

FIXING FOIA: HOW THIRD-PARTY INTERVENTION THWARTS TRANSPARENCY

Amy Kristin Sanders* & William D. Kosinski**

The Supreme Court’s recent *Food Marketing Institute v. Argus Leader Media* decision—as well as other decisions permitting third-party intervention—has opened the door for increasing opposition to public records requests. This fundamental shift has global implications for transparency as other governments may follow our lead. But possible judicial and legislative reforms, including some modeled by other countries, to constrain third-party intervention and limit the definition of confidential information offer a glimmer of hope for transparency advocates.

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I. INTRODUCTION

When journalists—like those at South Dakota’s *Argus Leader*¹—file public records requests in the United States, they are prepared to take on government agencies that want to prevent the disclosure of those records. Until recently, though, news organizations had not anticipated squaring off against well-funded corporations and powerful industry groups seeking to limit access to government information.² But the Supreme Court’s 2019 ruling in *Food Marketing Institute v. Argus Leader Media*³—as well as other lower court decisions⁴ permitting broad third-party intervention in freedom of information cases—has opened the door for a new wave of corporate opposition to public records requests.⁵ This fundamental shift in how

* Associate Professor of Journalism and Law, School of Journalism and Media, The University of Texas at Austin. The author would like to thank her co-author William Kosinski as well as her phenomenal undergraduate research assistant Kirk von Kreisler for their contributions to this article. Much gratitude to the editors of the Journal of International Media and Entertainment Law for their helpful comments and suggestions throughout the publication process.

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¹ The *Argus Leader* is the daily newspaper in Sioux Falls, South Dakota. Owned by Gannett and part of the USA Today Network, it is South Dakota’s largest newspaper group with a Sunday circulation just over 33,000 as of March 2021. Argus Leader News Media Statement, All. for Audited Media (Mar. 31, 2021) (on file with author).

² In fact, in a 1979 case, the U.S. Supreme Court ruled that the federal Freedom of Information Act is a statute that presumes disclosure, and it does not create a private right of action to prevent agencies from disclosing information. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979). As a result, those seeking to prevent the government from disclosing information often rely on § 10(a) of the Administrative Procedure Act as the basis for their “reverse FOIA” actions. *Id.* at 285, 317.

³ 139 S. Ct. 2356 (2019).

⁴ *See, e.g., Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015) (permitting a third-party to claim competitive harm as a reason to exempt records from disclosure under Texas’ Public Information Act).

⁵ Reverse FOIA cases, as they are called, are not new. The first reported case occurred in 1973. *See generally* Charles River Park “A,” Inc. v. Dep’t of Hous. & Urb. Dev., 360 F. Supp. 212 (1973), *rev’d*, 519 F.2d 935 (1975).

our nation's freedom of information law is being construed, along with the country's recent declines in a number of freedom-measuring indices,⁶ has dramatic implications for government transparency on a global scale. As a wave of nationalist and populist sentiment spreads, other governments may be inclined to follow our lead with regard to freedom of information—a move that could usher in a new era of government secrecy worldwide. But approaches taken by other countries, including Canada and South Africa, as well as possible judicial and legislative reforms may offer a glimmer of hope for increased government transparency.

Initially, the *Argus Leader* case started out like any typical Freedom of Information Act (FOIA) request. The newspaper, based in Sioux Falls, requested the names and addresses of all stores participating in the federal food-stamp program, referred to as SNAP.⁷ In addition, it asked the U.S. Department of Agriculture (USDA) for SNAP redemption data for each store.⁸ After releasing the stores' names and addresses, the USDA invoked FOIA Exemption 4,⁹ claiming the redemption data was protected from disclosure as “trade secrets or commercial or financial information” that are “privileged or confidential.”¹⁰ As news organizations often do when the government denies access to information, the *Argus Leader* filed suit against the USDA in federal court.¹¹ The U.S. District Court for the District of South Dakota ordered disclosure, and the USDA declined to appeal that decision. However, the USDA alerted the retailers that had

⁶ As one example, the United States ranked 48th in Reporters Without Borders' 2019 World Press Freedom Index, down from 32nd in 2013. It noted, “[j]ournalists covering the Trump administration were denied access to information and events of public interest. The White House repeatedly broke records for the longest spans of time without a press briefing.” *RSF Index 2019: Institutional Attacks on the Press in the U.S. and Canada*, RSF REPS. WITHOUT BORDERS: WORLD PRESS FREEDOM INDEX, <https://rsf.org/en/rsf-index-2019-institutional-attacks-press-us-and-canada> (last visited Apr. 14, 2021); *United States*, RSF REPS. WITHOUT BORDERS: WORLD PRESS FREEDOM INDEX, <https://rsf.org/en/united-states> (last visited Apr. 14, 2021).

⁷ *Argus Leader Media v. U.S. Dep't of Agric.*, 900 F. Supp. 2d 997, 1000 (2012).

⁸ *Id.*

⁹ The relevant part of the Freedom of Information Act reads, “[t]his section does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential . . .” 5 U.S.C. § 552(b)(4).

¹⁰ 5 U.S.C. § 552(b)(4).

¹¹ *Argus Leader*, 900 F. Supp. 2d at 999.

provided redemption data. The Food Marketing Institute—a grocery store industry group—intervened¹² under Federal Rule of Civil Procedure 24(a).¹³

Subsequently, the *Argus Leader* again prevailed in the Eighth Circuit,¹⁴ which applied the rigorous “substantial [competitive] harm test” traditionally used in Exemption 4 cases. However, the U.S. Supreme Court overruled that decision, instead relying on the plain meaning of “confidential” to permit a significantly lower threshold for a third-party intervenor to overcome, essentially eliminating any requirement to prove harm.¹⁵ As a result, the *Argus Leader* decision dramatically undercut FOIA’s presumption of openness by reducing the standard for when third-party information will be considered confidential and cast a shadow on government transparency worldwide.

¹² As Stephen F. Hehl points out, “the reverse FOIA suit has become an extremely confused and complicated area of law. Perhaps the main reason for this confusion is Congress’ failure to explicitly provide for any such suit in the FOIA.” Stephen F. Hehl, *Reverse FOIA Suits After Chrysler: A New Direction*, 49 *FORDHAM L. REV.* 185, 187 (1979). As a result, corporations tried many different approaches before succeeding in reverse FOIA actions. *See id.* at 188.

¹³ (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) *In General*. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

See FED. R. CIV. P. 24(a) (providing for intervention by right and permissive intervention).

¹⁴ *Argus Leader Media v. U.S. Dep’t of Agric.*, 889 F.3d 914, 915–17 (8th Cir. 2018).

¹⁵ *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362–64, 2366 (2019).

Media law scholars Daxton “Chip” Stewart and Amy Kristin Sanders point out that the *Argus Leader* decision opens the door to increased secrecy through the use of public-private partnerships, allowing private organizations doing government work to take advantage of Exemption 4’s protections for confidential information: “The U.S. Supreme Court rarely hears Freedom of Information Act cases. But when it does, the decisions have the potential to carry significant weight as a statement on democratic principles by the highest court in the country despite only addressing the application and interpretation of federal open records law.”¹⁶

The decision in *Argus Leader* and some of the Court’s other recent FOIA decisions have chipped away at the public’s ability to access information about the government—a critical aspect of democratic governance. Not all jurisdictions allow the kind of third-party intervention that occurred in *Argus Leader*, and we believe that judicial action or legislative reform is necessary to preserve the press and public’s ability to engage in meaningful government oversight. We start by reviewing the central purpose of the Freedom of Information Act, outlining both Congress and the courts’ iterations of the statute’s importance. Next, we detail how the Court has construed FOIA’s exemptions in the past and the ways in which the *Argus Leader* decision contravenes the law’s central purposes. We then review alternative approaches—from both the United States and abroad—to address third-party interventions aimed at limiting access to public records. Finally, the article concludes with a call to action to restore access to these records, which fulfills FOIA’s central purpose and ensures government transparency.

II. THE CENTRAL PURPOSE OF THE FREEDOM OF INFORMATION ACT

“A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.”¹⁷

The purpose of the Freedom of Information Act is rooted in its origin. The law, which has since been internationally renowned as a

¹⁶ Daxton “Chip” Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records*, 1 J. CIVIC INFO. 1, 23–24 (2019).

¹⁷ S. REP. NO. 89-813, at 45 (1965).

pertinent tenet of government transparency,¹⁸ was drafted in response to increasing Cold War Era secrecy under the Eisenhower Administration in the mid-1950s and an inadequate public information statute.¹⁹ John Moss, then a House Representative from California's Third Congressional District, started campaigning for an improved public records law after being denied access to information related to the firings of thousands of federal employees accused of being communist sympathizers.²⁰ Fearful of a government operating without any mechanism for its citizens to inform themselves about its actions, Moss said, "The present trend toward government secrecy could end in a dictatorship. The more information that is made available, the greater will be the nation's security."²¹

Journalists, lawmakers, scientists, and members of the public joined Moss' movement to hold the federal government accountable by giving Congress, the press, and the general public the ability to access records documenting the federal government's actions.²² Moss eventually found a Republican co-sponsor, Donald Rumsfeld, to help push a law opposed by many in the federal government—including every federal agency and department²³—through Congress. After nearly a decade of work, Moss brought Senate Bill 1160 to the floors

¹⁸ The concept of granting access to government information has existed for hundreds of years. Sweden enacted its FOI law in 1766, and both Colombia and Finland developed forms of FOI legislation in the 19th and early 20th centuries, respectively. At the time of its passage in 1966, the United States' FOIA was considered unprecedented in its comprehensive scope and served as a catalyst for countries all over the world to pass their own FOI laws. Denmark and Norway passed their FOI laws in 1970, followed by France and the Netherlands in 1978, and later followed by Australia, Canada, and New Zealand in the early 1980s. In all, two countries had FOI laws before the United States; now, over 100 countries have some codified way for the public to access government information. See John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85 (2006); and TONY MENDEL, UNESCO, FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY 20–23 (2d ed. 2008).

