No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, DBA ARGUS LEADER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS, ANIMAL AGRICULTURE ALLIANCE, FUR INFORMATION COUNCIL OF AMERICA, INSTITUTE FOR MARINE MAMMAL STUDIES, NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH, PROTECT THE HARVEST, UNITED STATES ASSOCIATION OF REPTILE KEEPERS AND ZOOLOGICAL ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

IRA T. KASDAN
Counsel of Record
BEZALEL A. STERN
KELLEY DRYE & WARREN, LLP
3050 K Street N.W., Suite 400
Washington, D.C. 20007
ikasdan@kelleydrye.com
(202) 342-8864

Counsel for Amici Curiae

284403

BLANK PAGE

QUESTION PRESENTED

Should the Court restore the word "confidential" in Exemption 4 of the Freedom Information Act, 5 U.S.C. § 552(b)(4), to its plain meaning, or should it affirm the atextual meanings provided to it by the D.C. Circuit in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) and *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280 (D.C. Cir. 1983)?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Statutes and Regulations

Other Authorities

Cited Authorities

Page

INTEREST OF *AMICI CURIAE*[1]

Amici are national associations and organizations whose members and stakeholders work with and care for animals in their respective vocations, businesses, industries and fields. As such, *amici* and their members and stakeholders regularly provide information, on both a required and a voluntary basis, to various federal agencies that regulate animal and wildlife use, care and maintenance. This case is important to *amici* because they and their members have been, and will continue to be, subjected to negative financial and reputational consequences as a result of the government's release of their confidential information due to the D.C. Circuit's atextual interpretation of the word "confidential" in Exemption 4 of the Freedom of Information Act, which courts around the country have adopted.

The Alliance of Marine Mammal Parks & Aquariums ("AMMPA") is a 501(c)(4) nonprofit international association and accrediting body for marine parks, aquariums, and zoos dedicated to the highest standards of care for marine mammals and their conservation in the wild. AMMPA's 65 members, which include both for-profit and nonprofit entities, advance the objectives of marine mammal conservation through public display, education,

---

1. Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

research, and the rescue and rehabilitation of injured, orphaned, and distressed animals in the wild.

The Animal Agriculture Alliance is a 501(c)(3) industry-united nonprofit organization that connects food industry stakeholders; engages with food chain influencers; promotes consumer choice by helping people better understand modern animal agriculture; and protects the future of animal agriculture. Its members include farmers, ranchers, food companies, feed and animal nutrition companies, veterinarians, animal scientists, agricultural associations and other allied stakeholders.

The Fur Information Council of America ("FICA") is a not-for-profit organization that protects and promotes the interests of the U.S. fur industry. While its more than 100 members include some of the nation's largest fur retailers, manufacturers, wholesalers, fashion designers, auction houses, and other U.S. exporters of furbearing skins and products, approximately 85% of FICA's members are small, family-run businesses. FICA provides the public with information on the fur industry, wildlife conservation and responsible animal care to which the fur industry is committed. Part of FICA's mission is to protect the interests of the U.S. fur industry by providing its membership with support to counter distortions and misrepresentations made by anti-animal use groups.

The Institute for Marine Mammal Studies ("IMMS") is a 501(c)(3) nonprofit organization established in 1984 for the purposes of public education, conservation, and research on marine mammals in the wild and under human care. Located in Gulfport, Mississippi, IMMS has been an active participant of the Department of Commerce's National Oceanic and Atmospheric Administration's

National Stranding Network for decades, with the capability and expertise to care for sick and injured marine mammals and sea turtles. Through its programs for conservation, education and research, IMMS serves as a marine mammal educational outlet for the Mississippi Gulf Coast.

The National Association for Biomedical Research ("NABR") is a 501(c)(6) nonprofit association dedicated to sound public policy for the humane use of animals in biomedical research, education and testing. NABR has 330 member organizations, including pharmaceutical companies, biotechnology companies, universities, medical schools, and other life science organizations engaged in or having a stake in humane animal research.

Protect the Harvest is a nonprofit organization that works with stakeholders to educate the general public about agriculture and promote favorable food security policies.

