No. 19-15528

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND,
Plaintiff-Appellee,

v.

U.S. FOOD & DRUG ADMINISTRATION,
Defendant-Appellant.

On Appeal from the U.S. District Court for
the Northern District of California
No. 3:12-cv-4376-EDL
(Hon. Elizabeth D. Laporte, United States Magistrate Judge)

APPELLEE'S BRIEF

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November 4, 2019

CORPORATE DISCLOSURE STATEMENT

Animal Legal Defense Fund is a nonprofit organization that has not issued shares or debt securities to the public. It has no parent companies, and no publicly held company has any form of ownership interest in it.

Date: November 4, 2019

/s/ Patrick D. Llewellyn
Patrick D. Llewellyn

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INTRODUCTION

The Freedom of Information Act (FOIA) was enacted to help "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The statute achieves this goal by requiring agencies to disclose records in response to requests, 5 U.S.C. § 552(a)(3), or proactively, *id.* § 552(a)(1)–(2), subject to nine exemptions, *id.* § 552(b).

At issue here is exemption 4, which permits agencies to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Id.* § 552(b)(4). Plaintiff-appellee Animal Legal Defense Fund (ALDF) submitted a FOIA request to defendant-appellant U.S. Food and Drug Administration (FDA) seeking information about egg safety and egg production. In response, FDA disclosed some information but withheld several categories of information under exemption 4 as confidential commercial information. The district court ordered the FDA to disclose information in four of the withheld categories. After the FDA appealed, the Supreme Court announced a new standard for determining whether information is

"confidential" for purposes of exemption 4. Because the information at issue is not confidential under this new standard, the Court should affirm the district court's order requiring disclosure of the requested information in those categories.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331 & 1346. On January 23, 2019, the district court entered final judgement based on Findings of Facts and Conclusions of Law issued that same day following a four-day bench trial. ER 1, ER 2–21. On March 22, 2019, the government filed a notice of appeal. ER 23–24. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the requested information falls within the scope of FOIA exemption 4.

2. Whether the district court correctly determined that the total number of hen houses has been publicly disclosed.

STATUORY PROVISION INVOLVED

All applicable statutory provisions are contained in the addendum of the FDA.

STATEMENT OF THE CASE

The FDA has broad authority to promulgate regulations; conduct examinations, inspections, and investigations; and obtain records to, among other things, protect the public from the consumption of adulterated foods. 21 U.S.C. §§ 371–374. In furtherance of this duty, on July 9, 2009, the FDA published a Final Rule on Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation, 74 Fed. Reg. 33,030 (July 9, 2009) (codified at 21 C.F.R. Parts 16 and 18) ("Egg Safety Rule"). ER 3. As the FDA explained in promulgating the Egg Safety Rule, Salmonella infection in humans "is a serious health concern" and "can lead to a severe and fatal illness." 74 Fed. Reg. at 33,031. Because "eggs remain the primary source of" Salmonella infections and "progress in reducing the number of illnesses and outbreaks appears to have slowed or stopped," the FDA concluded the "additional preventative measures" of the Egg Safety Rule were "needed to reduce further risk of" Salmonella. *Id.*

Pursuant to the Egg Safety Rule, the FDA conducts inspections of egg production establishments to protect the public from adulterated eggs. ER 3. During these inspections, the FDA collects a variety of information from egg producers, including: (1) a Salmonella enteritidis prevention plan; (2) farm records regarding how the farm implements the Salmonella enteritidis prevention plan; and (3) evidence of compliance with or deviation from the requirements of the Egg Safety Rule, which may include rodent monitoring data, temperature logs, sampling results, information about how often the farm tests for Salmonella enteritidis, records of treatments, and chick certifications. *Id*. FDA inspectors record their findings in Establishment Inspection Reports (EIRs). *Id*.

ALDF, concerned about both animal welfare and public safety, sought information to enable it to assess the agency's effectiveness in preventing and identifying unsanitary conditions associated with diseases like Salmonella enteritidis and bird flu. On December 15, 2011, ALDF submitted a FOIA request to the FDA for records concerning egg safety and egg production in Texas. ER 4. Among the records produced during the administrative process and in litigation were 12 EIRs for various egg producers that remain at issue in this case. *Id.* Within the

EIRs, the FDA withheld information under exemption 4. *Id.* The withholdings included six categories of information that ALDF challenged in this lawsuit: (1) total hen population; (2) the number of hen houses; (3) the number of floors per house; (4) the number of cage rows per house; (5) the number of cage tiers per house; and (6) the number of birds per cage. *Id.*

On August 20, 2012, ALDF filed this lawsuit seeking to compel the disclosure of these six withheld categories of information. *Id.*; ER 87. In early 2013, the parties filed cross-motions for summary judgment. ER 5. Granting each party's motion in part and denying each in part, the court ordered the FDA to disclose one category of information, the number of birds per cage, but upheld the withholding of the other five categories of information. *See ALDF v. FDA*, No. C-12-04376 EDL, 2013 WL 4511936 (N.D. Cal. Aug. 23, 2013). The FDA subsequently disclosed the number of birds per cage to ALDF. ER 5.

