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 RESPONDENT

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QUESTIONS PRESENTED

Exemption 4 of the Freedom of Information Act exempts from the statute's disclosure obligation "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4). The Eighth Circuit determined that Exemption 4 does not shield from release information generated and compiled by the Government regarding the amounts of federal money disbursed to food retailers under the Supplemental Nutrition Assistance Program.

The questions presented are:

1. Should Exemption 4, which permits agencies to withhold confidential commercial information, be read to require competitive harm, where that requirement is consistent with the common-law understanding of "confidential commercial information," and where Congress has repeatedly ratified the lower courts' uniform reading of the exemption to require such a showing?

2. Should this Court modify the longstanding competitive-harm standard to require only a mere possibility of harm?

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INTRODUCTION

This Court granted review to examine Exemption 4 of the Freedom of Information Act. But the case took an unexpected turn when the Solicitor General filed its brief in this Court. That brief raises substantial questions regarding petitioner's Article III standing—in particular, whether a ruling by this Court on Exemption 4 would redress petitioner's alleged injury.

The Solicitor General correctly explains that FOIA exemptions do not bar the Government from exercising discretion to disclose. The Solicitor General thus rightly continues that, even if this Court rules for petitioner, and holds that FOIA Exemption 4 (5 U.S.C. §552(b)(4)) applies to the requested information, that ruling would *not* bar the agency, the Department of Agriculture, from disclosing the information. And the brief now announces for the first time that, even if this Court rules that Exemption 4 applies, USDA *would* in fact affirmatively exercise any discretion it has to disclose the requested information.

But in a final, unforeseen move, the Solicitor General reports that, although USDA would exercise its discretion to disclose, the agency believes it lacks such discretion for one reason alone: It interprets another statute, 7 U.S.C. §2018(c), to forbid disclosure.

To have standing, petitioner must show that prevailing on Exemption 4 in this Court is *likely* to redress its claimed harm. It cannot make that showing when USDA has declared that it would exercise its

discretion to release, regardless of whether Exemption 4 applies. And although USDA resists disclosure under another statute, that position is untenable. The Court of Appeals rejected USDA's reading of that statute in this very case; no party sought this Court's review of that ruling; and, in any case, the Court of Appeals was plainly correct. Accordingly, USDA is free to carry out its announced decision to release the information at issue on a discretionary basis.

If the Court reaches the merits of Exemption 4, it should affirm. For 40 years, the courts of appeals have uniformly read the exemption for trade secrets and confidential commercial information to require a showing of likely competitive harm upon disclosure. Now, citing selective excerpts of dictionary definitions of "confidential," petitioner claims there is only one way to read the plain text: to cover anything the private-party source of the information treats as confidential. However, dictionaries, as well as common parlance and numerous other sources of interpretive guidance, show that "confidential" often means information that is confidential *in nature* based on objective harm of disclosure. That is how "confidential" commercial information is properly read here.

While dictionaries do not definitively tell us how to read Exemption 4's reference to confidential commercial information, the common law does. The common law extended protection to non-public commercial information if its disclosure would likely cause competitive harm.

In addition, Congress, aware of the longstanding, uniform judicial construction of Exemption 4, has enacted the same or virtually identical language 60 times in other statutes across the U.S. Code. Congress has thus ratified the exemption's longstanding competitive-harm requirement.

Given the announcements in the Solicitor General's brief and the case's "extraordinarily atypical" posture, U.S. Br. 32, this Court may want to consider whether this remains the proper case for examining Exemption 4. If this Court reaches the merits, however, the case for affirming the competitive-harm standard is overwhelming.

STATEMENT OF THE CASE

1. Published since 1881, the Argus Leader is South Dakota's most widely circulated newspaper. In 2011, an Argus Leader reporter submitted a FOIA request to the U.S. Department of Agriculture. Pet. App. 61a. The request sought the amount of federal funds paid to food retailers under the Supplemental Nutrition Assistance Program (SNAP), formerly the food-stamp program.

The reporter, who has published several articles on SNAP fraud,[1] sought the data as part of an investigation of a phenomenon called "retailer trafficking," whereby a retailer illegally exchanges SNAP benefits for cash (say, by accepting $100 in benefits, giving $50

[1] *E.g.*, Jonathan Ellis, *States Accused of Submitting Bad Food Stamp Data*, Argus Leader, Nov. 28, 2016, http://tinyurl.com/y4c8quwy.

to the SNAP beneficiary, then claiming $100 from the Government and pocketing the rest). Trafficking has grown in recent years, with the Government Accountability Office citing USDA for failing to "prevent, detect, and respond to retailer trafficking."[2] USDA tracks and analyzes the same information that Argus requested "to investigate and sanction SNAP retailers who commit fraud." JA67.

2. Historically, retailers submitted physical food-stamp coupons and USDA would, absent a finding of irregularity, redeem them by disbursing federal funds. For that reason, the government-spending information[3] requested in this case is often called SNAP "redemption" data.

Today, food stamps have been replaced by a debit card-like system, where money is deposited into SNAP beneficiaries' accounts and they swipe their card (an "Electronic Benefit Transfer" or "EBT" card) at the checkout counter. Pet. App. 51a. The retailer's electronic-sale device communicates with a government contractor (an "EBT processor"), which confirms

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[2] GAO-19-167, SNAP: Actions Needed to Better Measure and Address Retailer Trafficking 17 (2018), http://tinyurl.com/y3wr3mbf.

[3] Petitioner incorrectly states "redemption data is not a record of Government payments" because payments are made to "the retailers' designated bank accounts, which may be associated with multiple stores," whereas the redemption data is broken down by individual-store location. Pet. Br. 5. If, for example, the Government sends $30 at once to Safeway based on three $10 transactions at three different stores, each $10 transaction record is no less a "record of Government payment" to Safeway. It is simply a more precise record.

the SNAP account is valid and has sufficient funds. JA64-67. Then, government funds are transferred through the EBT processor to the retailer. *Ibid.*

3. USDA refused to provide the requested federal-spending data, invoking, as relevant here, FOIA Exemptions 3 and 4.

Exemption 3 covers information "exempted from disclosure by statute." 5 U.S.C. §552(b)(3). Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." §552(b)(4).

Argus Leader sued to compel disclosure under FOIA, §552(a)(4)(B). In 2012, the district court granted USDA's motion for summary judgment under Exemption 3. Pet. App. 24a-45a. The court held the SNAP data was exempted by 7 U.S.C. §2018(c), a provision that bars disclosure of certain information "submit[ted]" to USDA as part of its "determination … whether [a retailer] qualifies, or continues to qualify" for SNAP. Without finding that SNAP-funding disbursements play any role whatsoever in the retailer application or renewal process, the court held the data fell within §2018(c). Pet. App. 41a-42a.

The Eighth Circuit reversed. Pet. App. 48a-57a. Focusing on the statute's plain text, the court emphasized §2018(c) applies only to information retailers are "require[d] … to submit" to USDA. Pet. App. 53a. The data sought by the Argus Leader does not qualify because USDA automatically obtains that data when SNAP transactions are electronically processed: "[USDA], not any retailer, generates the information,

and the underlying data is 'obtained' from third-party payment processors, not from individual retailers." Pet. App. 54a. The Court of Appeals also held retailer-by-retailer SNAP-spending records are not, as required by §2018(c), part of USDA's "determin[ation] … whether … a … retailer 'qualifies' or 'continues to qualify'" for SNAP. *Ibid.*

4. On remand, USDA sought to substantiate its reliance on Exemption 4. USDA requested input from "all current" SNAP retailers, calling and emailing them to inquire whether they thought release of SNAP-spending data would cause harm. Dkt. 59, at 2-4; *see* 79 Fed. Reg. 45,175 (Aug. 4, 2014). Of some 321,000 SNAP-participating retailers, just 323 (less than 1%) responded. Dkt. 59, at 4. Some responses opposed release; some had no objection or no comment; and some—apparently misconstruing the agency's question—responded by attempting to publicly disclose their store-level SNAP data by posting it to the agency website. JA85.

With the record showing over 99% of SNAP retailers "are not concerned about any competitive harm" from disclosure, Pet. App. 68a, USDA sought to fill the gap with testimony from several grocery-store executives. They asserted generally that retailer-level SNAP-spending data might be helpful to competitors. Pet. App. 11a-12a. They acknowledged, however, that a store's total SNAP funding provides, at most, a limited window into store operations. Pet. App. 11a-12a. Argus Leader's experts agreed, explaining that any "additional insights" from the SNAP data would be "very limited" because information most valuable to a

retailer's competitors—such as "prices, the promotional activity, the store layout, the level of customer service, and the product assortments"—is already publicly available. JA102, 107.

Evaluating the record evidence, the district court found USDA failed to meet its burden under the longstanding Exemption 4 standard, requiring it to demonstrate release would likely cause competitive harm. Pet. App. 16a. The court found "any potential competitive harm … is speculative at best." Pet. App. 19a. While the court credited testimony that the industry relies on "model forecasts to determine where to add locations and that releasing SNAP data could improve the accuracy of these models," Pet. App. 13a, it found that any such improvement would be miniscule. The testimony of USDA's own expert showed SNAP data "would not add significant insights." Pet. App. 18a-19a.[4]

5. USDA decided not to appeal. The district court, however, allowed petitioner Food Marketing Institute (FMI) to intervene in the Government's stead. Pet. App. 71a-78a. Argus unsuccessfully opposed the intervention, arguing "FMI has misdirected its remedial efforts" and "should be separately targeting

[4] As to potential "stigma," the court found USDA's claim was based on mere speculation that "high SNAP sales revenue might affect" business, including by leading a landlord not "to rent its commercial space to a retailer." Pet. App. 19a. Absent any supporting evidence, the court found this and similar consequences "unlikely." *Ibid.* A landlord, the court reasoned, would already "be []aware of its tenant's customer base." *Ibid.*

USDA and seeking some type of injunctive relief," rather than seeking to intervene in a FOIA suit against USDA. Dkt. 142, at 2.

FMI appealed. On appeal, USDA did not participate or in any fashion support reversal. The Eighth Circuit affirmed. The court found "no clear error" in the numerous findings supporting the district court's careful application of Exemption 4. Pet. App. 1a-6a.

SUMMARY OF ARGUMENT

I. Based on the positions of USDA, conveyed in the Solicitor General's brief to this Court, petitioner lacks Article III standing for want of redressability. Petitioner cannot show a favorable ruling on Exemption 4 would likely prevent USDA from releasing the requested records. Exemption 4 does not *forbid* the Government from releasing anything. It simply provides the Government with discretion.

