Am., Inc.* v. *Reeder-Simco GMC, Inc.*, 546 U.S. 164, 177 (2006).

A test asking merely whether there is a reasonable possibility that disclosure will divert sales or profits is unlikely to be misapplied by well-meaning government officials—who are tasked with defending confidential information submitted by industries in which they have no or limited expertise (certainly as compared to the submitters themselves). Plus, this test would ease the administrative burden on the Government and courts. It will reduce the substantial expense submitters and requesters incur by eliminating uncertainty, minimizing the wrangling of witnesses and testimony, and ending the carousel of appellate second-guessing.

1. The proposed standard does not require the Government to prove that a defined competitive harm must *immediately* result from a competitor's use of submitted information. Instead, as the First and Tenth Circuits have held, a competitor's *possible* use of the information to cause harm threatens the submitter's interests and satisfies Exemption 4. *N.H. Right to Life*, 778 F.3d 43, 51 (1st Cir. 2015) (rejecting a "myopic" view of competition); *State of Utah* v. *U.S. Dep't of Interior*, 256 F.3d 967, 970-971 (10th Cir. 2001).

In turn, the Court should disapprove any requirement for demonstrating a precisely defined competitive harm, as demanded by the Eighth, Ninth, and D.C. Circuits. *E.g.*, *McDonnell Douglas Corp.* v. *U.S. Dep't of the Air Force*, 375 F.3d 1182, 1192 (D.C. Cir. 2004); *GC Micro Corp.* v. *Defense Logistics Agency*, 33 F.3d 1109, 1114-15 (9th Cir. 1994); Pet. App. 5a.

2. Second, a broad inquiry recognizes the reality that actors beyond present competitors can cause competitive harm to a submitter. Information, once disclosed, may be used by future competitors just as well as present ones. If such a threat is reasonably possible, there is no principled reason why the submitter facing this threat should be barred from Exemption 4's protection—as the First, Eleventh, and D.C. Circuits have already acknowledged. *E.g.*, *N.H. Right to Life*, 778 F.3d at 51; *Sharkey* v. *FDA*, 250 F. App'x 284 289-290 (11th Cir. 2007); *People for the Ethical Treatment of Animals* v. *U.S. Dep't of Health & Human Servs.*, 901 F.3d 343, 351-352 (D.C. Cir. 2018).

Similarly, a reasonable probability of harm exists, and thus Exemption 4 should apply, when customers, vendors, or the public may be able to use submitted information in a way that injures the submitter. See, *e.g.*, *McDonnell Douglas Corp.* v. *NASA*, 180 F.3d 303, 306-307 (D.C. Cir. 1999) (accepting as competitive harm the prospect that a

customer will use released information to improve its bargaining position against the submitter). It makes little sense to cabin the concept of substantial competitive harm solely to present market competitors, as the D.C. Circuit has inconsistently done. See, *e.g.*, *Public Citizen Health Research Grp.*, 704 F.2d at 1291 n.30.

3. A broad inquiry also should not discriminate between types of harm that may result from releasing submitted information. Injury to reputation or a loss of public confidence in a submitter can divert sales or profits just as easily as another competitor building more stores in a retailer's area. Indeed, some FOIA requests are submitted *for the purpose* of embarrassing the submitter or causing political interference, as in *Nadler* v. *FDIC*, 92 F.3d 93, 96 (2d Cir. 1996). As that court recognized: "The fact that this harm would result from active hindrance by the Plaintiffs rather than directly by potential competitors does not affect the fairness considerations that underlie Exemption Four." *Id.* at 97. Undermining a business in these ways harms its competitive position just as effectively, if slightly less directly.

4. Finally, a broad competitive-harm standard should encompass external indicia of competitive harm. Those indicia include whether and at what cost the information could be obtained or derived, and whether the submitter took measures to protect its confidentiality. See *Worthington Compressors, Inc.* v. *Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981) ("If private reproduction of the information would be so expensive or arcane as to be impracticable, disclosure of that information through the FOIA conduit could damage the competitive position of the submitters, to the advantage of FOIA requesters."); *Sharkey*, 250 F. App'x at 290 (drastic measures taken by the submitter to keep information confidential supports a conclusion that information is confidential).

B. Under an objective application of *National Parks*, the SNAP data clearly falls within the ambit of Exemption 4

USDA's evidence at trial should have been more than sufficient to demonstrate that there was a reasonable possibility that releasing the SNAP data could injure the competitive position of at least some of the submitting retailers. USDA's expert witness guided the district court step-by-step through his process of using the real sales figures at issue to create a statistical model for analyzing retail market positioning. Reporter's Record I:393-400. The expert testified that the SNAP data would be a "windfall" for retail analytics firms like his, and thus for the retailers with deep enough pockets to hire such statisticians. *Id.* at II:393.

