SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

FOOD MARKETING INSTITUTE,)
Petitioner,)
v.) No. 18-481
ARGUS LEADER MEDIA,)
dba ARGUS LEADER,)
Respondent.)

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Pages: 1 through 70

Place: Washington, D.C.

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3 FOOD MARKETING INSTITUTE,)

4 Petitioner,)

5 v.) No. 18-481

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:

18 EVAN A. YOUNG, ESQ., Austin, Texas; on behalf of the

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.

1

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1 P R O C E E D I N G S

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

11 it please the Court:

12 Before I turn to why the Court should

13 jettison the National Parks definition of

14 "confidential" and instead restore that word's

15 plain meaning as used in Exemption 4 of the

16 Freedom of Information Act, let me address

17 justiciability. Respondent's brief expressed

18 doubts about redressability, but redressability

19 and the other two requirements of Article III

20 standing are established here.

21 First, our injury in fact is the

22 disclosure of our members' store-level sales

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 appeal. It chose, by definition, to turn it
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
10 proper party. We have an interest that allowed
11 us to intervene.
12 JUSTICE SOTOMAYOR: But the -- if you
13 had been a part of the -- if you had been the
14 original asker, we have a case that says --
15 Crystal City -- that if the government chooses
16 to 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.
20 JUSTICE SOTOMAYOR: Well, but they
21 haven't made the choice on this exemption.
22 They've made the choice because of a new law.
23 Isn't the proper course for them to go
24 back to the district court with a motion for
25 reconsideration or for them to petition the

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
11 of the earlier judgment, telling them that
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
17 clear that they are not pressing an Exemption 3
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
21 Eighth Circuit's first judgment --
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
25 for -- for their refusal to turn it over now is

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
11 disclosing it, which would be what they would
12 do if they decided to follow it, they
13 facilitated our intervention by alerting us to
14 the possibility of judicial intervention.
15 They then, when we did intervene, told
16 the district court, they told the federal
17 court, as they've told this Court, we will not
18 release that information unless a final
19 judgment in the judicial system requires it.
20 CHIEF JUSTICE ROBERTS: Do you
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.

1 CHIEF JUSTICE ROBERTS: I noticed them
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
11 appellate jurisdiction of the federal courts
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
16 friend on the other side invoked in his brief
17 to this Court. That would be a mootness
18 question. And, of course, mootness can be
19 established only if it's impossible that this
20 Court's reversal would give us meaningful
21 relief.
22 The opposite is true. If this Court
23 reverses, the only thing that will lead to our
24 information certainly being made public will be
25 destroyed. And that's why all the requirements

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's

10 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

13 judgment under Exemption 4?

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

24 decades of the highest level promise of

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 --
11 JUSTICE GINSBURG: But wasn't the
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.
17 So, to -- to say the government can
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.
21 MR. YOUNG: Well, it would perhaps run
22 counter to the idea of FOIA if it were the kind
23 of information that were -- was about the
24 government's own doings or even, conceivably,
25 something that's not presented here, if there

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 quote.
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

1 two grocery stores market and -- and -- and
2 sell and what their selection might be.
3 JUSTICE BREYER: I don't doubt that
4 you're heard. I -- I -- I -- I do -- I can't
5 quite figure out how this mootness thing works.
6 It seems to me there are two laws, A
7 and B. All right? A is the -- the one you're
8 interested in, and B is this other one that
9 stops them from -- maybe -- from giving out
10 information.
11 Now, here, you're attacking A, so I'm
12 asking, does A cause you injury? Not does B
13 cause you injury. Now, if B stops them from
14 giving out the information, if you win on A,
15 you don't get it. If you lose on A, you don't
16 get it.
17 If B doesn't stop them from giving out
18 information, if you win on A, you get it. If
19 you don't -- see, it works -- the -- the -- the
20 result is the same no matter how we decide your
21 case. We just don't know about B.
22 Now have I got that right? And if I
23 -- if I've got that right, I -- I don't know a
24 standing case right in point or a mootness case
25 right in point. I'm not sure what to do.