The United States Association of Reptile Keepers ("USARK") is a registered 501(c)(6) nonprofit membership organization representing reptile breeders, hobbyists, conservationists, academics, pet owners, scientists, and businesses that provide the reptile community with equipment, feed, transportation, and specialized veterinary and other services. USARK is an education, conservation and advocacy organization for herpetofauna promoting awareness, responsible care, and professional unity for all manners of reptile species. As part of this mission, the organization supports responsible private ownership of, and trade in, reptiles and amphibians, as well as promulgates and endorses responsible caging standards, sound husbandry, escape prevention protocols, and an integrated approach to vital conservation issues.

The Zoological Association of America ("ZAA") has more than 60 accredited members, with accreditation predicated on the promotion of the highest standards of animal welfare as well as public and staff safety. ZAA's work includes animal ambassador programs, classroom education and, with wildlife management professionals around the globe, the conduct and support of research in behavioral sciences and genetics and the exchange of information and training on husbandry, nutrition, best management practices and veterinary care.

SUMMARY OF THE ARGUMENT

The word "confidential," as used in the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), to exempt confidential information from disclosure, is not defined. It need not be, as "confidential information" has a plain, unambiguous meaning: "Knowledge or facts not in the public domain but known to some . . . ." Black's Law Dictionary 361 (10th Ed. 2014).

Nonetheless, in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the D.C. Circuit created a test out of whole cloth to determine what is protected "confidential" information, viz., whether release of the information would likely cause substantial competitive injury. In *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280 (D.C. Cir. 1983), the D.C. Circuit further minimized the plain reading of the term by imposing further atextual limitations.

Under *Public Citizen*, information is not considered "confidential" for Exemption 4 purposes if the disclosure of the information would cause reputational harm – even

if economic harm would flow from that reputational harm. Also under *Public Citizen*, information is only considered "confidential" if the party requesting it through FOIA is a direct competitor of the entity who submitted the confidential information to the government. These requirements have no basis in the text of the statute, or in its legislative history. Instead, they are based solely on two citation-free sentences in a law review article published in the University of Wisconsin Law Review in 1981. *Public Citizen*, 704 F.2d at 1291 n. 30.

Notwithstanding its dubious origins, *Public Citizen*'s law-review inspired precedent has been accepted by courts throughout the country, including the district court below. *Argus Leader Media v. U.S. Dep't of Agric.*, 224 F. Supp. 3d 827, 833 (D.S.D. 2016) (quoting *Public Citizen*, 704 F.2d 1291 n. 30). This widespread adoption wrongfully has failed to protect many persons whose confidential information is requested and then released through FOIA, including *amici*.

The lower courts' (mis)reading and misapplication of the term "confidential" as framed by the *National Parks and Public Citizen's* tests is both atextual and inequitable. This Court should return the word to its plain meaning.

ARGUMENT

I. THE D.C. CIRCUIT'S "CONFIDENTIAL" TEST FOR EXEMPTION 4 IS FUNDAMENTALLY FLAWED

In its Petition for a Writ of Certiorari, Petitioner Food Marketing Institute ("Petitioner" or "FMI") makes a compelling case why the D.C. Circuit's atextual

construction of the word "confidential" in the Freedom of Information Act ("FOIA")'s Exemption 4, 5 U.S.C. § 552(b)(4), should be reviewed and ultimately overruled by this Court. Having been targets of FOIA requests for information that a plain-language reading of Exemption 4 should have served to exempt from disclosure, *amici* urge the Court to grant FMI's Petition.

Petitioner correctly identifies *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) as the source of the D.C. Circuit's atextual "confidential" test. *Amici* have been particularly harmed by a later refinement of that test by the D.C. Circuit in *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280 (D.C. Cir. 1983), which further distanced the D.C. Circuit and other courts that adopted the D.C. Circuit's test from the plain meaning of "confidential."

In a footnote that has since taken on a life of its own, the D.C. Circuit in *Public Citizen*

> emphasize[d] that "[t]he important point for competitive harm in the FOIA context . . . is that it be limited to harm flowing from the affirmative use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws."

