22-2232

United States Court of Appeals

for the

Second Circuit

THE NEW YORK TIMES COMPANY, JOHN EWING, JR.,

Plaintiffs-Appellants,

– v. –

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant-Appellee,

VOLKSWAGEN AG,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, NO. 19-CV-1424 (FAILLA, J.)

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[*]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community—including the scope of Exemption 4 of the Freedom of Information Act (FOIA). The Chamber submits this brief under Rule 29(a)(2) of the Federal Rules of Appellate Procedure.

[*] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the modern administrative state, American businesses submit vast amounts of sensitive information to the government, for a wide range of reasons: regulatory compliance, contracting and procurement, grant applications, and law enforcement, among others. While FOIA creates a general rule that information held by federal agencies is subject to disclosure, Congress has always made an exception for confidential commercial information obtained by the government from private parties. And courts have long construed that exception broadly, recognizing that FOIA's open-government mandate does not require exposing information that businesses keep confidential from their competitors and would-be wrongdoers simply because it found its way into a federal agency's files.

In this case, Volkswagen AG provided confidential information about its compliance programs to the Department of Justice (DOJ) pursuant to a plea agreement. The New York Times and one of its reporters (collectively, the Times) requested that information under FOIA. DOJ withheld the information under FOIA Exemption 4's protection for "trade secrets and commercial or financial information obtained" by the government "from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

But the District Court ordered the information disclosed, reasoning that "commercial" information protected by Exemption 4 is limited narrowly to information that has "intrinsic commercial value" or "relate[s] to the income-producing aspects of a business." Sp. App'x 68-69.

The District Court's cramped reading of "commercial" contradicts the ordinary meaning of the statutory text, misunderstands important business principles, and would inflict far-reaching harms on companies, consumers, the government, and the public alike. Accordingly, if this Court does not affirm the judgment below on the basis of Exemption 5, then it should hold that nearly all of the same information was properly withheld under Exemption 4.[1]

As this Court has long recognized, the meaning of word "commercial" in Exemption 4 is straightforward and broad: "pertaining or relating to or dealing with commerce." *Am. Airlines, Inc.* v. *Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). Details about a business's compliance programs fit naturally within that definition, because a company's strategy for conducting its commercial operations lawfully is inseparable

[1] Because the Chamber's principal interest is the construction of Exemption 4's protection of confidential "commercial or financial information," this brief does not address Exemption 5.

from those operations. Information about a company's compliance programs also has commercial significance to its competitors and would-be wrongdoers, who could exploit the information to gain an advantage and harm the business. Courts had thus uniformly protected compliance-program information under Exemption 4—until the decision below.

The District Court's reasoning turns on a basic error. The District Court observed that many applications of Exemption 4 involve "core" commercial information, such as sales figures and revenue projections. Sp. App'x 18 (citation omitted). But the District Court jumped from that observation to the conclusion that Exemption 4 protects *only* such information. That result is logically flawed, at odds with the plain meaning of the statutory language, and flatly contrary to the reasoned holdings of many courts that "Exemption 4 is *not* confined only to records that reveal basic commercial operations or relate to the income-producing aspects of a business," but instead "reaches more broadly and applies (among other situations) when the provider of the information has a commercial interest in the information submitted to the agency." *Baker & Hostetler LLP* v. *Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006) (Kavanaugh, J.).

The District Court's unduly narrow interpretation of "commercial" would undermine the promise of confidentiality in negotiated agreements like the one between Volkswagen and DOJ, making it harder for the government and businesses to resolve investigations in a way that results in effective remediation. And the harm would not stop there. Across a wide range of regulatory and other contexts, diminishing Exemption 4's protection could chill businesses' willingness to share sensitive information with the government—or result in damaging disclosures of information that can be exploited by competitors or criminals. And while this case involves FOIA requests from journalists, the District Court's holding would require disclosure to any requester, including a competitor or would-be wrongdoer. The District Court's decision could thus expose businesses to dangers that Congress never intended—and enacted Exemption 4 to foreclose. All those considerations underscore why this Court should interpret "commercial" based on its ordinary broad meaning, as it has for decades.

The Times contends that the FOIA Improvement Act of 2016 (Improvement Act)—which prohibits withholding unless an "agency reasonably foresees that disclosure would harm an interest protected by

[the relevant FOIA] exemption," 5 U.S.C. § 552(a)(8)(A)(i)(I) (enacted via Pub. L. No. 114-185, 130 Stat. 538)—supports disclosure even if Volkswagen's compliance-program information is protected by Exemption 4. The Times argues (at 23) that the only "interest protected by" Exemption 4 is competitive harm. But that assertion contradicts this Court's recent interpretation of the Improvement Act in *Seife* v. *FDA*, 43 F.4th 231 (2d. Cir. 2022), and it seeks to restore a standard that the Supreme Court squarely rejected in *Food Marketing Institute* v. *Argus Leader Media*, 139 S. Ct. 2356 (2019). In any event, the Times' position would not change the result here, because disclosing confidential compliance-program information would result in competitive harm.

