SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COUR	T OF	THE	UNITED	STATES
FOOD MARKETING INSTITUTE,)	
Petitioner,)	
v.) No. 1	L8-481
ARGUS LEADER MEDIA,)	
dba ARGUS LEADER,)	
Respondent.)	
			_	

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

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1 IN THE SUPREME COURT OF THE UNITED STATES 2 FOOD MARKETING INSTITUTE,) 3 4 Petitioner,)) No. 18-481 5 v. 6 ARGUS LEADER MEDIA,) 7 dba ARGUS LEADER,) 8 Respondent.) 9 _ _ _ _ _ _ _ - - - - - - - - -10 Washington, D.C. 11 Monday, April 22, 2019 12 13 The above-entitled matter came on for 14 oral argument before the Supreme Court of the 15 United States at 10:05 a.m. 16 17 **APPEARANCES:** EVAN A. YOUNG, ESQ., Austin, Texas; on behalf of the 18 19 Petitioner. 20 ANTHONY A. YANG, Assistant to the Solicitor General, 21 Department of Justice, Washington, D.C.; 22 for the United States, as amicus curiae, in 23 support of the Petitioner. 24 ROBERT M. LOEB, ESQ., Washington, D.C.; on behalf of 25 the Respondent.

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1 PROCEEDINGS 2 (10:05 a.m.) 3 CHIEF JUSTICE ROBERTS: We'll hear 4 argument first this morning in Case 18-481, the 5 Food Marketing Institute versus the Argus 6 Leader -- versus Argus Leader Media. 7 Mr. Young. 8 ORAL ARGUMENT OF EVAN A. YOUNG 9 ON BEHALF OF THE PETITIONER 10 MR. YOUNG: Mr. Chief Justice, and may it please the Court: 11 12 Before I turn to why the Court should jettison the National Parks definition of 13 "confidential" and instead restore that word's 14 plain meaning as used in Exemption 4 of the 15 Freedom of Information Act, let me address 16 justiciability. Respondent's brief expressed 17 18 doubts about redressability, but redressability and the other two requirements of Article III 19 20 standing are established here. 21 First, our injury in fact is the disclosure of our members' store-level sales 22 23 information that they keep secret. 24 JUSTICE SOTOMAYOR: Not if the 25 government decides that it doesn't want to give

1 it. We already have a case that says, if the 2 government voluntarily chooses to disclose, 3 you're stuck; you can't appeal. 4 So, here, the government chose not to 5 It chose, by definition, to turn it appeal. 6 over. Why aren't you bound by that decision? 7 MR. YOUNG: We're not bound for it 8 because the intervention that we successfully 9 moved in the District of South Dakota made us a proper party. We have an interest that allowed 10 11 us to intervene. 12 JUSTICE SOTOMAYOR: But the -- if you had been a part of the -- if you had been the 13 14 original asker, we have a case that says, 15 Crystal City, that if the government chooses to 16 turn it over, you can't appeal. 17 MR. YOUNG: And the government did not

18 make that choice. So there are really five
19 things.

JUSTICE SOTOMAYOR: Well, but they
haven't made the choice on this exemption.
They've made the choice because of a new law.
Isn't the proper course for them to go
back to the district court with a motion for
reconsideration or for them to petition the

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1 court or for you to go to the court or for --2 or -- or for someone else to go to the court 3 and say they have to turn it over? 4 MR. YOUNG: No, Your Honor. The 5 government in this case made a number of steps 6 that make clear that our redressability is not 7 only likely but certain. And let me start 8 because standing at the time --9 JUSTICE SOTOMAYOR: Well, it's not 10 certain until the district court relieves them of the earlier judgment, telling them that 11 12 Exemption 3 didn't apply. 13 MR. YOUNG: Well, that -- that 14 premise, I think, is -- is a mistaken one. And 15 if you look at pages 30 to 31 of the 16 government's brief, for example, they make clear that they are not pressing an Exemption 3 17 18 argument here. They are not requiring this 19 Court or even asking this Court to reconsider 20 the Section 2018(c) argument, on which the Eighth Circuit's first judgment --21 22 JUSTICE SOTOMAYOR: But that's the 23 basis for their refusal to turn it over now. 24 MR. YOUNG: Well, no, the -- the basis for -- for their refusal to turn it over now is 25

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1 an Exemption 4 basis, that the information --2 JUSTICE SOTOMAYOR: Well, they can 3 speak for themselves, but I thought --4 MR. YOUNG: Agreed. 5 JUSTICE SOTOMAYOR: -- when they chose 6 not to appeal, they chose not -- they chose to 7 follow the order of the court to turn it over. 8 MR. YOUNG: There are a number of 9 things that differentiate this from a situation 10 like that. For example, instead of voluntarily disclosing it, which would be what they would 11 do if they decided to follow it, they 12 facilitated our intervention by alerting us to 13 14 the possibility of judicial intervention. 15 They then, when we did intervene, told the district court, they told the federal 16 court, as they've told this Court, we will not 17 release that information unless a final 18 19 judgment in the judicial system requires it. CHIEF JUSTICE ROBERTS: Do you 20 21 understand the government to be firmly 22 committed to not releasing the information 23 unless required to? 24 MR. YOUNG: Yes, that's what I 25 understand.

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CHIEF JUSTICE ROBERTS: I noticed them 1 2 on your -- your side of the lectern. 3 MR. YOUNG: And I won't speak for 4 them, but that's what they have represented not 5 only to the district court but to this Court. 6 CHIEF JUSTICE ROBERTS: Now, of 7 course, they remain free to change their mind. 8 MR. YOUNG: And that would be a -- a 9 -- a different situation, but the question for 10 standing at the time when we invoked the appellate jurisdiction of the federal courts 11 12 was would we have a likelihood of relief, and 13 the answer is yes. 14 And right now, based on the Solicitor 15 General's brief, that was the thing that my friend on the other side invoked in his brief 16 to this Court. That would be a mootness 17 question. And, of course, mootness can be 18 19 established only if it's impossible that this 20 Court's reversal would give us meaningful 21 relief.

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

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1 of Article III standing are met --2 JUSTICE SOTOMAYOR: But it won't be 3 destroyed because they have a 2018(c) argument. 4 MR. YOUNG: Well, the fact, as in 5 Milner, in which there was an Exemption 7 6 argument pending, this Court took it to decide 7 Exemption 2. Sure, there's a 2018(c) argument 8 that, in theory, would be pending if this Court 9 were not persuaded by anything we say, there 10 has been an intervening change in the law --11 JUSTICE SOTOMAYOR: If they're wrong 12 on 2018(c), they have to comply with the extant judgment under Exemption 4? 13 14 MR. YOUNG: No, I -- I disagree, and I 15 will allow my friend from the government to 16 explain their position. But they're making an 17 Exemption 4 argument based on the -- the --18 what they say in part B.2 of their brief. 19 JUSTICE SOTOMAYOR: They're trying to 20 piggyback their appeal on you. 21 MR. YOUNG: No, I -- I disagree with 22 that as well, Justice Sotomayor. I think what 23 the government is saying is we've had four decades of the highest level promise of 24 25 confidentiality that the government can make to

1 its citizens, and that is that this kind of 2 confidential information, we will protect the 3 confidentiality of it. 4 And for that reason, even if the 5 motivation that they had back in 1979 for 6 starting down that process turns out to be 7 wrong, nonetheless, the promise of 8 confidentiality, which Exemption 4 and not 9 Exemption 3 protects, remains. 10 JUSTICE SOTOMAYOR: Mr. Young --JUSTICE GINSBURG: But wasn't the 11 12 whole purpose of -- FOIA says disclose, and one 13 of the concerns was the government official, 14 for one reason or another, doesn't want to 15 disclose. There have been cases of a captive 16 agency, for example. So, to -- to say the government can 17 18 control this by making a promise that it won't 19 disclose, that seems to run counter to the 20 whole idea of FOIA. MR. YOUNG: Well, it would perhaps run 21 22 counter to the idea of FOIA if it were the kind 23 of information that were -- was about the government's own doings or even, conceivably, 24 25 something that's not presented here, if there

