[ORAL ARGUMENT NOT SCHEDULED]

No. 21-5276

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff-appellant Citizens for Responsibility and Ethics in Washington (CREW) appeared in district court and is a party in this Court.

Defendant-appellee the U.S. Department of Justice appeared in district court and is a party in this Court.

American Oversight, Electronic Privacy Information Center, and Electronic Frontier Foundation have appeared in this Court as amici in support of CREW. No amici participated in the district court proceedings.

B. Rulings Under Review

Appellant seeks review of the September 30, 2021, opinion and order of the district court (Friedrich, J.), granting in part and denying in part the U.S. Department of Justice's motion for summary judgment, and granting in part and denying in part CREW's cross-motion for summary judgment. The district court's opinion is available at 567 F.

Supp. 3d 204, and ECF No. 29 (JA410-27). The court's order is available at ECF No. 30 (JA409).

C. Related Cases

This case has not previously been before this Court, and counsel is unaware of any pending related cases in this Court or other courts that raise the same issue presented on appeal here.

/s/ Amanda L. Mundell
Amanda L. Mundell

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GLOSSARY

Bureau	Federal Bureau of Prisons
CREW	Citizens for Responsibility and Ethics in Washington
FOIA	Freedom of Information Act

INTRODUCTION

In this Freedom of Information Act (FOIA) suit, plaintiff Citizens for Responsibility and Ethics in Washington (CREW) seeks information regarding the Federal Bureau of Prisons' (Bureau) procurement of pentobarbital for use in federal executions, including the identities of companies in the government's pentobarbital supply chain and related testing laboratories, as well as key contract terms relating to the price and quantity of the drug. The government withheld a number of responsive records on the ground that the information contained therein was exempt from disclosure under FOIA Exemption 4, which protects, among other things, confidential commercial information.

Those withholdings were proper. This Court has construed the term "commercial" broadly to encompass more than just information that reveals a business's basic commercial operations. Instead, information is commercial in nature whenever the supplier of the information has a commercial interest at stake in its disclosure. The Bureau's declarations explain that the disclosure of certain companies' identities in connection with the government's procurement of pentobarbital for use in capital punishment would cause the companies

to suffer financial losses and could result in the companies being forced to exit the market for lethal injection drugs altogether. Contrary to CREW's suggestion, that risk is not speculative: examples abound of companies suffering economic harm after their identities as suppliers of drugs for purposes of capital punishment are publicly revealed. And because CREW does not dispute that this information is kept confidential by the companies, the government properly applied Exemption 4 to withhold the companies' identities.

CREW's challenge to the government's decision to withhold confidential contract terms—which CREW does not dispute are commercial in nature—fares no better. Consistent with the Supreme Court's test for confidentiality articulated in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), the Bureau substantiated its withholdings with declarations that establish that the suppliers of this information keep it private, that they do so because the information could identify them, and that the government provided express assurances to the companies that the information would remain confidential to the extent permissible by law. Those declarations satisfy Exemption 4's confidentiality requirement.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter under 28 U.S.C. § 1331. Plaintiff filed a timely notice of appeal on November 29, 2021, 60 days after the district court entered final judgment. JA409, 428. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the confidential names of the companies involved in the government's procurement of pentobarbital are exempt from disclosure as "commercial" information under FOIA Exemption 4.

2. Whether other commercial information, including key contract terms, is "confidential" information under FOIA Exemption 4 and therefore exempt from disclosure.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to appellant's brief.

STATEMENT OF THE CASE

A. Statutory Background

FOIA provides for mandatory disclosure of government records to the public, subject to several enumerated exemptions. 5 U.S.C. § 552. This appeal concerns the application of FOIA Exemption 4, which

protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." *Id.* § 552(b)(4). A "person" includes "an individual, partnership, corporation, association, or public or private organization other than an agency." *Id.* § 551(3).