¹⁹ See *Freedom of Information Act*, HISTORY, <https://www.history.com/topics/1960s/freedom-of-information-act> (last updated Aug. 21, 2018).

²⁰ MICHAEL R. LEMOV, *PEOPLE'S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS* (2011).

²¹ HISTORY, *supra* note 19.

²² *Id.*

²³ *History of FOIA*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/transparency/history-of-foia> (last visited Apr. 14, 2021).

of the Senate and House, both of which recognized the importance of broad government disclosure with narrow exemptions in their final reports on what would eventually become the Freedom of Information Act.²⁴ Notably, in recognizing Section 3 of the Administrative Procedure Act's failure to give the public adequate access to information,²⁵ the Senate wrote in its report:

It is the very purpose of the [FOIA] to . . . establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld

At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights . . .

It is not an easy task to balance the opposing interests, but it is not an impossible one either Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.²⁶

Similarly, the House wrote in its report that the Freedom of Information Act would serve a vital role in America's democracy by allowing agencies to withhold information only under the law's nine narrow exemptions.²⁷ By improving upon Section 3 of the

²⁴ S. REP. NO. 89-813, at 40-41 (1965).

²⁵ Section 3 of the Administrative Procedure Act, 5 U.S.C. § 1002 (1964 ed.), which was titled "Public Information" was intended to disclose government information, contained broadly worded exemptions that effectively allowed the federal government to unilaterally prevent any types of disclosure. *See id.* at 38 (stating that Section 3 was "full of loopholes which allow[ed] agencies to deny legitimate information to the public. Innumerable times it appear[ed] that information [was] withheld only to cover up embarrassing mistakes or irregularities").

²⁶ *Id.*

²⁷ *See* H.R. REP. NO. 89-1497, at 22, 28-33 (1966) (clarifying generally the exemptions to be construed narrowly).

Administrative Procedure Act,²⁸ FOIA's greater access to government documents would provide "the necessary machinery to assure the availability of Government information necessary to an informed electorate."²⁹

Moss eventually garnered enough votes to get his bill passed.³⁰ On July 4, 1966, President Lyndon B. Johnson signed the bill into law.³¹ He issued a signing statement praising the law's structure of balancing government transparency with interests of privacy, national security, and the facilitation of government operations.³² President Johnson made clear he and his administration would fully embrace the law,³³ and he stated, "I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."³⁴

Even though Congress anticipated FOIA's exemptions to be unequivocal and narrow,³⁵ federal agencies quickly initiated litigation to prevent the public from viewing and evaluating their documents. But the plan did not succeed. In the Supreme Court's first FOIA-related decision,³⁶ the Court endorsed the statute's central purpose of broad disclosure and narrow exemptions even though it largely ruled in favor of non-disclosure. After thirty-three members of the House of Representatives filed a request to the Nixon Administration for documents and recommendations relating to an upcoming underground nuclear test, the administration claimed it could withhold

²⁸ Similar to the Senate, the House recognized that Section 3 of the Administrative Procedure Act "though titled 'Public Information' and clearly intended for that purpose, has been used as an authority for withholding, rather than disclosing, information." *Id.* at 25.

²⁹ *Id.* at 33.

³⁰ See William M. Blair, *INFORMATION BILL SENT TO JOHNSON; House Votes, 307-0, to Open Federal Records to Public*, N.Y. TIMES, June 21, 1966, at 21.

³¹ HISTORY, *supra* note 19.

³² Presidential Statement on Signing the Freedom of Information Act, 1966, 2 PUB. PAPERS 699 (July 4, 1966).

³³ *Id.* (stating, "I am instructing every official in this administration to cooperate with this end and to make information available to the full extent consistent with individual privacy and with the national interest").

³⁴ *Id.*

³⁵ For an explanation of the purposes and scope of the exemptions, see H.R. REP. NO. 89-1497, at 28-33 (1966) and S. REP. NO. 89-813, at 37-38, 44-45 (1965).

³⁶ *EPA v. Mink*, 410 U.S. 73 (1973).

the information under Exemptions 1 and 5.³⁷ The D.C. Circuit remanded the case back to the U.S. District Court for an *in camera* review of whether some of the documents were exempt.³⁸ On appeal, the U.S. Supreme Court granted *certiorari*, analyzing FOIA's legislative history and both the Senate and House reports to guide its decision.³⁹ Justice White wrote for the majority: "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands."⁴⁰ The *Mink* Court's reliance on FOIA's legislative history, in addition to its enumeration of the law's central purpose, established a clear path for lower courts as they navigated the law's nine stated exemptions.

Just three years later, in *Department of the Air Force v. Rose*,⁴¹ the Court reinforced *Mink* and further elaborated FOIA's importance. In *Rose*, the Air Force argued FOIA permitted it to withhold summaries of honor and ethics hearings at the U.S. Air Force Academy.⁴² The Academy claimed that Exemptions 2 and 6, both of which are intended to protect personal privacy, applied because the summaries contained information that would constitute invasions of privacy, if disclosed.⁴³ Citing *Mink* and the Senate and House reports,⁴⁴ Justice William Brennan wrote for the majority that the summaries must be disclosed after being properly redacted to protect privacy interests to meet the law's goal of the broadest responsible disclosure:

To make crystal clear the congressional objective—in the words of the Court of Appeals, “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny”—Congress provided in 552 (c)

³⁷ *See id.* at 74–75 (noting that the Freedom of Information Act exempts documents that are “specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy” or “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”) (citations omitted).

³⁸ *Id.* at 78.

³⁹ *Id.* at 79–91.

⁴⁰ *Id.* at 80.

⁴¹ 425 U.S. 352 (1976).

⁴² *Id.* at 357.

⁴³ *Id.*

⁴⁴ *Id.* at 360–62.

that nothing in the Act should be read to “authorize withholding of information or limit the availability of records to the public, except as specifically stated” But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. “These exemptions are explicitly made exclusive” and must be narrowly construed.⁴⁵

Despite early articulations in favor of a narrow construction of FOIA’s exemptions, the Court has not always followed that path. Fifteen years after *Rose*, the Court again returned FOIA’s central purpose—this time to justify withholding information in the name of privacy. In *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*,⁴⁶ the Court unanimously ruled that Exemption 7(C) prevents the disclosure of documents compiled for law enforcement purposes when disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”⁴⁷ Although the individual documents were otherwise available from other sources, “when the information is in the Government's control as a compilation, rather than as a record of ‘what the Government is up to,’ the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir.”⁴⁸ In other words, the Court emphasized that disclosing information about a person’s criminal records would violate personal privacy if it did not provide meaningful insight into the government’s conduct.⁴⁹ More explicitly, Justice Stevens wrote: “[T]he FOIA’s central purpose is to ensure that the *Government’s* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens

⁴⁵ *Id.* at 361 (citations omitted).

⁴⁶ 489 U.S. 749 (1989).

⁴⁷ *Id.* at 751, 780 (citation omitted).

⁴⁸ *Id.* at 780.

⁴⁹ [A]s a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that, when the request seeks no ‘official information’ about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is ‘unwarranted.’

to be in the warehouse of the Government be so disclosed.”⁵⁰ In so ruling, the Court made clear that the balance must tip in favor of illuminating government conduct before it could justify the kind of disclosure permitted in *Rose*.⁵¹ *Reporters Committee* effectively expanded the scope of Exemption 7(C). Legal scholars have long criticized the ruling, which has been used to justify the government’s decision to withhold information in many subsequent decisions.⁵²

But the courts have also cited *Reporters Committee*, along with *Mink* and *Rose*, in many decisions that ultimately mandated disclosure of documents where doing so supported FOIA’s central purpose—providing the public with knowledge of the government actions, subject to narrow exemptions.⁵³ The Supreme Court has long recognized and relied on this central purpose when considering various important questions relating to disclosure of government information. Regardless of the specific exemption at issue—be it privacy, national security or confidential information—the Court has routinely been

⁵⁰ *Id.* at 774.

⁵¹ See Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporters Committee “Central Purpose” Reformulation*, 54 ADMIN. L. REV. 983, 989–92 (2002).

The Court’s definition of the FOIA’s “central purpose” [in *Reporters Committee*] raises serious questions about the future of public access to vast stores of government-held information that does not necessarily reveal government operations but that still holds great public interest. . . .

. . . .

The 1989 *Reporters Committee* opinion seemingly contravenes the legislative intent of the FOIA by narrowly defining a disclosable record as only official information that reflects an agency’s performance and conduct. In effect, the ruling creates a *court*-crafted FOIA exemption, which operates as a performance or conduct test.

Id. at 989–92 (footnote omitted).

⁵² See, e.g., *Reed v. NLRB*, 927 F.2d 1249 (D.C. Cir. 1991); *Fed. Lab. Rels. Auth. v. U.S. Dep’t of Def.*, 977 F.2d 545 (11th Cir. 1992); *Fed. Lab. Rels. Auth. v. U.S. Dep’t of Navy*, 975 F.2d 348 (7th Cir. 1992); *U.S. Dep’t of Def. v. Fed. Lab. Rels. Auth.*, 510 U.S. 487 (1994); and *Nat’l Archives & Recs. Admin. v. Favish*, 541 U.S. 157 (2004).

⁵³ See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); *FBI v. Abramson*, 456 U.S. 615 (1982); *U.S. Dep’t of Just. v. Tax Analysts*, 492 U.S. 136, 142 (1989); *Fed. Lab. Rels. Auth. v. U.S. Dep’t of Com.*, 954 F.2d 994 (4th Cir. 1992); and *Fed. Lab. Rels. Auth. v. U.S. Dep’t of Navy*, 966 F.2d 747 (3d Cir. 1992).

required to strike a balance between the exemptions' interests and FOIA's interest in the "fullest responsible disclosure."⁵⁴

More than a half-century later, FOIA no longer holds the same promise it did when President Johnson signed the law into effect. As a result of a handful of Supreme Court decisions, including *Reporters Committee*, the exemptions have grown in ways that prevent the fullest responsible disclosure. Further, even though FOIA has been amended seven times since first enacted in 1966,⁵⁵ it has not kept pace with other freedom of information laws around the world.⁵⁶ As courts have broadened FOIA's exemptions and digital technology has evolved, disclosure has waned. Once considered a key statute necessary to a democracy, the Freedom of Information Act no longer lives up to its legacy.

