No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN SMALL BUSINESS LEAGUE IN SUPPORT OF RESPONDENT ARGUS LEADER MEDIA

KARL OLSON*
AARON R. FIELD
CANNATA O'TOOLE FICKES & OLSON LLP
100 Pine St., Suite 350
San Francisco, CA 94111
(415) 409-8900
kolson@cofolaw.com

Counsel for Amicus Curiae American Small Business League

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

OTHER AUTHORITIES

I.
INTEREST OF *AMICUS CURIAE*[1]

Perhaps no non-media organization has brought more Freedom of Information Act ("FOIA") lawsuits over the last three decades than the American Small Business League. American Small Business League has fought hard, and successfully, to advance the interests of small businesses. It has crusaded effectively and zealously to ensure that small businesses get their share of federal subcontracting dollars as required by the Small Business Act. It has a currently-pending case against the Department of Defense and the Department of Justice seeking access to information about subcontracting plans required by the government's Comprehensive Subcontracting Plan Test Program (hereafter "Test Program").

Against that background, American Small Business League strongly opposes the effort by Petitioner to discard decades of settled precedent and weaken FOIA. Neither the text of Exemption 4 nor the settled interpretation of it justify jettisoning the requirement that businesses seeking to withhold information show a likelihood of substantial competitive harm in order to prevail on a claim of exemption. And the interpretation championed by Petitioner would allow compliant or corrupt government officials, acting in concert with large businesses, to evade public scrutiny of how billions of tax dollars are spent.

American Small Business League's mission to ensure that prime contractors, including large defense contractors, not hide their compliance, or lack thereof, with the Small Business Act's subcontracting goals gives the American Small Business League a unique perspective on the issues in this case. Ameri-

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to this brief being filed.

can Small Business League respectfully submits that the lower courts' judgments in this case – which relied on evidence, not speculative assertions of harm – should be affirmed.

II.
SUMMARY OF ARGUMENT: EXEMPTIONS ARE NARROWLY CONSTRUED, BURDEN IS ON GOVERNMENT TO JUSTIFY NON-DISCLOSURE, AND *NATIONAL PARKS* INTERPRETS EXEMPTION 4 ACCURATELY. PETITIONER'S INTERPRETATION WOULD MAKE IT NEARLY IMPOSSIBLE TO UNCOVER WASTEFUL SPENDING.

FOIA's core purpose is to "permit public access to official information long shielded unnecessarily from public view" and to "create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Department of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976).

FOIA embodies this Court's observation, in the context of access to judicial proceedings, that, " 'People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.' " *Press-Enterprise Co*. v. *Superior Court*, 478 U.S. 1, 13 (1986) (quoting *Richmond Newspapers, Inc*. v. *Virginia*, 448 U. S. 555, 572 (1980)).

The cardinal rule in FOIA cases is that exemptions "must be narrowly construed" in light of FOIA's "dominant objective" of disclosure, not secrecy. *Department of Air Force*, 425 U.S. at 361. The corollary is that the burden rests upon the government, or the opponent of disclosure, to show that an exemption properly applies to the records it seeks to withhold. *Hamdan* v. *U.S. Department of Justice*, 797 F.3d 759, 772 (9th Cir. 2015).

The narrow construction requirement, and the placement of the burden on those resisting disclo-

sure, are especially important features of FOIA litigation because the government, or a submitter of information, knows what it is withholding, and how the information might or might not cause competitive harm. The requester, on the other hand, does not know what is being withheld, or how the information might or might not cause competitive harm.

Thus, if exemptions are not narrowly construed, the government, and businesses that submit information to the government to obtain large government contracts, will enjoy an advantage in FOIA litigation which would be nearly impossible to overcome. *See In re Providian Credit Card Cases*, 96 Cal. App. 4th 292, 301, 307-09 (2001).

Trade secrets and similar confidential business information are easy to claim. Many businesses would like to have their cake and eat it too: they would like to obtain millions (or in the case of big defense contractors, billions) of dollars in government contracts, without letting the taxpayers who fund those contracts know where the money is going or how well the contract is being performed.