The Solicitor General's brief reports USDA has decided it would disclose the requested government-spending records here, no matter how this Court rules on Exemption 4, so long as it has discretion to do so. Thus, a ruling by this Court on Exemption 4 would not prevent USDA from disclosing the information sought.

The one and only obstacle USDA sees to disclosure is its view that a separate statute—7 U.S.C. §2018(c)—withdraws its discretion to disclose. USDA, however, cannot refuse to disclose the records on that basis. The Court of Appeals' ruling in this case, to which USDA was a party, held that §2018(c) does not

apply here. No party sought this Court's review of that decision. USDA is thus bound.

In any case, USDA cannot lawfully exercise its discretion on the basis of an erroneous view of the law. The Eighth Circuit's straightforward reading of §2018(c)'s text is correct and should not be disturbed by this Court.

Because §2018(c) does not restrict USDA's discretion to release, and USDA has told this Court it would disclose the data if permitted, petitioner lacks standing. If, however, the Court addresses §2018(c) and disagrees with the Eighth Circuit's view, the Exemption 4 question this Court granted to resolve would become moot. Disclosure of the requested SNAP data would be barred in any event, so the question of Exemption 4's scope would be academic.

II. Statutory construction begins with the text. Exemption 4 of FOIA exempts "trade secrets" and "confidential" "commercial or financial information." For over 40 years, the courts of appeals have read that standard to require a showing of likely competitive harm. There is no basis to discard that uniform interpretation.

A. Congress did not define "confidential" commercial information. In examining undefined terms, this Court looks to dictionaries, the common law, and other sources of interpretive guidance to determine whether the term used by Congress has an established meaning.

Here, dictionaries are not dispositive, but the common law is. Dictionary definitions do not tell a court whether "confidential" information means information that is objectively confidential *in nature*, meaning sensitive and harmful if disclosed, or instead, as petitioner contends, unilaterally "treated as confidential" by the private-party source of the information.

By contrast, the common law supports the competitive-harm test employed by the courts of appeals. When FOIA was enacted, the common law protected against disclosure of confidential business information if the disclosure would cause competitive harm. In other words, "confidential commercial information" was a term of art at common law meaning business information that would cause competitive harm if disclosed. Consistent with this Court's well-settled interpretive practice, it should presume Congress adopted that term of art here. Exemption 4 is thus properly read to require likely competitive harm.

B. A second reason the longstanding competitive-harm standard must be retained is Congress has reenacted the text and ratified the standard *60 times*. Against the backdrop of the uniform judicial consensus that Exemption 4 requires an assessment of competitive harm, Congress has repeatedly incorporated Exemption 4 and its language into a multitude of other statutes. In so doing, Congress has unmistakably adopted the longstanding judicial construction.

C. Petitioner's interpretation, turning on whether the private party unilaterally treated the information as confidential, lacks merit. It is contrary to the term's

established common-law usage, Congress' 60 acts of ratification, and this Court's repeated admonition that FOIA exemptions should be narrowly construed.

In addition to dictionary definitions, common parlance and real-world examples show that the word "confidential" commonly refers, not just to information's secrecy, but also to the inherent nature of the information: whether it is sensitive and objectively harmful if disclosed. A range of analogous legal regimes—including state and federal judicial-sealing rules and civil-discovery practices—provide further support for this definition. They reveal a clear norm in the law: that non-public business information is shielded from disclosure only where harm would result. Exemption 4 is thus properly read to require a showing of harm from disclosure.

D. Petitioner's sweeping interpretation of "confidential" would undermine FOIA's core objective of, as this Court has put it, allowing the public to learn "what the Government is up to." It would make it far more difficult for the press and public to uncover evidence of government waste, fraud, and dereliction of duty. That is because the public must examine some data submitted to the Government (*e.g.*, contractor prices) to know what the Government is spending public money on. The public must also be able to examine what private parties submit to the Government (*e.g.*, compliance reports) to assess how and whether the Government is wielding its expansive regulatory powers.

E. The Solicitor General offers a different but equally flawed reading of "confidential": that information submitted to the Government automatically becomes "confidential" anytime the Government provides an "assurance" of confidentiality. The Government acknowledges no limits on its authority to offer such assurances. Such a far-reaching proposal is flatly contrary to FOIA's basic premise. Congress enacted FOIA to put an end to the days when the Government had unchecked discretion to refuse disclosure requests for any reason it deemed appropriate.

III. As to the second question presented, this Court should not dilute the longstanding competitive-harm standard that Congress has repeatedly ratified. Petitioner vastly overstates the administrative difficulties in applying the longstanding test: Almost all cases are resolved at the administrative level. Discovery is rare in FOIA cases; trials, even rarer, at just an average of three per year. Moreover, by looking to the common law in construing Exemption 4, courts will be able to draw upon well-established principles to decide any legal questions identified by petitioner that remain unsettled in the lower courts.

IV. Finally, under any applicable standard, the records requested here must be disclosed. Petitioner maintains that a record qualifies as "confidential" as long as it is treated as "confidential" by the party submitting the information to the Government. But here, it makes no sense to say that a private retailer submitted a record of a government-spending decision to the Government. That record was generated within the Government itself. That is why the district court

held the data was "obtained from" the Government's contractor responsible for processing SNAP transactions. Petitioner did not seek appellate review of that ruling. In any case, the requested record is plainly a record of a government-spending decision, meaning petitioner lacks any confidentiality interest protected by FOIA.

ARGUMENT

I. Petitioner Is Not A Proper Party To Enforce FOIA's Exemptions And Lacks Article III Standing.

Based on the positions of USDA, conveyed in the Solicitor General's brief to this Court, petitioner's Article III standing fails for want of redressability. Even if petitioner were to prevail in this Court on the meaning of Exemption 4, USDA would still retain discretion to disclose the data at issue. And USDA would exercise that discretion "to release store-level redemption data," *but for one and only one reason*: "its understanding of its legal obligations under Section 2018(c)" as barring disclosure. U.S. Br. 26, 35.

The Eighth Circuit, however, in its earlier ruling against USDA in this very case, rejected that "understanding" of §2018(c) as contrary to the statute's plain text. Pet. App. 54a. USDA was a party to, and is thus bound by, that ruling.

As detailed below, the Eighth Circuit's ruling regarding §2018(c) was also correct. USDA thus lacks any proper basis to refuse to exercise its announced discretionary decision to release the SNAP data. This

means petitioner's claimed "injury will [not] be redressed by a favorable decision" by this Court on the scope of Exemption 4. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quotation marks omitted). If this Court, however, were to reach the §2018(c) question and disagree with the Eighth Circuit, that interpretation would then render the Exemption 4 issue moot.

For these reasons, this Court may wish to consider dismissing the case as improvidently granted. This Court has done so where, as here, "[i]n order to reach the merits of th[e] case," the Court "would have to address a question that was neither presented in the petition for certiorari nor fairly included in the … question[s] that [were] presented." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 28 (1993); *see Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001). The unusual justiciability issues now presented are a consequence of the case's "extraordinarily atypical" posture, U.S. Br. 32, where a private party has improperly intervened in the Government's place in a FOIA suit—a statute that does not authorize any party other than the Government to oppose disclosure.

A. Petitioner's alleged injury is not redressable because, even if its construction of Exemption 4 prevails, USDA would exercise its discretion to disclose.

Petitioner lacks Article III standing because, even assuming its reading of Exemption 4 prevails, it is not "likely" that its claimed injury would be redressed by

a ruling from this Court on that issue. *Lujan*, 504 U.S. at 561.

As the Solicitor General's brief explains, no matter how this Court rules on Exemption 4, that ruling will not deprive USDA of discretion to release the SNAP data. U.S. Br. 32. In *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979), this Court held that "FOIA is exclusively a disclosure statute." The FOIA exemptions, such as Exemption 4, merely "demarcate[] the agency's *obligation* to disclose; [they do] not foreclose disclosure." *Ibid.* (emphasis added). Thus, a ruling by this Court on Exemption 4 in petitioner's favor would not compel USDA to withhold the requested data.

Sometimes private parties have standing to bring so-called reverse-FOIA suits objecting to disclosure. A reverse-FOIA suit is generally a case under the Administrative Procedure Act alleging an agency's decision to disclose is contrary to a statutory bar on disclosure *outside of* FOIA. *See Chrysler*, 441 U.S. at 317-19; *e.g., Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008).

As relevant here, one such bar appears in the Trade Secrets Act, 18 U.S.C. §1905, a criminal statute prohibiting government officials from disclosing certain non-public commercial information. In other words, if disclosure would violate the Trade Secrets Act, an aggrieved party may bring an APA action maintaining it would be unlawful to release the information under the Trade Secrets Act. *Chrysler*, 441 U.S. at 318-19.

In this case, petitioner has never raised any claims under the Trade Secrets Act.[5] Nor has it brought a reverse-FOIA suit under the APA. Petitioner instead intervened in a FOIA action, over the objection of Argus Leader, which explained at the time that the proper procedure was to bring a separate action opposing disclosure. *Supra* pp. 7-8. As the Solicitor General explains, the intervention into this FOIA action was "extraordinarily atypical" and legally improper. U.S. Br. 32. Because a private-party intervenor such as petitioner lacks any right to oppose disclosure under FOIA, it cannot show the necessary "invasion of a legally protected interest" to support standing. *Lujan*, 504 U.S. at 560.[6]

Moreover, a private-party intervenor cannot establish redressability where, as here, the Government

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[5] While not at issue, the Trade Secrets Act would not bar disclosure here. Although courts have disagreed about the precise scope of the Act, none has construed it as broadly as petitioner construes Exemption 4. The D.C. Circuit has viewed the Trade Secrets Act as roughly coextensive with Exemption 4 as construed in *National Parks. Canadian Commercial Corp.*, 514 F.3d at 39. Other courts have read it more narrowly. *E.g.*, *United States v. Wallington*, 889 F.2d 573, 577 (5th Cir. 1989); *Gen. Elec. Co. v. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984). Whatever the Act's precise scope, it does not criminalize release of a document obtained from a party merely because that party treated the document as secret. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1008 (1984) (reading the Act narrowly).