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1 were willy-nilly ad hoc promises of 2 confidentiality in which low-level employees 3 could wave a wand and say confidential, 4 confidential, but I think that what this Court 5 has repeatedly said -- I'll mention the 6 Department of Justice versus the Reporters 7 Committee case, where the Court says: "Yes, 8 FOIA's basic policy focuses on the citizens' 9 right to be informed about what their 10 government is up to." That's a direct guote. 11 But then the Court immediately says 12 that purpose, however, is not fostered by 13 disclosure of information about private 14 citizens that has accumulated in various 15 governmental files but that reveals little or 16 nothing about an agency's own conduct. 17 And so, here, what we see is a choice. 18 When a SNAP beneficiary receives an allocation 19 from the government, their choice to shop at 20 this grocery store rather than one across the 21 street is in no sense government action. It is 22 the unmediated decision of third parties. 23 It tells you, in other words, an awful 24 lot about Mrs. Smith or Mr. Jones and their 25 choices, and it tells you a lot about how those

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two grocery stores market and -- and -- and sell and what their selection might be. JUSTICE BREYER: I don't doubt that you're heard. I -- I -- I do -- I can't quite figure out how this mootness thing works. It seems to me there are two laws, A and B. All right? A is the -- the one you're interested in, and B is this other one that stops them from -- maybe -- from giving out information. Now, here, you're attacking A, so I'm asking, does A cause you injury? Not does B cause you injury. Now, if B stops them from giving out the information, if you win on A, you don't get it. If you lose on A, you don't get it. If B doesn't stop them from giving out information, if you win on A, you get it. If you don't -- see, it works -- the -- the -- the result is the same no matter how we decide your case. We just don't know about B. Now have I got that right? And if I -- if I've got that right, I -- I don't know a standing case right in point or a mootness case

25 right in point. I'm not sure what to do.

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1 MR. YOUNG: Well -- well, if I'm 2 understanding you, Justice Breyer, I -- I don't 3 think it raises either one of those 4 justiciability questions because the Court can 5 have in reserve many grounds that the lower 6 courts, for example, may not have addressed. 7 In Milner, I mentioned Exemption 7 was 8 still there. Now, if Exemption 7 was well 9 taken, Exemption 2 wouldn't have been 10 necessary. The Court granted in Milner to resolve what Exemption 2 meant, and it granted 11 12 in this case to resolve what Exemption 4 means. 13 And if you do it and you reverse --14 JUSTICE SOTOMAYOR: The problem with 15 that in Milner is -- and the big difference is 16 that the government chose not to appeal the ruling on Exemption 4, so it acceded to turning 17 18 it over under that exemption. And under 19 Crystal City, we said they -- you -- they or 20 you can't appeal that. 21 And you admit if that was all of it 22 and they had chosen to turn it over, you would 23 get it. 24 So now the question is can they -- and 25 they and you do an end-run around Crystal City

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1 by simply saying, no, we're really not going to 2 turn it over because of something else, but we 3 really didn't want to challenge Exemption 4 at 4 all and we were going to turn it over because 5 we didn't really think the pricing information 6 was confidential back then. 7 But now we think we're going to change 8 our mind -- this is how I'm reading the 9 argument -- and so we're going to piggyback on 10 a private entity raising an issue that we should have appealed on. 11 12 MR. YOUNG: Justice Sotomayor, I don't believe the government's piggybacking at all. 13 14 They're here as an amicus. And it is we, the Food Marketing Institute --15 16 JUSTICE SOTOMAYOR: But why -- why can 17 you, without getting stuck in Crystal City? MR. YOUNG: Well, because --18 19 JUSTICE SOTOMAYOR: Just because 20 they've said I won't turn it over, but they're 21 bound to turn it over right now by a judgment below, and they haven't asked the court below 22 23 to reconsider that judgment. 24 MR. YOUNG: I -- I -- I think it's as 25 simple as --

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1	JUSTICE SOTOMAYOR: They raised
2	Exemption 3. They lost. A change of law has
3	happened. They should have moved for
4	reconsideration, and they didn't.
5	So why aren't they stuck?
б	MR. YOUNG: Because we intervened and
7	the opportunity to conclude that we are not a
8	proper party to be able to make any of these
9	merits inquiries has long since passed.
10	JUSTICE KAGAN: Mr. Young, may I ask
11	you a question about your substantive standard?
12	You at some points in your brief say
13	that the question is simply whether the
14	information is private, private being a synonym
15	for confidential.
16	At other points in your brief, you
17	talk about whether the information is kept
18	private. To me, those two things are a little
19	bit different, that the idea of keeping
20	something private is not just that the
21	information isn't out there in the world but
22	that you're doing something to make sure that
23	the information doesn't get out there in the
24	world.
25	So which do you think is the right

1 approach in this case? 2 MR. YOUNG: I'll -- I'll readily agree 3 with the latter. Our -- our argument is not 4 that simply marking something or stamping it 5 confidential does the trick. 6 We've had 27 years with the D.C. 7 Circuit's critical mass case, which essentially 8 adopts the position that we think correctly 9 defines the entirety of Exemption 4. 10 And in critical mass cases, when a party wants the release of some information 11 that a party like us might say that's our 12 13 confidential commercial information, more is 14 required and you can be held to fail your 15 Exemption 4 argument if you don't illustrate 16 how you protect the information. 17 So, for example, what is relevant and 18 what was asked even in this very case, in -- in which these questions were presented to the 19 20 trial court, do you bind it with nondisclosure

22 that it limits the number of people even

23 internally who have access to it?

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How do you make sure that it is notsupplied accidentally in litigation, for

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agreements? Do you have security in place so

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1 example? How, in other words, do you make sure 2 that it doesn't become public? Have you made sure that comparable 3 4 information has not been made public in other 5 forums? And so there are critical mass cases, 6 decisions from the D.C. Circuit courts and from 7 the Tenth Circuit courts that apply that, that 8 look to those exact types of questions and say: 9 Well, we can find something rather like this in 10 publicly available information already. Your Exemption 4 argument is gone. 11 12 JUSTICE SOTOMAYOR: So how does that dovetail with the SG's position that if they 13 14 ask you to turn over something confidentially -- and you seemed to be arguing that earlier --15 that that's enough, that that makes it 16 confidential, because you've just said to me 17 18 something quite different, which is it's not 19 the government's request or promise to keep it 20 confidential, but is it, in fact, kept in 21 confidence the way you've defined it? So how 22 do you dovetail the two? 23 MR. YOUNG: Well, I would say that even if the government gives us a promise of 24 25 confidentiality, that fits within the

1 definition of what confidential is, we now have 2 given something to the government in 3 confidence, if we, nonetheless, publish it, if 4 we're sloppy with it, if we release it in some 5 other way, then we have breached the 6 confidentiality ourselves. 7 And I would argue that someone like 8 that is no longer protected by --9 JUSTICE KAVANAUGH: How about the --10 JUSTICE SOTOMAYOR: So the government's overlay is really not necessary to 11 12 this case? 13 MR. YOUNG: It's a manifestation of what confidential is. 14 15 JUSTICE SOTOMAYOR: Man -- but only a 16 point of evidence, not a point that binds? MR. YOUNG: I -- I guess. I'm not 17 18 sure what a point of evidence means. 19 JUSTICE SOTOMAYOR: Meaning, you say a 20 manifestation, that a district court judge 21 could look at that as among many factors. 22 MR. YOUNG: Yes, I -- I would say that 23 if the government in a proper form, if the government binds itself here through 24 25 notice-and-comment rulemaking --

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1	JUSTICE SOTOMAYOR: If you if you
2	leave if you give this information to your
3	employees, there's no promise of secrecy and
4	MR. YOUNG: Well, Landano defined what
5	confidential meant also, and it recognized that
6	confidential does not mean that nobody knows
7	it. It means that you have to keep it within a
8	limited universe.
9	Mr. Chief Justice, if I may reserve
10	the balance of my time.
11	CHIEF JUSTICE ROBERTS: Thank you,
12	counsel.
13	Mr. Yang.
14	ORAL ARGUMENT OF ANTHONY A. YANG,
15	FOR THE UNITED STATES, AS AMICUS CURIAE,
16	IN SUPPORT OF THE PETITIONER
17	MR. YANG: Mr. Chief Justice, and may
18	it please the Court:
19	Before I address the merits, I'd
20	briefly like to address justiciability and be
21	clear: The government will not release the
22	disputed records from 2005 to 2010 if a FOIA
23	exemption applies. So long as the government
24	is not judicially compelled to do so, it will
25	not do so.