ARGUMENT

If this Court does not affirm the District Court's decision applying Exemption 5, then it should affirm on the alternative ground that most of the same information was permissibly withheld pursuant to Exemption 4. Under a straightforward reading of the statute and a proper understanding of business operations, the confidential details of corporate compliance programs provided to the government constitute "commercial" information protected by Exemption 4. And because disclosure of

such information would foreseeably harm multiple interests protected by Exemption 4—including interests of critical importance to the business community—the Improvement Act also supports withholding.

I. CONFIDENTIAL DETAILS OF A BUSINESS'S COMPLIANCE PROGRAM CONSTITUTE "COMMERCIAL" INFORMATION UNDER EXEMPTION 4

Exemption 4 permits the government to withhold "trade secrets and commercial or financial information obtained from a person and [which are] privileged or confidential." 5 U.S.C. § 552(b)(4). It is undisputed that Volkswagen is a "person" for FOIA purposes, that the government "obtained" the compliance-program-related information at issue "from" Volkswagen, and that the information is otherwise "confidential." *Id.* Whether Exemption 4 applies thus turns on whether the information is "commercial." *Id.* FOIA's text, purpose, and history—as well as nearly uniform judicial precedent—all show that it is. The District Court's contrary conclusion reflects an unduly narrow understanding of "commercial" information that conflicts with multiple sources of statutory meaning and that would have severely harmful consequences for businesses, consumers, the government, and the public alike.

A. The Term "Commercial" In Exemption 4 Carries Its Ordinary Broad Meaning

1. The word "commercial" appears several times in FOIA, but the statute does not define it. *See* 5 U.S.C. § 552(a)(4)(ii)-(iii), (b)(4). When a statute "does not define" a word, courts typically apply its "ordinary meaning." *Schindler Elevator Corp.* v. *U.S. ex rel. Kirk*, 563 U.S. 401, 407 (2011). Courts have followed that approach for "undefined terms in FOIA." *Argus Leader*, 139 S. Ct. at 2362; *see Milner* v. *Dep't of the Navy*, 562 U.S. 562, 569 (2011); *N.H. Right to Life* v. *HHS*, 778 F.3d 43, 49 (1st Cir. 2015) (collecting cases).

When FOIA was enacted in 1966, the ordinary meaning of "commercial" was "of, relating to, characteristic of, or suitable for commerce." Webster's Seventh New Collegiate Dictionary 166 (1963); *accord, e.g.*, Black's Law Dictionary 370 (rev. 4th ed. 1968) ("[r]elating to or connected with trade and traffic or commerce in general"); Oxford English Dictionary (2d ed. 1989) ("having reference to, or bearing on commerce … [o]f or pertaining to commerce or trade"). The word means the same today. *See, e.g.*, Merriam-Webster Online Dictionary (last visited Apr. 14, 2023) ("of or relating to commerce"); Oxford English Dictionary (Dec. 2021 update) ("of or pertaining to commerce or trade").

Under settled principles of statutory construction, that broad ordinary meaning of "commercial" should apply to Exemption 4, absent some basis to conclude that Congress used the term to have a narrower or more specific definition in that context. *Cf. Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 612-13 (1992) (explaining that "commercial" in the Foreign Sovereign Immunities Act is a "term of art" deriving its meaning from historical understanding of sovereign immunity). Not only is there no such basis here, but multiple tools of statutory interpretation reinforce that "commercial" retains its broad ordinary meaning.

When Congress enacted FOIA, it did so against a "long" established backdrop of disclosure protections for "trade secrets and other confidential commercial information," which were vital to the growth and competitiveness of American businesses—particularly as information became an increasingly valuable commodity in the business world. *Fed. Open Mkt. Comm.* v. *Merrill*, 443 U.S. 340, 356 (1979). Congress devised FOIA to overcome shortcomings in existing administrative law, which had left "official information … shielded unnecessarily from public view." *EPA* v. *Mink*, 410 U.S. 73, 80 (1973); *see John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 150 (1989) (describing "the fundamental principle of public

access to Government documents that animates the FOIA"). But there is no evidence that, when creating FOIA's new mechanisms to access *official* information in *government* documents, Congress meant to abrogate well-settled protections for confidential information maintained by *businesses*. *See Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 154 (1980) (explaining the Supreme Court's "reluctance to construe the FOIA as silently departing from prior longstanding practice").