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
11 resolve what Exemption 2 meant, and it granted
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
17 ruling on Exemption 4, so it acceded to turning
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

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
11 should have appealed on.
12 MR. YOUNG: Justice Sotomayor, I don't
13 believe the government's piggybacking at all.
14 They're here as an amicus. And it is we, the
15 Food Marketing Institute --
16 JUSTICE SOTOMAYOR: But why -- why can
17 you, without getting stuck in Crystal City?
18 MR. YOUNG: Well, because --
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
22 below, and they haven't asked the court below
23 to reconsider that judgment.
24 MR. YOUNG: I -- I -- I think it's as
25 simple as --

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?
6 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. At other points in your
16 brief, you talk about whether the information
17 is kept private.
18 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
11 party wants the release of some information
12 that a party like us might say that's our
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
19 which these questions were presented to the
20 trial court, do you bind it with nondisclosure
21 agreements? Do you have security in place so
22 that it limits the number of people even
23 internally who have access to it?
24 How do you make sure that it is not
25 supplied accidentally in litigation, for

1 example? How, in other words, do you make sure
2 that it doesn't become public?
3 Have you made sure that comparable
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
11 Exemption 4 argument is gone.
12 JUSTICE SOTOMAYOR: So how does that
13 dovetail with the SG's position that if they
14 ask you to turn over something confidentially
15 -- and you seemed to be arguing that earlier --
16 that that's enough, that that makes it
17 confidential?
18 Because you've just said to me
19 something quite different, which is it's not
20 the government's request or promise to keep it
21 confidential, but is it, in fact, kept in
22 confidence the way you've defined it? So how
23 do you dovetail the two?
24 MR. YOUNG: Well, I would say that
25 even if the government gives us a promise of

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

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

1 not do so.

2 Petitioner also had Article III

3 standing. That's evaluated at the time they

4 filed the notice of appeal and invoked the

5 appellate court's jurisdiction.

6 JUSTICE BREYER: Is that true if -- if

7 the -- the other statute here were held not to

8 block the government from releasing it?

9 MR. YANG: Yes.

10 JUSTICE BREYER: You mean so however

11 the other statute comes out, the government now

12 is saying -- I didn't get this at the beginning

13 -- we're not going to release it -- even if we

14 have every right to release it, we're not going

15 to release it, even if we have every right to

16 do so?

17 MR. YANG: It would help to take a

18 look at Footnote 5 --

19 JUSTICE BREYER: Yeah.

20 MR. YANG: -- at page 26 of our brief,

21 where we explain --

22 JUSTICE BREYER: Yeah.

23 MR. YANG: -- there would -- there is

24 a policy interest in USDA, if they were writing

25 on a clean slate, going prospectively, that

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

1 here.

2 MR. YANG: Right.

3 JUSTICE BREYER: And -- and if -- if

4 you're going to tell me I don't care if 2018

5 never appeared, doesn't appear, doesn't exist,

6 we still won't release it, which is your right

7 in the absence of -- of --

8 MR. YANG: I would say that's

9 partially right. The reason we're not

10 releasing it is because we have made assurances

11 of confidentiality at pages 30 to 31 of our

12 brief. We explained that that was motivated by

13 Section 2018(c). But even if we were --

14 JUSTICE BREYER: All right. So what

15 happens if 2018(c) now is wiped from the books?

16 MR. YANG: As I was explaining --

17 JUSTICE BREYER: Will you release it?

18 MR. YANG: As I was -- no. As I was

19 explaining --

20 JUSTICE BREYER: No? Okay.

21 MR. YANG: -- on page 30 to 31 of our

22 brief, even if we were wrong about 2018(c), the

23 fact that it was reasonable, it was objectively

24 reasonable in light of the government's

25 assurances for 40 years to understand the

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

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

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

1 JUSTICE GINSBURG: -- that I asked
2 your fellow counsel? That is, one of the aims
3 of FOIA was to -- FOIA was to make information
4 public despite official --
5 MR. YANG: Yes.
6 JUSTICE GINSBURG: -- willingness.
7 MR. YANG: I -- I think that's right,
8 and that is certainly FOIA's general goal, but,
9 in this exemption, it only targets a particular
10 type of information, not general. It is
11 information that is private information, it's
12 obtained outside the government, it's about
13 private entities, that is, either commercial or
14 financial.
15 And in that narrow ambit of commercial
16 or financial information, Congress made the
17 policy judgment that when that is reasonably
18 understood to be confidential, it should not be
19 disclosed. Exemption --
20 JUSTICE KAGAN: If I understand your
21 argument, Mr. Yang, you kind of have two
22 prongs, two ways of saying that something is
23 confidential. One is just like Mr. Young's or
24 something like it -- something like it, and we
25 -- and the other is this assurances point.