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1 Petitioner also had Article III 2 standing. That's evaluated at the time they 3 filed the notice of appeal and invoked the 4 appellate court's jurisdiction. 5 JUSTICE BREYER: Is that true if -- if 6 the -- the other statute here were held not to 7 block the government from releasing it? 8 MR. YANG: Yes. 9 JUSTICE BREYER: You mean so however 10 the other statute comes out, the government now is saying -- I didn't get this at the beginning 11 -- we're not going to release it -- even if we 12 have every right to release it, we're not going 13 14 to release it, even if we have every right to 15 do so? 16 MR. YANG: It would help to take a 17 look at Footnote 5 --18 JUSTICE BREYER: Yeah. 19 MR. YANG: -- at page 26 of our brief, 20 where we explain --21 JUSTICE BREYER: Yeah. 22 MR. YANG: -- there would -- there is a policy interest in USDA, if they were writing 23 on a clean slate, going prospectively, that 24 25 they may well release this information and they

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1 said they likely would.

2	However, as we explain in Footnote 5,
3	we said, if Congress had not amended Section
4	2018, so that's an if the agency might have
5	explored changing its position.
6	It has not changed its position, one.
7	Two, and then we go on to say, to release
8	store-level redemption data collected after
9	such a change. In other words, the data
10	collected before the change when we have
11	provided an assurance of confidentiality in
12	notice-and-comment rulemaking go back going
13	back 40 years, the government is not
14	voluntarily releasing that on the basis of
15	having to do so.
16	JUSTICE BREYER: I know, but you
17	sounded in that footnote as if you were saying
18	that the reason we're not releasing it is
19	because of new 2018.
20	MR. YANG: Well, the reason we're not
21	releasing anything, whether before or after
22	JUSTICE BREYER: No, but just answer
23	look at my look at my question. I'm
24	trying to figure out whether I have a question
25	here.

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1 MR. YANG: Right. 2 JUSTICE BREYER: And -- and if -- if 3 you're going to tell me I don't care if 2018 4 never appeared, doesn't appear, doesn't exist, 5 we still won't release it, which is your right 6 in the absence of -- of --7 MR. YANG: I would say that's 8 partially right. The reason we're not 9 releasing it is because we've made assurances 10 of confidentiality at pages 30 to 31 of our brief. We explained that that was motivated by 11 Section 2018(c). But even if we were --12 13 JUSTICE BREYER: All right. So what 14 happens if 2018(c) now is wiped from the books? 15 MR. YANG: As I was explaining --16 JUSTICE BREYER: Will you release it? 17 MR. YANG: As I was -- no. As I was 18 explaining --19 JUSTICE BREYER: No? Okay. 20 MR. YANG: -- on page 30 to 31 of our 21 brief, even if we were wrong about 2018(c), the 22 fact that it was reasonable, it was objectively 23 reasonable in light of the government's assurances for 40 years to understand the 24 25 government to be providing an assurance of

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1 confidentiality, and we understand these 2 retailers to have done so, to be relying on 3 that --4 JUSTICE GORSUCH: Mr. Yang, let me see 5 _ _ 6 MR. YANG: -- we're not going to 7 release it as a matter of good governance. 8 JUSTICE SOTOMAYOR: Mr. Yang, you are going to tell me that you were going to be in 9 10 contempt on the order below? 11 MR. YANG: Of course not. 12 JUSTICE SOTOMAYOR: The order below, you litigated Exemption 3. 13 14 MR. YANG: Of course not. If we were 15 16 JUSTICE SOTOMAYOR: The court -- the 17 court --18 CHIEF JUSTICE ROBERTS: Could I hear 19 his answer, please? 20 MR. YANG: Of course not. If we were 21 compelled to do so by a court, we will do so. 22 But if we have discretion to do so --23 JUSTICE SOTOMAYOR: But wait a minute, 24 there is no discretion. Let's assume there's 25 no 2018(c) amendment. You litigated Exemption

1 3. You lost. You litigated Exemption 4. You 2 lost. 3 MR. YANG: I --4 JUSTICE SOTOMAYOR: You were ordered 5 to disclose --6 MR. YANG: I think there's some 7 confusion in the question. 2018(c) prohibits 8 the government from releasing. It does not --9 so, if 2018(c) is taken off the table, we still 10 have discretion. And we are exercising our discretion in a matter of good government. 11 12 JUSTICE SOTOMAYOR: No, but I'm sorry, 13 but once you didn't --14 MR. YANG: The Court has repeated -the Court recognized in a --15 16 JUSTICE SOTOMAYOR: -- once you didn't 17 appeal -- forget about the amendment -- you 18 didn't appeal, would you have had to turn over 19 the material? 20 MR. YANG: No. So long as a party is 21 appealing -- a party, they became a party, is appealing. This is an indivisible judgment. 22 23 It's not like a money judgment that you say the government owes \$5 and party A owes \$10, and if 24 the government owes -- you know, doesn't 25

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1 appeal, it's going to go to \$5. 2 This is the same thing. Any party can 3 bring that up, and if the judgment below 4 requiring the government and the general 5 disclosure is taken off the books, we're no 6 longer bound. 7 CHIEF JUSTICE ROBERTS: Perhaps in 8 your remaining time you could turn to the 9 merits. 10 MR. YANG: Sure. We believe that the 11 information here is -- the store-level 12 redemption data is confidential because it's 13 reasonably understood in context to have been communicated in confidence and held secret. 14 15 Now the government has had 40 years of express assurances of confidentiality embodied 16 in regulations and in an ongoing dialogue with 17 Congress about these regulations, showing that 18 19 the store redemption data was communicated in 20 confidence because we would not disclose it. The first --21 22 JUSTICE GINSBURG: May I ask you --23 may I ask you the same question --24 MR. YANG: Sure. 25 JUSTICE GINSBURG: -- that I asked

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your fellow counsel? That is, one of the aims of FOIA was to -- FOIA was to make information public despite official --MR. YANG: Yes. JUSTICE GINSBURG: -- willingness. MR. YANG: I -- I think that's right, and that is certainly FOIA's general goal, but, in this exemption, it only targets a particular type of information, not general. It is information that is private information, it's obtained outside the government, it's about private entities, that is, either commercial or 13 financial.

