No. 18-481

IN THE
Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

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

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR *AMICI CURIAE* CAUSE OF ACTION INSTITUTE, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, FOIA ADVISOR, OPEN THE GOVERNMENT, AND PROJECT ON GOVERNMENT OVERSIGHT, IN SUPPORT OF RESPONDENT

Ryan P. Mulvey
Counsel of Record
R. James Valvo, III
CAUSE OF ACTION INSTITUTE
1875 Eye Street, NW, Ste. 800
Washington, DC 20006
202.499.4232
ryan.mulvey@causeofaction.org
james.valvo@causeofaction.org

Counsel for CoA Institute

(additional counsel on signature page)

March 22, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authorities

BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 37, Cause of Action Institute ("CoA Institute") respectfully submits this *amicus curiae* brief in support of Respondent on its own behalf and on behalf of co-*amici*.[1]

INTEREST OF *AMICI CURIAE*

CoA Institute is a 501(c)(3) nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public about how government accountability, transparency, and the rule of law protect individual liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse of power by, among other things, appearing as *amicus curiae* before this and other courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing CoA Institute brief); Br. of *Amicus Curiae* CoA Inst., *Inst. for Justice v. Reilly*, No. A19A0076 (Ga. Ct. App. filed Oct. 23, 2018) (presenting court with fifty-state survey of state open records laws).

CoA Institute has a particular interest in the proper application of the Freedom of Information Act ("FOIA") because it is the primary tool that CoA

[1] All parties have consented to the filing of this brief via blanket consent. No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except CoA Institute financially contributed to this brief.

Institute uses to conduct government oversight. The proper application of FOIA's statutory exemptions is one of the most important issues related to FOIA administration. For that reason, CoA Institute has a strong interest in this case and the Court's determination of the scope of Exemption 4.

Citizens for Responsibility and Ethics in Washington ("CREW") is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue code. CREW seeks to promote accountability, transparency, and integrity in government officials and the government decision-making process. CREW is committed to protecting the right of citizens to be informed about the activities of government officials and empowering citizens to have an influential voice in government decisions through the dissemination of information, including information CREW obtains through the FOIA. Toward that end, CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW's public interest litigation includes lawsuits brought against the Executive and executive branch agencies to prevent abuses of executive power.

FOIA Advisor is an online, noncommercial forum designed to help the public learn about the federal FOIA. Its staff answers questions about FOIA-related topics, highlights news developments of interest to the FOIA and transparency communities, compiles and opines on new opinions in FOIA cases, and publishes commentary on issues concerning public access to government information.

Open the Government ("OTG") is an inclusive, nonpartisan coalition that works to strengthen our democracy and empower the public by advancing policies that create a more open, accountable, and responsive government. As the coordinating hub of a coalition of more than 100 public-interest organizations, OTG leads efforts to pass critically needed reforms to the FOIA and defends against efforts to weaken and violate the law. OTG works with coalition members to file FOIA requests for records on government decision-making and believes that ensuring public access to information is essential to hold our public officials accountable at all levels of government.

Founded in 1981, the Project On Government Oversight ("POGO") is a nonpartisan independent watchdog that champions good government reforms. POGO investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. And, in doing so, it relies on the FOIA. POGO has found that in many cases, the concealment of government records has to do with hiding corruption, intentional wrongdoing, or gross mismanagement by the government or its contractors. POGO strongly believes that sunshine is the best disinfectant, and that it must empower citizens with information and tools to hold a local, state, or federal government accountable.

SUMMARY OF ARGUMENT

The FOIA exempts "confidential" commercial or financial information that the government obtains from a person from disclosure. But the FOIA does not define "confidential." The term's meaning cannot be derived from bare dictionary definitions. "Confidential" instead must be understood in light of its historical usage in other legal contexts and elsewhere in the FOIA. Persuasive canons of statutory interpretation counsel the Court to take that approach. Petitioner's overbroad reading of "confidential" ignores legal history, deviates from the interpretative methodology accepted for other terms in Exemption 4, and would render it surplusage by swallowing up the independent meanings of "trade secret" and "privileged."

The proper meaning of "confidential" covers information that, if made public, would cause competitive harm to its source. This meaning is rooted in the common law and the nature of confidential relationships. But history is not the only basis for this understanding. In other legal contexts, construing the phrase "confidential information" frequently involves some form of harm analysis. From judicial records and the Bankruptcy Code, to the Rules of Civil Procedure and this Court's precedents on FOIA Exemptions 5 and 7, legal context demonstrates that Petitioner's approach is incorrect.

This case also presents the Court with an opportunity to clarify other aspects of Exemption 4.

Although *amici* ask the Court to uphold the competitive-harm justification of *National Parks*, they also ask the Court to eliminate the government-impairment justification, abandon the distinction between information submitted voluntarily or under compulsion, reiterate that competitive harm must be analyzed under an objective test, and accept reputational harms that impact competitive standing as cognizable under Exemption 4.

As the Court considers this case, it should do so consistent with its precedents. The Court has recognized that the FOIA is essential to "ensure an informed citizenry, vital to the functioning of a democratic society," *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (citation omitted), and that it contains a "strong presumption in favor of disclosure[.]" *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). FOIA exemptions "must be 'narrowly construed'" to ensure that citizens have access to information and to honor the strong presumption of disclosure. *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (citation omitted).

ARGUMENT

I. The Court should interpret the term "confidential" in Exemption 4 in harmony with the statutory text and its historical usage in other legal contexts.

Exemption 4 protects from disclosure "commercial or financial information obtained from a person and . . . confidential[.]" 5 U.S.C. § 552(b)(4). Although

Congress did not define "confidential," it is not self-evident that it intended the term to carry a bare dictionary definition. On the contrary, persuasive canons of statutory construction, as well as the other contexts in which "confidential" is a legal term of art, counsel against a generalized interpretation.