In numerous FOIA cases, either the government or the submitter of information, or both, will submit a formulaic recitation of a claimed trade secret or confidentiality requirement and a speculative assertion of potential harm. The requester, who does not know what is being withheld, will have no way of overcoming the assertion if FOIA is interpreted the way Petitioner and its amici would like.

The case of *GC Micro* v. *Defense Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994), is a good example of that. In *GC Micro* a small computer software company sought records relating to the utilization of small disadvantaged businesses by major federal defense contractors. The Defense Logistics Agency ("DLA") submitted declarations by officers of each of the three corporations involved, Loral Aerospace, McDonnell Douglas Corporation, and Northrop

Corporation. Each declaration stated that disclosure of information on a federal form would cause harm to their competitive positions because it would provide competitors with a roadmap of their subcontracting plans. *Id.* at 1113-14.

The Ninth Circuit observed,

> While the law does not require the DLA to engage in a sophisticated economic analysis of the substantial competitive harm to its contractors that might result from disclosure, in order to prevail the DLA must meet its burden of showing a potential of substantial competitive harm to its contractors. The DLA has not met this burden . . . we must balance the strong public interest in favor of disclosure against the right of private businesses to protect sensitive information. Based on the record in this case, we believe that FOIA's strong presumption in favor of disclosure trumps the contractors' right to privacy . . . . It is questionable whether the declarations submitted by the three contractors show *any* potential for competitive harm, let alone *substantial* harm. Congress did not pass Exemption 4 to protect large corporations from persistent computer salespeople.

Id. at 1115 (emphasis in original).

In contrast to the sensible approach taken in *GC Micro* and other cases, the approach taken by Petitioner and its amici would allow both the government and large government contractors – who already wield enormous power and wealth – to keep information from the public simply by saying that it is confidential. That would turn FOIA on its head.

The D.C. Circuit's interpretation of Exemption 4 in *National Parks and Conservation Association v. Morton* ("*National Parks*"), 498 F.2d 765, 770 (D.C. Cir. 1974) is consistent with the requirements that

FOIA exemptions be construed narrowly and that opponents of access bear the burden of proof, and Petitioner's interpretation is not. *See Argus Leader Media v. U.S. Department of Agric.*, 889 F.3d 914, 916 n.4 (8th Cir. 2018) (rejecting argument that " 'confidential' means 'secret' " based on " 'the Supreme Court's admonition that FOIA exemptions 'must be narrowly construed,' " and holding that "[u]nder [Food Marketing Institute]'s reading, Exemption 4 would swallow FOIA nearly whole") (quoting *Milner v. Department of Navy*, 562 U.S. 562, 565 (2011)). The Eighth Circuit's decision should be affirmed.

III.
ARGUMENT

A. REAL-LIFE EXAMPLES DEMONSTRATE HOW HOLLOW ASSERTIONS OF CONFIDENTIALITY OFTEN WILT UNDER SCRUTINY.

A very recent pair of cases involving American Small Business League exemplifies the extent to which both the government and large government contractors will go to keep information from seeing the light of day even when no true trade secrets or competitive harm are involved. In *American Small Business League* v. *U.S. Department of Defense*, Case No. 14-cv-2166 (N.D. Cal.), American Small Business League sought disclosure of Sikorsky Aircraft Corporation's fiscal year 2013 Comprehensive Small Business Subcontracting Plan ("the Plan").[2] Sikorsky

[2] Sikorsky is a defense contractor famous for helicopters such as the UH-60 Black Hawk and the MH-60R Seahawk. *See Sikorsky BLACK HAWK Helicopter*, SIKORSKY AIRCRAFT CORP., https://www.lockheedmartin.com/en-us/products/sikorsky-black-hawk-helicopter.html (last visited March 22, 2019); *Sikorsky MH-60R SEAHAWK Helicopters*, SIKORSKY AIRCRAFT CORP., https://www.lockheedmartin.com/en-us/products/sikorsky-mh-60-seahawk-helicopters.html (last visited March 22, 2019). The Plan described Sikorsky's small business subcontracting goals, consistent with the Small Business Act. *See infra* at § III.D (discussing Small Business Act procurement programs, includ-

intervened in the case and initially joined with the Department of Defense in objecting to disclosure of nearly all of the information in the Plan.