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

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

25 Is that right?

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1 MR. YANG: Yes. That --2 JUSTICE KAGAN: Your --3 MR. YANG: -- those are manifestations. 4 We think the --5 JUSTICE KAGAN: Am I -- am I --6 MR. YANG: -- meaning of confidential 7 8 JUSTICE KAGAN: -- am I -- am I right 9 that you're relying here on the assurances 10 point? 11 MR. YANG: We are, because we think 12 it's a little more complicated. This is, in our view, an objective test, and you have to 13 take it in context. 14 15 And the context here is more complicated than a normal Exemption 4 case 16 17 because the government's own actions of paying 18 money is intertwined closely with the 19 information submitted to it, which is why we 20 think the easier path in this context is to --21 where there has been 40 years of 22 notice-and-comment regulations by a high, high 23 level of government sign-off, right, this has 24 to be the agency administrator that signs off 25 on these, that, where it's objectively

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1 reasonable, provides an assurance of 2 confidentiality that --3 JUSTICE KAVANAUGH: When can -- when 4 can it be deemed confidential as a matter of 5 law, even without such assurances? 6 MR. YANG: I think this confidential 7 question ultimately is a question that requires 8 factual context. You don't know if information 9 is -- is confidential without understanding the 10 context in which it's either treated public -in the general sphere before it's obtained by 11 12 the government or understanding how it comes 13 into the government's possession. So there are -- we think as a matter of law --14 15 JUSTICE KAVANAUGH: Can it -- can it be deemed confidential even in cases without 16 government assurance? I'll ask it a different 17 18 way. 19 MR. YANG: Oh -- oh, sure, sure. 20 JUSTICE KAVANAUGH: And what factors would determine that? 21 22 MR. YANG: Well, that's the first 23 manifestation of what's confidential. Just to 24 be clear, we think --25 JUSTICE KAVANAUGH: Do you have any

1 disagreement with Petitioners on how they 2 articulate that first --MR. YANG: I don't think so except 3 4 that we think you have to take the full context 5 into account. And when you do that here, the 6 inquiry is more complicated. 7 JUSTICE KAGAN: So, as I understood 8 your brief, and tell me if I've gotten this 9 wrong, you're basically saying that the first 10 way of showing confidentiality, the 11 non-assurances way --12 MR. YANG: Right. 13 JUSTICE KAGAN: -- isn't really met 14 here because what they're seeking to protect is 15 something -- is -- is information that 16 essentially the government reveals all the time 17 by virtue of its payments. Is that correct? 18 MR. YANG: I think it's close. We're 19 a little bit more agnostic. We think that that 20 is a hard question and we're not coming 21 definitively down. 22 There are some side questions like, is 23 this exactly what the government is doing? How close is it? These types of nuances, I think, 24 25 is what Petitioner may be relying on.

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1	We may have a small disagreement, but,
2	ultimately, I think what we agree on is, in
3	light of the 40 years of practice that has
4	occurred here, all we're trying to do is live
5	up to what this Court said in another FOIA
6	case, CIA versus Sims, that great nations, like
7	great men, should keep their word. And the
8	government is trying to keep its word, given
9	over 40 years in the most official form
10	possible, that we're going to keep this
11	information confidential.
12	JUSTICE KAGAN: And this assurances
13	point of yours, does it apply only when
14	somebody is voluntarily giving information to
15	the government, or might it apply when somebody
16	is mandated to give information to the
17	government?
18	MR. YANG: I think it it generally
19	applies. Now you'd have to look to see whether
20	the government would have authority to the
21	agent the government official has have
22	authority to make this assurance in a way
23	that's objectively understood to be speaking
24	for the agency, but it can apply potentially in
25	both contexts.

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1	There are hard hypotheticals, I think,
2	at some edges. This case doesn't implicate any
3	of them, so I think the Court could just simply
4	cut through the through the the noise and
5	and rule quite cleanly here.
6	JUSTICE KAGAN: Because
7	JUSTICE SOTOMAYOR: Mr. Yang, this is
8	this is somewhat confusing to me. Exemption
9	3 says Congress gets to choose what should not
10	be disclosed.
11	MR. YANG: I
12	JUSTICE SOTOMAYOR: That it's
13	Congress's choice what the government will view
14	as confidential and not disclose.
15	Now you're bringing the government,
16	the government qua the executive branch, into
17	deciding what not to disclose under Exemption
18	4. Doesn't that turn FOIA on its head?
19	MR. YANG: No, I think you if you
20	read back a little bit in the statute, you'll
21	say that Congress says that FOIA does not apply
22	if any of the exemptions apply. Exemption 3 is
23	one of them. It is one way, but it is an
24	independent basis when Exemption 4 applies.
25	And Exemption 4 is what we're talking about

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      here.
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               JUSTICE SOTOMAYOR: So let's go back.
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      If the store does not keep it confidential, can
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      you, by a promise of confidentiality, protect
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      it from FOIA disclosure?
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               MR. YANG: I think that would be
 7
      difficult. The first prong that we are -- rely
 8
      upon is -- the first manifestation, if it is --
 9
      if I could just finish the -- the sentence, Mr.
      Chief Justice.
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11
               CHIEF JUSTICE ROBERTS: Yeah.
12
               MR. YANG: If information is
      customarily not publicly disclosed by those who
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14
      submit it, so long as there is nothing in
15
      context that suggests that they would
16
      understand otherwise, when it's provided to the
      government, it would be confidential.
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18
               CHIEF JUSTICE ROBERTS: Thank you,
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      Mr. Yang.
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               Mr. Loeb.
21
                  ORAL ARGUMENT OF ROBERT M. LOEB
22
                    ON BEHALF OF THE RESPONDENT
23
               MR. LOEB: Mr. Chief Justice, and may
24
      it please the Court:
25
               If the Court reaches the merits here,
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1 it should affirm the judgment of the Eighth 2 Circuit. For 45 years, the language of 3 Exemption 4 has been properly construed to 4 require a showing of likely competitive harm. 5 Not only is that competitive harm 6 standard fully supported by the common law that 7 prevailed in 1966 when Exemption 4 was enacted, 8 the standard has also been ratified by Congress 9 for reasons that I'll explain. 10 In 1974, the D.C. Circuit adopted the National Parks test with its two-prong test, 11 12 including the competitive harm requirement. But, by 2001, there was a clear judicial 13 14 construction. 15 Eight circuits had adopted the same 16 two-prong test as National Parks. So, between 2001 and today, during those 18 years, Congress 17 18 has enacted 29 statutes endorsing the language 19 of and the provision of Exemption 4 and has --20 and has effectively amended Exemption 4, 21 thereby ratifying the National Parks standard. 22 Now --23 JUSTICE KAGAN: Mr. Loeb, this case

24 strikes me as a lot like Milner, that you have
25 a D.C. Circuit opinion which puts some things

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1 into the test that maybe the -- the statutory 2 text does not immediately suggest. And then 3 there is -- everybody adopts it, you know? In 4 Milner too, all the courts of appeals had 5 adopted it. Congress had let it remain on the 6 books for quite some time without doing 7 anything about it. 8 Why isn't this the same thing as that, 9 where we did say no, we're going to go with the 10 text, not with this extrapolation? MR. LOEB: Context here is very 11 12 different than Milner. This Court in Milner expressly said there wasn't a judicial 13 14 consensus supporting the D.C. Circuit's ruling. 15 Also there, there weren't multiple 16 statutes that -- here, we have 29 statutes, 17 after the judicial consensus, enacted which 18 effectively amend Exemption 4 --19 JUSTICE GINSBURG: As to the --20 MR. LOEB: -- and that certainly was 21 not the case --22 JUSTICE GINSBURG: -- as to the 23 consensus, if I can stop you on that point, we're told by the other side that the circuits 24

25 have been markedly inconsistent in the way they

1 apply the test.

2	So, if if if the D.C. Circuit
3	had ruled one way and everybody said yeah, this
4	is how we do it, and the decisions all lined
5	up, that would be one thing. But, here, we're
б	told that they will verbalize the same
7	formulation, but they apply it differently.
8	MR. LOEB: Well, I think the the
9	key factor is they all adopt the same two-prong
10	standard of National Parks. And in any
11	standard, how it's applied, even terms like
12	fraud, which are well developed in the law, as
13	it's applied to a particular circumstance,
14	there's always going to be some deviation of
15	the courts.
16	But, ultimately, all the circuits who
17	have addressed this issue have adopted the
18	National Parks standard and, as to the
19	competitive harm requirement, all require a
20	showing of likely competitive harm.
21	And that is the standard we're saying
22	that is has been ratified here. If you look
23	at some of the statutes that we attach in our
24	addendum, they are actually limiting the
25	discretion that's under Exemption 4.

