

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

FOOD MARKETING INSTITUTE, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 18-481  
 )  
 ARGUS LEADER MEDIA, )  
 )  
 dba ARGUS LEADER, )  
 )  
 Respondent. )

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Pages: 1 through 70  
Place: Washington, D.C.  
Date: April 22, 2019

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1           IN THE SUPREME COURT OF THE UNITED STATES  
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3   FOOD MARKETING INSTITUTE,                    )  
4                                    Petitioner,                    )  
5                                    v.                                    ) No. 18-481  
6   ARGUS LEADER MEDIA,                            )  
7   dba ARGUS LEADER,                                )  
8                                    Respondent.                    )

9   - - - - -  
10                                   Washington, D.C.  
11                                   Monday, April 22, 2019

12  
13                                   The above-entitled matter came on for  
14   oral argument before the Supreme Court of the  
15   United States at 10:05 a.m.

16  
17   APPEARANCES:

18   EVAN A. YOUNG, ESQ., Austin, Texas; on behalf of the  
19                                   Petitioner.

20   ANTHONY A. YANG, Assistant to the Solicitor General,  
21                                   Department of Justice, Washington, D.C.;  
22                                   for the United States, as amicus curiae, in  
23                                   support of the Petitioner.

24   ROBERT M. LOEB, ESQ., Washington, D.C.; on behalf of  
25                                   the Respondent.

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1   P R O C E E D I N G S  
2   (10:05 a.m.)  
3                                 CHIEF JUSTICE ROBERTS: We'll hear  
4                                 argument first this morning in Case 18-481, the  
5                                 Food Marketing Institute versus the Argus  
6                                 Leader -- versus Argus Leader Media.

7                                 Mr. Young.

8   ORAL ARGUMENT OF EVAN A. YOUNG  
9   ON BEHALF OF THE PETITIONER

10                                 MR. YOUNG: Mr. Chief Justice, and may  
11                                 it please the Court:

12   Before I turn to why the Court should  
13                                 jettison the National Parks definition of  
14                                 "confidential" and instead restore that word's  
15                                 plain meaning as used in Exemption 4 of the  
16                                 Freedom of Information Act, let me address  
17                                 justiciability. Respondent's brief expressed  
18                                 doubts about redressability, but redressability  
19                                 and the other two requirements of Article III  
20                                 standing are established here.

21   First, our injury in fact is the  
22                                 disclosure of our members' store-level sales  
23                                 information that they keep secret.

24   JUSTICE SOTOMAYOR: Not if the  
25                                 government decides that it doesn't want to give

1 it. We already have a case that says, if the  
2 government voluntarily chooses to disclose,  
3 you're stuck; you can't appeal.

4 So, here, the government chose not to  
5 appeal. It chose, by definition, to turn it  
6 over. Why aren't you bound by that decision?

7 MR. YOUNG: We're not bound for it  
8 because the intervention that we successfully  
9 moved in the District of South Dakota made us a  
10 proper party. We have an interest that allowed  
11 us to intervene.

12 JUSTICE SOTOMAYOR: But the -- if you  
13 had been a part of the -- if you had been the  
14 original asker, we have a case that says,  
15 Crystal City, that if the government chooses to  
16 turn it over, you can't appeal.

17 MR. YOUNG: And the government did not  
18 make that choice. So there are really five  
19 things.

20 JUSTICE SOTOMAYOR: Well, but they  
21 haven't made the choice on this exemption.  
22 They've made the choice because of a new law.

23 Isn't the proper course for them to go  
24 back to the district court with a motion for  
25 reconsideration or for them to petition the

1 court or for you to go to the court or for --  
2 or -- or for someone else to go to the court  
3 and say they have to turn it over?

4 MR. YOUNG: No, Your Honor. The  
5 government in this case made a number of steps  
6 that make clear that our redressability is not  
7 only likely but certain. And let me start  
8 because standing at the time --

9 JUSTICE SOTOMAYOR: Well, it's not  
10 certain until the district court relieves them  
11 of the earlier judgment, telling them that  
12 Exemption 3 didn't apply.

13 MR. YOUNG: Well, that -- that  
14 premise, I think, is -- is a mistaken one. And  
15 if you look at pages 30 to 31 of the  
16 government's brief, for example, they make  
17 clear that they are not pressing an Exemption 3  
18 argument here. They are not requiring this  
19 Court or even asking this Court to reconsider  
20 the Section 2018(c) argument, on which the  
21 Eighth Circuit's first judgment --

22 JUSTICE SOTOMAYOR: But that's the  
23 basis for their refusal to turn it over now.

24 MR. YOUNG: Well, no, the -- the basis  
25 for -- for their refusal to turn it over now is

1 an Exemption 4 basis, that the information --

2 JUSTICE SOTOMAYOR: Well, they can  
3 speak for themselves, but I thought --

4 MR. YOUNG: Agreed.

5 JUSTICE SOTOMAYOR: -- when they chose  
6 not to appeal, they chose not -- they chose to  
7 follow the order of the court to turn it over.

8 MR. YOUNG: There are a number of  
9 things that differentiate this from a situation  
10 like that. For example, instead of voluntarily  
11 disclosing it, which would be what they would  
12 do if they decided to follow it, they  
13 facilitated our intervention by alerting us to  
14 the possibility of judicial intervention.

15 They then, when we did intervene, told  
16 the district court, they told the federal  
17 court, as they've told this Court, we will not  
18 release that information unless a final  
19 judgment in the judicial system requires it.

20 CHIEF JUSTICE ROBERTS: Do you  
21 understand the government to be firmly  
22 committed to not releasing the information  
23 unless required to?

24 MR. YOUNG: Yes, that's what I  
25 understand.

1 CHIEF JUSTICE ROBERTS: I noticed them  
2 on your -- your side of the lectern.

3 MR. YOUNG: And I won't speak for  
4 them, but that's what they have represented not  
5 only to the district court but to this Court.

6 CHIEF JUSTICE ROBERTS: Now, of  
7 course, they remain free to change their mind.

8 MR. YOUNG: And that would be a -- a  
9 -- a different situation, but the question for  
10 standing at the time when we invoked the  
11 appellate jurisdiction of the federal courts  
12 was would we have a likelihood of relief, and  
13 the answer is yes.

14 And right now, based on the Solicitor  
15 General's brief, that was the thing that my  
16 friend on the other side invoked in his brief  
17 to this Court. That would be a mootness  
18 question. And, of course, mootness can be  
19 established only if it's impossible that this  
20 Court's reversal would give us meaningful  
21 relief.

22 The opposite is true. If this Court  
23 reverses, the only thing that will lead to our  
24 information certainly being made public will be  
25 destroyed. And that's why all the requirements



1 of Article III standing are met --

2 JUSTICE SOTOMAYOR: But it won't be  
3 destroyed because they have a 2018(c) argument.

4 MR. YOUNG: Well, the fact, as in  
5 Milner, in which there was an Exemption 7  
6 argument pending, this Court took it to decide  
7 Exemption 2. Sure, there's a 2018(c) argument  
8 that, in theory, would be pending if this Court  
9 were not persuaded by anything we say, there  
10 has been an intervening change in the law --

11 JUSTICE SOTOMAYOR: If they're wrong  
12 on 2018(c), they have to comply with the extant  
13 judgment under Exemption 4?

14 MR. YOUNG: No, I -- I disagree, and I  
15 will allow my friend from the government to  
16 explain their position. But they're making an  
17 Exemption 4 argument based on the -- the --  
18 what they say in part B.2 of their brief.

19 JUSTICE SOTOMAYOR: They're trying to  
20 piggyback their appeal on you.

21 MR. YOUNG: No, I -- I disagree with  
22 that as well, Justice Sotomayor. I think what  
23 the government is saying is we've had four  
24 decades of the highest level promise of  
25 confidentiality that the government can make to

1 its citizens, and that is that this kind of  
2 confidential information, we will protect the  
3 confidentiality of it.

4 And for that reason, even if the  
5 motivation that they had back in 1979 for  
6 starting down that process turns out to be  
7 wrong, nonetheless, the promise of  
8 confidentiality, which Exemption 4 and not  
9 Exemption 3 protects, remains.

10 JUSTICE SOTOMAYOR: Mr. Young --

11 JUSTICE GINSBURG: But wasn't the  
12 whole purpose of -- FOIA says disclose, and one  
13 of the concerns was the government official,  
14 for one reason or another, doesn't want to  
15 disclose. There have been cases of a captive  
16 agency, for example.

17 So, to -- to say the government can  
18 control this by making a promise that it won't  
19 disclose, that seems to run counter to the  
20 whole idea of FOIA.

21 MR. YOUNG: Well, it would perhaps run  
22 counter to the idea of FOIA if it were the kind  
23 of information that were -- was about the  
24 government's own doings or even, conceivably,  
25 something that's not presented here, if there

1 were willy-nilly ad hoc promises of  
2 confidentiality in which low-level employees  
3 could wave a wand and say confidential,  
4 confidential, but I think that what this Court  
5 has repeatedly said -- I'll mention the  
6 Department of Justice versus the Reporters  
7 Committee case, where the Court says: "Yes,  
8 FOIA's basic policy focuses on the citizens'  
9 right to be informed about what their  
10 government is up to." That's a direct quote.