Exemption 4 reflects that background understanding by protecting confidential commercial information "obtained by" the government from private entities. 5 U.S.C. § 552(b)(4); *see id.* § 551(2) (defining "person" in FOIA to include "an individual, partnership, corporation, association, or public or private organization other than an agency"). "Essentially, Congress believed that information, considered private and confidential in business life, should not be compromised simply because the information was transferred to government." *N.Y. Pub. Int. Rsch. Grp.* v. *EPA*, 249 F. Supp. 2d 327, 332 (S.D.N.Y. 2003) (*NYPIRG*). That context confirms that "commercial" retains the "natural breadth" of its ordinary meaning in Exemption 4 and should not be confined to an "artificially narrow" scope. *Bartenwerfer* v. *Buckley*, 143 S. Ct. 665, 673 (2023).

Other FOIA provisions reinforce that inference. A "term appearing in several places in a statutory text is generally read the same way each time it appears." *Milner*, 562 U.S. at 570 (citation omitted); *see Argus Leader*, 139 S. Ct. at 2365. And none of FOIA's uses of the term "commercial"—addressing applicable fees when records are requested "for commercial use" or are "in the commercial interest of the requester," 5 U.S.C. § 552(a)(4)(ii)-(iii)—lend themselves to any interpretation other than the broad, ordinary meaning of "commercial" described above.

What's more, Congress allowed "any person" to make a FOIA request, 5 U.S.C. § 552(a)(3)(A)—an authorization that includes commercial competitors of a business that provides information to the government, *see, e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975); *see also* Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1376-81 (2016) (describing the prevalence of FOIA requests by competitors). Broad protection under Exemption 4 for "commercial" information submitted by a business to the government is thus essential to avoid undermining long-established legal principles protecting businesses from exploitation by their competitors. *See* pp. 9-10, *supra*. That objective is "as

much a part of FOIA's purposes and policies as the statute's disclosure requirement." *Argus Leader*, 139 S. Ct. at 2366 (citation omitted).

The legislative history of Exemption 4 further buttresses that understanding. When Congress was drafting FOIA, a Treasury Department official emphasized that there was "no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor." *Freedom of Information: Hearings on S. 1666 Before the Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary*, 88th Cong. 174 (1964). Legislators likewise recognized that it was "in the public interest if all the facts about a company were not made public." *Id.* at 102 (statement of Sen. Quentin Burdick). The relevant committee reports, moreover, contemplate that Exemption 4 would protect "information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges"—many of which plainly extend beyond any narrow understanding of "commercial." S. Rep. No. 89-813, at 9 (1965); H.R. Rep. No. 89-1497, at 10 (1966).[2]

[2] Indeed, DOJ initially understood Exemption 4 to protect all confidential information that was provided to the government, even if not commercial or financial. *See* Kenneth Culp Davis, *The Information Act: A*

In short, the relevant tools of statutory interpretation indicate that the language of Exemption 4 should "be construed to mean what it says," *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 803 (1984)—to incorporate the ordinary broad meaning of "commercial," and nothing less.

2. Decades of judicial decisions reflect the "straightforward" construction that information qualifies "as 'commercial or financial'" under Exemption 4 "if it relates to business or trade." DOJ, *Guide to the Freedom of Information Act: Exemption 4*, at 4-6 (2021) (collecting cases), https://bit.ly/3nT47T5.

That long line of precedent began in this Court. In *American Airlines*, the Court considered whether the National Mediation Board was required to disclose the number of employee authorization cards that the Teamsters had filed as part of its efforts to unionize airline employees. 588 F.2d at 864-65. This Court allowed the Board's withholding, explaining that—at minimum—the term "commercial" in Exemption 4

Preliminary Analysis, 34 U. CHI. L. REV. 761, 790 (1967) (discussing an Attorney General Memorandum issued shortly after FOIA's adoption). While an interpretation that broad is difficult to square with the statutory text, *see id.*, DOJ's initial position—along with the analyses of leading administrative-law scholars—reinforces the absence of any basis to conclude that Congress intended "commercial" to apply narrowly, *see id.* at 790-92.

"surely means pertaining or relating to or dealing with commerce," which the Teamsters' unionization activities "quite obviously" did. *Id.* at 870.

This Court in *American Airlines* rejected the argument that information was not commercial just because it was not aimed at making a "profit." 588 F.2d at 870. The Court cautioned that such an "interpretation gives much too narrow a construction to the phrase in question." *Id.* While acknowledging that Exemption 4 had limits, the Court explained that information could not be considered "commercial" when it did not serve a "commercial function," lacked a "commercial nature," or gave rise to a "commercial interest" that was at best "extremely remote." *Id.* Because the information about the employee authorization cards fell within those limits, the Court allowed it to be withheld. *Id.*

American Airlines remains good law in this Court, *see, e.g.*, *Nadler* v. *FDIC*, 92 F.3d 93, 95-96 (2d Cir. 1996), and other circuits have adopted similar reasoning. Of particular note, the D.C. Circuit—which decides an outsized proportion of FOIA cases—has held that "the terms 'commercial' and 'financial' in" Exemption 4 "should be given their ordinary meanings," and has rejected the contention that "commercial" information is "confined to records that actually reveal basic commercial

operations, such as sales statistics, profits and losses, and inventories, or relate to the income-producing aspects of a business." *Pub. Citizen Health Rsch. Grp.* v. *FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