704 F.2d at 1291 n. 30 (emphasis in original) (quoting Mark Q. Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 Wis. L. Rev. 207, 235-36 (hereinafter, "*Secrets and Smokescreens*")). Grounded only on the conjecture of the article's author for this "important point for competitive harm in the FOIA context" which *Public Citizen* embraced without any reference to case law, legislative history or analysis, *Secrets and Smokescreens* effectively established two new requirements for information to qualify as "confidential" under Exemption 4.

First, *Secrets and Smokescreens* posited that for information to be "confidential" under Exemption 4, the harm must "flow[] from the affirmative use of [the] proprietary information by *competitors*." *Secrets and Smokescreens*, 235 (emphasis in original) (citing nothing). Second, the article summarily concluded that reputational harm of the party whose information would be disclosed does not count in the Exemption 4 "confidential" analysis, stating that competitive harm cannot "flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations . . . ." *Secrets and Smokescreens*, 235 (citing nothing).[2]

2. As to *Secrets and Smokescreens*' unilateral exclusion of reputational harm from the Exemption 4 analysis, one critic has noted: "The author cites no cases or authority for this statement, nor does he provide any data or reference to social-science research on reputational effects. There is no other context given to his assertion of what competitive harm does or does not include. And yet it is this quote to which the D.C. Circuit [in *Public Citizen*] refers two years later in what has become a widely-cited – if purely dicta – comment regarding reputational harm." Kathleen Vermazen Radez, *The Freedom of Information Act Exemption 4:*

Nothing in the legislative history of FOIA – even in the attenuated legislative history relied on by the *National Parks* court – required or implied that the limitations imposed by the author of *Secrets and Smokescreens* should be applied to Exemption 4.[3] Yet, *Public Citizen*, depending on nothing other than *Secrets and Smokescreens*, imposed those restrictions. *National Parks* at least purported to rely on legislative history in expanding the statutory language. *See* Petition, pp. 12-13. *Public Citizen* did no such thing. Instead, in *Public Citizen* the D.C. Circuit radically expanded its already atextual definition of "confidential" based on a single academic's assumptions.[4]

Protecting Corporate Reputation in the Post-Crash Regulatory Environment, 2010 Colum. Bus. L. Rev. 632, 658 (2010) (citations omitted).

3. Indeed, "[b]oth the House and Senate reports on the FOIA bills provide that [Exemption 4] is intended to protect information which customarily would not be released to the public by the person from whom it was maintained. It seems clear that Congress intended Exemption 4 to maintain the status quo: business information which industry customarily held in confidence would continue to be exempt from mandatory disclosure under FOIA." Thomas L. Patten and Kenneth W. Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Admin. L. Rev. 193, 197 (1977) (hereinafter, "Patten and Weinstein") (citations to House and Senate Reports omitted).

4. *Amici* recognize that members of the Court have expressed differences of opinion as to the utility of legislative history in the subsequent interpretation of a statute. *Compare Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 782 (J. Sotomayor, concurring) (2018) ("Legislative history is of course not the law, but that does not mean it cannot aid us in our understanding of a law."), *with id.* at 783-84 (J. Thomas, concurring in part and in the judgment) ("I join the Court's opinion only to the extent it relies on the text of the Dodd–Frank Wall Street Reform and

Since *Public Citizen*, aside from courts within the D.C. Circuit, courts outside the Circuit also have applied the "law" of *Secrets and Smokescreens* without second thought.[5] For example, in *Watkins v. U.S. Bureau of Customs & Border Prot.*, 643 F.3d 1189 (9th Cir. 2011), the Ninth Circuit took *Secrets and Smokescreens*, quoted without reservation by *Public Citizen*, as settled law. *See* 643 F.3d at 1195 ("Competitive harm analysis 'is . . . limited to harm flowing from the affirmative use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position . . . .'") (quoting *Public Citizen*, 704 F.2d 1280, 1291 n. 30).

Similarly, the district court in *Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262 (S.D.N.Y. 2009), which was affirmed by the Second Circuit, 601 F.3d 143 (2d Cir. 2010), concluded that Exemption 4 did not apply because "the specific evidence must show that the competitive harm will result from the affirmative use of the information by competitors of the person from whom the information was obtained, not merely injuries to that person's competitive position in the marketplace

---

Consumer Protection Act . . . I am unable to join the portions of the Court's opinion that venture beyond the statutory text."). In this case, where both the statute itself and its legislative history were ignored in the D.C. Circuit's interpretation of Exemption 4, all of the Court's members should be comfortable overruling *Public Citizen*'s law-review inspired precedent.