11 But then the Court immediately says  
12 that purpose, however, is not fostered by  
13 disclosure of information about private  
14 citizens that has accumulated in various  
15 governmental files but that reveals little or  
16 nothing about an agency's own conduct.

17 And so, here, what we see is a choice.  
18 When a SNAP beneficiary receives an allocation  
19 from the government, their choice to shop at  
20 this grocery store rather than one across the  
21 street is in no sense government action. It is  
22 the unmediated decision of third parties.

23 It tells you, in other words, an awful  
24 lot about Mrs. Smith or Mr. Jones and their  
25 choices, and it tells you a lot about how those

1 two grocery stores market and -- and -- and  
2 sell and what their selection might be.

3 JUSTICE BREYER: I don't doubt that  
4 you're heard. I -- I -- I -- I do -- I can't  
5 quite figure out how this mootness thing works.

6 It seems to me there are two laws, A  
7 and B. All right? A is the -- the one you're  
8 interested in, and B is this other one that  
9 stops them from -- maybe -- from giving out  
10 information.

11 Now, here, you're attacking A, so I'm  
12 asking, does A cause you injury? Not does B  
13 cause you injury. Now, if B stops them from  
14 giving out the information, if you win on A,  
15 you don't get it. If you lose on A, you don't  
16 get it.

17 If B doesn't stop them from giving out  
18 information, if you win on A, you get it. If  
19 you don't -- see, it works -- the -- the -- the  
20 result is the same no matter how we decide your  
21 case. We just don't know about B.

22 Now have I got that right? And if I  
23 -- if I've got that right, I -- I don't know a  
24 standing case right in point or a mootness case  
25 right in point. I'm not sure what to do.

1                   MR. YOUNG: Well -- well, if I'm  
2 understanding you, Justice Breyer, I -- I don't  
3 think it raises either one of those  
4 justiciability questions because the Court can  
5 have in reserve many grounds that the lower  
6 courts, for example, may not have addressed.

7                   In Milner, I mentioned Exemption 7 was  
8 still there. Now, if Exemption 7 was well  
9 taken, Exemption 2 wouldn't have been  
10 necessary. The Court granted in Milner to  
11 resolve what Exemption 2 meant, and it granted  
12 in this case to resolve what Exemption 4 means.

13                   And if you do it and you reverse --

14                   JUSTICE SOTOMAYOR: The problem with  
15 that in Milner is -- and the big difference is  
16 that the government chose not to appeal the  
17 ruling on Exemption 4, so it acceded to turning  
18 it over under that exemption. And under  
19 Crystal City, we said they -- you -- they or  
20 you can't appeal that.

21                   And you admit if that was all of it  
22 and they had chosen to turn it over, you would  
23 get it.

24                   So now the question is can they -- and  
25 they and you do an end-run around Crystal City

1 by simply saying, no, we're really not going to  
2 turn it over because of something else, but we  
3 really didn't want to challenge Exemption 4 at  
4 all and we were going to turn it over because  
5 we didn't really think the pricing information  
6 was confidential back then.

7 But now we think we're going to change  
8 our mind -- this is how I'm reading the  
9 argument -- and so we're going to piggyback on  
10 a private entity raising an issue that we  
11 should have appealed on.

12 MR. YOUNG: Justice Sotomayor, I don't  
13 believe the government's piggybacking at all.  
14 They're here as an amicus. And it is we, the  
15 Food Marketing Institute --

16 JUSTICE SOTOMAYOR: But why -- why can  
17 you, without getting stuck in Crystal City?

18 MR. YOUNG: Well, because --

19 JUSTICE SOTOMAYOR: Just because  
20 they've said I won't turn it over, but they're  
21 bound to turn it over right now by a judgment  
22 below, and they haven't asked the court below  
23 to reconsider that judgment.

24 MR. YOUNG: I -- I -- I think it's as  
25 simple as --

1 JUSTICE SOTOMAYOR: They raised  
2 Exemption 3. They lost. A change of law has  
3 happened. They should have moved for  
4 reconsideration, and they didn't.

5 So why aren't they stuck?

6 MR. YOUNG: Because we intervened and  
7 the opportunity to conclude that we are not a  
8 proper party to be able to make any of these  
9 merits inquiries has long since passed.

10 JUSTICE KAGAN: Mr. Young, may I ask  
11 you a question about your substantive standard?

12 You at some points in your brief say  
13 that the question is simply whether the  
14 information is private, private being a synonym  
15 for confidential.

16 At other points in your brief, you  
17 talk about whether the information is kept  
18 private. To me, those two things are a little  
19 bit different, that the idea of keeping  
20 something private is not just that the  
21 information isn't out there in the world but  
22 that you're doing something to make sure that  
23 the information doesn't get out there in the  
24 world.

25 So which do you think is the right

1 approach in this case?

2 MR. YOUNG: I'll -- I'll readily agree  
3 with the latter. Our -- our argument is not  
4 that simply marking something or stamping it  
5 confidential does the trick.

6 We've had 27 years with the D.C.  
7 Circuit's critical mass case, which essentially  
8 adopts the position that we think correctly  
9 defines the entirety of Exemption 4.

10 And in critical mass cases, when a  
11 party wants the release of some information  
12 that a party like us might say that's our  
13 confidential commercial information, more is  
14 required and you can be held to fail your  
15 Exemption 4 argument if you don't illustrate  
16 how you protect the information.

17 So, for example, what is relevant and  
18 what was asked even in this very case, in -- in  
19 which these questions were presented to the  
20 trial court, do you bind it with nondisclosure  
21 agreements? Do you have security in place so  
22 that it limits the number of people even  
23 internally who have access to it?

24 How do you make sure that it is not  
25 supplied accidentally in litigation, for



1 example? How, in other words, do you make sure  
2 that it doesn't become public?

3 Have you made sure that comparable  
4 information has not been made public in other  
5 forums? And so there are critical mass cases,  
6 decisions from the D.C. Circuit courts and from  
7 the Tenth Circuit courts that apply that, that  
8 look to those exact types of questions and say:  
9 Well, we can find something rather like this in  
10 publicly available information already. Your  
11 Exemption 4 argument is gone.

12 JUSTICE SOTOMAYOR: So how does that  
13 dovetail with the SG's position that if they  
14 ask you to turn over something confidentially  
15 -- and you seemed to be arguing that earlier --  
16 that that's enough, that that makes it  
17 confidential, because you've just said to me  
18 something quite different, which is it's not  
19 the government's request or promise to keep it  
20 confidential, but is it, in fact, kept in  
21 confidence the way you've defined it? So how  
22 do you dovetail the two?

23 MR. YOUNG: Well, I would say that  
24 even if the government gives us a promise of  
25 confidentiality, that fits within the

1 definition of what confidential is, we now have  
2 given something to the government in  
3 confidence, if we, nonetheless, publish it, if  
4 we're sloppy with it, if we release it in some  
5 other way, then we have breached the  
6 confidentiality ourselves.

7 And I would argue that someone like  
8 that is no longer protected by --

9 JUSTICE KAVANAUGH: How about the --

10 JUSTICE SOTOMAYOR: So the  
11 government's overlay is really not necessary to  
12 this case?

13 MR. YOUNG: It's a manifestation of  
14 what confidential is.

15 JUSTICE SOTOMAYOR: Man -- but only a  
16 point of evidence, not a point that binds?

17 MR. YOUNG: I -- I guess. I'm not  
18 sure what a point of evidence means.

19 JUSTICE SOTOMAYOR: Meaning, you say a  
20 manifestation, that a district court judge  
21 could look at that as among many factors.

22 MR. YOUNG: Yes, I -- I would say that  
23 if the government in a proper form, if the  
24 government binds itself here through  
25 notice-and-comment rulemaking --

1 JUSTICE SOTOMAYOR: If you -- if you  
2 leave -- if you give this information to your  
3 employees, there's no promise of secrecy and --

4 MR. YOUNG: Well, Landano defined what  
5 confidential meant also, and it recognized that  
6 confidential does not mean that nobody knows  
7 it. It means that you have to keep it within a  
8 limited universe.

9 Mr. Chief Justice, if I may reserve  
10 the balance of my time.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Mr. Yang.

14 ORAL ARGUMENT OF ANTHONY A. YANG,  
15 FOR THE UNITED STATES, AS AMICUS CURIAE,  
16 IN SUPPORT OF THE PETITIONER

17 MR. YANG: Mr. Chief Justice, and may  
18 it please the Court:

19 Before I address the merits, I'd  
20 briefly like to address justiciability and be  
21 clear: The government will not release the  
22 disputed records from 2005 to 2010 if a FOIA  
23 exemption applies. So long as the government  
24 is not judicially compelled to do so, it will  
25 not do so.