Sikorsky insisted that information in the Plan was confidential under Exemption 4. But its claim of confidentiality wilted under cross-examination. As the government itself later stated in a letter to Sikorsky's counsel,

> This discovery revealed that at least for some of the information that had been redacted, the Company's witnesses were unable to establish that there is a likelihood of substantial competitive injury in the relevant market. . . . This failure is particularly acute given that the information in the Plan is now over five years old. First, Ms. Johnson, Sikorsky's supply chain executive, was unable to provide any detailed information regarding the subcontracts at issue during her deposition. She could not recall the details of any non-disclosure provisions used by Sikorsky to limit dissemination of information. . . . She did not know whether Sikorsky's contracts with suppliers required exclusivity . . . . Prior to reaching her conclusion that disclosure would harm Sikorsky's competitive interests, she did not check whether Sikorsky is currently still using any of the subcontractors, and when asked, did not know with certainty.

November 7, 2017 Letter from Paul Jacobsmeyer, Chief of U.S. Department of Defense Freedom of Information Division, to Sikorsky lawyer Rex Heinke, filed December 7, 2018 as ECF No. 47-4 at 3 in *American Small Business League* v. *U.S. Department of Defense*, Case No. 3:18-cv-01979-WHA (N.D. Cal.).

---

ing the Test Program under which Sikorsky provided the Plan to the government).

Another Sikorsky witness fared even worse when questioned at deposition about the conclusory assertions of confidentiality she had made in a sworn declaration. This witness, Martha Crawford, was asked, "is there any fact that supports your conclusion that the release of any of these redactions would harm Sikorsky?" She replied, "No." The questioner then asked, "I understand your answer to be no, there are no facts." Crawford answered, "That's correct." Crawford Deposition Tr. at 185:9-18, filed December 7, 2018 as ECF No. 47-14 at 4 in *American Small Business League* v. *U.S. Department of Defense*, Case No. 3:18-cv-01979-WHA (N.D. Cal.).

Eventually, given the Sikorsky witnesses' complete inability to substantiate declarations which the Court found "generic and generally unpersuasive," the Department of Defense decided to release the information at issue in the Plan, after giving Sikorsky an opportunity (of which Sikorsky did not avail itself) to take court action to enjoin release. March 14, 2018 letter from Paul Jacobsmeyer, Chief of U.S. Department of Defense Freedom of Information Division, to Sikorsky lawyer Rex Heinke, filed December 7, 2018 as ECF No. 47-6 at 2-3, in *American Small Business League* v. *U.S. Department of Defense*, Case No. 3:18-cv-01979-WHA (N.D. Cal.).

The government has nevertheless withheld information in more recent Comprehensive Small Business Subcontracting Plans under Exemption 4, based in part on the same Sikorsky witness's, Ms. Crawford's testimony. *See American Small Business League* v. *U.S. Department of Defense*, Case No. 3:18-cv-01979-WHA, 2019 WL 1100372, at **5-7 (N.D. Cal. Mar. 8, 2019). In *American Small Business League* v. *U.S. Department of Defense*, Case No. 3:18-cv-01979-WHA (N.D. Cal.), American Small Business League is fighting to enforce its right of access to that more recent information as well.

The result in American Small Business League's 2014 lawsuit was important. Sikorsky's 2013 Com-

prehensive Small Business Subcontracting Plan revealed that it had reduced its small business subcontracting goals since the prior year, including its goals for women and veteran owned small businesses. *See* Sikorsky Aircraft Corporation Comprehensive Small Business Subcontracting Plan for Fiscal Year 2013, filed December 7, 2018 as ECF No. 47-24 at 8-9, in *American Small Business League* v. *U.S. Department of Defense*, Case No. 3:18-cv-01979-WHA (N.D. Cal.). Also, more broadly, it allowed American Small Business League to look behind the curtain and assess for itself Sikorsky's small business subcontracting efforts based on actual data, at least to the extent permitted by the Plan. The public and groups like American Small Business League need actual data to independently evaluate, *inter alia*, whether the Comprehensive Small Business Subcontracting Test Program is helping small businesses. *See infra* at § III.D.