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

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

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

21 That's what this Court said in 22 Lorillard, in Shapiro, and this term in 23 Helsinn. And, likewise, here, we have all the 24 circuits lined up on the two-prong standards. 25 We have Congress not just addressing

1 the statute once but 29 times in this 18-year 2 period where they, again, have codified over 3 and over again that -- that -- that standard. 4 JUSTICE GORSUCH: Mr. Loeb, along 5 those lines, the other side makes the argument 6 that, in Exemption 7, the word "confidential" 7 is given a different gloss than you would have 8 us give it in -- in Exemption 4. 9 I'm sure you would like an opportunity 10 to respond to that. MR. LOEB: Correct, Your Honor. 11 So, in looking at Exemption 4, you have to look at 12 13 those words in -- in a -- a textual 14 construction of it. We'll begin by looking at the words and looking at how they were used in 15 16 context at the time. And we know for Exemption 4, Congress 17 18 started with a common law term, trade secrets, 19 which even FMI agrees --20 JUSTICE GORSUCH: That's another 21 point. I'd like to get to that too. But, when 22 we're dealing with the word "confidential", 23 Justice Kagan made the point that perhaps there's a gloss that's been placed on it that 24

25 might be inconsistent with what might appear to

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1 be its ordinary meaning. 2 And that argument seems to me to have 3 some strength, given the fact that Exemption 7 4 hasn't been treated by lower courts that bear 5 the same gloss that you would have us put on 6 Section -- on Exemption 4. 7 And I'm just wondering how do you deal 8 with that incongruity textually? 9 MR. LOEB: Right. Well, first, let me 10 admit we're not -- we -- we agree that the reading of the -- the word in Exemption 7 and 11 12 Exemption 4 don't have the same import. Let me explain why. 13 14 JUSTICE GORSUCH: So why should we give the same word two different meanings when 15 16 they're virtual neighbors? MR. LOEB: First, the commonality, 17 that even under Exemption 7, this Court didn't 18 19 turn to ask the confidential source, do you 20 think that you had a confidential relationship? 21 Instead, they looked for objective factors. 22 And our -- our standard here is 23 looking at an objective one, objective harm. 24 Second, the fact that the same word is 25 used in different provisions of the exemption

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1	doesn't answer it. For example, trade secrets
2	has the word "secret". But, if you look at
3	Exemption 1, it uses the word "secret"
4	regarding national security matters.
5	You wouldn't say the word "secret"
б	regarding national security secrets has to be
7	read the same as trade secrets because trade
8	secrets has a common law meaning. And that
9	common law meaning
10	JUSTICE GORSUCH: I agree, secrets in
11	the national security context might be
12	different than they are in the trade secret
13	context, but that's that's just not helping
14	me with the word "confidential".
15	So perhaps there's something
16	particular about it, maybe there isn't. I'll
17	let you go on.
18	MR. LOEB: No, no. There's something
19	particular about Exemption 7. It talks about
20	information that's information that is
21	furnished under a basis of a confidential
22	basis.
23	So there, where Congress wanted to say
24	it was furnished on a confidential basis, it
25	knew how to say that. That's not what it says

1 under Exemption 4.

2	Instead, we have Congress adopting			
3	these common law terms, trade secrets and			
4	related confidential commercial information,			
5	and when looking at those those words anew,			
б	you would you would look at how they were			
7	used in 1966 under the common law.			
8	And we know trade secrets required			
9	under the common law a showing of competitive			
10	harm. And for the restatement, we know that			
11	this other second box of of confidential			
12	business information also required a showing of			
13	competitive harm.			
14	JUSTICE BREYER: So so what do you			
15	do you think? That is, what do you think			
16	about that? I mean, in reading some of these			
17	cases, it wasn't National Parks so much that I			
18	think caused the problem but other cases that			
19	sort of run with it. That is, some say, well,			
20	the competitors have to use this in an			
21	affirmative way.			
22	I don't know where they got that out			
23	of the statute. So would you be satisfied if			
24	we were to simply say: Well, they had the			
25	right idea there. Confidential information is			

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information that is legitimate for a confidential -- for a legitimate reason. It's confidential for a legitimate Release would hurt the company or reason. release would hurt the government. And then we add: And, of course, there has to be harm, I mean, business-related harm to the company. Now that would stop -- you know, I can imagine easily cases where there's information about who you sell to and who you don't sell to, and, of course, you want to keep that quiet because you give the impression that every sane person in the world buys your product. And this would show that's not true. But we don't know whether people will take advantage of that or not, but they might. So it's harm, and it's legitimate. Is that good enough in your opinion? MR. LOEB: Yes, Your Honor. So --JUSTICE BREYER: Yes? MR. LOEB: -- the National Parks test requires a likely showing of competitive harm. JUSTICE BREYER: And -- and it's other

24 cases that have gone beyond that.

25 MR. LOEB: To --

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1 JUSTICE BREYER: Likely showing of 2 competitive harm. Maybe it's harm to business. 3 Maybe when people find out about this, they just will stop buying it, though no new person 4 5 will enter the market. 6 You see, I mean, I -- I don't see the 7 harm being any different there. And I ask the 8 question, say, is it necessary to use, with the 9 word "harm", that word "competitive", rather than a more general word, like "business"? 10 11 MR. LOEB: I --12 JUSTICE BREYER: Business-related. MR. LOEB: Well, trade secrets, which 13 14 is the brother of this category of information 15 _ _ 16 JUSTICE BREYER: But, I'm curious, if 17 you can give me a yes-or-no answer, it would 18 really help. You don't have to, but it would 19 help me. 20 MR. LOEB: Our threshold answer is 21 that it -- it requires a competitive harm. But 22 even National Parks and the circuits adopting 23 it haven't -- didn't say that was hermetically 24 sealed, and there could be other related 25 business harms that you could show were to the

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1	same level and that should still trigger
2	JUSTICE SOTOMAYOR: I'm sorry, do you
3	accept the reasonable possibility of harm test?
4	MR. LOEB: No. No, Your Honor.
5	JUSTICE SOTOMAYOR: Because Justice
6	Breyer in his description said sometimes you
7	just can't prove it, but there's a reasonable
8	possibility of it.
9	That has been thrown out as a as a
10	why is that not enough?
11	MR. LOEB: Well, under the common law
12	and under the restatement, there was always a
13	requirement of showing a likely competitive
14	harm or a likely harm of sorts.
15	So having just a reasonable
16	possibility seems to be sort of more of a
17	scintilla argument which which would allow
18	so much more information here to be withheld.
19	It's not such a strong burden to
20	say I'm not saying you have to show there
21	will be actual competitive harm, just there is
22	a likelihood of of competitive harm. And
23	that standard has prevailed for 40 some years.
24	JUSTICE SOTOMAYOR: How is that
25	different from substantial harm? That's the

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1 National Parks test. 2 MR. LOEB: So we think the other side 3 over-reads the word "substantial". It's, I 4 think, properly read to be the contrast --5 JUSTICE SOTOMAYOR: Is it them or 6 other courts? 7 MR. LOEB: I -- I think there are a 8 few outlier courts, but most courts have 9 applied it as the Eighth Circuit here. It has 10 to distinguish between substantial and insubstantial. 11 12 And, here, the district court found that the evidence presented by the government 13 14 and by FMI to show harm was -- was speculative 15 at best and marginal at best. So they -- they didn't meet whatever 16 17 low standard there would -- you could 18 articulate, but the requirement of some 19 non-insubstantial likely harm I don't think is 20 a -- is a -- too high a bar to put to the --21 the private party trying to bar disclosure of 22 the information. 23 JUSTICE GINSBURG: What if the 24 standard were that the -- the agency must 25 reasonably foresee disclosure would harm an