1           Petitioner also had Article III  
2 standing. That's evaluated at the time they  
3 filed the notice of appeal and invoked the  
4 appellate court's jurisdiction.

5           JUSTICE BREYER: Is that true if -- if  
6 the -- the other statute here were held not to  
7 block the government from releasing it?

8           MR. YANG: Yes.

9           JUSTICE BREYER: You mean so however  
10 the other statute comes out, the government now  
11 is saying -- I didn't get this at the beginning  
12 -- we're not going to release it -- even if we  
13 have every right to release it, we're not going  
14 to release it, even if we have every right to  
15 do so?

16           MR. YANG: It would help to take a  
17 look at Footnote 5 --

18           JUSTICE BREYER: Yeah.

19           MR. YANG: -- at page 26 of our brief,  
20 where we explain --

21           JUSTICE BREYER: Yeah.

22           MR. YANG: -- there would -- there is  
23 a policy interest in USDA, if they were writing  
24 on a clean slate, going prospectively, that  
25 they may well release this information and they

1 said they likely would.

2           However, as we explain in Footnote 5,  
3 we said, if Congress had not amended Section  
4 2018, so that's an if -- the agency might have  
5 explored changing its position.

6           It has not changed its position, one.  
7 Two, and then we go on to say, to release  
8 store-level redemption data collected after  
9 such a change. In other words, the data  
10 collected before the change when we have  
11 provided an assurance of confidentiality in  
12 notice-and-comment rulemaking go back -- going  
13 back 40 years, the government is not  
14 voluntarily releasing that on the basis of  
15 having to do so.

16           JUSTICE BREYER: I know, but you  
17 sounded in that footnote as if you were saying  
18 that the reason we're not releasing it is  
19 because of new 2018.

20           MR. YANG: Well, the reason we're not  
21 releasing anything, whether before or after --

22           JUSTICE BREYER: No, but just answer  
23 -- look at my -- look at my question. I'm  
24 trying to figure out whether I have a question  
25 here.

1 MR. YANG: Right.

2 JUSTICE BREYER: And -- and if -- if  
3 you're going to tell me I don't care if 2018  
4 never appeared, doesn't appear, doesn't exist,  
5 we still won't release it, which is your right  
6 in the absence of -- of --

7 MR. YANG: I would say that's  
8 partially right. The reason we're not  
9 releasing it is because we've made assurances  
10 of confidentiality at pages 30 to 31 of our  
11 brief. We explained that that was motivated by  
12 Section 2018(c). But even if we were --

13 JUSTICE BREYER: All right. So what  
14 happens if 2018(c) now is wiped from the books?

15 MR. YANG: As I was explaining --

16 JUSTICE BREYER: Will you release it?

17 MR. YANG: As I was -- no. As I was  
18 explaining --

19 JUSTICE BREYER: No? Okay.

20 MR. YANG: -- on page 30 to 31 of our  
21 brief, even if we were wrong about 2018(c), the  
22 fact that it was reasonable, it was objectively  
23 reasonable in light of the government's  
24 assurances for 40 years to understand the  
25 government to be providing an assurance of

1 confidentiality, and we understand these  
2 retailers to have done so, to be relying on  
3 that --

4 JUSTICE GORSUCH: Mr. Yang, let me see  
5 --

6 MR. YANG: -- we're not going to  
7 release it as a matter of good governance.

8 JUSTICE SOTOMAYOR: Mr. Yang, you are  
9 going to tell me that you were going to be in  
10 contempt on the order below?

11 MR. YANG: Of course not.

12 JUSTICE SOTOMAYOR: The order below,  
13 you litigated Exemption 3.

14 MR. YANG: Of course not. If we were  
15 --

16 JUSTICE SOTOMAYOR: The court -- the  
17 court --

18 CHIEF JUSTICE ROBERTS: Could I hear  
19 his answer, please?

20 MR. YANG: Of course not. If we were  
21 compelled to do so by a court, we will do so.  
22 But if we have discretion to do so --

23 JUSTICE SOTOMAYOR: But wait a minute,  
24 there is no discretion. Let's assume there's  
25 no 2018(c) amendment. You litigated Exemption

1 3. You lost. You litigated Exemption 4. You  
2 lost.

3 MR. YANG: I --

4 JUSTICE SOTOMAYOR: You were ordered  
5 to disclose --

6 MR. YANG: I think there's some  
7 confusion in the question. 2018(c) prohibits  
8 the government from releasing. It does not --  
9 so, if 2018(c) is taken off the table, we still  
10 have discretion. And we are exercising our  
11 discretion in a matter of good government.

12 JUSTICE SOTOMAYOR: No, but I'm sorry,  
13 but once you didn't --

14 MR. YANG: The Court has repeated --  
15 the Court recognized in a --

16 JUSTICE SOTOMAYOR: -- once you didn't  
17 appeal -- forget about the amendment -- you  
18 didn't appeal, would you have had to turn over  
19 the material?

20 MR. YANG: No. So long as a party is  
21 appealing -- a party, they became a party, is  
22 appealing. This is an indivisible judgment.  
23 It's not like a money judgment that you say the  
24 government owes \$5 and party A owes \$10, and if  
25 the government owes -- you know, doesn't



1 appeal, it's going to go to \$5.

2 This is the same thing. Any party can  
3 bring that up, and if the judgment below  
4 requiring the government and the general  
5 disclosure is taken off the books, we're no  
6 longer bound.

7 CHIEF JUSTICE ROBERTS: Perhaps in  
8 your remaining time you could turn to the  
9 merits.

10 MR. YANG: Sure. We believe that the  
11 information here is -- the store-level  
12 redemption data is confidential because it's  
13 reasonably understood in context to have been  
14 communicated in confidence and held secret.

15 Now the government has had 40 years of  
16 express assurances of confidentiality embodied  
17 in regulations and in an ongoing dialogue with  
18 Congress about these regulations, showing that  
19 the store redemption data was communicated in  
20 confidence because we would not disclose it.  
21 The first --

22 JUSTICE GINSBURG: May I ask you --  
23 may I ask you the same question --

24 MR. YANG: Sure.

25 JUSTICE GINSBURG: -- that I asked

1 your fellow counsel? That is, one of the aims  
2 of FOIA was to -- FOIA was to make information  
3 public despite official --

4 MR. YANG: Yes.

5 JUSTICE GINSBURG: -- willingness.

6 MR. YANG: I -- I think that's right,  
7 and that is certainly FOIA's general goal, but,  
8 in this exemption, it only targets a particular  
9 type of information, not general. It is  
10 information that is private information, it's  
11 obtained outside the government, it's about  
12 private entities, that is, either commercial or  
13 financial.

14 And in that narrow ambit of commercial  
15 or financial information, Congress made the  
16 policy judgment that when that is reasonably  
17 understood to be confidential, it should not be  
18 disclosed. Exemption --

19 JUSTICE KAGAN: If I understand your  
20 argument, Mr. Yang, you kind of have two  
21 prongs, two ways of saying that something is  
22 confidential. One is just like Mr. Young's or  
23 something like it -- something like it, and we  
24 -- and the other is this assurances point.

25 Is that right?

1 MR. YANG: Yes. That --

2 JUSTICE KAGAN: Your --

3 MR. YANG: -- those are manifestations.

4 We think the --

5 JUSTICE KAGAN: Am I -- am I --

6 MR. YANG: -- meaning of confidential

7 --

8 JUSTICE KAGAN: -- am I -- am I right

9 that you're relying here on the assurances

10 point?

11 MR. YANG: We are, because we think

12 it's a little more complicated. This is, in

13 our view, an objective test, and you have to

14 take it in context.

15 And the context here is more

16 complicated than a normal Exemption 4 case

17 because the government's own actions of paying

18 money is intertwined closely with the

19 information submitted to it, which is why we

20 think the easier path in this context is to --

21 where there has been 40 years of

22 notice-and-comment regulations by a high, high

23 level of government sign-off, right, this has

24 to be the agency administrator that signs off

25 on these, that, where it's objectively

1 reasonable, provides an assurance of  
2 confidentiality that --

3 JUSTICE KAVANAUGH: When can -- when  
4 can it be deemed confidential as a matter of  
5 law, even without such assurances?

6 MR. YANG: I think this confidential  
7 question ultimately is a question that requires  
8 factual context. You don't know if information  
9 is -- is confidential without understanding the  
10 context in which it's either treated public --  
11 in the general sphere before it's obtained by  
12 the government or understanding how it comes  
13 into the government's possession. So there are  
14 -- we think as a matter of law --

15 JUSTICE KAVANAUGH: Can it -- can it  
16 be deemed confidential even in cases without  
17 government assurance? I'll ask it a different  
18 way.

