No. 18-481

IN THE
Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, DBA ARGUS LEADER,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DEBORAH R. WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

QUESTIONS PRESENTED

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

2. Alternatively, if the Court retains the substantial-competitive-harm test, is that test satisfied when the requested information could be potentially useful to a competitor, or must the party opposing disclosure establish with near certainty a defined competitive harm like lost market share?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the Retail Litigation Center has participated as an amicus in more than 100 cases of great importance to retailers.

The members of the RLC have a strong interest in the outcome of this proceeding. Exemption 4 of the Freedom of Information Act (FOIA) protects against disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). When the RLC's members disclose confidential information to the government, they rely on Exemption 4 to ensure that the confidential information will not be released to the

---

[1] Counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

general public. The Eighth Circuit's decision artificially narrows Exemption 4 by applying it only if disclosure is "likely to cause substantial harm to the competitive position of" the provider. Pet. App. 3a. Thus, even if a company can show that disclosure of confidential information would be harmful, the Eighth Circuit nonetheless requires disclosure so long as that harm does not meet the vague requirement of being "substantial." Worse, if a company concludes, and provides evidence, that disclosure of its confidential information is likely to cause substantial competitive harm, the Eighth Circuit's decision allows a federal judge to override the company's assessment—even though the company is in a far better position than the court to predict the competitive consequences of disclosure.

Exemption 4, by its terms, applies to *all* confidential information. Thus, if a company discloses information to the government but otherwise keeps that information confidential, Exemption 4 requires the government to respect the company's confidentiality decision. The RLC's members have a strong interest in ensuring that Exemption 4 is applied according to its unambiguous terms.

SUMMARY OF ARGUMENT

The Court should expressly reject "the rule favoring narrow construction of FOIA exemptions." *Milner v. Dep't of the Navy*, 562 U.S. 562, 579-80 (2011).

This Court has never articulated a principled basis for the narrow-construction canon. The canon appears to have originated in ill-considered dicta from a line of

D.C. Circuit cases from the early 1970s. In *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), this Court adopted the narrow-construction canon, citing only the D.C. Circuit cases in support. Subsequent cases have repeated the canon, but this Court has never explained its basis, beyond adverting to FOIA's supposed general policy in favor of disclosure.

That supposed general policy is an insufficient basis for inferring a narrow-construction canon. Last Term, this Court rejected a nearly identical narrow-construction canon for Fair Labor Standards Act (FLSA) exemptions. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). The employee argued that because the FLSA is generally intended to assist employees, exemptions to the FLSA should be construed narrowly. This Court disagreed, finding that the FLSA's exemptions should not be artificially narrowed based on policy concerns. Here, too, Exemption 4—and FOIA's other exemptions—should be applied according to their terms.

At a minimum, the narrow-construction canon should not be used to narrow an *unambiguous* statute. The Eighth Circuit expressly acknowledged that its interpretation of Exemption 4 deviated from the dictionary definition of "confidential," but it held that the narrow-construction canon gave it license to ignore the exemption's plain text. The Eighth Circuit erred in unapologetically rewriting a federal statute.

The Court should expressly repudiate the narrow-construction canon in this case. Even though *Encino* undermines the arguments in favor of the narrow-construction, lower Courts are nonetheless likely to

follow that canon unless this Court instructs them not to. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018) (lower courts are bound by Supreme Court's pronouncements, "[h]owever persausive" the arguments against them (quotation marks omitted)). That canon has a significant impact in lower-court FOIA litigation, including in cases involving sensitive law enforcement and national security materials. This Court rarely hears FOIA cases, so the opportunity to reconsider the narow-construction canon rarely arises. The Court should take the opportunity in this case to repudiate that canon and direct lower courts to interpret FOIA according to its terms.

ARGUMENT

The RLC agrees with Petitioner that Exemption 4 of FOIA applies to all confidential information, rather than a limited subset of confidential information that, in the view of a federal district judge, would cause "substantial competitive harm" if released. The Court should hold that "confidential" means "confidential," rather than arbitrarily narrowing Exemption 4 based on a generalized intuition that the more disclosure, the better.