B. THE MILITARY-INDUSTRIAL COMPLEX IS BETTER EQUIPPED TO BEAR ANY "BURDEN" ASSOCIATED WITH SUBSTANTIATING CONFIDENTIALITY CLAIMS THAN AN EVERYDAY CITIZEN.

Petitioner's amicus the Chamber of Commerce of the United States complains to this Court that the *National Parks* test has "imposed substantial burdens on courts and litigants." Chamber of Commerce Amicus Brief at 10. This is a one-sided view which bears little relationship to reality. It ignores the burdens imposed upon everyday citizens and small businesses who want to obtain information from their government about how their tax dollars are spent, and the burdens imposed upon businesses and citizens who write big checks to the government on April 15 to pay for government employees' salaries and prime contractors' profits. For example, American Small Business League's 2014 and 2018 lawsuits against the Department of Defense take on a government agency which spends hundreds of billions of taxpayer dollars a year, and a subsidiary of a For-

tune 500 company which gets billions of taxpayer dollars a year.[3]

We respectfully submit that a company which gets $36 billion a year from the government in taxpayer dollars is better equipped to bear whatever "burdens" arise from justifying confidentiality claims than a small business watchdog group or a citizen. Likewise, the government itself – which generally aligns with private parties claiming confidentiality[4] – is well equipped to bear the minuscule burden involved in defending the rare FOIA case.

As Respondent points out, very few FOIA requests turn into litigation: the overwhelming majority of FOIA requests are resolved at the administrative level. Less than one-tenth of one percent of FOIA requests turn into litigation, and of those, very few get to discovery, and fewer still to trial. Brief for Respondent at 57 & n.27. In the almost 30 years between 1979 and 2008, there were just 88 FOIA trials (fewer than three per year), only a fraction of which concerned Exemption 4.

C. SECRECY, OR OVERBROAD ASSERTIONS OF CONFIDENTIALITY, CAN MASK CORRUPTION, INEFFICIENCY, AND WASTE.

President Dwight Eisenhower famously warned of

---

[3] Lockheed Martin Corporation, of which Sikorsky is a subsidiary, reported 2015 sales of $46.1 billion, with a backlog of $99.6 billion; 78.1 percent of its sales were to the U. S. Government. ECF No. 47-12 at 6-7, filed December 7, 2018 in *American Small Business League* v. *U.S. Department of Defense*, Case No. 3:18-cv-01979-WHA (N.D. Cal.).

[4] As noted above in section III.A, the Department of Defense in a 2014 case eventually agreed to release information over Sikorsky's objections, but when American Small Business League made a similar request later, the DOD again sided with the defense contractors and has provided free legal help for them in the currently-pending litigation involving American Small Business League.

the dangers of giving what he called the "military-industrial complex" too much power. In the nearly 60 years since that warning, the Pentagon and its prime contractors have grown even more powerful. FOIA was enacted to allow the public to keep a watchful eye on how its money is spent, and no agency spends more federal money than the Pentagon, which has been known to purchase toilet seats for $640 apiece and fighter planes for a million times that amount. Brief for Respondent at 54 & n.23. This Court should not enact a regime which would allow the government and government contractors to keep information secret with a mere "because I said so."

In a June 2016 report from the Department of Defense's own Office of Inspector General, the Inspector General concluded that the Pentagon could not account for a staggering *$6.5 trillion* in spending in 2015 alone. Scot Paltrow, *U.S. Army fudged its accounts by trillions of dollars, auditor finds*, REUTERS (Aug. 19, 2016, 8:08 a.m.), https://www.reuters.com/article/us-usa-audit-army-idUSKCN10U1IG (last visited March 22, 2019).