5. *See, e.g.*, *100Reporters LLC v. U.S. Dep't of Justice*, 248 F. Supp. 3d 115, 138 (D.D.C. 2017) (applying *Secrets and Smokescreens* test); *Edelman v. U.S. Sec. & Exch. Comm'n*, No. 315CV02750BENBGS, 2017 WL 4286939, at *6 (S.D. Cal. Sept. 27, 2017) (same); *AIDS Healthcare Found. v. U.S. Food & Drug Admin.*, No. CV1107925MMMJEMX, 2014 WL 10983763, at *6 (C.D. Cal. Feb. 13, 2014) (same).

or 'embarrassing publicity attendant upon public revelations.'" *Id.* at 279 (quoting *Public Citizen*, 704 F.2d at 1291 n. 30). And, relying on *Public Citizen*, the Seventh Circuit expounded that "the competitive harm that attends any embarrassing disclosure is not the sort of thing that triggers exemption 4." *Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984).[6]

In fact, the district court in *this* case relied on the definition of "competitive harm" invented by *Secrets and Smokescreens*. The district court held, as a matter of law: "Competitive harm is limited to 'harm flowing from the use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations.'" *Argus Leader Media v. U.S. Dep't of Agric.*, 224 F. Supp. 3d 827, 833 (D.S.D. 2016) (quoting *Public Citizen*, 704 F.2d 1291 n. 30).

"It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quotation omitted). It should go without saying that the pronouncement of an academic in a law-review article

6. *But see Nadler v. F.D.I.C.*., 92 F.3d 93, 97 (2d Cir. 1996) (finding that "[s]ensitive financial information" falls within the class of materials that should be viewed as confidential and noting that "[t]he fact that this harm would result from active hindrance by the Plaintiffs rather than directly by potential competitors does not affect the fairness considerations that underlie Exemption Four.").

should not be enough to modify the fundamental canons of statutory construction. Unfortunately, in the case of Exemption 4, a single University of Wisconsin Law Review article has managed to trump the statutory language and skew the fundamental canons of statutory construction.

Exemption 4 has evaded this Court's review for far too long. As Petitioner has explained, and as *amici* further demonstrate, it is past time for this Court to remedy the lower courts' errors, to revive the statutory language of Exemption 4, and to discard the convoluted and contradictory tests developed by the Circuit Courts in response to the D.C. Circuit's opinions in *National Parks* and *Public Citizen*. The historically suspect and practically harmful precedent of the D.C. Circuit should be relegated to the annals of history, and to the legacy of a time when statutory construction was more fluid and less attached to the text than today.[7]

II. *AMICI*'S DETRACTORS USE THE ARTIFICIAL STANDARDS CREATED BY THE D.C. CIRCUIT'S "CONFIDENTIAL" TEST TO HARM *AMICI*, THEIR MEMBERS AND SIMILARLY SITUATED ENTITIES

The D.C. Circuit's neutering of FOIA's Exemption 4 in *National Parks* and *Public Citizen* has not been

7. FOIA Exemptions 6 and 7 protect against the release of information that could cause a non-governmental party reputational harm. This Court has ruled that those exemptions do not apply to corporations. *FCC v. AT & T Inc.*, 562 U.S. 397 (2011). The Court should not allow a law review article to write out reputational harm from Exemption 4, which "clearly applies to corporations." *Id.* at 408-09.

without consequences. Indeed, the evisceration of the plain language of Exemption 4 has caused *amici* and similarly situated entities to have their confidential commercial information released under FOIA to their economic and reputational detriment.

In *Jurewicz v. U.S. Department of Agriculture*, 741 F.3d 1326 (D.C. Cir. 2014), the D.C. Circuit, adhering to its precedent originating in *National Parks* and *Public Citizen*, allowed confidential information of private entities similarly situated to *amici* to be released to the Humane Society of the United States ("HSUS"). In that case, "dog breeders and dealers in Missouri challenge[d] the Department of Agriculture's decision to release information in their annual reports relating to their gross revenue and business volume." *Id.* at 1329. This information clearly was confidential financial information of a non-governmental entity, and would squarely have been covered by a plain language reading of Exemption 4.