ALDF appealed the district court's ruling to this Court. *Id.* A three-judge panel initially upheld the district court's ruling under this Court's prior summary-judgment standard for FOIA cases, *see ALDF v. FDA*, 819 F.3d 1102 (9th Cir. 2016), under which the Court reviewed "conclusions

of fact" for clear error, "in essence, … treat[ing] the judgment as if it were a bench trial," *Yonemoto v. Dep't of Veteran Affairs*, 686 F.3d 681, 688 (9th Cir. 2012). The Court then reheard the case *en banc* and overturned that standard, adopting for FOIA cases the same *de novo* standard for review of summary-judgment rulings applicable in other types of cases. *See ALDF v. FDA*, 836 F.3d 987 (9th Cir. 2016) (en banc). Applying *de novo* review, the three-judge panel reversed the district court's grant of summary judgment to the FDA on the remaining five categories of information and remanded the case to the district court. *See ALDF v. FDA*, 839 F.3d 750 (9th Cir. 2016) (per curiam).

Following the remand, the district court held a four-day bench trial to resolve the question whether the information in these five categories fell within the scope of FOIA exemption 4. The court applied the then-governing exemption 4 standard: whether "disclosure of the information is likely … to cause substantial competitive harm to the competitive position of the person from whom the information was obtained." ER 4, 13 (quoting *Watkins v. U.S. Bureau of Customs & Border Patrol*, 643 F.3d 1189, 1194 (9th Cir. 2011)). At trial, the district court heard testimony from egg producers and experts offered by both the FDA and ALDF. *See*

ER 7–9. Among other things, the egg producers testified regarding the steps they took to protect the five categories of information, the public availability of the information, and the scope of any confidentiality arrangements with the FDA. *See* ER 11–13, 19–21, 40–41, 43. Specifically, the egg producers testified that they generally do not require employees or service providers to sign non-disclosure agreements or otherwise agree to keep this information secret. *See* ER 19; SER 32. Although the egg producers testified that they did not affirmatively publicly disclose the information at issue, they conceded that the total number of hen houses could not be hidden from public view. *See* ER 11–12, ER 19. Additionally, the egg producers stated that they consider the information confidential, but none were able to establish the existence of an express confidentiality agreement with the FDA. *See* ER 40–41, 43.

Following the trial, the district court issued Findings of Fact and Conclusions of Law. ER 2–21. The court found that, of the five categories of information, the total number of hens was the "most useful to a competitor" and concluded that, while not enabling competitors to precisely determine the total number of eggs produced by an egg producer—the piece of information that would potentially allow

competitors to "more effectively compete" against each other—it was nonetheless "meaningful information" because it required consideration of relatively few "unknown variables" to be "competitively advantageous." ER 16. Accordingly, the court found that disclosure of that information would cause substantial competitive harm.

As to the other four categories, the district court found that disclosure was not likely to cause substantial competitive harm. *See* ER 17. Specifically, the court concluded that "FDA failed to present persuasive evidence at trial that these four categories of information, if disclosed, have any meaningful ability to give a competitive edge to one egg producer over another, such as by enabling underbidding or permitting a producer to lure a customer away." ER 18. The court also found that the total number of hen houses had been publicly disclosed because the houses were publicly visible. ER 11, 19. Accordingly, the court ordered disclosure of (1) the number of hen houses; (2) the number of floors per house; (3) the number of cage rows per house; and (4) the number of cage tiers per house. ER 21.

The government appealed the district court's ruling that these four categories of information were not exempt and required to be disclosed.

ER 23–24.[1] After the government filed its appeal in this case, the Supreme Court issued its decision in *Food Marketing Institute v. Argus Leader* (*FMI*), 139 S. Ct. 2356 (2019). In *FMI*, the Supreme Court rejected the longstanding substantial competitive harm test applied by every federal court of appeals to have considered the question and held that "where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *Id.* at 2366.

SUMMARY OF ARGUMENT

In *FMI*, the Supreme Court held that commercial or financial information is "confidential" under exemption 4 "[a]t least where [it] is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy." *Id.* Applying that standard here, the information at issue is not confidential and, therefore, not exempt. The egg producers have not customarily kept and

[1] ALDF initially cross-appealed the district court's ruling that the total number of hens was exempt from disclosure. *See* ER 22. On October 31, 2019, the parties voluntarily dismissed ALDF's cross-appeal. Accordingly, whether that information is exempt is no longer at issue in this case.

actually treated the information as private. Indeed, they have done little more than refrain from publicly disclosing most of the information. And as to whether an assurance of confidentiality is required for a record to be confidential under exemption 4—a question left open in *FMI*—this Court should hold that a government assurance of confidentiality is required. None was provided here.

In addition, the district court correctly concluded that one category of information—the total number of hen houses—had been publicly disclosed by the egg producers, such that any applicable exemption no longer applied. Because the government has waived any argument that the district court clearly erred in finding as a matter of fact that the total number of hen houses is publicly visible and identifiable—and in any event the finding is plainly supported by the record—the Court should affirm that the FDA must disclose this category of information on this independent basis as well.

STANDARDS OF REVIEW

Following a bench trial, this Court reviews the district court's findings of fact for clear error and the district court's conclusions of law de novo. *O'Bannon v. NCAA*, 802 F.3d 1049, 1061 (9th Cir. 2015).

ARGUMENT

I. The information at issue is not "confidential" under exemption 4.

Exemption 4 covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Here, the parties agree that the information at issue was "commercial or financial information" and was "obtained from a person." ER 5–6, 14. The only dispute is whether the information is "confidential" within the meaning of exemption 4. ER 13–14.