The RLC writes separately to urge the Court to reject "the rule favoring narrow construction of FOIA exemptions." *Milner*, 562 U.S. at 579-80. The Eighth Circuit applied that rule in rejecting Petitioner's interpretation of Exemption 4. Pet. App. 4a n.4. Yet this Court has never articulated any principled basis for this canon, and none exists. Further, the canon improperly encourages courts to artificially narrow the

scope of unambiguous FOIA exemptions—as occurred in this case. This Court recently rejected a similarly unprincipled narrow-construction canon for FLSA exemptions. *See Encino*, 138 S. Ct. at 1142. Thus, as Petitioner suggests (Pet. Br. 32 n.19), this Court should reject the narrow-construction canon in this case as well.

I. This Court Has Never Articulated A Principled Basis For The Narrow-Construction Canon.

The narrow-construction canon for FOIA exemptions has humble roots. It appears to have originated in poorly-explained dicta from D.C. Circuit decisions in the early 1970s. This Court then imported the canon from the D.C. Circuit, citing the D.C. Circuit's dicta and offering no additional explanation. Later decisions of this Court have continued reciting the narrow-construction canon, eventually characterizing it as "oft-repeated" and "consistently stated." But this Court's sole support for this canon has been its own prior cases; it has never offered any principled explanation for the canon.

The narrow-construction canon appears to have originated in two D.C. Circuit cases by Chief Judge Bazelon: *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970), and *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970). *Bristol-Myers* declared that "[t]he legislative plan creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed," 424 F.2d at 938, while *Grumman* similarly asserted that "the Act requires that exemptions be

narrowly construed," 425 F.2d at 580 n.5. In support of this proposition, both cases cited the statute now codified at 5 U.S.C. § 552(d).[2] That statute, however, does not create a narrow-construction canon. It actually says the exact opposite: "This section does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated in this section*." 5 U.S.C. § 552(d) (emphasis added). Thus, Congress insisted that courts follow the *specific* terms of the exemptions, rather than artificially altering them via a judge-made canon with no basis in the statutory text.

Nonetheless, after creating a narrow-construction canon out of whole cloth, the D.C. Circuit continued to invoke it, citing only its prior cases for support.

- In *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971), the D.C. Circuit asserted that Exemption 4 "is intended to encourage individuals to provide certain kinds of confidential information to the Government, *and it must be read narrowly in accordance with that purpose*." *Id.* at 1078 (emphasis added). The court offered no additional explanation but inserted a footnote consisting of a string-cite of a Senate Report, a House Report, *Bristol-Myers*, *Grumman*, a district court case, and seven additional cases that do not mention FOIA, including two 19th-century cases. *Id.* at 1078 n.46.

[2] At the time, the statute was codified at 5 U.S.C. § 552(c). *See Bristol-Myers*, 424 F.2d at 938; *Grumman*, 425 F.2d at 580 n.5.

- In *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971), the D.C. Circuit recited the same canon, citing *Bristol-Myers* for support. *Id.* at 672.
- In *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), the D.C. Circuit repeated the canon, citing *Getman*, *Bristol-Myers*, and a district court case that relied on *Bristol-Myers*. *Id.* at 823 & n.11.
- The *Vaughn* case later returned to the D.C. Circuit, and the court declared that it had "repeatedly stated" that exemptions must be construed narrowly. *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975). The court's support for this proposition consisted of *Soucie* and the first iteration of *Vaughn*. *Id.* at 1142 nn.23-24.

This Court first recited the narrow-construction canon in *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). In that case, the Court stated that FOIA's exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.* at 361. It then declared that these exemptions "must be narrowly construed." *Id.* Its sole authority for this proposition consisted of three of the D.C. Circuit cases cited above: the two *Vaughn* cases and *Soucie*. *Id.* The Court then offered a block-quotation from a prior case from this Court that did not recite a narrow-construction canon, but instead merely characterized FOIA as "broadly conceived." *Id.* (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973)). That block-quotation also cited a Senate Report that did not

endorse a narrow-construction canon either, but instead observed that "[s]uccess lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." *Id.* (quoting S. Rep. No. 89-813, at 3 (1965)). No additional explanation for the narrow-construction canon was provided.