19 MR. YANG: Oh -- oh, sure, sure.

20 JUSTICE KAVANAUGH: And what factors  
21 would determine that?

22 MR. YANG: Well, that's the first  
23 manifestation of what's confidential. Just to  
24 be clear, we think --

25 JUSTICE KAVANAUGH: Do you have any

1 disagreement with Petitioners on how they  
2 articulate that first --

3 MR. YANG: I don't think so except  
4 that we think you have to take the full context  
5 into account. And when you do that here, the  
6 inquiry is more complicated.

7 JUSTICE KAGAN: So, as I understood  
8 your brief, and tell me if I've gotten this  
9 wrong, you're basically saying that the first  
10 way of showing confidentiality, the  
11 non-assurances way --

12 MR. YANG: Right.

13 JUSTICE KAGAN: -- isn't really met  
14 here because what they're seeking to protect is  
15 something -- is -- is information that  
16 essentially the government reveals all the time  
17 by virtue of its payments. Is that correct?

18 MR. YANG: I think it's close. We're  
19 a little bit more agnostic. We think that that  
20 is a hard question and we're not coming  
21 definitively down.

22 There are some side questions like, is  
23 this exactly what the government is doing? How  
24 close is it? These types of nuances, I think,  
25 is what Petitioner may be relying on.

1           We may have a small disagreement, but,  
2 ultimately, I think what we agree on is, in  
3 light of the 40 years of practice that has  
4 occurred here, all we're trying to do is live  
5 up to what this Court said in another FOIA  
6 case, CIA versus Sims, that great nations, like  
7 great men, should keep their word. And the  
8 government is trying to keep its word, given  
9 over 40 years in the most official form  
10 possible, that we're going to keep this  
11 information confidential.

12           JUSTICE KAGAN: And this assurances  
13 point of yours, does it apply only when  
14 somebody is voluntarily giving information to  
15 the government, or might it apply when somebody  
16 is mandated to give information to the  
17 government?

18           MR. YANG: I think it -- it generally  
19 applies. Now you'd have to look to see whether  
20 the government would have authority to -- the  
21 agent -- the government official has -- have  
22 authority to make this assurance in a way  
23 that's objectively understood to be speaking  
24 for the agency, but it can apply potentially in  
25 both contexts.

1           There are hard hypotheticals, I think,  
2           at some edges. This case doesn't implicate any  
3           of them, so I think the Court could just simply  
4           cut through the -- through the -- the noise and  
5           -- and rule quite cleanly here.

6           JUSTICE KAGAN: Because --

7           JUSTICE SOTOMAYOR: Mr. Yang, this is  
8           -- this is somewhat confusing to me. Exemption  
9           3 says Congress gets to choose what should not  
10          be disclosed.

11          MR. YANG: I --

12          JUSTICE SOTOMAYOR: That it's  
13          Congress's choice what the government will view  
14          as confidential and not disclose.

15          Now you're bringing the government,  
16          the government qua the executive branch, into  
17          deciding what not to disclose under Exemption  
18          4. Doesn't that turn FOIA on its head?

19          MR. YANG: No, I think you -- if you  
20          read back a little bit in the statute, you'll  
21          say that Congress says that FOIA does not apply  
22          if any of the exemptions apply. Exemption 3 is  
23          one of them. It is one way, but it is an  
24          independent basis when Exemption 4 applies.  
25          And Exemption 4 is what we're talking about

1 here.

2 JUSTICE SOTOMAYOR: So let's go back.  
3 If the store does not keep it confidential, can  
4 you, by a promise of confidentiality, protect  
5 it from FOIA disclosure?

6 MR. YANG: I think that would be  
7 difficult. The first prong that we are -- rely  
8 upon is -- the first manifestation, if it is --  
9 if I could just finish the -- the sentence, Mr.  
10 Chief Justice.

11 CHIEF JUSTICE ROBERTS: Yeah.

12 MR. YANG: If information is  
13 customarily not publicly disclosed by those who  
14 submit it, so long as there is nothing in  
15 context that suggests that they would  
16 understand otherwise, when it's provided to the  
17 government, it would be confidential.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 Mr. Yang.

20 Mr. Loeb.

21 ORAL ARGUMENT OF ROBERT M. LOEB

22 ON BEHALF OF THE RESPONDENT

23 MR. LOEB: Mr. Chief Justice, and may  
24 it please the Court:

25 If the Court reaches the merits here,



1 it should affirm the judgment of the Eighth  
2 Circuit. For 45 years, the language of  
3 Exemption 4 has been properly construed to  
4 require a showing of likely competitive harm.

5 Not only is that competitive harm  
6 standard fully supported by the common law that  
7 prevailed in 1966 when Exemption 4 was enacted,  
8 the standard has also been ratified by Congress  
9 for reasons that I'll explain.

10 In 1974, the D.C. Circuit adopted the  
11 National Parks test with its two-prong test,  
12 including the competitive harm requirement.  
13 But, by 2001, there was a clear judicial  
14 construction.

15 Eight circuits had adopted the same  
16 two-prong test as National Parks. So, between  
17 2001 and today, during those 18 years, Congress  
18 has enacted 29 statutes endorsing the language  
19 of and the provision of Exemption 4 and has --  
20 and has effectively amended Exemption 4,  
21 thereby ratifying the National Parks standard.  
22 Now --

23 JUSTICE KAGAN: Mr. Loeb, this case  
24 strikes me as a lot like Milner, that you have  
25 a D.C. Circuit opinion which puts some things

1 into the test that maybe the -- the statutory  
2 text does not immediately suggest. And then  
3 there is -- everybody adopts it, you know? In  
4 Milner too, all the courts of appeals had  
5 adopted it. Congress had let it remain on the  
6 books for quite some time without doing  
7 anything about it.

8 Why isn't this the same thing as that,  
9 where we did say no, we're going to go with the  
10 text, not with this extrapolation?

11 MR. LOEB: Context here is very  
12 different than Milner. This Court in Milner  
13 expressly said there wasn't a judicial  
14 consensus supporting the D.C. Circuit's ruling.

15 Also there, there weren't multiple  
16 statutes that -- here, we have 29 statutes,  
17 after the judicial consensus, enacted which  
18 effectively amend Exemption 4 --

19 JUSTICE GINSBURG: As to the --

20 MR. LOEB: -- and that certainly was  
21 not the case --

22 JUSTICE GINSBURG: -- as to the  
23 consensus, if I can stop you on that point,  
24 we're told by the other side that the circuits  
25 have been markedly inconsistent in the way they

1 apply the test.

2           So, if -- if -- if the D.C. Circuit  
3 had ruled one way and everybody said yeah, this  
4 is how we do it, and the decisions all lined  
5 up, that would be one thing. But, here, we're  
6 told that they will verbalize the same  
7 formulation, but they apply it differently.

8           MR. LOEB: Well, I think the -- the  
9 key factor is they all adopt the same two-prong  
10 standard of National Parks. And in any  
11 standard, how it's applied, even terms like  
12 fraud, which are well developed in the law, as  
13 it's applied to a particular circumstance,  
14 there's always going to be some deviation of  
15 the courts.

16           But, ultimately, all the circuits who  
17 have addressed this issue have adopted the  
18 National Parks standard and, as to the  
19 competitive harm requirement, all require a  
20 showing of likely competitive harm.

21           And that is the standard we're saying  
22 that is -- has been ratified here. If you look  
23 at some of the statutes that we attach in our  
24 addendum, they are actually limiting the  
25 discretion that's under Exemption 4.

1           So, as the SG's brief points out,  
2           Exemption 4 doesn't prohibit disclosure, it  
3           just says the agency has discretion whether to  
4           disclose or not.

5           These additional statutes micromanage  
6           that discretion. Some of them say that when  
7           you have the discretion, you have to withhold.  
8           Some say that when you have the discretion, you  
9           have to withhold for five years. Some say when  
10          you have discretion, you have to ask the  
11          private party their view.

12          Those are all -- those all could have  
13          been codified under Exemption 4, but, instead,  
14          they were codified under separate statutes.  
15          But that's just a matter of formalism. This  
16          Court has said when -- when Congress actually  
17          examines a statute, amends a statute and -- and  
18          reenacts it, that your -- that -- that Congress  
19          is presumed to have adopted the prevailing  
20          judicial construction.

21          That's what this Court said in  
22          Lorillard, in Shapiro, and this term in  
23          Helsinn. And, likewise, here, we have all the  
24          circuits lined up on the two-prong standards.

25          We have Congress not just addressing

1 the statute once but 29 times in this 18-year  
2 period where they, again, have codified over  
3 and over again that -- that -- that standard.

4 JUSTICE GORSUCH: Mr. Loeb, along  
5 those lines, the other side makes the argument  
6 that, in Exemption 7, the word "confidential"  
7 is given a different gloss than you would have  
8 us give it in -- in Exemption 4.

9 I'm sure you would like an opportunity  
10 to respond to that.

11 MR. LOEB: Correct, Your Honor. So,  
12 in looking at Exemption 4, you have to look at  
13 those words in -- in a -- a textual  
14 construction of it. We'll begin by looking at  
15 the words and looking at how they were used in  
16 context at the time.

