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

REPLY FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement in the petition remains accurate.

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The Brief in Opposition does not dispute how unmoored the *National Parks* test is from Exemption 4's text, and it ignores the numerous criticisms of that test marshaled by petitioner and *amici*. Nowhere does respondent contest the importance of the questions presented. Instead, it justifies denying certiorari on the basis that *National Parks* already reigns broadly across the country.

But *this Court* is the authoritative expositor of the meaning of federal law. Textual errors aside, *National Parks* has not generated clarity, either. Respondent denies the existence of the numerous circuit splits that petitioner, multiple *amici*, and Members of this Court have identified—but respondent fails to meaningfully examine the relevant cases. Respondent also raises, for the first time, the specter of a "vehicle" issue—one unsupported by the record, uncontested below, and insufficient in any case to justify denial of review. Rather, this case represents an ideal vehicle to restore an important statute's

plain meaning. The Court should grant review.

I. RESPONDENT BARELY TRIES TO SQUARE *NATIONAL PARKS* WITH FOIA'S PLAIN TEXT AND THIS COURT'S CASES

Perhaps recognizing the difficulty of contesting petitioner's argument that *National Parks & Conservation Association* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), is irreconcilable with Exemption 4's plain text,[1] respondent makes little effort to defend the test on that basis. It instead urges inertia: that this Court should defer to the D.C. Circuit because other lower courts have widely adopted *National Parks*. Of course, this Court owes no deference to any Circuit precedent, particularly one that was wrongly decided and that continues to generate serious confusion in application.

1. Respondent is right that many Circuits have reflexively adopted *National Parks*. BIO 13. But this Court grants certiorari to correct erroneous, although widespread, interpretations of important federal statutes. *E.g.*, *Milner* v. *Dep't of the Navy*, 562 U.S. 562, 581 (2011) (overturning a long-standing atextual test adopted by most Circuits for a plain-text interpretation of FOIA Exemption 2); *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191, 196 (1994) (replacing long-standing and broadly-adopted lower-court interpretation of aiding-and-abetting liability in securities actions with a plain-text interpretation, and rejecting dissent's argument that the previously "settled construction * * * should not be disturbed").

Widespread adoption of a test does not make it correct. Respondent does not dispute that the Circuits have "fallen in line behind" the D.C. Circuit, BIO 13, rather than having embraced the test after careful examination

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[1] 5 U.S.C. § 552(b)(4).

of Exemption 4's text. In contrast, *National Parks* has met staunch criticism from jurists, including Members of this Court, and the Department of Justice. See Pet. 14-15; U.S. Br. in Opp'n 9, *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, No. 14-1273 (arguing that "confidential" in Exemption 4 should be given its ordinary meaning). And a majority of the Members of this Court granted petitioner's Application to Recall the Mandate in this case, confirming that these concerns are plausible. Pet. App. 81a-82a.

Respondent neither refutes these points nor explains why they do not justify this Court's review. It just ignores them.

2. Respondent attempts to bolster *National Parks* by suggesting that the D.C. Circuit unequivocally reaffirmed it. BIO 14 (discussing *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*)). In fact, the *en banc* D.C. Circuit retained its test based on *stare decisis*—not because it believed *National Parks* correctly interpreted FOIA Exemption 4. See *Critical Mass*, 975 F.2d at 877 ("Whatever our individual opinions as to the merits of the two-part test, we accept the wisdom of Justice Brandeis's observation * * * that *stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." (internal quotation omitted)).

Regardless, D.C. Circuit precedent poses no *stare decisis* obstacle for this Court. The opposite is true: "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994). Furthermore, as *amici* supporting petitioner demonstrated, *National Parks* is not even set-

tled—it has caused pernicious and unpredictable effects.[2] Whatever the D.C. Circuit may have thought a generation ago, experience has proven *National Parks* unworkable.

3. Respondent's reliance on legislative history is also misplaced. Respondent mistakenly suggests that Congress blessed the *National Parks* test in a 1978 Committee report. BIO 16.