Rose was apparently sufficient to give the narrow-construction canon a foothold in the law. After *Rose*, this Court continued reciting the narrow-construction canon, citing only its prior cases and offering no additional explanation. The Court next invoked the narrow-construction canon in *FBI v. Abramson*, 456 U.S. 615 (1982). Even though *Abramson* was only the second time that this Court had mentioned the canon, the Court characterized it as "oft-repeated"—citing only *Rose* for support. *Id.* at 630. The canon appeared for a third time in *United States Department of Justice v. Julian*, 486 U.S. 1 (1988), in which the Court declared that "the mandate of the FOIA calls for broad disclosure of Government records," and thus asserted that "for this reason we have consistently stated that FOIA exemptions are to be narrowly construed." *Id.* at 8 (quotation marks and brackets omitted). Despite the assertion that this canon was "consistently" applied, the only two cases cited in support of this proposition were *Abramson* and *Rose*. *Id.*

Subsequent cases from this Court continued to characterize the narrow-construction canon as a consistently applied rule, citing prior cases in the jurisprudential chain. *See, e.g.*, *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (stating that

"these exemptions have been consistently given a narrow compass" and citing *Julian* and *Abramson*); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (similar, citing *Rose*); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 180 (1991) (similar, citing *John Doe*). In *United States Department of Justice v. Landano*, 508 U.S. 165 (1993), this Court cast the narrow-construction canon as an "obligation," citing only *John Doe* and *Rose* for support. *Id.* at 181. More recent cases have continued to assert the canon and cite older cases without additional explanation. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (citing *Tax Analysts* and *Abramson*); *Milner*, 562 U.S. at 571 (citing *Tax Analysts*, *Klamath*, and *Landano*).

To sum up, the narrow-construction canon has its origins in D.C. Circuit cases decided almost 50 years ago that relied exclusively on a statute reciting the exact opposite of a narrow-construction canon. A "canon" with such a weak legal basis is ripe for reconsideration.

II. There Is No Basis For The Narrow-Construction Canon.

This Court's sole justification for the narrow-construction canon has been the "basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361; *see Julian*, 486 U.S. at 8 (citing FOIA's "mandate" of "broad disclosure"). This general policy is not a sound basis for ignoring the plain language of a statute. This Court rejected a similar narrow-construction canon for FLSA exemptions in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134

(2018). The Court's analysis in *Encino* requires the same result for FOIA exemptions as well.

The FLSA is structured similarly to FOIA. FOIA imposes a general obligation for the government to make information available to the public, 5 U.S.C. § 552(a), subject to several enumerated exemptions, 5 U.S.C. § 552(b)(1)-(9). Similarly, the FLSA imposes a general obligation for employers to pay minimum wage and overtime pay to employees, 29 U.S.C. §§ 206, 207, subject to several enumerated exemptions, 29 U.S.C. § 213(a)(1)-(19) (exemptions to both minimum wage and overtime requirements), 29 U.S.C. § 213(b)(1)-(30) (additional exemptions to overtime requirement).

In *Encino*, this Court considered whether service advisors at car dealerships fell within the FLSA's exemption from the overtime-pay requirement for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." 29 U.S.C. § 213(b)(10)(A). The Court held that the exemption applied, reasoning that service advisors were "salesmen" who were "primarily engaged in … servicing automobiles." 138 S. Ct. at 1140-41. The Court rejected the employees' argument that the exemption applied only to salesman who *sold* (as opposed to serviced) automobiles. *Id.* at 1141-42.