III. THE UNRAVELING OF ACCESS RIGHTS

Although *Argus Leader* may appear to strike a fatal blow to FOIA, in reality, the Court has slowly unraveled access rights over time. On its face, the *Reporters Committee* decision paid homage to the importance of broad government disclosure,⁵⁷ but the Court's interpretation of Exemption 7(C)⁵⁸ has allowed subsequent courts wide

⁵⁴ S. REP. NO. 89-813, at 38 (1965).

⁵⁵ For a complete list and descriptions of FOIA's amendments, see *Legislative History*, FOIA WIKI, https://foia.wiki/wiki/Legislative_History (last modified Sept. 20, 2018, 1:04 PM).

⁵⁶ See David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1098–99 (2017).

⁵⁷ See *supra* text accompanying note 50.

⁵⁸ For a discussion of *Reporters Committee*'s, 489 U.S. at 773–74, restrictive definition of the FOIA's central purpose, see Halstuk & Davis, *supra* note 51; Michael Hoefges et al., *Privacy Rights Versus FOIA Disclosure Policy: The "Uses and Effects" Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 WM. & MARY BILL RTS. J. 1, 20–24 (2003); Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 543–46 (2006); Jane E. Kirtley, "Misguided in Principle and Unworkable in Practice": *It is Time to Discard the Reporters Committee Doctrine of Practical Obscurity (and Its Evil Twin, the Right to Be Forgotten)*, 20 COMM. L. & POL'Y 91 (2015); and Clay Calvert et al., *Reining in Internet-Age Expansion of Exemption 7(C): Towards a Tort Law Approach for Ferreting Out Legitimate Privacy Concerns and Unwarranted Intrusions Under FOIA*, 70 SMU L. REV. 255, 264–68 (2017).

latitude to prevent the disclosure of information, undermining FOIA's central purpose. At the time, Exemption 7(C) stated that information cannot be disclosed when the release "could reasonably be expected to constitute an unwarranted invasion of personal privacy."⁵⁹ A 1974 FOIA amendment had omitted the word "clearly" in front of "unwarranted."⁶⁰ As a result, the Court reasoned that this amendment made the exemption "somewhat broader" in its application than other privacy exemptions.⁶¹

Rejecting Reporters Committee's argument that personal privacy interests are nonexistent when a government agency compiled publicly available personal information,⁶² the Court looked at both the common law and literal understandings of the word "privacy" but relied much more heavily on the dictionary definition⁶³—a trend that recurs in *Argus Leader* and other FOIA decisions. Interpreting "privacy" to mean "not otherwise 'freely available,'"⁶⁴ the Court relied on this broader definition to decide that disclosing a government compilation of otherwise publicly available records containing personal information constituted an unwarranted invasion of privacy.⁶⁵

The Court's expansive interpretation of Exemption 7(C), along with its reliance on privacy's denotative meaning, broadened the

⁵⁹ 5 U.S.C. § 552(b)(7)(C).

⁶⁰ See H.R. 12471, 93rd Cong. (1974).

⁶¹ *Reporters Committee*, 489 U.S. at 756.

⁶² *Id.* at 762–63.

⁶³ According to Webster's initial definition, information may be classified as "private" if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." Recognition of *this* attribute of a privacy interest supports the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap-sheet and revelation of the rap-sheet as a whole.

See *id.* at 763–64 (emphasis added) (footnote omitted).

⁶⁴ *Id.* at 764.

⁶⁵ [W]e hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."

Id. at 780.

exemption's applicability.⁶⁶ As a result, *Reporters Committee* laid the foundation for the continued enlargement of Exemption 7(C). In the years following the decision, for example, journalists filed hundreds of complaints with the Reporters Committee for Freedom of the Press, claiming that federal agencies were overusing privacy exemptions and impeding their access to government information.⁶⁷ Moreover, *Reporters Committee's* more restrictive articulation of FOIA's central purpose⁶⁸ has not only been used in subsequent Exemption 7 cases⁶⁹ but also in cases defining covered agencies and records.⁷⁰ Legal scholars widely consider *Reporters Committee* to be one of the

⁶⁶ See Halstuk & Davis, *supra* note 51. See also *supra* note 50 and accompanying text.

⁶⁷ REPORTERS COMM. FOR FREEDOM OF THE PRESS, 105TH CONG., REPORT ON RESPONSES AND NON-RESPONSE OF THE EXECUTIVE AND JUDICIAL BRANCHES TO CONGRESS' FINDING THAT THE FOI ACT SERVES 'ANY PURPOSE' 2 (Comm. Print 1998) [hereinafter RCFP REPORT].

⁶⁸ See *supra* text accompanying note 50. See also RCFP REPORT, *supra* note 67, at 10–11 (explaining how this articulation of FOIA's central purpose restricted what information could be disclosed).

⁶⁹ Halstuk & Davis, *supra* note 51, at 1000–02. Halstuk & Davis compiled the following list of cases that used *Reporters Committee* when evaluating privacy exemptions in FOIA disputes: Sheet Metal Workers Int'l Ass'n, Local Union No. 19 v. U.S. Dep't of Veteran Affs., 135 F.3d 891 (3d Cir. 1998); Kimberlin v. U.S. Dep't of Just., 139 F.3d 944 (D.C. Cir. 1998); McQueen v. United States, 179 F.R.D. 522 (S.D. Tex. 1998); Ligorner v. Reno, 2 F. Supp. 2d 400 (S.D.N.Y. 1998); Lurie v. U.S. Dep't of Army, 970 F. Supp. 19 (D.D.C. 1997); Ctr. to Prevent Handgun Violence v. U.S. Dep't of Treasury, 981 F. Supp. 20 (D.D.C. 1997); Sheet Metal Workers Int'l Ass'n, Local No. 9 v. U.S. Air Force, 63 F.3d 994 (10th Cir. 1995); Manna v. U.S. Dep't of Just., 51 F.3d 1158 (3d Cir. 1995), *cert. denied*, 516 U.S. 975 (1995); Exner v. U.S. Dep't of Just., 902 F. Supp. 240 (D.D.C. 1995); Jones v. FBI, 41 F.3d 238 (6th Cir. 1994); Fed. Lab. Relations Auth. v. U.S. Dep't of Navy, 975 F.2d 348 (7th Cir. 1992); Hunt v. FBI, 972 F.2d 286 (9th Cir. 1992); Hale v. U.S. Dep't of Just., 973 F.2d 894 (10th Cir. 1992). Halstuk & Davis, *supra* note 51, at 996 n.76.

⁷⁰ See Christopher P. Beall, Note, *The Exaltation of Privacy Doctrines over Public Information Law*, 45 DUKE L.J. 1249, 1273–80 (1996). Beall identified and analyzed three cases where courts applied *Reporters Committee's*, 489 U.S. 749, "central purpose" definition in disputes not relating to Exemptions 6 and 7 (the privacy exemptions): Sweetland v. Walters, 60 F.3d 852 (D.C. Cir. 1995) (relying on *Reporters Committee* to help define what qualifies as an agency subject to FOIA); Baizer v. U.S. Dep't of Air Force, 887 F. Supp. 225 (N.D. Cal. 1995) (relying on *Reporters Committee* to help define agency records); and Vazquez-Gonzalez v. Shalala, 1995 U.S. Dist. LEXIS 5671 (D.P.R. 1995). Beall, *supra*.

Supreme Court's greatest missteps in its FOIA jurisprudence.⁷¹ Notably, *Reporters Committee* greatly increased the burden requestors must overcome to obtain government records that may implicate any privacy exemption by requiring requestors to prove the documents will shed light on government actions,⁷² which can be nearly impossible if they do not already have access to the documents.

In 2004, the Court further limited FOIA's effectiveness when it decided *National Archives & Records Administration v. Favish*.⁷³ In *Favish*, the Court relied on *Reporters Committee* to further extend Exemption 7(C)⁷⁴ to include the personal privacy interests of a person's family.⁷⁵ Writing for the majority, Justice Anthony Kennedy declined to accept the argument that "the individual who is the subject of the information is the only one with a privacy interest."⁷⁶ Expanding the exemption, he wrote:

The right to personal privacy is not confined, as *Favish* argues, to the "right to control information about oneself" To say that the concept of personal privacy must "encompass" the individual's control of information about himself does not mean it cannot encompass other personal privacy interests as well.⁷⁷

Embracing the Court's broad concept of privacy established in *Reporters Committee*, Justice Kennedy wrote that a person's family also possesses the same privacy right outlined in Exemption 7(C) and can rightfully object to disclosure of their loved one's personal information.⁷⁸ Such an interpretation of FOIA undermines congressional intent that exemptions be narrowly construed. The Court's opinion did not mention any *explicit* recognition from

⁷¹ See, e.g., sources cited *supra* note 58.

⁷² See Hehl, *supra* note 12, at 190.

⁷³ 541 U.S. 157 (2004).

⁷⁴ 5 U.S.C. § 552(b)(7)(C).

⁷⁵ *Favish*, 541 U.S. at 165–67.

⁷⁶ *Id.* at 165.

⁷⁷ *Id.* (quoting Brief on the Merits of Respondent Allan J. Favish at 4, Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157 (2003) (No. 02-954)).

⁷⁸ See *id.* (stating that "the concept of personal privacy under Exemption 7(C) is not some limited or 'cramped notion' of that idea" (quoting U.S. Dep't of Just. v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989))).

Congress that the definition of “personal privacy” in Exemption 7(C) was intended to include the privacy interests of a person’s family.⁷⁹ Such a reading by the Court is particularly ironic given more recent decisions—including *Argus Leader*—that purport to rely on “plain language” when interpreting FOIA’s exemptions.