Instead, as the D.C. Circuit has repeatedly explained, Exemption 4's protection of "commercial" information "reaches more broadly and applies (among other situations) when the provider of the information has a commercial interest in the information submitted to the agency." *Baker & Hostetler*, 473 F.3d at 319; *see, e.g.*, *Nat'l Ass'n of Home Builders* v. *Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (quoting *Am. Airlines*, 588 F.2d at 870). Other courts of appeals have likewise reiterated that "'commercial' in the FOIA context 'surely means pertaining or relating to or dealing with commerce.'" *N.H. Right to Life*, 778 F.3d at 49 (quoting *Am. Airlines*, 588 F.2d at 870); *accord Brown* v. *Perez*, 835 F.3d 1223, 1230-31 (10th Cir. 2016) (same); *see also Gen. Motors Corp.* v. *Marshall*, 654 F.2d 294, 297 n.8 (4th Cir. 1981) (noting that *American Airlines* is "an informative decision on the scope of exemption (b)(4)").

In applying that understanding, courts have consistently held that Exemption 4 protects from disclosure a diverse array of business information that pertains to commerce—not simply sales data, profit-and-loss

figures, and other information that most paradigmatically reflects a business's commercial operations. For example, courts have held that "commercial" information protected by Exemption 4 includes:

- the names of a bank's subprime-lending clients, *Inner City Press/Cmty. on the Move* v. *Bd. of Govs. of Fed. Rsrv. Sys.*, 463 F.3d 239, 244 (2d Cir. 2006);
- descriptions of favorable market conditions and industry analysis of competitive strengths and weaknesses, *Baker & Hostetler*, 473 F.3d at 320;
- a business's number of employees and employee work hours, *Pub. Citizen Found.* v. *DOL*, 2020 WL 9439355, at *7 (D.D.C. June 23, 2020);
- whether an oil refinery applied for an exemption from government program requiring that refineries produce a certain volume of renewable fuel, *Renewable Fuels Ass'n* v. *EPA*, 519 F. Supp. 3d 1, 8 (D.D.C. 2021);
- health and safety data compiled by a medical device manufacturer, *Pub. Citizen*, 704 F.2d at 1290;
- the professional opinions of telecommunications consultant, *ICM Registry, LLC* v. *Dep't of Commerce*, 2007 WL 1020748, at *7 (D.D.C. Mar. 29, 2007);
- internal company analyses and communications addressing customer complaints, *N.Y. Times Co.* v. *FDA*, 529 F. Supp. 3d 260, 284 (S.D.N.Y. 2001).

At the same time, courts have enforced Exemption 4's textual limits by holding that information that cannot reasonably be understood as "commercial" is subject to disclosure. The D.C. Circuit has reasoned, for

example, that the locations of sightings of endangered owls are not commercial, because "[n]o 'business information' is involved," and "the owl-sighting data itself is commercial neither by its nature … nor in its function (as there is no evidence that the parties who supplied the owl-sighting information have a commercial interest at stake in its disclosure)." *Norton*, 309 F.3d at 39 (citations omitted). And courts within this Circuit have held that Exemption 4 does not apply to information that had no "intrinsic commercial value to [a company] or to its competitors," was not "used by [the company] in any aspect of its daily operations," and was not subject to any "commercial interest that could be compromised by [its] disclosure." *NYPIRG*, 249 F. Supp. 2d at 333.

B. Compliance-Related Information Of The Kind At Issue Is "Commercial" Information Under Exemption 4

Under the straightforward reading outlined above, confidential compliance-related information provided by a business to the government—including the confidential information about Volkswagen's compliance program provided to DOJ in this case, Sp. App'x 21-22, 67-69—readily qualifies as "commercial" information protected by Exemption 4.

1. At the most basic level, the details of a company's compliance program constitute information "pertaining or relating to or dealing with

commerce," *Am. Airlines*, 588 F.2d at 870, because the purpose of a compliance plan is to enable the company to undertake its commercial operations lawfully. Particularly in an era of expanding regulatory scope and complexity, a business that has no mechanism to ensure that it is complying with the law will not be in business for long. There is thus a direct connection between a company's maintenance of a compliance program and its ability to engage in commercial operations. Businesses accordingly recognize that "an effective ethics and compliance program" is "a valuable organizational asset." Deloitte Development LLC, *Building World-Class Ethics and Compliance Programs* 11 (2015), https://bit.ly/3KMjV3d; *see* KPMG Int'l Cooperative, *The Compliance Investment* 1 (2016) (explaining that "compliance" is "an increasingly integrated part of the business investment strategy"), https://bit.ly/3KwKGav. That "relat[ionship]" demonstrates that compliance-program information is "commercial" information under Exemption 4. *Am. Airlines*, 588 F.2d at 870; *see also Naimoli* v. *Ocwen Loan Servicing, LLC*, 22 F.4th 376, 384 (2d Cir. 2022) ("relating to" is a "broad term"; a thing relates to another when it "has some connection

with or pertains to" the other (citing *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992))).