1 Is that right?

2 MR. YANG: Yes. That --

3 JUSTICE KAGAN: Your --

4 MR. YANG: -- those are manifestations.

5 We think the --

6 JUSTICE KAGAN: Am I -- am I --

7 MR. YANG: -- meaning of confidential

8 --

9 JUSTICE KAGAN: -- am I -- am I right

10 that you're relying here on the assurances

11 point?

12 MR. YANG: We are, because we think

13 it's a little more complicated. This is, in

14 our view, an objective test, and you have to

15 take it in context.

16 And the context here is more

17 complicated than a normal Exemption 4 case

18 because the government's own actions of paying

19 money is intertwined closely with the

20 information submitted to it, which is why we

21 think the easier path in this context is to --

22 where there has been 40 years of

23 notice-and-comment regulations by a high, high

24 level of government sign-off, right, this has

25 to be the agency administrator that signs off

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

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

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

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

1 And Exemption 4 is what we're talking about
2 here.
3 JUSTICE SOTOMAYOR: So let's go back.
4 If the store does not keep it confidential, can
5 you, by a promise of confidentiality, protect
6 it from FOIA disclosure?
7 MR. YANG: I think that would be
8 difficult. The first prong that we are -- rely
9 upon is -- the first manifestation, if it is --
10 if I could just finish the -- the sentence, Mr.
11 Chief Justice.
12 CHIEF JUSTICE ROBERTS: Yeah.
13 MR. YANG: If information is
14 customarily not publicly disclosed by those who
15 submit it, so long as there is nothing in
16 context that suggests that they would
17 understand otherwise, when it's provided to the
18 government, it would be confidential.
19 CHIEF JUSTICE ROBERTS: Thank you,
20 Mr. Yang.
21 Mr. Loeb.
22 ORAL ARGUMENT OF ROBERT M. LOEB
23 ON BEHALF OF THE RESPONDENT
24 MR. LOEB: Mr. Chief Justice, and may
25 it please the Court:

1 If the Court reaches the merits here,
2 it should affirm the judgment of the Eighth
3 Circuit. For 45 years, the language of
4 Exemption 4 has been properly construed to
5 require a showing of likely competitive harm.
6 Not only is that competitive harm
7 standard fully supported by the common law that
8 prevailed in 1966 when Exemption 4 was enacted,
9 the standard has also been ratified by Congress
10 for reasons that I'll explain.
11 In 1974, the D.C. Circuit adopted the
12 National Parks test with its two-prong test,
13 including the competitive harm requirement.
14 But, by 2001, there was a clear judicial
15 construction.
16 Eight circuits had adopted the same
17 two-prong test as National Parks. So, between
18 2001 and today, during those 18 years, Congress
19 has enacted 29 statutes endorsing the language
20 of and the provision of Exemption 4 and has --
21 and has effectively amended Exemption 4,
22 thereby ratifying the National Parks standard.
23 Now --
24 JUSTICE KAGAN: Mr. Loeb, this case
25 strikes me as a lot like Milner, that you have

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

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

1 discretion that's under Exemption 4.
2 So, as the SG's brief points out,
3 Exemption 4 doesn't prohibit disclosure, it
4 just says the agency has discretion whether to
5 disclose or not.
6 These additional statutes micromanage
7 that discretion. Some of them say that when
8 you have the discretion, you have to withhold.
9 Some say that when you have the discretion, you
10 have to withhold for five years. Some say when
11 you have discretion, you have to ask the
12 private party their view.
13 Those are all -- those all could have
14 been codified under Exemption 4, but, instead,
15 they were codified under separate statutes.
16 But that's just a matter of formalism. This
17 Court has said when -- when Congress actually
18 examines a statute, amends a statute, and --
19 and reenacts it, that your -- that -- that
20 Congress is presumed to have adopted the
21 prevailing judicial construction.
22 That's what this Court said in
23 Lorillard, in Shapiro, and this term in
24 Helsinn. And, likewise, here, we have all the
25 circuits lined up on the two-prong standards.