The report came from a House of Representatives Committee—hardly both Houses of Congress after presentment to the President. Even if the report *were* authoritative, it still contradicts respondent's characterization. It did not bless *National Parks*, but expressly stated the opposite: that the committee was "not prepared at this time to consider the merits of the substantial comparative harm test." *Freedom of Information Act Requests for Business Data and Reverse FOIA Lawsuits*, H.R. Rep. No. 95-1382 at 22. Instead, the subcommittee that prepared the report "limited its review primarily to the procedures used by agencies and by courts in deciding cases involving business information under exemption 4," *id.* at 12, and the report noted that the underlying hearings did not "delve deeply into the scope of exemption 4," *id.* at 22. In all events, the opinion of a House committee regarding the meaning of statute enacted by a different Congress over a decade earlier is at best an unreliable tool of statutory interpretation.

4. Respondent's brief ends with piecemeal merits arguments that "confidential" in Exemption 4 should *not* bear its plain meaning. Such contentions make certiorari *more* important, not less. If this Court's clear directive

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[2] *E.g.*, National Association of Convenience Stores *Amicus* Br. 14-23; Alliance of Marine Mammal Parks & Aquariums *Amicus* Br. 11-19; Chamber of Commerce *Amicus* Br. 10-17.

that statutes mean what they say does not apply to this single provision of FOIA, *this Court* should be the one to say so. And if respondent's arguments are wrong, then widespread legal error should not evade this Court's review.

a. Respondent asserts that "confidential" should not be given its ordinary meaning because FOIA exemptions should be narrowly construed. BIO 30. This Court recently rejected a strikingly similar argument under the Fair Labor Standards Act. *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018). The "narrow-construction principle relies on the flawed premise that the FLSA pursued its remedial purpose at all costs." *Ibid.* Instead, exemptions must be given a "fair reading," as they "are as much a part of FLSA's purpose" as its other provisions. *Ibid.*; see also *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known pursues its stated purpose at all costs." (internal quotation and modifications omitted)).

FOIA is no different: each exemption is part of the statute, and a plain-meaning interpretation "gives the exemption the [meaning] Congress intended." *Milner*, 562 U.S. at 572 (giving "personnel" in FOIA Exemption 2 its plain meaning); see also Pet. 22.[3] *National Parks*, moreover, does not give "confidential" a "narrow" reading. Instead, it replaces that term with an atextual test fabricated using an especially objectionable form of legislative history: selective excerpts of witness testimony during hearings on a predecessor bill. Pet. 12-14; see *Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986) (declining

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[3] As the Retail Litigation Center explains, the narrow-construction canon has a dubious provenance. Retail Litigation Center *Amicus* Br. 5-16.

to accord any significance to comments not made by a Member of Congress and not included in the official Senate and House Reports).

b. Respondent next protests that giving "confidential" its plain meaning would generate a subjective rather than objective test.[4] But parties would have to make the objective and verifiable showing that, for example, the information at issue was *in fact* considered and kept secret rather than publicly disseminated. Cases would turn on whether the record reflects satisfaction of an objective, matter-of-law standard defining "confidential," and the courts would always be the final arbiters of whether the agency or submitters met that standard.

Respondent unsuccessfully tries to turn *United States Department of Justice* v. *Landano*, 508 U.S. 165 (1993), to its advantage on this point. BIO 33. In *Landano*, this Court held that "confidential" in FOIA Exemption 7—which protects records that could reasonably be expected to disclose the identity of a confidential law-enforcement source—should be given its plain meaning. 508 U.S. at 174. The Court identified factors that could support inferring a source's confidentiality, such as how law enforcement communicated with the source. *Id.* at 179. *Landano* did not thereby repudiate the ordinary meaning of "confidential," but merely recognized that circumstantial evidence (examples of which it provided) may sometimes establish *whether* something is "confi-

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[4] Respondent claims "confidential" has been given an objective meaning in "analogous contexts." BIO 31. It cites cases about rules that govern whether the parties showed the requisite "good cause" to seal confidential documents in a judicial proceeding—not whether those documents were confidential in the first place. Respondent also cites regulations and state statutes that *expressly adopted* the "likelihood-of-substantial-competitive-harm" standard—unlike Exemption 4, whose text protects "confidential" information.

dential." *Landano* also expressly *rejected* a definition of "confidential" that "relie[d] extensively on legislative history" rather than on the statute's plain text, *id.* at 178—underscoring the impropriety of *National Parks'* legislative-history-driven rewriting of Exemption 4.