Nevertheless, finding that it was "bound by the law of the circuit," the D.C. Circuit in *Jurewicz* summarily rejected appellants' Exemption 4 challenge to the release of their confidential information, disregarding appellants' argument that "the Humane Society's intended use" of the FOIA'd information was "'to destroy [appellants'] businesses.'" *Id.* at 1331 (quoting Appellants' Br. 53). *Amici*, who face the same sorts of opponents as the *Jurewicz* appellants, have been and will continue to be similarly harmed unless this Court steps in.

More specifically, detractors of *amici* – including organizations such as People for the Ethical Treatment of Animals ("PETA"), HSUS and like-minded groups –

are not direct competitors of *amici*, in that they do not operate similar businesses. But, among their primary goals is to harm the interests of *amici* by, among other tactics, promoting negative campaigns and publicity against them and their members on social media, and, in certain instances, by harassing them and attempting to put them out of business. *Amici*'s detractors receive under FOIA confidential documents and information from the government that the government, in turn, obtained from *amici* and their members. Those opposition groups then use the confidential materials and information in their campaigns against *amici* and their members.

Under a plain language reading of Exemption 4, such confidential commercial or financial information would not be released. Yet, because *amici*'s detractors are not *amici*'s "direct competitors," and because the harm the activists intend to cause is, more often than not, reputational in nature (with adverse economic repercussions stemming from the reputational harm), the D.C. Circuit's interpretation of Exemption 4 improperly allows the publication and dissemination of *amici* and their members' confidential and proprietary information.

One *amicus*, the National Association for Biomedical Research, compiled an analysis of FOIA requests submitted to the U.S. Department of Agriculture's Animal and Plant Inspection Service ("APHIS") in 2015. That analysis found that, in 2015, APHIS received 889 requests for information under FOIA. "Approximately 30 percent (265) of the FOIA requests, which is a 23% increase from [2014], could be identified as submitted by animal rights/animal interest organizations, or individuals that appeared to be associated with such groups." *FY 15:*

Animal Rights FOIA Requests, National Association for Biomedical Research (May 19, 2016), https://www.nabr.org/wp-content/uploads/2016/05/FY2015-FOIA-Report-Final.pdf (the "NABR Report"), p. 2.[8] The NABR Report found that the information "most frequently requested" by the animal rights groups was "about exhibitors, actions related to horses and wildlife, dealers and research facilities." *Id.*

The NABR Report also found that approximately 10% (128) of the 1,273 FOIA requests received by the National Institutes of Health in 2015 came from animal rights/animal interest organizations. *Id.* at p. 5. "Almost all of the 123 requests filed by animal rights groups sought information related to research and research organizations." *Id.* at p. 6.[9]

A plain reading of FOIA's Exemption 4 would protect this information from being disseminated where it is commercial or financial in nature and confidential. Nonetheless, *National Parks* and *Public Citizen* have gutted the plain reading of Exemption 4, as detractors of *amici* explicitly rely on the tests enunciated in those cases in order to thwart a correct application of Exemption 4. *See, e.g., Jurewicz, supra; In Defense of Animals v. U.S. Dept. of Agriculture,* 656 F. Supp. 2d 68, 80 (D.D.C. 2009) (animal rights activist group allowed to obtain commercial confidential information, rejecting application of Exemption 4 because "the competitive harm that matters is a competitor's affirmative use of proprietary

8. The estimated cost to APHIS of handling the FOIA requests it received in 2015 was $1,836,896.28. NABR Report, p. 4.

9. The estimated cost to the NIH of handling its FOIA requests in 2015 was $3,621,518.15. NABR Report, p. 6.

information that could reap a commercial windfall for the competitor, rather than the harm caused by a customer or other third party's negative reaction to disclosure"); *Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv.*, No. 16-cv-00720 (D.D.C. filed Apr. 18, 2016), Humane Society International Motion for Summary Judgment, ECF No. 36 (filed June 22, 2018) pp. 28-29 ("[T]he majority of submitter declarants also argue that they would face competitive harm if their data were released, because animal protection organizations would harass them or otherwise interfere with their business. But this type of argument is entirely outside the realm of what Exemption 4 concerns." (Footnote omitted) (collecting cases)).