This Court should construe the term "confidential" to include information that, if made public, would likely cause competitive harm to its source. *See Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) [hereinafter *Nat'l Parks*] ("[C]ommercial or financial matter is 'confidential' . . . if disclosure of the information is likely . . . to cause substantial harm to the competitive position of the person from whom [it] was obtained.").

A. Three canons of construction counsel against using Petitioner's overbroad interpretation of "confidential."

Unless a term is statutorily defined, it is "a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (citation omitted). But words do not exist in isolation and the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Three canons of statutory

construction counsel against using an overbroad, ordinary-meaning construction here: the surplusage, associated-words, and legal-meaning canons.

(1) The surplusage canon: The surplusage canon teaches that, whenever possible, courts should interpret statutes so that all the words are given effect, and none are rendered meaningless. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute. We are thus reluctant to treat statutory terms as surplusage in any setting.") (cleaned up). Although "[t]he canon against surplusage is not an absolute rule," it has special force "where a competing interpretation gives effect to every clause and word of a statute." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013) (citation omitted). Here, *amici* provide the Court with an interpretation that gives effect to every word and clause of Exemption 4, whereas Petitioner's interpretation of "confidential" would render the rest of the exemption nearly meaningless.

Exemption 4 allows agencies to withhold information if it meets one of three statutory bases: it must be a (1) trade secret, or commercial or financial information that is either (2) privileged or (3) confidential. Petitioner asks the Court to interpret "confidential" to mean "something kept private and not publicly disclosed." Pet. Br. 16. But doing so would read "trade secrets" and "privileged" out of the statute. Why? Because all trade secrets and privileged information are "kept private and not

publicly disclosed." They are both "confidential" in Petitioner's broadest dictionary sense.

For example, both a company's secret drug formula (trade secret) and attorney-client communications (privileged) are private, intended to be kept secret, and not ordinarily publicly disseminated, thus meeting Petitioner's definition of "confidential." If that interpretation were correct, there would have been no reason for Congress to include "trade secret" or "privileged" in Exemption 4; it simply could have said "confidential." *See In re Orion Pictures Corp.*, 21 F.3d 24, 28 (2d Cir. 1994) (disclosure exemption in bankruptcy code "carefully drafted to avoid merging 'trade secrets' with 'confidential commercial information'"). But that is not what Congress did. Exemption 4 must be interpreted so that "trade secret" and "privileged" mean something different than "confidential."

In its petition for a writ of certiorari, Petitioner argued that the D.C. Circuit's interpretation of "confidential" according to the *National Parks* competitive-harm test led it to later interpret "trade secrets" in a narrow way to avoid reading "trade secrets" out of Exemption 4. Pet. 20–21. Petitioner is correct that the D.C. Circuit's decisions in *National Parks* and *Public Citizen* avoided any surplusage problem. But now Petitioner asks this Court to upset the applecart and introduce an even graver surplusage problem than the one the D.C. Circuit originally avoided. Petitioner's failure to discuss the surplusage canon in its merits brief is telling.

Amici propose to retain the *National Parks* competitive-harm test and, by doing so, create three distinct, if slightly overlapping, spheres of protected information. *Amici*'s approach would retain the comparatively easy test for "trade secrets"—that is, the test adopted in *Public Citizen*—while requiring a greater showing to invoke the "confidential" prong.

First, under *amici*'s interpretation, a trade secret would be exempt from disclosure if an agency could show that it is "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1288 (D.C. Cir. 1983) [hereinafter *Pub. Citizen*]. This prong of Exemption 4 protects a smaller universe of information but does so without a competitive-harm showing. The evidentiary showing is fully internal to the company; no market-impact analysis would need to be conducted.

Second, privileged commercial or financial information, such as attorney-client communications, would be exempt from disclosure regardless of whether it is a trade secret or if disclosure would cause competitive harm, thus giving independent effect to the second prong of Exemption 4.

Third, "confidential" would encompass any remaining information that, if disclosed, would cause its source competitive harm. This universe of

commercial or financial information is broader than both "trade secrets" and "privileged" information but requires a relatively more-difficult showing.

Thus, *amici* provide the Court with an interpretation that gives all three statutory terms independent applications and tests, none of which render the others meaningless. Petitioner's interpretation cannot perform this basic task of statutory interpretation. Instead, Petitioner turns Exemption 4 analysis into a one-trick pony: was the information meant to be kept secret? The surplusage canon cannot bear that much statutory invalidation. *See Marx*, 568 U.S. at 385 (canon especially important "where a competing interpretation gives effect to every clause and word of a statute").

(2) The associated-words canon: The associated-words canon (*noscitur a sociis*) teaches that words located near one another in a statute give each other meaning. *See* Antonin Scalia & Bryan Garner, Reading Law 195–98 (2012). Courts apply this canon to "'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'" *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)).

In Exemption 4, "confidential" exists alongside "trade secret" and "privileged," two terms of art that carry specialized legal meanings. *See Pub. Citizen*, 704 F.2d at 1286–90 (exploring complex legal meaning

of "trade secret"); *Wash. Post Co. v. Dep't of Health & Human Servs.*, 690 F.2d 252, 268 n.50 (D.C. Cir. 1982) (noting that "privileged" includes the legal understanding of attorney-client privilege). So too must "confidential" be given its legal meaning to avoid giving it "unintended breadth," *Yates*, 135 S. Ct. at 1085, and to harmonize it with associated words in the same statutory provision.

(3) The legal-meaning canon: Statutes may contain words that are not used according to their common-language dictionary definition but instead carry long-understood legal meaning. When "Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning[.]" *Morissette v. United States*, 342 U.S. 246, 263 (1952).