The employees also "invoked the principle that exemptions to the FLSA should be construed narrowly." *Id.* at 1142. This Court "reject[ed] the principle as a useful guidepost for interpreting the FLSA." *Id.* It explained that "[b]ecause the FLSA gives no textual indication that its exemptions should be construed narrowly, there is no reason to give

[them] anything other than a fair (rather than a 'narrow') interpretation." *Id.* (quotation marks omitted). It noted that the "narrow-construction principle relies on the flawed premise that the FLSA pursues its remedial purpose at all costs," emphasizing that it "is quite mistaken to assume … that whatever might appear to further the statute's primary objective must be the law." *Id.* (quotation marks, alterations, and citations omitted). The Court also observed that the FLSA has numerous exemptions, and "[t]hose exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement." *Id.* Therefore, this Court held, "we thus have no license to give the exemption anything but a fair reading." *Id.*

Identical reasoning requires rejecting the narrow-construction canon for FOIA exemptions. First, like the FLSA, FOIA "gives no textual indication that its exemptions should be construed narrowly." *Id.* (quotation marks omitted). To the contrary, FOIA instructs that exemptions should be construed according to their terms: "This section does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated in this section*." 5 U.S.C. § 552(d) (emphasis added). Contrary to the 1970s D.C. Circuit cases in which the narrow-construction canon originated, this provision does not provide license to a federal court to interpret FOIA exemptions more narrowly than their text would dictate.

Second, although FOIA doubtless was enacted with the general purpose of facilitating disclosure of government information, it "is quite mistaken to

assume … that whatever might appear to further the statute's primary objective must be the law." *Encino*, 138 S. Ct. at 1142 (quotation marks omitted). Just as the FLSA's exemptions "are as much a part of the FLSA's purpose as the overtime-pay requirement," *id.*, so, too, are FOIA's exemptions as much a part of its purpose as its general disclosure requirement.

Indeed, it is arbitrary to focus on FOIA's "mandate" of "broad disclosure," *Julian*, 486 U.S. at 8, as a basis for construing Exemption 4. One could just as easily say that *Exemption 4*'s "mandate" is one of broad protection for confidential information acquired from third parties, based on *Exemption 4*'s policy that FOIA should not harm the confidentiality interests of private parties who give financial information to the government. And by defining Exemption 4's mandate that way, one could just as easily say that Exemption 4 should be construed *broadly* to achieve that mandate. That reasoning is faulty, just as the reasoning underlying the narrow-construction canon is faulty. In reality, FOIA has multiple objectives, including not impeding the government from receiving confidential business information, and those objectives are reflected in both the disclosure obligation and the exemptions. All of Congress's objectives are best advanced by applying the statute as written. *Encino*, 138 S. Ct. at 1142 ("Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage" (quotation marks omitted)).

The narrow-construction canon also produces counterintuitive results with respect to other FOIA exemptions. For instance, FOIA Exemption 1 applies

to information kept secret "in the interest of national defense or foreign policy," while FOIA Exemption 7 applies to certain "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(1), (7). Under the narrow-construction canon, courts would assume that Congress intended to disfavor national security and law enforcement interests, and therefore that those exemptions should be construed narrowly. Yet there is nothing in the statutory text, or even in broad conceptions of policy, that would support judge-driven efforts to undermine national security and law enforcement efforts by artificially narrowing the scope of these exemptions.

Indeed, concerns about law enforcement interests led the D.C. Circuit to make the opposite error: to arbitrarily *broaden* the scope of a different FOIA exemption based on a perception that FOIA, as written, did not protect law enforcement interests well enough. Exemption 2 of FOIA protects materials "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. § 552(b)(2), yet in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981), *abrogated by Milner v. Department of the Navy*, 562 U.S. 562 (2011), the D.C. Circuit expanded that exception to apply to any materials that might risk "circumvention of agency regulations or statutes," in light of its assessment that Congress would not have wanted to undermine "the effectiveness of law enforcement agencies." 670 F.2d at 1074. This Court rejected that countertextual interpretation in *Milner*, explaining that *Crooker*'s interpretation requires "cutting out some words and

pasting in others until little of the actual provision remains." 562 U.S. at 573 (citation and quotation marks omitted). As *Milner* demonstrates, FOIA's exemptions should be construed based on what they say, rather than based on courts' intuitions about whether disclosure is good or bad. The same reasoning justifies eliminating the narrow-construction canon.