17 And we know for Exemption 4, Congress  
18 started with a common law term, trade secrets,  
19 which even FMI agrees --

20 JUSTICE GORSUCH: That's another  
21 point. I'd like to get to that too. But, when  
22 we're dealing with the word "confidential",  
23 Justice Kagan made the point that perhaps  
24 there's a gloss that's been placed on it that  
25 might be inconsistent with what might appear to

1 be its ordinary meaning.

2 And that argument seems to me to have  
3 some strength, given the fact that Exemption 7  
4 hasn't been treated by lower courts that bear  
5 the same gloss that you would have us put on  
6 Section -- on Exemption 4.

7 And I'm just wondering how do you deal  
8 with that incongruity textually?

9 MR. LOEB: Right. Well, first, let me  
10 admit we're not -- we -- we agree that the  
11 reading of the -- the word in Exemption 7 and  
12 Exemption 4 don't have the same import. Let me  
13 explain why.

14 JUSTICE GORSUCH: So why should we  
15 give the same word two different meanings when  
16 they're virtual neighbors?

17 MR. LOEB: First, the commonality,  
18 that even under Exemption 7, this Court didn't  
19 turn to ask the confidential source, do you  
20 think that you had a confidential relationship?  
21 Instead, they looked for objective factors.

22 And our -- our standard here is  
23 looking at an objective one, objective harm.

24 Second, the fact that the same word is  
25 used in different provisions of the exemption

1 doesn't answer it. For example, trade secrets  
2 has the word "secret". But, if you look at  
3 Exemption 1, it uses the word "secret"  
4 regarding national security matters.

5           You wouldn't say the word "secret"  
6 regarding national security secrets has to be  
7 read the same as trade secrets because trade  
8 secrets has a common law meaning. And that  
9 common law meaning --

10           JUSTICE GORSUCH: I agree, secrets in  
11 the national security context might be  
12 different than they are in the trade secret  
13 context, but that's -- that's just not helping  
14 me with the word "confidential".

15           So perhaps there's something  
16 particular about it, maybe there isn't. I'll  
17 let you go on.

18           MR. LOEB: No, no. There's something  
19 particular about Exemption 7. It talks about  
20 information that's -- information that is  
21 furnished under a basis of -- a confidential  
22 basis.

23           So there, where Congress wanted to say  
24 it was furnished on a confidential basis, it  
25 knew how to say that. That's not what it says

1 under Exemption 4.

2           Instead, we have Congress adopting  
3 these common law terms, trade secrets and  
4 related confidential commercial information,  
5 and when looking at those -- those words anew,  
6 you would -- you would look at how they were  
7 used in 1966 under the common law.

8           And we know trade secrets required  
9 under the common law a showing of competitive  
10 harm. And for the restatement, we know that  
11 this other second box of -- of confidential  
12 business information also required a showing of  
13 competitive harm.

14           JUSTICE BREYER: So -- so what do you  
15 -- do you think? That is, what do you think  
16 about that? I mean, in reading some of these  
17 cases, it wasn't National Parks so much that I  
18 think caused the problem but other cases that  
19 sort of run with it. That is, some say, well,  
20 the competitors have to use this in an  
21 affirmative way.

22           I don't know where they got that out  
23 of the statute. So would you be satisfied if  
24 we were to simply say: Well, they had the  
25 right idea there. Confidential information is



1 information that is legitimate for a  
2 confidential -- for a legitimate reason.

3 It's confidential for a legitimate  
4 reason. Release would hurt the company or  
5 release would hurt the government. And then we  
6 add: And, of course, there has to be harm, I  
7 mean, business-related harm to the company.

8 Now that would stop -- you know, I can  
9 imagine easily cases where there's information  
10 about who you sell to and who you don't sell  
11 to, and, of course, you want to keep that quiet  
12 because you give the impression that every sane  
13 person in the world buys your product. And  
14 this would show that's not true.

15 But we don't know whether people will  
16 take advantage of that or not, but they might.  
17 So it's harm, and it's legitimate. Is that  
18 good enough in your opinion?

19 MR. LOEB: Yes, Your Honor. So --

20 JUSTICE BREYER: Yes?

21 MR. LOEB: -- the National Parks test  
22 requires a likely showing of competitive harm.

23 JUSTICE BREYER: And -- and it's other  
24 cases that have gone beyond that.

25 MR. LOEB: To --

1 JUSTICE BREYER: Likely showing of  
2 competitive harm. Maybe it's harm to business.  
3 Maybe when people find out about this, they  
4 just will stop buying it, though no new person  
5 will enter the market.

6 You see, I mean, I -- I don't see the  
7 harm being any different there. And I ask the  
8 question, say, is it necessary to use, with the  
9 word "harm", that word "competitive", rather  
10 than a more general word, like "business"?

11 MR. LOEB: I --

12 JUSTICE BREYER: Business-related.

13 MR. LOEB: Well, trade secrets, which  
14 is the brother of this category of information  
15 --

16 JUSTICE BREYER: But, I'm curious, if  
17 you can give me a yes-or-no answer, it would  
18 really help. You don't have to, but it would  
19 help me.

20 MR. LOEB: Our threshold answer is  
21 that it -- it requires a competitive harm. But  
22 even National Parks and the circuits adopting  
23 it haven't -- didn't say that was hermetically  
24 sealed, and there could be other related  
25 business harms that you could show were to the

1 same level and that should still trigger --

2 JUSTICE SOTOMAYOR: I'm sorry, do you  
3 accept the reasonable possibility of harm test?

4 MR. LOEB: No. No, Your Honor.

5 JUSTICE SOTOMAYOR: Because Justice  
6 Breyer in his description said sometimes you  
7 just can't prove it, but there's a reasonable  
8 possibility of it.

9 That has been thrown out as a -- as a  
10 -- why is that not enough?

11 MR. LOEB: Well, under the common law  
12 and under the restatement, there was always a  
13 requirement of showing a likely competitive  
14 harm or a likely harm of sorts.

15 So having just a reasonable  
16 possibility seems to be sort of more of a  
17 scintilla argument which -- which would allow  
18 so much more information here to be withheld.

19 It's not such a strong burden to  
20 say -- I'm not saying you have to show there  
21 will be actual competitive harm, just there is  
22 a likelihood of -- of competitive harm. And  
23 that standard has prevailed for 40 some years.

24 JUSTICE SOTOMAYOR: How is that  
25 different from substantial harm? That's the

1 National Parks test.

2 MR. LOEB: So we think the other side  
3 over-reads the word "substantial". It's, I  
4 think, properly read to be the contrast --

5 JUSTICE SOTOMAYOR: Is it them or  
6 other courts?

7 MR. LOEB: I -- I think there are a  
8 few outlier courts, but most courts have  
9 applied it as the Eighth Circuit here. It has  
10 to distinguish between substantial and  
11 insubstantial.

12 And, here, the district court found  
13 that the evidence presented by the government  
14 and by FMI to show harm was -- was speculative  
15 at best and marginal at best.

16 So they -- they didn't meet whatever  
17 low standard there would -- you could  
18 articulate, but the requirement of some  
19 non-insubstantial likely harm I don't think is  
20 a -- is a -- too high a bar to put to the --  
21 the private party trying to bar disclosure of  
22 the information.

23 JUSTICE GINSBURG: What if the  
24 standard were that the -- the agency must  
25 reasonably foresee disclosure would harm an

1 interest protected by an exemption? That's the  
2 language of the 2016 amendment.

3 MR. LOEB: Certainly, that provides --  
4 that applies now to all of the FOIA exemptions  
5 under the 2016 amendment. This is a pre-2016  
6 case.

7 JUSTICE GINSBURG: But it -- it  
8 applies to Exemption 4?

9 MR. LOEB: It does for future cases.  
10 This case was a pre-2016 case, so it doesn't  
11 apply to this particular case, but it -- it  
12 certainly undercuts the arguments of the  
13 government and of FMI that it's the -- to  
14 require a showing of harm requires all these  
15 trials and it's really unadministrable, when  
16 Congress not only adopted that for Exemption 4  
17 but for all the provisions --

18 JUSTICE GINSBURG: It just doesn't say  
19 competitive harm. It just says disclose what  
20 harm an interest protected by an exemption.

21 MR. LOEB: Right. And the courts will  
22 have to fill out what that means on an  
23 exemption-by-exemption basis and what's  
24 required and whether it's the government who  
25 believes it or it's something that's a de novo

1 review by the court. That's something that  
2 still needs to be worked out under the 2016  
3 amendments.

4 And if this Court had granted a case  
5 under the 2016 amendments, we -- I think we  
6 could talk about how it applies here, but it  
7 simply doesn't apply to -- to this particular  
8 --

9 JUSTICE KAGAN: May -- may I ask, Mr.  
10 Loeb, if -- if I were to say to you give me  
11 your best shot on a textual argument for your  
12 position, so putting aside subsequent  
13 congressional inaction, putting aside how many  
14 courts have adopted this test, just sort of  
15 give me your best shot for why this is the  
16 right way to read the text, what would you say?