1 interest protected by an exemption? That's the 2 language of the 2016 amendment. 3 MR. LOEB: Certainly, that provides --4 that applies now to all of the FOIA exemptions 5 under the 2016 amendment. This is a pre-2016 6 case. 7 JUSTICE GINSBURG: But it -- it applies to Exemption 4? 8 MR. LOEB: It does for future cases. 9 10 This case was a pre-2016 case, so it doesn't apply to this particular case, but it -- it 11 12 certainly undercuts the arguments of the government and of FMI that it's the -- to 13 14 require a showing of harm requires all these 15 trials and it's really unadministrable, when 16 Congress not only adopted that for Exemption 4 17 but for all the provisions --18 JUSTICE GINSBURG: It just doesn't say 19 competitive harm. It just says disclose what 20 harm an interest protected by an exemption. 21 MR. LOEB: Right. And the courts will 22 have to fill out what that means on an

23 exemption-by-exemption basis and what's

- 24 required and whether it's the government who
- 25 believes it or it's something that's a de novo

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

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

9 JUSTICE KAGAN: May -- may I ask, Mr. 10 Loeb, if -- if I were to say to you give me your best shot on a textual argument for your 11 12 position, so putting aside subsequent congressional inaction, putting aside how many 13 14 courts have adopted this test, just sort of give me your best shot for why this is the 15 16 right way to read the text, what would you say? 17 MR. LOEB: I would say you have to 18 look at words in context and that their 19 neighbors inform their meaning. And as this 20 Court has said under -- when it's looked at 21 other FOIA provisions, that you first look to 22 the common law to help inform what the language 23 means. Where a plain language is, they just 24 want to look at dictionaries, but even the 25 dictionaries are ambiguous.

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1 But the common law tells you at the 2 time that Congress chose the word "trade 3 secrets," which has a common law meaning which 4 requires competitive harm. And the restatement 5 as well said there was a second category of 6 business information and that it was treated 7 the same way under the same standard and 8 required competitive harm. 9 So you look at the plain language 10 there of trade secrets and financial and commercial information that's confidential, and 11 12 understand that those were terms of art that were used in the common law, and these -- these 13 14 words didn't fall from the sky and just 15 randomly appear here. They chose common law terms, trade secrets and the closely related 16 commercial confidential information. And the 17 courts have used and the rules and the statutes 18 19 have referred to those two bodies together. 20 And if you look at this Court's 21 decision in FMOC versus Merrill, you were there 22 saying, regarding a different exemption as to 23 privileges, we're going to protect trade 24 secrets and confidential business information, 25 because those --

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1 JUSTICE SOTOMAYOR: The problem I have 2 is that the common law didn't use it the way --3 didn't borrow a term of art. This says trade 4 secrets and financial and commercial materials, 5 but that's not how the -- how the common law 6 used it. 7 The common law used other words, like 8 private commercial information or other sorts 9 of words. So it's not a direct taking from the 10 common law. MR. LOEB: No, it's not like the word 11 12 "fraud" and -- every time the word "fraud" is used, you would look at the common law, but 13 this is a -- it was clear that the restatement 14 15 and the common law had two boxes of protected business information, trade secrets and 16 confidential commercial -- commercial and 17 18 financial information. 19 And for both of them, they required some showing of -- of -- of significant -- of 20 21 competitive harm. It wasn't to turn on -- on 22 the particular unilateral view of the 23 submitter. So I -- I -- I think that's --24 JUSTICE GORSUCH: You'd agree, though, 25 that when -- when Congress uses words that are

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1 different from common law terms that are 2 invested with meaning, we usually presume that 3 it means something different? 4 MR. LOEB: I -- I think here that common law developed in a way where they're 5 6 talking about a class of information and it's 7 clear that Congress is referring to that class 8 information. 9 It's not -- so this is not a -- a term 10 of art where you have one word which triggers it. You're -- you're clearly talking about 11 12 that same second box of information, which has been protected by the common law and is being 13 14 -- is being referred to here by the reference 15 to commercial and financial confidential 16 information. You'll see again and again in the 17 18 courts, in the rules, in sealing rules, in the 19 Federal Rules of Procedure, likewise speak to the same classes of trade secrets and 20 21 confidential business information, and all of 22 them require some level of harm. None of them 23 just turn on --24 JUSTICE BREYER: I agree with that, 25 but what -- what happens if -- if the company,

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1	a firm, A, says to a group of customers, we					
2	would like some information from you which is					
3	private, it'll help us in our business. And					
4	they say, whoa, no, I don't want this to get					
5	out. They say, we promise it won't, and if it					
6	ever should, we'll pay you a lot of money. Lo					
7	and behold, it's made public. It doesn't hurt					
8	them commercially in the term of competition,					
9	but it does hurt them because they have to pay					
10	a lot of money.					
11	Now does that fall within the statute					
12	as you understand it?					
13	MR. LOEB: Well, I mean, your analogy					
14	speaks to a private party getting a company					
15	getting private information.					
16	JUSTICE BREYER: Yeah, yeah, and, of					
17	course					
18	MR. LOEB: And would there be any					
19	JUSTICE BREYER: That's right. And					
20	then they give it to the government, and they					
21	they use it and, you know, all the rest					
22	takes place as is.					
23	MR. LOEB: All right. So there could					
24	be a breach of contract in that situation					
25	JUSTICE BREYER: Yeah.					

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1	MR. LOEB: there is a contract, and				
2	there could be damages under this contract				
3	JUSTICE BREYER: Yeah.				
4	MR. LOEB: but we're talking about				
5	a class of information				
6	JUSTICE BREYER: Well, all right. But				
7	does the government does that fall within				
8	the exemption? If the government gets the				
9	information, does that fall within the				
10	exemption? Because it was confidential				
11	information, the company was harmed through its				
12	release. It's just hard to say that that was				
13	competitive harm. They may have had to pay 42				
14	million dollars, I don't know how much, but				
15	but it was harm. And it was confidential. So				
16	it's literally within the statute.				
17	MR. LOEB: I				
18	JUSTICE BREYER: And I want to know				
19	about that.				
20	MR. YANG: I don't I don't think it				
21	would be within the statute. The statute's				
22	referring to commercial and financial				
23	information that's obtained from				
24	JUSTICE BREYER: No, it is commercial				
25	and financial information. That's what it is.				

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1	I just you you do go that way. I'll					
2	just assume it into my hypothetical.					
3	(Laughter.)					
4	JUSTICE BREYER: I'm still focusing on					
5	what words you don't have to write this, but					
6	I might.					
7	(Laughter.)					
8	JUSTICE BREYER: And I - and I have					
9	and I have to write down something by the word					
10	"harm," and that word that word "competitive					
11	harm" is still giving me some trouble, and I'm					
12	that's why I'm asking these questions.					
13	MR. LOEB: Right. Well, it it has					
14	to be obtained from a person and you look at					
15	whether there was harm to that that party					
16	who is who it was obtained from, which would					
17	be the the company or and if but if it					
18	was information that pertained to the					
19	individual, it could perhaps be protected by					
20	other provisions like the Privacy Act to to					
21	to extends to a large degree of of					
22	information regarding a particular individual					
23	citizen, which is possessed by the government,					
24	which then shouldn't be disclosed.					
25	So there are other exemptions that					