In addition, businesses have a "commercial interest," *Am. Airlines*, 588 F.2d at 870; *accord Baker & Hostetler*, 473 F.3d at 319, in their compliance-program information, because disclosure of the information could strengthen their competitors and jeopardize their own commercial prospects. *See, e.g.*, J.A. 166 (declaration explaining that "Volkswagen's compliance and risk management systems … could be undermined if details [about them] … are disclosed, as anyone wishing to engage in misconduct or otherwise harm Volkswagen could exploit this information"). Courts have recognized that interest even apart from the FOIA context, explaining for example that corporate compliance manuals should be protected in discovery when a company "invested significant time and money in developing the manuals and ensuring the secrecy of the information contained in them," and making the compliance information public would "diminish [the company's] competitive edge, confer on its competitors an unwarranted advantage in the industry, and furnish a potential avenue for fraud by third parties." *Bank of N.Y.* v. *Meridian BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 143-45 (S.D.N.Y. 1997); *see also, e.g.*, *SIPC* v.

Bernard L. Madoff Inv. Sec. LLC, 2011 WL 1378602, at *3 (Bankr. S.D.N.Y. Apr. 12, 2011) (barring disclosure of company's know-your-client and anti-money-laundering policies as "commercial information" protected from disclosure under 11 U.S.C. § 107(b)(1)).

2. Courts in the FOIA context have also recognized, with near-uniformity, that confidential compliance-related information provided by businesses to the government is "commercial" information protected by Exemption 4. That is so particularly when, as here, the information was provided under an agreement with the government expressly providing that it would remain confidential. J.A. 138 (monitoring agreement ¶ 23).

For example, in a case involving a civil settlement agreement between Pfizer and the U.S. Department of Health and Human Services, a district court upheld the government's withholding of compliance information that Pfizer had submitted under the agreement. *Pub. Citizen* v. *HHS*, 66 F. Supp. 3d 196, 214-15 (D.D.C. 2014). The court credited the company's explanation that, if the compliance-program details were disclosed, "a competitor could copy Pfizer's system and adopt it for its own use," "thus obtaining the benefit of Pfizer's investment without having to incur the cost itself." *Id.* at 215 (brackets omitted). Such a "revelation,"

the court explained, "could easily lead to substantial competitive harm." *Id.* The objections by the FOIA requester thus failed to perceive "the value of a robust compliance program to" a business. *Id.*

In another case with facts closely paralleling those here, Siemens entered a plea agreement with the DOJ and a consent decree with the SEC that required oversight by an independent monitor to resolve certain bribery allegations. *100Reporters LLC* v. *DOJ*, 248 F. Supp. 3d 115, 125-26 (D.D.C. 2017). When it received a FOIA request, the government withheld the monitor's reports, along with Siemens's internal trainings, presentations, and compliance policies. *Id.* at 135-37. The court allowed that withholding because it found the compliance materials "'instrumental' to a commercial interest" and therefore "sufficiently commercial for the purposes of Exemption 4." *Id.*; *100Reporters LLC* v. *DOJ*, 316 F. Supp. 3d 124, 139-40, 142 (D.D.C. 2018) (reaching the same result after *in camera* review).

District courts have continued to apply that approach to find compliance-related information "commercial" for purposes of Exemption 4. *See, e.g.*, *Majuc* v. *DOJ*, 2022 WL 266700, at *5 (D.D.C. Jan. 28, 2022) (explaining that a bank's compliance protocols implicated "commercial

interests" because disclosure would reveal "to competitors and others its internal financial controls, vulnerabilities of those controls, and means of avoiding such controls"); *Leopold* v. *DOJ*, 2021 WL 124489, at *6-7 (D.D.C. Jan. 13, 2021) (similar); *Tokar* v. *DOJ*, 304 F. Supp. 3d 81, 94 n.3 (D.D.C. 2018) (similar).

C. The District Court Erroneously Rejected The Assertion Of Exemption 4 Based On An Unduly Narrow Interpretation Of "Commercial" Information

The District Court here nevertheless concluded that the confidential compliance information submitted by Volkswagen to DOJ was not "commercial" information for purposes of Exemption 4. Sp. App'x 68-69. In the District Court's view, information is "commercial" under Exemption 4 only if it has "intrinsic commercial value or relate[s] to the income-producing aspects of a business." *Id.*; *see id.* at 32. For the reasons outlined above, that unduly narrow reading defies the ordinary meaning of the statutory language and the virtually uniform interpretation of "commercial" information adopted by other courts—including this one.