Once activists obtain through FOIA confidential commercial or financial information submitted to the government, they use it to the submitter's detriment. One case in point is demonstrated by the testimony presented earlier this year by Dr. Rae Stone, who testified on behalf of *amicus* AMMPA before the Senate Subcommittee on Oceans, Atmosphere, Fisheries, and Coast Guard. *See Enhancing the Marine Mammal Protection Act: Before the Subcomm. on Oceans, Atmosphere, Fisheries, and Coast Guard of the S. Comm. on Commerce, Science, and Transportation*, 115th Cong., p. 6 (April 25, 2018) (statement of Rae Stone, President & Partner, Dolphin Quest), https://www.commerce.senate.gov/public/index.cfm/2018/4/enhancing-the-marine-mammal-protection-act ("Stone Testimony"). Dr. Stone testified about confidential information required to be submitted by AMMPA members to the National Marine Fisheries Service ("NMFS") for its marine mammal inventory maintained pursuant to the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361, *et seq.*

The MMPA requires that NMFS maintain in the inventory, among other things, "[t]he name of the marine mammal or other identification . . . [t]he estimated or actual birth date of the marine mammal . . . [and the] date of death of the marine mammal and the cause of death when determined." 16 U.S.C. § 1374(c)(10)(A), (B), (H). This confidential commercial information is routinely sought by activists under FOIA. The activists use the FOIA information in order to promote and often exaggerate the deaths of animals in zoos, marine mammal parks and similar facilities and "unambiguously say their goal is to end the use of animals in zoological facilities, agriculture, and other sectors." *See* Stone Testimony, p. 6. Notwithstanding, the D.C. Circuit's "competitors" test means this confidential information that *amici* are required to turn over to the government is provided no protection under *Public Citizen*'s Exemption 4 standard.

Further, the NMFS inventory "information" the activists obtain often is inaccurate, and is used by them to promote further inaccuracies and to cause *amici* reputational (and, thereby, economic) harm. For example, detractors of marine mammal park Dolphin Quest used FOIA to receive confidential information about Dolphin Quest, and then misused that confidential information to make false claims about the facility. As Dr. Stone observed:

> A committee [in the Hawaii legislature] was considering legislation that sought to ban the transfer of cetaceans in human care "for breeding or entertainment purposes." Not only did animal extremists supporting this bill say they used "research" gleaned from the NMFS inventory to support this legislation,

> the bill sponsors included inaccuracies from the NMFS inventory in the actual bill text. *The information about Dolphin Quest from the inventory that was the basis of this "research" was grossly inaccurate and referenced animals that were never at Dolphin Quest and died before Dolphin Quest was even founded.*

Stone Testimony, p. 6. (emphasis added).

PETA, Humane Society International ("HSI") and the Center for Biological Diversity ("CBD") also use FOIA to seek other types of commercial information such as the identities of shippers who transport animals to *amici*, their members and similarly situated entities. For example, in the pending case *Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv., supra,* HSI is seeking confidential commercial information required to be provided to the U.S. Department of Fish & Wildlife Services ("FWS") pursuant to 50 C.F.R. § 14.52. This information is housed in the Law Enforcement Management Information System ("LEMIS").

There is real concern that HSI or others will use the LEMIS information in order to harass transport carriers and to disrupt supply chains. As Nick Pologeorgis, whose company is a member of *amicus* FICA, declared in the pending *Humane Society* case:

> [D]isclosure of LEMIS data would greatly increase the risk of supply chain disruption by animal activist groups. For example, an animal activist group could review the information contained in the importer/exporter LEMIS field to identify the company's preferred vendors

> and suppliers and then use that information – along with carrier, source country, port code and date – to learn the company's shipping routes. Armed with this information, animal activist organizations could then target preferred vendors and transport carriers with harassment . . . [thereby] increasing costs, and/or leading to a more limited pool of vendors/suppliers.

Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv., D.D.C. Case No. 16-cv-00720, ECF No. 33-6, p. 22, ¶ 10, Declaration of Nick Pologeorgis (filed May 8, 2018).

In the same case, another declarant, Ira Block, averred:

> Organizations like the Humane Society International ("HSI") seek to damage companies that conduct federally required research on animals. One of their primary strategies is to disrupt supply chains. To do this, these organizations frequently request import/export information from government agencies and use that information to identify research animal suppliers and transporters. They then target those suppliers and transporters with harassment for the purpose of halting or delaying animal research.

Id. at p. 71, ¶ 22, Declaration of Ira Block. It can take years for companies to develop and maintain reliable supply sources and transporters of animals. The names of suppliers and transporters are closely-held, confidential

business information, and should not be made accessible under FOIA – especially to groups, even if they are "non-competitors," that will use this information for disruptive purposes.[10]

Indeed, Messrs. Pologeorgis and Block's fears in this regard are not theoretical. PETA has made FOIA requests to the U.S. Department of Agriculture ("USDA") in order to obtain information regarding airlines transferring animals into the United States. *See* https://www.aphis.usda.gov/foia/foia_logs/2013/April.xlsx ("Request the full USDA APHIS files on the following air carriers with dateline going back as far as USDA APHIS' records go for these air carriers: 1. Air France Cargo (Certificate 57-T-0109)...."). After obtaining such confidential information, PETA uses it to attempt to prevent those airlines from carrying animals, to the detriment of *amici* and similarly situated entities. *See, e.g.*, *Stop Air France From Shipping Monkeys to Their Deaths!*, https://headlines.

10. Another consideration for returning "confidential" to its plain meaning in Exemption 4, is the undue burden in time and expense to submitters in attempting to prove "substantial competitive harm" versus being able to make a simple showing that their confidential information is not normally made publicly available. *See* Patten and Weinstein at 200 (proof of competitive harm "obviously would be difficult and costly to present"). Activist groups are, on the whole, much better-funded than the many small business members of *amici*. The latter do not have the same resources to protect their confidential information from disclosure, as compared to their detractors who seek such information under FOIA. *Cf. Kuehl v. Sellner*, 887 F.3d 845, 856 (8th Cir. 2018) (expressing concern about "plaintiffs' attempt, assisted as it is by at least five of such [animal rights] organizations, as evidenced by their corporate-level-counsel amici briefs . . . to close small, privately owned zoos.").

peta.org/air-france-stop-shipping-monkeys/ ("Air France even canceled an individual shipment of monkeys after a public outcry by PETA and its supporters.").

As demonstrated by the above examples, the activists' receipt and use of the "confidential" information they currently can and do obtain pursuant to FOIA, can and does cause *amici* and their constituents both reputational and economic harm. In short, *amici* are being penalized by their compliance with laws requiring government disclosure of their confidential information, and by their voluntary willingness to provide the government with confidential information.

The word "confidential" in Exemption 4 should be construed to mean that whatever information a party designates and treats as "confidential" and does not normally share with the public for whatever reason should be protected from disclosure – including for reasons to safeguard against reputational harm or harassment. FMI is right in urging this Court to restore the word "confidential" to its plain meaning. By doing so, the Court will afford *amici* the Exemption 4 coverage to which they rightfully are entitled under FOIA.

III. THE UNSETTLED STATE OF EXEMPTION 4 LEADS TO POTENTIALLY CONFLICTING JURISPRUDENCE, RESULTING IN THE POSSIBILITY OF GAMESMANSHIP

Because the interpretation of the word "confidential" in Exemption 4 has not been definitively ruled on by this Court, parallel – indeed, often virtually identical – court proceedings involving FOIA requests for substantially

the same information will have potentially conflicting outcomes.

For example, currently there are two pending lawsuits in two different jurisdictions, filed months apart, both involving requests from the same government agency pursuant to FOIA for substantially the same information. One is pending before a district court in the District of Columbia. *Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv.*, No. 16-cv-00720 (D.D.C. filed Apr. 18, 2016) (the "HSI Case"). The second was filed in Arizona district court. *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, No. 16-cv-00527, (D. Ariz. filed August 9, 2016) (the "CBD Case").