Under *Favish*, requestors face a higher burden when seeking information potentially implicating an “unwarranted invasion of privacy.”⁸⁰ Contrary to the statute itself and previous case law,⁸¹ requestors must now show why they are requesting the information when Exemption 7(C) objections are made.⁸² Requestors must demonstrate a “significant”⁸³ public interest in seeking the information and that releasing the information is “likely to advance that interest.”⁸⁴ Information can be withheld if the requestor fails to fulfill either prong.⁸⁵

Many legal scholars argue that *Favish*’s two-pronged test fundamentally altered FOIA and further constrained the public’s ability to access information.⁸⁶ In many ways, *Favish* shifted the burden to the requesting party. By its terms, FOIA does not require the

⁷⁹ Justice Kennedy’s discussion on the definition of privacy did not include any reference to S. REP. NO. 89-813 (1965), which the Court used in *EPA v. Mink*, 410 U.S. 73 (1973), *U.S. Dep’t of Air Force v. Rose*, 425 U.S. 352 (1976), *Reporters Committee*, 489 U.S. 749, and other FOIA-related cases as the leading indicator of Congress’ intent when passing the FOIA. *See generally Favish*, 541 U.S. 157.

⁸⁰ *See generally Favish*, 541 U.S. 157.

⁸¹ [A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information. A person requesting the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose. Furthermore, as we have noted, the disclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all.

See id. at 172.

⁸² *Id.*

⁸³ *See id.* (defining “specific” as “more specific than having the information for its own sake”).

⁸⁴ *Id.*

⁸⁵ *See id.*

⁸⁶ Halstuk & Chamberlin, *supra* note 58, at 552–53, 560–64. *See also* Lauren Bemis, Note, *Balancing a Citizen’s Right to Know with the Privacy of an Innocent Family: The Expansion of the Scope of Exemption 7(C) of the Freedom of Information Act Under National Archives & Records Administration v. Favish*, 25 J. NAT’L ASS’N ADMIN. L. JUDGES 507, 540–43 (2005).

requestor to prove that a significant public interest lies in the information or that releasing the information will further that interest; it states instead that the government agency must demonstrate why the information can be withheld.⁸⁷ Lauren Bemis clearly articulated the resulting quandary: “How can an individual show that the government is acting improperly when they cannot have access to the documents to prove impropriety? The courts have created a catch-22 for requestors.”⁸⁸ When assessing the combined impact of *Reporters Committee* and *Favish*, Martin E. Halstuk and Bill F. Chamberlin noted:

[T]he Supreme Court has created [a] FOIA-related privacy framework that has reset the balance significantly in favor [of] privacy over disclosure. Taken as a whole, the Court-crafted privacy principles create [an] irrebuttable presumption of nondisclosure that stands in stark contrast to FOIA’s voluminous legislative record. . . .

Congress has repeatedly reiterated the statute’s strong presumption of government openness, and the Supreme Court had consistently recognized this principle for more than two decades after the FOIA’s enactment. The Court’s current FOIA privacy framework is the product of judicial overreaching grounded in historical revisionism that is clearly at odds with the bedrock democratic principles of accountability and transparent governance in an open society, as envisioned by FOIA’s framers forty years ago.⁸⁹

IV. CAN THE COURT CORRECT ITS COURSE?

Perhaps now-Chief Justice John Roberts was paying attention when legal scholars excoriated the Rehnquist Court’s decisions in *Reporters Committee* and *Favish*. His 2011 majority opinion in *FCC v. AT&T Inc.*⁹⁰ prevented Exemption 7(C) from being further

⁸⁷ See 5 U.S.C. § 552(a)(8).

⁸⁸ Bemis, *supra* note 86, at 540.

⁸⁹ Halstuk & Chamberlin, *supra* note 58, at 563–64.

⁹⁰ 562 U.S. 397, 407–09 (2011).

expanded. Just like *Reporters Committee* and *Favish*, AT&T again turned on the meaning of one word: “personal” in the phrase “personal privacy.”⁹¹ In this case, AT&T argued that Exemption 7(C) prevented disclosure of “[a]ll pleadings and correspondence”⁹² relating to an FCC investigation into the company⁹³ because “personal” is the adjective form of the term “person,” which Congress defined in the Administrative Procedure Act to include corporations.⁹⁴ The Court unanimously rejected this argument.⁹⁵

Justice Roberts, writing for the majority, opined that adjectives do not always reflect the meaning of their corresponding nouns.⁹⁶ Furthermore, he wrote that “person” was defined in FOIA, but “personal” was not and thus looked at the word’s “ordinary meaning.”⁹⁷ Without making reference to a dictionary, Justice Roberts explained that “[p]ersonal’ ordinarily refers to individuals”⁹⁸ and is not generally used to describe corporate entities’ actions, feelings, communications, characteristics, or thoughts. “In fact, we often use the word ‘personal’ to mean precisely the *opposite* of business related.”⁹⁹ This interpretation of the word “personal” made even greater sense, Justice Roberts asserted, when looking at the terms surrounding it.¹⁰⁰ “‘Personal’ in the phrase ‘personal privacy’ conveys more than just ‘of a person.’ It suggests a type of privacy evocative of human concerns—not the sort usually associated with an entity like, say, AT&T.”¹⁰¹ Lastly, Justice Roberts inferred the purpose of Exemption 7(C) by examining the entire statute, reviewing the exemption’s legislative and judicial history, and comparing Exemption 7(C) to FOIA’s other exemptions relating to privacy and financial interests.¹⁰² He concluded

⁹¹ *See id.* at 405–09.

⁹² *AT&T Inc. v. FCC*, 582 F.3d. 490, 493 (2009), *rev’d sub nom.* *FCC v. AT&T*, 562 U.S. 397 (2011).

⁹³ *See* Brief for Respondent AT&T Inc. at 4, *FCC v. AT&T Inc.*, 562 U.S. 397 (2010) (No. 09-1279).

⁹⁴ *See also AT&T*, 562 U.S. at 497.

⁹⁵ *See id.*

⁹⁶ *See id.* at 402–03 (giving numerous examples of such words).

⁹⁷ *Id.* at 403 (quoting *Johnson v. United States*, 559 U.S. 133, 138 (2010)).

⁹⁸ *Id.*

⁹⁹ *Id.* at 403–04.

¹⁰⁰ *Id.* at 405–07.

¹⁰¹ *Id.* at 406.

¹⁰² *See id.* at 406–08 (discussing how the creation of Exemption 7(C), the Court’s precedents, and Exemptions 4 and 6 all support an understanding of “personal

that Exemption 7(C) applied solely to individual people, not corporations.¹⁰³

Although Justice Roberts' rigorous analysis of Exemption 7(C) emphasized FOIA's legislative intent, it did not place adequate weight on the statute's central purpose. Nonetheless, *AT&T* stands out when compared with *Reporters Committee* and *Favish*. Journalists, watchdog organizations, and other civil society groups filed amicus briefs arguing that corporate wrongdoing would be shielded from public scrutiny were the Court to construe "personal" to include private corporations: "Recognizing corporate personal privacy would 'result in the withholding of agency records to which the public should have access, including records documenting corporate malfeasance.'"¹⁰⁴ Ultimately, Justice Roberts' decision prevented a further watering down of Exemption 7(C), yet it could not undue the harm *Reporters Committee* had inflicted.¹⁰⁵

Less than a week after deciding *AT&T*, the Court issued its decision in *Milner v. Department of the Navy*.¹⁰⁶ There, the Court narrowed the reach of Exemption 2, which prevents the disclosure of information "related solely to the internal personnel rules and practices of an agency."¹⁰⁷ After *Rose*, lower courts had established two differing interpretations of the exemption, often dubbed as "Low 2" and "High 2."¹⁰⁸ The narrower "Low 2" exemption adopted a strict construction

privacy" that does not include corporations); see also Maeve E. Huggins, *Don't Take It Personally: Supreme Court Finds Corporations Lack Personal Privacy under FOIA Exemptions*, 19 COMM.LAW CONSPECTUS 481, 506–07 (2011).

¹⁰³ See *AT&T*, 562 U.S. at 409–10.

We reject the argument that because 'person' is defined for purposes of FOIA to include a corporation, the phrase 'personal privacy' in Exemption 7(C) reaches corporations as well. The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations. We trust that AT&T will not take it personally.

Id.

¹⁰⁴ Huggins, *supra* note 102, at 500–01 (citing Petition for Writ of Certiorari at 29, *FCC v. AT&T Inc.*, 562 U.S. 397 (2010) (No. 09-1279)).

¹⁰⁵ See RCFP REPORT, *supra* note 67.

¹⁰⁶ *Milner v. Dep't of Navy*, 562 U.S. 562 (2011).

¹⁰⁷ 5 U.S.C. § 552(b)(2).

¹⁰⁸ See Ashley E. Short, *The Taming of the "2": Milner v. Department of the Navy Signals the Curtain Call on Debates Surrounding the Scope of FOIA's Exemption*

approach to Exemption 2, protecting only documents related to personnel matters such as pay, pensions, benefits, vacation, etc.¹⁰⁹ The “High 2” interpretation relied on a broader construction of the exemption that applied to any internal documents that would “risk circumvention of the law” if disclosed.¹¹⁰

Justice Kagan, writing for the Court in an 8–1 decision, struck down the “High 2” interpretation as improper. She reasoned, “the only way to arrive at High 2 is by taking a red pen to the statute—‘cutting out’ some words and ‘pasting in others’ until little of the actual provision remains.”¹¹¹ Looking back at FOIA’s “‘goal of broad disclosure’ and insist[ing] that the exemptions be ‘given a narrow compass,’”¹¹² Justice Kagan acknowledged the plain meaning of the word “personnel” taken with congressional understanding results in a narrower interpretation consistent with FOIA’s legislative intent.¹¹³ As a result, the Court held Exemption 2’s phrase “personnel rules and practices” to mean “rules and practices dealing with employee relations or human resources.”¹¹⁴

Multiple times in FOIA cases, the Court has relied on its dictionary to determine the plain-language meaning of words. In *Milner*, Justice Kagan turned to a 1966 version of the Webster’s Third New International Dictionary for a definition of the word “personnel.”¹¹⁵ In *Reporters Committee*, Justice Stevens used a 1976 version of the Webster’s Third New International Dictionary when evaluating the language Exemption 7(C).¹¹⁶ In *AT&T*, Chief Justice Roberts cited a

2, 63 MERCER L. REV. 1419, 1425 (2012) (explaining how *Rose* did not make clear “whether Exemption 2 applies to situations where disclosure may risk circumvention of agency regulation”). Five years later in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981), the D.C. Circuit Court of Appeals “determined that if an agency record is ‘predominately internal []’ and its disclosure ‘significantly risks circumvention of agency regulations or statutes,’ then Exemption 2 protects the material from mandatory disclosure.” *Crooker*, 670 F.2d at 1074.