Despite that term's breadth, the District Court wrongly inferred that Exemption 4 protects only paradigmatic examples of commercial information. The District Court began by explaining that information

qualifying as "commercial" under Exemption 4 "[*g*]*enerally*" involves "basic commercial operations, such as sales statistics, profits and losses, and inventories, or relate to the income-producing aspects of a business"—what the District Court described as "*core*" examples of "commercial' information. Sp. App'x 18 (emphases added; citations omitted); *see id.* (explaining that commercial information "*typically* reveal[s] something 'about the nature and character of … [a] business, or its revenues, expenses or income.'" (emphasis added; citation omitted)). But the District Court seemingly leaped from those observations about "typical[]" or "core" illustrations of commercial information to the conclusion that *only* information that fits into such "core" categories qualifies as "commercial."

Whatever the merit of the District Court's description of sales and revenue data as "core" commercial information, there is no basis for concluding that "commercial" information is *limited* to such core items. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101 (2012) ("[G]eneral words … are to be accorded their full and fair scope."). The District Court accordingly should have applied the ordinary meaning of "commercial," which includes but is not limited to those paradigmatic examples of "core" information . *See, e.g.*,

Schindler Elevator, 563 U.S. at 408 (applying the "ordinary meaning of the term 'transaction,'" which refers broadly "to many different types of business dealings between parties"); *Milner*, 562 U.S. at 570 (declining to confine FOIA's reference to "personnel rules and practices" to any "comprehensive list" of illustrative policies).

The District Court appeared to base its "narrower" reading of the term "commercial" on *Intellectual Property Watch* v. *U.S. Trade Representative*, 134 F. Supp. 3d 726 (S.D.N.Y. 2015), which the court described as reflecting this Court's interpretation, Sp. App'x 24. As an initial matter, *Intellectual Property Watch* is not a decision of this Court, and this Court has never cited it. In any event, *Intellectual Property Watch* does not support the District Court's reading. While that case described records that "reveal basic commercial operations" as "core" commercial information, it never suggested that Exemption 4 protected only that "core" information. 134 F. Supp. 3d at 744. To the contrary, it acknowledged that there is "commercial" information "at the margins" that Exemption 4 also protects. *Id.*

The District Court also purported to distinguish the many decisions from courts within the D.C. Circuit that have affirmed the withholding

of compliance-program information of the kind at issue. *See* Sp. App'x 24-32, 67. But the District Court's narrow interpretation, limiting "commercial" information to information that has "intrinsic commercial value or relate[s] to the income-producing aspects of a business," *id.* at 68-69, is flatly incompatible with the D.C. Circuit's holding that "Exemption 4 is *not* confined only to records that reveal basic commercial operations or relate to the income-producing aspects of a business," *Baker & Hostetler*, 473 F.3d at 319; *see, e.g.*, *100Reporters*, 248 F. Supp. 3d at 137 (finding compliance and training materials to be "commercial" even though they "do *not* appear to directly 'relate to the income-producing aspects of the business'" (emphasis added; citation omitted)).

At bottom, the District Court provided no valid basis for its "much too narrow … construction" of Exemption 4, which defies both the ordinary meaning of "commercial" and the overwhelming consensus of other courts, including this one. *Am. Airlines*, 588 F.2d at 870. If this Court reaches the Exemption 4 question, it should accordingly reject the

District Court's position and hold that the compliance-program information at issue can be withheld as "commercial" information.[3]

D. The District Court's Interpretation Has Far-Reaching Negative Consequences For Businesses, Consumers, The Government, And The Public

Not only does the District Court's interpretation contradict the best reading of Exemption 4, it would produce severely negative policy consequences—both in the context of negotiated agreements like the one in this case, and in the many other areas in which Exemption 4 applies.

1. Negotiated resolutions to criminal investigations of corporate defendants are common and generally beneficial to businesses, employees, consumers, government, and the public alike. *See, e.g.*, Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 113-16 (2006). Such resolutions—whether by plea agreement, deferred prosecution agreement, or other similar arrangements—"can help restore the integrity of a company's operations," "preserve the financial viability of a corporation," and avoid "a result that seriously harms innocent third parties who played no role

[3] Even if the Court does not reach the Exemption 4 question, it should make clear that its decision does not endorse the District Court's interpretation of Exemption 4.

in the criminal conduct," while "maintaining the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement." DOJ, *Justice Manual (f/k/a U.S. Attorneys' Manual)* § 9-28.1100.B ("Collateral Consequences") (2023), https://bit.ly/416iQJ5. DOJ's recently released update to guidance on the federal prosecution of corporate entities (the so-called Monaco Memo) accordingly reiterates the government's commitment to this approach. *See* Memo. from Deputy Att'y Gen. Lisa Monaco, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group* (Sept. 15, 2022), https://bit.ly/3KtxnHJ.

