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 *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 36 MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Reporters Committee for Freedom of the Press, American Society of News Editors, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, California News Publishers Association, Californians Aware, The E.W. Scripps Company, First Amendment Coalition, First Look Media Works, Inc., Inter American Press Association, Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The McClatchy Company, The Media Institute, Media Law Resource Center, MPA – The Association of Magazine Media, National Newspaper Association, The National Press Club, National Press Club Journalism Institute, National Press Photographers Association, National Public Radio, Inc., New England First Amendment Coalition, The New York Times Company, News Media Alliance, The NewsGuild - CWA, Online News Association, POLITICO LLC, ProPublica, Radio Television Digital News Association, Reporters Without Borders, Reveal from The Center for Investigative Reporting, Society of Environmental Journalists, Society of Professional Journalists, South Dakota Newspaper Association, TEGNA Inc., and Tully Center for Free Speech (collectively, "*amici*").

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part, no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the *amici curiae*, its members, or its counsel made monetary contributions intended to fund the preparation or submission of this brief. Both parties have given blanket consent to the filing of all *amicus* briefs.

Amici file this brief in support of Respondent Argus Leader Media ("Argus Leader"). *Amici* rely on the Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552, to gather information and inform the public about government activities. FOIA is an important tool frequently used by the press in carrying out its role "as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). As this Court has recognized, the Act is a "structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

This case marks the first time the Court has granted certiorari to interpret FOIA since the enactment of the FOIA Improvement Act of 2016. FOIA Improvement Act of 2016, Pub. L. No. 114–185, 130 Stat. 538 (2016). The 2016 amendments to the Act impose new, additional requirements that must be met before records may be withheld under one of FOIA's discretionary exemptions, which include Exemption 4. Specifically, the amendments impose a "foreseeable harm" requirement, prohibiting a government agency from withholding information unless it "reasonably foresees that disclosure would harm an interest protected by" that exemption. 5 U.S.C. § 552(a)(8). While the FOIA request at issue in this case is not governed by the foreseeable harm standard because it was made before the effective date of the 2016 amendments, *see* Pub. L. No. 114–185, 130 Stat. 544–45 (2016), future FOIA requests like it will be. Thus, regardless of whether this Court affirms or

rejects the interpretation of Exemption 4 articulated by the Eighth Circuit below, for all FOIA requests submitted since June 30, 2016, the responding government agency will be required to show harm that is reasonably foreseeable to withhold records under Exemption 4. *Id.* Accordingly, *amici* write not only to urge the Court to interpret Exemption 4 in this case in a manner that is consistent with the Act's purpose and congressional intent, but also to ensure the Court is aware of the plain text of the Act—including its foreseeable harm requirement—as it stands today.

SUMMARY OF ARGUMENT

Petitioner argues that the plain text of Exemption 4, 5 U.S.C. § 552(b)(4), permits government agencies to withhold records requested under FOIA if a third party claims that the information is either kept private, or, alternatively, that disclosure might lead to "negative publicity" or "could" result in some financial harm. Pet. Br. 16, 53. Petitioner's purported textual argument, however, is irreconcilable with recent amendments to FOIA that impose a "foreseeable harm" requirement that must be satisfied before agency records can be withheld. *See* FOIA Improvement Act of 2016, Pub. L. No. 114–185, 130 Stat. 538, 539 (2016).

Because Congress's 2016 amendments to FOIA significantly alter the statute, but do not apply to the request at issue in this case, this Court should dismiss the writ of certiorari as improvidently granted. Alternatively, *amici* urge the Court to affirm the decision of the United States Court of Appeals for the Eighth Circuit, and adopt the test set forth in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The recent amendments to FOIA impose a "foreseeable harm" requirement for all discretionary withholdings, including those under Exemption 4, to prevent agencies from unnecessarily withholding records from the public. *See* S. Rep. No. 114–4, at 2–3 (2015). Under this requirement, a record that falls within the scope of one of FOIA's enumerated, discretionary exemptions cannot be withheld unless the agency also "reasonably foresees that disclosure would harm an interest protected by [that]

exemption." 5 U.S.C. § 552(a)(8)(A); *see also* FOIA Improvement Act of 2016, Pub. L. No. 114–185, 130 Stat. 538, 539 (2016). Thus, even if Petitioner was correct with respect to its interpretation of an isolated word within Exemption 4 as applied to the particular request at issue in this case—which it is not—that interpretation cannot survive under the plain language of the Act as amended; FOIA now expressly requires a government agency to show that it reasonably foresees harm from disclosure in order to justify withholding records, including those the agency claims contain "confidential" information under Exemption 4. *Cf.* Pet. Br. 2 (incorrectly suggesting that the foreseeable harm standard, 5 U.S.C. § 552(a)(8)(A), governs the FOIA request in this case); Cert. Pet. Br. 2 (same).