¹⁰⁹ See *Milner*, 562 U.S. at 567.

¹¹⁰ See *id.*; Short, *supra* note 108, at 1420, 1426.

¹¹¹ *Milner*, 562 U.S. at 573 (quoting *Elliott v. Dep’t of Agric.*, 596 F.3d 842, 845 (D.C. Cir. 2010)).

¹¹² *Id.* at 571 (citing *Dep’t of Just. v. Tax Analysts*, 492 U.S. 136, 151 (1989)).

¹¹³ See *id.* at 569–72.

¹¹⁴ *Id.* at 570.

¹¹⁵ See *id.* at 569.

¹¹⁶ See *Dep’t of Just. v. Reprs. Comm. for Freedom of the Press*, 489 U.S. 749, 763–64 (1989); see also *supra* notes 63–65 and accompanying text.

2002 version of the Webster’s Third New International Dictionary¹¹⁷ to argue that adjectives and nouns can take on different meanings and pointed to many examples, including the difference between the noun “crab” and the adjective “crabbed.”¹¹⁸ Nearly one decade later in *Argus Leader*, Justice Gorsuch pulled out the 1963 version of Webster’s Seventh New Collegiate Dictionary, among others, to determine “confidential” meant “private or secret” when Congress passed the law.¹¹⁹

But, we argue that the Court must consider the plain meaning of words against FOIA’s legislative history, as Justice Kagan did in *Milner*.¹²⁰ Doing so, rather than simply relying on the dictionary alone, “instead gives the exemption the ‘narrower reach’ Congress intended through the simple device of confining [Exemption 2]’s meaning to its words.”¹²¹ Justice Kagan’s approach rightly mirrors Justice Roberts’ in *AT&T*, where he examined the exemption against the backdrop of the entire law and its other exemptions.¹²² Justice Gorsuch’s approach in *Argus Leader* instead dismissed the statute’s legislative intent and FOIA’s central purpose, calling the D.C. Circuit’s reliance on “substantial competitive harm” a “selective tour through the legislative history.”¹²³

The Court’s lack of consistency in interpreting FOIA’s exemptions is troubling, even though some of the Court’s recent decisions had signaled a return toward the law’s central purpose. By rejecting the notion of a “High 2” in *Milner* and by narrowly construing “personal privacy” in Exemption 7(c), the Court limited the government’s ability

¹¹⁷ *FCC v. AT&T Inc.*, 562 U.S. 397, 402 (2011).

¹¹⁸ “The noun ‘crab’ refers variously to a crustacean and a type of apple, while the related adjective ‘crabbed’ can refer to handwriting that is ‘difficult to read,’” he wrote. *Id.*

¹¹⁹ *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019).

¹²⁰ Conflicting congressional reports about the exemption led Justice Kagan to use a strict constructionist approach. She recognized that such an approach would adhere to the FOIA’s central purpose of broad disclosure with narrow exemptions, which she wrote was reinforced throughout the law’s congressional history. *See Milner*, 562 U.S. at 574 (explaining that “[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it . . . When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language.”) (citations omitted).

¹²¹ *Id.* at 573.

¹²² *See supra* pp. 251-53; Huggins, *supra* note 102.

¹²³ *See Argus Leader*, 139 S. Ct. at 2364.

to withhold information. These 2011 decisions have undoubtedly helped journalists, watchdogs, and the public access more information by narrowly interpreting aspects of two key exemptions, but those victories pale in comparison to the Court's most recent blow to the public's right to access information.

V. ARGUS LEADER UPENDS THE TREND TOWARD TRANSPARENCY

Although access advocates lauded *AT&T* and *Milner*, those celebrations were short-lived. The Court's streak of narrowly interpreting exemptions came to an abrupt halt in 2019 with Justice Gorsuch's wide-reaching interpretation of Exemption 4.¹²⁴ The exemption, which prevents the disclosure of "trade secrets and commercial or financial information [that is] obtained from a person and privileged or confidential,"¹²⁵ is routinely invoked in reverse FOIA cases, where plaintiffs attempt to prevent the government from releasing information.¹²⁶ It is important to note that *Argus Leader* did not begin as a reverse FOIA case.¹²⁷ Instead, the South Dakota newspaper requested access to USDA records regarding the federal food stamp program, known as SNAP.¹²⁸ Only after the government lost its case and agreed to disclose the requested information did the Food Marketing Institute intervene as a third party in an attempt to prevent the information from becoming public.¹²⁹

Hinging solely on the interpretation of the word "confidential," the Court's *Argus Leader* decision overturns nearly five decades of lower court precedent established by the D.C. Circuit in *National Parks and Conservation Association v. Morton*.¹³⁰ After the National Parks and Conservation Association filed a FOIA request with the National Parks Service to obtain financial data about park concession operations,¹³¹ the National Parks Service argued that the information was exempt

¹²⁴ See *id.* at 2366 (focusing on the definition of "confidential" under Exemption 4); 5 U.S.C. § 552(b)(4).

¹²⁵ 5 U.S.C. § 552(b)(4).

¹²⁶ See *e.g.*, *Argus Leader*, 139 S. Ct. at 2360–62.

¹²⁷ *Id.* at 2361.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

¹³¹ *Id.* at 766.

from disclosure under Exemption 4.¹³² The District Court for the District of Columbia granted summary judgment in favor of the National Parks Service and explained that—because both parties agreed the information was obtained from a person and was commercial and financial—its decision rested on the meaning of “confidential.”¹³³ Relying directly on FOIA’s Senate Report and on appellate court precedent, the district court held that information is “confidential” for the purposes of Exemption 4 when it is information that “would customarily not be released to the public by the person from whom it was obtained.”¹³⁴

The D.C. Circuit upheld the district court’s definition of “confidential” but reversed its judgment.¹³⁵ The appellate court reasoned:

[T]he test for confidentiality is an objective one. Whether particular information would customarily be disclosed to the public by the person from whom it was obtained *is not the only relevant inquiry* in determining whether that information is ‘confidential’ for purposes of [Exemption 4]. *A court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption.*¹³⁶

The D.C. Circuit turned to the Senate Report—the court’s primary source for the statute’s legislative history—to ensure that its definition of “confidential” adhered closely to the FOIA’s central purpose.¹³⁷

¹³² See *Nat’l Parks & Conservation Ass’n v. Morton*, 351 F. Supp. 404, 406 (D.D.C. 1972).

¹³³ *Id.* at 406–07.

¹³⁴ See *id.* at 406 (citing S. REP. NO. 89-813, at 9 (1965)).

¹³⁵ *Nat’l Parks & Conservation Ass’n*, 498 F.2d at 770–71.

¹³⁶ *Id.* at 766–67 (emphasis added) (citations omitted).

¹³⁷ The reversal can be seen as part of the District of Columbia Circuit’s past effort to steer itself, its lower courts, and other appellate courts back toward a judicial administration of the FOIA that releases as much information as possible. See Theodore P. Seto, Recent Case, *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), 88 HARV. L. REV. 470, 471–77 (1974) (citing other District of Columbia Circuit cases consistent with a philosophy of broad disclosure and explaining that “[t]he *National Parks* reversal reflected the [district courts]’s apparent belief that the circuit’s prior construction of subsection (b)(4) . . . exempted more than was necessary to protect against those harms which Congress . . . had attempted to avoid.”).

Using the House and Senate reports to determine Exemption 4's purpose, the D.C. Circuit provided the district court with detailed guidance to reevaluate the case on remand.¹³⁸ According to the D.C. Circuit, Exemption 4 was intended to ensure that the government can continue to obtain financial information *and* to protect the financial interests of the persons providing it.¹³⁹ More specifically, the court wrote:

[Exemption 4] recognizes the need of government policymakers to have access to commercial and financial data. Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired.

....

Apart from encouraging cooperation with the Government by persons having information useful to officials . . . [Exemption 4] protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.¹⁴⁰

Because the district court had decided that the information “would customarily not be released to the public by the person from whom it was obtained,”¹⁴¹ it only needed to decide whether disclosure would “impair the Government's ability to obtain necessary information in the future” *or* “cause substantial harm to the competitive position of the person from whom the information was obtained.”¹⁴² If neither condition was met, disclosure would be warranted under FOIA's central purpose.

The decision established what came to be known as the *National Parks* test, which was quickly recognized as strongly upholding the FOIA's central purpose by placing a high burden on government

¹³⁸ See *Nat'l Parks & Conservation Ass'n*, 498 F.2d at 767–69 (first citing S. REP. NO. 89-813; then citing H.R. REP. NO. 89-1497).

¹³⁹ *Id.* at 767.

¹⁴⁰ *Id.* at 768.

¹⁴¹ *Id.* at 766.