A central aspect of such agreements is a company's commitment to provide the government (often through a monitor or a court) with information demonstrating that it has adopted compliance systems to prevent a recurrence of the conduct that led to the criminal charges. *See* J.A. 43. Because such information frequently includes "proprietary, financial, confidential, and competitive business information," which—if disclosed—"could discourage cooperation," advantage competitors, or "impede pending or potential government investigations," agreements typically provide that the information will "remain non-public." J.A. 138; *see, e.g.*, *United States* v.

HSBC Bank USA, N.A., 863 F.3d 125, 130 (2d Cir. 2017) ("By the terms of the DPA, the Monitor's reports are intended to remain non-public.").

By ordering the disclosure of compliance-related information that a business provided to the government on the understanding that it would remain confidential, the District Court's holding in this case directly contravenes the premise of such agreements. The inevitable effect of that ruling is to make companies less likely to volunteer misconduct to the government or enter into such agreements. That in turn would delay the remediation of allegedly unlawful conduct and drive businesses and the government into high-stakes confrontation about whether to contest criminal charges. There is no basis to believe that Congress in enacting FOIA sought to produce such a broadly harmful result. *See, e.g.*, *Critical Mass Energy Project* v. *Nuclear Regul. Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc) ("It is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability to secure such data on a cooperative basis and injure the provider's interest in preventing its unauthorized release."); *M/A-Com Info. Sys., Inc.* v. *HHS*, 656 F. Supp. 691, 692 (D.D.C. 1986) ("[I]t is in the public interest to encourage

settlement negotiations in matters of this kind and it would impair the ability of HHS to carry out its governmental duties if disclosure of this kind of material under FOIA were required."); *see also, e.g.*, *Majuc*, 2022 WL 266700, at *5 (similar); *Leopold*, 2021 WL 124489, at *6 (similar).

2. The negative effects of the District Court's position in the criminal-enforcement context are reason enough to reject it, but the harms would hardly stop there. FOIA applies broadly to information held by federal agencies, and criminal enforcement is not the only (or even the most prominent) way in which the government obtains otherwise-confidential information from businesses. Under federal regulations and reporting requirements, companies in a wide range of industries must routinely submit sensitive commercial information to obtain government contracts, grants, approvals, and more. *See, e.g.*, David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1113-14 (2017). As just a few examples, federal law requires companies, in the ordinary course of business, to furnish information to agencies about securities, 15 U.S.C. § 77a; banking, 12 U.S.C. § 161; *id.* § 1842(a); labor management, 29 U.S.C. § 431; food purity, 7 U.S.C. § 138e; and drug safety and efficacy, 21 U.S.C. § 355(*i*). A rule narrowing FOIA's protection for

confidential commercial information to only certain "core" elements would disrupt settled expectations and create dire complications for businesses in regulated industries. At the least, and as this Court has recognized, such a rule would produce an incentive to "submit the bare minimum required," *Inner City Press*, 463 F.3d at 247 (citation omitted), which would disadvantage the government and the public alike.

While this case involves a FOIA request by journalists, the rule announced by the District Court would apply to all FOIA requests. As explained above, FOIA allows requests to be submitted by any person—including a business competitor. *See* p. 11, *supra*. Narrowing Exemption 4's protection could thus embolden competitors to seek confidential commercial information that they can exploit to their advantage. *See Pub. Citizen*, 66 F. Supp. 3d at 210 (explaining dangers of releasing a "roadmap [that] would allow competitors to avoid incurring the experiential or monitoring costs [the company] did in gaining the information").

This concern is hardly hypothetical. Companies routinely make requests—either directly or through third parties—to obtain otherwise confidential information on competitors to further their own commercial interests or to inform investment decisions. *See, e.g.*, *Honeywell Tech.*

Sols. v. *Dep't of the Air Force*, 779 F. Supp. 2d 14, 23 (D.D.C. 2011) (competitors used intermediary to seek information about Honeywell's successful bid for a government contract). Indeed, FOIA has spawned a "cottage industry" built on requesting records only to resell them to the highest bidder. *Bus. Record Exemption of the Freedom of Info. Act: Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 95th Cong., 69-70 (1977) (statement of Donald Kennedy, former FDA commissioner); *see* Kwoka, *FOIA, Inc.*, 65 DUKE L.J. at 1376-81; Brody Mullins & Christopher Weaver, *Open-Government Laws Fuel Hedge-Fund Profits*, WALL ST. J. (Sept. 23, 2013) (reporting that more than 100,000 of the three million FOIA requests filed between 2008 and 2013 were commercial requests from investors), http://bit.ly/3Kxbvvj. The Times itself reported decades ago that competitors were using FOIA as "a form of 'industrial espionage.'" Allen Weinstein, *Open Season on 'Open Government'*, N.Y. TIMES (June 10, 1979), https://bit.ly/3MBPYEl.