More than two decades ago, this Court held that information was "confidential" for purposes of exemption 4 if "disclosure is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994). The Court adopted this standard from the D.C. Circuit's decision in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Recently, in *FMI*, the Supreme Court rejected the *National Parks* test and announced a new test for determining whether information is "confidential" for purposes of

exemption 4: "At least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *FMI*, 139 S. Ct. at 2366. The Supreme Court left open the question whether the second prong—government assurance of privacy—is required. *Id.* at 2363.

The information at issue is not "confidential" under the *FMI* test. First, the information is not customarily kept and actually treated as private by the egg producers. Second, this Court should hold that confidentiality under exemption 4 requires a government assurance of confidentiality, and the government did not assure the confidentiality of this information. Because the information fails both prongs of the *FMI* test, the FDA erred in withholding it under exemption 4.[2]

A. The egg producers have neither "customarily kept" the information private nor "actually treated" it as private.

As the Supreme Court explained in *FMI*, the first prong of confidentiality under exemption 4 asks whether the information "is

[2] The FDA argues at length that *FMI* applies in this case. Appellant Br. 11–17. ALDF agrees.

customarily kept private, or at least closely held, by the person imparting it" and is "actually treated as private." 139 S. Ct. at 2363, 2366. This inquiry has two parts. First, is the information of a type that the submitter "customarily kept private"? To answer this question, the Court should consider whether the submitter has an established practice of preventing disclosure of the information at issue. *See* Merriam-Webster Online Dictionary (last visited Nov. 3, 2019), https://www.merriam-webster.com/dictionary/customarily (defining customarily as "by or according to custom or established practice" and "in accordance with what is customary or usual"). Second, has the submitter "actually treated" the specific information at issue "as private"? To answer this question, the Court should consider whether the submitter in fact acted in conformity with its usual practice of preventing disclosure of this information. *See* Merriam-Webster Online Dictionary (last visited Nov.3, 2019), https://www.merriam-webster.com/dictionary/actually (defining actually as "in act or in fact").

FMI makes clear that the focus of this inquiry is how the information is "kept" and "treated"—rather than how it is considered, viewed, or understood. In other words, the determination must rest on

the sufficiency of the active steps taken by the information-holder to prevent disclosure, not a subjective view of the nature of the information. *See FMI*, 139 S. Ct. at 2361, 2363 (noting that witnesses testified the information was "closely guard[ed]" and discussing retailers limiting of access to information "[e]ven within a company"); *cf. id.* at 2368 (Breyer, J., dissenting) (disagreeing with the majority's holding that confidentiality is assessed by "how [the information] is kept by those who possess it").

Applying that standard to this case, the district court's factual findings and the record in this case establish that the information at issue in this case is neither customarily kept nor actually treated as private. To begin with, the district court found that "employees do not sign non-disclosure agreements." ER 19. Therefore, employees are not required to keep it private. Likewise, egg producers generally do not require those who provide services to their facilities, such as electricians, to sign non-disclosure agreements or otherwise agree to protect the confidentiality of any information they observe. SER 32. The egg producers also generally use third-party suppliers to install the cage structures in their hen houses, SER 26, 27, 31, and specifically "rely on

the expertise of the suppliers of that equipment, who are not only familiar with theirs but the competitors" in setting up the cage structures in their hen houses, SER 31. In addition, egg producers have disclosed similar information in the past, including in "publicity articles" and "investor presentations." ER 19; *see* ER 12. Although past disclosures have not matched the information sought here sufficiently to "show that [public] disclosure had already occurred," ER 12, 19–21, that egg producers have historically disclosed similar information indicates that the information is not of a type that is "customarily kept private" by the egg producers.

These facts illustrate that, although the egg producers may not publicly advertise the information, they put few restrictions on its dissemination by those who know it. These facts stand in stark contrast to those in *FMI*, where the "closely guard[ed]" information at issue was neither disclosed nor made publicly available "in any way," and "[e]ven within a company … only small groups of employees usually have access to it." 139 S. Ct. at 2361, 2363.

In arguing that the information is nonetheless confidential under exemption 4, the FDA primarily relies on evidence that the egg producers "limited access to the production facilities" by "prohibiting competitors

and the public from entering." Appellant Br. 18 (quoting ER 19, 11). Witness testimony from the egg producers, however, indicated that the primary reason for keeping the egg production facilities closed to the public was to prevent the spread of disease. SER 30, 34, 37. And of course, businesses may choose not to open their facilities to the public for a number of reasons, other than confidentiality. For example, a business typically must undertake a higher standard of care—and assume greater liability for—injuries that occur to those invited or permitted to enter its property as opposed to those who trespass. *See* Restatement (Second) of Torts §§ 333, 342, 343 (Am. Law Inst. 1965 & Oct. 2019 Update) (providing various duties of care owed by possessors of property to invitees, licensees, and trespassers to such property). Opening business property—and particularly food production facilities—to numerous visitors would thereby increase the costs of operating the property. Keeping and actually treating information as private must mean more than the common business practice of having a non-public facility.