1 We have Congress not just addressing
2 the statute once but 29 times in this 18-year
3 period where they, again, have codified over
4 and over again that -- that -- that standard.
5 JUSTICE GORSUCH: Mr. Loeb, along
6 those lines, the other side makes the argument
7 that, in Exemption 7, the word "confidential"
8 is given a different gloss than you would have
9 us give it in -- in Exemption 4.
10 I'm sure you would like an opportunity
11 to respond to that.
12 MR. LOEB: Correct, Your Honor. So,
13 in looking at Exemption 4, you have to look at
14 those words in -- in a -- a textual
15 construction of it. We'll begin by looking at
16 the words and looking at how they were used in
17 context at the time.
18 And we know for Exemption 4, Congress
19 started with a common law term, trade secrets,
20 which even FMI agrees --
21 JUSTICE GORSUCH: That's another
22 point. I'd like to get to that too. But, when
23 we're dealing with the word "confidential",
24 Justice Kagan made the point that perhaps
25 there's a gloss that's been placed on it that

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

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

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

1 right idea there. Confidential information is
2 information that is legitimate for a
3 confidential -- for a legitimate reason.
4 It's confidential for a legitimate
5 reason. Release would hurt the company or
6 release would hurt the government. And then we
7 add: And, of course, there has to be harm, I
8 mean, business-related harm to the company.
9 Now that would stop -- you know, I can
10 imagine easily cases where there's information
11 about who you sell to and who you don't sell
12 to, and, of course, you want to keep that quiet
13 because you give the impression that every sane
14 person in the world buys your product. And
15 this would show that's not true.
16 But we don't know whether people will
17 take advantage of that or not, but they might.
18 So it's harm, and it's legitimate. Is that
19 good enough in your opinion?
20 MR. LOEB: Yes, Your Honor. So --
21 JUSTICE BREYER: Yes?
22 MR. LOEB: -- the National Parks test
23 requires a likely showing of competitive harm.
24 JUSTICE BREYER: And -- and it's other
25 cases that have gone beyond that.

1 MR. LOEB: To --

2 JUSTICE BREYER: Likely showing of

3 competitive harm. Maybe it's harm to business.

4 Maybe when people find out about this, they

5 just will stop buying it, though no new person

6 will enter the market.

7 You see, I mean, I -- I don't see the

8 harm being any different there. And I ask the

9 question, say, is it necessary to use, with the

10 word "harm", that word "competitive", rather

11 than a more general word, like "business"?

12 MR. LOEB: I --

13 JUSTICE BREYER: Business-related.

14 MR. LOEB: Well, trade secrets, which

15 is the brother of this category of information

16 --

17 JUSTICE BREYER: But, I'm curious, if

18 you can give me a yes-or-no answer, it would

19 really help. You don't have to, but it would

20 help me.

21 MR. LOEB: Our threshold answer is

22 that it -- it requires a competitive harm. But

23 even National Parks and the circuits adopting

24 it haven't -- didn't say that was hermetically

25 sealed, and there could be other related

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

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

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

1 believes it or it's something that's a de novo
2 review by the court. That's something that
3 still needs to be worked out under the 2016
4 amendments.
5 And if this Court had granted a case
6 under the 2016 amendments, we -- I think we
7 could talk about how it applies here, but it
8 simply doesn't apply to -- to this particular
9 --
10 JUSTICE KAGAN: May -- may I ask, Mr.
11 Loeb, if -- if I were to say to you give me
12 your best shot on a textual argument for your
13 position, so putting aside subsequent
14 congressional inaction, putting aside how many
15 courts have adopted this test, just sort of
16 give me your best shot for why this is the
17 right way to read the text, what would you say?
18 MR. LOEB: I would say you have to
19 look at words in context and that their
20 neighbors inform their meaning. And as this
21 Court has said under -- when it's looked at
22 other FOIA provisions, that you first look to
23 the common law to help inform what the language
24 means. Where a plain language is, they just
25 want to look at dictionaries, but even the

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

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

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

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

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

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

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

1 information that FOIA has been used for decades
2 to reveal, you know, the Navy using -- spending
3 $670 on toilet seats, to the bail-out funds
4 being abused and wasted, et cetera, et cetera.
5 We lay out examples in our brief.
6 Under their test, that would -- could
7 all now be claimed confidential by the parties
8 saying, look, this reveals our side of the
9 business. Two sides of the coin. You spend
10 the money, we submit it. We did the work. We
11 don't want you to reveal that.
12 That would be a -- a -- a dramatic
13 change of the way that FOIA -- FOIA has been
14 applied for more than 40 years. Also to the
15 regulatory regime. We have --
16 JUSTICE GINSBURG: May I -- may I ask
17 you a question about now -- now that the -- the
18 circuit court was wrong about Exemption 3 under
19 the clarification that Congress provided, so
20 are we supposed to just ignore that? That's --
21 MR. LOEB: Well, we -- we don't
22 believe that -- that the -- the new version of
23 2018(c) changes the law about this case at all.
24 It's prospective. This is information that was
25 submitted under that amendment. And we don't