Later, in a November 15, 2018 report, the Department of Defense's Office of the Inspector General stated, following an attempt at an audit of the Department of Defense's financial records, that, rather than shedding light on the Department of Defense's mysterious expenditures, the Inspector General had been "unable to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion," due in part to "material weaknesses in internal control over financial reporting that affected DOD as a whole." *Memorandum for Secretary of Defense, Under Secretary of Defense (Comptroller) / Chief Financial Officer, DOD*, OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF DEFENSE 2-3 (Nov. 15, 2018), *available at* https://comptroller.defense.gov/Portals/45/Documents/afr/fy2018/DoD_FY18_Agency_Financial_Report.pdf#page=138.

In a speech the day before September 11, 2001, Secretary of Defense Donald Rumsfeld presaged these accounting problems at the Pentagon, stating:

> The technology revolution has transformed organizations across the private sector, but not ours, not fully, not yet. We are, as they say, tangled in our anchor chain. Our financial systems are decades old. According to some estimates, we cannot track $2.3 trillion in transactions. We cannot share information from floor to floor in this building because it's stored on dozens of technological systems that are inaccessible or incompatible.

Donald Rumsfeld, *DOD Acquisition and Logistics Excellence Week Kickoff – Bureaucracy to Battlefield*, U.S. DEPARTMENT OF DEFENSE (Sept. 10, 2001), *available at* https://web.archive.org/web/20100301161721/http://www.defense.gov/Speeches/Speech.aspx?SpeechID=430 (last visited March 22, 2019).

Finally, in a much earlier instance of famous cost overruns at the Pentagon that reached this Court, a management analyst at the Department of the Air Force, A. Ernest Fitzgerald, lost his job approximatly one year after reporting, "[t]o the evidenct embarrassment of his superiors in the Department of Defense," that "cost-overruns on the C-5A transport plane could approximate $2 billion. He also revealed that unexpected technical difficulties had arisen during the development of the aircraft." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 734 (1982).

The suggestions by Petitioner and its amici that this Court should do away with the requirement of narrow construction of exemptions, or allow alleged harm to corporate reputation to justify nondisclosure, Petitioner's Brief at 50, both lack merit and would seriously undercut FOIA's core purpose. As noted above, both the government and the submitter of information are in the best position to

explain why an exemption should apply. Narrow construction of exemptions, and the placement of the burden on the government to justify non-disclosure, are essential to preserve a level playing field under FOIA.[5] *See ACLU* v. *U.S. Department of Justice*, 880 F.3d 473, 483 (9th Cir. 2018) (disclosure is the dominant purpose of FOIA, and exemptions are to be narrowly construed).

The suggestion that harm to reputation should suffice to justify non-disclosure would be inconsistent with FOIA's core purpose of allowing the public to monitor the spending of public money. As this Court has observed, "the value of a trade secret lies in the competitive advantage it gives its owner over competitors," not any protection from embarrassing fallout such as "the harmful side effects of [its] product." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1011 n.15 (1984); *see also NBC Subsidiary (KNBC-TV, Inc.)* v. *Superior Court*, 20 Cal. 4th 1178, 1208 (1999) (closure of unfair trade practices lawsuit not justified merely in order to minimize damage to corporate reputation); *Publicker Industries*, *Inc.* v. *Cohen*, 733 F.2d 1059, 1074 (3d Cir. 1984) (public has First Amendment right of access to civil proceedings concerning motion for preliminary injunction in securities litigation; closure is not warranted to protect against "potential harm" from "disclosure of poor management in the past" which "is hardly a trade secret") (internal citation and quotation marks omitted). For example, a defense contractor may get a multi-billion dollar contract to manufacture a plane that doesn't fly properly or a weapons system which proves defective or ineffective. The revelation that a company took billions of government dollars to deliver a defective product might harm its reputation, but it is not a trade secret. It is information the public has a right and a need to know.

[5] It should be noted that disclosure of information under FOIA promotes a level playing field. If competitors all have access to information about government contracts, none of them will suffer competitive harm.

As courts have observed, access to public information can expose "corruption, incompetence, inefficiency, prejudice and favoritism." *NBC Subsidiary*, 20 Cal. 4th at 1211 n.28 (internal citations omitted). U.S. taxpayers pay for billions of dollars in federal spending, and a lot of that goes to private companies. Not all of it is well spent. The public has a right to know where its money goes, and companies who get big government contracts have to expect some level of public scrutiny of whether government money is well spent.