[6] The Second Circuit has dismissed for lack of standing in this precise posture, where a private party intervenes to appeal a FOIA case in the Government's stead. *Det. Watch Network v. Corr. Corp. of Am.*, No. 16-3141, 2017 WL 4122728, at *1 (2d. Cir. Feb. 8, 2017), *cert. denied* 138 S.Ct. 317 (2017).

retains discretion to disclose, even if a FOIA exemption applies. We now know from the Government's brief that USDA would exercise such discretion to disclose. U.S. Br. 26 ("USDA [has] inform[ed] [the Solicitor General] that it would now likely elect to release store-level redemption data nationwide" if it had the discretion to do so). Because USDA is likely to disclose the requested data in any event, a ruling on Exemption 4 by this Court is not likely to redress petitioner's alleged injury.[7]

B. The only basis on which USDA now resists disclosure—its interpretation of §2018(c)—was correctly rejected by the Court of Appeals.

The Solicitor General has informed this Court that USDA would now exercise its discretion to disclose the SNAP redemption data. The one and only obstacle USDA sees is its legal interpretation of

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[7] USDA's preference to exercise discretion to disclose makes sense. As the Government rightly emphasizes, retailers have no "objectively reasonable" "expectation of confidentiality" because the requested SNAP data "corresponds to" the "amount that the government pays a private entity to supply goods or services"—information "generally disclosed to the public." U.S. Br. 25-26.

Moreover, USDA's announced exercise of discretion is supported by an executive-branch directive—later codified prospectively by the 2016 FOIA Amendments, *see* 5 U.S.C. §552(a)(8)(A)(i)—prohibiting agencies from relying solely on exemptions to avoid disclosure. Under this directive, an "agency should not withhold information simply because" a FOIA exemption applies. Att'y Gen., Memorandum for Heads of Executive Departments and Agencies (March 19, 2009). Agencies are "strongly encourage[d] … to make discretionary disclosures." *Ibid.*

§2018(c), which it views as barring disclosure of the data.

USDA, however, *lost* on that issue in the Eighth Circuit in this very case. And neither petitioner nor the Government sought this Court's review of that §2018(c) holding, even though either could have done so (USDA, following the Eighth Circuit's 2014 ruling, and petitioner, following the Eighth Circuit's more recent decision). USDA is not free to exercise its discretion in this very case by disregarding a ruling to which it was a party. There would be no question that, if this Court were to affirm, or had denied certiorari, USDA would not be able to invoke §2018(c) as a basis for nondisclosure after having lost on the issue. Likewise, if this Court were to rule in petitioner's favor on Exemption 4, USDA could not then refuse to disclose based on §2018(c).

In any event, the Eighth Circuit's 2014 ruling was clearly right. Because USDA must act "in accordance with law," 5 U.S.C. §706(2)(A), it cannot ground its refusal to release the requested information in a legally erroneous view of §2018(c). If an agency action rests upon "an exercise of judgment in an area which Congress has entrusted to the agency," the action "m[ay] not stand" if it "is based upon a determination of law" and "the agency has misconceived the law." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

The Eighth Circuit, emphasizing the statute's plain text, held SNAP redemption data did not fall within §2018(c). Pet. App. 56a. Reinforcing that interpretation, §2018(c) imposes "criminal punishment," Pet. App. 39a, an important point because courts

must exercise "restraint in assessing the reach of a federal criminal statute," *Marinello v. United States*, 138 S.Ct. 1101, 1106 (2018).

Section 2018(c) bars disclosure of a limited set of information: information USDA "require[s] an applicant retail food store … to submit" for the specific purpose of making a "determination … as to whether such applicant qualifies, or continues to qualify" for the program. Carefully construing that text, the Eighth Circuit correctly held §2018(c) inapplicable for three reasons.

First, redemption data is not information retailers are "require[d]" to "submit" to USDA. USDA automatically obtains that information when SNAP transactions are electronically processed. As the Court of Appeals explained, USDA itself, "not any retailer, generates the information, and the underlying data is 'obtained' from third-party payment processors, not from individual retailers." Pet. App. 54a.

That is fully supported by the record. SNAP redemption data—the information requested by Argus here—provides a record of a *consummated* transaction. While the retailer certainly transmits some data electronically when a SNAP beneficiary swipes his or her card at the register, that data includes only the requested transaction amount. JA49, 76. It does not, and could not, include confirmation the account is valid and has sufficient funds. The EBT vendor (the government contractor that electronically processes SNAP transactions) makes and records that determination separately. *Supra* pp. 4-5; U.S. Br. 3-4. Accordingly, the EBT processor's role is far more involved

than the Postal Service's ministerial role in "transmit[ing] [mail]." U.S. Br. 31. And regardless, a private party simply cannot be said to "submit" a record of the Government's own conduct (*i.e.*, approving and executing disbursement of federal funds).

Second, the Eighth Circuit properly concluded SNAP redemption data is not information "require[d]" to be provided to determine whether a retailer "qualifies, or continues to qualify" for the program. "Neither of the forms used to determine whether a given retailer 'qualifies' or 'continues to qualify' as a program participant asks for the spending information." Pet. App. 53a-54a. The Solicitor General does not claim otherwise.

Context about administration of the SNAP program confirms redemption data is immaterial to application and renewal decisions. When §2018(c) was enacted, retailers submitted food-stamp coupons, along with a "redemption certificate" (essentially a deposit slip) indicating "the value of the coupons redeemed," for the simple reason that such a submission was necessary to be paid. 7 C.F.R. §278.4(c) (1979) (retailers "shall use the redemption certificates for th[e] purpose" of exchanging "coupons … for cash"). Redemption-related information was, however, never provided as part of USDA's retailer application and renewal process.

Today, that characterization would make even less sense. The Government *already has* redemption information, which it automatically obtains when it electronically processes SNAP transactions. It is

simply wrong to suggest that redemption data is provided as part of retailers' applications for participation in SNAP.

Third, the Eighth Circuit correctly held a separate statute, 7 U.S.C. §2019, regulates retailers' redemption of SNAP funding. Pet. App. 56a. That statute provides for "[r]egulations" governing the "redemption of benefits accepted by retail food stores." Thus, unlike §2018(c), §2019 has long expressly addressed redemption data. That would therefore be the logical place for Congress to make any directive to withhold SNAP redemption data. But no such directive appears there, forcing USDA to turn to §2018(c), stretching its text to invent a bar on redemption-data disclosure. That this internal-government view of §2018(c) may be "longstanding" (U.S. Br. 31) does not make it right. Nor do scattered statements in the Federal Register or legislative reports (cited at U.S. Br. 29-30) overcome the textual problems with USDA's interpretation.

For all these reasons, there is no basis to disturb the Eighth Circuit's ruling on §2018(c). Even USDA indicates that it "might have explored changing its position" that §2018(c) bars release of SNAP redemption data, were it not for a curious recent amendment of the statute, enacted in the final days of the 2018 legislative session. U.S. Br. 26 n.5. While the amendment addresses SNAP redemption data, it does not alter the Eighth Circuit's construction of the provision. It thus provides no valid basis for USDA to refuse to disclose the requested SNAP data.

The 2018 amendment made the following insertion to §2018(c):

> [USDA] … shall require an applicant retail food store … to submit information, which may include **… redemption data provided through the electronic benefit transfer system** …. Any person who … discloses … information obtained under this subsection shall be fined … or imprisoned ….

Agriculture Improvement Act, Pub. L. No. 115-334 (2018). Whatever the import of the amendment, it cannot be read to restrict USDA's discretion to release redemption data. While Congress was demonstrably aware of the Eighth Circuit's ruling, Congress opted not to address the legal basis for it. As discussed, the Eighth Circuit held that redemption data is not "submit[ted]" to USDA within the meaning of §2018(c). The 2018 amendment does nothing to alter this threshold requirement under §2018(c). For information to come within the provision, it still must be "submit[ted]" to USDA.

It was not as if Congress was unaware of the Eighth Circuit's analysis. A prior version of the bill—ostensibly designed to moot this case—expressly exempted disclosure of the retailer-specific SNAP data under FOIA.[8] But it was not enacted.

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[8] H.R. 5961, 115th Cong. §768 (2018) ("Any [SNAP] transaction data that contains information specific to a retail food

Moreover, if Congress had intended the statute to forbid disclosure of government records, it would have made express reference to FOIA. Since 2009, FOIA has required a statute to "specifically cite[] to" Exemption 3 to qualify as a non-FOIA statute that "specifically exempt[s]" records from disclosure under that provision. 5 U.S.C. §552(b)(3)(B). That is why the text of the unenacted provision, *see supra* n.8, includes the express reference to "section 552(b)(3) of title 5." By contrast, the amendment Congress ultimately enacted includes no such reference.

In sum, even if USDA were not bound by the Eighth Circuit's prior ruling against it on this very issue in this very case, it could not now properly construe §2018(c) to restrict its authority to disclose the SNAP data requested here. USDA is thus free to release the data, as the Solicitor General has told this Court it prefers to do.

Accordingly, petitioner lacks standing because even if this Court accepts petitioner's interpretation of Exemption 4, that ruling would not likely redress petitioner's claimed harm.[9]

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store … shall be exempt from … section 552(a) of title 5 of the United States Code pursuant to section 552(b)(3).").

[9] If this Court were to address §2018(c) and conclude it bars disclosure of the requested SNAP data, that ruling would render moot the Exemption 4 question. Disclosure would be barred in any event, so interpretation of Exemption 4 would be purely academic.

II. Exemption 4 Of FOIA Requires An Assessment Of Likely Competitive Harm.

As always, this Court's interpretation of a statute "begins with the text." *Ross v. Blake*, 136 S.Ct. 1850, 1856 (2016). FOIA Exemption 4 allows an agency to withhold information to the extent it contains: "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4).

Congress did not define "confidential" commercial information. And dictionary definitions provide no conclusive answer: They do not tell a court whether to read the provision as referencing information that is confidential *in nature*, such that its release would be objectively harmful, or instead to view information as "confidential" merely because it is treated as secret by its private-party source (as petitioner argues).

Where the key terms of a statute are undefined, this Court often looks to the common law to determine whether the undefined term has an established meaning, *i.e.*, whether it has been used as a legal term of art. Here, the common law provides a clear answer: Commercial information is deemed confidential if disclosure would likely cause competitive harm.