1 think that -- that amendment also applies to
2 the application process, not to the -- the
3 monthly and annual data that we're -- we're
4 seeking here.
5 But, as some earlier questions pointed
6 out, if the government wants to seek relief on
7 remand, if you rule for us and it goes back,
8 they can go to the district court before the
9 information is -- is disclosed and say we want
10 to reopen the judgment based on a change of the
11 law. And we could litigate that here. That's
12 not something to be litigated in this Court,
13 the meaning of 2018(c).
14 So I don't think that -- that -- that
15 with -- the Eighth Circuit was correct in how
16 it read 2018(c), there was no -- no one's
17 asking this Court to review that, and the new
18 amendment doesn't alter how this Court should
19 dispose of this case. If they're -- they want
20 to make an argument on remand, they are free to
21 do so.
22 JUSTICE KAVANAUGH: You seem to be
23 making two distinct arguments about National
24 Parks. One is National Parks is correct. Two,
25 alternatively, is even if National Parks is

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

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

1 29 statutes since 2001, taking the exact
2 verbatim language of the statute and a
3 reference to Exemption 4 and saying how it
4 applies to different circumstances.
5 Again, those could --
6 JUSTICE GINSBURG: That would stop
7 this Court from saying -- this Court has never
8 -- has never answered that question. And
9 you're -- you're saying that the D.C. Circuit
10 decision and then other measures using the same
11 language stops this Court from saying what the
12 words of Exemption 4 mean?
13 MR. LOEB: No, Your Honor, it doesn't
14 stop this Court. But this Court has been
15 deferential to Congress when it -- when it
16 looks to -- when it reenacts a statute and
17 there is a uniform construction, as there was
18 here in eight, nine different uniform circuits
19 about the two-prong test, that you know
20 Congress knows about it, it is -- it is now
21 reenacting the statute, and that's what this
22 Court said this term in Helsinn.
23 There was an appellate decision. And
24 it was they took -- they -- they reenacted that
25 same language and put it into the American

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

1 the uniform construction since 2001.
2 JUSTICE ALITO: So, I mean, if there
3 were a statute that says something has to be
4 done within 30 days, and a court said 30 really
5 means 50, and all the other courts fell in
6 line, we would say, all right, that Congress
7 has -- and Congress enacts statutes related to
8 that -- we would say, well, Congress has
9 implicitly ratified that?
10 MR. LOEB: Obviously, that's a hard
11 hypothetical, Your Honor, but I would say yes,
12 that -- that even in that context, that
13 Congress was aware of the construction of that
14 term, even how bizarre it may be.
15 Here, we don't have such a bizarre,
16 you know, construction. We have the Congress
17 adopting the common law construction. But this
18 Court has said in Lorillard, in Shapiro, in
19 Helsinn, again and again, that when you take
20 language from one spot and you put it into
21 another, reenact it, it contains the same
22 meaning as -- as --
23 JUSTICE ALITO: Well, under the common
24 law, was competitive harm part of the claim
25 itself, or was it simply what you needed to

1 show to get damages?

2 MR. LOEB: For trade secrets, it was,

3 in essence, a definition of what a trade secret

4 is, something that, when it's released, will

5 cause competitive harm. And the restatement

6 said it was treating this --

7 JUSTICE ALITO: Well, for things that

8 are not trade secrets, confidential financial

9 information that is not a trade secret.

10 MR. LOEB: The courts treated that

11 same confidential business information in the

12 same respect, that you had to show a

13 competitive harm. It wasn't just injury,

14 because you could show injury in lots of

15 different ways, but you would have to show

16 actually a competitive injury in the case.

17 JUSTICE KAGAN: Is -- is there a

18 difference, Mr. Loeb, for purposes of this

19 congressional ratification argument that the

20 court at issue was not the Supreme Court, that

21 it was instead a circuit court?

22 MR. LOEB: It -- what this Court has

23 said is if there's a -- a uniform judicial

24 construction. That can come, of course, from

25 the Supreme Court. And then, if they take the

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

1 of district courts have said so?

2 MR. LOEB: Well, I don't think we

3 would be -- this Court or -- or -- we're

4 arguing that --

5 JUSTICE GORSUCH: Is that consistent

6 with fair notice or due process or any normal

7 statutory interpretation methodology you're

8 familiar with?

9 MR. LOEB: In this particular case,

10 there's not this sort of stark it says 30 and

11 we're reading it to be 50. And maybe that's

12 sort of an outlier situation where you would

13 have an exception like Lorillard.