Another reason this Court should not discard decades of precedent under Exemption 4 is that this precedent has given rise to the favorable judgment of experience.

> [T]he case for a right of access has special force when drawn from an enduring and vital tradition of public entrée to particular proceedings or information. . . . a tradition of accessibility implies the favorable judgment of experience. Second, the value of access must be measured in specifics.

Richmond Newspapers, 448 U.S. at 589 (Brennan, J. concurring).

D. THE SMALL BUSINESS ACT, WHICH IT IS AMERICAN SMALL BUSINESS LEAGUE'S MISSION TO ENSURE IS FOLLOWED BY THE GOVERNMENT AND ITS PRIME CONTRACTORS, UNDERSCORES THE IMPORTANCE OF THE *NATIONAL PARKS* TEST.

The structure and purpose of the Small Business Act underscores the importance of preserving the *National Parks* test and affirming the Eighth Circuit.

The Small Business Act is intended to promote small businesses in order to

> . . . preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.

15 U.S.C. § 631. As the Congressional Research Service has explained,

> In economic terms, the congressional intent was to assist small businesses as a means to deter monopoly and oligarchy formation within all industries and the market failures caused by the elimination or reduction of competition in the marketplace.

Small Business Size Standards: A Historical Analysis of Contemporary Issues, CRS Report No. R40860, CONGRESSIONAL RESEARCH SERVICE 1 (Feb. 1, 2019), *available at* https://crsreports.congress.gov/product/pdf/R/R40860.

> In furtherance of these objectives, the Small Business Act
>
> . . . directs the President to "establish Governmentwide goals for procurement contracts awarded to small business concerns," which "shall be established at not less than 23 percent of the total value of all prime contract awards for each fiscal year." 15 U.S.C. § 644(g)(1)(A), (i). The Act also requires federal agencies to set individual goals, *id.* § 644(g)(2)(A), and directs the Small Business

> Administration . . . to submit an annual report to the President and Congress explaining whether federal agencies achieved these goals, *id.* § 644(h)(2)(B)-(C).

American Small Business League v. *Contreras-Sweet*, 712 F. App'x 667, 667-68 (9th Cir. 2018).

The Small Business Act generally "requires prime contractors to submit 'Individual Subcontracting Plans' for each contract to show how government contracts and subcontracts are awarded to small businesses." *American Small Business League*, 2019 WL 1100372, at *1; *see also* 15 U.S.C. § 637(d); 48 CFR § 19.702(a). However, a so-called "Test Program" "allow[s] certain large defense contractors to instead submit a single annual 'Comprehensive Subcontracting Plan' for an entire plant, division, or company to identify all subcontract amounts awarded to small businesses on government contracts." *American Small Business League*, 2019 WL 1100372, at *1. "Test Program participants must submit their Comprehensive Subcontracting Plan to the DOD each year for review and approval." *Id.*

The subcontracting plans of prime contractors, and ensuing communications about the extent to which plans are consistent with the government's small business goals and are being adequately executed, provide hard numbers that are essential to the public and groups like American Small Business League in assessing whether the Small Business Act is helping small businesses, not large government contractors. But if Petitioner's interpretation of FOIA is adopted, information about compliance with Small Business Act goals may never see the light of day.

American Small Business League's watchdog efforts – which involve unearthing information, including hard numbers, on how small business subcontracting dollars are being spent – are essential to making the Small Business Act work.