In the context of Exemption 4, the foreseeable harm standard requires agencies to release records unless (1) the record meets the threshold requirements of the exemption, and (2) the agency demonstrates that it reasonably foresees that disclosure of the records will harm an interest protected by Exemption 4—*i.e.*, the competitive position of a third party. Thus, the fact that information in a record meets the threshold requirements of Exemption 4, alone, does not mean that it may be withheld. Nor is mere speculation that there may be some indirect harm in the future sufficient to justify withholding. Congress expressly rejected both of these propositions when it codified the foreseeable harm standard. *See* S. Rep. No. 114–4, at 8 (noting that "mere 'speculative or abstract fears,' or fear of embarrassment, are an insufficient basis for withholding information").

This Court's precedent states that the Court exercises its "powers of judicial review only as a matter of necessity." *Sanks v. Georgia*, 401 U.S. 144, 151 (1971) (dismissing in light of new legislation addressing the issue presented). There is no question that the Court's holding in this case would be limited to FOIA requests submitted before Congress's enactment of the foreseeable harm requirement. Accordingly, *amici* join Respondent in urging that the writ of certiorari in this case be dismissed as improvidently granted. Resp. Br. 14.

Alternatively, *amici* urge the Court to affirm the decision of the United States Court of Appeals for the Eighth Circuit, which adopted and applied the test articulated by the United States Court of Appeals for the District of Columbia Circuit in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The plain text of FOIA's foreseeable harm standard substantially mirrors the *National Parks* test. Both require the government to show that harm will result to the competitive position of a third party before it may withhold records under Exemption 4. Just as the *National Parks* test requires agencies to show how disclosure of documents will result in competitive harm, the foreseeable harm standard requires agencies to show how disclosure will result in harm to an interest protected by an exemption—in the context of Exemption 4, the competitive position of the third party. *Cf.* Pet. Br. 46.

The strong public interest in access to records regarding expenditures of public funds also counsels in favor of affirming the Eighth Circuit's decision. FOIA is a powerful tool used by journalists, news

organizations, and the public to monitor how the government spends tax dollars. For example, journalists have used SNAP data to determine which private companies obtain the greatest benefits from government subsidies. Similar records also allow the public to understand which companies the government selects for lucrative contracts. The *National Parks* test ensures that the public can access agency records to learn the details of how government programs use public dollars.

For the reasons set forth herein, *amici* agree with Respondent that the writ of certiorari in this case should be dismissed as improvidently granted, Resp. Br. 14, or, alternatively, that the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

ARGUMENT

I. FOIA's plain text, as amended, requires agencies to disclose records otherwise covered by a discretionary exemption, unless it reasonably foresees that disclosure will cause harm particularly protected by an exemption.

The Freedom of Information Act ("FOIA" or the "Act") makes government records presumptively open to the public in order to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). It reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976) (citing S. Rep. No. 813, at 3 (1965)).

Congress has amended FOIA on a number of occasions to improve its effectiveness, often narrowing exemptions or providing procedural support for requesters. *See, e.g.*, H. Rep. No. 110–45, at 4–5 (2007) (noting the OPEN Government Act of 2007 was aimed at addressing problems in FOIA administration); S. Rep. No. 104–272, at 5 (1996) (explaining the 1996 amendments to FOIA sought to "encourage electronic access" to government records and create more efficient and timely government responses); H. Rep. No. 94–1441, at 24–25 (1976) (Conf. Rep.) (explaining that the 1976 Government in the Sunshine Act amended FOIA Exemption 3 by creating particular criteria for an agency to withhold records); S. Rep. No. 93–854, at 182 (1974) (explaining

the 1974 amendments to FOIA require courts to conduct *de novo* review of executive claims of national security).