14 JUSTICE GORSUCH: Exception for maybe

15 due process and fair notice?

16 MR. LOEB: Well, no one can argue that

17 adopting the common law meaning of trade

18 secrets and business information is a violation

19 of due process. And the way that you're saying

20 30 days versus 50 days, I'll give you that.

21 That's a much harder case and -- and maybe --

22 JUSTICE GORSUCH: Very kind of you.

23 Thank you.

24 (Laughter.)

25 JUSTICE GORSUCH: But -- but --

1 CHIEF JUSTICE ROBERTS: Well, but --
2 JUSTICE GORSUCH: -- don't our --
3 don't our tools of interpretation normally take
4 their cue from things like due process and fair
5 notice, rather than the other way around, where
6 due process and fair notice have to become the
7 exception to our statutory interpretation
8 tools?
9 MR. LOEB: But it is an established
10 statutory interpretation mechanism that when
11 Congress reenacts a statute and there's a
12 uniform construction, even if it's a uniform
13 circuit construction, that you presume that
14 Congress has adopted that prior judicial
15 construction.
16 CHIEF JUSTICE ROBERTS: So how many --
17 how many courts of appeals do you have to take
18 -- I assume uniform isn't enough -- if there
19 are just two, that's uniform, but you have -- I
20 understand you -- you think you have eight,
21 right?
22 MR. LOEB: At least eight, Your Honor.
23 And there's no -- and no outlier circuits on
24 the two-prong test.
25 JUSTICE KAGAN: Is it that, or are you

1 really relying on the D.C. Circuit's special
2 situation with respect to FOIA?
3 MR. LOEB: With all deference to the
4 D.C. Circuit, no, there's no special deference
5 here. We're looking for whether there is a
6 judicial construction in the terms of Helsinn
7 and the terms of Lorillard.
8 And I think, when you have a
9 overwhelming number of the circuits who have
10 uniformly addressed it without any dissenting
11 circuits, that whatever that standard means,
12 that it's -- it's met in that -- in this
13 circumstance.
14 It's really quite --
15 CHIEF JUSTICE ROBERTS: Thank you, Mr.
16 Young -- I'm sorry, Mr. Loeb.
17 Now, Mr. Young, you have five minutes
18 remaining.
19 REBUTTAL ARGUMENT OF EVAN A. YOUNG
20 ON BEHALF OF THE PETITIONER
21 MR. YOUNG: Thank you, Mr. Chief
22 Justice. Just a few points I'd like to make.
23 First, to start with what
24 "confidential" means and its relationship to
25 any concept of harm.

1 That question of harm asks a very
2 different question. It asks why someone keeps
3 something secret, not whether they keep it
4 secret. There is no common law term of art
5 called confidential business information or
6 confidential commercial information.
7 It's not -- that does not appear in
8 the restatement. It doesn't appear in the
9 cases that are cited. It doesn't appear in any
10 scholarship. And it wasn't something that
11 either National Parks or any other case before
12 or after it relied on to find some common law
13 heritage.
14 It's true, of course, that when one
15 has a tort action, any kind of tort action,
16 harm will be something that has to be shown,
17 but that does not infuse harm into the very
18 meaning of other elements of the tort.
19 We know that from cases like Carter
20 and Bruesewitz that even if there were some
21 common law conception, it isn't enough for
22 Congress to refer to some vague principle. It
23 would actually have to use that term of art.
24 JUSTICE SOTOMAYOR: Counsel, that --
25 that begs a question, which is we sort of

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

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

1 point, which is --

2 MR. YOUNG: But the founder of

3 LifeLock put his Social Security number up on

4 billboards all across the country to prove that

5 his technology was so secure. Now we wouldn't

6 think that that is confidential anymore.

7 It's just one manifestation of it.

8 Everybody else's might be.

9 And, here, when you -- when you have

10 this bucket in Exemption 4, you start with it

11 being commercial or financial. Those are

12 limits. Of course, you're right, if you can't

13 show that it's commercial or financial

14 information, you're not within Exemption 4.

15 Then you have to show it's obtained from a

16 person. That's not the government doing it, in

17 other words.

18 And then, lastly, it has to be

19 confidential or privileged. And all that

20 Congress asked the courts to do is answer the

21 objective question: Does the person whose

22 information the government now has, does that

23 person keep this secret and not publicly

24 disclose it?

25 And, if so, the fact, of course, that

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

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