Under a broad inquiry into competitive harm, no additional testimony was required. But USDA's fact witnesses also testified to four distinct ways competitors could use the SNAP data to cause substantial competitive harm.

First, stores revealed to have a high rate of redemptions expected to see increased competition from their existing competitors, as those competitors adjust their product selection and marketing to attract SNAP customers. Reporter's Record I:224; *id.* at II:324.

Second, new market entrants—especially those whose strategy involves targeting price-conscious shoppers—will use the SNAP data to reveal the best locations from which to lure away incumbent retailers' customers. Andrew Johnstone of Kmart testified that if foreign grocer Lidl—which seeks to attract price-conscious shoppers and has "announced very publicly plans to build hundreds of new stores in the United States"—knew Kmart's SNAP sales at the store level, "I think you can be pretty sure where they would start putting their stores." *Id.* at I:252-253. David Siebert of Supervalu/Save-A-Lot similarly

explained that releasing SNAP redemption data would allow a market entrant "to better identify where they see opportunity to enter the market and take a portion of those food dollars." *Id.* at II:309.

Other new market entrants include online grocers, such as Amazon, that are increasingly competing with traditional grocers. Reporter's Record I:208. In the time since trial, USDA has announced a pilot program to allow online retailers to participate in SNAP.[30] Online retailers will be perfectly poised to reap the upside of a massive data release and will be asymmetrically benefited over traditional retailers by such a release, both because the online retailers have no data included in the current FOIA request and because they will *never* have store-level data to release.

Third, the retailers uniformly expressed their fears that SNAP redemption data will allow data analysts to better estimate total sales volume. As one retailer testified: "[I]f you knew what percentage of my sales was paid for in SNAP benefits, you could come to a rough estimate, a better estimate, let me put it that way, of what our store's sales are, and determine if you think there's more for you to get from us." Reporter's Record I:192. USDA's expert witness confirmed the retailers' fears: he knew precisely how to use the SNAP data to give his data analysis a competitive edge. *Id.* at II:394-395.

Lastly, retailers raised the specter that releasing SNAP data may draw negative attention and generate an unfair stigma around shopping at a particular store. Reporter's Record I:194; *id.* at I:212. If particular locations gain notoriety as high-SNAP stores, other customers may wish to avoid being tagged with the same stigma, or

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[30] SNAP Online Purchasing Pilot, https://www.fns.usda.gov/snap/online-purchasing-pilot (last accessed Feb. 15, 2019).

landlords may hesitate to continue a tenancy. *Id.* at I:212. The harm this stigma could cause is every bit as real as the harms inflicted by a competitor; there is no jurisprudential reason to distinguish between the two.

To refute this testimony, Argus Leader put on only two expert witnesses. An assistant agribusiness professor agreed that it would be wrong to characterize the SNAP data as having "no value," and conceded that its release "could cause some harm to some retailers," but maintained that the harm would be "very limited and very unlikely." Reporter's Record II:348; *id.* at II:351; *id.* at II:362. A professor of business administration testified that large retailers devote entire departments to data analytics, but then claimed that the risk of substantial competitive harm was nonetheless low because retailers already make decisions based on their own and publicly available data. *Id.* at II:375-378.

Straightforward application of a broad competitive harm test reveals there is a reasonable possibility that competitors could use store-level SNAP redemption data in ways resulting in harmful diversion of sales or profits. Having exhausted its expertise, the district court should have ended its inquiry there. SNAP data is the type of information that Exemption 4 and even the substantial-competitive-harm test are meant to protect.

* * *

This litigation exemplifies many of the worst tendencies of the lower courts applying *National Parks*, and it demonstrates the need for an improved, streamlined test for competitive harm. The district court required a hyper-precise showing of exactly how a competitor could use SNAP data, ignored harms caused by negative publicity instead of by competitors directly, and resulted in a two-day bench trial with a bevy of government, retailer, and expert witnesses.

The Eighth Circuit even acknowledged that the SNAP data "might prove useful" and would improve statistical modeling efforts. Pet. App. 5a. But "without more," the panel concluded that the "highly competitive" grocery industry would be unaffected by "marginal improvement[s]." The Eighth Circuit treated all 321,000 retailers as one industry-wide monolith, assuming that a small improvement in competitiveness will be equally distributed across competitors. And the court refused to grapple with the fact that a "marginally more accurate" statistical model in the undisputed extraordinarily competitive world of retail grocers can be the difference between a red and black ledger. The Court should eliminate the *National Parks* test altogether—but if it does not, it should direct that it be applied in the simple, objective manner proposed here.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

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APPENDIX

5 U.S.C.A. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * *

(8)(A) An agency shall--

(i) withhold information under this section only if--

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--

> **(A)(i)** requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
>
> > **(ii)** establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
>
> **(B)** if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted

invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.