In those situations, courts must avoid "reject[ing] a relevant definition of a word tailored to judicial settings in favor of a more general definition from another dictionary." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 616 (2001). That is, "[w]ords that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning." *Id.* at 615. When a concept is "transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Scalia & Garner, Reading Law 73 (citing Felix Frankfurter, *Some Reflections on the*

Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947)); *see* William N. Eskridge Jr., Interpreting Law 60 (2016) (When "Congress is using legal terms of art in laws directing [agency] officials, presumably advised by lawyers, it makes sense to focus on the specialized meaning reflected in legal sources[.]").

Courts can understand legal meaning by consulting previous judicial interpretations, equity, common law, and usage of the same term for the same purpose in other contexts. *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1425–26 (2018) (drawing on common-law understanding of "tort"); *Wilkie v. Robbins*, 551 U.S. 537, 563–64 (2007) (same, "extortion"); *Nat'l Labor Relations Bd. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (referring to "settled meaning under either equity or the common law"); *Carolene Prod. Co. v. United States*, 323 U.S. 18, 26 (1944) (phrases carry "previous judicial interpretations of the wording") (citations omitted). *But see Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 233–34 (2011) (declining to assume Congress meant to incorporate the meaning of "unavoidable" pulled from a comment to the Restatement (Second) of Torts).

As argued below, the word "confidential" in Exemption 4 draws its meaning from a long-established legal tradition. Congress did not use the word in a common-language dictionary sense, as Petitioner contends, but instead carried over the "old soil" understanding that "confidential information" is exchanged in a confidential relationship and, if disclosed, would cause competitive harm to its source.

B. The legal meaning of "confidential" includes information that, if made public, would cause its source competitive harm.

As argued above, three canons of statutory construction counsel in favor of understanding the term "confidential" according to its specialized legal meaning rather than its bare dictionary definition. To assess a term's legal meaning, courts consult history, common law, and uses of the term in related contexts. *See Jesner*, 138 S. Ct. at 1425–26 (drawing on common-law understanding); *Carolene Prod. Co.*, 323 U.S. at 26 (phrase "carries with it the previous judicial interpretations") (citations omitted). Here, these sources point to an understanding of "confidential information" that includes information that, if disclosed, would cause its source competitive harm.

1. "Confidential information" has historically encompassed materials that would cause injury if improperly disclosed.

The legal understanding of the term "confidential" has its historical roots in the law of confidential relationships, including attorney-client and principal-agent. But the understanding also embraced tort and equity actions for "implied contracts of confidentiality" and "breach of trust and confidence." The common touchstone in these areas is the idea that "confidential information" arises from the duty that attaches when information of a certain character is shared by one party with another. The character of

information that has been protected as "confidential" in these situations is information that, if misused, would injure its source. *See* Resp. Br. 42–48 (discussing material that is "confidential in *nature*").

A small sample of early English cases makes the point. In 1820, an employee stole recipes for veterinary medicines from his employer and used them in his own business to the disadvantage of that employer. *Yovatt v Winyard*, 37 E.R. 425 (1820 Ch.). The Lord Chancellor granted an injunction against their use based on a "breach of trust and confidence." *Id*. Similarly, in 1825, a pupil attending a surgeon's lectures was found to have entered into an implied contract not to transcribe and publish the lectures' content. *Abernethy v Hutchinson*, 47 E.R. 1313 (1825 Ch.). Joseph Story later noted the principle behind this prohibition was that those granted "admission to hear such lectures [do so] upon the implied *confidence* and contract, that the hearer will not use any means *to injure*, or to take away the exclusive right of the lecturer in his own lectures." Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L.J. 123, 137 (2007) (citing 2 Joseph Story, Commentaries on Equity Jurisprudence: As Administered in England and America 264 (3d rev., corrected, and enlarged ed. 1843)) (emphasis added); *see also Prince Albert v Strange*, 64 E.R. 293 (1849 Ch.) ("A man may employ himself in private in a manner very harmless, but which, disclosed to society, may destroy the comfort of his life, or even his success in it.").

The English examples in this area are nearly endless but the cited cases exemplify the law's recognition of the duty that arises when confidential information moves from its original source to another person, regardless of whether that duty is explicit, or the information is subject to formal intellectual-property or contractual protections.

This understanding was translated into American law as well. For example, the Supreme Judicial Court of Massachusetts has acknowledged that an employee is "restrained from making use of *confidential information* which he has gained in the employment of some other person [because] there is . . . an implied contract on the part of the employé that he will not . . . use [that] information . . . *to the detriment* of his former employer." *Essex Tr. Co. v. Enwright*, 102 N.E. 441, 442 (Mass. 1913) (citing *Robb v. Green*, 2 Q. B. 1 (1895)) (emphases added); *see also Stevens & Co. v. Stiles*, 71 A. 802 (R.I. 1909) (finding an employee may not surreptitiously collect customers names and addresses and solicit them to use his services instead).

This Court too has recognized that the foundations of confidential information are cemented in the relationship in which the information arose, the character of that information, and the duty the recipient takes on when receiving it. As early as 1917, the Court wrote that when a "defendant stood in *confidential relations* with the plaintiffs . . . the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. . . . If there is any disadvantage in the fact that he knew

the plaintiffs' secrets, *he must take the burden* with the good." *E. I. Du Pont De Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917) (emphases added). That is, because the parties were in a confidential relationship, the defendant had a duty not to use the plaintiffs' secrets to their disadvantage. The Court's reasoning in *Masland* has informed its later treatment of confidential information in other contexts, including the FOIA. *See Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 356 (1979) (noting "courts have long recognized a qualified evidentiary privilege for . . . confidential commercial information" when discussing the scope of FOIA Exemption 5) (citing *Masland*); *Becher v. Contoure Labs.*, 279 U.S. 388, 391 (1929) (noting that claim for "wrongful disregard of confidential relations" arises "independent of the patent law") (citing *Masland*).

This understanding of "confidential information" — information shared in a confidential relationship that would cause harm to its source if it is disclosed or misused—has been extended in other statutory and non-statutory contexts as well.