¹⁴² *Id.* at 770.

agencies to justify the withholding of information.¹⁴³ More than half of the federal appellate circuits subsequently adopted the *National Parks* test to evaluate Exemption 4 cases.¹⁴⁴

Writing for a 6–3 majority in *Argus Leader*, Justice Gorsuch rejected the D.C. Circuit’s definition of “confidential” and abandoned the *National Parks* test.¹⁴⁵ Justice Gorsuch largely set aside the legislative history, looking at the word’s “‘ordinary, contemporary, common meaning’ when Congress enacted FOIA in 1966”¹⁴⁶—even though Congress made clear through its Senate and House reports that it understood “confidential” information to mean that which “‘would customarily not be released to the public by the person from whom it was obtained.’”¹⁴⁷

Justice Gorsuch cited multiple dictionaries when he concluded:

The term “confidential” meant then, as it does now, “private” or “secret.” Contemporary dictionaries suggest two conditions that might be required for information communicated to another to be considered confidential. In one sense, information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the

¹⁴³ See Seto, *supra* note 137, at 477 (stating “[t]he test may therefore provide . . . that which the Congress hoped the Act would generally provide — ‘a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.’” (quoting S. REP. NO. 89-813, at 37)).

¹⁴⁴ For the Eighth Circuit Court of Appeals list of cases in its decision to use the *National Parks* test, see *Cont. Freighters, Inc. v. Sec’y of U. S. Dep’t of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001) (first citing *OSHA Data/CIH, Inc. v. U.S. Dep’t of Lab.*, 220 F.3d 153, 162 n. 24, (3rd Cir. 2000); then citing *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1112–13 (9th Cir. 1994); then citing *Anderson v. Dep’t of Health Hum. Servs.*, 907 F.2d 936, 944–46 (10th Cir. 1990); then citing *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1029 (4th Cir. 1988); then citing *Gen. Elec. Co. v. U.S. Nuclear Regul. Comm’n*, 750 F.2d 1394, 1398 (7th Cir. 1984); then citing 9 to 5 *Org. for Women Off. Workers v. Bd. of Governors of Fed. Rsrv. Sys.*, 721 F.2d 1 *passim* (1st Cir. 1983); then citing *Cont’l Stock Transfer Tr. Co. v. S.E.C.*, 566 F.2d 373, 375 (2d Cir. 1977); and then citing *Cont’l Oil Co. v. Fed. Power Comm’n*, 519 F.2d 31, 35 (5th Cir. 1975)).

¹⁴⁵ See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366.

¹⁴⁶ *Id.* at 2362 (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

¹⁴⁷ See *Nat’l Parks & Conservation Ass’n*, 498 F.2d at 766 (citing S. REP. NO. 89-813 at 9).

person imparting it. In another sense, information might be considered confidential only if the party receiving it provides some assurance that it will remain secret.¹⁴⁸

Put in simpler terms, Justice Gorsuch decided that something is “confidential” when it is “customarily kept private . . . by the person imparting it” and when “the party receiving it provides some assurance that it will remain secret.”¹⁴⁹ As a result, “[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 [at issue in the case] is ‘confidential’ within Exemption 4’s meaning.”¹⁵⁰

The Court’s decision to abandon the *National Parks* substantial harm requirement is particularly striking. Citing a case unrelated to FOIA, Justice Gorsuch reasoned that the Court cannot give Exemption 4 “anything but a fair reading.”¹⁵¹ He continued: “just as [the Court] cannot properly *expand* Exemption 4 beyond what its terms permit, [the Court] cannot arbitrarily *constrict* [Exemption 4] either by adding limitations found nowhere in its terms.”¹⁵² But Justice Gorsuch ignores the congressional intent that exemptions are to be construed as narrowly as possible while still protecting the relevant opposing interests. Removing *National Parks*’ substantial harm requirement increased the likelihood that information will be withheld under Exemption 4, which is inconsistent with FOIA’s central purpose. As a result, *Argus Leader* falls far short of protecting the “*fullest* responsible disclosure.”¹⁵³

Unraveling *National Parks*’ requirement of “substantial competitive harm” all but ensures an increase in reverse FOIA suits by parties seeking to prevent disclosure. *Argus Leader* dramatically reduced the government’s burden for withholding information,

¹⁴⁸ See *Argus Leader*, 139 S. Ct at 2363 (citing WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 174 (1962); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 476 (1961); *Confidential*, BLACK’S LAW DICTIONARY (rev. 4th ed. 1968); 1 OXFORD UNIVERSAL DICTIONARY ILLUSTRATED 367 (3d ed. 1961); WEBSTER’S NEW WORLD DICTIONARY 158 (1960)).

¹⁴⁹ *Id.* at 2363.

¹⁵⁰ *Id.* at 2366 (emphasis added).

¹⁵¹ *Id.* (quoting *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1138, 1143 (2018)).

¹⁵² *Id.* (citing *Milner v. Dep’t. of Navy*, 562 U.S. 562, 570–71).

¹⁵³ S. REP. NO. 89-813, at 38 (1965) (emphasis added).

encouraging any party who submits commercial or financial information to the government to claim it is exempt from disclosure as confidential information.¹⁵⁴ Such a low threshold shields a multitude of corporate and financial records from public scrutiny—the exact concern that amici alluded to in *AT&T*.¹⁵⁵ Absent any reform, the Court’s decision in *Argus Leader* upends any meaningful attempt at government transparency when corporations are involved in the government’s work.

Additionally, *Argus Leader* further affirms the right of third parties to intervene in FOIA cases.¹⁵⁶ After a FOIA request is filed, it is the government agencies that should decide whether information is protected by one of the statute’s exemptions.¹⁵⁷ Indeed, the Court recognized in *Chrysler Corp. v. Brown* that “the FOIA by itself protects [private organizations’] interest[s] . . . *only to the extent that th[e] interest[s] [are] endorsed by the agency collecting the information.*”¹⁵⁸ Government agencies, after considering the private organization’s concerns, have the ultimate authority to decide whether to disclose information—not the organizations themselves.¹⁵⁹ Even more, all of the exemptions, save Exemption 3, are permissive rather than mandatory; they grant the government the authority to release information covered by an exemption should it believe doing so will further FOIA’s central purpose.¹⁶⁰ As a result, had Congress wanted to provide the wide-reaching protection to confidential information inferred by the Court in *Argus Leader*, it could have specifically exempted that information by statute, thereby removing the agency’s discretion related to disclosure. *Argus Leader* ignores this important aspect of FOIA, with the Court instead substituting its judgment where Congress could have, but did not, act.¹⁶¹

It is important to also note that the Food Marketing Institute was not an original party in the case, which began with the *Argus Leader*’s

¹⁵⁴ *Argus Leader*, 139 S. Ct. at 2366.

¹⁵⁵ Petition for Writ of Certiorari at 48, *FCC v. AT&T Inc.*, 562 U.S. 397 (2011) (No. 09-1279).

¹⁵⁶ *Argus Leader*, 139 S. Ct. at 2362.

¹⁵⁷ See generally Freedom of Information Act, 5 U.S.C. § 552.

¹⁵⁸ See *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (emphasis added).

¹⁵⁹ *Id.* at 292–93; 5 U.S.C. § 552(a)(8).

¹⁶⁰ See *Chrysler Corp.*, 441 U.S. at 293–94, 284; 5 U.S.C. § 552(a)(8).

¹⁶¹ See *Argus Leader*, 139 S. Ct. at 2366.

request to obtain the store-level SNAP data.¹⁶² The organization only entered the dispute after the U.S. Department of Agriculture declined to appeal the district court's order to disclose and sent notice of its decision to release the requested information.¹⁶³ Because of this, the newspaper rightly questioned the Food Marketing Institute's standing, noting the nature of FOIA's exemptions would permit the government to release the information even if it were deemed to cause substantial competitive harm.¹⁶⁴ But Justice Gorsuch concluded that Article III of the Constitution gave the organization this standing because the government assured the court it wouldn't release the information even if it were allowed.¹⁶⁵ Such an approach to third-party intervention contravenes FOIA's central purpose and encourages the government and private entities to conspire in the name of limiting disclosure.

As a result of the Court's gradual expansion of FOIA's exemptions, its recent decision broadening the definition of "confidential," and its increasing assent to third-party intervention, the statute's effectiveness has been seriously constrained. If we are to preserve the statute's congressional intent and our nation's commitment to government transparency, serious reforms are needed to prevent corporations and other entities from abusing the statute's exemptions to preclude the public from accessing government information.

VI. FIXING FOIA: OPTIONS FOR RESTORING THE PUBLIC'S ACCESS TO INFORMATION

The Supreme Court's decision in *Argus Leader* has the potential to severely limit the public's access to information by allowing third-party intervenors to claim information is "confidential" under the gaping hole created in Exemption 4. However, this need not be the case. After examining public records statutes here in the United States and abroad, it is clear that a number of actions could be taken—either

¹⁶² *Id.* at 2361.

¹⁶³ *Id.* at 2362.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (first citing Brief for U.S. as Amicus Curiae Supporting Petitioner at 35, 139 S. Ct. 2356 (No. 18-481); then citing Transcript of Oral Argument at 18-22, 139 S. Ct. 2356 (No. 18-481); and then citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 152-53).

judicially or legislatively—to reaffirm FOIA’s central purpose and restore the presumption that government records are open to the public. The most wide-reaching of those options would be to prevent third-party intervention in FOIA cases through judicial or legislative action, effectively forbidding reverse FOIA lawsuits. More narrowly, Congress could amend FOIA to clarify the rights of third-party intervenors—placing strict parameters on their ability to intervene as have countries like Canada, South Africa and Uganda.¹⁶⁶ In the alternative, Congress could amend FOIA to clarify the meaning of “confidential” by legislatively overriding the Supreme Court’s decision in *Argus Leader*. As will be discussed, a review of more than 100 freedom of information laws from around the world suggests few, if any, laws rely on a definition of “confidential” as broad as the one adopted by the Court in *Argus Leader*.