For over 40 years, an objective competitive-harm standard has governed in the lower courts.[10] Petitioner asks the Court to now cast aside that

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[10] *See, e.g.*, *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (likely to cause "harm to the competitive position of the person from whom the information was obtained"); *Cont'l Stock Transfer & Trust Co. v. SEC*, 566 F.2d

longstanding approach, but such upheaval is wholly unwarranted. Congress, well aware of the uniformly adopted judicial construction, has repeatedly ratified the longstanding competitive-harm standard by incorporating Exemption 4 and its text into *60* other provisions across the U.S. Code.

Moreover, that reading of Exemption 4 respects this Court's repeated instruction that the FOIA exemptions must be "narrowly construed." *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (quotation marks omitted). That well-established interpretive principle reflects FOIA's fundamental contribution to our constitutional order: The Act's basic objective "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). This Court has explained that the "limited exemptions do not obscure the basic

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373, 375 (2d Cir. 1977); *9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 7-10 (1st Cir. 1983); *Gen. Elec. Co.*, 750 F.2d at 1402-03 (disclosure must "inflict … competitive harm"); *Acumenics Research & Tech. v. Dep't of Justice*, 843 F.2d 800, 807 (4th Cir. 1988); *Pac. Architects & Eng'rs Inc. v. Dep't of State*, 906 F.2d 1345, 1347 (9th Cir. 1990); *Anderson v. Dep't of Health & Human Servs.*, 907 F.2d 936, 947 (10th Cir. 1990) ("competitive injury would likely result" (quotation marks omitted)); *OSHA Data / CIH, Inc. v. Dep't of Labor*, 220 F.3d 153, 162 & n.24 (3d Cir. 2000); *Contract Freighters, Inc. v. Dep't of Transp.*, 260 F.3d 858, 862 (8th Cir. 2001).

policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

A. Exemption 4's plain language, informed by the common law, requires reading "confidential" commercial information to turn on a showing of competitive harm.

Exemption 4 is limited to: "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4). As noted above, FOIA "does not define the word 'confidential.'" *Dep't of Justice v. Landano*, 508 U.S. 165, 173 (1993). Absent an express definition, this Court typically looks to dictionaries, common parlance, and common-law usages to define a statute's terms.

Petitioner contends that dictionary definitions of "confidential" require reading Exemption 4 to turn on whether a private party treated the information it submitted to the Government as secret. Pet. Br. 17-19. But dictionaries show that is not the only way that "confidential" is used. It is also used to mean confidential *in nature*—in other words, not ordinarily disclosed because the information is inherently sensitive and would be harmful if released. Or as this Court has

put it, information is "confidential" if its nature creates an objectively "reasonable expectation of confidentiality." *Landano*, 508 U.S. at 173.[11]

Petitioner's own examples illustrate this common understanding of "confidential." For instance, petitioner cites (Pet. Br. 20 n.11) a decision stating that a "report was a confidential document." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 534 (1961). But the full quoted paragraph explains the report contained several controversial "unsolicited recommendations" (about how a government agency should direct its resources) and referenced a "vast quantity" of sensitive internal-government data. *Ibid.* So "confidential report" could mean "report kept secret," but in context, it is better read to mean "inherently sensitive report."[12]

Beyond dictionaries, in reading a statute's plain text, this Court frequently looks to the common law to determine if Congress used a term of art with a well-developed legal meaning. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 22 (1999) (term "fraud" is one with

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[11] "Of the nature of confidence," WEBSTER'S NEW INT'L DICTIONARY (2d ed. 1934); "of the nature of confidence," "*[b]etokening* private intimacy," THE OXFORD UNIVERSAL DICTIONARY ILLUSTRATED (3d ed., 1959) (emphasis added); "*indicating* close intimacy," WEBSTER'S NEW COLLEGIATE DICTIONARY (1951) (emphasis added); "*of or showing* confidence," WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, Concise Edition (1960) (emphasis added).

[12] We explain this common usage of "confidential" to mean "confidential *in nature*" in more detail below (pp. 42-51), referencing a variety of sources, including this Court's analysis in *Landano* and numerous real-world examples.

"a well-settled meaning at common law"); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) (same for "employee"). As this Court has explained, "[i]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Sekhar v. United States*, 570 U.S. 729, 732 (2013) (quotation marks omitted).

Indeed, when a term used by Congress had an established term-of-art meaning at common law, that often begins and ends the textual inquiry. Dictionaries and other guides to plain meaning are frequently unnecessary or inconclusive where it is evident Congress adopted a term from the common law. *E.g., Neder*, 527 U.S. at 22; *Reid*, 490 U.S. at 739*; see also Hall v. Hall*, 138 S.Ct. 1118, 1124 (2018) (where term had an established "legal lineage," "looking to dictionari[es]" was not determinative).

Here, while dictionaries do not provide any dispositive reading of Exemption 4, the common law does. As we detail below, "confidential" is properly read in accordance with its term-of-art usage: "Confidential commercial information" has traditionally referred to non-public business information that would cause competitive harm if disclosed.

1. When FOIA was enacted, "trade secrets and other confidential commercial information" was an established term of art for business information that would likely cause competitive harm if disclosed.

When Exemption 4 was enacted, there was an established common-law term of art for non-public business information, disclosure of which would be tortious because it would cause competitive harm. Both courts and the relevant (and near-universally adopted) provisions in the first RESTATEMENT OF TORTS (1939) used the term "trade secrets and other confidential commercial information" (or some near-identical equivalent) to refer to this body of protected materials. Thus, in saying "trade secrets and other confidential commercial information," courts and commentators meant non-public business information that would likely cause competitive harm if released.

Exemption 4 likewise juxtaposes "trade secrets" and "confidential commercial information." This was no accident. The first RESTATEMENT OF TORTS, where Congress would have looked for the definition of trade secrets when enacting FOIA, employed a similar distinction between trade secrets and other confidential commercial information entitled to essentially the same protection. It defined a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competi-

tors who do not know or use it." §757, cmt. b. The RESTATEMENT separately referred to other "secret information in a business" that did not qualify as a formal "trade secret": in particular, "information as to single or ephemeral events in the conduct of the business." *Ibid.*[13]

Critically, this second subset of information was subject to "rules virtually identical to those applicable to trade secrets"—*i.e.*, it was shielded from disclosure if the information would afford an "economic advantage over others." RESTATEMENT (THIRD), UNFAIR COMPETITION §39 & cmt. d (1995) (summarizing principles in first RESTATEMENT OF TORTS); *see also Protection and Use of Trade Secrets*, 64 Harv. L. Rev. 976, 976 n.5 (1951) (same).

The reason for the similarity was that both trade secrets and other non-public business information were shielded under common-law unfair competition principles—the essential element of which is likely competitive harm. As the first RESTATEMENT OF TORTS put it, the common law barred "procur[ement] by improper means [of] information about another's business" to "advanc[e] a rival business interest." §759. Disclosure of both trade secrets and non-public

[13] The RESTATEMENT provided as examples of such "ephemeral" information: "terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or … new model." §757, cmt. b.

business "information not a trade secret" would violate this bar on wrongful disclosure. §757 cmt. b.[14]

Courts have long embraced this same usage. They have often addressed both "trade secrets" and "confidential business information" in the same breath to refer to all non-public commercial information that would likely cause competitive harm, and thus be tortious, if disclosed.[15] Given that, in 1966, trade secrets and confidential business information were commonly referenced together and widely protected at common law from disclosure for the same reason—the likelihood of competitive harm—it is unsurprising that

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[14] The first RESTATEMENT OF TORTS addressed tortious disclosure of confidential commercial information and other unfair-competition principles. The subject was then dropped from any Restatement until the first edition of the RESTATEMENT OF UNFAIR COMPETITION (called RESTATEMENT (*THIRD*), UNFAIR COMPETITION).

[15] *E.g., Metropolis Bending Co. v. Brandwen*, 8 F.R.D. 296, 298 (M.D. Pa. 1948) ("[t]rade secrets and other business information"); *Smith v. Dravo Corp.*, 203 F.2d 369, 374-75 (7th Cir. 1953) ("[c]onfidential business information" and "trade secret"); *Seismograph Serv. Corp. v. Offshore Raydist, Inc.*, 135 F. Supp. 342, 354 (E.D. La. 1955) ("business information or trade secrets"); *McDonald's Corp. v. Moore*, 243 F. Supp. 255, 258 (S.D. Ala. 1965) ("business information or trade secrets"); *Alpha Distrib. Co. of Cal., Inc. v. Jack Daniel's Distillery*, 207 F. Supp. 136, 138 (N.D. Cal. 1961) ("confidential information [and] trade secrets"); *Lyon v. Gen. Motors Corp.*, 200 F. Supp. 89, 91 (N.D. Ill. 1961) ("confidential information and trade secrets"); *Food Processes, Inc. v. Swift & Co.*, 280 F. Supp. 353, 362 (W.D. Mo. 1966) ("confidential information and trade secrets"); *Sybron Corp. v. Wetzel*, 385 N.E.2d 1055, 1056 (N.Y. 1978) ("trade secrets or confidential information"); *USM Corp. v. Marson Fastener Corp.*, 393 N.E.2d 895, 902-03 (Mass. 1979) ("trade secrets" and "confidential … business information" (quotation marks omitted)).

Congress incorporated both categories, paired together, in FOIA Exemption 4.

This Court presumes Congress looks to term-of-art usages in both case law and the relevant Restatement. *E.g.*, *Field v. Mans*, 516 U.S. 59, 70 (1995) (Restatement is "the most widely accepted distillation of the common law"). That presumption is especially appropriate here because few, if any, Restatement provisions have been as widely adopted as the first RESTATEMENT OF TORTS definition of trade secrets. *See Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 266 (1979) (the "most commonly accepted definition"); 1 TRADE SECRETS LAW §3:2 (2018) ("so universal that it is difficult to find a modern trade secret case that does not … heavily rely upon [it]").[16]

Moreover, this interpretive principle fully applies under FOIA, which courts often construe by looking to the common law. *See, e.g., Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167-68 (2004) (construing "personal privacy" in Exemption 6 to protect "tradition" with "deep[] roots in the common law"); *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d

[16] While not at issue here, the D.C. Circuit in *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286-88 (1983), recognized the first RESTATEMENT OF TORTS definition was widely accepted, but nonetheless adopted a narrower definition under Exemption 4. As petitioner acknowledges, the D.C. Circuit incorrectly departed from the "broad common-law definition of trade secrets … widely accepted in other areas of the law." Pet. 20.

