

2020

More “Substantial Harm” Than Good: Recrafting FOIA’s Exemption 4 after Food Marketing Institute v. Argus Leader Media

Jane E. Kirtley

Scott Memmel

Jonathan Anderson

Follow this and additional works at: <https://open.mitchellhamline.edu/mhlr>

 Part of the [Administrative Law Commons](#), and the [Government Contracts Commons](#)

Recommended Citation

Kirtley, Jane E.; Memmel, Scott; and Anderson, Jonathan (2020) "More “Substantial Harm” Than Good: Recrafting FOIA’s Exemption 4 after Food Marketing Institute v. Argus Leader Media," *Mitchell Hamline Law Review*: Vol. 46 : Iss. 3 , Article 2.

Available at: <https://open.mitchellhamline.edu/mhlr/vol46/iss3/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

**MORE “SUBSTANTIAL HARM” THAN GOOD:
RERAFTING FOIA’S EXEMPTION 4 AFTER *FOOD
MARKETING INSTITUTE V. ARGUS LEADER MEDIA*¹**

Jane E. Kirtley*
Scott Memmel†
Jonathan Anderson^

I. INTRODUCTION.....	497
II. HISTORY	500
<i>A. Brief History of FOIA.....</i>	500
<i>B. Legislative History.....</i>	501
<i>C. Circuit Rulings Regarding the Substantial Harm Test and Exemption 4.....</i>	505
III. <i>FOOD MARKETING INSTITUTE V. ARGUS LEADER MEDIA.....</i>	506
<i>A. Facts.....</i>	507
<i>B. Arguments.....</i>	508
<i>C. Justice Gorsuch’s Opinion.....</i>	512
<i>D. Justice Breyer’s Opinion</i>	514
<i>E. Commentary about the Ruling.....</i>	515
IV. DISCUSSION	516
<i>A. Necessary Congressional Action Related to the Harm Requirement.....</i>	517
<i>B. Exemptions Narrowly Construed: FCC v. AT&T.....</i>	518
<i>C. Congressional Action Needed to Protect Newsgathering, Transparency, and the Free Flow of Information.....</i>	522
<i>D. Congress Has Introduced a Possible Solution.....</i>	523
V. CONCLUSION.....	525

I. INTRODUCTION

In the early 1970s, the National Parks and Conservation Association (Association), an independent organization focused on advocacy related to the National Parks System, sought records under the Freedom of

*Silha Professor of Media Ethics and Law, and Director, Silha Center for the Study of Media Ethics and Law, Hubbard School of Journalism and Mass Communication, University of Minnesota; Affiliated Faculty Member, University of Minnesota Law School.

†PhD Candidate and editor, Silha *Bulletin*, Hubbard School of Journalism and Mass Communication, University of Minnesota.

^PhD Student, Hubbard School of Journalism and Mass Communication, University of Minnesota.

¹ Portions of this article include material adapted from the Silha *Bulletin*, a publication produced by the Silha Center for the Study of Media Ethics and Law. The director of the Silha Center, Professor Jane Kirtley, retains the right to republish the contents elsewhere.

Information Act (FOIA)² pertaining to concession operations run at National Parks around the United States.³ The Association had asked the Director of the National Park Service to disclose specified documents pertaining to these operations.⁴ Although the Park Service provided some documents obtained “without extensive research,” it refused to provide the “results of audits upon the books of several companies operating concessions in the national parks, the annual financial statements filed with the Park Service by these concessioners, and other financial information.”⁵

The Park Service cited Exemption 4 of FOIA,⁶ which protects “trade secrets and commercial or financial information obtained from a person [that are] privileged or confidential.”⁷ The National Parks and Conservation Association ultimately filed a lawsuit in the U.S. District Court for the District of Columbia,⁸ which held that the “sales statistics, inventories, holdings, expenses, statements of profits and gross receipts, securities, liabilities, and salaries and bonuses by position” contained within the requested materials constituted “confidential” information under Exemption 4.⁹ However, the case would take on significant importance when, in 1974, the U.S. Court of Appeals for the D.C. Circuit created a two-part test requiring that, in order to withhold records, the agency must show disclosure of the requested information would either impair the federal government’s ability to obtain related information in the future or cause “substantial harm” to the “competitive position” of the individual or organization from whom the materials were obtained.¹⁰

Significantly, this test would be used in FOIA Exemption 4 cases for the next several decades but would be rejected by the U.S. Supreme Court on June 24, 2019, when the majority held that such a showing of harm was not necessary under the statutory language of the exemption.¹¹ The Court held that Exemption 4 allows a federal agency to withhold “confidential” financial information when it is “customarily and actually” treated as private by the owner of the information and is provided to the government under an assurance of privacy.¹² Observers criticized the ruling for several reasons,

² Freedom of Information Act, 5 U.S.C. § 552 (2018).

³ Nat’l Parks & Conservation Ass’n v. Morton, 351 F. Supp. 404, 405 (D.D.C. 1972).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 405–06.

⁷ 5 U.S.C. § 552(b)(4) (2018); *see also* U.S. DEP’T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE: EXEMPTION 4 (2004), <https://www.justice.gov/oip/foia-guide-2004-edition-exemption-4> [<https://perma.cc/DWM8-YDUV>]. This article uses the 2004 edition as it provides an extensive discussion of judicial action related to Exemption 4.

⁸ *Nat’l Parks & Conservation Ass’n*, 351 F. Supp. at 404.

⁹ *Id.* at 406, 407.

¹⁰ *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

¹¹ *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019).

¹² *Id.*

including that expanding the scope of information protected from disclosure by Exemption 4 would limit newsgathering, government transparency, and the free flow of information.¹³ Others argued that the ruling could potentially conflict with the “foreseeable harm standard,” which states that a federal agency can withhold information only if it “reasonably foresees that disclosure would harm an interest protected by [a FOIA] exemption.”¹⁴

This article joins other observers in arguing that this holding by the Supreme Court was problematic in several ways, necessitating action by Congress to clarify the meaning of “confidential” in Exemption 4. More specifically, this article argues that Congress can, and should, ensure that Exemption 4 does not prohibit the disclosure of information of public concern, absent a showing of at least some harm, as Justice Stephen Breyer argued in his dissenting opinion.¹⁵ By limiting the scope of Exemption 4, Congress would promote government openness and transparency. Such an action would also ensure that the news media and others can obtain information of public interest necessary to hold government agencies accountable, including in their connections to private businesses.

This article first reviews the legislative history of Exemption 4. It argues that the question of whether Exemption 4 requires a showing of harm was not resolved explicitly either way by Congress. Second, this article discusses key federal court cases that have dealt with Exemption 4, including *National Parks*, demonstrating that the two-part test articulated by the D.C. Circuit has been adopted by most federal circuits in the decades since that ruling. Third, this article discusses the Supreme Court’s ruling in *Food Marketing Institute v. Argus Leader Media*, including the arguments made by both sides in their briefs before the Court, as well as the facts and opinions in the case. Fourth, this article joins other commentators in arguing for Congressional action following *Food Marketing Institute*. Specifically, it seeks clarification of whether harm is required under Exemption 4 to ensure

¹³ See James Bovard, *The Supreme Court Rewrote FOIA into the Freedom FROM Information Act*, USA TODAY (June 27, 2019), <https://www.usatoday.com/story/opinion/2019/06/27/loss-foia-scotus-government-keep-food-stamp-data-secret-column/1559162001> [<https://perma.cc/7NH6-C3FT>]; Mark Fenster, *Opinion Analysis: Court Gives Broad Meaning to “Confidential” in FOIA Exemption for Commercial and Financial Information*, SCOTUSBLOG (June 24, 2019, 7:48 PM), <https://www.scotusblog.com/2019/06/opinion-analysis-court-gives-broad-meaning-to-confidential-in-foia-exemption-for-commercial-and-financial-information> [<https://perma.cc/JUE3-BHE3>]; Jessica Gresko, *Justices Side with Business, Government in Information Fight*, AP NEWS (June 24, 2019), <https://apnews.com/44d921a0323448fbaa4372c150eb655e> [<https://perma.cc/H3K8-T26G>].

¹⁴ 5 U.S.C. § 552(a)(8)(A) (2018). More information and commentary on the “foreseeable harm standard” is provided at *infra* notes 117–23.

¹⁵ See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2368 (2019) (Breyer, J., dissenting).

the free flow of information in cases like *Food Marketing Institute*, where the requested records contain only proprietary or secret commercial information but also raise significant matters of public concern. Finally, this article highlights a piece of legislation introduced in the U.S. Senate in June 2019,¹⁶ demonstrating that Congressional action is not only needed, but possible.

II. HISTORY

The following sections will provide key background information, including a brief history of FOIA, the legislative history of Exemption 4, and a discussion of key circuit court rulings that address this exemption, particularly related to whether it requires a showing of harm to prevent disclosure of requested materials.

A. Brief History of FOIA

FOIA was signed into law by President Lyndon B. Johnson in 1966 and took effect on July 4, 1967, with the intention of creating a presumption of public access to the records of any federal agency.¹⁷ Under the statute, agencies are generally required to disclose records unless they fall under one of nine exemptions, including Exemption 4.¹⁸

FOIA has undergone several amendments, including most recently in 2016 when President Barack Obama signed the FOIA Improvement Act of 2016.¹⁹ This amendment promoted greater public access to government records that were frequently requested, and created a single online portal for FOIA requests, among other provisions.²⁰ The most lauded change, which had been proposed by previous administrations, including that of

¹⁶ Open and Responsive Government Act of 2019, S. 2220, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/2220/text> [<https://perma.cc/P49C-EQHS>].