A. *Forbidding Third-Party Intervention to Oppose Disclosure*

Because FOIA did not explicitly create a right of intervention to oppose disclosure, a strong argument could be made that either Congress or the Supreme Court could forbid third-party intervention. Although this is a dramatic departure from the current jurisprudence, it would clearly further FOIA’s central purpose of promoting the fullest possible disclosure of information.¹⁶⁷ Further, because all but Exemption 3 are permissive exemptions, allowing the government to choose to disclose information even when it falls within an exemption, a third party’s right to intervene provides no guaranteed remedy against disclosure.¹⁶⁸

Facebook recently attempted to prevent the FTC from releasing annual privacy assessments mandated by Facebook’s consent decree with the FTC.¹⁶⁹ Facebook relied on Federal Rule of Civil Procedure

¹⁶⁶ Access to Information Act, R.S.C. 1985 c A-1, § 27 (Can.) [Hereinafter “Access to Infor. Act (Can.)”]; Promotion of Access to Information Act 2 of 2000 §§ 47-49 (S. Afr.) [Hereinafter “Access to Infor. Act (S. Afr.)”]; Access to Information Act 2005, Act No. 6, §§ 35-36, (Uganda), <https://www.parliament.go.ug/documents/1254/acts-2005> (select “Access-To-Information-Act-2005.Pdf” to view) [Hereinafter “Access to Infor. Act (Uganda)”].

¹⁶⁷ S. REP. NO. 89-813, at 38.

¹⁶⁸ 5 U.S.C. §522(a)(8)-(b).

¹⁶⁹ Elec. Priv. Info. Ctr. v. FTC, No. 18-00942, 2020 BL 225877 (D.D.C. June 16, 2020).

24 (FRCP) (the same provision FMI relied on in *Argus Leader*) to request intervention.¹⁷⁰ FRCP 24 creates several conditions for intervention by right, including “an unconditional right to intervene by a federal statute.”¹⁷¹ FOIA does not create such a right.¹⁷² Intervenor like Facebook must instead rely on the second clause, which permits permissive intervention when a party “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.”¹⁷³ In FOIA litigation, however, where the government’s position is one opposing disclosure, it is hard to imagine how it would not adequately represent a third party’s interest against disclosure. Particularly under Exemption 4, as EPIC argues in its Motion to Oppose Intervention, the intervening party’s interests nearly always directly overlap the government’s interests in asserting non-disclosure.¹⁷⁴ Recall that because Exemption 4 is a permissive exemption, the government could choose to release the information even if it were covered by the exemption.¹⁷⁵ As a result, a strong argument can be made that third-party intervention should not be permitted in cases involving Exemption 4 because the government’s interest in opposing disclosure protects and represents the third party’s interest.

One state appellate court in the United States has clearly ruled that its state freedom of information law does not permit third-party intervention. In *Hunter Health Clinic v. Wichita State University*, the Kansas Court of Appeals held that a non-profit had no standing to file suit to prevent a public agency from disclosing public records it claimed contained private information.¹⁷⁶ In so ruling, the court ruled the Kansas Open Records Act was a disclosure statute¹⁷⁷—akin to the Supreme Court’s ruling in *Chrysler*.¹⁷⁸ The court noted:

¹⁷⁰ *Id.*

¹⁷¹ FED. R. CIV. P. 24(a)(1).

¹⁷² *See generally* 5 U.S.C. § 552.

¹⁷³ FED. R. CIV. P. 24(a)(2).

¹⁷⁴ Plaintiff’s Opposition to Motion by Facebook, Inc. to Intervene at 4, Elec. Priv. Info. Ctr. v. FTC (D.D.C. filed June 14, 2019) (No. 18-0094), 2020 BL 225877.

¹⁷⁵ 5 U.S.C. § 552(a)(8)-(b).

¹⁷⁶ 362 P.3d 10, 11 (2015).

¹⁷⁷ *Id.* at 12.

¹⁷⁸ *Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979).

[A] violation under KORA may occur when a public agency denies access to the public record. . . . Hunter was not an entity or person whose request for records under the act, i.e., the public record, has been denied or impeded. Hunter’s request to the district court was to prevent WSU from disclosing purportedly private records. On this basis, Hunter lacked statutory standing to make a KORA claim.¹⁷⁹

In many ways, the Kansas Court of Appeals’ approach in *Hunter* is quite similar to the Supreme Court’s approach in *Chrysler*. The Kansas Court goes further, however, noting the legislative declaration of KORA’s purpose controls:

[T]he legislature has declared it to be “the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act.” The legislature also directed that KORA “shall be liberally construed and applied to promote such policy. . . .” The legislature’s intent was “to ensure public confidence in government by increasing the access of the public to government and its decision-making processes.” Hunter’s construction of KORA does not promote the public policy determined by the legislature.¹⁸⁰

Given the similarity between KORA’s public policy and FOIA’s central purpose, it is hardly a stretch to suggest that such a prohibition against third-party intervention at the federal level would not be equally beneficial in promoting a strong culture of disclosure.

B. Limiting the Rights of Third-Party Intervenors

Assuming the Supreme Court or Congress is unwilling to prohibit third-party intervention in FOIA cases, steps to limit the rights of third-party intervenors could prove effective in promoting access to public records. A review of 128 countries’ freedom of information laws

¹⁷⁹ *Hunter Health Clinic*, 362 P.3d at 16.

¹⁸⁰ *Id.* at 17 (citations omitted) (first citing KAN. STAT. ANN. § 45-216 (West, Westlaw through 2021 Reg. Legis. Sess.); then quoting *Data Tree, LLC v. Meek* 109 P.3d 1226, 1233 (2005)).

catalogued in the Centre for Law and Democracy's Right to Information Ratings database revealed that although some countries specifically permit third-party intervention in cases involving public records requests, they do so in much narrower ways than the United States.¹⁸¹ Often this takes the form of either limiting when and how parties can intervene or narrowly outlining when information would be exempt from release. In most instances, these limits are outlined in the country's FOI law.

Clear statutory guidance can help the courts determine when third-party intervention is likely to unduly inhibit the public's right to information. In its Access to Information Act, Canada outlines the standard for third-party intervention in Section 27.¹⁸² It permits limited intervention through a mandatory system of notice in cases involving trade secrets, commercially sensitive, and confidential information—information like that which was it issue in *Argus Leader*.¹⁸³ In addition,

¹⁸¹ See generally CTR. FOR L. & DEMOCRACY, *The RTI Rating*, <https://www.rti-rating.org/> (last visited Apr. 21, 2021).

¹⁸² Canada is not the only country whose FOI law permits third-party intervention. However, it does so in a way that does not create disproportionately broad exemptions for confidential information. See *Access to Infor. Act (Can.)*, *supra* note 166. Uganda's law appears to permit third-party intervention once the government has ruled in favor of disclosure, but it is unclear what would be needed to overcome the disclosure. See *Access to Infor. Act (Uganda)*, *supra* note 166. South Africa's law, which also permits third-party intervention, is written in a way that creates a broad exemption with mandatory protections for information classified as trade secrets, confidential or financial in nature. See *Access to Infor. Act (S. Afr.)*, *supra* note 166, § 9. India's law is similar to South Africa's. See *Right to Information Act, 2005*, § 11 (India).

¹⁸³ The law reads, in part:

- 20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part that contains
- (a) trade secrets of a third party;
 - (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
 - (b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the Emergency Management Act and that concerns the vulnerability of the third party's buildings or other structures, its

the Canadian statute provides stringent time limits to prevent delays in access—one of the key issues Stewart and Sanders identified with third-party intervention.¹⁸⁴

Canada is not alone in permitting third-party intervention while still establishing statutory guidance on how that intervention can take place. A number of other countries, many of whom have enacted their freedom of information laws long after the United States enacted

networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

Product or environmental testing

(2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a part of a record if that part contains the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.

Access to Infor. Act (Can.), *supra* note 166, § 20. Communicated information was considered confidential if (1) the information is customarily kept private, and (2) the party receiving it provided some assurance that it will remain private. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019).

(1) [T]he communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would result to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

R v. Gruenke, [1991] 3 S.C.R. 263, 265 (Can.).

¹⁸⁴ “The ability of private companies to intervene in discretionary matters bestows upon them an enormous procedural advantage to run out the clock on requesters, employing attorneys at costs that private citizens or freedom of information advocates simply cannot match.” Stewart & Sanders, *supra* note 16, at 28.

FOIA, include such provisions.¹⁸⁵ The list includes a number of common law countries, including Canada, South Africa, and India, as well as civil law countries. Section 11 of India's Right to Information Act (2005) provides specific guidance to government officials tasked with responding to information requests:

Where a[n] . . . Information Officer . . . intends to disclose any information . . . which relates to or has been supplied by a third party and has been treated as confidential by that third party, the . . . Information Officer . . . shall, within five days from the receipt of the request, give written notice to such third party of the request and of the fact that the . . . Information Officer . . . intends to disclose the information [T]he third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.¹⁸⁶

¹⁸⁵ Dozens of countries have provisions within their FOI statutes that outline the processes for how and to what extent third parties can intervene in information requests. *E.g.*, Access to Infor. Act (S. Afr.), *supra* note 166, §§ 34–37, 43, 47–49, 63–65, 69, 71–78; Access to Infor. Act (Can.), *supra* note 166, art. 20, 27–29, 43–44 (1985); Access to Infor. Act (Uganda), *supra* note 166, §§ 27, 28(1), 28(2)(b), 35–36, 38; Freedom of Information Act 2000 c. 36, §§ 43, 44(1)(a), 57–61, 79 (Eng.); Gyōsei kikan no hoyū suru jōhō no kōkai ni kansuru hōritsu [Act on Access to Information Held by Administrative Organs], Act No. 42 of 1999, art. 5–7, 13, 19, 20 (Japan), *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp/law/detail_main?re=02&vm=02&id=99; [Access to Public Administration Files Act], Lov om offentlighed i forvaltningen (Offentlighedsloven), Lov nr. 572 af 19 Dec. 1985 (Den.), <https://www.retsinformation.dk/eli/lt/1985/572> (§§ 1(2), 1(3), 12(1), 13(1)(5), 13(1)(6), 15(2)); Gesetz zur Regelung des Zugangs zu Informationen des Bundes [Informationsfreiheitsgesetz] [IFG] [Freedom of Information Act] Sep. 5, 2005, BGBl I at 2722, last amended by Verordnung (V), BGBl I at 1328, art. 44 (Ger.), <http://www.gesetze-im-internet.de/ifg/> (§§ 2(2), 3(4), 3(7), 4(1), 5, 6, 7(1), 7(2), 8 of English translation); Right to Information Act, 2005, §§ 7(7), (8)(1)(d), 11, 19(4) (India); Freedom of Information Act 2014 (Act No. 30/2014) § 24, 35–37 (Ir.), <http://www.irishstatutebook.ie/eli/2014/act/30/enacted/en/html>; Access to Information Act, No. 31 (2016) KENYA GAZETTE SUPPLEMENT No. 152 § 6(1)(e), 15, 25(2)(g); Ley General de Transparencia y Acceso a la Información Pública [LGTAIP] art. 120, 144, 162, 169, 170, 178, Diario Oficial de la Federación [DOF] 04-05-2015, últimas reformas DOF 13-08-2020 (Mex.).