Congress adopted Exemption 4's protection for "commercial" information in large part to address that risk. *See* p. 12, *supra*. Rejecting the District Court's unjustified narrowing of the meaning of "commercial" is essential to preserving a healthy business environment and ensuring

that Exemption 4 has the "meaningful reach and application" that Congress intended. *John Doe Corp.*, 493 U.S. at 152.

II. THE IMPROVEMENT ACT'S FORESEEABLE HARM REQUIREMENT DOES NOT DEMAND A RISK OF "COMPETITIVE HARM"

Because the District Court found that the compliance-related information at issue was not "commercial" under Exemption 4, it did not conduct the further inquiry—now required under the Improvement Act—whether it is "reasonably foresee[able] that disclosure would harm an interest protected by [the] exemption." 5 U.S.C. § 552(a)(8)(A)(i)(I). But the answer to that question is straightforward in this case. As explained at length above, disclosing confidential information about a business's compliance program would directly implicate the interests protected by Exemption 4 by (among other things) providing an "unfair advantage to its competitors," "dissuad[ing the business] and others from cooperating with the government in the future," *Leopold*, 2021 WL 124489, at *6-7, and increasing the risks of fraud against the business and its customers by supplying corporate misfeasors with a "road map" "to exploit vulnerabilities in the [business'] compliance regime," *HSBC Bank*, 863 F.3d at 132. Accordingly, courts that have considered assertions of Exemption 4 to withhold compliance-program-related information after

the Improvement Act have found that Act's foreseeable-harm requirement readily satisfied. *Leopold*, 2021 WL 124489, at *6-7; *see Majuc*, 2022 WL 266700, at *5-6.

In its opening brief, the Times suggests (at 27) that the only "interest protected by" Exemption 4 for purposes of the Improvement Act is avoiding competitive harm, and that the Improvement Act therefore requires disclosure in this case absent a finding that Volkswagen would suffer competitive harm. As a practical matter, that argument should make little difference in this case, because disclosing the information related to Volkswagen's compliance program would foreseeably result in competitive harm for the reasons that courts have explained in routinely finding such information protected by Exemption 4. *See* pp. 21-22, *supra*.

The Times is wrong, however, that avoiding competitive harm is the only "interest protected by" Exemption 4 for purposes of the Improvement Act. In its recent decision in *Seife*, this Court applied the Improvement Act to Exemption 4 and held that the "interest" that Exemption 4 "protects" is the "submitter's commercial or financial interests in information that is of a type held in confidence and not disclosed to any member of the public by the person to whom it belongs." 43 F.4th at 234.

There is no basis in *Seife* or in the statutory text for limiting the "commercial or financial interests," *id.*, protected by Exemption 4 to *only* interests in avoiding competitive harm.

To be sure, avoiding competitive harm is certainly an interest protected by Exemption 4, but it is not the only one. As explained, revealing confidential commercial information also exposes businesses to risk from criminals or other perpetrators of fraud, jeopardizes the privacy and security of customer and employee information held by businesses, and reduces the incentives for businesses to cooperate with the government in regulatory and criminal-enforcement contexts. *See, e.g.*, *Majuc*, 2022 WL 266700, at *5-6; *Leopold*, 2021 WL 124489, at *6-7.[4] Avoiding all those harms—each of which is distinct from competitive harm—is among the "interest[s] protected by" Exemption 4. The Times' construction of the Improvement At is accordingly far too narrow.

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[4] Consider, for example, a business that as a matter of course stores the private personal information of its customers, such as a financial institution or a health-care provider. Disclosing the policies to protect that information would reveal any "vulnerabilities of those controls, and means of avoiding those controls," *Majuc*, 2022 WL 266700, at *5, making that business a prime target for a wrong-doer. The resulting harm then would not only be to the to the business itself but would cause immediate injury to those customers whose information may now be in the hands of a bad actor.

The Times' interpretation also conflicts with the Supreme Court's recent decision in *Argus Leader*. There, the Supreme Court expressly *rejected* an argument that Exemption 4 applies only when its disclosure would likely cause "competitive harm." 139 S. Ct. at 2366. The Times' position would essentially resurrect precisely the standard that the Supreme Court declined to adopt. The Times provides no valid basis for that defiant approach. Indeed, as the Supreme Court explained in *Argus Leader*, cases imposing a "competitive harm" requirement under Exemption 4 had existed for decades. *See id.* at 2364 (citing *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974)). Congress was presumably aware of such lower-court decisions when it enacted the Improvement Act in 2016, and yet it chose not to impose any "competitive harm" requirement. This Court should not do so either.

CONCLUSION

For these reasons, and those detailed in Appellees' briefs, this Court should reject the District Court's construction of Exemption 4 if it reaches that question.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Second Circuit Local Rules 29.1(c) and 32.1(a)(4)(A) because this brief is not longer than 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

Dated: April 14, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2023, I electronically filed the foregoing brief with the Clerk of Court for the U.S. Court of Appeals for the Second Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served via the CM/ECF system.

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