The FDA also points to the subjective views of the egg producers and a lack of public disclosure of the information at issue; neither is sufficient. Although the egg producers "'consider this information to be

confidential and proprietary' based on their concern that its disclosure 'would give a competitor a sense of the producer's costs and capacity,'" Appellant Br. 18 (quoting ER 11), that view sheds no light on any objective actions the producers took to keep and treat the information as private.

Below, the district court found that the information at issue had not previously been publicly disclosed—a threshold inquiry because "[i]nformation that is normally protected from disclosure under FOIA loses its protected status if it has otherwise been made public." ER 11; *see ACLU v. DOJ*, 880 F.3d 473, 491 (9th Cir. 2018) (stating that "[t]he logic of FOIA postulates that an exemption can serve no purpose once information becomes public" (internal ellipsis and quotation marks omitted) (quoting *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999))). That inquiry, while related, is distinct from the question whether information has been "kept private" and "actually treated as private." For instance, a business is not likely to publicly disclose the paint color of its conference room, but it would not customarily keep private the paint colors and actually treat the paint color as private. In other words, lack

of public disclosure is necessary to keep information private, but it is not sufficient under *FMI*.

Taken together, the record shows that, although the information at issue is not actively disclosed to the public by the egg producers, the egg producers do not take meaningful steps to keep or actually treat the information at issue as private. Accordingly, exemption 4 does not apply.

B. The government did not assure the confidentiality of the information at issue.

The Supreme Court in *FMI* left open the question whether, in addition to the requirement that the information be customarily kept and actually treated as private, an assurance of confidentiality by the government is required for information to be "confidential" under exemption 4.[3] *FMI*, 139 S. Ct. at 2363. Because, exemption 4 is best interpreted to require an assurance of confidentiality and none was

[3] The government suggests that, based on FOIA's legislative history, a government assurance of confidentiality could be sufficient on its own to render information "confidential" under exemption 4. Appellant Br. 14 (citing H.R. Rep. 89-1497, at 10 (1966)). The Supreme Court has rejected this suggestion, holding that "[a]t least the first condition has to be" met—that is, the information must be customarily kept and actually treated as confidential. *FMI*, 139 S. Ct. 2363. Therefore, the only question is whether the government must *also* assure its confidentiality. *See id.*

provided here, the information at issue is also not exempt under the second prong of the *FMI* test.

1. A government assurance of confidentiality is required.

As the Supreme Court noted, prior to adoption of the *National Parks* test, some courts of appeals—including this Court—had indicated that exemption 4 applied only where information had been disclosed to the government "'under the express or implied promise' of confidentiality." *Id.* (quoting *GSA v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969)); *see also Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971) (relying on the government's "agree[ment] to treat … as confidential" the information submitted), *cited in FMI*, 139 S. Ct. at 2363. Although *FMI* leaves open the question of whether a promise of confidentiality is a necessary second prong for information to be "confidential" within the meaning of exemption 4, this Court should return to its pre-*National Parks* understanding that exemption 4 requires a government promise of confidentiality, in light of the consistency of that position with *FMI*.

Further, requiring an assurance of confidentiality for "confidential" information is the best interpretation of exemption 4 because it ensures

that other portions of the statute are not rendered superfluous. The canon against surplusage is "one of the most basic interpretive canons," *Corley v. United States*, 556 U.S. 303, 314 (2009), and "is strongest when an interpretation would render superfluous another part of the same statutory scheme," *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013). That is precisely what the FDA's proposed interpretation would do here. Exemption 4 protects three categories of information: trade secrets, privileged commercial or financial information, and confidential commercial or financial information. 5 U.S.C. § 552(b)(4). The FDA's reading, however, would render both "trade secrets" and "privileged" superfluous, because both types of information by definition are kept private by the holder of the information. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) ("If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret," his property interest in the trade secret "is extinguished."); *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003) (en banc) ("An express waiver occurs when a party discloses privileged information to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making

the information public." (citing Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence: Practice Under the Rules* § 5.28, at 530–33 (2d ed. 1999), and *Developments in the Law – Privileged Communications*, 98 Harv. L. Rev. 1450, 1630 & n.2 (1985)). Thus, if the FDA were correct that "confidential" in exemption 4 "[g]enerally" requires only that the holder of the information customarily keep and actually treat the information as confidential, Appellant Br. 21, trade secrets and privileged information would be included within the category "commercial or financial information obtained from a person and … confidential." No principle of statutory construction requires this result.

FDA argues that government assurances of confidentiality are not always required but then explains that where the "objective inquiry into the circumstances surrounding" submission of the information to the government reveals that "there is reason to expect that the government *might* disclose the information at issue, express or implied assurances by the government" *are* required. Appellee Br. 13 (emphasis added). But there is almost always "reason to expect that the government might disclose the information at issue": All agency records are presumptively disclosable under FOIA, "subject to nine enumerated exemptions" that

are exclusive and "narrowly construed." *ACLU v. DOJ*, 880 F.3d at 483 (citing *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)).