Congress's most recent amendments to FOIA, through the FOIA Improvement Act of 2016, limit the circumstances in which the government can withhold records from the public by requiring agencies to provide records unless disclosure is prohibited by law or the agency reasonably foresees that disclosure would harm an interest protected by an exemption. *See* S. 337, 114th Cong. (2015–2016). The full text of FOIA's foreseeable harm standard reads:

> 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;

5 U.S.C. § 552(a)(8)(A).

In the Senate Report accompanying the bill, Congress explained that it was amending FOIA to address its concern about the "growing trend" of agencies overusing FOIA exemptions to withhold records from the public. *See* S. Rep. No. 114–4, at 2–3 (2015). As the Senate Report states, the foreseeable harm standard was intended to prohibit the government's use of "discretionary exemptions to withhold large swaths of Government information, even though no harm would result from disclosure." *Id.* at 3. It further requires agencies applying the

foreseeable standard to determine whether disclosing a "particular document, given its age, content, and character, *would* harm an interest protected by the applicable exemption," and that it may withhold the document *only* after establishing this likelihood of concrete harm. *Id.* (emphasis added). The Senate Report makes clear that "mere 'speculative or abstract fears,' or fear of embarrassment, are an insufficient basis for withholding information." *Id.* at 8 (citation omitted).

The concerns expressed in the Senate Report mirror those identified in a 2016 report by the former chairman of the House Committee on Oversight and Government Reform, Jason Chaffetz, which highlighted agencies' overuse and misapplication of FOIA exemptions, including Exemption 4. Staff of H. Comm. on Oversight and Gov't Reform, 114th Cong., FOIA is Broken: A Report iii–iv, 20 (2016). Titling the report "FOIA is Broken," then-Chairman Chaffetz called for structural reform to enable FOIA to facilitate government transparency, as intended, noting a comment from a 26-year-old freelance journalist, who said: "I often describe the handling of my FOIA request as the single most disillusioning experience of my life." *Id.* at ii, 39. The report explained that reform was necessary to prevent agencies from broadly invoking exemptions when harm will not occur, specifically pointing to Exemption 4. *See id.* at 20.

Since the passage of the FOIA Improvement Act of 2016, courts have followed Congress's intent by applying the foreseeable harm standard as a distinct requirement that an agency must meet, in addition to showing that a record falls within the scope of a

discretionary FOIA exemption. In *Rosenberg v. United States Department of Defense*, for example, the United States District Court for the District of Columbia explicitly rejected the argument of the Department of Defense ("DoD") that the foreseeable harm standard merely duplicates existing agency obligations under FOIA. 342 F. Supp. 3d 62, 78 (D.D.C. 2018). The district court held that the DoD did not meet the foreseeable harm requirement when it claimed that disclosing any records "would jeopardize the free exchange of information between senior leaders within and outside of the [DoD]," without any showing that disclosure would harm the deliberative process, as protected by Exemption 5.[2] *Id.*; *see also Ecological Rights Found. v. Fed. Emergency Mgmt. Agency*, 2017 WL 5972702 (N.D. Cal. 2017) (holding that a government agency failed to satisfy the foreseeable harm standard when it withheld documents without explaining why the release of each specific document would harm the deliberative process).

In sum, with the addition of the foreseeable harm requirement to FOIA, any agency that seeks to withhold records under a discretionary exemption must establish *both* that a specific, discretionary FOIA exemption applies and that the agency reasonably foresees that the interest protected by that exemption will be harmed by disclosure.

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[2] FOIA's Exemption 5 exempts from disclosure "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." 5 U.S.C. § 552(b)(5).

II. Petitioner's arguments are incompatible with the foreseeable harm standard.

Petitioner argues that this Court's sole consideration in interpreting Exemption 4 should be whether the submitter keeps the information private, Pet. Br. 16, or, in the alternative, that Exemption 4 permits a "*broad* inquiry assessing whether there is a *reasonable possibility* that commercial or financial interests *may* be injured, directly or indirectly." *Id.* at 47 (emphasis added). Both interpretations of Exemption 4 are incompatible with the plain text of the Act as it exists today, and consequently the writ of certiorari should be dismissed as improvidently granted.