III. The Narrow-Construction Canon Is Especially Pernicious As Applied To Unambiguous Statutes Like Exemption 4.

At a minimum, the Court should reject the application of the narrow-construction canon in a case like this one, where the exemption at issue is unambiguous.

The application of the narrow-construction canon is even more troubling in this case than in *Encino*. In *Encino*, the employee did not argue that an unambiguous statute should be modified based on policy concerns; rather, he merely argued that a statutory ambiguity should be resolved in the employee's favor. In particular, the employee contended that the exemption at issue was ambiguous as to whether it applied only to salesmen who sold, or also to salesmen who serviced, and that the employee should prevail in light of that ambiguity. *Encino*, 138 S. Ct. at 1141-42.

Here, by contrast, the Eighth Circuit applied the narrow-construction canon to modify an *unambiguous* statute. The word "confidential" is not ambiguous. "Confidential" is an ordinary English word that carries a well-understood meaning: a document is

"confidential" if it is kept secret, regardless of whether its disclosure will cause competitive harm. *See* Pet. 18 & nn.11-12 (citing dictionary definitions of "confidential"). To be sure, there may be factual disputes as to whether a particular document actually *is* confidential—for instance, litigants may disagree about whether the document is customarily disclosed. But the *word* confidential is not ambiguous.

Yet the Eighth Circuit applied the narrow-construction canon nonetheless. It expressly rejected the argument that the word "confidential" should be construed according to its "dictionary definition[]." Pet. App. 4a n.4 (internal quotation marks omitted). It found this argument to be "precluded by the Supreme Court's admonition that FOIA exemptions must be narrowly construed." *Id.* (internal quotation marks omitted). It reasoned that if dictionary definitions were applied, "Exemption 4 would swallow FOIA nearly whole." *Id.* Thus, it applied a rule that has no basis whatsoever in the statutory text: the provider of the information must proffer evidence not only that the information is confidential, but evidence of "actual competition and the likelihood of substantial competitive injury." Pet. App. 3a (quotation marks omitted).

The Eighth Circuit's reasoning is pernicious because it opens the door for courts to alter FOIA to conform to their policy preferences. If the narrow-construction canon is merely a tool to resolve ambiguities, the canon will apply only in the limited subset of cases where a statute is genuinely ambiguous.

But if the canon can be used to alter unambiguous exemptions, it becomes much more powerful.

The Eighth Circuit applied the canon to rewrite Exemption 4, but courts could apply the canon to rewrite other exemptions as well. For instance, a court may disagree with Congress's policy judgment that information "related solely to the internal personnel rules and practices of an agency," or information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions," is exempted from disclosure. 5 U.S.C. § 552(b)(2), (8). Thus, a court could take it upon itself to narrow those exemptions only to documents that it deems, in its sole discretion, to be particularly sensitive—in contravention of those exemptions' plain terms.

At a minimum, this Court should clarify that, even if the narrow-construction canon applies in some contexts, it does not apply where there is no statutory ambiguity to resolve. Here, the word "confidential" is unambiguous and the statute should be applied as written.

IV. The Court Should Reconsider The Narrow-Construction Canon In This Case Because The Narrow-Construction Canon Has A Significant Impact In Lower Courts.

The Court should repudiate the narrow-construction canon in this case, rather than leaving the issue for another day. Admittedly, repudiating this

canon is not strictly necessary to resolve this case. As Petitioner correctly argues, the Eighth Circuit's interpretation is so plainly contrary to the statutory text that Petitioner should prevail regardless of whether there is a narrow-construction canon. Nonetheless, because the canon significantly affects lower-court litigation, but few opportunities for this Court to reconsider that canon arise, the Court should do so in this case.