¹⁷ See generally *History of FOIA*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/transparency/history-of-foia> [<https://perma.cc/TSE7-SUSE>] (last visited Sept. 27, 2019); Joan M. Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261, 1261-84 (1969); SUZANNE J. PIOTROWSKI, GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM (2007) (discussing the implementation of FOIA); MICHAEL R. LEMOV, PEOPLE'S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS (Fairleigh Dickinson University Press, 2011) (discussing Congressman John Moss's efforts to pass FOIA).

¹⁸ See 5 U.S.C. § 552(b)(4) (2018).

¹⁹ FOIA Improvement Act of 2016, Pub. L. No. 114-85, 130 Stat. 538.

²⁰ Scott Memmel, *President Obama Signs Law Making Significant Amendments to the Freedom of Information Act*, 21 SILHA BULLETIN 10 (Summer 2016), <http://silha.umn.edu/assets/pdf/2016-summer-bulletin.pdf> [<https://perma.cc/4A4D-PLVK>].

President Bill Clinton,²¹ was the explicit requirement that federal agencies must consider releasing records under a “presumption of openness” standard, rather than presuming government information is secret.²² The standard therefore “place[d] the burden on agencies to justify withholding information, instead of on the requester to justify release.”²³ Under this standard, agencies may withhold requested records only when “foreseeable harm” could be caused by the release.²⁴

One reason for the passage of the amendment was a memorandum issued in October 2001 by then-Attorney General John Ashcroft in the wake of the September 11, 2001, terrorist attacks.²⁵ Among other provisions, the memorandum for the “heads of all federal departments and agencies” ordered the U.S. Department of Justice (DOJ) to defend all decisions to withhold records, “unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”²⁶ The memorandum also stated that “[a]ny discretionary decision by [a federal agency] to disclose information protected under FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.”²⁷

B. Legislative History

Congress’ motivations behind FOIA Exemption 4—in particular, what kinds of information Congress intended to protect—are not easily discernible. Although one court has characterized FOIA’s legislative history as “tortured, not to say obfuscating,”²⁸ certain benchmarks and objectives of the bill are relatively clear.

²¹ See DEP’T OF JUSTICE, FOIA UPDATE: PRESIDENT AND THE ATTORNEY GENERAL ISSUE NEW FOIA POLICY MEMORANDA (Jan. 1, 1993), <https://www.justice.gov/oip/blog/foia-update-president-and-attorney-general-issue-new-foia-policy-memoranda> [<https://perma.cc/D7Q3-5TJE>].

²² Memmel, *supra* note 20, at 10.

²³ *Id.* (quoting Press Release, U.S. House Comm. on Oversight and Reform, Chaffetz, Cummings, Issa Applaud Passage of Bipartisan FOIA Reform Bill (June 13, 2016), <https://oversight.house.gov/news/press-releases/chaffetz-cummings-issa-applaud-passage-of-bipartisan-foia-reform-bill> [<https://perma.cc/L66D-V3ND>]).

²⁴ *Id.* More information on the “foreseeable harm standard” is provided at *infra* notes 120–126.

²⁵ FOIA Project Staff, *Defensive Standards Hinder FOIA Openness*, FOIA PROJECT (Mar. 1, 2012), <http://foiaproject.org/2012/03/01/defensive-standards-hinder-foia-openness/> [<https://perma.cc/2BZL-LZ2L>].

²⁶ *Id.* (citing John Ashcroft, Memorandum for Heads of All Federal Departments and Agencies (Oct. 12, 2001), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB84/Ashcroft%20Memorandum.pdf> [<https://perma.cc/9CYP-MFPC>]).

²⁷ Ashcroft, *supra* note 26.

²⁸ *Am. Airlines, Inc. v. Nat’l Mediation Bd.*, 588 F.2d 863, 865 (2d Cir. 1978).

It took two sessions of Congress to pass what would eventually become FOIA. The first iteration of the legislation, introduced in the Senate in June 1963,²⁹ did not include Exemption 4, which was later added as part of an amendment, along with other exemptions.³⁰ The original statutory language of Exemption 4 permitted agencies to withhold “trade secrets and other information obtained from the public and customarily privileged or confidential.”³¹ One Senate report states that the exemption was intended to “protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained.”³² The report lists various types of information that would be covered by the exemption, including sales data, lists of inventories and customers, and processes involved in manufacturing.³³ The Senate passed that version of the legislation in July 1964,³⁴ but the House failed to take up the bill before adjourning for the session, so the legislation died.³⁵

The Senate then took up FOIA the following session and passed a version of the bill that was substantially the same as the previous one, but with some changes, including two modifications to the statutory language of Exemption 4.³⁶ Instead of “trade secrets and other information obtained from the public and customarily privileged or confidential,” the amended exemption covered “trade secrets and commercial or financial information obtained from the public and privileged or confidential.”³⁷ The words “other information” were replaced with “commercial or financial information.”³⁸ The word “customarily” also was omitted.³⁹ No reasons were given for these changes.⁴⁰ The Senate report concluded: “The committee feels that this bill, as amended, would establish a much-needed policy of disclosure, while balancing the necessary interests of confidentiality.”⁴¹

A subsequent House report from 1966 offers additional context for the purpose of the modifications, stating that the exemption would cover

²⁹ SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE S. COMM. ON THE JUDICIARY, 93D CONG., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 8 (Comm. Print 1974).

³⁰ S. REP. NO. 88-1219 (1964).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE S. COMM. ON THE JUDICIARY, 93D CONG., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 8 (Comm. Print 1974).

³⁵ *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 769 (D.C. Cir. 1974).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ S. REP. NO. 89-813, at 10 (1965).

“information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.”⁴² The report also added another example of information that would be covered under Exemption 4: information submitted to the government about negotiations between labor and management.⁴³

The Senate passed the second iteration of the legislation in October 1965, further augmenting the description of Exemption 4.⁴⁴ According to the Congressional Record, the exemption would cover “any commercial, technical, and financial data submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan.”⁴⁵ The bill subsequently passed the House in June 1966.⁴⁶

There is evidence that lawmakers were made aware of concerns about disclosure of commercial and financial information. In testimony submitted to Congress in connection with the 1963 FOIA bill, the DOJ expressed apprehension about “the large body of the Government’s information involving private business data.”⁴⁷ Disclosing such information, the DOJ said, could harm competitors and chill cooperation between industry and governmental regulators.⁴⁸ Congress did not formally respond to this concern.

Congressional intent on whether there must be a showing of harm is demonstrated by the Food Marketing Institute’s (FMI’s) and the Argus Leader’s differing interpretations of the contemporaneous Senate and House reports. FMI’s brief before the Supreme Court cited the Senate and the House Reports “accompanying the bill that became FOIA.”⁴⁹ Based on the Senate Report explanation, the brief argued that Exemption 4 “gives federal agencies discretion to withhold non-governmental commercial or financial information that ‘would customarily not be released to the public

⁴² H.R. REP. NO. 89-1497, at 31 (1966).

⁴³ *Id.*

⁴⁴ 111 CONG. REC. S26820, at 26823 (daily ed. Oct. 13, 1965).

⁴⁵ *Id.*

⁴⁶ SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE S. COMM. ON THE JUDICIARY, 93D CONG., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 8 (Comm. Print 1974).

⁴⁷ *Freedom of Information: Hearing on S. 1666 and S. 1663 (in part) Before the Subcomm. on Admin. Practice & Procedure of the Comm. on the Judiciary*, 88th Cong. 199 (1963) (statement of Norbert A. Schlei, Assistant Att’y Gen., Office of Legal Counsel, Department of Justice).

⁴⁸ *Id.*

⁴⁹ Brief for Petitioner at 22, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019) (No. 18-481), https://www.supremecourt.gov/DocketPDF/18/18-481/88748/20190215204958915_1.%20Brief%20on%20the%20Merits.pdf [<https://perma.cc/73VS-FLCP>] [hereinafter Brief for Petitioner].

by the person from whom it was obtained.”⁵⁰ FMI claimed that the House Report’s definition was “nearly identical: Exemption 4 ‘exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government.’”⁵¹ The brief, therefore, argued that Exemption 4 applies to all information falling under these definitions, “not just information whose disclosure would ‘cause substantial competitive harm.’”⁵²

Conversely, the brief filed by the Argus Leader disputed FMI’s use of the Senate and House Reports regarding the drafting of FOIA.⁵³ The brief argued that FOIA’s legislative history “is notoriously flawed.”⁵⁴ Additionally, the brief contended that FMI’s reliance on a single statement in the reports—that information is “confidential” if it “customarily not be released to the public by the person from whom it was obtained”—was a “snippet . . . recycled from reports issued on the FOIA bill from the *prior year*, which unlike the final law, expressly used the word ‘customarily,’” a word that was later removed from the bill before it was passed.⁵⁵ The brief explained that the Senate “simply failed to alter its earlier report,” and “the House committee seven months later copied most of the Senate committee report.”⁵⁶

Some of the motivation behind Exemption 4 is made clear in the Senate and House reports. These documents demonstrate that Congress intended to protect financial and commercial information given to the government in confidence, with the intention that the government would not disclose such materials to the public.⁵⁷ The reports provided several examples, ranging from sales data to loan applications to labor negotiations.