The FDA relies on *DOJ v. Landano*, 508 U.S. 165 (1993), to argue that an "objective" inquiry into the circumstances of the submission of information is required to determine whether a government assurance is necessary. *Landano*, however, reaffirms that the necessity of a promise of confidentiality. In *Landano*, the Supreme Court considered the meaning of "confidential" in the context of exemption 7(D), which covers information compiled for law enforcement purposes if disclosure "could reasonably be expected to disclose" the identity of, or information provided by, a "confidential source." 508 U.S. at 167 (quoting 5 U.S.C. § 552(b)(7)(D)). In rejecting the government's request that *all* FBI sources presumptively be considered confidential sources, the Court explained the government must provide "more narrowly defined circumstances" to establish "an implied assurance of confidentiality." *Id.* at 178–79. Thus, the "objective inquiry into the circumstances surrounding" submission of the information that the government proposes based on *Landano* is not for the purposes of determining whether an assurance of confidentiality is necessary but, instead,

whether objective facts show an assurance of confidentiality in the absence of an express statement. Thus, even under the government's formulation, some assurance of confidentiality is required.

The FDA also contends that, generally, no government assurance of confidentiality should be required for information to be "confidential" within the scope of exemption 4 because information "'obtained from outside the Government'" is "not what Congress intended FOIA to address" and, therefore, limiting access to such information will not harm FOIA's purpose. Appellant Br. 14–15 (internal brackets and citation omitted). In other words, the agency posits that disclosure of information submitted to the government will not "'contribute significantly to public understanding *of the operations or activities of the government*.'" *Id.* at 14 (quoting *DOJ v. Reporters' Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989)). FDA's argument misrepresents the critical role played by information obtained from non-governmental entities. Such information does not just happen to be in the government's possession; it is collected and obtained to inform government decisionmaking and policy, and it sheds light on government implementation and enforcement of federal

law. As Congress recognized in passing the Paperwork Reduction Act of 1980:

> [M]any federal programs attempt to serve large numbers of people in a variety of ways, such as protecting civil rights, providing decent housing and ensuring safe and healthy working conditions. In those and other areas, Congress has made critically important commitments to the people of this nation. In order to be effective, many of those programs must collect information from the public in order to make intelligent decisions on standards, benefits and other government actions.

S. Rep. No. 96-930 at 3 (1980), 1980 U.S.C.C.A.N. 6241, 6243.

Public disclosure of information submitted by a company, in turn, can often reveal what the "government is up to." *Reporters' Comm.*, 489 U.S. at 773. It elucidates the basis for government action or inaction, and can reveal whether the government is effectively doing its job, whether it is efficient or wasteful, and whether a regulator is subject to "agency capture." In fact, the FDA itself recognizes the vital role disclosure of this information plays: Since at least 2009, the agency has publicly disclosed findings from FDA inspections that resulted in citations to private companies "to improve the public's understanding of how the FDA works to protect the public health, provide the public with a rationale for the Agency's enforcement actions, and to help inform public and industry

decision-making allowing them to make more informed marketplace choices and help to encourage compliance." FDA, *Inspection Citation* (last updated Oct. 17, 2019), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/inspection-references/inspection-citation. In fact, the documents at issue here are *FDA forms* "created by the [FDA] inspectors based on their inspection findings." ER 3.

In sum, to avoid rendering other terms superfluous and consistent with both this Court's decision in *Benson* and FOIA's goal of broad disclosure of government records, this Court should hold that, to be "confidential" under exemption 4, the government must provide the submitter an assurance of confidentiality.

2. The FDA gave no express assurance of confidentiality in this case.

The FDA relies on both the underlying rulemaking for the Egg Safety Rule and witness testimony at trial to argue that it provided an express assurance of privacy. Appellant Br. 21–23. Neither demonstrates an express assurance of privacy here.

a. Part 20 of 21 C.F.R. sets forth the FDA's FOIA regulations. In the proposed Egg Safety Rule, the FDA proposed the following provision

governing public disclosure of the records obtained: "Records required by this part are subject to the disclosure requirements under part 20 of this chapter." Prevention of Salmonella Enteritidis in Shell Eggs During Production, 69 Fed. Reg. 56,824, 56,896 (Sept. 22, 2004). The agency maintained this provision in the Final Rule, 74 Fed. Reg. at 33,098, which was codified at 21 C.F.R. § 118.10(f). Under the FDA's FOIA regulations, while FDA states it will solicit and consider the submitter's position on the confidentiality of the information, FDA will independently decide whether to disclose the records and will inform the submitter if it needs to file a lawsuit to seek to prevent disclosure. 21 C.F.R. § 20.61(e)(1)–(3). Thus, far from an assurance of confidentiality, the Egg Safety Rule puts egg producers on notice that the records collected under that rule are subject to disclosure under FOIA, like other agency records.

Nonetheless, the FDA contends that its statement in the Proposed Rule that it "intend[ed] to consider records that come into [the agency's] possession under this rule as *generally* meeting the definition of either a trade secret or commercial confidential materials" was an assurance of confidentiality to the egg producers. Appellant Br. 21–22 (emphasis added and alterations in original) (quoting 69 Fed. Reg. at 56,841). To

begin with, a statement in a preamble to a proposed rule is not a rule and cannot properly be viewed as a promise that overrides the text of the regulations. *See Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (explaining that a preamble is not itself a regulation and lacks the force of law).