2. Courts apply some form of harm analysis to protect "confidential information" in modern contexts.

Today, the concept of "confidential information" arises in a number of contexts, including: access to judicial records, bankruptcy court records, protective orders in civil discovery, Exemption 5's confidential-

commercial-information privilege, and Exemption 7's protection of law enforcement records. *Cf.* Resp. Br. 43–51. The rule against disclosure arises when a source entrusts information to the care of another and would be harmed by its disclosure.

Judicial Records: The common-law right of public access to judicial records contains an exception for commercial information that would cause competitive harm. In *Nixon v. Warner Communications, Inc.*, this Court made "clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." 435 U.S. 589, 597 (1978). Like the FOIA, the interest behind that right is "the citizen's desire to keep a watchful eye on the workings of public agencies and in a newspaper publisher's intention to publish information concerning the operation of government." *Id.* at 598 (citations omitted). But that right is, of course, not absolute and one limitation is for "sources of business information that might harm a litigant's competitive standing." *Id.* (citing *Schmedding v. May*, 48 N.W. 201, 202 (Mich. 1891)) (showing concern about releasing materials that would affect a litigant's "financial standing").

Bankruptcy Court: Similarly, in the bankruptcy context, Congress created a statutory right of access to papers filed with a bankruptcy court. *See* 11 U.S.C. § 107. But Congress devised an exemption to protect "trade secret[s] or confidential research, development, or commercial information[.]" *Id.* § 107(b)(1). Courts

view "confidential" in the Bankruptcy Code as protecting "information which would cause 'an unfair advantage to competitors by providing them information as to the commercial operations of the debtor.'" *In re Orion Pictures Corp.*, 21 F.3d at 27 (citing *In re Itel Corp.*, 17 B.R. 942, 944 (B.A.P. 9th Cir. 1982)); *see In re Glob. Crossing Ltd.*, 295 B.R. 720, 725 (Bankr. S.D.N.Y. 2003) (protecting against disclosure that could "reasonably be expected to cause the entity commercial injury"). This focus on "unfair advantage" and "commercial injury" mirrors concerns about "competitive harm" in other areas.

Civil Discovery: The same understanding is reflected in Federal Rule of Civil Procedure 26(c), which governs protective orders restricting access to discovery materials. One of the bases for the good-cause showing necessary to obtain a protective order is to ensure "that a trade secret or other *confidential* research, development, or commercial information not be revealed[.]" Fed. R. Civ. P. 26(c)(1)(G) (emphasis added). That standard is met when "a party's interest in *confidential* commercial information . . . [faces] a sufficient threat of *irreparable harm*." *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (citation omitted) (emphasis added); *see Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981) (asking if disclosure would cause "cognizable harm sufficient to warrant a protective order").

FOIA Exemption 5: This Court already has seen the importance of the competitive-harm principle and

adopted it in the FOIA context. In *Federal Open Market Committee v. Merrill*, the Court held that "Exemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract[.]" 443 U.S. at 360. The basis of that privilege, the Court reasoned, is not to protect the free exchange of information within agencies, as has been relied upon for other Exemption 5 privileges, but rather that "the Government will be placed at a *competitive disadvantage* or that the consummation of the contract may be endangered." *Id.* (emphasis added); *see id.* at 363 (protecting records because of "the harm that would be inflicted upon the Government by premature disclosure," and because "immediate release . . . would significantly harm the Government's . . . commercial interests" and "give unfair advantage"). Lower courts have adhered to this Court's direction that the harm principle "should continue to serve as relevant criteria in determining the applicability of this Exemption 5 privilege." *Id.*; *see Burka v. Dep't of Health & Human Servs.*, 87 F.3d 508, 518 (D.C. Cir. 1996); *Gov't Land Bank v. Gen. Servs. Admin.*, 671 F.2d 663, 665–66 (1st Cir. 1982); *Taylor-Woodrow Int'l v. Dep't of Navy*, No. 88-429, 1989 WL 1095561, at *3 (W.D. Wash. Apr. 5, 1989).

In a dissent from a denial of a petition for a writ of certiorari, two members of the Court expressed concern about a "disconcerting anomaly" that "confidential" in Exemption 4 and the government's confidential-commercial-information privilege under

Exemption 5 were not coterminous. *N.H. Right to Life v. Dep't of Health & Human Servs.*, 136 S. Ct. 383, 385 (2015). That concern is misplaced. Both exemptions protect information that would cause competitive harm if disclosed. The difference in application is because Exemption 5's confidential-commercial-information privilege protects information generated by government, while Exemption 4 protects information "obtained from a person." 5 U.SC. § 552(b)(4); *Merrill* 443 U.S. at 360 (noting different applications because Exemption 4 is "limited to information 'obtained from a person,' that is, to information obtained outside the Government.").

FOIA Exemption 7: This Court also has adopted a harm-based approach in interpreting "confidential" under Exemption 7, which protects law enforcement records that "could reasonably be expected to disclose the identity of a confidential source . . . which furnished information on a confidential basis," or that contain "information furnished by a confidential source" during a "lawful national security investigation." 5 U.S.C. § 552(b)(7)(D). Once again, the concept of "confidential information" arises in the context of a relationship and the duty that attaches when information is exchanged.