However, what is less clear from the legislative history is whether Congress meant for federal agencies to also show some level of harm to justify withholding documents under Exemption 4. Not only is this not explicitly discussed in the congressional documents, it is also an issue of contemporaneous debate, including before, and by, the Supreme Court.

⁵⁰ *Id.* (citing S. REP. NO. 89-813, at 9 (1965)).

⁵¹ *Id.* at 23 (citing H.R. REP. NO. 89-1497, at 10 (1965)). The brief added that the report “also specifies that the exemption applies to ‘information which is given to an agency in confidence, since a citizen must be able to confide in his Government,’ and ‘where the Government has obligated itself in good faith not to disclose documents or information which it receives.’” *Id.*

⁵² *Id.* at 22.

⁵³ Brief for Respondent at 51, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019) (No. 18-481), https://www.supremecourt.gov/DocketPDF/18/18-481/92325/20190318174331610_190309%20Brief%20for%20E-Filing.pdf [<https://perma.cc/9NK4-FE2G>] [hereinafter Brief for Respondent].

⁵⁴ *Id.* at 51 (citing Kenneth C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 789–90 (1967); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *Lawson v. FMR LLC*, 571 U.S. 429, 459 (2014) (Scalia, J., concurring)).

⁵⁵ *Id.* at 52.

⁵⁶ *Id.* (citing Davis, *supra* note 54, at 790).

⁵⁷ See 111 CONG. REC. S26820, at 26823 (daily ed. Oct. 13, 1965).

Accordingly, it is unclear, based on the legislative history alone, whether Congress meant for harm to be part of Exemption 4. Congress should, therefore, resolve this question that it left open more than four decades ago.

C. Circuit Rulings Regarding the Substantial Harm Test and Exemption 4

The DOJ has noted that “[b]y far, most Exemption 4 litigation has focused on whether or not requested information is ‘confidential’ for purposes of Exemption 4.”⁵⁸ The DOJ’s *Freedom of Information Act Guide*, published in 2004, explained that in the early years of FOIA, courts determined the application of Exemption 4 on “whether there was a promise of confidentiality by the government to the submitting party, or whether the information was of the type not customarily released to the public by the submitter.”⁵⁹

This changed in 1974 when the D.C. Circuit ruled in *National Parks & Conservation Assn. v. Morton* that, in addition to the requirements set forth in Exemption 4, a “court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption.”⁶⁰ The court, therefore, created a two-part test to determine whether information is, in fact, “confidential” under Exemption 4. The court held that:

[A] commercial or financial matter is “confidential” for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.⁶¹

Most recently, in its 2001 ruling in *Contract Freighters, Inc. v. Secretary of U.S. Department of Transportation*, the Eighth Circuit noted that it, and almost every federal circuit court in addition to the D.C. Circuit, had adopted the *National Parks* two-part test,⁶² including the First,⁶³

⁵⁸ U.S. DEP’T OF JUSTICE, *supra* note 7.

⁵⁹ *Id.* (citing *GSA v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 471 (D.D.C. 1972)).

⁶⁰ *Food Mktg. Inst.*, 139 S. Ct. at 2363–64 (citing *Nat’l Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974)).

⁶¹ *Nat’l Parks & Conservation Ass’n*, 498 F.2d at 770.

⁶² *Contract Freighters, Inc. v. Sec’y of U.S. Dep’t of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001); *see also* U.S. DEP’T OF JUSTICE, *supra* note 7. The DOJ’s “Freedom of Information Act Guide” provides an extensive discussion of how the different circuits have applied the test on a case-by-case basis. The guide also provides extensive discussions on other court applications of Exemption 4, though those are less relevant for the purposes of this article. *Id.*

⁶³ 9 to 5 Org. for Women Office Workers v. Bd. of Governors of Fed. Reserve Sys., 721 F.2d 1, 8 (1st Cir. 1983).

Second,⁶⁴ Third,⁶⁵ Fourth,⁶⁶ Fifth,⁶⁷ Seventh,⁶⁸ Ninth,⁶⁹ and Tenth Circuits.⁷⁰ The Eighth Circuit ultimately applied the *National Parks* test, finding that Contract Freighters, a freight logistics and motor carrier company, needed to demonstrate that “substantial competitive harm was likely to result from disclosure” of “certain financial data submitted to the Department of Transportation (DOT).”⁷¹

In its FOIA guide, the DOJ explained that in *Critical Mass Energy Project v. NRC*, the D.C. Circuit added a “third prong” to the test to determine whether “other governmental interests—such as compliance and program effectiveness,” were at stake.⁷² The DOJ subsequently issued policy guidance following the ruling in 1992, focusing particularly on “intrinsically valuable” records, namely those that “are significant not for their content, but as valuable commodities which can be sold in the marketplace.”⁷³

However, the majority of Exemption 4 cases, as would be the case in *Food Marketing Institute*, have “involved the competitive harm prong of the test for confidentiality established in *National Parks*,”⁷⁴ with courts tending “to resolve issues of competitive harm on a case-by-case basis rather than by establishing general guidelines.”⁷⁵

III. FOOD MARKETING INSTITUTE V. ARGUS LEADER MEDIA

On June 24, 2019, the U.S. Supreme Court held in a 6-3 ruling that Exemption 4 of FOIA, 5 U.S.C. § 552(b)(4), allows a federal agency to withhold “confidential” commercial or financial information when it is “customarily and actually” treated as private by the owner of the information and is provided to the government under an assurance of privacy.⁷⁶ In an opinion concurring in part and dissenting in part, Justice Stephen Breyer

⁶⁴ *Cont'l Stock Transfer & Trust Co. v. S.E.C.*, 566 F.2d 373, 375 (2d Cir. 1977).

⁶⁵ *OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 162 n. 24, 167–68 (3d Cir. 2000).

⁶⁶ *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1029 (4th Cir. 1988).

⁶⁷ *Cont'l Oil Co. v. Fed. Power Comm'n*, 519 F.2d 31, 35 (5th Cir. 1975).

⁶⁸ *Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1398 (7th Cir. 1984).

⁶⁹ *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1112–13 (9th Cir. 1994).

⁷⁰ *Anderson v. Dep't of Health & Human Servs.*, 907 F.2d 936, 944 (10th Cir. 1990).

⁷¹ *Contract Freighters Inc. v. Sec'y of United States Dep't of Transp.*, 260 F.3d 858, 859–60 (8th Cir. 2001).

⁷² U.S. DEP'T OF JUSTICE, *supra* note 7 (citing *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992); *FOIA Update*, Vol. XIV, No. 2, at 7 (“Exemption 4 Under Critical Mass: Step-By-Step Decision-making”); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 n.17 (D.C. Cir. 1974)).

⁷³ *Id.* (citing *FOIA Update*, Vol. VI, No. 1, at 3–4 (“OIP Guidance: Protecting Intrinsic Commercial Value”).

⁷⁴ *Id.* (citing *Nat'l Parks & Conservation Ass'n*, 498 F.2d at 770).

⁷⁵ *Id.*

⁷⁶ *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2359 (2019).

contended that Exemption 4 should require a showing of at least some harm.⁷⁷

A. Facts

The case arose when the Argus Leader, a newspaper in Sioux Falls, South Dakota, filed a FOIA request for data collected by the U.S. Department of Agriculture (USDA) regarding the national food-stamp program, Supplemental Nutrition Assistance Program (SNAP).⁷⁸ The newspaper was investigating the practice of “trafficking,” in which “SNAP recipients sell their benefits for cash at a discount to food retailers,” with some estimates stating that “approximately ten percent of participating retailers engage in trafficking.”⁷⁹

The FOIA request sought names and addresses of all retail stores that participated in SNAP, as well as each store’s redemption data from 2005 to 2010, referred to as “store-level SNAP data.”⁸⁰ As the Argus Leader explained in its brief before the Supreme Court, the redemption data is not information retailers are required to submit to the USDA.⁸¹ Instead, the USDA “automatically obtains that information when SNAP transactions are electronically processed.”⁸²

The USDA released the names and addresses but refused to disclose the store-level SNAP data.⁸³ The USDA cited Exemption 4, which, according to the DOJ guidance, protects two types of records: “trade secrets and commercial or financial information obtained from a person [that is] *privileged or confidential*.”⁸⁴

In 2016, the U.S. District Court for the District of South Dakota held a two-day bench trial to determine whether disclosure of the store-level SNAP data would cause substantial competitive harm to participating stores and retailers.⁸⁵ During the trial, the USDA testified that “retailers closely guard store-level SNAP data and that disclosure would threaten stores’

⁷⁷ *Id.* at 2366–69 (Breyer, J., concurring in part and dissenting in part).

⁷⁸ *Id.* at 2361.

⁷⁹ Argus Leader Media v. U.S. Dep’t of Agric., 740 F.3d 1172, 1174 (8th Cir. 2014) (adding that an “estimated \$858 million per year is ‘trafficked’”).

⁸⁰ *Id.*

⁸¹ Brief for Respondent, *supra* note 53, at 19.

⁸² *Id.* at 19 (adding that the “USDA itself, ‘not any retailer, generates the information, and the underlying data is ‘obtained’ from third-party payment processors, not from individual retailers”); see also Agriculture Improvement Act of 2018, Pub. L. No. 115-334 (2018), <https://www.govtrack.us/congress/bills/115/hr2/text> [<https://perma.cc/FC6X-KQUF>].

⁸³ Brief for Respondent, *supra* note 53, at 21.