¹⁸⁶ Right to Information Act, 2005, § 11(1)-(2) (India).

South Africa's law contains an entire chapter (Part 2, Chapter 5) that outlines the procedure when third-party interests are implicated in a request for public information, including that a decision on access must be made within 30 days of notifying third parties, unless an appeal is lodged.¹⁸⁷ These kinds of procedural protections would have prevented the eleventh-hour intervention of Food Marketing Institute, which would ultimately lower litigations costs for plaintiffs like the *Argus Leader*—an important step toward ensuring the public's access to government information.

C. Amending FOIA to Narrow the Definition of Confidential

Many countries' laws contain exemptions for trade secrets and other forms of business or financial information. But, unlike the American law, these FOI laws clearly articulate standards defining what constitutes "confidential" information. South Africa's exemption only covers information where the disclosure could "reasonably be expected" to disadvantage the third party.¹⁸⁸ At a minimum, this requires some showing of potential harm—unlike the current American standard.

Canada's test for whether information should be protected as confidential—outlined in Section 20 and subsequent case law—is much more stringent than the standard the U.S. Supreme Court articulated in *Argus Leader*. Rather than adopting a plain-language meaning of confidential, which the U.S. Supreme Court took to mean "private" or "secret," the Canadian courts went further, requiring the evaluation of the content, purpose, and circumstances in which the information was compiled and communicated.¹⁸⁹ The Canadian Supreme Court also established standards for judges to use when evaluating appeals from third parties.¹⁹⁰ These standards include requiring judges to narrowly construe exemptions, requiring third parties to demonstrate they meet an exemption, and requiring third parties claiming an exemption due to harm to demonstrate a link between the disclosure and a real harm.¹⁹¹ Authored by Justice Thomas

¹⁸⁷ See Access to Infor. Act (S. Afr.), *supra* note 166, §§ 47–49.

¹⁸⁸ See Access to Infor. Act (S. Afr.), *supra* note 166, § 36(1)(c)(i).

¹⁸⁹ See *R v. Gruenke*, [1991] 3 S.C.R. 263, 265 (Can.); *see also supra* note 183 (quotation from *Gruenke*).

¹⁹⁰ *Gruenke*, 3 S.C.R. at 265.

¹⁹¹ See *Merck Frosst Ltd. v. Canada*, [2012] 1 S.C.R. 23 (Can.).

Cromwell, the *Merck Frosst* decision makes it much harder for third-party intervenors to prevail, and for good reason: “Refusing to disclose information for fear of public misunderstanding undermines the fundamental purpose of access to information legislation; the public should have access to information so that they can evaluate it for themselves.”¹⁹² In many ways, the *Merck* standard parallels the standard the Eighth Circuit applied in *Argus Leader* when it ruled in favor of disclosure.

In March 2021, Senators Charles Grassley (R-Iowa), Patrick Leahy (D-Vt.), and Dianne Feinstein (D-Cal.) introduced a bipartisan bill to restore the meaning of ‘confidential’ in light the Court’s *Argus Leader* decision.¹⁹³ The bill, while also addressing other FOIA issues, includes a provision that would reinstate the D.C. Circuit’s definition of ‘confidential’ as outlined in its *National Parks* decision. If passed, the bill would codify the substantial harm standard¹⁹⁴ and realign Exemption 4 more closely with FOIA’s central purpose. It does not, however, address the ability of third parties to intervene in FOIA litigation.

VII. CONCLUSION

Globally, the right to information dates back to the 18th century,¹⁹⁵ but the majority of its history is remarkably recent. In 1990, the United States was among only twelve countries with a freedom of information

¹⁹² *Id.* para. 224.

¹⁹³ See Open and Responsive Government Act of 2021, S. 742, 117th Cong. (2021); see also Grassley, Leahy, Feinstein Introduce Bill to Reinforce Transparency in Wake of Supreme Court FOIA Decision & Recent Regulations, CHUCK GRASSLEY (Mar. 15, 2021), <https://www.grassley.senate.gov/news/news-releases/grassley-leahy-feinstein-introduce-bill-to-reinforce-transparency-in-wake-of-supreme-court-foia-decision-and-recent-regulations>.

¹⁹⁴ The bill would revise Exemption 4 to exempt 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 substantial harm to the competitive position of the person from whom the information was obtained. See S.B. 742, § 2.

¹⁹⁵ Enacted in 1766, Sweden’s Press Act gets credit for being the oldest freedom of information law in the country. *Sweden: International Focus*, UNIV. COLLEGE LONDON: THE CONSTITUTION UNIT, <https://www.ucl.ac.uk/constitution-unit/research/research-archive/foi-archive/international-focus/sweden> (last visited Apr. 23, 2021).

law. A majority of laws were adopted in the 1990s and 2000s in the new post-Soviet democracies of Eastern Europe and burgeoning democracies in South America, Africa and Southeast Asia. Often, they were drafted in the spirit—if not letter—of FOIA,¹⁹⁶ which has been called “one of the United States’ leading legal exports abroad.”¹⁹⁷ Modern FOI laws have substantively outpaced their American counterpart at ensuring access to government information,¹⁹⁸ even though its presumption of openness is often credited with establishing a minimum expectation of access and transparency: “the decisions and policies—as well as the mistakes—of public officials are always subjected to the scrutiny and judgments of the people.”¹⁹⁹ Critics have convincingly argued FOIA has failed to keep up with the rest of the world.²⁰⁰ Because developing democracies have historically looked to the United States as a role model,²⁰¹ aspiring to emulate its constitutional protections for a free press and statutory commitment to open government, recent trends in opposition to disclosure—sure to be

¹⁹⁶ Ackerman & Sandoval-Ballesteros, *supra* note 18, at 111.

¹⁹⁷ Pozen, *supra* note 56, at 1106.

¹⁹⁸ In the Centre for Law and Democracy’s most recent ranking of these laws, the United States scored 83, tying it with Romania and ranking it 72nd in the world.

[T]here are significant problems with the USA’s access regime which negatively impact the right to information in that country. For instance, exceptions within the law are in many instances not harm tested and there is only a very limited public interest override. The United States also lacks a specialised [sic] appeals body and, while American courts have been somewhat good in defending the right to information, they cannot do the job as effectively or expeditiously as an independent appeals body.

United States, GLOB. RIGHT TO INFO. RATING, <https://www.rti-rating.org/country-data/United%20States/> (June 2016).

¹⁹⁹ When President Johnson—hardly an advocate for transparency—initially signed the FOIA, this quote was written at the bottom of the signing statement, but it had been crossed out. See Nate Jones, *How to Ensure We Have a More Open, Accountable Government*, WASH. POST (Mar. 13, 2019), <https://www.washingtonpost.com/outlook/2019/03/13/how-ensure-we-have-more-open-accountable-government/>.

²⁰⁰ Clark Merrefield, *How Business Interests Shaped US Public Records Law: Q&A with Jeannine Relly*, JOURNALIST’S RES. (June 28, 2019), <https://journalistsresource.org/studies/society/news-media/foia-public-records-business-interests/>.

²⁰¹ John McCain, Opinion, *America Must Be a Good Role Model*, FIN. TIMES (Mar. 18, 2008), <https://www.ft.com/content/c7e219e2-f4ea-11dc-a21b-000077b07658>.

further fueled by the Supreme Court's *Argus Leader* decision—are particularly troublesome.

Given the United States' historical role in setting an aspirational standard for other democratic nations, the expansion of Exemption 4, combined with an increase in third-party intervention, suggest the tide has turned away from FOIA's central purpose. The Court's plain reading of the word "confidential" threatens several of access advocate Toby Mendel's guiding principles for FOI laws, including maximum disclosure and limited scope of exceptions as well as disclosure taking precedence.²⁰² In fact, the current setup almost guarantees that secrecy will reign once a third party asserts information is confidential. Similarly, it flies in the face of long-standing tradition to construe exemptions narrowly in favor of broad disclosure. Without a proper legislative²⁰³ or judicial fix, the Court's broad interpretation of the FOIA Exemption 4 serves as a prime example for other countries—countries looking to increase secrecy and decrease accountability. Whether it means limiting the scope of third-party intervention, narrowing the definition of confidential information—as other countries have done—or enacting a statutory prohibition on third-party intervention in access to information cases as has been done in some U.S. states, judges and legislators must push back against corporate efforts to close off access to government records. In the meantime, transparency advocates will have to rely on other democracies to lead the way in terms of open government.

²⁰² MENDEL, *supra* note 18, at 33, 34, 39.

²⁰³ Shortly after the decision, U.S. Senator Charles Grassley (R-Iowa) said he was "working on legislation to address these developments and to promote access to government records. Americans deserve an accountable government, and transparency leads to accountability." 165 CONG. REC. S4587 (daily ed. June 27, 2019) (statement of Sen. Charles Grassley), <https://www.congress.gov/116/crec/2019/06/27/CREC-2019-06-27-pt1-PgS4587-5.pdf>. To date, no such legislation has been enacted.