17 MR. LOEB: I would say you have to  
18 look at words in context and that their  
19 neighbors inform their meaning. And as this  
20 Court has said under -- when it's looked at  
21 other FOIA provisions, that you first look to  
22 the common law to help inform what the language  
23 means. Where a plain language is, they just  
24 want to look at dictionaries, but even the  
25 dictionaries are ambiguous.

1           But the common law tells you at the  
2 time that Congress chose the word "trade  
3 secrets," which has a common law meaning which  
4 requires competitive harm. And the restatement  
5 as well said there was a second category of  
6 business information and that it was treated  
7 the same way under the same standard and  
8 required competitive harm.

9           So you look at the plain language  
10 there of trade secrets and financial and  
11 commercial information that's confidential, and  
12 understand that those were terms of art that  
13 were used in the common law, and these -- these  
14 words didn't fall from the sky and just  
15 randomly appear here. They chose common law  
16 terms, trade secrets and the closely related  
17 commercial confidential information. And the  
18 courts have used and the rules and the statutes  
19 have referred to those two bodies together.

20           And if you look at this Court's  
21 decision in *FMOC versus Merrill*, you were there  
22 saying, regarding a different exemption as to  
23 privileges, we're going to protect trade  
24 secrets and confidential business information,  
25 because those --

1           JUSTICE SOTOMAYOR: The problem I have  
2 is that the common law didn't use it the way --  
3 didn't borrow a term of art. This says trade  
4 secrets and financial and commercial materials,  
5 but that's not how the -- how the common law  
6 used it.

7           The common law used other words, like  
8 private commercial information or other sorts  
9 of words. So it's not a direct taking from the  
10 common law.

11           MR. LOEB: No, it's not like the word  
12 "fraud" and -- every time the word "fraud" is  
13 used, you would look at the common law, but  
14 this is a -- it was clear that the restatement  
15 and the common law had two boxes of protected  
16 business information, trade secrets and  
17 confidential commercial -- commercial and  
18 financial information.

19           And for both of them, they required  
20 some showing of -- of -- of significant -- of  
21 competitive harm. It wasn't to turn on -- on  
22 the particular unilateral view of the  
23 submitter. So I -- I -- I think that's --

24           JUSTICE GORSUCH: You'd agree, though,  
25 that when -- when Congress uses words that are



1 different from common law terms that are  
2 invested with meaning, we usually presume that  
3 it means something different?

4 MR. LOEB: I -- I think here that  
5 common law developed in a way where they're  
6 talking about a class of information and it's  
7 clear that Congress is referring to that class  
8 information.

9 It's not -- so this is not a -- a term  
10 of art where you have one word which triggers  
11 it. You're -- you're clearly talking about  
12 that same second box of information, which has  
13 been protected by the common law and is being  
14 -- is being referred to here by the reference  
15 to commercial and financial confidential  
16 information.

17 You'll see again and again in the  
18 courts, in the rules, in sealing rules, in the  
19 Federal Rules of Procedure, likewise speak to  
20 the same classes of trade secrets and  
21 confidential business information, and all of  
22 them require some level of harm. None of them  
23 just turn on --

24 JUSTICE BREYER: I agree with that,  
25 but what -- what happens if -- if the company,

1 a firm, A, says to a group of customers, we  
2 would like some information from you which is  
3 private, it'll help us in our business. And  
4 they say, whoa, no, I don't want this to get  
5 out. They say, we promise it won't, and if it  
6 ever should, we'll pay you a lot of money. Lo  
7 and behold, it's made public. It doesn't hurt  
8 them commercially in the term of competition,  
9 but it does hurt them because they have to pay  
10 a lot of money.

11 Now does that fall within the statute  
12 as you understand it?

13 MR. LOEB: Well, I mean, your analogy  
14 speaks to a private party getting -- a company  
15 getting private information.

16 JUSTICE BREYER: Yeah, yeah, and, of  
17 course --

18 MR. LOEB: And would there be any --

19 JUSTICE BREYER: That's right. And  
20 then they give it to the government, and they  
21 -- they use it and, you know, all the rest  
22 takes place as is.

23 MR. LOEB: All right. So there could  
24 be a breach of contract in that situation --

25 JUSTICE BREYER: Yeah.

1           MR. LOEB: -- there is a contract, and  
2 there could be damages under this contract --

3           JUSTICE BREYER: Yeah.

4           MR. LOEB: -- but we're talking about  
5 a class of information --

6           JUSTICE BREYER: Well, all right. But  
7 does the government -- does that fall within  
8 the exemption? If the government gets the  
9 information, does that fall within the  
10 exemption? Because it was confidential  
11 information, the company was harmed through its  
12 release. It's just hard to say that that was  
13 competitive harm. They may have had to pay 42  
14 million dollars, I don't know how much, but --  
15 but it was harm. And it was confidential. So  
16 it's literally within the statute.

17           MR. LOEB: I --

18           JUSTICE BREYER: And I want to know  
19 about that.

20           MR. YANG: I don't -- I don't think it  
21 would be within the statute. The statute's  
22 referring to commercial and financial  
23 information that's obtained from --

24           JUSTICE BREYER: No, it is commercial  
25 and financial information. That's what it is.

1 I just -- you -- you do -- go that way. I'll  
2 just assume it into my hypothetical.

3 (Laughter.)

4 JUSTICE BREYER: I'm still focusing on  
5 what words -- you don't have to write this, but  
6 I might.

7 (Laughter.)

8 JUSTICE BREYER: And I - and I have --  
9 and I have to write down something by the word  
10 "harm," and that word -- that word "competitive  
11 harm" is still giving me some trouble, and I'm  
12 -- that's why I'm asking these questions.

13 MR. LOEB: Right. Well, it -- it has  
14 to be obtained from a person and you look at  
15 whether there was harm to that -- that party  
16 who is -- who it was obtained from, which would  
17 be the -- the company or -- and if -- but if it  
18 was information that pertained to the  
19 individual, it could perhaps be protected by  
20 other provisions like the Privacy Act to -- to  
21 -- to -- extends to a large degree of -- of  
22 information regarding a particular individual  
23 citizen, which is possessed by the government,  
24 which then shouldn't be disclosed.

25 So there are other exemptions that

1 cover information which goes to private  
2 information of an individual.

3 Here, we're talking about commercial  
4 and financial information. It was enacted  
5 together with trade secrets, both being common  
6 law terms, and it would be inappropriate to  
7 sort of expand it to a global confidentiality  
8 term.

9 Here, you know, FMI is basically  
10 suggesting a unilateral approach to say as long  
11 as they treat it as secret and confidential,  
12 that this Court should fall in line as well.  
13 That would dramatically alter the scheme of  
14 FOIA, the one which -- Congress has reenacted  
15 Exemption 4 for 26 times, again and again after  
16 there was a -- a universal reading of this  
17 provision.

18 First of all, FMI's counsel here says  
19 that this information isn't important, doesn't  
20 show what the government is up to.

21 How the government spends its own  
22 money is critical information that the press  
23 and the public need to know. It's the type of  
24 information that FOIA has been used for decades  
25 to reveal, you know, the Navy using -- spending

1 \$670 on toilet seats, to the bail-out funds  
2 being abused and wasted, et cetera, et cetera.  
3 We lay out examples in our brief.

4 Under their test, that would -- could  
5 all now be claimed confidential by the parties  
6 saying, look, this reveals our side of the  
7 business. Two sides of the coin. You spend  
8 the money, we submit it. We did the work. We  
9 don't want you to reveal that.

10 That would be a -- a -- a dramatic  
11 change of the way that FOIA -- FOIA has been  
12 applied for more than 40 years. Also to the  
13 regulatory regime. We have --

14 JUSTICE GINSBURG: May I -- may I ask  
15 you a question about now -- now that the -- the  
16 circuit court was wrong about Exemption 3 under  
17 the clarification that Congress provided, so  
18 are we supposed to just ignore that? That's --

19 MR. LOEB: Well, we -- we don't  
20 believe that -- that the -- the new version of  
21 2018(c) changes the law about this case at all.  
22 It's prospective. This is information that was  
23 submitted under that amendment. And we don't  
24 think that -- that amendment also applies to  
25 the application process, not to the -- the

1 monthly and annual data that we're -- we're  
2 seeking here.

3 But, as some earlier questions pointed  
4 out, if the government wants to seek relief on  
5 remand, if you rule for us and it goes back,  
6 they can go to the district court before the  
7 information is -- is disclosed and say we want  
8 to reopen the judgment based on a change of the  
9 law. And we could litigate that here. That's  
10 not something to be litigated in this Court,  
11 the meaning of 2018(c).

12 So I don't think that -- that -- that  
13 with -- the Eighth Circuit was correct in how  
14 it read 2018(c), there was no -- no one's  
15 asking this Court to review that, and the new  
16 amendment doesn't alter how this Court should  
17 dispose of this case. If they're -- they want  
18 to make an argument on remand, they are free to  
19 do so.