1 cover information which goes to private 2 information of an individual. 3 Here, we're talking about commercial 4 and financial information. It was enacted 5 together with trade secrets, both being common 6 law terms, and it would be inappropriate to 7 sort of expand it to a global confidentiality 8 term. 9 Here, you know, FMI is basically 10 suggesting a unilateral approach to say as long as they treat it as secret and confidential, 11 12 that this Court should fall in line as well. That would dramatically alter the scheme of 13 14 FOIA, the one which -- Congress has reenacted 15 Exemption 4 for 26 times, again and again after 16 there was a -- a universal reading of this 17 provision. 18 First of all, FMI's counsel here says 19 that this information isn't important, doesn't 20 show what the government is up to. 21 How the government spends its own 22 money is critical information that the press 23 and the public need to know. It's the type of 24 information that FOIA has been used for decades 25 to reveal, you know, the Navy using -- spending

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

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

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

14 JUSTICE GINSBURG: May I -- may I ask you a question about now -- now that the -- the 15 circuit court was wrong about Exemption 3 under 16 17 the clarification that Congress provided, so 18 are we supposed to just ignore that? That's --19 MR. LOEB: Well, we -- we don't 20 believe that -- that the -- the new version of 21 2018(c) changes the law about this case at all. 22 It's prospective. This is information that was 23 submitted under that amendment. And we don't 24 think that -- that amendment also applies to 25 the application process, not to the -- the

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

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

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

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

1 On that second argument, how can that 2 be squared with Milner? 3 MR. LOEB: Again, Milner was a very 4 different concept. It was really a judicial 5 acquiescence to -- to Congress not changing the 6 law of -- of Exemption 2. And -- and this 7 Court's opinion said there wasn't a judicial 8 consensus, so you wouldn't even --9 JUSTICE KAVANAUGH: Why --10 MR. LOEB: -- assume that Congress had one way or the other --11 12 JUSTICE KAVANAUGH: Let me take it out from under Milner then and just say why, if we 13 14 disagree with National Parks, the D.C. Circuit's decision, should we nonetheless 15 follow it? 16 MR. LOEB: Because this Court has long 17 held that when Congress reenacts a statute or

held that when Congress reenacts a statute or revises a statute that's subject to a uniform judicial construction, that you presume that Congress understands and knows that that construction has adopted it, in its -- in its ratification, in its -- in its amendment to the statute. So there you have --

25 JUSTICE KAVANAUGH: The construction

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was changed in critical mass in some 1 2 significant respect, correct? 3 MR. LOEB: Not correct, Your Honor. 4 So critical mass was just an application of 5 prong one. So prong one says, look, if -- as 6 to whether disclosing the information will harm the government from, in the future, being able 7 8 to get information, the D.C. Circuit, applying 9 prong one, came up with its voluntary/ 10 involuntarily test, which hasn't been followed by all the circuits, but that's just an 11 12 application of prong one. 13 We're saying what has been uniformly 14 adopted, at least since 2001, is the two-prong 15 test. One is to that first prong as to harm to 16 the government. And the second prong is the 17 competitive injury. 18 So Congress has been well aware of 19 that test, they had hearings about it, sought 20 proposals. And did they change the statute? 21 That would be judicial acquiescence we're not 22 relying on. Instead, they actually amended 23 again and again, passed statute after statute, 24 29 statutes since 2001, taking the exact 25 verbatim language of the statute and a

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1	reference to Exemption 4 and saying how it				
2	applies to different circumstances.				
3	Again, those could				
4	JUSTICE GINSBURG: That would stop				
5	this Court from saying this Court has never				
6	has never answered that question. And				
7	you're you're saying that the D.C. Circuit				
8	decision and then other measures using the same				
9	language stops this Court from saying what the				
10	words of Exemption 4 mean?				
11	MR. LOEB: No, Your Honor, it doesn't				
12	stop this Court. But this Court has been				
13	deferential to Congress when it when it				
14	looks to when it reenacts a statute and				
15	there is a uniform construction, as there was				
16	here in eight, nine different uniform circuits				
17	about the two-prong test, that you know				
18	Congress knows about it, it is it is now				
19	reenacting the statute, and that's what this				
20	Court said this term in Helsinn.				
21	There was an appellate decision. And				
22	it was they took they they reenacted that				
23	same language and put it into the American				
24	Invents Act, right, and this Court said that				
25	Congress is presumed to know the prior judicial				

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1	construction and is assumed to have adopted it.				
2	So we're not saying you're in any way				
3	barred from doing it, but that's a significant				
4	factor. When this Court has found that				
5	ratification theory applies, it hasn't even				
б	gone on to sort of look anew at the statute				
7	because it it looks it recognizes that				
8	Congress knows about the prevailing view and				
9	has adopted it by amending the statute and not				
10	changing it or or not changing it in the				
11	relevant sense here.				
12	JUSTICE ALITO: Does that does that				
13	argument depend upon how plausible this				
14	interpretation would be as a matter of first				
15	impression?				
16	MR. LOEB: Justice Alito, I I don't				
17	think that that that is part of the				
18	calculus. This Court has has said, has				
19	there been a uniform construction, you know,				
20	and they presume Congress is aware. Here, we				
21	know Congress was aware of it.				
22	And here we don't we have Congress				
23	enacting 29 different statutes knowing about				
24	the uniform construction since 2001.				
25	JUSTICE ALITO: So, I mean, if there				

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1	were a statute that says something has to be
2	done within 30 days, and a court said 30 really
3	means 50, and all the other courts fell in
4	line, we would say, all right, that Congress
5	has and Congress enacts statutes related to
6	that we would say, well, Congress has
7	implicitly ratified that?
8	MR. LOEB: Obviously, that's a hard
9	hypothetical, Your Honor, but I would say yes,
10	that that even in that context, that
11	Congress was aware of the construction of that
12	term, even how bizarre it may be.
13	Here, we don't have such a bizarre,
14	you know, construction. We have the Congress
15	adopting the common law construction. But this
16	Court has said in Lorillard, in Shapiro, in
17	Helsinn, again and again, that when you take
18	language from one spot and you put it into
19	another, reenact it, it contains the same
20	meaning as as
21	JUSTICE ALITO: Well, under the common
22	law, was competitive harm part of the claim
23	itself, or was it simply what you needed to
24	show to get damages?
25	MR. LOEB: For trade secrets, it was,

1 in essence, a definition of what a trade secret 2 is, something that, when it's released, will 3 cause competitive harm. And the restatement 4 said it was treating this --5 JUSTICE ALITO: Well, for things that 6 are not trade secrets, confidential financial 7 information that is not a trade secret. 8 MR. LOEB: The courts treated that 9 same confidential business information in the 10 same respect, that you had to show a competitive harm. It wasn't just injury, 11 because you could show injury in lots of 12 different ways, but you would have to show 13 14 actually a competitive injury in the case. 15 JUSTICE KAGAN: Is -- is there a 16 difference, Mr. Loeb, for purposes of this congressional ratification argument that the 17 18 court at issue was not the Supreme Court, that 19 it was instead a circuit court? 20 MR. LOEB: It -- what this Court has 21 said is if there's a -- a uniform judicial construction. That can come, of course, from 22 23 the Supreme Court. And then, if they take the language and reenact it or put it from this 24 25 statute to that statute, you would presume that

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1 they know the Supreme Court construction. 2 But the language of Lorillard and 3 Shapiro and Helsinn just talk about a uniform 4 judicial construction. And we know from 5 Helsinn we had just the Federal Circuit 6 construing the prior iteration, which was then 7 lifted into the American Invents Act. 8 So that principle is one really, does 9 Congress know of that uniform construction, and 10 did it do anything about it? And here we didn't have them just reenact something once or 11 amend the statute once, but some --12 13 JUSTICE GORSUCH: So -- so, again, 14 let's say we just had district courts, but we 15 had uniform district courts saying 30 days means 50 days. That's absolutely uniform. 16 Congress thereafter says 30 days, 17 18 everybody in America should know that that 19 really means 50. 20 The average person who's supposed to 21 have fair notice of the statutes opens up the 22 books and sees 30 days but, in fact, is 23 supposed to know that it means 50 because a lot of district courts have said so? 24 25 MR. LOEB: Well, I don't think we