Virtually any pronouncement the Court makes regarding FOIA will have a substantial practical effect, in view of the large volume of FOIA litigation, and the even larger volume of FOIA requests. Indeed, 228 FOIA lawsuits were filed in Fiscal Year 2018, an increase from 204 in Fiscal Year 2017.[3] Those lawsuits are only a tiny fraction of the more than 800,000 FOIA requests filed in Fiscal Year 2017 (the most recent year for which data is available), which resulted in 14,548 administrative appeals.[4] Courts and agencies are bound by this Court's interpretations of FOIA—including the narrow-construction canon. Thus, every time a court or an agency interprets FOIA's exceptions in the course of considering a FOIA request, it is required to interpret FOIA via a distorting lens that has no basis in the statutory text.

---

[3] The FOIA Project, http://foiaproject.org/lawsuit/.

[4] Department of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2017*, at 4, 15, http://www.justice.gov/oip/page/file/1069396/download.

Further, the narrow-construction canon affects the outcome of FOIA disputes in the real world. Lower courts routinely invoke the canon in decisions ordering disclosure of documents, including in cases involving documents related to law enforcement and national security. *See, e.g.*, *ACLU of N. Cal. v. U.S. Dep't of Justice*, 880 F.3d 473, 482-83 (9th Cir. 2018) (requiring disclosure of materials addressing electronic surveillance and tracking devices); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 854 F.3d 675, 681-82 (D.C. Cir. 2017) (vacating decision exempting FBI correspondence related to public corruption investigation); *Lucaj v. FBI*, 852 F.3d 541, 549 (6th Cir. 2017) (requiring disclosure of documents shared between FBI and foreign government); *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 103, 111 (2d Cir. 2014) (requiring disclosure of documents related to targeted killings via drone strikes).

ACLU v. Department of Defense, 543 F.3d 59 (2d Cir. 2008), *summarily vacated by* 558 U.S. 1042 (2009), provides an illustrative example of the canon's practical impact. In that case, the requestor sought disclosure of photographs depicting treatment of detainees by United States soldiers in Iraq and Afghanistan. *Id.* at 63. The government sought to withhold the photographs under the FOIA exemption for law enforcement records that "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). It contended that releasing the information could endanger the lives of American troops in the Middle East. 543 F.3d at 63.

The Second Circuit rejected this argument, holding instead that the exemption applied only if the government identified *specific* individuals who were endangered. *Id.* at 70. The court expressly stated that this interpretation was driven by the narrow-construction canon:

> The defendants' construction of "any individual" as not requiring the government to name or even roughly identify any individual … is not a narrow one. The reading of "any individual" as requiring a FOIA defendant to identify an individual with reasonable specificity is a narrower construction, and to be preferred on that ground alone. … [T]he principle that FOIA exemptions are to be construed narrowly cabins the permissible construction of the phrase "any individual." A construction that requires the agency to identify with reasonable specificity the person or persons who could reasonably be expected to be endangered accords with that principle. The defendants' unbounded interpretation does not.

Id. The Second Circuit's decision precipitated the passage of special legislation intended to protect the photographs from disclosure, and this Court vacated the Second Circuit's decision in light of that legislation. *Dep't of Defense v. ACLU*, 558 U.S. 1042 (2009).

The RLC does not take a position on how any of these cases should have been decided in the absence of a narrow-construction canon. Rather, the RLC merely emphasizes that the narrow-construction canon significantly affects FOIA litigation in practice.

Whether such canon remains good law is therefore an important issue that this Court should resolve.

Yet, although FOIA disputes are evergreen in agencies and lower federal courts, they rarely arise in this Court. The Court has heard only two FOIA cases since 2004, and none since 2011. *See Milner v. Department of the Navy*, 562 U.S. 562 (2011); *FCC v. AT&T Inc.*, 562 U.S. 397 (2011).

The paucity of FOIA cases does not reflect that FOIA is unimportant. Rather, it reflects that FOIA cases tend to present fact-specific disputes that do not lend themselves to Supreme Court review. The narrow-construction canon serves as a thumb on the scale that affects myriad disputes, but it is uncommon for such disputes to yield circuit splits of the sort this Court would grant certiorari to resolve.