20 JUSTICE KAVANAUGH: You seem to be  
21 making two distinct arguments about National  
22 Parks. One is National Parks is correct. Two,  
23 alternatively, is even if National Parks is  
24 incorrect, we think we should nonetheless  
25 follow it.

1           On that second argument, how can that  
2           be squared with Milner?

3           MR. LOEB:   Again, Milner was a very  
4           different concept.  It was really a judicial  
5           acquiescence to -- to Congress not changing the  
6           law of -- of Exemption 2.  And -- and this  
7           Court's opinion said there wasn't a judicial  
8           consensus, so you wouldn't even --

9           JUSTICE KAVANAUGH:  Why --

10          MR. LOEB:  -- assume that Congress had  
11          one way or the other --

12          JUSTICE KAVANAUGH:  Let me take it out  
13          from under Milner then and just say why, if we  
14          disagree with National Parks, the D.C.  
15          Circuit's decision, should we nonetheless  
16          follow it?

17          MR. LOEB:  Because this Court has long  
18          held that when Congress reenacts a statute or  
19          revises a statute that's subject to a uniform  
20          judicial construction, that you presume that  
21          Congress understands and knows that that  
22          construction has adopted it, in its -- in its  
23          ratification, in its -- in its amendment to the  
24          statute.  So there you have --

25          JUSTICE KAVANAUGH:  The construction



1 was changed in critical mass in some  
2 significant respect, correct?

3 MR. LOEB: Not correct, Your Honor.  
4 So critical mass was just an application of  
5 prong one. So prong one says, look, if -- as  
6 to whether disclosing the information will harm  
7 the government from, in the future, being able  
8 to get information, the D.C. Circuit, applying  
9 prong one, came up with its voluntary/  
10 involuntarily test, which hasn't been followed  
11 by all the circuits, but that's just an  
12 application of prong one.

13 We're saying what has been uniformly  
14 adopted, at least since 2001, is the two-prong  
15 test. One is to that first prong as to harm to  
16 the government. And the second prong is the  
17 competitive injury.

18 So Congress has been well aware of  
19 that test, they had hearings about it, sought  
20 proposals. And did they change the statute?  
21 That would be judicial acquiescence we're not  
22 relying on. Instead, they actually amended  
23 again and again, passed statute after statute,  
24 29 statutes since 2001, taking the exact  
25 verbatim language of the statute and a

1 reference to Exemption 4 and saying how it  
2 applies to different circumstances.

3 Again, those could --

4 JUSTICE GINSBURG: That would stop  
5 this Court from saying -- this Court has never  
6 -- has never answered that question. And  
7 you're -- you're saying that the D.C. Circuit  
8 decision and then other measures using the same  
9 language stops this Court from saying what the  
10 words of Exemption 4 mean?

11 MR. LOEB: No, Your Honor, it doesn't  
12 stop this Court. But this Court has been  
13 deferential to Congress when it -- when it  
14 looks to -- when it reenacts a statute and  
15 there is a uniform construction, as there was  
16 here in eight, nine different uniform circuits  
17 about the two-prong test, that you know  
18 Congress knows about it, it is -- it is now  
19 reenacting the statute, and that's what this  
20 Court said this term in *Helsinn*.

21 There was an appellate decision. And  
22 it was they took -- they -- they reenacted that  
23 same language and put it into the American  
24 Invents Act, right, and this Court said that  
25 Congress is presumed to know the prior judicial

1 construction and is assumed to have adopted it.

2           So we're not saying you're in any way  
3 barred from doing it, but that's a significant  
4 factor. When this Court has found that  
5 ratification theory applies, it hasn't even  
6 gone on to sort of look anew at the statute  
7 because it -- it looks -- it recognizes that  
8 Congress knows about the prevailing view and  
9 has adopted it by amending the statute and not  
10 changing it or -- or not changing it in the  
11 relevant sense here.

12           JUSTICE ALITO: Does that -- does that  
13 argument depend upon how plausible this  
14 interpretation would be as a matter of first  
15 impression?

16           MR. LOEB: Justice Alito, I -- I don't  
17 think that that -- that is part of the  
18 calculus. This Court has -- has said, has  
19 there been a uniform construction, you know,  
20 and they presume Congress is aware. Here, we  
21 know Congress was aware of it.

22           And here we don't -- we have Congress  
23 enacting 29 different statutes knowing about  
24 the uniform construction since 2001.

25           JUSTICE ALITO: So, I mean, if there

1 were a statute that says something has to be  
2 done within 30 days, and a court said 30 really  
3 means 50, and all the other courts fell in  
4 line, we would say, all right, that Congress  
5 has -- and Congress enacts statutes related to  
6 that -- we would say, well, Congress has  
7 implicitly ratified that?

8 MR. LOEB: Obviously, that's a hard  
9 hypothetical, Your Honor, but I would say yes,  
10 that -- that even in that context, that  
11 Congress was aware of the construction of that  
12 term, even how bizarre it may be.

13 Here, we don't have such a bizarre,  
14 you know, construction. We have the Congress  
15 adopting the common law construction. But this  
16 Court has said in *Lorillard*, in *Shapiro*, in  
17 *Helsinn*, again and again, that when you take  
18 language from one spot and you put it into  
19 another, reenact it, it contains the same  
20 meaning as -- as --

21 JUSTICE ALITO: Well, under the common  
22 law, was competitive harm part of the claim  
23 itself, or was it simply what you needed to  
24 show to get damages?

25 MR. LOEB: For trade secrets, it was,

1 in essence, a definition of what a trade secret  
2 is, something that, when it's released, will  
3 cause competitive harm. And the restatement  
4 said it was treating this --

5 JUSTICE ALITO: Well, for things that  
6 are not trade secrets, confidential financial  
7 information that is not a trade secret.

8 MR. LOEB: The courts treated that  
9 same confidential business information in the  
10 same respect, that you had to show a  
11 competitive harm. It wasn't just injury,  
12 because you could show injury in lots of  
13 different ways, but you would have to show  
14 actually a competitive injury in the case.

15 JUSTICE KAGAN: Is -- is there a  
16 difference, Mr. Loeb, for purposes of this  
17 congressional ratification argument that the  
18 court at issue was not the Supreme Court, that  
19 it was instead a circuit court?

20 MR. LOEB: It -- what this Court has  
21 said is if there's a -- a uniform judicial  
22 construction. That can come, of course, from  
23 the Supreme Court. And then, if they take the  
24 language and reenact it or put it from this  
25 statute to that statute, you would presume that

1 they know the Supreme Court construction.

2 But the language of Lorillard and  
3 Shapiro and Helsinn just talk about a uniform  
4 judicial construction. And we know from  
5 Helsinn we had just the Federal Circuit  
6 construing the prior iteration, which was then  
7 lifted into the American Invents Act.

8 So that principle is one really, does  
9 Congress know of that uniform construction, and  
10 did it do anything about it? And here we  
11 didn't have them just reenact something once or  
12 amend the statute once, but some --

13 JUSTICE GORSUCH: So -- so, again,  
14 let's say we just had district courts, but we  
15 had uniform district courts saying 30 days  
16 means 50 days. That's absolutely uniform.

17 Congress thereafter says 30 days,  
18 everybody in America should know that that  
19 really means 50.

20 The average person who's supposed to  
21 have fair notice of the statutes opens up the  
22 books and sees 30 days but, in fact, is  
23 supposed to know that it means 50 because a lot  
24 of district courts have said so?

25 MR. LOEB: Well, I don't think we

1 would be -- this Court or -- or -- we're  
2 arguing that --

3 JUSTICE GORSUCH: Is that consistent  
4 with fair notice or due process or any normal  
5 statutory interpretation methodology you're  
6 familiar with?

7 MR. LOEB: In this particular case,  
8 there's not this sort of stark it says 30 and  
9 we're reading it to be 50. And maybe that's  
10 sort of an outlier situation where you would  
11 have an exception like Lorillard.

12 JUSTICE GORSUCH: Exception for maybe  
13 due process and fair notice?

14 MR. LOEB: Well, no one can argue that  
15 adopting the common law meaning of trade  
16 secrets and business information is a violation  
17 of due process. And the way that you're saying  
18 30 days versus 50 days, I'll give you that.  
19 That's a much harder case and -- and maybe --

20 JUSTICE GORSUCH: Very kind of you.  
21 Thank you.

22 (Laughter.)

23 JUSTICE GORSUCH: But -- but --

24 CHIEF JUSTICE ROBERTS: Well, but --

25 JUSTICE GORSUCH: -- don't our --

1 don't our tools of interpretation normally take  
2 their cue from things like due process and fair  
3 notice, rather than the other way around, where  
4 due process and fair notice have to become the  
5 exception to our statutory interpretation  
6 tools?