First, even assuming, *arguendo*, that Petitioner's arguments pass muster under the language of the Act prior to its amendment in 2016, under current law, FOIA cannot be interpreted to allow for the blanket withholding under Exemption 4 of any record that is kept private. *See* Pet. Br. 16. The foreseeable harm standard prohibits withholding of records unless disclosure will harm the protected interest—in this case, a third party's competitive standing. 5 U.S.C. § 552(a)(8)(A); *see also* Resp. Br. 24–36 (explaining that the common law requires a showing of likelihood of competitive harm in determining what is "confidential").[3] The mere fact

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[3] Petitioner's argument that records should be exempt from disclosure if they are kept private—regardless of any competitive harm—misses the point of FOIA. *Most* government records are kept "private" until they are disclosed under FOIA. Congress enacted FOIA because the government was consistently denying the public access to government records "for

that information may have been kept private does not demonstrate that competitive harm will result from its release. Thus, Petitioner's interpretation of the word "confidential" in Exemption 4, even if adopted by this Court, will not govern FOIA requests submitted since the effective date of the FOIA Improvement Act of 2016.

Should its interpretation of "confidential" fail, Petitioner suggests another atextual reading of Exemption 4. Petitioner argues that Exemption 4 contemplates "a *broad inquiry* assessing whether there is *a reasonable possibility* that commercial or financial interests *may be* injured, *directly or indirectly*." Pet. Br. 47 (emphasis added). Again, the plain language of the foreseeable harm standard makes clear that *potential* harms will not suffice: nondisclosure is permissible only when the agency "reasonably foresees that disclosure *would* harm" a protected interest. 5 U.S.C. § 552(a)(8)(A). It does not allow for records to be withheld because it is possible some harm to an interest "may" occur in the future. *See id.*

At trial, Petitioner's witnesses asserted ways that "competitors *could* use the SNAP data," and testified about their fears of how the data could be used, and the stigma that might be caused if the data were released. Pet. Br. 51–52 (emphasis added). Such speculative claims of possible harm, however, do not

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good cause," with no further explanation. *See* S. Rep. No. 1219, at 8 (1964). And its most recent amendments to the Act sought to prohibit agencies from withholding records *even if* a particular exemption applies. S. Rep. No. 114–4, at 3.

satisfy the Act's requirement that records may be withheld only if it is reasonably foreseeable that disclosure *would harm* a third party's financial interests. And as testimony submitted by the Argus Leader made clear, any competitive harm was "very limited and very unlikely," and that any risk of harm was low. *Id.* at 53 (citing Reporter's Record II:238; *id.* at II:351; *id.* at II:362).

An evaluation of harm is not "unworkable" as Petitioner claims. Pet. Br. 40. Evaluating these claims of harm on a case-by-case basis is in fact *precisely* what Congress intended when it codified the foreseeable harm requirement. As the Senate Report accompanying the FOIA Improvement Act makes clear, "the content of a *particular* record should be reviewed and a determination made as to whether the agency reasonable foresees that disclosing that *particular* document, *given its age, content, and character*, would harm an interest protected by the applicable exemption." S. Rep. No. 114–4, at 8 (emphasis added). Indeed, allowing Petitioner's hypothetical claims of harm to satisfy the foreseeable harm requirement would "swallow FOIA nearly whole." *Argus Leader Media v. U.S. Dep't of Agriculture*, 889 F.3d 914, 916 n.4 (8th Cir. 2018).

For these reasons, dismissal of the writ of certiorari as improvidently granted is appropriate. This Court exercises its "powers of judicial review only as a matter of necessity." *Sanks v. Georgia*, 401 U.S. 144, 151 (1971) (dismissing in light of new legislation addressing the issue presented); *see also Cook v. Hudson*, 429 U.S. 165, 165 (1976) (dismissing writ of certiorari as improvidently granted in light of changes in applicable law). As noted by Respondent, the