In *Department of Justice v. Landano*, the Court rejected a broad common-usage meaning of "confidential" and instead construed the term in light of the unique expectations that arise when individuals provide vital information to law enforcement authorities. 508 U.S. 165, 174 (1993) ("A source

should be deemed confidential if [it] furnished information with the understanding that the [government] would not divulge the communication except to the extent necessary for law enforcement purposes."). The same contextual approach proves useful in understanding Exemption 4.[2]

Under Exemption 7(D), "the question is not whether [a] requested *document* is of the type that [an] agency usually treats as confidential, but whether the particular *source* spoke with an understanding that the communication would remain confidential." *Id.* at 172. The exemption applies whenever disclosure is likely to harm a source's expectation of anonymity. Outside of an express promise of secrecy, that expectation is not "inherently implicit," as the government argued in *Landano*, *id.*

---

[2] The parallels between *National Parks* and *Landano* are compelling. In analyzing the "dual purpose" of Exemption 4, the D.C. Circuit—perhaps unknowingly—drew a connection between the government's interest in collecting "commercial and financial data" and the possible existence of an implied assurance of confidentiality. *Nat'l Parks*, 498 F.2d at 767–68 ("Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials[.]"). Thus, the relationship of confidence created when sensitive commercial or financial information is given to the government is similar to the relationship between a law enforcement official and informant. In both cases, the source providing information expects secrecy given the harm that would occur from any violation of confidence by the other party. *Cf. infra* § II.A (discussing relationship between competitive disadvantage from disclosure and impairment of government information collection).

at 174, but is established on an "individualized" basis by examining several factors, including (a) whether a source was a "paid informant," (b) the "nature of the source's ongoing relationship" with law enforcement officials, (c) the "character of the crime at issue," and (d) "the source's relation to the crime." *Id.* at 179.

These last two factors reflect how an expectation of confidentiality is founded in a source's fear that he may be harmed if his identity is disclosed. Courts consistently note the danger of bodily harm, invasion of safety, harassment, and retaliation when evaluating the existence of an implied promise of confidentiality. *See id.* at 179–80; *see also, e.g.*, *Massey v. Fed. Bureau of Investigation*, 3 F.3d 620, 623 (2d Cir. 1993) ("*Landano* noted that courts may look to the risks an informant might face were her identity disclosed, such as retaliation, reprisal[,] or harassment[.]"); *accord Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 487–88 (2d Cir. 1999) ("If the identities of the sources . . . were disclosed, they would face an objectively real and substantial risk of retaliation, reprisal or harassment."); *Williams v. Fed. Bureau of Investigation*, 69 F.3d 1155, 1159–60 (D.C. Cir. 1995) (same). At least one court has recognized the relevance of commercial harm under Exemption 7(D). *See Council on Am.-Islamic Relations v. Fed. Bureau of Investigation*, 749 F. Supp. 2d 1104, 1122 (S.D. Cal. 2010) ("[D]isclosure of the information would 'likely cause substantial harm to the competitive position of the [informant] companies[.]'").

Petitioner relies on *Landano* but mischaracterizes its holding. *See* Pet. Br. 19–21. This Court recognized the inadequacy of a bare dictionary definition of "confidential," which merely set the farthest limits of its possible meaning. *See Landano*, 508 U.S. at 173 (citing Webster's Third New International Dictionary 476 (1986)). Instead, it looked to common usage and context as a basis for inferring confidentiality. That context, in turn, required examining individualized circumstances. Foremost among these is whether disclosure will cause harm.

* * *

Petitioner's insistence on a simple dictionary definition does not give "confidential" its proper legal meaning. Understood in context—after consulting canons of construction, historical origins, and usage in other contexts—"confidential information" is information that, if disclosed, would cause its source competitive harm.[3] This Court should interpret Exemption 4 in fidelity with that understanding.

---

[3] This understanding is further supported by Respondent's recognition of a sliding scale of confidentiality, where information can be more or less confidential, indicating that the magnitude of the harm from disclosure is a relevant consideration. *See* Resp. Br. 46–47.

II. The Court should provide clarity on other aspects of Exemption 4's confidential-information test.

After confirming that competitive harm is the core of the test to withhold information as "confidential," the Court should clean up other elements of the Exemption 4 inquiry. Specifically, the Court should (1) eliminate the *National Parks* government-impairment justification for withholding information as unnecessary and duplicative, (2) abandon the *Critical Mass* distinction between information submitted voluntarily or under compulsion as atextual, (3) confirm that competitive harm is analyzed under an objective test, and (4) recognize reputational harm can be a valid competitive harm.

A. The Court should eliminate the government-impairment justification for withholding information because it is unnecessary and duplicative.

The D.C. Circuit's *National Parks* test for Exemption 4 allows an agency to withhold information as "confidential" if disclosure is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks*, 498 F.2d at 770; *see also Sharkey v. Food & Drug Admin.*, 250 F. App'x 284, 288 (11th Cir. 2007) (adopting *National Parks*); *Utah v. Dep't of Interior*, 256 F.3d 967, 969 (10th Cir. 2001) (same). Both of these justifications protect the same sphere of

information and, therefore, it is unnecessary and duplicative to treat them as distinct.

When the D.C. Circuit created the government-impairment justification in *National Parks*, it canvassed the FOIA's legislative history and stated that Exemption 4's "'financial information' exemption recognizes the need of government policymakers to have access to commercial and financial data." 498 F.2d at 767. The D.C. Circuit reasoned that "[u]nless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired." *Id*. Although this may be a legitimate policy concern, there is nothing in the text, history, or contextual usage of "confidential" to support withholding information on that basis.

More importantly, when properly considered, the two justifications in *National Parks* are two sides of the same coin. Because the concept of "confidential information" arises out of the law of confidential relationships, it follows that both parties in that relationship have interests that deserve to be protected. For example, while the master has an interest in his secret formulas not being released, so too does the apprentice have a corresponding interest in being trusted to receive the information without the master fearing its misuse. Without the law's protection of "confidential information," the master will not share it and the apprentice will be worse off. But although the justification can be stated either as

protecting the master from harm or preventing the impairment of the apprentice from receiving it, the sphere of information protected is the same. Thus, there is no need to rely on the impairment prong to justify the protection.

The interests of the parties in a confidential relationship in preserving the flow of information cannot be divorced from the nature of the information being exchanged. Confidential relationships arise precisely because some harm could befall the party providing sensitive information if it were disclosed to the public. And, without a likelihood of harm upon disclosure or misuse, there is no disincentive for sharing sensitive information. As discussed above, this Court's treatment of "confidential" under Exemption 7(D) is helpful in illustrating the principle. *See supra* § I.B.2. An informant has an expectation of confidentiality in his dealings with law enforcement because the disclosure of his identity, or the information he provides, could cause real harm; the government's ability to obtain that information would be impaired if that confidentiality were not respected.