350, 356 (2d Cir. 2005) (construing Exemption 5 to adopt common-law principles).[17]

Years after FOIA was enacted, the trade-secrets definition was broadened. Most notably, the drafters of both the Restatement and the Uniform Trade Secrets Act eliminated the distinction between trade secrets and other protected business information, such that "trade secret" now covers all non-public business information that would cause competitive harm if disclosed. *See* RESTATEMENT (THIRD), UNFAIR COMPETITION §39 cmt. d; Uniform Trade Secrets Act, §1, cmt., 14 U.L.A. 543 (1985). This formalized the prior state of affairs where the two categories were given "virtually identical" protection at common law. But the 1966 Congress enacting FOIA would have looked to the then well-established usage, juxtaposing "trade secrets" with other "confidential commercial information," both requiring a showing of competitive injury to give rise to tort liability for improper disclosure.

Finally, this term-of-art construction is faithful to Congress' expectation that courts "provide 'workable' rules" when construing FOIA's exemptions. *FTC v. Grolier Inc.*, 462 U.S. 19, 27 (1983). Construing Exemption 4 to embrace the common-law understanding

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[17] In both *Favish* and *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989), this Court looked to common-law privacy torts to construe FOIA's references to "privacy." The Court also noted that Exemption 7 "goes beyond the common law." 541 U.S. at 170. All the Court appeared to mean was that the statutory term "privacy" was not, as is the case here, a "term of art that has a widely accepted common-law meaning." *Molzof v. United States*, 502 U.S. 301, 306 (1992).

of confidential business information supplies administrable answers to the questions that, in petitioner's view, have generated difficulties in applying the competitive-harm standard. Pet. Br. 40-41. For example, as discussed below (pp. 61-63), the common law shows why competitive harm must be "likely," not merely "possible." Pet. Br. 48-49. In this way, common-law incorporation has a "stabilizing" effect, directing courts today to the understandings reached by their predecessors when grappling with similar questions in the past. *See* Antonin Scalia & Bryan A. Garner, READING LAW 318, 320 (2012) (calling this a "stabilizing canon").

2. Common-law rules regarding special evidentiary privileges and fiduciary relationships have no application here.

Petitioner points briefly to two other areas of common law: attorney-client confidentiality, Pet. Br. 22, and the marital-communications privilege, *id.* at 20 n.11. But those doctrines are not analogous to confidentiality issues that arise under FOIA, and thus have no application here. Such privileges are limited to "special relationships" where there is a strong expectation of secrecy. *SEC v. Lavin*, 111 F.3d 921, 929 (D.C. Cir. 1997); *see Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (similar). No similar "special relationship" exists when a private party furnishes information to a government agency.

Nor is the common-law fiduciary relationship—shielding forms of business information through fiduciary obligations—a guide for construing FOIA. The

common law has long imposed a fiduciary duty on employees and other agents not to reveal private information they learn in the course of their duties. RESTATEMENT (THIRD), AGENCY §8.05(2) (2006). As this Court has explained in a case involving a fiduciary breach, "a person who acquires special knowledge …by virtue of a … fiduciary relationship with another is not free to exploit that … information for his own personal benefit but must account to his principal for any profits derived therefrom." *Carpenter v. United States*, 484 U.S. 19, 27-28 (1987) (quotation marks omitted).

Congress would not have looked to this fiduciary rule when enacting Exemption 4. An agent's duty of nondisclosure is an essential part of the agent's broader duty, rich in legal tradition, "to act loyally for the principal's benefit." RESTATEMENT (THIRD), AGENCY §8.01. There is no basis to engraft that duty onto the Government when making disclosure decisions under FOIA. The Government owes no fiduciary duty to private parties that submit information.

By contrast, all parties, *including the Government*, are barred from wrongfully disclosing trade secrets and closely related non-public business information that would cause competitive harm. As discussed, private parties are subject to longstanding tort rules forbidding wrongful disclosure of such information. And as for the Government, it is a Fifth Amendment "taking" to reveal such information after the Government collects it. *Monsanto*, 467 U.S. at 1010-11. Naturally, then, Congress would have looked to the common law's protection of trade secrets

and similar non-public commercial information when enacting FOIA.

In sum, the common law accorded protections virtually identical to trade secrets to non-public business information. As with trade secrets, disclosure of this information was tortious if competitive harm would likely result. Exemption 4 is properly construed to incorporate that common-law understanding.

B. Congress has ratified the longstanding judicial consensus that Exemption 4 requires likely competitive harm.

A second reason that Exemption 4 is properly read to require a competitive-harm showing is Congress has ratified the longstanding judicial consensus. Since the D.C. Circuit decided *National Parks* in 1974, all other circuits to address Exemption 4 have agreed information qualifies as "confidential" if disclosure would "impair the Government's ability to obtain necessary information in the future" or harm "the competitive position of the person from whom the information was obtained." 498 F.2d at 770. *Supra* pp. 24-25 n.10.

With that judicial consensus as a backdrop, Congress has enacted 46 statutes with 60 separate provisions that either expressly incorporate Exemption 4 into specific agency disclosure regimes or enact a virtually identical standard. For instance, in 1991, Congress prohibited the Secretary of Transportation from exercising any discretion to disclose certain infor-

mation related to development of high-speed rail projects. Congress turned to the text of Exemption 4 to specify the scope of what should be shielded: "commercial or financial information that is privileged or confidential, under the meaning of section 552(b)(4) of title 5." 49 U.S.C. §309 note.

To the same effect, Congress has in other instances incorporated Exemption 4's language by express cross-reference. In a 1988 statute, for example, Congress aimed to protect sensitive portions of reports to the Attorney General on authorized controlled-substance distributors. Again, Congress turned to Exemption 4: "[A]ny information … which is exempt from disclosure under … section 552(b)(4) … may not be disclosed to any person." 21 U.S.C. §830(c)(1).

The list goes on. In all but one Congress from the 93rd to the 115th (which ended last year), Congress has enacted at least one statute incorporating the Exemption 4 standard. All 60 provisions, their text, and dates of enactment are included in the appendix attached to this brief.

This significant degree of congressional reenactment and extension of a provision and its text, in the face of a uniform judicial construction, shows that Congress has ratified the prevailing standard. It is well-settled that when Congress reenacts the same language or "substantially the same" language that has been given a uniform judicial interpretation, *Shapiro v. United States*, 335 U.S. 1, 6 (1948), "it adopt[s] the … judicial construction," *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S.Ct.

628, 633-34 (2019). This is true whether that judicial construction comes from this Court or, as in *Helsinn* and other cases, "lower-court opinions" that are, as here, "uniform" and "sufficiently numerous." Scalia & Garner, *supra* at 325; *e.g.*, *Davis v. United States*, 495 U.S. 472, 482 (1990); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Ordinarily, the ratification canon comes into play where Congress reenacts language in the same statute. While that is not the case here—*i.e.*, Congress has not reenacted Exemption 4 itself as part of FOIA—the case for ratification is even stronger. Under the classic formulation in this Court's cases, all it takes for Congress to ratify is to reenact the same language *just once*. Here, Congress has reenacted Exemption 4's standard *60 times,* applying it in an extraordinarily wide range of statutory settings.[18] As this Court has recognized, the more times Congress enacts the same judicially construed language, the more certainty this Court can have in concluding Congress has ratified the judicial interpretation. *See Shapiro*, 335 U.S. at 6-7 & n.4 (listing 26 statutes where Congress enacted an earlier provision "in substantially the same terms").

One subset of the statutes makes ratification particularly clear here. In ten of them (denoted by "†" in the Appendix), Congress has extended Exemption 4's

[18] This case thus differs markedly from one where a party argues Congress has accepted lower-court interpretations based on mere legislative "'inaction'" or "acquiescence." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994).

standard to exempt from mandatory disclosure records that were not furnished by a private party and, thus, would not otherwise fall within Exemption 4. *See* 5 U.S.C. §552(b)(4) (records must be "obtained from a [non-Government] person"). For example, a 2007 statute authorized the Secretary of Energy to exempt from FOIA renewable energy-related information that "would be" "confidential … commercial or financial information under subsection (b)(4) of [FOIA] *if the information had been obtained from a non-Government party*." 42 U.S.C. §17244(h) (emphasis added).

The clear import is that government-generated records are exempt if their disclosure would, under the uniform, judicially adopted standard, pose the same likelihood of competitive harm as if obtained from a private party. By contrast, petitioner's interpretation of "confidential"—"kept secret" by the submitting party—would make no sense in this context. Government-generated records are simply not "kept secret" by any private party.

Two additional factors further support ratification here. *First*, FOIA is, like the tax code, an "area … of traditional year-by-year supervision." *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969); *see Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983) (same). Indeed, Congress has committed to "regularly review" the statute "to determine whether further changes … are necessary to ensure that the Government remains open and accessible." Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524. And that is exactly what Congress has done: FOIA requires the Attorney General to submit for congressional review

annual reports summarizing the disposition of all FOIA litigation, and each agency to submit annual reports cataloging every decision to withhold information. 5 U.S.C. §552(e)(1)(A), (6)(A). Congress also routinely holds hearings on FOIA, including Exemption 4 specifically.[19]

Second, FOIA itself has been amended some dozen times since its enactment. Such "full and continuing congressional awareness" strengthens the inference of congressional ratification because each revision provides a natural opportunity to review judicial constructions. *Flood v. Kuhn*, 407 U.S. 258, 281-83 (1972); *see also, e.g.*, *Manhattan Props., Inc. v. Irving Tr. Co.*, 291 U.S. 320, 336 (1934). Several FOIA amendments have specifically responded to judicial interpretations of the exemptions. *E.g.*, Pub. L. 93-502, 88 Stat. 1561 (1974) (responding to *EPA v. Mink*, 410 U.S. 73 (1973)); Pub. L. 99-570, §1802(a), 100 Stat. 3207 (1986) (responding to Exemption 7 case law).

Contrary to petitioner's view, the D.C. Circuit's ruling in *Critical Mass Energy Project v. Nuclear Reg. Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), did not alter the judicial consensus that Congress has re-

[19] *E.g.*, Business Record Exemption of the Freedom of Information Act: Hearings Before a Subcomm. of the H. Comm. on Gov't Operations, 95th Cong. 2 (1977); Freedom of Information Reform Act: Hearing on S. 774, Hearings Before the Subcomm. of the H. Comm. on Gov't Operations, 98th Cong. 279-401 (1984).

peatedly ratified. Just the opposite: *Critical Mass reaffirmed* the "circuit precedent of almost twenty years' standing." *Id.* at 875.