United States Department of Agriculture has represented that it will *not* withhold the records at issue in this case based on Exemption 4's confidentiality protections, even if this Court reverses the Eighth Circuit's judgment mandating disclosure. *See* Resp. Br. 1–3, 15; U.S. Br. 32, 35. And, contrary to Petitioner's assertion, there is no question that this Court's holding would be limited to FOIA requests submitted before Congress's enactment of the foreseeable harm requirement. *See* Resp. Br. 3; Pub. L. No. 114–185, 130 Stat. 544–45 (2016); *cf.* Pet. Br. 2 (incorrectly asserting that the foreseeable harm standard, 5 U.S.C. § 552(a)(8), governs the FOIA request in this case, which was submitted in 2011); Cert. Pet. Br. 2 (same). Because the Argus Leader, or any other requester, could file a FOIA request for the same Supplemental Nutrition Assistance Program ("SNAP") data today and have it governed by the foreseeable harm standard, this case is neither an efficient nor effective use of this Court's resources.

III. The *National Parks* test comports with congressional intent and FOIA's foreseeable harm requirement.

Should this Court interpret Exemption 4 in this case, it should affirm, and adopt the standard set forth in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test not only correctly identifies and addresses the purpose of Exemption 4, but it is also consistent with the foreseeable harm requirement applicable to all FOIA requests submitted after June 30, 2016, the effective date of the FOIA Improvement Act. Pub. L. No. 114–185, 130 Stat. 538 (2016).

A. *National Parks* correctly identifies the primary interest protected by Exemption 4—the potential harm to competitive interests of third parties.

Exemption 4 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). Federal appellate courts, beginning with the United States Court of Appeals for the District of Columbia Circuit in *National Parks*, have identified the primary purpose of Exemption 4 as "protect[ing] persons who submit financial or commercial data to government agencies from the *competitive disadvantages* which would result from its publication." 498 F.2d at 768 (emphasis added);[4] *see also* Resp. Br. 24 n.10 (listing cases from circuits adopting *National Parks*). In doing so, the *National Parks* court looked to the Senate Report accompanying FOIA's initial enactment, which detailed numerous examples of documents that would likely be exempt from disclosure, and legislative statements from government officials and members of the public who explained why such an exemption for financial or commercial records was necessary. 498 F.2d at 768–70. Each statement focused on protecting businesses from the "unfair advantage" that its

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[4] *National Parks* also discusses the government's interest in obtaining data from third parties as another interest protected by Exemption 4. *National Parks*, 498 F.2d at 767–68. This interest is not at issue in this case. Petitioner did not and cannot assert that release of the requested record would inhibit the government's ability to collect SNAP data because participation in the SNAP program requires private parties to submit such data.

competitors would be given through access to certain documents, such as loan applications. *Id.*

Congress incorporated *National Parks*' interpretation of Exemption 4 through its enactment of the Government in the Sunshine Act, which provided an exemption to federal open meetings laws with the exact same language as FOIA's Exemption 4. *Compare* 5 U.S.C. § 552(b)(4) *with* 5 U.S.C. § 552b(c)(4). As the House Conference Report explained: "The language of the House amendment regarding trade secrets and confidential financial or commercial information is identical to the analogous exemption in the Freedom of Information Act, 5 U.S.C. 552(b)(4), *and the conferees have agreed to this language with recognition of judicial interpretations of that exemption*." H. Rep. No. 94–1441, at 15 (Conf. Rep.) (emphasis added) (regarding the exemption similar to Exemption 4 in open meetings laws, 5 U.S.C. § 552b(c)). This statement was in clear reference to *National Parks*; the House of Representatives' summary of the companion bill explains that the exemption protects "commercial or financial material obtained from a person and privileged or confidential, *as interpreted in cases such as* National Parks & Conservation Assn. v. Morton." 122 Cong. Rec. 24,181 (1976) (emphasis added) (citation omitted).

Congress was thus aware of *National Parks*' interpretation of FOIA's Exemption 4 and approved of it when it created a new law with language identical to Exemption 4. *See id; cf. Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018) (explaining that when Congress uses "the materially same language in [a new statute], it presumptively

was aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning"). This, coupled with the other 59 statutes that Congress enacted that either expressly incorporate Exemption 4 or use virtually the same language, *see* Resp. Br. 36–41, make clear that Congress intended for *National Parks* to govern disclosure requirements. *See Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 633–34 (2019); *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.").