B. Factual Background

The Federal Bureau of Prisons is tasked with setting the date, time, place, and method of execution when a sentence of death has been imposed. 28 C.F.R. § 26.3(a). In 2005, several federal condemned inmates filed suit challenging the Bureau's use of a three-drug lethal-injection protocol consisting of sodium thiopental, pancuronium bromide, and potassium choloride. *See, e.g.*, *Roane v. Gonzales*, 832 F. Supp. 2d 61 (D.D.C. 2011). The government's sole source of sodium thiopental for lethal injections later ceased providing it. *See Glossip v. Gross*, 576 U.S. 863, 869-73 (2015). Due to the unavailability of sodium thiopental, the cases challenging the agency's protocol were stayed while the government considered revisions to its lethal-injection protocol.

Following extensive review, in July 2019, the government adopted an addendum to the federal execution protocol and scheduled executions for several condemned inmates. *See* JA157. Relevant here, the addendum replaced the government's previously used three-drug lethal injection procedure with a single drug—pentobarbital. But because BOP was unable to identify a drug manufacturer willing to sell pentobarbital solution for use in executions, the Bureau contracted with a bulk manufacturer of the active pharmaceutical ingredient for pentobarbital and a compounding pharmacy to make an injectable solution. *See* Dkt. No. 39-1, at 4-5, *In re Federal Bureau of Prisons' Execution Protocol Cases (Execution Protocol Cases)*, No. 1:19-mc-00145 (D.D.C. Nov. 13, 2019). Independent laboratories conducted quality-control testing on the drug. *Id.*

Several condemned inmates challenged the revised protocol, *see Execution Protocol Cases*, but those challenges were ultimately rejected, and the government carried out 13 executions between July 2020 and January 2021. In December 2020, the Department of Justice amended its regulations to allow for additional methods of execution besides lethal injection, *see* 28 C.F.R. § 26.3(a)(4), and on July 1, 2021, Attorney

General Garland imposed a moratorium on federal executions, *see* Memorandum from the Attorney Gen. to the Deputy Attorney Gen. et al., *Moratorium on Federal Executions Pending Review of Policies and Procedures* (July 1, 2021), https://perma.cc/7CCD-UASC, which remains in effect.

C. Prior Proceedings

1. On August 8, 2019, CREW submitted a FOIA request to the Bureau of Prisons, seeking "all records from February 14, 2019, to the present related to the procurement of pentobarbital, pentobarbital sodium, or Nembutal to be used in federal executions, including without limitation any notifications to or communications with vendors, solicitation information, requests for information, subcontracting leads, and contract awards."[1] JA103 (quotation marks omitted). The agency acknowledged CREW's request and initiated a search for responsive

[1] CREW submitted a similar request to the Office of Information Policy, seeking the same records from the Offices of the Attorney General, the Deputy Attorney General, and the Associate Attorney General. JA174, 176-77, 195. The Office of Information Policy located 40 pages of responsive records, released 27 pages to CREW with some redactions of information exempt from mandatory release under FOIA, and withheld 13 pages because they are fully exempt. JA179-80. Those redactions and withholdings are not at issue in this appeal.

records on August 8, 2019. *See id.* The agency ultimately determined that 1,095 email records and 56 pages of non-email records were responsive to CREW's FOIA request, with 848 email records deemed duplicative. JA108-10. On September 30, 2019, the Bureau informed CREW that it had determined that any records responsive to CREW's request would be categorically exempt from disclosure under FOIA Exemptions 4, 5, 6, 7(A), 7(B), 7(C), 7(E), and 7(F). JA150.

CREW filed an administrative appeal with the Office of Information Policy regarding the Bureau's withholding of the documents responsive to its request. JA153.

While the administrative appeal was pending, CREW filed this lawsuit in December 2019, and the Office of Information Policy subsequently closed CREW's appeal. JA6, 155. In its complaint, CREW alleges that the Bureau of Prisons and the Department of Justice "wrongfully withheld all non-exempt records responsive to [its] FOIA request." JA11-12. CREW requested that the district court "[o]rder Defendant [Department of Justice] and its component [Bureau of Prisons] to immediately and fully process Plaintiff's requests and disclose all non-exempt documents to Plaintiff." *Id.*

2. During the pendency of district court proceedings, the parties narrowed their dispute to a subset of the records the Bureau had identified as responsive. *See* JA359-60. CREW largely conceded the Bureau's withholdings under FOIA Exemptions 5, 6, 7(C), and 7(F); the agency withdrew its invocation of FOIA Exemption 7(A). *Id.* At the district court's direction, the agency submitted a revised index of responsive records and withholdings pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). *See* JA365.