II. THE CIRCUIT SPLITS REGARDING APPLICATION OF *NATIONAL PARKS* ARE REAL AND THIS CASE CAN ELIMINATE THEM

1. Respondent vastly downplays the circuit splits that *National Parks* has spawned. It claims none exist because the Circuits all "articulate that same [*National Parks*] standard." BIO 18. As Justice Thomas recognized in his dissent from denial of certiorari in *New Hampshire Right to Life* v. *Department of Health and Human Services*, the Circuits may have nominally adopted the same standard, but its application has produced numerous splits. 136 S. Ct. 383, 384-385 (2015). Allegiance to a common "standard" or a shared magic-words formula is empty absent uniform implementation.

To satisfy *National Parks*, the D.C. and Ninth Circuits require "evidence that the entity whose information is being disclosed would likely suffer some defined competitive harm (like lost market share) if competitors used the information"; but the First and Tenth Circuits find the test met even if disclosure "would not likely result in any negative consequences for the entity whose information was disclosed." *Id.* at 384 (discussing *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 778 F.3d 43, 51 (1st Cir. 2015); *McDonnell Douglas Corp.* v. *Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004); *GC Micro Corp.* v. *Def. Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994)); Pet. 26 (discussing *State of Utah* v. *U.S. Dep't of the Interior*, 256 F.3d 967, 970 (10th Cir. 2001)).

Respondent denies that the D.C. and Ninth Circuits demand "more certainty and specificity" than other Cir-

cuits—by noting that their opinions faithfully recite the *National Parks* standard. BIO 19. Again, parroting the same general standard cannot foreclose a circuit split on what satisfies the standard. The *McDonnell* and *GC Micro* courts demanded the submitter provide extensive, detailed, and industry-specific evidence regarding how each individual item of requested information would affect the submitter if used by a particular competitor. *McDonnell*, 375 F.3d at 1187-1193; *GC Micro*, 33 F.3d at 1113-1115. In contrast—and as respondent admits, BIO 18, 21-22—the Tenth Circuit deemed the *National Parks* test satisfied merely with affidavits stating generally that disclosure would provide competitors with a negotiating "advantage," and the First Circuit required only a showing that *future unidentified* competitors *might* use the information to compete against the submitter in some way. *State of Utah*, 256 F.3d at 970; *N.H. Right to Life*, 778 F.3d at 51.

Respondent contends that the First Circuit's approach does not represent a split because the *facts* there differed from the facts here. *National Parks*, like Exemption 4, does not define "confidential" differently based on the submitter's industry. Because these cases establish a split that was outcome-determinative below, certiorari is also warranted on petitioner's second question presented.[5]

2. Respondent does *not* contest several additional splits that petitioner[6] and *amici*[7] identified. Instead, it

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[5] Respondent's test for "splits" would shrivel much of this Court's docket—virtually no First Amendment case could be part of a "split," for example, because all courts quote the same First Amendment text and facts vary widely among cases.

[6] Respondent does not dispute the circuit split regarding "whether bad publicity or 'embarrassment' in the marketplace is a type of competitive harm against which Exemption 4 protects," Pet. 28, but

dismisses them as irrelevant, asserting that this case does not directly implicate *all* of them. BIO 22. But as petitioner explained, the circuit splits will all evaporate if the Court gives Exemption 4 its plain meaning, and at least some can be addressed if it does not. Pet. 11-12.

3. Finally, respondent justifies preserving *National Parks* because it supposedly produces predictable outcomes. BIO 34. The premise of predictability fails, and respondent provides no authority or examples to support it. Nor could it. As the DOJ FOIA Guide—cited by both parties—reveals, lower courts have "tended to resolve issues of competitive harm on a case-by-case basis rather than by establishing general guidelines," and consequently have rendered "conflicting decisions" over whether Exemption 4 protects particular types of information.[8]

III. THERE IS NO VEHICLE PROBLEM

Respondent belatedly attempts to inject a nonexistent vehicle issue, arguing that the requested SNAP redemption data was not "obtained from a person." BIO 25-29. This tardy contention is meritless, waived, and presents no barrier to this Court's review.