Plaintiffs in the two cases had sought, by way of a FOIA request to the FWS, electronic LEMIS records for the years 2002 through 2010, 2013 and 2014 (the HSI Case), and 2005 to the present (the CBD Case). The requested data sets total tens of thousands of confidential entries relating to imports and exports of animals by private persons and entities of any taxonomic class, whether live, dead, parts or products. In both cases, in response to the activists' requests, FWS withheld certain portions of the LEMIS data under FOIA Exemption 4. HSI and CBD sued – albeit in different jurisdictions.

On March 30, 2018, the district court in the CBD Case granted summary judgment to CBD. 2018 WL 1586648. In articulating the Exemption 4 "confidential" test, the district court explicitly relied on the standard of *Secrets and Smokescreens*, as quoted in *Public Citizen. Id.*, at *4 n. 2. And, in granting CBD's summary judgment motion and directing FWS to provide documents responsive to

CBD's FOIA request, the district court relied on *National Park's* atextual definition of the term "confidential," concluding: "Based on the circumstances of this case, the corporate speculations are insufficient to support exemption . . . CBD is entitled to a dataset including the Exemption 4 information at issue." The Ninth Circuit has stayed the district court's ruling in part. Order, *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 18-15997 (9th Cir. June 14, 2018), ECF No. 18.[11] As of the date of this filing, the CBD Case remains pending.

Meanwhile, in the HSI Case in the District of Columbia, cross-motions for summary judgment are pending. In its motion for summary judgment, HSI explicitly relied on the district court's ruling in the CBD Case (and failed to mention that the ruling had been stayed by the Ninth Circuit). *See, e.g.*, HSI Motion for Summary Judgment, HSI Case, ECF No. 36, p. 23 ("the Court in CBD analyzed these exact allegations of harm from many of the exact same companies, and held that FWS did not meet its burden to justify nondisclosure, holding that 'the corporate speculations are insufficient to support exemption.'") (quoting CBD Case, 2018 WL 1586648 at *4-7). The HSI case remains pending.

Unless this Court returns the term "confidential" to its proper, textual meaning, there is a strong possibility that both HSI and CBD will prevail. However, because of the unsettled nature of the term "confidential" in Exemption 4, there also is a possibility that one of the two cases will

11. The Ninth Circuit stayed the release of the documents at issue and remanded to the district court to consider the question of whether a third-party could intervene.

be resolved in favor of the activist group which made the FOIA request, and the other in favor of FWS. If such a scenario occurs, FWS's victory will be pyrrhic. Once the prevailing activist obtains the FOIA'd documents, those confidential documents will be made public.

As this Court recognized when it issued the stay in Petitioner's favor, there is no going back. If the defendant loses somewhere, the defendant loses everywhere.

The detractors of *amici* know this, and use it to their advantage, filing similar cases in multiple jurisdictions. They don't need to win every case. Under the current Exemption 4 jurisprudence, one positive ruling is enough to cause *amici*, their members and similarly situated entities irrecoverable harm. By accepting FMI's Petition, the Court has the ability to rectify this.

CONCLUSION

Words mean what they say. In the absence of an obvious statutory reason to change the plain language meaning of the word "confidential" – which the D.C. Circuit has never provided – the plain language meaning should be retained. Allowing the word "confidential" to stray from its plain meaning has caused harm to *amici*, to similarly situated entities and to many other persons who provide confidential information to the government. If Congress wishes to codify the D.C. Circuit's interpretation of FOIA, it has the power to do so. The D.C. Circuit, however, does not have the right to modify the statute as it has in *National Parks* and *Public Citizen.*

The Court should grant FMI's Petition in order to overrule the D.C. Circuit's antiquated, atextual precedent limiting the scope of FOIA Exemption 4, and to reinvigorate the statute with its plain meaning.

Respectfully submitted,

IRA T. KASDAN
Counsel of Record
BEZALEL A. STERN
KELLEY DRYE & WARREN, LLP
3050 K Street N.W., Suite 400
Washington, D.C. 20007
ikasdan@kelleydrye.com
(202) 342-8864

Counsel for Amici Curiae