⁸⁴ U.S. DEP’T OF JUSTICE, *supra* note 7 (emphasis added) (quoting 5 U.S.C. § 552(b)(4) (2000)).

⁸⁵ Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2361 (2019) (citing Argus Leader Media v. U.S. Dep’t. of Agric., 224 F. Supp. 3d 827, 832–35 (D.S.D. 2016)).

competitive positions,” in part because store-level SNAP data “could create a windfall for competitors” for three reasons:

- [1.] Stores with high SNAP redemptions could see increased competition for SNAP customers from existing competitors,
- [2.] new market entrants could use SNAP data to determine where to build their stores, and
- [3.] [competitors could use SNAP data to determine] a rival retailer’s overall sales and develop strategies to win some of that business too.⁸⁶

The Argus Leader countered that such harm would not be “substantial,” and the district court agreed.⁸⁷

The Food Marketing Institute (FMI), a trade association representing grocery retailers, intervened in the case and appealed the decision to the Eighth Circuit, which held that the district court “did not clearly err in finding SNAP redemption data not exempt from disclosure under FOIA exemption for confidential commercial information.”⁸⁸ The Eighth Circuit rejected FMI’s argument that the court “should discard the ‘substantive competitive harm’ test in favor of the ordinary public meaning of the statutory term ‘confidential.’”⁸⁹ The court further held that “the evidence [did] not support a finding” that releasing the contested data was “likely to cause *substantial* competitive harm.”⁹⁰

B. Arguments

On February 15, 2019, FMI filed its brief before the Supreme Court.⁹¹ The brief first argued that the word “[c]onfidential” is an unambiguous word with a longstanding, ordinary meaning,⁹² namely, “something that is private and not publicly disclosed.”⁹³ The brief further argued that in *U.S. Department of Justice v. Landano*, the Supreme Court had held that the word “confidential” in Exemption 7 of FOIA⁹⁴ had the “plain meaning [of]

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 2362 (citing *Argus Leader Media v. United States Dep’t of Agric.*, 889 F.3d 914, 915 (8th Cir. 2018)).

⁸⁹ *Id.* at 2359.

⁹⁰ *Argus Leader Media*, 889 F.3d at 916.

⁹¹ Brief for Petitioner, *supra* note 49.

⁹² *Id.* at 12.

⁹³ *Id.*

⁹⁴ 5 U.S.C. § 552(b)(7)(D) (2018) (“[R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or

private information that is not publicly disclosed,”⁹⁵ and that there was no requirement to show harm from the disclosure of the information at issue to justify denying the request. The brief further argued that Congress “chose not to give ‘confidential’ a different definition for FOIA; it chose to use an ordinary term in common usage.”⁹⁶

Second, the brief contended that the test crafted by the D.C. Circuit was “atextual,”⁹⁷ meaning it “disregarded Exemption 4’s plain text.”⁹⁸ The brief argued that the “atextual test is unworkable, unduly complex, and unpredictable.”⁹⁹ The brief added, “There is no serious argument that Congress itself endorsed a reading that so departs from the words that it used. All that the lower courts have left is circuit-level *stare decisis*, which of course does not bind [the Supreme] Court.”¹⁰⁰

Finally, FMI contended that the data the Argus Leader requested “fits easily within the ordinary definition of ‘confidential.’”¹⁰¹ The brief reasoned that the newspaper had “not disputed that retailers carefully safeguard this information or that USDA represented to retailers that it would keep such information confidential pursuant to the agency’s longstanding policies.”¹⁰² The brief argued that the information was, therefore, “not subject to mandatory disclosure under FOIA, and USDA may withhold that information.”¹⁰³ The brief added that even if the *National Parks* test was applied, there was “a reasonable possibility that disclosure might harm commercial or financial interests.”¹⁰⁴

The Argus Leader’s brief contended that FMI lacked Article III standing under the U.S. Constitution because the Solicitor General’s brief to the Court noted that the USDA had “decided it would disclose the requested government-spending records here, no matter how this Court rules on Exemption 4, so long as it has discretion to do so.”¹⁰⁵ Accordingly, the Argus Leader argued that the petitioner could not “show a favorable

by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source . . .”).

⁹⁵ Brief for Petitioner, *supra* note 49, at 19–21 (citing U.S. Dep’t of Justice v. Landano, 508 U.S. 165, 173 (1993); Baldrige v. Shapiro, 455 U.S. 345, 356 (1982); Gray v. Netherland, 518 U.S. 152, 182 (1996); United States v. Miss. Valley Generating Co., 364 U.S. 520, 534 (1961); Pereira v. United States, 347 U.S. 1, 6 (1954)). The brief further argued that the Supreme Court gave “‘personal privacy’ the same plain meaning in both Exemptions 6 and 7(C).” *Id.* (quoting FCC v. AT&T, Inc., 562 U.S. 397, 407–08 (2011)).

⁹⁶ *Id.* at 3.

⁹⁷ *Id.*

⁹⁸ *Id.* at 23.

⁹⁹ *Id.* at 3.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 43.

¹⁰² *Id.*

¹⁰³ *Id.* at 46.

¹⁰⁴ *Id.* at 47.

¹⁰⁵ Brief for Respondent, *supra* note 53, at 8.

ruling on Exemption 4 would likely prevent USDA from releasing the requested records. Exemption 4 does not *forbid* the Government from releasing anything. It simply provides the Government with discretion.”¹⁰⁶

Second, the Argus Leader argued that for “over 40 years, the courts of appeals have read [Exemption 4] to require a showing of likely competitive harm,” meaning there was “no basis to discard that uniform interpretation.”¹⁰⁷ Third, the Argus Leader contended that because Congress did not define “confidential” commercial information, the Court needed to look “to dictionaries, the common law, and other sources of interpretive guidance.”¹⁰⁸ The Argus Leader’s brief argued that dictionaries “are not dispositive, but the common law is.”¹⁰⁹ The brief explained that when FOIA was enacted, the common law “protected against disclosure of confidential business information if the disclosure would cause competitive harm.”¹¹⁰ According to the brief, “[i]n other words, ‘confidential commercial information’ was a term of art at common law meaning business information that would cause competitive harm if disclosed.”¹¹¹

The Argus Leader’s brief further argued that Congress would have looked for the definition of trade secrets in the first *Restatement of Torts*, which referred to “trade secrets and other confidential commercial information” as “non-public business information, disclosure of which would . . . likely cause competitive harm if released.”¹¹² According to the Argus Leader, courts “have long embraced this same usage. They have often addressed both ‘trade secrets’ and ‘confidential business information’ in the same breath to refer to all non-public commercial information that would likely cause competitive harm, and thus be tortious, if disclosed.”¹¹³ The brief therefore concluded that when drafting Exemption 4, Congress meant for there to be a showing of harm if disclosure was to be denied.

Fourth, the Argus Leader asserted that the longstanding competitive harm standard “must be retained [because] Congress has reenacted the text and ratified the standard *60 times*.”¹¹⁴ The brief contended that “Congress, well aware of the uniformly adopted judicial construction, has repeatedly ratified the longstanding competitive-harm standard by incorporating Exemption 4 and its text into *60* other provisions across the U.S. Code.”¹¹⁵

Finally, the brief argued that FMI’s “sweeping interpretation of ‘confidential’ would undermine FOIA’s core objective of, as this Court has

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 9.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 10.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 29 (citing *Restatement of Torts* § 757, cmt. B (Am. Law Inst. 1939)).

¹¹³ *Id.* at 31.

¹¹⁴ *Id.* at 10.

¹¹⁵ *Id.* at 25.

put it, allowing the public to learn ‘what the Government is up to.’”¹¹⁶ The Argus Leader continued:

It would make it far more difficult for the press and public to uncover evidence of government waste, fraud, and dereliction of duty. That is because the public must examine some data submitted to the Government (*e.g.*, contractor prices) to know what the Government is spending public money on. The public must also be able to examine what private parties submit to the Government (*e.g.*, compliance reports) to assess how and whether the Government is wielding its expansive regulatory powers.¹¹⁷

Among several other *amicus* briefs,¹¹⁸ the Reporters Committee for Freedom of the Press (RCFP) and thirty-six media organizations filed a brief in support of the Argus Leader.¹¹⁹ The brief argued that the *National Parks* standard was consistent with the “foreseeable harm standard,” codified as part of the 2016 amendments to FOIA.¹²⁰ This provision states that a federal agency may withhold information under this standard only if it “reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or . . . disclosure is prohibited by law.”¹²¹ The standard further requires that agencies “(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and (II) take reasonable steps necessary to segregate and release nonexempt information.”¹²²

The brief cited the First Circuit’s ruling in *9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*,¹²³ in which the court “presciently described the ‘principle to be derived from *National Parks*[], and the cases which have followed it.’”¹²⁴ Accordingly, the court argued that “[i]nformation will not be regarded as confidential under Exemption 4 unless it can be demonstrated that disclosure will harm a specific interest that Congress sought to protect by enacting the exemption.”¹²⁵ The brief argued that the “plain text of the

¹¹⁶ *Id.* at 11.

¹¹⁷ *Id.*

¹¹⁸ Among the parties that filed briefs were Retail Litigation Center, Inc., Chamber of Commerce of the United States of America, the Electronic Privacy Information Center, Freedom of Information Act and First Amendment Scholars, and several others.