In any event, viewed in context, this statement did not promise confidentiality as to any particular information collected. The FDA has withheld from disclosure significant amounts of information (not at issue here) collected during FDA inspections, including in the EIRs themselves, and also initially produced some of the information. *See* ER 3–4 (explaining the various categories of information collected during FDA inspections and noting that some categories of exemption 4 withholdings in the EIRs are not at issue); ER 103–30 (one of the EIRs at issue). Consistent with the FDA's statement that information will "generally"—not always—be withheld, the FDA discloses some information while withholding other information collected under the Egg Safety Rule. Indeed, in responding to a comment requesting that the FDA specify what information it would consider to be confidential commercial information based on the statement in the proposed rule, the FDA declined to "designate information upfront as [confidential commercial

information] or trade secret because these determinations can be made before releasing any such information" under the FDA's generally applicable FOIA regulations. 74 Fed. Reg. at 33,047. In other words, when asked in the rulemaking to assure the confidentiality of certain categories of records, the FDA declined to do so. FDA's argument in this case that it assured the confidentiality of every piece of information it obtains under the Egg Safety Rule is, thus, flatly contradicted by the rulemaking on which it relies.

In addition, comparison of the FDA's statement in the egg safety rulemaking to that considered by the Supreme Court in *FMI* further shows that no assurance of confidentiality was made in this case. In *FMI*, the Supreme Court noted "the government has long promised [retailers] that it will keep their information private" and relied on the U.S. Department of Agriculture's (USDA) 1978 rulemaking, which finalized a USDA regulation providing that the information obtained under the relevant program could not "be used or disclosed to anyone except for purposes directly connected with the administration and enforcement of" the relevant statute and implementing regulations. Food Stamp

Program, 43 Fed. Reg. 43,272, 43,275 (Sept. 22, 1978) (codified at 7 C.F.R. § 278.1(*l*) (1978)), *cited in FMI*, 139 S. Ct. at 2363.

Similarly, several FDA regulations are equally clear that information will be kept confidential. *See, e.g.*, 21 C.F.R. § 314.430(b) ("FDA will not publicly disclose the existence of an application or abbreviated application before an approval letter … or tentative approval letter is sent … unless the existence of the application or abbreviated application has been previously publicly disclosed or acknowledged."); *id.* § 514.87(e) ("Sales and distribution data and information reported under this section will be considered to fall within the exemption for confidential commercial financial information established in § 20.61 of this chapter and will not be disclosed," except for aggregated summary reports prepared by FDA); *id.* § 601.51(b) ("The existence of a biological product file will not be disclosed by the Food and Drug Administration before a biologics license application has been approved unless it has been previously public disclosed or acknowledged."). As these regulations show, the FDA knows how to make express assurances of confidentiality. It did not do so here.

Even putting aside that a statement in the preamble to the proposed rule cannot override the Final Rule itself, which refers to the FDA's FOIA regulations, and even putting aside that "generally" cannot reasonably be construed as a synonym for "always," the statement on which the FDA relies here was, at most, an assurance that the FDA would not disclose information that qualified as confidential commercial information under the relevant standard at the time of submission: information the disclosure of which would likely cause substantial competitive harm or impair the government's ability to obtain information in the future. As noted above, prior to *FMI*, every court of appeals to consider the question had adopted the *National Parks* test for confidential commercial information. *See FMI*, 139 S. Ct. at 2364. And the FDA had itself long acknowledged the *National Parks* test as its governing standard for withholding confidential commercial information. For example, in a 1993 rulemaking concerning the sharing of confidential information with foreign governments, FDA found inclusion of a "lengthy definition" of "confidential commercial information" to be "unnecessary" because that term had "been defined by Federal statute, judicial opinions, and agency practice over many years." Public Information;

Communications with Foreign Government Officials, 58 Fed. Reg. 61,598, 61,600 (Nov. 19, 1993). Specifically, "[c]ommercial or financial information that a person is required to provide FDA is 'confidential' for purposes of exemption 4 if disclosure of the information is likely to (1) Impair [sic] the Government's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* (citing *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 877–880 (D.C. Cir. 1992) (en banc), *and National Parks*, 498 F.2d at 770).[4] Thus, when FDA provided that its generally applicable FOIA regulations applied to records obtained under the Egg Safety Rule, all parties would have understood that the FDA would apply *National Parks* to assess whether information was exempt under exemption 4.

[4] In *Critical Mass*, the D.C. Circuit adopted a distinction between voluntary and required submissions, which this Court declined to explicitly accept or reject. *Frazee v. U.S. Forest Service*, 97 F.3d 367, 371–72 (9th Cir. 1996), *abrogated on other grounds by ALDF v. FDA*, 836 F.3d 987. FDA has never contended that the submission of the information at issue was voluntary, and the Egg Safety Rule makes clear that participation is compulsory for covered persons. *See* 21 C.F.R. § 118.1. Accordingly, the Court need not determine the extent of any assurance of privacy for voluntarily submitted information.

Here, the district court correctly concluded that disclosure of the four categories of information at issue would not likely cause substantial competitive harm, ER 17–19, and the government has not argued otherwise. As the district court explained: "At most, this information is likely to give a somewhat better sense of the general nature of a producer's operation, without providing any solid, actionable information that can be used against it, particularly in the short term." ER 18. Because "[m]ore information would be necessary to enable a competitor to put this information to use and cause substantial competitive harm," the district court found there was an insufficient "link between the release of these four categories of information and the possibility of harm." ER 18, 19; *see also* ER 19 ("For the categories relating to the number of hen houses, floors, rows, and tiers, a competitor would need to combine that information with too many other factors to make the risk of underbidding likely.").