At some level, the *National Parks* court appears to have recognized the interrelation of interests found on each side of a confidential relationship, but it confused the government's interest as entirely distinct and severable. 498 F.2d at 767. That confusion may be based on the D.C. Circuit's inadequate reading of *Soucie v. David*, 448 F.2d 1067, 1078 & 1078 n.46 (D.C. Cir. 1971), which depended on inapposite cases dealing with other aspects of Exemption 4. *See, e.g.*,

Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 582 (D.C. Cir. 1970) (focusing on whether information has been "obtained from any person"). The *Soucie* court also misread cases that presaged the necessary link between the government-impairment and harm justifications. *See Bristol-Meyers Co. v. Fed. Trade Comm'n*, 424 F. 2d 935, 938 (D.C. Cir. 1970) ("This provision serves the important function of protecting the privacy and the competitive position of the citizen who offers information to assist government policy makers.").

Amici therefore urge the Court to abandon the first justification in *National Parks* and retain the second, with its proper focus on competitive harm. The first interest—"the Government's ability to obtain necessary information in the future," 498 F.2d at 770—is adequately covered by the competitive-harm test. The protection of information that will cause competitive harm to its source operationalizes the term and is true to its historical usage.

B. The Court should eliminate the atextual distinction created in *Critical Mass* between information that is obtained through voluntary or compulsory means.

Nearly twenty years after the introduction of the *National Parks* competitive-harm test, the D.C. Circuit reversed course in part by creating a distinction between information obtained on a *voluntary* basis and information obtained under

compulsion. "In the latter case," the court held, "there is a presumption that the Government's interest [in ensuring the continued submission of information] is not threatened by disclosure because it secures the information by mandate," and therefore an inquiry into the likely harm in disclosure is appropriate. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F. 2d 871, 878 (D.C. Cir. 1992) [hereinafter *Critical Mass*]. But in cases of *voluntary* submission, "the private interest served by Exemption 4 is the protection of information that, for whatever reason, 'would customarily not be released to the public by the person from whom it was obtained[.]'" *Id.* (citation omitted). This lessened standard is entirely atextual and subjective. Neither the plain text of Exemption 4 nor the legal meaning of "confidential" suggest any difference in treatment for voluntarily produced or compelled information. The Court should overrule *Critical Mass* and apply the *National Parks* competitive-harm test in all cases.[4]

---

[4] Consider if a CEO emails an agency head to arrange a lunch meeting and, in that email, includes information about a dispute between the company and agency. Under *Critical Mass*, because the CEO voluntarily sent the email, a court would affirm the agency withholding it because emails between CEOs and agency heads are "customarily not . . . released to the public[.]" 975 F.2d at 879. Similarly, under Petitioner's standard, the email would be withheld because it is "something kept private and not publicly disclosed." Pet. Br. 16. But under *amici*'s test, the email could only be withheld if its disclosure would cause the company competitive harm. More likely, a court would require the agency to conduct a segregability analysis and release the portion of the

As an initial matter, the conceptual distinction between voluntary and compulsory submissions is difficult to maintain in application. *See, e.g.*, *McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin.*, 895 F. Supp. 316, 317–18 (D.D.C. 1995) ("[N]o bright line rule exists for determining voluntariness[.]"). In this case, for example, the district court held that the *National Parks* test applied because "SNAP retailers [were] required to disclose EBT data if they want[ed] to be compensated" for accepting food stamps. Pet. App. 67a n.3 (citation omitted). The parties never disputed that choice of test. But it is not entirely clear why, as a categorical matter, a person's *voluntary* participation in a government program, including a welfare benefits compensation scheme, should always entail the *compulsory* submission of commercial or financial information for Exemption 4 purposes, notwithstanding the paperwork or reporting requirements of that program.

To be sure, many courts have recognized that "when the government requires a private party to

---

email about the lunch but withhold information describing the dispute. *Cf. Judicial Watch, Inc. v. Dep't of Treasury*, 802 F. Supp. 2d 185, 205–07 (D.D.C. 2011) (allowing agency to withhold portions of "Current Draft Talking Points" shared with it by a company because they were submitted voluntarily, but requiring the agency to conduct a segregability analysis). *Amici*'s approach draws the proper balance between allowing oversight of government activity, including interactions with private entities, and protecting companies from competitive harm that would result from disclosure of their information in government hands.

submit information as a condition of doing business," that submission is "required" for the purposes of *Critical Mass*. *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000). But some courts have taken the opposing view. *See, e.g.*, *Envtl. Tech., Inc. v. Envtl. Prot. Agency*, 822 F. Supp. 1226, 1229 (E.D. Va. 1993) (information provided in response to EPA bid request was submitted voluntarily). And at least three circuits have rejected the *Critical Mass* distinction altogether or deferred its adoption. *See N.H. Right to Life v. Dep't of Health & Human Servs.*, 778 F.3d 43, 52 n.8 (1st Cir. 2015); *Am. Mgmt. Servs., LLC v. Dep't of the Army*, 703 F.3d 724, 731 n.6 (4th Cir. 2013); *Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 245 n.6 (2d Cir. 2006); *Frazee v. U.S. Forest Serv.*, 97 F.3d 367, 372 (9th Cir. 1996).