Relevant here, the Bureau continued to apply Exemption 4 to records that contain confidential commercial or financial information provided to the agency by individuals and entities in the government's pentobarbital supply chain, including those who performed testing services on the pentobarbital that the government procured. JA111. The information withheld included not only information that directly identified the individuals or companies, such as names, addresses, and company logos, but also any other information that could lead to their identities, such as "purchase order/reference numbers, account numbers, contract numbers, . . . quotations, invoices, testing results, dates of purchase, service, and/or delivery, substance description,

item/stock/UPC numbers, price, quantity, concentration, packaging details, expiration dates, container units, lot numbers, and product identification numbers." JA111-12.

The Bureau also applied Exemption 4 to "price and contract term negotiations, pricing and business strategies, instructions for ordering and purchase, unique order and purchase requirements, and production and/or testing capability, to include formulas, quantity, timing of production and/or testing, and specific production/testing methods or standards." JA112.

Finally, the Bureau applied Exemption 4 to withhold in full "invoices, quotations, and protocols for third party testing services, as well as test results, as these documents reflect price and contract term negotiations, specific methods of testing, and detailed descriptions of how testing was or can be completed, including formulas, quantities and time frames required for testing." JA112.

In declarations submitted by the Bureau's information specialist, Kara Christenson, and an attorney with the Bureau, Rick Winter, the agency explained that the above information is "confidential because the individuals/companies providing the information have typically kept

it private, have specifically designated the information as proprietary and/or confidential, and have expressly required or requested that the Government maintain the information as confidential to the greatest extent possible under the law, a condition to which the Government has agreed to abide." JA112; *see also* JA164.

The Bureau further explained that "[t]his information is kept private because those individuals and companies involved in [the Bureau's] procurement of Pentobarbital are well aware that those involved in the process (at the state or federal level) are commonly subject to harassment, threats, and negative publicity leading to commercial decline when it is discovered that they are providing substances to be used in implementing the death penalty." JA112-13. The agency elaborated on the financial and reputational harms that could befall the companies once their identities became known. It identified numerous examples of anti-death penalty advocates' successful practice of "[d]oxing suppliers and/or their employees with the intent to shame, coerce or threaten them into refusing to provide lethal injection substances through negative publicity and subsequent financial injury." JA114 (footnote omitted). The agency described how,

in many instances, manufacturers, suppliers, compounding pharmacies, or testing laboratories abandoned the market after their companies were linked to lethal injection drugs. "Woodlands Compounding Pharmacy" ceased "providing lethal injection substances to be used in the State of Texas's lethal injection protocol" after its identity was leaked. JA113. "[T]he United States manufacturer of sodium thiopental[] stopped manufacturing this drug as a result of controversies over its use in executions[] . . . ." JA132. "Once it became known that the state of Missouri was intending to incorporate the drug propofol into its lethal-injection protocol, the German drug manufacturer that produced propofol announced it would no longer sell the drug to states for executions and shifted its distribution model." JA133.

The Bureau also explained how other confidential, but seemingly non-identifying, information could be pieced together to identify the companies at issue. For example, the agency explained at length how the contract terms CREW seeks, such as "invoices, . . . dates and times of purchase and/or delivery of products or services, and specific descriptions of the substance(s) and/or service(s), such as

item/stock/UPC numbers, price, quantity, concentration, . . . expiration dates, . . . and lot numbers" "could reveal the identity of those involved." JA134.

The Bureau explained that "dates, times, or the specific description of a substance or service could be compared to heightened email activity, or activity reported in accordance with government reporting requirements, within a certain timeframe to determine, or [at] least narrow down, the identity of such persons/companies." JA134. "[D]ates of purchases" could "be compared" to these "reporting logs" or other "databases maintained by the Drug Enforcement [Administration] . . . , which tracks and regulates the manufacture, sale, and purchase of controlled substances." *Id.* "By comparing dates of purchases . . . to publically-available data, or data gained through other non-related requests or discovery, savvy individuals could determine or narrow down companies . . . involved in [the] procurement . . . ." *Id.* "Expiration dates can also be compared to [Drug Enforcement Administration] logs and data to narrow down or identify suppliers or potential suppliers of lethal injection substances." JA135.