First, public discourse based on hard numbers provides government agencies with a political incentive to comply with the Small Business Act. As the Small Business Administration's Inspector General stated in 2005, "One of the most important challenges facing the Small Business Administration (SBA) and the entire Federal Government today is that large businesses are receiving small business procurement awards and agencies are receiving credit for these awards." Harold Damelin, *New Management Challenge – Large Businesses Receive Small Business Awards, Report # 5-15*, U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL (Feb. 24, 2005), *available at* http://www.asbl.com/documents/05-15.pdf. As one Congressional Research Service Report explains, "[t]here are no punitive consequences for not meeting the small business procurement goals" that agencies set for themselves. *Small Business Administration: A Primer on Programs and Funding, CRS Report No. RL33243*, CONGRESSIONAL RESEARCH SERVICE 23 (Feb. 21, 2019), *available at* https://crsreports.congress.gov/product/pdf/RL/RL33243/96. However, "media attention" and questions from Members of Congress incentivize government agency compliance. *Id.* Public access to Small Business Act compliance information is needed to ensure this sort of public scrutiny is fact-based and effective.

Second, public discourse based on hard numbers incentivizes good faith compliance with the Small Business Act by prime contractors. The Small Business Act directs prime contractors to give part of their government payouts to small business subcontractors. Prime contractors have a strong incentive to do the minimum necessary to secure future government business. The best medicine for this problem is sunlight.

Third, public discourse based on hard numbers allows the public and groups like American Small Business League to meaningfully evaluate how Congress and the Executive Branch have defined "small business" under the Small Business Act. The

Small Business Act provides that a small business must be "independently owned and operated" and "not dominant in its field of operation." 15 U.S.C. §632(a)(1); *see also* 48 CFR § 19.703 (eligibility requirements for small business subcontracting program).

Fourth, public discourse based on hard numbers is needed to assess whether the Department of Defense's Comprehensive Small Business Subcontracting Plan Test Program should continue. In a 2015 report, the Government Accountability Office asserted that the Test Program helps "participants," some of the largest defense contractors, by reducing their administrative costs. *See Action Needed to Determine Whether DOD's Comprehensive Subcontracting Plan Test Program Should Be Made Permanent, Report No. GAO-16-27*, GOVERNMENT ACCOUNTABILITY OFFICE 7-8 (Nov. 2015), *available at* https://www.gao.gov/assets/680/673649.pdf; *see also id.* at 3 (listing large defense contractor Test Program participants as of Fiscal Year 2015). But the report included comments from the Department of Defense to the effect that the Test Program did not help the small businesses it was supposed to. *Id.* at 28-30. A chart provided by the Department of Defense showed that "the percentage of dollars subcontracted to small businesses by all of the [Test Program] participants combined declined over the life of the [Test Program] from approximately 46% in FY96" to "24% in FY14." *Id.* at 30. To assess how this happened, and, if appropriate, make a case for change, the public and groups like American Small Business League must be able to look behind numbers like these and review hard data submitted by prime contractors, like the FY2013 Plan the American Small Business League secured in its 2014 lawsuit.

As our society grapples with how to allocate hundreds of billions of taxpayer dollars to government contractors, it is critical that it have access to hard numbers. The public needs hard numbers to ensure

that discourse about the Small Business Act's future is based on facts, not speculation or political posturing.

The requirement under *National Parks* that the government or submitters of information show likely competitive harm in order to withhold information under Exemption 4 is necessary to ensure that the public and groups like American Small Business League can make informed judgments about how the Small Business Act is working. Eliminating the competitive harm element of the *National Parks* test would invite prime contractors to conceal information about Small Business Act goals and performance with minimal effort. And prime contractors would have strong incentives to accept that invitation: avoiding public scrutiny of their Small Business Act compliance, or lack thereof, and denying the public information that could support policy, regulatory, or statutory changes.

To ensure that the public and groups like American Small Business League can continue to monitor how hundreds of billions of taxpayer dollars are spent, Petitioner's novel interpretation of Exemption 4 should be rejected, and the Eighth Circuit's decision should be affirmed.

IV.
CONCLUSION

Petitioner has asked this Court to discard decades of precedent and to keep the public in the dark about how billions of dollars of government money are spent. This Court should decline the invitation. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

KARL OLSON*
AARON R. FIELD
CANNATA O'TOOLE FICKES
& OLSON LLP
100 Pine St Suite 350
San Francisco, CA 94111
(415) 409-8900
kolson@cofolaw.com

Counsel for Amicus Curiae American Small Business League
**Counsel of Record*

March 22, 2019