For all these reasons, neither the Egg Safety Rule nor the underlying rulemaking provide an express assurance of confidentiality to the egg producers.

b. The FDA additionally cites to witness testimony that it argues "confirms [the] understanding" that there was an assurance of confidentiality. Appellant Br. 22. But the witness testimony does little more than provide the subjective views of some egg producers that "would not want that information to become public" and their belief that the information at issue "is generally held within FDA." *Id.* (quoting ER 33, 43). The FDA cites no testimony establishing that an explicit assurance of privacy was provided to any egg producer. Although the agency contends one witness stated that "an arrangement [of confidentiality] had been reached between the government and producers," *id.*, the testimony cited falls far short of identifying any such arrangement:

> Q. Is there any confidentiality associated with the FDA inspection?
>
> …
>
> A. You know, I'm trying to recall. I think if that was a big issue within the development of that program because producers wanted a confidentiality arrangement and – so I think the answer is, yes, there is a confidentiality arrangement.
>
> Q. And how do you have the understanding?
> A. How did I come to understand that?
>
> Q. Yes.
>
> …

> A. I remember when the program was – was begun, and I just generally remember some of – some of the concerns at that time.
>
> Q. If the process wasn't confidential, would [the egg producer] have a different reaction to the inspection process?
>
> …
>
> A. A different reaction in what way?
>
> Q. Would it be less amenable to having the FDA come and inspect [the egg producer's] farms?
>
> …
>
> A. Well, no. I mean, they're there to – if – if the determination is made that there are problems regarding [Salmonella], it affects your life from then on. You do things that cost a lot of money for one thing or the cost the – causes the inability of your product for customers. So we'd be very serious about it anyway. It's just that we don't also want the information being made available to others.

ER 40–41. Another egg producer witness was specifically asked about confidentiality arrangements and was similarly unable to provide details regarding the existence of any such arrangement. *See* ER 43 (stating a subjective belief that Egg Safety Rule indicated confidentiality but affirming that he had not had "any conversations with FDA representatives about the confidentiality of the inspection").

FOIA places the burden on the agency to "prov[e] the applicability of the exemption." *Yonemoto*, 686 F.3d at 688, *overruled on other grounds*

by ALDF v. FDA, 836 F.3d 987. The witness testimony is insufficient to carry the agency's burden to establish that an assurance of privacy was provided—indeed, the testimony supports the view that such assurance was *not* provided. Moreover, the Court should decline the FDA's suggestion of a remand for further factual development on this point, because the witnesses were already directly asked to provide any information about confidentiality arrangements with the FDA and were unable to do so.

3. Implied assurances of confidentiality are limited to circumstances not applicable in this case.

This Court indicated in *Benson* that an implied promise of confidentiality could suffice under exemption 4. 415 F.2d at 881. Review of the Supreme Court's decision in *Landano* regarding the circumstances in which an assurance of confidentiality can be implied suggest that such circumstances will rarely, if ever, exist in the exemption 4 context. At the least, they do not exist here.

In *Landano*, the Supreme Court considered when an assurance of confidentiality could be implied for individuals, state and local governmental agencies, and "private commercial and financial

institutions" that were law enforcement sources for purposes of exemption 7(D). 508 U.S. at 168, 172. The Court then explained that an implied assurance of confidentiality could be inferred for any source only from certain "narrowly defined circumstances," such as "paid informants" who "normally expect their cooperation with the FBI will be kept confidential" based on "[t]he nature of the informant's ongoing relationship with the Bureau, and the fact that the Bureau typically communicates with informants only at locations and under conditions which assure the contact will not be noticed." *Id.* at 179 (internal quotation marks omitted). The Court also noted that other circumstances could be relevant, such as "the character of the crime at issue" and "the source's relation to the crime," specifically finding that "[m]ost people would think that witnesses to a gang-related murder likely would be unwilling to speak to the Bureau except on the condition of confidentiality." *Id.* The other potential examples the Court pointed to from courts of appeals were (1) sources who provided information about a murder by foreign operatives, (2) sources who provided information about the murder of missionaries in El Salvador, (3) prison officials who feared reprisal for providing information about an attack on an inmate,

(4) sources providing information about a person from whom there was a reasonable fear of harassment, and (5) prison inmates and guards providing information about other guards who beat another inmate. *Id.* at 179–80 (citing cases). The Court's discussion provided no indication that the circumstances under which confidentiality can be inferred differ between individuals and businesses. *See Elec. Frontier Found. v. DOJ*, No. 15-cv-03186, 2016 WL 7406429, at *13–14 (N.D. Cal. Dec. 22, 2016) (rejecting government's position that "private-sector companies" were confidential sources under exemption 7(D) for failure to discuss any of the circumstances outlined in *Landano*).

In the context of exemption 4, there is no equivalent to the fear of physical harm, harassment, or reprisal justifying an inference of implied confidentiality in exemption 7(D) cases. In general, the circumstances cited by the Supreme Court in *Landano*, and discussed by other courts thereafter, revolve around the commonsense notion that some sources would likely face retaliation for cooperating with the government and that no reasonable person would expect that those sources would voluntarily subject themselves to such risk. *See, e.g.*, *Mays v. DEA*, 234 F.3d 1324, 1329 (D.C. Cir. 2000) (explaining the "pertinent question is

whether the violence and risk of retaliation that attend this type of crime warrant an implied grant of confidentiality"); *Ortiz v. U.S. Dep't of Health & Human Servs.*, 70 F.3d 729, 733–34 (2d Cir. 1995) (explaining the question is whether source faced such a risk of "retaliation or harassment" that "it is reasonable to presume that the information would not have been provided if confidentiality had not been assured").