¹¹⁹ Brief of Reporters Committee for Freedom of the Press et al. as Amici Curiae in Support of Respondent at 1-2, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019) (No. 18-481), <https://www.rcfp.org/wp-content/uploads/2019/03/2019-03-25-FMI-v-Argus-Leader.pdf> [<https://perma.cc/2C52-SM98>] [hereinafter Brief of Reporters Committee].

¹²⁰ *Id.* at 5; *see also* 5 U.S.C. § 552(a)(8)(A) (2018).

¹²¹ 5 U.S.C. § 552(a)(8)(A).

¹²² *Id.*

¹²³ 721 F.2d 1, 9 (1st Cir. 1983).

¹²⁴ Brief of Reporters Committee, *supra* note 119, at 18.

¹²⁵ *Id.* at 19 (citing *9 to 5 Org. for Women Office Workers*, 721 F.2d at 9).

foreseeable harm standard requires the government to demonstrate (1) harm to an interest protected by a FOIA exemption—here, the competitive position of a third party—and (2) a reasonable likelihood that harm will occur.”¹²⁶

RFCP and the media organizations also argued that there is a “strong public interest in access to records regarding expenditures of public funds.”¹²⁷ The brief continued, “FOIA is a powerful tool used by journalists, news organizations, and the public to monitor how the government spends tax dollars,” such as previously using “SNAP data to determine which private companies obtain the greatest benefits from government subsidies. Similar records also allow the public to understand which companies the government selects for lucrative contracts.”¹²⁸

C. Justice Gorsuch’s Opinion

Justice Neil Gorsuch delivered the majority opinion of the Supreme Court. He first contended that the Eighth Circuit, among other appellate courts, had “engrafted onto Exemption 4 a so-called ‘competitive harm’ test, under which commercial information cannot be deemed ‘confidential’ unless disclosure is ‘likely . . . to cause *substantial* harm to the competitive position of the person from whom the information was obtained.”¹²⁹

Second, Justice Gorsuch held that FMI had Article III standing under the U.S. Constitution to pursue the appeal, reasoning that although the issue before the Court was whether its member retailers would suffer “substantial competitive harm,” there was no doubt that the disclosure of the SNAP data would cause “*some* financial injury.”¹³⁰

Third, Justice Gorsuch held that because FOIA does not define the term “confidential,” the Court must determine what the term’s “ordinary, contemporary, common meaning” was when Congress enacted FOIA in

¹²⁶ *Id.* at 19–20 (“The 2016 amendments to the Act include an unambiguous direction from Congress that a showing of foreseeable harm to an interest protected by a discretionary FOIA exemption *must* be made before records may be withheld. Thus, even if the Court does not adopt the *National Parks* test for Exemption 4 now, current and future FOIA requests will be governed by an essentially, if not entirely, identical standard. Indeed, as noted above, the Argus Leader can simply file a new FOIA request today that would require the Food and Drug Administration to apply the foreseeable harm standard.”). The brief makes several additional arguments, including that the public had a “strong interest in understanding how the government spends tax dollars and contracts with private parties,” among other claims. *Id.* at 20. For more information on how federal courts have interpreted the foreseeable harm standard in relation to Exemption 4, see Al-Amyn Sumar, *Unpacking FOIA’s “Foreseeable Harm” Standard*, COMM. LAW., Winter 2020, at 15, 18–20.

¹²⁷ *Id.* at 6.

¹²⁸ *Id.* at 6–7.

¹²⁹ *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2361 (2019) (emphasis added) (citing *Argus Leader Media v. U.S. Dep’t of Agric.*, 889 F.3d 915, 915 (2018)).

¹³⁰ *Id.* at 2362 (internal quotations omitted).

1966.¹³¹ Justice Gorsuch concluded based on definitions in “contemporary dictionaries” that the term meant “private” or “secret” and must meet two conditions, including that the information “communicated to another remains confidential whenever it is customarily kept private . . . by the person imparting it” and that the information “might be considered confidential only if the party receiving it provides some assurance that it will remain secret.”¹³² Taken together, the two conditions posit that the financial information is “customarily and actually” treated as private.

Justice Gorsuch found that FMI had met the first condition because its retailers “customarily do not disclose store-level SNAP data or make it publicly available ‘in any way.’”¹³³ Justice Gorsuch held that the retailers had “clearly” satisfied the second condition: “Can privately held information *lose* its confidential character for purposes of Exemption 4 if it’s communicated to the government without assurances that the government will keep it private?”¹³⁴ He reasoned that the government, to induce retailers to participate in SNAP and provide store-level information to the USDA, “has long promised them that it will keep their information private.”¹³⁵ Therefore, Justice Gorsuch concluded that the data at issue qualified as “confidential” data under Exemption 4.¹³⁶

Fourth, Justice Gorsuch turned to the “substantial competitive harm” requirement articulated by the D.C. Circuit in *National Parks* and by several additional federal circuit courts.¹³⁷ He wrote that the Court could not “approve such a casual disregard of the rules of statutory interpretation” and refused to “alter FOIA’s plain terms on the strength only of arguments from legislative history.”¹³⁸ Justice Gorsuch called the D.C. Circuit’s approach a “relic from a ‘bygone era of statutory construction,’” because, among other reasons, the appellate court had “relied heavily on statements from witnesses in congressional hearings years earlier on a different bill that was never enacted into law.”¹³⁹

Finally, Justice Gorsuch rejected several arguments by the Argus Leader attempting to salvage the reasoning of the D.C. Circuit, including that Congress had “effectively ratified its understanding of the term ‘confidential’ by enacting similar phrases in other statutes in the years since that case was decided.”¹⁴⁰ Justice Gorsuch held that although “the ratification

¹³¹ *Id.* (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)) (internal quotations omitted).

¹³² *Id.* at 2363 (internal quotations omitted).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 2363–64 (citing *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974)).

¹³⁸ *Id.* at 2364.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2365.

canon can sometimes prove a useful interpretive tool,”¹⁴¹ Congress had never “reenacted” Exemption 4, meaning its use of similar language in other statutes after the D.C. Circuit’s ruling “tells us nothing about Congress’s understanding of the language it enacted in Exemption 4 in 1966.”¹⁴²

The Argus Leader had argued that the “substantial competitive harm” requirement should be adopted because FOIA exemptions are to be “narrowly construed,”¹⁴³ meaning its scope does not cover more records than Congress intended. Justice Gorsuch rejected this argument as well, reasoning that the Court had “no license to give [statutory] exemption[s] anything but a fair reading.”¹⁴⁴

Thus, Justice Gorsuch concluded that “[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy,” the information is “‘confidential’ within the meaning of Exemption 4.”¹⁴⁵ He continued, “Because the store-level SNAP data at issue here is confidential under that construction, the judgment of the court of appeals is reversed and the case is remanded for further proceedings consistent with this opinion.”¹⁴⁶

D. Justice Breyer’s Opinion

In an opinion concurring in part and dissenting in part, Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor, agreed with the two conditions set out by Justice Gorsuch but added that “there is a third: Release of such information must also cause genuine harm to the owner’s economic or business interests.”¹⁴⁷

Justice Breyer wrote that he agreed that the D.C. Circuit’s test in *National Parks* “[went] too far.”¹⁴⁸ He reasoned that he could “find nothing in FOIA’s language, purposes, or history that imposes so stringent a requirement,” which would create several problems, including “long, onerous court proceedings” to determine whether something qualifies as “substantial.”¹⁴⁹ However, Justice Breyer disagreed “with the majority’s decision to jump to the opposite conclusion, namely, that Exemption 4 imposes no ‘harm’ requirement whatsoever.”¹⁵⁰

¹⁴¹ *Id.*

¹⁴² *Id.* at 2366.

¹⁴³ *Id.*

¹⁴⁴ *Id.* (citing *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018)) (internal quotations omitted).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2366–67 (Breyer, J., concurring in part and dissenting in part).

¹⁴⁸ *Id.* at 2367.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 2368.

Justice Breyer reasoned that the word “confidential” sometimes referred to, “at least in the national security context, . . . information the disclosure of which would cause harm.”¹⁵¹ Second, he contended that the majority’s reading of Exemption 4 was “at odds with [the] principles” of FOIA, including that the mandate of the statute is the “broad disclosure of Government records.”¹⁵² He continued, “The whole point of the FOIA is to give the public access to information it cannot otherwise obtain. So the fact that private actors have ‘customarily and actually treated’ commercial information as secret cannot be enough to justify nondisclosure.”¹⁵³ Justice Breyer added,

[A] statute designed to take from the government the power to unilaterally decide what information the public can view put such determinative weight on the government’s preference for secrecy. . . . I fear the majority’s reading will deprive the public of information for reasons no better than convenience, skittishness, or bureaucratic inertia.¹⁵⁴

Therefore, Justice Breyer concluded that “Exemption 4 can be satisfied where, in addition to the conditions set out by the majority, release of commercial or financial information will cause genuine harm to an owner’s economic or business interests.”¹⁵⁵

E. Commentary about the Ruling

Following the decision, several observers expressed concern with the majority’s ruling, particularly its impact on the news media’s ability to cover matters of public interest. Argus Leader news director, Cory Myers, said in a June 17, 2019, statement that he was “disappointed” in the outcome of the case.¹⁵⁶ “This is a massive blow to the public’s right to know how its tax dollars are being spent, and who is benefiting,” he said. “Regardless, we will continue to fight for government openness and transparency, as always.”¹⁵⁷

Maribel Perez Wadsworth, president of the USA Today Network, the parent company of the Argus Leader, also expressed disappointment in the ruling.¹⁵⁸ “[The court’s decision] effectively gives businesses relying on taxpayer dollars the ability to decide for themselves what data the public will

¹⁵¹ *Id.*

¹⁵² *Id.* (citing *CIA v. Sims*, 471 U.S. 159, 166 (1985)) (internal quotations omitted).