B. The *National Parks* standard is consistent with FOIA's foreseeable harm standard.

Under *National Parks*, commercial or financial information is considered "confidential," and may therefore be withheld under FOIA's Exemption 4, if its disclosure "is likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained." 498 F.2d at 770. That standard comports with the current text of FOIA, adopted by Congress through enactment of the foreseeable harm standard in 2016. *See* 5 U.S.C. § 552(a)(8)(A). Indeed, in adopting the *National Parks* standard, the United States Court of Appeals for the First Circuit presciently described the "principle to be derived from *National Parks*[], and the cases which have followed it":

> [I]nformation will not be regarded as confidential under exemption 4 unless it can be demonstrated that disclosure will harm a specific interest that Congress sought to protect by enacting the exemption.

9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys., 721 F.2d 1, 9 (1st Cir. 1983). Like *National Parks*, the plain text of the foreseeable harm standard requires the government to demonstrate (1) harm to an interest protected by a FOIA exemption—here, the competitive position of a third party—and (2) a reasonable likelihood that harm will occur. *Compare National Parks*, 498 F.2d at 770, *with* 5 U.S.C. § 552(a)(8).

The 2016 amendments to the Act include an unambiguous direction from Congress that a showing of foreseeable harm to an interest protected by a discretionary FOIA exemption *must* be made before records may be withheld. Thus, even if the Court does not adopt the *National Parks* test for Exemption 4 now, current and future FOIA requests will be governed by an essentially, if not entirely, identical standard. Indeed, as noted above, the Argus Leader can simply file a new FOIA request today that would require the Food and Drug Administration to apply the foreseeable harm standard. *See Spannaus v. Dep't of Justice*, 824 F.2d 52, 61 (D.C. Cir. 1987) (noting that parties can "simply refile [their] FOIA request tomorrow and restart the process").

IV. The public has a strong interest in understanding how the government spends tax dollars and contracts with private parties.

As Congress envisioned, journalists regularly use FOIA to inform the public about the actions of government. Access to records showing the government's interactions with third parties and how taxpayer dollars are spent is an important part of ensuring the public knows "what their government is up to," and further counsels in favor of a narrow reading of Exemption 4. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

For instance, the New Food Economy, a nonprofit newsroom, has used data from the SNAP program, similar to the data at issue in this case, to report which companies benefit the most from taxpayer-funded food subsidies. This data revealed that some of the largest beneficiaries of this federal program—aimed at supporting the nutritional needs of low-income families and individuals—were multi-billion dollar companies. H. Claire Brown, *Amazon Gets Huge Subsidies to Provide Good Jobs—But It's a Top Employer of SNAP Recipients in at Least Five States*, New Food Econ. (Apr. 19, 2018), https://perma.cc/3WG3-EBR3. As a result of the New Food Economy's reporting, the public learned that in some states, employees of Amazon, McDonald's, Uber, and Walmart benefited the most from the SNAP program. *See id.* In addition, the report showed which companies benefit from a United States Department of Agriculture pilot program that permits online grocers to accept SNAP benefits. *Id.*; *see also*

Leanna Garfield, *Amazon Will Soon Start Accepting Food Stamps*, Bus. Insider (Jan. 9, 2017), https://perma.cc/N84D-Q5JG. These SNAP records help the public fully understand how public dollars go towards meeting the nutritional needs of workers, as well as how some companies receive taxpayer dollars through SNAP benefit spending.

Access to these and similar SNAP records is necessary if the public is to fully understand how and where government money is spent, which in turn encourages public officials to represent the public's interest in overseeing such spending. Following the New Food Economy's article, a bill was introduced in the Senate that would tax large companies for any government benefits its employees receive, with the goal of ensuring that the government is not subsidizing the wealthiest corporations. *See* David Leonhardt, *Amazon's Surrender is Inspiring*, N.Y. Times (Oct. 3, 2018), https://nyti.ms/2UWSMxS. In response, Amazon, for example, increased its minimum wage to $15 and committed to lobbying for an increased federal minimum wage. *See* John Lauerman & Jeremy Kahn, *Bezos Blinks and Raises Amazon's Minimum Wage in U.S., U.K.*, Bloomberg (Oct. 2, 2018), https://bloom.bg/2GVfh30.