7 MR. LOEB: But it is an established  
8 statutory interpretation mechanism that when  
9 Congress reenacts a statute and there's a  
10 uniform construction, even if it's a uniform  
11 circuit construction, that you presume that  
12 Congress has adopted that prior judicial  
13 construction.

14 CHIEF JUSTICE ROBERTS: So how many --  
15 how many courts of appeals do you have to take  
16 -- I assume uniform isn't enough if there are  
17 just two, that's uniform, but you have -- I  
18 understand you -- you think you have eight,  
19 right?

20 MR. LOEB: At least eight, Your Honor.  
21 And there's no -- and no outlier circuits on  
22 the two-prong test.

23 JUSTICE KAGAN: Is it that, or are you  
24 really relying on the D.C. Circuit's special  
25 situation with respect to FOIA?



1           MR. LOEB: With all deference to the  
2 D.C. Circuit, no, there's no special deference  
3 here. We're looking for whether there is a  
4 judicial construction in the terms of Helsinn  
5 and the terms of Lorillard.

6           And I think when you have a  
7 overwhelming number of the circuits who have  
8 uniformly addressed it without any dissenting  
9 circuits, that whatever that standard means,  
10 that it's -- it's met in that -- in this  
11 circumstance.

12           It's really quite --

13           CHIEF JUSTICE ROBERTS: Thank you, Mr.  
14 Young -- I'm sorry, Mr. Loeb.

15           Now, Mr. Young, you have five minutes  
16 remaining.

17           REBUTTAL ARGUMENT OF EVAN A. YOUNG  
18           ON BEHALF OF THE PETITIONER

19           MR. YOUNG: Thank you, Mr. Chief  
20 Justice. Just a few points I'd like to make.

21           First, to start with what  
22 "confidential" means and its relationship to  
23 any concept of harm.

24           That question of harm asks a very  
25 different question. It asks why someone keeps

1 something secret, not whether they keep it  
2 secret. There is no common law term of art  
3 called confidential business information or  
4 confidential commercial information.

5           It's not -- that does not appear in  
6 the restatement. It doesn't appear in the  
7 cases that are cited. It doesn't appear in any  
8 scholarship, and it wasn't something that  
9 either National Parks or any other case before  
10 or after it relied on to find some common law  
11 heritage.

12           It's true, of course, that when one  
13 has a tort action, any kind of tort action,  
14 harm will be something that has to be shown,  
15 but that does not infuse harm into the very  
16 meaning of other elements of the tort.

17           We know that from cases like Carter  
18 and Bruesewitz that even if there were some  
19 common law conception, it isn't enough for  
20 Congress to refer to some vague principle. It  
21 would actually have to use that term of art.

22           JUSTICE SOTOMAYOR: Counsel, that --  
23 that begs a question, which is we sort of  
24 naturally think that if people are going to  
25 keep something confidential, that there's a

1 reason for it. You don't just say, I don't  
2 want to disclose because I don't feel like it,  
3 although some people do.

4 It seems to me that this concept that  
5 there has to be a reason for it and that it has  
6 to be tied to business and to commercial and  
7 financial matters, because that's the words,  
8 financial and confidential -- financial and  
9 commercial matters, those are the words of the  
10 statute, doesn't that naturally infuse the  
11 concept with some sense that there's a reason  
12 for keeping it a secret?

13 MR. YOUNG: Well, I think it's likely  
14 that there is.

15 JUSTICE SOTOMAYOR: And that has to --  
16 and -- and if there is some sense of it, why  
17 isn't that sense infused with a concept, if I  
18 let it out, it's going to hurt me?

19 MR. YOUNG: Well, again, we think --

20 JUSTICE SOTOMAYOR: Taking aside the  
21 quantum of hurt, but --

22 MR. YOUNG: Right.

23 JUSTICE SOTOMAYOR: -- there's a  
24 reason I keep it a secret.

25 MR. YOUNG: And I will address that as

1 well. But I think that in this very case it  
2 maybe is a good exemplar.

3 Of course our clients aren't paying  
4 for us to pursue this to this level because  
5 they just feel like it. Of course we think  
6 there is substantial competitive harm.

7 But the question Congress asked is not  
8 for courts to engage in the prospective,  
9 speculative assessment --

10 JUSTICE SOTOMAYOR: But that's not  
11 true.

12 MR. YOUNG: -- of whether they think  
13 it is.

14 JUSTICE SOTOMAYOR: If -- if we read  
15 "confidential" as being confidential in nature,  
16 which is part of your definition --

17 MR. YOUNG: It's a manifestation of  
18 it.

19 JUSTICE SOTOMAYOR: Well, it's --

20 MR. YOUNG: Things that are  
21 confidential in nature are likely to be kept  
22 secret. Of course.

23 JUSTICE SOTOMAYOR: Well, that's the  
24 point, which is --

25 MR. YOUNG: But the founder of

1 LifeLock put his Social Security number up on  
2 billboards all across the country to prove that  
3 his technology was so secure. Now, we wouldn't  
4 think that that is confidential any more.

5 It's just one manifestation of it.  
6 Everybody else's might be.

7 And here when you -- when you have  
8 this bucket in Exemption 4 you start with it  
9 being commercial or financial. Those are  
10 limits. Of course you're right, if you can't  
11 show that it's commercial or financial  
12 information, you are not within Exemption 4.  
13 Then you have to show it's obtained from a  
14 person. That's not the government doing it, in  
15 other words.

16 And then, lastly, it has to be  
17 confidential or privileged. And all that  
18 Congress asked the courts to do is answer the  
19 objective question: Does the person whose  
20 information the government now has, does that  
21 person keep this secret and not publicly  
22 disclose it?

23 And, if so, the fact, of course, that  
24 likely the reason they do that in many  
25 instances is to protect themselves from

1 competitive harm, that's not something that  
2 courts need to spend two days on a trial with  
3 expert witnesses and leaders from industry and  
4 all different industry segments coming in to  
5 try to persuade a poor district judge to figure  
6 out why in the world this information would  
7 cause a substantial competitive harm or not.

8 Harm is not part of the word  
9 confidential. It's often associated with it if  
10 you --

11 JUSTICE BREYER: But why not call it  
12 harm, some harm, I mean, some harm, because  
13 Congress isn't going around protecting people  
14 from X where X doesn't cause any harm. That  
15 would be not there in the statute but it would  
16 be a general assumption.

17 MR. YOUNG: Well, Congress spoke  
18 broadly --

19 JUSTICE BREYER: Do you object to  
20 that, saying adding to that some harm?

21 MR. YOUNG: Well, I -- I -- I -- I  
22 object to it in this sense: I think that by  
23 opening that door, you now are opening trial  
24 courts to have to do the kind of tedious and  
25 laborious work that leads to false negatives

1 like this case.

2           It -- it really is amazing that  
3 something like store-level SNAP redemption data  
4 would lead to a situation in which we had to  
5 have a trial at all. And you wouldn't have to  
6 do it, and people aren't likely to press  
7 objections, if they don't have any harm that's  
8 going to befall them.

9           And so Congress solved that problem by  
10 saying objectively -- if I might just finish  
11 the thought, Mr. Chief Justice.

12           CHIEF JUSTICE ROBERTS: Sure.

13           MR. YOUNG: Objectively, if you have a  
14 pattern of keeping this information secret and  
15 not publicly disclosing it, that is the only  
16 thing the federal courts are authorized to ask,  
17 and that gives the government the authority to  
18 keep it secret, if it so desires.

19           CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel. The case is submitted.

21           (Whereupon, at 11:07 a.m., the case  
22 was submitted.)

23

24

25

## Official - Subject to Final Review

<b>\$</b>	<b>absolutely</b> <sup>[1]</sup> 61:16	<b>amendments</b> <sup>[2]</sup> 45:3,5	<b>authority</b> <sup>[3]</sup> 29:20,22 70:17
<b>\$10</b> <sup>[1]</sup> 23:24	<b>abused</b> <sup>[1]</sup> 53:2	<b>amends</b> <sup>[1]</sup> 35:17	<b>authorized</b> <sup>[1]</sup> 70:16
<b>\$5</b> <sup>[2]</sup> 23:24 24:1	<b>acceded</b> <sup>[1]</sup> 12:17	<b>America</b> <sup>[1]</sup> 61:18	<b>available</b> <sup>[1]</sup> 16:10
<b>\$670</b> <sup>[1]</sup> 53:1	<b>accept</b> <sup>[1]</sup> 42:3	<b>American</b> <sup>[2]</sup> 57:23 61:7	<b>average</b> <sup>[1]</sup> 61:20
<b>1</b>	<b>access</b> <sup>[1]</sup> 15:23	<b>amicus</b> <sup>[4]</sup> 1:22 2:9 13:14 18:15	<b>aware</b> <sup>[4]</sup> 56:18 58:20,21 59:11
<b>1</b> <sup>[1]</sup> 38:3	<b>accidentally</b> <sup>[1]</sup> 15:25	<b>among</b> <sup>[1]</sup> 17:21	<b>awful</b> <sup>[1]</sup> 10:23
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