¹⁵³ *Id.* (internal citations omitted).

¹⁵⁴ *Id.* (internal citations omitted).

¹⁵⁵ *Id.* at 2369.

¹⁵⁶ Bovard, *supra* note 13.

¹⁵⁷ See Jonathan Ellis and Richard Wolf, *Supreme Court Limits Access to Government Records in Loss for Argus Leader*, *Part of the USA TODAY Network*, USA TODAY (June 24, 2019), <https://www.usatoday.com/story/news/politics/2019/06/24/freedom-information-act-supreme-court-rules-south-dakota-case/1475089001/> [<https://perma.cc/T7Z2-KMEU>].

¹⁵⁸ Gresko, *supra* note 13.

see about how that money is spent,” she said in a statement.¹⁵⁹ “This is a step backward for openness and a misreading of the very purpose of the Freedom of Information Act.”¹⁶⁰

In a June 24, 2019, SCOTUSblog post, Mark Fenster, the Stephen C. O’Connell Chair at the Levin College of Law at the University of Florida, predicted that the ruling would “frustrate news media, watchdogs and competitors who will be less likely to have their FOIA requests met.”¹⁶¹ Fenster added that “the majority never explained that the Argus Leader submitted its FOIA request as part of its investigation into SNAP-related fraud” and that the investigation would “now have to proceed without access to the SNAP data.”¹⁶²

In a June 24, 2019, tweet, Argus Leader reporter, Jonathan Ellis, agreed, writing, “[T]oday six members of the U.S. Supreme Court used it as a vehicle to wipe out more than 40 years of established #FOIA precedent.”¹⁶³ In a tweet on the same day, RCFP attorney, Adam A. Marshall, also criticized the ruling, similarly writing that the Supreme Court had “wiped out” forty-five years of precedent related to Exemption 4, citing the D.C. Circuit’s ruling in *National Parks*.¹⁶⁴

IV. DISCUSSION

This article joins other commentators in arguing that the Supreme Court’s decision in *Food Market Institute* fails to protect important public interests in government transparency, newsgathering, and the free flow of information. In particular, Congressional action is needed to clarify key questions related to Exemption 4, as well as to ensure that the Exemption does not limit disclosure of information more than is necessary. In fact, a piece of legislation, already introduced by Congress,¹⁶⁵ would help resolve the concerns that need to be addressed, demonstrating that Congressional action is not only necessary, but also possible.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Fenster, *supra* note 13.

¹⁶² *Id.*

¹⁶³ Jonathan Ellis (@argusjellis), TWITTER (June 24, 2019, 7:48 AM), <https://twitter.com/argusjellis/status/1143169087499055105?s=20> [<https://perma.cc/WUV7-68VB>].

¹⁶⁴ Adam A. Marshall (@a_marshall_plan), TWITTER (June 24, 2019, 7:53 AM), https://twitter.com/a_marshall_plan/status/1143170206157758465 [<https://perma.cc/RP6C-ZMMC>].

¹⁶⁵ See Open and Responsive Government Act of 2019, S. 2220, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/2220/text> [<https://perma.cc/P49C-EQHS>].

A. Necessary Congressional Action Related to the Harm Requirement

Based on original research into the legislative history of FOIA Exemption 4, it is clear that a primary motivation behind the exemption was to protect information provided to a federal agency that was meant to be kept in confidence by the government.¹⁶⁶ As a House Report explained in 1966, Exemption 4 was included in the revised version of FOIA to protect “information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.”¹⁶⁷ Such materials include sales data, lists of inventories and customers, and processes involved in manufacturing,¹⁶⁸ as well as “any commercial, technical, and financial data submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan”¹⁶⁹ and information submitted to the government about negotiations between labor and management.¹⁷⁰

However, Congressional documents stop short of clarifying a key debate that took place before the Supreme Court: whether Exemption 4 requires a showing of harm, as federal circuit courts have required through the *National Parks* two-part test originally introduced by the D.C. Circuit in 1974. At best, one could argue either that Congress *implicitly* required, or did not require, such a showing, as demonstrated by FMI’s and Argus Leader’s briefs before the Supreme Court. Furthermore, the disagreement between the majority and dissenting justices in the case further show that it remains unsettled whether Congress intended for harm to be required under Exemption 4.

Put simply, the legislative history of the exemption is ambiguous and fails to resolve this key question. Congress has the ability to do so in the wake of *Food Marketing Institute*. Congressional action is necessary to limit the scope of Exemption 4 of FOIA by applying the reasoning of Justice Breyer, requiring that there be at least some requirement of harm caused by the disclosure of trade secrets to justify the withholding of records.¹⁷¹

¹⁶⁶ See H. R. REP. NO. 89-1497, at 31 (1966); 111 CONG. REC. S. 26820, at S. 26823 (daily ed. Oct. 13, 1965).

¹⁶⁷ H. R. REP. NO. 89-1497, at 31 (1966).

¹⁶⁸ S. REP. NO. 88-1219, agency cmt. to S. 1666, subsec. (c) (1964).

¹⁶⁹ 111 CONG. REC. 26820, at 26823 (daily ed. Oct. 13, 1965).

¹⁷⁰ H. R. REP. NO. 89-1497, at 31 (1966).

¹⁷¹ See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2369 (2019) (Breyer, J., dissenting).

B. Exemptions Narrowly Construed: FCC v. AT&T

As the Argus Leader argued, a substantial harm standard should be implemented to ensure Exemption 4 is narrowly construed.¹⁷² In its brief, the Argus Leader argued that the Supreme Court should “adopt a ‘substantial competitive harm’ requirement as a matter of policy because it believes FOIA exemptions should be narrowly construed.”¹⁷³ Justice Gorsuch refused to do so, reasoning that the Court could not “properly *expand* Exemption 4 beyond what its terms permit” and could not “arbitrarily *constrict* it either by adding limitations found nowhere in its terms.”¹⁷⁴

However, in its 2011 decision in *Federal Communications Commission v. AT&T Inc.*, the Supreme Court did constrict the scope of Exemption 7(C),¹⁷⁵ which permits agencies to withhold “personal” information contained within law enforcement records under certain conditions.¹⁷⁶ Exemption 7(C) applies specifically to “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.”¹⁷⁷

The case arose from a FOIA request by CompTel, a trade organization representing competitors of AT&T, seeking “[a]ll pleadings and correspondence” related to the Federal Communications Commission’s (FCC) Enforcement Bureau’s investigation into AT&T.¹⁷⁸ The investigation was launched after the company “voluntarily reported to the FCC that it might have overcharged the Government for services it provided” as part of the FCC-administered Education Rate program, which was meant to enhance access for schools and libraries to telecommunications and information services.¹⁷⁹ As part of the investigation, AT&T provided “various documents, including responses to interrogatories, invoices, e-mails with pricing and billing information, names and job descriptions of employees involved, and [the company’s] assessment of whether those employees had violated the company’s code of conduct.”¹⁸⁰ The FCC and AT&T later reached a resolution in December 2004 in which AT&T,

¹⁷² Brief for Respondent, *supra* note 53, at 46.

¹⁷³ *Food Mktg. Inst.*, 139 S. Ct. at 2360.

¹⁷⁴ *Id.* at 2366.

¹⁷⁵ See Fed. Comm. Comm’n v. AT&T, Inc., 562 U.S. 397, 409 (2011).

¹⁷⁶ 5 U.S.C. § 552(b)(7)(C) (2018).

¹⁷⁷ *Id.*

¹⁷⁸ *AT&T, Inc.*, 562 U.S. at 400.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

without conceding liability, agreed to pay the government \$500,000 and “institute a plan to ensure compliance with the program.”¹⁸¹

AT&T argued that the FCC “could not lawfully release documents obtained during the course of an investigation into an alleged overcharging on the ground that disclosure would likely invade the company’s ‘personal privacy.’”¹⁸²

Regarding CompTel’s FOIA request, the FCC Enforcement Bureau raised the argument that Exemption 4 protected from disclosure some of the information provided by AT&T,¹⁸³ specifically regarding the “cost and pricing data, billing-related information, and identifying information about staff, contractors, and customer representatives.”¹⁸⁴ The Bureau also decided to withhold information under Exemption 7(C), but only information “[p]ertaining to] individuals identified in [AT&T’s] submission” because they have “privacy rights” protected by Exemption 7(C).¹⁸⁵ The Bureau found that Exemption 7(C) did not apply to AT&T itself, reasoning that “businesses do not possess ‘personal privacy’ interests as required [by the exemption].”¹⁸⁶ On review, the FCC agreed with the Bureau’s findings, concluding that AT&T’s argument that it was a “private corporate citizen” with personal privacy rights within the meaning of Exemption 7(C) was “at odds with established [FCC] and judicial precedent.”¹⁸⁷

The Third Circuit ultimately held that Exemption 7(C) “unambiguously indicates that a corporation may have a ‘personal privacy’ interest within the meaning of Exemption 7(C).”¹⁸⁸ The court accepted AT&T’s argument that “the plain text of Exemption 7(C) indicates that it applies to corporations. After all, ‘personal’ is the adjectival form of ‘person,’ and FOIA defines ‘person’ to include a corporation.”¹⁸⁹ The Third Circuit added, “It would be very odd indeed for an adjectival form of a defined term *not* to refer back to that defined term. Further, FOIA’s exemptions indicate that Congress knew how to refer solely to human

¹⁸¹ *Id.*

¹⁸² *AT&T, Inc. v. Federal Comm. Comm’n*, 582 F.3d 490, 492 (3d Cir. 2009). The court added that AT&T “submitted a letter to the Bureau opposing CompTel’s request, arguing that the FCC collected the documents that AT&T produced for law enforcement purposes and therefore that the FCC regulations implementing FOIA’s exemptions prohibited disclosure.” *Id.* at 439.