1. Respondent's vehicle argument is meritless. Re-

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simply disagrees with Justice Thomas's description in his *New Hampshire Right to Life* dissent. See BIO 23-24. Respondent's challenge to the other split—whether a different test applies when information is *voluntarily* provided to the government, Pet. 28-29—misstates petitioner's argument. See BIO 24 (incorrectly characterizing petitioner as having argued that some decisions below "rested entirely" on the presence of hypothetical competitors).

[7] *E.g.*, Alliance of Marine Mammal Parks & Aquariums *Amicus* Br. 5-11 (identifying additional split); Chamber of Commerce *Amicus* Br. 5-9 (identifying two additional splits).

[8] U.S. Dep't of Justice Guide to the Freedom of Information Act at 309 (2009) https://www.justice.gov/oip/foia_guide09/exemption4.pdf (collecting cases); see also Pet. 25 & n.18.

spondent seeks "the yearly redemption amounts, or EBT [Electronic Benefits Transfer] *sales figures, for each store*" that participates in SNAP. Appellant's CA8 Br. App. 4 (emphasis added). The requested data represents actual sales information *from retail stores*—not a record of federal spending. It is created when customers swipe their EBT cards at a store and an EBT processor approves the transaction and pays the retailer. Trial Reporter's Record Vol. 1 at 15-21. The EBT processor sends the government daily SNAP-redemption totals for every retail location. *Id.* at 18.

The government does not generate the data, but only *receives* it. That the agency then stores, summarizes, or reformulates the information does not transform it into government information for purposes of Exemption 4. See, *e.g.*, *OSHA Data/CIH, Inc.* v. *U.S. Dep't of Labor*, 220 F.3d 153, 162 (3d Cir. 2000) (figures calculated *from information supplied by persons* are "obtained from a person"). Respondent's argument to the contrary—that it merely seeks "records generated * * * by a federal agency"—is both dangerous (it would allow *any* private information to escape the exemption if the government simply processes it) and unsupported by any record citation. See BIO 25-29. Because this is not a "request for the federal government's own records," BIO 28, respondent's associated standing argument also fails.

2. Respondent has also waived this argument, as the Eighth Circuit made crystal clear without objection: "The district court found that the contested data were obtained from a person, and neither party contests that finding on appeal." Pet. App. 2a n.2. The Eighth Circuit correctly recognized that respondent did not raise this argument on appeal; it is waived and too late to raise it

now.[9] Even if the Court concludes that the question is not waived,[10] it would at most be a matter for application on remand, not an obstacle to this Court's review of the governing legal questions presented. Cf. *Lucia* v. *SEC*, 138 S. Ct. 2044, 2050 n.1 (2018) (declining to address additional question presented where "[n]o court has addressed that question, and we ordinarily await thorough lower court opinions to guide our analysis of the merits." (internal quotation omitted)).

CONCLUSION

The Court should grant the petition.

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[9] Contrary to respondent's contention, this issue was not foreclosed by "law of the case" after the first appeal to the Eighth Circuit. BIO 27 n.5. The first appeal concerned Exemption 3, not Exemption 4. Pet. App. 53a. On remand, and following a full merits trial, the district court ordered briefing on the "obtained from a person" issue. Neither party claimed this issue had been resolved in the prior appeal. *Argus Leader Media* v. *U.S. Dep't of Agric.*, Case No. 4:11-cv-04121-KES (D.S.D.), Docs. 121 (USDA Post-Trial Brief) & 124 (Argus Leader Post-Trial Brief). And the district court concluded—"[b]ased on the Eighth Circuit's ruling *and* the testimony at trial"—that this Exemption 4 prong was met. Pet. App. 16a (emphasis added). Respondent elected not to contest this finding before the Eighth Circuit, Pet. App. 2a n.2, and cannot change its mind now.

[10] Respondent's own cases recognize an issue must be raised before the Circuit to be preserved, even if that argument is foreclosed by Circuit precedent. BIO 27 n.5 (citing *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007)).

Respectfully submitted.

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