"[T]he description of a particular substance, including the manner in which it is produced, packaged, sold or identified," can also "reveal the identity of the individual or company responsible for producing, packaging, selling, and/or testing lethal injection substances." JA134. The Bureau explained that "if a particular company is known or discovered to . . . price a substance in a particular way, or test a product in a particular way, the manner in which it is described in [the Bureau's] records could be used to trace the substance back to that particular provider by the process of comparison and elimination." JA134-35.

The agency further explained that "testing results, quotes for services, and invoices, even in redacted format, could be analyzed and compared to those obtained either in a public forum or through other FOIA requests to specifically identify which company(ies) produced them." JA135. The agency provided a recent example of how this identification process could unfold. In July 2020, Reuters "published an article describing how it purportedly determined the identity of three laboratories who were allegedly involved in testing compounded pentobarbital intended to be used for federal executions." *Id.* (citing

Jonathan Allen, *Special Report: How the Trump administration secured a secret supply of execution drugs*, REUTERS (July 10, 2020, 7:13 AM), https://perma.cc/4PZD-CGRL). The article explained that journalists had reviewed redacted laboratory reports that the government had produced in the federal litigation regarding the legality of the Bureau's lethal-injection protocol. JA135. Despite the "company names, logos, and other identifying information" being "blacked out," Reuters claimed that it was still able to identify the laboratories involved. *Id.*

Consequently, the Bureau stated that "[e]ven a small piece of information can be the catalyst leading to the revelation of those involved in [the Bureau's] procurement of Pentobarbital." JA136.

3. On cross-motions for summary judgment, *see* JA20, 210, the district court granted in part and denied in part each motion.[2] JA410. Relevant here, the district court granted summary judgment in favor of the government with respect to the application of Exemption 4.

The court noted that "CREW does not challenge the adequacy of the government's searches for responsive records" or that the records

[2] The court granted summary judgment in favor of CREW with respect to the agency's withholdings under Exemption 7(E). That ruling is not at issue in this appeal.

were obtained from a "person" as required by Exemption 4. JA414-15. CREW also did not contest that the contract terms it sought are "commercial" or that the identities of the companies in the government's pentobarbital supply chain are "confidential." JA419, 421. Thus, the court analyzed whether information identifying the companies is "commercial" information, and whether the contract terms are "confidential." *Id.*

With respect to records that identified the companies in the government's pentobarbital supply chain, the district court explained that this "information . . . fits neatly into" the commercial "context." JA418. In particular, the court relied on the Bureau's representations that "private companies that provide drugs for the death penalty 'are commonly subject to harassment, threats, and negative publicity leading to commercial decline when' their provision of those drugs 'is discovered.'" *Id.* (quoting JA112-13). The district court noted that these consequences were "not mere conjecture," identifying a "Texas pharmacy that received this treatment when the public learned that the pharmacy provided lethal injection drugs to the state of Texas," *id.*, and "a manufacturer" who "had to exit an entire drug market as a result of

negative publicity surrounding its government contract to provide lethal injection drugs," JA419. Accordingly, the court explained that "manufacturers of pentobarbital thus have a credible fear that their businesses could suffer the same fate if their identities were released." *Id.* The court further recognized that "[t]he competitive harm here is quite clear—revelation of the companies' identity could lead to harassment, cost them business, or force them to exit the pentobarbital market entirely." *Id.*

With respect to the other information that CREW sought, the district court explained that it was properly withheld as "confidential" under Exemption 4. JA420. The court rejected CREW's assertion that in order to demonstrate that each "piece of information" was confidential, the government was required to show that it "could identify the companies." JA421. Instead, the court explained, "[t]he question the court must answer . . . is . . . whether the companies keep that information private." *Id.* In this regard, the court noted that "[c]ompanies need not justify why they keep information confidential; Exemption 4 only requires that they do keep it confidential." *Id.* The court determined that the Bureau "represented that the companies do

keep this information confidential," a representation that is "entitled to a presumption of good faith," and that "CREW has provided nothing that rebuts that presumption." JA422 (quotation marks omitted). The court further stated that the government had "clearly . . . met" its burden of showing that it had promised to keep the information confidential. JA420-21. Accordingly, the court "conclude[d] that the [government's] withholdings under Exemption 4 were proper." JA422.