By contrast, information potentially subject to exemption 4 typically comes into the government's possession when businesses submit commercial or financial information either because they are required to as a regulated entity or because they choose to in an attempt to sway agency decisionmaking. Neither situation raises similar concerns. Because Congress intended FOIA "to provide workable rules" governing the application of FOIA exemptions, *Reporters' Comm.*, 489 U.S. at 779 (quoting *FTC v. Grolier Inc.*, 462 U.S. 19, 27–28 (1983)), given the lack of such circumstances in exemption 4 cases generally, as well as agencies' ability to provide a straightforward express assurance of confidentiality, an express assurance of confidentiality should be required for application of exemption 4.

Here, in any event, there is no evidence in the record establishing that most people would expect that the egg producers would not have submitted the information at issue without an assurance of confidentiality. The information was collected as part of a *mandatory* inspection program operated by the FDA "to protect the public from adulterated food in interstate commerce." ER 3. Thus, whether implied assurances of confidentiality can ever exist under exemption 4, there was no such implied assurance here.

II. The district court correctly determined that the total number of hen houses is publicly disclosed.

As explained above, "[t]he logic of FOIA postulates that an exemption can serve no purpose once information becomes public." *ACLU v. DOJ*, 880 F.3d at 491 (internal ellipsis and quotation marks omitted) (quoting *Cottone*, 193 F.3d at 554). Accordingly, information or records "normally immunized from disclosure under FOIA,"—i.e., records that are exempt from disclosure—"lose their protective cloak" upon being publicly disclosed. *Id.* (quoting *Cottone*, 193 F.3d at 554). Because this doctrine applies across all exemptions and essentially asks whether the protection of FOIA's exemptions has been waived through public

disclosure, the Supreme Court's decision in *FMI* did not alter or affect its applicability in any way.

In this case, the district court concluded that the total number of hen houses had been publicly disclosed based on its factual finding that they were publicly visible and identifiable. ER 12; ER 19 ("ALDF did establish, however, that the total number of hen houses has been publicly disclosed."). Because the information had been publicly disclosed, the district court held exemption 4 did not apply. ER 19. (For the same reason, no other exemption could apply either. *See ACLU v. DOJ*, 880 F.3d at 491.)

The government concedes in its standard of review section that this Court reviews findings of fact for clear error. Appellant Br. 10 (citing *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 843 (9th Cir. 2004)). Yet the government does not argue that the district court committed clear error in finding the total number of hen houses were publicly visible and identifiable, *see id.* at 19–20, much less identify sufficient evidence in the record to satisfy the "significantly deferential" clearly erroneous standard, which requires a "definite and firm conviction that a mistake has been committed before reversal is

warranted," *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004) (internal quotation marks omitted). Accordingly, the government has waived any challenge to the district court's factual finding that the total number of hen houses is publicly visible and identifiable. *See Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1203 n.6 (9th Cir. 2005) (holding issues not raised in appellant's opening brief are waived) (citing *Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 858 n.4 (9th Cir. 1999)).

In any event, the district court's factual finding is correct and supported by the evidence submitted in the case. As the district court explained, "the number of hen houses cannot be hidden from public view," as supported by testimony of one of the egg producers. ER 12 (citing SER 35); *see also* ER 19 ("[I]t is practically impossible to shield [the total number of hen houses] from public view because, as Mr. Storm testified, any person on a public road adjacent to an egg farm will be able to identify the number of hen houses."). Moreover, either through "access[ing] aerial photographs … from Google Earth" or "perform[ing] their own reconnaissance, for example, [by] using drones or driving by farms close to the road," the number of hen houses are publicly visible, as supported

by the testimony of ALDF's expert and authenticated Google Earth images of the egg production facilities at issue. ER 12 (citing SER 1–13, 16–23); *see* ER 19 ("[E]ven if some hen houses cannot be seen from a public road, there is nothing standing in the way of a competitor accessing Google images or flaying a drone overhead.").

Accordingly, the district court correctly held that the total number of hen houses "has been publicly disclosed" because "it is practically impossible to shield information from public view[.]" ER 19. Adopting the government's view would require the nonsensical conclusion that, although the number of structures is visible to the public, the information is "confidential." To state that view is to refute it.

Because the total number of hen houses have been publicly disclosed, they cannot be exempt under FOIA.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's ruling that the number of hen houses, the number of floors per house, the number of cage rows per house, and the number of cage tiers per house are not exempt and must be disclosed under FOIA.

Dated: November 4, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, ALDF states that it is not aware of any related cases pending in this Court

/s/ Patrick D. Llewellyn
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the typeface and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(5), (a)(6), and (a)(7)(B) as follows: The proportionally spaced typeface is 14-point Century Schoolbook, and, as calculated by my word processing software (Microsoft Word for Office 365), the brief contains 8,331 words, exclusive of those parts of the brief not required to be included in the calculation by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Patrick D. Llewellyn
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