The public also has an interest in knowing what companies the government chooses to do business with. For example, reporters at Reveal from the Center for Investigative Reporting used FOIA to obtain EEO-1 reports of various government contractors, which included data about the race and gender of the contractors' employees, from the Department of Labor. *See* Will Evans & Sinduja Rangarajan, *We Got the Government to Reverse Its*

Longtime Policy to get Silicon Valley Diversity Data, Reveal (Nov. 15, 2018), https://perma.cc/YHM3-3VY4; *see also EEO-1 Frequent Asked Questions and Answers*, Equal Employment Opportunity Commission, https://perma.cc/L5CK-XUHR (last visited Mar. 24, 2019). The records showed that many technology companies that receive lucrative government contracts employ very few women or people of color. *See* Will Evans & Sinduja Rangarajan, *Oracle and Palantir Said Diversity Figures Were Trade Secrets. The Real Secret: Embarrassing Numbers*, Reveal (Jan. 7, 2019), https://perma.cc/K4R4-6EDR. For example, Palantir, which has received hundreds of millions of dollars in government contracts to develop technology for law enforcement entities, has no female executives and only one female manager. *Id.*

Many private companies that do business with the government are quick to assert that *any* disclosures in response to FOIA requests may cause competitive harm. For example, in response to Reveal's FOIA request, Palantir's counsel sent a letter to the Department of Labor, arguing that the disclosure of the EEO-1 reports would allow competitors to "identify changes in relative staffing levels," and thus that "*it may be possible* for a competitor to gain insight into how Palantir is staffing its workforce and modify its own workforce accordingly." Letter from Tammy R. Daub, Paul Hastings LLP, to Candice Spalding, Deputy Director of the Department of Labor (Sept. 29, 2017), https://perma.cc/G2VD-HN4W (emphasis added). Claims of competitive harm were even made by companies—such as Google or Apple—that now

voluntarily publicize their reports. *See Annual Report—Google Diversity*, Google, https://perma.cc/2VKT-FXZQ (last visited Mar. 3, 2019) (including latest EEO-1 report); *Inclusion & Diversity*, Apple, https://perma.cc/A6WH-2EZR (last visited Mar. 3, 2019) (same); *see also Black, Female, and a Silicon Valley 'Trade Secret,'* CNN (Mar. 18, 2013), https://perma.cc/44CJ-GH7Z (noting that many companies, including Google and Apple, often claimed that the information disclosed in EEO-1 reports would cause competitive harm).

The *National Parks* test, like the foreseeable harm standard, ensures that agencies do not withhold records without showing that disclosure will cause competitive harm to a third party. Application of the *National Parks* test has ensured that the public knows how government programs, like Medicare, are funded. *See, e.g.*, *Biles v. Dep't of Health and Human Servs.*, 931 F. Supp. 2d 211, 222–28 (D.D.C. 2013) (holding that Exemption 4 does not apply to records relating to projected costs and revenue provided by private insurance companies in the Medicare Advantage or Medicare programs).

The *National Parks* test has also ensured that Exemption 4 was not improperly used to withhold details about government spending. During its investigation of the California electricity crisis of the early 2000s, *The Wall Street Journal* filed a FOIA request for an appendix based on Federal Energy Regulatory Commission employee interviews and investigations regarding whether two government contractors had manipulated electricity prices. *Dow Jones Co., Inc. v. Fed. Energy Regulatory Comm'n*, 219 F.R.D. 167, 171 (C.D. Cal. 2003) (noting prices had

gone from $63 to $750 per megawatt). The district court, relying on *National Parks*, held that the agency failed to meet its burden under Exemption 4. *Id.* at 178 (noting that the agency relied on the government interest prong). The released records helped the *Journal* inform the public about the California energy crisis. *See, e.g.*, Rebecca Smith, *Indictments Are Returned in California Reliant Case*, Wall. St. J. (Apr. 9, 2004), https://on.wsj.com/2T88wg6. As these examples demonstrate, access to records like those at issue in this case are critical to ensuring that the public is properly informed about how the government spends taxpayer dollars, and necessary for the public to hold government officials accountable to those they are elected to serve.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to dismiss the writ of certiorari as improvidently granted or, in the alternative, to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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