¹⁸³ Brief for Respondents at 16, *AT&T, Inc. v. Fed. Comm. Comm’n*, 582 F.3d 490 (3d Cir. 2009) (No. 09-1279).

¹⁸⁴ *AT&T, Inc.*, 562 U.S. at 401.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (citing *In re SBC Communs., Inc.*, 23 FCC Rcd. 13704, 13707 (F.C.C. September 12, 2008)).

¹⁸⁸ *AT&T, Inc.*, 582 F.3d at 498.

¹⁸⁹ *Id.* at 497.

beings (to the exclusion of corporations and other legal entities) when it wanted to.”¹⁹⁰

AT&T argued that the Supreme Court should uphold the Third Circuit’s ruling, contending that the word “personal” in Exemption 7(C) “incorporates the statutory definition of ‘person,’” which includes corporations.¹⁹¹ AT&T also asserted that “its reading of ‘personal’ [was] supported by the common legal usage of the word ‘person.’”¹⁹² AT&T further contended that the Supreme Court had previously “recognized ‘privacy’ interests of corporations in the Fourth Amendment and double jeopardy contexts.”¹⁹³

The Supreme Court held that corporations “do not have ‘personal privacy’ for the purposes of Exemption 7(C),” reversing the ruling of the Third Circuit.¹⁹⁴ Chief Justice John Roberts delivered the opinion of the unanimous court and first rejected AT&T’s argument that the word “personal” in Exemption 7(C) incorporates the statutory definition of “person,” which includes corporations.¹⁹⁵ He reasoned that “a noun and its adjective form may have meanings as disparate as any two unrelated words” and agreed with the FCC that “‘personal’ does not, in fact, derive from the English word ‘person,’ but instead developed along its own etymological path.”¹⁹⁶

Chief Justice Roberts further held that because “personal” was not defined in the statute, the Court needed to give the phrase “personal privacy” “its ordinary meaning.”¹⁹⁷ He concluded that “[p]eople do not generally use terms such as personal characteristics or personal correspondence to describe the characteristics or correspondence of corporations.”¹⁹⁸ Chief Justice Roberts added that “personal privacy . . . suggests a type of privacy evocative of human concerns—not the sort usually associated with an entity like AT&T.”¹⁹⁹

Chief Justice Roberts also looked to dictionary definitions of “personal,” finding that the term “does not ordinarily relate to artificial

¹⁹⁰ *Id.* (citation omitted).

¹⁹¹ *AT&T, Inc.*, 562 U.S. at 402.

¹⁹² *Id.* at 398.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 397.

¹⁹⁵ *Id.* at 402.

¹⁹⁶ *Id.* at 403.

¹⁹⁷ *Id.* (citing *Johnson v. United States*, 559 U.S. 133, 138 (2010)).

¹⁹⁸ *Id.* at 397.

¹⁹⁹ *Id.* at 398. Chief Justice Roberts continued, “Certainly, if the chief executive officer of a corporation approached the chief financial officer and said, ‘I have something personal to tell you,’ we would not assume the CEO was about to discuss company business. Responding to a request for information, an individual might say, ‘that’s personal.’ . . . In fact, we often use the word ‘personal’ to mean precisely the opposite of business related: We speak of personal expenses and business expenses, personal life and work life, personal opinion and a company’s view.” *Id.* at 403–04.

‘persons’ such as corporations.”²⁰⁰ Additionally, he turned to the context of the statutory language, holding that the phrase “personal privacy” has a “more particular meaning than those words in isolation.”²⁰¹

Lastly, Chief Justice Roberts rejected AT&T’s argument that the Court should recognize the privacy interest of corporations regarding Exemption 7(C) just as it did in “the Fourth Amendment and double jeopardy contexts.”²⁰² He reasoned that the present case did not require the Court to rule “on the scope of a corporation’s ‘privacy’ interests as a matter of constitutional or common law.”²⁰³ Instead, the Court only needed to rule on “[t]he discrete question [of] whether Congress used the term ‘personal privacy’ to refer to the privacy of artificial persons in FOIA Exemption 7(C).”²⁰⁴ The Court held that AT&T had provided the Court with “no sound reason in the statutory text or context to disregard the ordinary meaning of the phrase ‘personal privacy.’”²⁰⁵

Chief Justice Roberts also explained that Exemption 4 “clearly applies to corporations,” adding that Congress “did not use any language similar to that in Exemption 4 in Exemption 7(C).”²⁰⁶ Chief Justice Roberts also noted that the Court had “regularly referred to Exemption 6²⁰⁷ as involving an ‘individual’s right of privacy’” and that it contained the same phrase—“personal privacy”—as Exemption 7(C).²⁰⁸ Thus, in this case, the Supreme Court drew a line, holding that although Exemption 4 applied to, and could be used by, corporations, Exemption 6 and Exemption 7(C) did not.

Whereas the majority in *Food Marketing Institute* used dictionary definitions of the statutory language to increase the scope of the material covered by Exemption 4 by rejecting a harm requirement,²⁰⁹ the unanimous court in *AT&T, Inc.* read the statutory language to restrict the scope of Exemption 6 and Exemption 7(C), preventing AT&T and other corporations from trying to invoke an exemption that Congress did not intend to apply to corporations.²¹⁰

In a 2011 article in the *Duquesne Business Law Journal*, Josh Brick argued that the Court’s ruling in *AT&T, Inc.* was “in alignment with its previous observation that there is a strong presumption in favor of

²⁰⁰ *Id.* at 404.

²⁰¹ *Id.* at 406.

²⁰² *Id.* at 407.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 398.

²⁰⁷ 5 U.S.C. § 552(b)(6) (2018). Exemption 6 allows agencies to withhold records containing information individuals in “personnel and medical files and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.”

²⁰⁸ *AT&T, Inc.*, 562 U.S. at 398 (citing *Dep’t of State v. Ray*, 502 U.S. 164, 175 (1991)).

²⁰⁹ *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019).

²¹⁰ *AT&T, Inc.*, 562 U.S. at 408–09.

disclosure under FOIA.”²¹¹ He continued, “When read alongside Exemption 4 and Exception 6, it is evident that Congress did not view corporations as possessing an interest in personal privacy,” therefore narrowly interpreting Exemption 7(C).²¹²

However, in a 2011 article for *CommLaw Conspectus*, Maeve E. Huggins observed that the Court had also failed to address several key issues, providing little discussion, if any, regarding newsgathering and transparency.²¹³ She wrote:

FOIA is a crucial tool of journalists. Any impact on FOIA will undoubtedly change the way journalists obtain information from the government and monitor the [federal] government’s investigative and enforcement responses to wrongdoing. . . . As a matter of public policy, courts must preserve and protect FOIA as an effective means to “ensure an informed citizenry.”²¹⁴

Huggins added that in *AT&T, Inc.*, the Court “failed to seize an opportunity to reaffirm the important values of government transparency and accountability in the face of private interests.”²¹⁵ As the following section argues, the Court put these values at risk in *Food Marketing Institute*. Congressional action is required to ensure Exemption 4 is narrowly construed.

C. Congressional Action Needed to Protect Newsgathering, Transparency, and the Free Flow of Information

A second reason for Congressional action following *Food Marketing Institute* is that the Court, by shielding from disclosure an even broader range of materials under Exemption 4, makes it more difficult for the press and the public to obtain information about the government and the organizations with which it does business. The result is decreased government transparency and accountability as the press and public are able to receive and disseminate less information about these transactions, even if that information is of public concern.

It is important to note that *Food Marketing Institute* was not about a secret, proprietary formula or about sensitive information implicating

²¹¹ Josh Brick, Case Note, *The United States Supreme Court Holds that Exemption 7(C) of the Freedom of Information Act Does Not Apply to Corporations: FCC v. AT&T Inc.*, 14 DUQ. BUS. L.J. 121, 141 (2012), <http://sites.law.duq.edu/blj/wp-content/uploads/2012/08/brick.pdf> [<https://perma.cc/JQ2A-Z9DD>].

²¹² *Id.*

²¹³ Maeve E. Huggins, Note, *Don’t Take It Personally: Supreme Court Finds Corporations Lack Personal Privacy under FOIA Exemptions*, 19 COMM.LAW CONSPECTUS 481, 508–10 (2011), <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1471&context=commlaw> [<https://perma.cc/8FUT-GYKW>].