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1 would be -- this Court or -- or -- we're 2 arquing that --3 JUSTICE GORSUCH: Is that consistent 4 with fair notice or due process or any normal 5 statutory interpretation methodology you're 6 familiar with? 7 MR. LOEB: In this particular case, 8 there's not this sort of stark it says 30 and 9 we're reading it to be 50. And maybe that's 10 sort of an outlier situation where you would 11 have an exception like Lorillard. JUSTICE GORSUCH: Exception for maybe 12 13 due process and fair notice? 14 MR. LOEB: Well, no one can argue that 15 adopting the common law meaning of trade secrets and business information is a violation 16 of due process. And the way that you're saying 17 30 days versus 50 days, I'll give you that. 18 19 That's a much harder case and -- and maybe --20 JUSTICE GORSUCH: Very kind of you. 21 Thank you. 22 (Laughter.) 23 JUSTICE GORSUCH: But -- but --24 CHIEF JUSTICE ROBERTS: Well, but --25 JUSTICE GORSUCH: -- don't our --

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

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

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

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

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

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1
               MR. LOEB: With all deference to the
 2
      D.C. Circuit, no, there's no special deference
 3
      here. We're looking for whether there is a
 4
      judicial construction in the terms of Helsinn
 5
      and the terms of Lorillard.
 6
               And I think when you have a
 7
      overwhelming number of the circuits who have
 8
      uniformly addressed it without any dissenting
 9
      circuits, that whatever that standard means,
      that it's -- it's met in that -- in this
10
11
      circumstance.
12
               It's really quite --
13
               CHIEF JUSTICE ROBERTS: Thank you, Mr.
14
      Young -- I'm sorry, Mr. Loeb.
15
               Now, Mr. Young, you have five minutes
16
      remaining.
               REBUTTAL ARGUMENT OF EVAN A. YOUNG
17
18
                   ON BEHALF OF THE PETITIONER
19
               MR. YOUNG: Thank you, Mr. Chief
20
      Justice. Just a few points I'd like to make.
21
               First, to start with what
22
      "confidential" means and its relationship to
23
      any concept of harm.
24
               That question of harm asks a very
25
      different question. It asks why someone keeps
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1 something secret, not whether they keep it 2 secret. There is no common law term of art 3 called confidential business information or 4 confidential commercial information. 5 It's not -- that does not appear in 6 the restatement. It doesn't appear in the 7 cases that are cited. It doesn't appear in any 8 scholarship, and it wasn't something that 9 either National Parks or any other case before or after it relied on to find some common law 10 11 heritage.

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

We know that from cases like Carter 17 18 and Bruesewitz that even if there were some 19 common law conception, it isn't enough for 20 Congress to refer to some vague principle. Ιt 21 would actually have to use that term of art. 22 JUSTICE SOTOMAYOR: Counsel, that --23 that begs a question, which is we sort of naturally think that if people are going to 24 25 keep something confidential, that there's a

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1	reason for it. You don't just say, I don't					
2	want to disclose because I don't feel like it,					
3	although some people do.					
4	It seems to me that this concept that					
5	there has to be a reason for it and that it has					
6	to be tied to business and to commercial and					
7	financial matters, because that's the words,					
8	financial and confidential financial and					
9	commercial matters, those are the words of the					
10	statute, doesn't that naturally infuse the					
11	concept with some sense that there's a reason					
12	for keeping it a secret?					
13	MR. YOUNG: Well, I think it's likely					
14	that there is.					
15	JUSTICE SOTOMAYOR: And that has to					
16	and and if there is some sense of it, why					
17	isn't that sense infused with a concept, if I					
18	let it out, it's going to hurt me?					
19	MR. YOUNG: Well, again, we think					
20	JUSTICE SOTOMAYOR: Taking aside the					
21	quantum of hurt, but					
22	MR. YOUNG: Right.					
23	JUSTICE SOTOMAYOR: there's a					
24	reason I keep it a secret.					
25	MR. YOUNG: And I will address that as					

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1 well. But I think that in this very case it 2 maybe is a good exemplar. 3 Of course our clients aren't paying 4 for us to pursue this to this level because 5 they just feel like it. Of course we think 6 there is substantial competitive harm. 7 But the question Congress asked is not 8 for courts to engage in the prospective, 9 speculative assessment --10 JUSTICE SOTOMAYOR: But that's not 11 true. 12 MR. YOUNG: -- of whether they think 13 it is. JUSTICE SOTOMAYOR: If -- if we read 14 15 "confidential" as being confidential in nature, 16 which is part of your definition --17 MR. YOUNG: It's a manifestation of 18 it. 19 JUSTICE SOTOMAYOR: Well, it's --20 MR. YOUNG: Things that are 21 confidential in nature are likely to be kept 22 secret. Of course. JUSTICE SOTOMAYOR: Well, that's the 23 24 point, which is --25 MR. YOUNG: But the founder of

1 LifeLock put his Social Security number up on 2 billboards all across the country to prove that 3 his technology was so secure. Now, we wouldn't 4 think that that is confidential any more. 5 It's just one manifestation of it. 6 Everybody else's might be. 7 And here when you -- when you have 8 this bucket in Exemption 4 you start with it 9 being commercial or financial. Those are 10 limits. Of course you're right, if you can't show that it's commercial or financial 11 12 information, you are not within Exemption 4. Then you have to show it's obtained from a 13 14 That's not the government doing it, in person. 15 other words. And then, lastly, it has to be 16 confidential or privileged. And all that 17 18 Congress asked the courts to do is answer the

19 objective question: Does the person whose 20 information the government now has, does that 21 person keep this secret and not publicly 22 disclose it?

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

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1	competitive harm, that's not something that				
2	courts need to spend two days on a trial with				
3	expert witnesses and leaders from industry and				
4	all different industry segments coming in to				
5	try to persuade a poor district judge to figure				
6	out why in the world this information would				
7	cause a substantial competitive harm or not.				
8	Harm is not part of the word				
9	confidential. It's often associated with it if				
10	you				
11	JUSTICE BREYER: But why not call it				
12	harm, some harm, I mean, some harm, because				
13	Congress isn't going around protecting people				
14	from X where X doesn't cause any harm. That				
15	would be not there in the statute but it would				
16	be a general assumption.				
17	MR. YOUNG: Well, Congress spoke				
18	broadly				
19	JUSTICE BREYER: Do you object to				
20	that, saying adding to that some harm?				
21	MR. YOUNG: Well, I I I I				
22	object to it in this sense: I think that by				
23	opening that door, you now are opening trial				
24	courts to have to do the kind of tedious and				
25	laborious work that leads to false negatives				

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1
      like this case.
 2
               It -- it really is amazing that
      something like store-level SNAP redemption data
 3
 4
      would lead to a situation in which we had to
      have a trial at all. And you wouldn't have to
 5
 6
      do it, and people aren't likely to press
 7
      objections, if they don't have any harm that's
 8
      going to befall them.
 9
               And so Congress solved that problem by
      saying objectively -- if I might just finish
10
      the thought, Mr. Chief Justice.
11
12
               CHIEF JUSTICE ROBERTS: Sure.
13
               MR. YOUNG: Objectively, if you have a
14
      pattern of keeping this information secret and
15
      not publicly disclosing it, that is the only
      thing the federal courts are authorized to ask,
16
      and that gives the government the authority to
17
      keep it secret, if it so desires.
18
19
               CHIEF JUSTICE ROBERTS: Thank you,
      counsel. The case is submitted.
20
21
               (Whereupon, at 11:07 a.m., the case
22
      was submitted.)
23
24
25
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