Petitioner incorrectly contends *Critical Mass* "rejected the *National Parks* definition in the context of information voluntarily submitted to the Government." Pet. Br. 30 (emphasis omitted). *Critical Mass* was a straightforward application of *National Parks* to "voluntarily submitted" information. With respect to the first *National Parks* prong—impairing the Government's ability to obtain necessary information—*Critical Mass* explained that, when "information is volunteered, the Government's interest is in ensuring its continued availability." 975 F.2d at 878. Thus, "categorical treatment" under *National Parks* was in order: When "the Government has secured [information] from voluntary sources on a confidential basis," releasing that information would "jeopardize its continuing ability to secure such data on a cooperative basis." *Id.* at 879. That "categorical" rule made consideration of the second prong—competitive harm—unnecessary.

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In short, Congress has reenacted and extended the Exemption 4 standard 60 times in the face of the provision's uniform judicial interpretation. A clearer case of ratification could scarcely be imagined.

C. Exemption 4's reference to confidential commercial information is properly read to mean information objectively "confidential in nature."

Petitioner argues that "confidential" commercial information, as used in Exemption 4, must be read to mean information "kept secret" by the person furnishing the information. Pet. Br. 2. That view, however, cannot overcome either of the two grounds, discussed above, requiring a showing of competitive harm: the established usage of "confidential commercial information" as a term of art at common law, and Congress' repeated ratification of the longstanding judicial consensus. Nor can petitioner's view be squared with this Court's repeated admonition that FOIA's exemptions are to be construed narrowly.

Exemption 4's text—read, not just in light of dictionaries (*supra* p. 27 n.11), but also this Court's precedent, common parlance, numerous real-world examples, and analogous sources of law—shows that "confidential" commercial information is properly interpreted as information that is "confidential in nature," *i.e.*, inherently sensitive and likely harmful if disclosed.

1. A variety of sources, including this Court's precedent, discredit petitioner's view that "confidential" must mean "kept secret," rather than "confidential in nature," "sensitive," and "likely harmful."

Petitioner's sweeping reading of Exemption 4 ignores the basic difference between information that is objectively confidential *in nature*, and information that is merely treated as a secret, without reference to its underlying nature. That distinction, reflected in the common law, is also reflected in this Court's reading of the word "confidential" in other settings, common parlance, and real-world examples, including judicial opinions, statutes, and court rules.

Landano. Exemption 7(D) of FOIA permits a federal agency to withhold "law enforcement" records that "disclose the identity of a confidential source." *Landano* rejected the equivalent of petitioner's proposed interpretation of Exemption 4. This Court refused to read "confidential source" to turn on the unilateral expectations of the source that the provided information would remain secret. Rather, this Court insisted on a showing that the information was confidential *in nature*, requiring "a reasonable expectation" or "inference" of confidentiality. 508 U.S. at 173, 179.

In applying that standard, the Court asked whether, objectively, there was a risk of harm from disclosure. For example, the Court pointed to "the

character of the crime at issue"—especially "gang-related" offenses—as a sign that the informant might fear identification and be "worried about retaliation" by the perpetrators. *Id.* at 179.

The Government agrees with this understanding of *Landano* and that, applied here, it requires "an objective assessment" whether there is a "reasonable expectation of confidentiality." U.S. Br. 17 (quotation marks omitted). Further, the Government agrees this assessment looks to the nature of the information at issue. For instance, here, there is no objectively reasonable expectation of confidentiality because the SNAP data is "intimately linked to the government's own actions, actions that one would not reasonably expect to be kept confidential." U.S. Br. 25; *see infra* pp. 59-61 (discussing Solicitor General's proposed interpretation of Exemption 4).

Petitioner nevertheless insists *Landano* supports its interpretation because the Court stated a "source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication." 508 U.S. at 174. But the question is *how* courts should go about determining the source's intent: by looking to the source's *unilateral* desire to keep information secret, as petitioner seeks here, or instead by examining the nature of the communication to determine whether it is the kind of information reasonably considered con-

fidential in nature. *Landano* selected the latter approach under Exemption 7(D). There is no reason a different approach should apply under Exemption 4.[20]

Common Parlance. Another important way we know "confidential" is often used to mean "confidential in nature" is by looking to how an "individual might" use the word. *FCC v. AT&T Inc.*, 562 U.S. 397, 403-04 (2011). As Justice Scalia said, the "acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny." *Johnson v. United States*, 529 U.S. 694, 718-19 (2000) (dissenting).

In that regard, imagine you are at a social gathering and your host says to you, "I have a question about your colleague Tom. Has he ever told you any confidential information?" Imagine further that Tom had, just that morning, told you his ATM-card pin number. (He wanted you to take his card and withdraw some cash for him.) Without knowing anything about how careful Tom is about concealing his financial information, you would answer, "Yes, Tom has told me confidential information." That's because a

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[20] *Landano* also suggested, without deciding, that a source might be treated as "confidential" if the FBI "made explicit promises of confidentiality." 508 U.S. at 172. This observation, of course, reinforces that a source lacks the *unilateral authority* petitioner seeks to decide which information should be shielded from disclosure. In any event, the Court could not have meant the Government has the power to decree that every source is confidential merely by making such a pledge. That would eviscerate the Court's holding that the Government may *not* "presume that virtually every source is confidential." *Id.* at 174-75.

pin number is objectively *confidential in nature*. It is *sensitive* information. By contrast, if Tom had never said a word to you beyond harmless pleasantries—like weekend plans or his thoughts on the baseball game last night—your answer would be "no." There would be no objective reason to expect that information to be treated as confidential.

Real-World Usages: Judicial Opinions. It is entirely natural to say that certain information is "confidential information" because it is "confidential in nature," that is, "highly personal," "sensitive," and "intimate." *New Jersey Bell Tel. Co. v. NLRB*, 720 F.2d 789, 790-91 (3d Cir. 1983) (discussing sensitive employment files such as employee tardiness records). For example, in *Nat'l Treasury Employees Union v. Von Raab*, Justice Scalia equated "sensitive information" with "confidential information." 489 U.S. 656, 685-86 (1989) (dissenting). Similarly, in *King v. Bryant*, 795 S.E.2d 340, 350 (N.C. 2017), the court described information as "confidential" because it was "*inherently sensitive* and confidential in nature." *Ibid.* (emphasis added) (discussing certain "medical information"). Such designations are based on the nature of the information, not a party's say so. *See, e.g.*, *Corning Glass Works v. U.S. Int'l Trade Comm'n*, 799 F.2d 1559, 1564 n.3 (Fed. Cir. 1986) ("materials marked confidential" by the submitting party, were improperly designated as "confidential" because the information was "non-confidential in nature").

Similar examples abound. To take just a few, it is common to find courts and other speakers remarking

that information is "highly confidential" or "more confidential" than other information. That usage often reflects a view about the information's intrinsic sensitivity, rather than its mere secrecy. For example, a party might argue that disclosure of certain information ("market share") would "allow a competitor to better estimate *even more confidential information*," such as "production capacity and manufacturing specifics." *Sharkey v. FDA*, 250 F. App'x 284, 290 (11th Cir. 2007) (emphasis added). By "more confidential," the party meant the information's disclosure was more likely to produce "very real … harm." *Ibid.* Likewise, a court used the term "highly confidential" to refer to the "important and sensitive" nature of information. *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1265 (7th Cir. 1995). This Court has done the same, referring to the "relationships of many" intelligence officers "to our Government" as "highly confidential" because of the likely harm of releasing that information: Many such officers, the Court explained, "are still engaged in intelligence gathering." *Haig v. Agee*, 453 U.S. 280, 283 (1981).

Real-World Usages: Statutes and Rules. Statutes and rules provide similar insight. Federal Rule of Criminal Procedure 17(c) requires court approval to serve a subpoena requesting "confidential information about a victim." The Advisory Committee Notes for this recent amendment strongly suggest it requires an assessment of sensitivity. Rather than make the standard turn on whether the victim has kept that information secret, the Advisory Committee left the term "'confidential information' … to case development," while providing some illustrations of sensitive materials that qualify regardless of the victim's

confidentiality practices: "such things as medical or school records." Fed. R. Crim. Proc. 17(c), advisory committee note to 2008 amendment.

Similarly, under the executive order barring disclosure of certain sensitive national-security information, information is "confidential" if "its unauthorized disclosure could reasonably be expected to cause … damage to the national security." Exec. Order No. 11652, 37 Fed. Reg. 5209 (Mar. 8, 1972). Likewise, statutes equate "sensitive information" with "confidential commercial … information." 10 U.S.C. §129d; *see also, e.g.*, 31 U.S.C. §3553 (referring to "sensitive information" and "other … confidential" information); 49 U.S.C. §24322 (referring to "confidential" and "other … sensitive information"). By contrast, where statutes adopt petitioner's broader interpretation, they typically say things like "kept confidential," "held … confidential," or "designated as confidential." *E.g.*, 15 U.S.C. §57b-2; 7 U.S.C. §2619; 7 U.S.C. §4912.

Petitioner is thus simply wrong in contending that the plain language mandates reading Exemption 4 as looking to whether the private party kept the information secret, as opposed to the objective confidential nature of the information.

2. Analogous disclosure regimes also require consideration of harm when evaluating confidentiality.

Reading Exemption 4 to require a showing of harm from disclosure is further buttressed by analogous areas of law, where courts similarly require a

showing of harm before blocking release of information to the public or another party. Sometimes courts derive this requirement from the word "confidential" alone; sometimes other language reinforces the need for a showing of harm. The relevant point is that there is a clear norm in the law that bare secrecy is insufficient to justify nondisclosure.

Judicial-Sealing Standards. Judicial-sealing practices are especially instructive because, just as FOIA exists to safeguard the common-law right "to inspect and copy public records," sealing rules safeguard the corresponding right "to inspect and copy … judicial records." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). Thus, in applying sealing rules that restrict the public filing of "confidential documents," state and federal courts require parties seeking to seal records to "identify a … serious injury that would occur from disclosure." Laurie Kratky Doré, *Public Courts Versus Private Justice*, 81 Chi.-Kent L. Rev. 463, 475 & nn.64-65 (2006) (collecting examples); *e.g.*, 11 U.S.C. §107(b)(1) ("bankruptcy court shall … protect an entity with respect to a trade secret or confidential … commercial information"). Courts have long refused "to permit their files to serve … as sources of business information that might harm a litigant's competitive standing." *Nixon*, 435 U.S. at 598.