²¹⁴ *Id.*

²¹⁵ *Id.* at 515–16.

business competition.²¹⁶ This case, in fact, arose from private companies working together with the government, raising important implications for government accountability. Additionally, the Argus Leader was investigating the practice of “trafficking” of benefits by SNAP recipients, demonstrating that there were issues of fraud, clearly constituting matters of significant public concern.²¹⁷

This article does not argue for the elimination of Exemption 4 because important interests do arise, justifying withholding propriety information or records whose disclosure would have significant effects on businesses’ ability to compete in the marketplace. In some instances, however, records that are subject to Exemption 4 transcend these types of situations, implicating matters of public concern. In such cases, especially where harm to businesses is unlikely and harm to the public *is* likely, the press and the public need access to relevant information to “know what their government is up to” and hold the government accountable.²¹⁸

D. Congress Has Introduced a Possible Solution

Congress has already considered a piece of bipartisan legislation that can help accomplish those desired outcomes. On July 23, 2019, U.S. Senators Chuck Grassley (R-Iowa.), Patrick Leahy (D-Vt.), John Cornyn (R-Texas), and Dianne Feinstein (D-Calif.) introduced The Open and Responsive Government Act of 2019 (S. 2220).²¹⁹ S. 2220, which, in early 2020, remained in the Committee on the Judiciary, would add language to Exemption 4 to require that the term “confidential” include “information that, if disclosed, would likely cause substantial harm to the competitive position of the person from whom the information was obtained.”²²⁰ The

²¹⁶ See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2360–61 (2019) (indicating the case involved the disclosure of store-level SNAP data).

²¹⁷ Brief for Respondent, *supra* note 53, at 3–4.

²¹⁸ See *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773–74 (1989) (citing *EPA v. Mink*, 410 U.S. 73, 80, 93 (1973) (Douglas J., dissenting) (emphasis omitted)). Justice Stevens cited Justice Douglas’s dissent in which he contended that the philosophy behind FOIA was “the principle that a democracy cannot function unless the people are permitted to know what their government is up to.” *Id.*

²¹⁹ Open and Responsive Government Act of 2019, S. 2220, 116th Cong. § 2(a) (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/2220/text> [<https://perma.cc/P49C-EQHS>]; see also Beryl Lipton, *Senate Introduces Legislation to Clarify Presumption of Disclosure in FOIA*, MUCKROCK (June 24, 2019), <https://www.muckrock.com/news/archives/2019/jul/24/Senate-FOIA-bill-b4/> [<https://perma.cc/4P9S-356N>].

²²⁰ Open and Responsive Government Act of 2019, S. 2220, 116th Cong. § 2(1) (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/2220/text> [<https://perma.cc/P49C-EQHS>]. The new language under Exemption 4 would read, “(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential, provided that the term ‘confidential’ means information that, if disclosed, would likely cause

bill would incorporate the *National Parks* harm requirement as part of Exemption 4 and would, therefore, formally incorporate into the statutory language what was previously common law under circuit court rulings.

The bill also clarifies that Exemption 4 would “not authorize the withholding of a portion of an otherwise responsive record on the basis that the portion is non-responsive.”²²¹ *The Hill* had previously reported on June 25, 2019 that, without a public comment period, the Environmental Protection Agency (EPA) approved a new rule that allowed EPA officials to review all materials that fit a FOIA request criteria, known as “responsive documents,” and then decide “whether to release or withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA, and to issue ‘no records’ responses,” prompting concern from observers, who called for Congress to intervene.²²²

In a July 23, 2019 press release, Senator Grassley contended that the Supreme Court’s ruling in *Food Marketing Institute*, by setting aside the *National Parks* standard, “significantly” broadened the scope of Exemption 4.²²³ He argued that such a ruling made it “more difficult for the media and general public to learn about government programs and hold accountable those who administer them.”²²⁴ This prompted bipartisan support to “update[] FOIA Exemption 4 to include key accountability language from *National Parks*, ensuring continued access to information.”²²⁵

In the press release, Senator Grassley further explained the reasoning behind the bill:

The people’s business ought to be available to the people. It’s only through public oversight and transparency that we ensure government programs are operating as intended, without any waste, fraud, or abuse. Transparency is something worth fighting for, and it seems we’re always in an uphill battle to keep the sunlight shining on government. This balanced and bipartisan bill responds to recent court rulings and regulatory actions, restoring pro-transparency principles and making crystal clear where Congress stands on the public’s right to know.”²²⁶

substantial harm to the competitive position of the person from whom the information was obtained.” *Id.*

²²¹ *Id.* § 2(2).

²²² Miranda Green, *New EPA rule could expand number of Trump officials weighing in on FOIA requests*, HILL (June 25, 2019, 9:50 AM), <https://thehill.com/policy/energy-environment/450169-new-epa-rule-would-allow-more-administration-officials-to-weigh-in-on-foia-requests> [https://perma.cc/93R8-2ZM4].

²²³ Press Release, Sen. Chuck Grassley, Grassley, Leahy, Cornyn, Feinstein Introduce Bill to Reinforce Transparency in Wake of Supreme Court FOIA Decision and Recent Regulations (July 23, 2019), <https://www.grassley.senate.gov/news/news-releases/grassley-leahy-cornyn-feinstein-introduce-bill-reinforce-transparency-wake> [https://perma.cc/HEQ3-6CQ3].

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

Senator Leahy agreed, adding that the bill would “limit the extent to which the government can use a recent Supreme Court opinion to justify abuses of a particular FOIA exemption to withhold information.”²²⁷

In a September 19, 2019, letter to U.S. Senators, the Campaign for Accountability, a nonprofit government watchdog organization, along with 34 other civil society organizations, including the American Civil Liberties Union (ACLU), called for the endorsement of S. 2220, particularly the provision that would codify the primary holding of *National Parks*.²²⁸ In particular, the letter argued that the Supreme Court had “greatly expanded [Exemption 4] . . . in such a way that the public may now have access only to information that is already openly shared.”²²⁹ The letter therefore called for Congress to amend FOIA to include the finding in *National Parks* that commercial information is exempt as confidential only if disclosure of such records would be likely to cause substantial harm.²³⁰

S. 2220, by amending FOIA to include such a requirement, would clarify and provide meaningful resolution to the debate around this issue. Although the majority in *Food Marketing Institute* declined to create such a standard, incorporating a harm requirement would, as the Argus Leader contended,²³¹ help narrow the scope of Exemption 4. At the very least, the result would be that more information would be disclosed about the business government agencies conduct with public and private organizations, even if trade secrets and other confidential commercial information are at issue. Congress would also be within the bounds of FOIA’s foreseeable harms standard, as asserted by RCFP and others.²³²

S. 2220, or a bill like it, would encourage public access to information, as well as enhance the ability of the press not only to obtain and disseminate information of public concern, but also to provide greater accountability of the government and the private actors with whom they work. Not only is such Congressional action is needed, it is also clearly possible, as demonstrated by S. 2220.

V. CONCLUSION

Although *Food Marketing Institute*, on the surface, helps to protect proprietary information under Exemption 4, it raises issues that require Congressional action. First, the Court reversed circuit-level precedent dating

²²⁷ *Id.*

²²⁸ Letter from 35 Civil Soc’y Grps., to U.S. Senators (Sept. 19, 2019), <https://campaignforaccountability.org/work/letter-supporting-the-open-and-responsive-government-act-s-2220/> [https://perma.cc/8QVA-CS6R].

²²⁹ *Id.*

²³⁰ *Id.* For additional commentary on how the Open and Responsive Government Act of 2019 would be a viable fix to *Food Marketing Institute*, see Sumar, *supra* note 126, at 15.

²³¹ Brief for Respondent, *supra* note 53, at 3.

²³² Brief of Reporters Committee, *supra* note 119, at 1-2; *see also* Sumar, *supra* note 126, at 18-20.

back to 1974 that had held that Exemption 4 required a showing of harm in order to prevent disclosure of requested materials. Because the legislative history behind such a requirement is ambiguous, Congress needs to step in to help resolve this critical issue by clarifying that such a demonstration of harm is necessary under the statutory language.

Second, this article argues that the Supreme Court's ruling in *Food Marketing Institute* broadened the scope of Exemption 4 to include information that would clearly be of a public interest, therefore limiting newsgathering and the free flow of information. Narrow categories of records, such as a secret formula or information directly affecting businesses' competitiveness in the marketplace, should remain protected from disclosure. However, in situations like those arising in *Food Marketing Institute*, where the information at issue clearly details the workings of government agencies and is of public concern, disclosure is essential. Because the Supreme Court curtailed the free flow of such information with its decision, Congressional action is needed to ensure that Exemption 4 does not limit newsgathering and government transparency.

Significantly, Congress has already considered legislation that would achieve the resolution discussed above. S. 2220 would formally incorporate the substantial harm test, helping to clarify the harm requirement in a way that would help promote broader disclosure of information related to Exemption 4, providing an adequate resolution to the concerns raised by *Food Marketing Institute*. Congress has demonstrated that it recognizes and has the ability to act on key issues raised following the Supreme Court's ruling. This formal change would ensure that, at least in cases arising around Exemption 4 of FOIA, newsgathering, transparency, and the free flow of information are promoted and protected.

Mitchell Hamline Law Review

The Mitchell Hamline Law Review is a student-edited journal. Founded in 1974, the Law Review publishes timely articles of regional, national and international interest for legal practitioners, scholars, and lawmakers. Judges throughout the United States regularly cite the Law Review in their opinions. Academic journals, textbooks, and treatises frequently cite the Law Review as well. It can be found in nearly all U.S. law school libraries and online.

mitchellhamline.edu/lawreview

MH

MITCHELL | HAMLINE

School of Law

© Mitchell Hamline School of Law
875 Summit Avenue, Saint Paul, MN 55105
mitchellhamline.edu