Now, however, the Court has granted certiorari in a case that cleanly implicates the continued vitality of the narrow-construction canon. That canon was central to the Eighth Circuit's reasoning: as previously noted, the Eighth Circuit relied on the narrow-construction canon as its very basis for rejecting the dictionary definition of "confidential." Now that the question is squarely before the Court, it should not needlessly wait to address it.

Further, reconsideration of the narrow-construction canon is especially warranted because that canon is irreconcilable with *Encino*, yet lower courts are likely to abide by it absent a contrary pronouncement by this Court. As explained in Part II, *Encino*'s logic applies with full force to FOIA's narrow-construction canon.

Yet, this Court has repeatedly recited the narrow-construction canon, and lower courts must follow this Court's decisions until this Court holds otherwise. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (lower court was "correct" in following Supreme Court precedent despite its "increasingly wobbly, motheaten foundations" because "it is this Court's prerogative alone to overrule one of its precedents").[5]

Thus, this is not a problem that will solve itself. Lower courts will continue applying a clearly incorrect doctrine until this Court makes explicit what *Encino* already implies: there is no basis for a narrow-construction canon.

Stare decisis should not be a basis for preserving the narrow-construction canon either. "[*S*]*tare decisis* is not an inexorable command." *Wayfair*, 138 S. Ct. at 2096 (quotation marks omitted). The narrow-construction canon is a "false … premise of this Court's own creation," and if that premise is not "accurate and logical," reconsideration is warranted. *Id.* at 2096-97. Moreover, the fact that the narrow-construction canon is not "clear and easy to apply," *id.* at 2097—but instead, alters ordinary statutory-interpretation

[5] Given that the narrow-construction canon has been articulated solely through unreasoned dicta, lower courts may not be strictly bound by it. This is especially true given that *Encino* rejects all the arguments in favor of such a canon. Nonetheless, given that this Court has repeated the narrow-construction canon many times, lower courts are unlikely, in practice, to disregard it.

principles to an unpredictable extent—further counsels in favor of eliminating it.

Most importantly, there are few, if any, reliance interests in preserving a faulty canon of construction—as opposed to a settled interpretation of a statutory term. *See Wayfair*, 138 S. Ct. at 2098 ("Reliance interests are a legitimate consideration when the Court weighs adherence to an earlier but flawed precedent."). The RLC does not advocate overruling any of this Court's interpretations of particular FOIA exemptions, even if the Court's reasoning in those cases may have been influenced by the narrow-construction canon, because stakeholders do rely on this Court's interpretations of FOIA.

But there are no analogous reliance interests associated with the narrow-construction canon. As applied to Exemption 4, no private party will have submitted information to the government in reliance on the narrow-construction canon. To the contrary, the narrow-construction canon would have made them more reluctant to submit information, because it increases the probability of disclosure. Similarly, as applied to other FOIA exemptions, the government would not have relied on the narrow-construction canon as a basis for including information in a document—if anything, the narrow-construction canon, which increases the probability that a document would be released, would make the government more guarded.

Nor could any member of the public claim reasonable reliance on the canon. First, no members of the public *do* anything in reliance on the narrow-construction canon. Perhaps the narrow-construction

canon increases the probability of a FOIA request being granted, but it is doubtful that the mere expectation of filing a successful FOIA request constitutes a vested interest on which a member of the public could reasonably rely. But even if it did, a member of the public could not reasonably rely on a canon of construction that merely puts a thumb on the scale, but does not resolve how any particular dispute will be decided. No one could reasonably expect that a particular document would be disclosed *because* of the narrow-construction canon. As such, repudiating the narrow-construction canon will promote evenhanded application of the law, without undermining the reliance interests that are the basis for *stare decisis*.

CONCLUSION

The Court should reject the narrow-construction canon for FOIA exemptions.

Respectfully submitted,

DEBORAH R. WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com