For instance, in *In re Orion Pictures Corp.*, applying the bankruptcy-court sealing rule at §107(b)(1), the court held "confidential … commercial information" is information that "would cause an unfair advantage to competitors." 21 F.3d 24, 27 (2d Cir. 1994) (quotations marks omitted). *See also, e.g.*, *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d

157, 167 (3d Cir. 1993) (sealing must be based on "*evidence* to show how public dissemination … would cause the competitive harm"); *Mosallem v. Berenson*, 76 A.D.3d 345, 350 (N.Y. App. Div. 2010) ("In the business context, we have allowed for sealing … where the release of documents could threaten a business's competitive advantage.").[21]

Discovery and Subpoena Practices. The Federal Rules of Civil Procedure twice reference "confidential" information: in Rule 26(c)(1)(G), authorizing courts to issue protective orders against discovery pertaining to "confidential … commercial information," and again in Rule 45(d)(3)(B)(i), authorizing courts to quash a subpoena when it would require "disclosing a trade secret or other confidential … commercial information." Both require the moving party to show "it would be harmed by [the] disclosure." 8A C. Wright & A. Miller, FED. PRAC. & PROC. CIV. §2043 (3d ed. 2018); *see also* Fed. R. Civ. P. 45, advisory committee note to 1991 amendment ("confidential" has same meaning as under Rule 26).

As this Court has held, these rules reflect the common law, which "recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information." *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 356 (1979); *see*

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[21] *See also*, *e.g.*, *Clear Channel Commc'ns, Inc. v. United Servs. Auto. Ass'n*, 195 S.W.3d 129, 136 (Tex. Ct. App. 2006); *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1225 (Fed. Cir. 2013); *Doe v. Doe*, ___ S.E.2d ___, 2018 WL 6613818, at *17 (N.C. Ct. App. Dec. 18, 2018); *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 451 (5th Cir. 2019).

also Fed. R. Civ. P. 26, advisory committee note to 1970 amendment ("new reference to trade secrets and other confidential commercial information" was intended to "reflect[] existing law."); Fed. R. Civ. P. 45, advisory committee note to 1991 amendment (same). The key word is "*qualified*." Protection was not "automatic and complete." 443 U.S. at 362 (quotation marks omitted). Courts "have in each case weighed the[] claim to privacy against" "the sensitivity of the commercial secrets involved, and the harm … [from] disclosure." *Id.* at 362-363 (quotation marks omitted).

Thus, in analogous areas of law, bare secrecy is insufficient to justify nondisclosure. Exemption 4 is properly construed in light of that norm.

3. The legislative history does not support petitioner's reading.

Petitioner's reliance on legislative history (Pet. Br. 22-23) is unavailing. As an initial matter, FOIA's legislative history is notoriously flawed, Kenneth C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 789-90 (1967)—even "tortured, not to say obfuscating," *9 to 5 Org.*, 721 F.2d at 6 (quotation marks omitted). It is exactly the sort of "murky" history that has led this Court and its members to caution against "excursions … into the swamps of legislative history." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *Lawson v. FMR LLC*, 571 U.S. 429, 459 (2014) (Scalia, J., concurring).

As to the specific history cited here, petitioner relies primarily on a single statement in the House and Senate Reports: that information is "confidential" if it

"would customarily not be released to the public by the person from whom it was obtained." Pet. Br. 22-23 (citing S. Rep. No. 89-813, at 9 (1965); H.R. Rep. No. 89-1497, at 10 (1965)). However, that quoted snippet was recycled from reports issued on the FOIA bill from the *prior year*, which unlike the final law, expressly used the word "customarily." It read: "trade secrets and other information obtained from the public and customarily privileged or confidential." S. 1666, 88th Cong. §3 (1964) (1964). When the word "customarily" was removed from the bill, the "Senate committee simply failed to alter its earlier report," and "the House committee seven months later copied most of the Senate committee report." Davis, *supra*, at 790.

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Petitioner's view—that "confidential" "unambiguous[ly]" means "private and not publicly disclosed," Pet. Br. 13—is a mirage. Petitioner presents this as a simple dictionary-driven case only by misreading the dictionaries it relies on, eliding common parlance and real-world examples, and misunderstanding this Court's decision in *Landano*—to say nothing of disregarding the common law and Congress' repeated ratification of the uniform judicial interpretation of Exemption 4.

D. Petitioner's standard would do serious damage to FOIA's core objective of shedding light on government spending, enforcement, and other actions.

FOIA expands on rights both constitutional and deeply rooted in the law. While "there is no constitutional right to obtain all the information provided by FOIA," *McBurney v. Young*, 569 U.S. 221, 232 (2013), the ability of the people to "know what [their] Government is up to" is a "structural necessity in a real democracy," *Favish*, 541 U.S. at 171-73. FOIA gives legislative effect to Justice Brandeis's famous maxim, "[s]unlight is … the best of disinfectants." Louis D. Brandeis, OTHER PEOPLE'S MONEY 92 (1914). FOIA also builds on the common-law right "to inspect and copy public records," *Nixon*, 435 U.S. at 597, and among other things, helps to make transparent how the Government spends the people's money, furthering the Constitution's guarantee that "regular statement[s] … of all public money shall be published," U.S. Const. art. I, §9, cl. 7.

Petitioner's reading of Exemption 4 threatens serious damage to FOIA's core objective of shedding light on "what [the] Government is up to." It would hamstring the public's ability to find out how the Government is spending the public's money and whether and how the Government is abusing, or failing to exercise, its vast regulatory authority. In short, if a private-party submitter may object to disclosure of government records merely because they contain information the submitter has unilaterally chosen to

keep secret, it will be very hard to expose government waste, fraud, and abuse.

Numerous examples illustrate as much. One notorious episode involved toilet seats purchased by the Navy for $640 apiece. The story started a national political conversation about wasteful government spending and led to further investigations that focused public attention on the subject for years to come.[22] Like many such stories on wasteful government spending, the toilet-seat tale began as a FOIA request.[23] In petitioner's view, however, the $640 toilet-seat contractor would have had a successful Exemption 4 objection to release of the contract price, merely because it necessarily contained pricing information the contractor had treated as secret.

Similar public-spending revelations obtained through FOIA are legion. We note just a few here. In each, the effect of petitioner's construction of Exemption 4 is plain. None of the private parties at issue had publicized the information, and presumably none would agree to if given a choice:

- Fox News' request for information about the banks receiving 2008 bailout funds—including "the names of the borrowing banks, the amount they borrowed, and the collateral pledged," *Fox*

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[22] William D. Hartung, *Only the Pentagon Could Spend $640 on a Toilet Seat*, The Nation, Apr. 11, 2016, http://tinyurl.com/jv2yuxa.

[23] Mike Ward, *It's Your Information*: *How a Federal Law Has Turned Citizens into Giant Slayers*, Austin American–Statesman, Oct. 6, 1996, at H1.

News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 601 F.3d 158, 159 (2d Cir. 2010);

- A request for a controversial pitch memo by BP written to government agencies in an attempt to retain myriad government contracts following the Gulf oil spill;[24]

- A front-page story that a local public-school system was charged massively inflated fees for certain maintenance contracts;[25]

- And a report that FEMA paid nearly $75 million to Carnival Cruise Lines to house post-hurricane workers, even though the company "hosted less than half the federal workers than was agreed to."[26]

This case is of a piece. As explained at the outset, the Argus Leader sought SNAP-spending data to assist the newspaper's investigation of potential fraud.

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[24] Jason Leopold, *How BP Lobbied the EPA to Let it Continue Being a 'Business Partner of the Government,'* Vice News, Nov. 12, 2014, http://tinyurl.com/y499x95d.

[25] Justin Blum, *Energy Contract Used to Repair D.C. Schools; No–Bid Agreement Pays Utility Millions*, Wash. Post, Apr. 23, 2001, at A1.

[26] Daniel Rivero, *FEMA Paid Millions For Half-Empty 'Floating Hotel' After Hurricane Maria*, WLRN, May 30, 2018, https://tinyurl.com/y2wxkmar.

In addition to keeping spending abuses and fraud from the scrutiny of the press and public, petitioner's interpretation would also threaten efforts to understand whether the Government is properly wielding its tremendous powers to enforce the law. To know whether the Government is effectively regulating private parties, it is important to know what the Government is requiring them to submit and what it is learning from their submissions. Examples include:

- A request for information collected from private parties by the CFPB in a 2015 study of arbitration practices that led the agency to issue a controversial rule prohibiting arbitration clauses in consumer-financial contracts, *Cause of Action Inst. v. CFPB*, No. 16-2434 (D.D.C. Dec. 13, 2016), Dkt. 1;

- An advocacy organization's request for certain documents considered by the FDA in approving mifepristone (the "medical abortion" drug), *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 148 (D.C. Cir. 2006);

- And another organization's request for records related to the safety of FDA-approved cataract-implantation devices, *Pub. Citizen Health*, 704 F.2d 1280.

Without addressing the compelling interests against reading Exemption 4 as petitioner proposes, petitioner alleges just two counterweights. Neither has merit.

First, petitioner argues the longstanding judicial interpretation of Exemption 4 has proved "unworkable," yielding multiple circuit "splits" and requiring "case-by-case" factbound analysis. Pet. Br. 41-44. As an initial matter, there is nothing unusual about a legal standard generating occasional circuit conflicts or requiring case-specific application to facts. And as explained below, pp. 61-63, petitioner's administrability concerns are addressed by looking to the way courts have historically dealt with similar issues at common law. In any case, the claimed tension in the case law is exaggerated. *See* Brief in Opposition 17-25.

The same is true of the suggestion that Exemption 4 produces sprawling litigation. The overwhelming majority of FOIA requests are resolved efficiently at the administrative level. Indeed, less than one-tenth of 1% of FOIA requests turn into litigation.[27] Of those, very few cases even get to discovery and, in the almost 30 years between 1979 and 2008, there were just 88 FOIA trials (fewer than three per year). Margaret Kwoka, *The Freedom of Information Act Trial*, 61 Am. U. L. Rev. 217, 246-47, 255-57 (2011).