Critical Mass ultimately obliterates any meaningful distinction between "voluntary" and "compulsory." It also complicates the Exemption 4 analysis for information submissions that contain both voluntary *and* compulsory elements. *See, e.g.*, *Am. Mgmt. Servs., LLC*, 703 F.3d at 731 n.6 ("[T]his case would present a unique circumstance because [the] disclosures . . . have both voluntary and obligatory elements."). In that situation, it is burdensome for submitters, agencies, FOIA requesters, and courts alike to determine the proper standards for withholding. Finally, *Critical Mass* fails to attend to the common-sense distinction between cases when information is submitted as a "condition of doing business with the government"—for example,

providing sensitive business information on a grant application or contract bid—and information collected as part of compliance with generally applicable laws or as a cost of participating in a regulated market.[5]

Yet another criticism of the *Critical Mass* test for "voluntary" submissions is that a subjective standard is required to determine whether information is "customarily" released to the public. Although the D.C. Circuit has insisted that *Critical Mass* is an "objective" approach, 975 F.2d at 879, it is difficult to accept that claim. An objective test would focus on the *nature* of the information at issue to determine its confidentiality. A "customary" test, by definition, is relative and subjective, looking at how an individual person typically treats (or intends to treat) information. The dissenting opinion in *Critical Mass*, authored by then-Judge Ruth Bader Ginsburg, explained the issue this way:

---

[5] When government obtains information on a voluntary basis, Exemption 3 may provide a mechanism for withholding. 5 U.S.C. § 552(b)(3) (coving records "specifically exempted from disclosure by statute"); *see, e.g.*, 15 U.S.C. §§ 46(f), 57b-2(f) (limiting FTC disclosure of "material . . . provided voluntarily in place of . . . compulsory process"); I.R.C. § 6103 (limiting disclosure of tax returns or return information); 19 U.S.C. § 1677f (limiting disclosure of foreign-subsidy information designated as proprietary by a submitter); 15 U.S.C. § 3710a(c) (protecting "commercial or financial information . . . obtained" during cooperative research and development).

> [T]he court's slacked test is not "objective" in any sense . . . . No longer is there to be an independent judicial check on the reasonableness of the provider's custom and the consonance of that custom with the purposes of [E]xemption 4 . . . . To the extent that the court allows providers to render categories of information confidential merely by withholding them from the public long enough to show a custom, the revised test is fairly typed "subjective[.]"

Id. at 883.

The *Critical Mass* distinction creates an unworkable subjective standard that is difficult to apply, allows businesses to work around the FOIA to frustrate public disclosure, and deviates from the well-established legal meaning of "confidential." The Court should require the same *National Parks* competitive-harm standard for all Exemption 4 cases dealing with "confidential" information.

C. Courts must adopt an objective test for determining the confidentiality of commercial or financial information.

Petitioner's broad definition of "confidential" would require courts to adopt a *subjective* test when applying Exemption 4. *National Parks* and its progeny across the circuits, however, have counseled that "the test for confidentiality is an *objective* one."

Nat'l Parks, 498 F.2d at 766 (emphasis added); *accord GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994), *overruled on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016); *9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 9 (1st Cir. 1983); *cf. Bristol-Myers Co.*, 424 F.2d at 938.

Petitioner suggests that "confidential" commercial or financial information ought to include anything that is "kept private and not publicly disclosed." Pet. Br. 16. Petitioner even implies that "confidential information" could extend to materials that a person *intended* to keep secret. *See id.* at 21 (discussing pre-*National Parks* caselaw); *see also* Pet. 16, 18 ("Information is confidential if it is . . . 'intended to be held in confidence or kept secret.'"). That approach is at once too broad and too difficult to apply.

Under Petitioner's interpretation of Exemption 4, confidentiality would no longer depend on the quality of the information at issue, or even on how a person used it in fact. Instead, public access to the information would depend on how an individual submitter intended to use it. This is a subjective test that would disrupt fair administration of the FOIA, upset the predictability of Exemption 4's application, and run afoul of congressional intent. *See 9 to 5 Org. for Women Office Workers*, 721 F.2d at 9 (rejecting a test that "would depend solely on the submitter's subjective intent") (citation omitted). Moreover, it would be difficult for courts to test the veracity of

claims about the "confidentiality" of records, or would at least complicate the inevitable trial proceedings.

The objective test and evidentiary standards that have developed post-*National Parks*, on the other hand, form an approach to which this Court should grant its imprimatur as the benchmark for Exemption 4 analysis. *See Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976) [hereinafter *Nat'l Parks II*] ("Confidential" information is protected when "specific factual or evidentiary material" demonstrates that its source "actually face[s] competition" and "competitive injury would likely result from disclosure"). To sustain a withholding under the "confidential" portion of Exemption 4, an agency (or submitter) must demonstrate "both actual competition and a likelihood of substantial competitive injury." *Jurewicz v. Dep't of Agric.*, 741 F.3d 1326, 1331 (D.C. Cir. 2014) (citation omitted).

By contrast, "generalized allegations relating to competitive harm," which lack "any concrete or detailed explanation," should be rejected as inadequate. *Trifid Corp. v. Nat'l Imagery & Mapping Agency*, 10 F. Supp. 2d 1087, 1099 (E.D. Mo. 1998); *see United Techs. Corp. v. Dep't of Def.*, 601 F.3d 557, 564 (D.C. Cir. 2010) (finding a showing of harm when "a contractor pinpoint[ed] by letter and affidavit technical information it believe[d] that its competitors c[ould] use in their own operation").

An objective test for Exemption 4 finds strong corollaries in broader FOIA principles, such as the requirement that agencies provide detailed justifications for the use of exemptions. *See, e.g.*, *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973) (agencies may not rely on "conclusory and generalized allegations"). An objective test with strict evidentiary requirements also follows this Court's direction that an agency bears the burden in sustaining its withholdings. *See* 5 U.S.C. § 552(a)(4)(B); *see also Nat'l Parks II*, 547 F.2d at 679 n.20 ("The party seeking to avoid disclosure bears the burden of proving that the circumstances justify nondisclosure."). Allowing an agency or source of information to sweep records outside the scope of the FOIA based on a subjective standard of intended secrecy would not only allow Exemption 4 to "swallow the FOIA nearly whole," as the Eight Circuit observed, Pet. App. 4a n.4, but it would make Exemption 4 an outlier among its sister exemptions.