Petitioner suggests that, in the agency review process, the agency is required to guess about the likelihood of competitive harm. Pet. Br. 48. That is incorrect. Regulations require "prompt notice" to a private-party submitter when an agency receives a FOIA request for information that party submitted. *E.g.*, 28

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[27] *See* U.S. Dep't of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2017*, at 4 (2017), http://tinyurl.com/y4z6pz64; The FOIA Project, FOIA Lawsuits, http://tinyurl.com/yyngpfs5.

C.F.R. §16.7. At that point, the submitter has an opportunity to explain to the agency exactly why the disclosure would cause it competitive harm. *See Acumenics Research*, 843 F.2d at 805 (explaining this system).

Finally, if a competitive-harm standard was in fact difficult to administer, as petitioner claims, it is unlikely states would require a competitive-harm showing under their state-law versions of Exemption 4. But numerous states do. *E.g.*, Ark. Code Ann. §25-19-105(b)(9)(A) ("[f]iles that … would give advantage to competitors"); Tex. Gov't Code §552.110(b) (similar); N.Y. Pub. Off. Law §87(2)(d) (similar); Utah Code Ann. §63G-2-305(2) (similar); Iowa Code Ann. §22.7(6) (similar); Neb. Rev. Stat. §84-712.05(3) (similar).

Second, petitioner contends that "commercial for-profit interests have dominated FOIA requests." Pet. Br. 34. But that would be a feature, not a bug, of FOIA's design, which entitles all members of the public—corporations and non-profits, entrepreneurs and journalists alike—to learn what their Government is up to. Small businesses, for example, might use FOIA to level the playing field, learning whether the Government is unfairly favoring larger, better-connected government contractors. It is profoundly inaccurate to suggest most commercial users of FOIA are illegitimately using the statute to obtain a competitive advantage. In fact, leading FOIA scholar Margaret Kwoka, the author of the statistical analysis petitioner cites, confirms "the vast majority of all commercial FOIA requests are seeking … routine records"

(things like FDA inspection reports and recent contract bids that agencies could "easily" post on "accessible, searchable" databases), rather than competitively damaging information. *FOIA, Inc.*, 65 Duke L.J. 1361, 1365, 1430-36 (2016).

FOIA protects the right of the people to know how the Government is spending their money and whether it is abusing its regulatory authority. Petitioner's alternative, which focuses on the submitter's unilateral practice of keeping information secret, would improperly conceal that vital information.

E. The Solicitor General's alternative definition of "confidential" also lacks merit.

For its part, the Solicitor General's brief offers multiple interpretations of "confidential."

SG Interpretation #1. The Solicitor General's brief begins with petitioner's interpretation, contending "confidential" means "kept secret by those who convey it to the government." U.S. Br. 14. But then, as discussed above (p. 44) in addressing this Court's *Landano* decision, the Government pivots, acknowledging that sometimes—including in this case—the fact that "information is not customarily released … by" a private party is "insufficient in itself to render it 'confidential.'" U.S. Br. 24. Analysis of Exemption 4 "must also take into account the context in which that information appears" to assess whether the provider's "expectation of confidentiality would be objectively reasonable." U.S. Br. 25.

That, however, *supports* the longstanding rule, requiring an objective assessment of the nature of the information, *i.e.*, whether the information is "confidential in nature." At a minimum, the Solicitor General's brief shows that reading "confidential" to turn on the objective nature of the information is *not* contrary to the plain language of the statute.

SG Interpretation #2. The Solicitor General also argues for an alternative definition: commercial information should be deemed "confidential" if the "statements or actions" of a government official could be "reasonably understood to show that the government will not publicly disclose it." U.S. Br. 15.

That would give a government official, even a low-ranking one, the power to freely exempt commercial information by simply providing an express or implied assurance that the information will not be disclosed under FOIA. In enacting FOIA, however, Congress removed the Government's unchecked discretion to shield documents from disclosure. *See Mink*, 410 U.S. at 79. Judicial review under FOIA is "de novo," 5 U.S.C. §552(a)(4)(A)(vii), with no deference to agency interpretations, *e.g.*, *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1115 (D.C. Cir. 2015).

That represented a major shift from pre-FOIA law, where agencies could withhold "information confidential for good cause found." 5 U.S.C. §1002(c) (1964). This Court has thus criticized interpretations of FOIA exemptions that would afford an agency "unlimited" authority to "withhold[] … files merely by classifying them" as FOIA-exempt. *FBI v. Abramson*, 456 U.S. 615, 621-22 (1982) (characterizing as

"sweeping" the notion, accepted by some lower courts before Congress intervened to amend FOIA, that the Government could simply classify files as "investigatory" and thereby subject them to Exemption 7).

The Solicitor General's proposal here is inconsistent with FOIA's basic premises and recalls the prior era of unlimited withholding discretion. In the Government's view, an agency official's assurance that commercial information will not be disclosed is controlling, even if that assurance was neither authorized nor rooted in the nature of the information (such that there would be an objectively reasonable basis for treating the information as confidential). Here, for example, the Solicitor General says USDA's assurances are sufficient to exempt the SNAP data "[e]ven if USDA's underlying reasons for its assurances were [legally] incorrect." U.S. Br. 30. Further, the Solicitor General acknowledges there was no reasonable expectation of confidentiality given the nature of the information—public-spending data, essential to an "informed public debate about the expense of government action." U.S. Br. 26.

The Government's reading of Exemption 4 improperly cedes virtually unlimited power to agencies to exempt commercial information from disclosure. That boundless and peremptory view should be rejected.

III. There Is No Basis To Water Down The Longstanding Competitive-Harm Standard.

Petitioner's second question presented asks the Court to reformulate the longstanding competitive-

harm inquiry to look to whether harm was merely "possible" as opposed to likely. Pet. Br. i, 48-49. Petitioner also asks the Court to hold that relevant harm includes "[i]njury to reputation." Pet. Br. 50. These requests are unsound and should be rejected.

First, petitioner's proposals are inconsistent with both the common law and the backdrop understanding Congress has repeatedly ratified. At common law, a mere "possibility" of economic harm has never sufficed to make out a tort claim for unfair competition. Most relevant here, a plaintiff alleging wrongful disclosure of non-public business information must show it "is likely to result in injury." RESTATEMENT (THIRD), UNFAIR COMPETITION §40.[28]

The common law likewise provides objective standards for evaluating whether alleged harm is cognizable. Under the common law, *unfair*-competition liability turns on whether "methods of competition … *improperly* interfere with … *legitimate* commercial interests." *See generally* RESTATEMENT (THIRD), UNFAIR COMPETITION, foreword (emphasis added). Under those standards, the risk of mere "bad publicity or embarrassment" would not suffice, as petitioner asserts, Pet. Br. 41, 50. *See, e.g., Monsanto*, 467 U.S. at 1011 n.15 ("value of a trade secret lies in the competitive advantage it gives its owner over competitors," not

[28] Other well-established grounds for unfair-competition liability require a similar showing. *E.g.*, RESTATEMENT (THIRD), UNFAIR COMPETITION §20 ("*likelihood* of confusion" for trademark infringement (emphasis added)); *id.* §2 (deceptive marketing requires representation that "is *likely* to deceive" (emphasis added)).

any protection from embarrassing information such as "harmful side effects of [its] product"); *In re Bolster*, 59 Wash. 655, 658 (1910) (that disclosure would be "embarrassing[] to … a corporation" did not render its documents "privileged as trade secrets").

Moreover, the longstanding test Congress has repeatedly ratified requires a showing that competitive harm is "likely." *Supra* pp. 24-25 n.10. Once Congress has ratified a judicial construction, only Congress may modify it. *See Helsinn*, 139 S.Ct. at 634.

Second, petitioner vastly overstates the burden under the longstanding competitive-harm test. Proving harm is "likely" to result does not require, as petitioner suggests, "demonstrating a precisely defined competitive harm," Pet. Br. 49, proving that harm will "immediately result," *ibid.*, or showing to a "near certainty" that harm will result, Pet. i. The cases petitioner cites do not hold otherwise; they straightforwardly apply the longstanding likelihood standard to different factual settings.[29] That a "legal doctrine phrased in terms of what is … 'likely'" sometimes yields results "subject to some debate" is no reason to jettison the standard. *Massachusetts v. EPA*, 549 U.S. 497, 547 (2007) (Roberts, C.J., dissenting). It

[29] *E.g., McDonnell Douglas Corp. v. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) ("party invoking Exemption 4 [need not] prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would 'likely' do so"); *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994) (similar).

is commonplace to have standards that call for the exercise of case-specific legal judgment.

Third, and finally, this is not the proper case to consider modification of the longstanding competitive-harm standard because the result here would be no different under petitioner's proposal. As the district court concluded after weighing the evidence—including the snippets of trial testimony petitioner selectively quotes, Pet. Br. 51-53—"any potential competitive harm from the release of the requested SNAP data is speculative at best." Pet. App. 19a. Further, there was no "evidence in the record" of reputational harm. Pet. App. 5a.

Petitioner's proposed modification of the longstanding competitive-harm standard is thus neither correct nor properly presented in this case.

IV. The Requested Government-Spending Data Is Not Encompassed By Exemption 4.

Exemption 4 is limited to commercial or financial information "obtained from a person." That is why petitioner consistently frames its favored standard as whether the information "would customarily not be released … *by the person from whom it was obtained*." Pet. Br. 22 (quotation marks omitted) (emphasis added); *id.* at 24 (similar); *id.* at 30 (similar).

But records of government funds transferred to SNAP-participating retailers are not "obtained" from the retailers. The Government and its contractor payment-processors make and record the determination

whether a SNAP account is valid and contains sufficient funds. *Supra* pp. 4-5, 19-20. That is why the district court held the information sought is "'obtained' from third-party payment processors, not from individual retailers." Pet. App. 15a-16a. Petitioner did not seek review of that determination. Pet. App. 2a n.2 (noting "neither party contest[ed] that finding on appeal").

Even if this Court chose to revisit the ruling on this question, the only possible sources of government-spending records could be the payment processor, as the Eighth Circuit held, or the Government itself. *See Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147-49 (2d Cir. 2010) (holding information about Federal Reserve loans was not "obtained from" the private loan applicants because they were records of "the agency's own executive actions").

Argus Leader seeks records of the Government's consummated SNAP transactions: funds approved by the Government and transferred to private retailers. As discussed above pp. 4-5, 19-20, records of those transfers did not come into existence until the SNAP account was deemed valid and funds were released. For this additional reason, the data here is not exempt from disclosure.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

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