D. Exemption 4 should protect against certain types of reputational harm that have a negative impact on competitive standing.

Finally, the Court should provide clarity about whether reputational injury flowing from disclosure of confidential information is a basis for withholding information under Exemption 4. As Justice Thomas explained in his dissent from the denial of writ of certiorari in *New Hampshire Right to Life*, at least two circuits have reached different outcomes on that

question. 136 S. Ct. at 364–85. *Amici* propose that *some* kinds of reputational injury—namely, reputational injuries that will have a demonstrated negative impact on competitive standing—should satisfy the *National Parks* test, assuming the likelihood of competitive harm is demonstrated objectively with adequate, non-conclusory evidence.

Soon after it decided *National Parks*, the D.C. Circuit provided one of its first clarifications on the competitive-harm test by explaining that "parties opposing disclosure need not 'show actual competitive harm,'" but merely "'[a]ctual competition and the likelihood of substantial competitive injury[.]'" *Pub. Citizen*, 704 F.2d at 1291 (citation omitted). In doing so, the court also opined, in a footnote and without elaboration, that "'[c]ompetitive harm should not be taken to mean simply any injury to competitive position, as might flow from . . . *embarrassing publicity*[.]'" *Id.* at 1291 n.30 (citation omitted).

That dictum, without substantive analysis, has been recycled over the years in the D.C. Circuit. *See United Techs. Corp.*, 601 F.3d at 564 ("Exemption 4 does not guard against mere embarrassment in the marketplace or reputational injury[.]"); *Occidental Petroleum Corp. v. Sec. & Exch. Comm'n*, 873 F.2d 325, 341 (D.C. Cir. 1989); *CAN Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 & nn. 157–58 (D.C. Cir. 1987). Two other circuits have adopted it. *Watkins v. Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1202 (9th Cir. 2011); *Gen. Elec. Co. v. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984).

The Second Circuit, by contrast, has rejected *Public Citizen*, and instead recognized that any disclosure of commercial or financial information that is likely to have a reputational harm also can carry negative competitive consequences. *See Nadler v. Fed. Deposit Ins. Corp.*, 92 F.3d 93, 97 (2d Cir. 1996) ("The fact is that release might hinder the commercial success of the development project . . . . This potential harm is not properly characterized as 'political.'"). No other circuit has adopted a similar stance, but the Tenth Circuit considered doing so and left the matter unresolved. *See Utah*, 256 F.3d at 970 n. 2.

At its heart, the *Public Citizen* dictum appears to have been misinterpreted, and courts have run away with the error. The D.C. Circuit was at pains to emphasize that competitive harm must flow "from the affirmative use of proprietary information *by competitors*." *Pub. Citizen*, 704 F.2d at 1291 n.30. That is, *mere* embarrassment or damage to goodwill *based on the fact of disclosure to the public* cannot constitute "competitive harm." But that is not the same thing as categorically discounting the negative economic consequences of reputationally damaging information being released into the public domain, such that the competitive standing of a firm is impacted in a real way. Although it may not have recognized the significance of its own observation, the D.C. Circuit appears to have made this point in a case affirming *Public Citizen*:

> [The] right to an exemption, if any, depends upon the *competitive significance* of whatever information may be contained in the documents, not upon whether its motive is to avoid embarrassing publicity. [An agency's] role, therefore, is not to assess the overall damage, regardless of its nature, that would result from disclosure of [embarrassing information], but rather to determine whether any non-public information contained in those documents is *competitively* sensitive, for whatever reasons.

Occidental Petroleum Corp., 873 F.2d at 341. This language appears to support the approach endorsed by the Second Circuit. The disclosure of information, which at first glance appears only to entail mere "political" or reputational harm, can have "competitive significance."

Amici therefore ask the Court to interpret Exemption 4 to protect against reputational harms that have a demonstrable impact on competitive standing, and which can be proven under the objective standard and evidentiary burdens that are well-established across multiple circuits.

CONCLUSION

The Court should affirm the decision below and construe the term "confidential" in Exemption 4 to include information that, if made public, likely would cause competitive harm to its source. The *National Parks* standard gives effect to the historical and legal meaning of "confidential," as well as the statutory text. Finally, the Court should provide clarity on other aspects of the Exemption 4 test by (1) eliminating the *National Parks* government-impairment justification, (2) abandoning the *Critical Mass* distinction between information submitted voluntarily or under compulsion, (3) reiterating that competitive harm is analyzed under an objective test, and (4) accepting certain reputational harms that affect competitive standing as cognizable under Exemption 4.

March 22, 2019

Respectfully submitted,

Ryan P. Mulvey
Counsel of Record
R. James Valvo, III
CAUSE OF ACTION INSTITUTE
1875 Eye Street, NW, Ste. 800
Washington, DC 20006
202.499.4232
ryan.mulvey@causeofaction.org
james.valvo@causeofaction.org

Counsel for CoA Institute

Anne Weismann
CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON
1101 K Street, NW, Suite 201
Washington, DC 20005
202.408.5565
aweismann@citizensforethics.org
Counsel for Citizens for Responsibility and Ethics in Washington

Allan Blutstein
FOIA ADVISOR
400 Massachusetts Avenue, NW
Washington, DC 20001
allan.blutstein@gmail.com
Counsel for FOIA Advisor

Lisa Rosenberg
OPEN THE GOVERNMENT
1612 K Street, NW
Washington, DC, 20006
202.332.6736
lrosenberg@openthegovernment.org
Counsel for Open the Government

Scott Amey
PROJECT ON GOVERNMENT OVERSIGHT
1100 G Street NW, Suite 500
Washington, DC 20005
202.347.1122
scott@pogo.org
Counsel for Project on Government Oversight