After CREW filed its opening brief, the government identified seven records on the *Vaughn* Index that it had withheld in full but that were already available in the public domain with only partial redactions. These documents had been filed publicly, with redactions covering Exemption 4 information, as part of the administrative record in the litigation challenging the Bureau's lethal-injection protocol. *See* Dkt. No. 39-1, *Execution Protocol Cases*. Counsel for the government provided the relevant pages of the administrative record to CREW's counsel on May 25, 2022.

SUMMARY OF ARGUMENT

The district court correctly concluded that the information CREW seeks is protected from disclosure under FOIA Exemption 4.

I. The identities of the companies in the government's pentobarbital supply and testing chain are commercial information. Commercial information is any information as to which the supplier of the information has "a commercial interest at stake in its disclosure." *National Ass'n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002). As the agency's declarations demonstrate, the companies at issue here risk serious financial consequences if their identities are linked to the production or testing of lethal injection drugs. Those financial consequences stemming from the disclosure of the companies' identities are sufficient to establish that the companies have a "commercial interest at stake" in that information. *Id.* Because CREW does not dispute that this information is also confidential, the agency properly invoked Exemption 4 to withhold the companies' identities.

II. The Bureau also properly withheld key contract terms pertaining to the government's procurement of pentobarbital, such as the quantity and price of the drug. CREW does not dispute that this information is commercial in nature and challenges only the agency's determination that the information is confidential. But Exemption 4's confidentiality requirement turns on whether the supplier of the

information actually treats the information as confidential, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019), and the Bureau's declarations unequivocally demonstrate that the companies do keep this information confidential as it relates to the production and testing of pentobarbital for use in capital punishment. Although not necessary to establish confidentiality, the record also demonstrates *why* the information is customarily kept confidential: its release, either alone or in connection with other information already in the public domain, risks identifying the companies at issue or causing them to suffer economic losses. The district court therefore correctly determined that Exemption 4 protects this information from disclosure.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment in a FOIA case de novo. *Shapiro v. U.S. Dep't of Justice*, 893 F.3d 796, 799 (D.C. Cir. 2018).

ARGUMENT

I. The Bureau Of Prisons Properly Withheld The Identities Of The Companies That Supply And Test The Government's Pentobarbital

CREW challenges the application of Exemption 4 to the names of the individuals and companies involved in the government's

procurement of pentobarbital. CREW does not dispute that this information was "obtained from a person" and is "confidential" as required by Exemption 4. Br. 15. Instead, CREW contends that the agency failed to carry its burden of showing that this information is commercial. The district court correctly rejected that contention.

A. The Term "Commercial" Reaches Broadly And Encompasses The Identifying Information At Issue Here

Because FOIA does not define the term "commercial," courts give the term its ordinary meaning. *See National Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002). Although FOIA "exemptions are to be narrowly construed," *FBI v. Abramson*, 456 U.S. 615, 630 (1982), courts must still give them "meaningful reach and application," *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). In light of contemporaneous dictionary definitions that define "commercial" as "[r]elating to or connected with . . . commerce in general," *Commercial*, Black's Law Dictionary (rev. 4th ed. 1968), this Court has determined that the term "commercial" "reaches . . . broadly." *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006). It is not limited to information that "reveal[s] basic commercial operations,

such as sales statistics, profits and losses, and inventories, or relate[s] to the income-producing aspects of a business," but covers any information in which the provider "[has] a commercial interest." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Thus, Exemption 4's requirement that information "serve[] a commercial function or is of a commercial nature" is satisfied whenever the information has a "connection with a commercial enterprise" or "the parties who supplied the . . . information *have a commercial interest at stake in its disclosure*." *Norton*, 309 F.3d at 38-39 (emphasis added and quotation marks omitted).

The names of the companies at issue here fall well within the scope of "commercial" information because the companies "have a commercial interest at stake in [the] disclosure" of their identities in connection with the government's procurement of pentobarbital for purposes of lethal injection. *Norton*, 309 F.3d at 39; *see Electronic Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 117 F. Supp. 3d 46, 62-63 (D.D.C. 2015) (holding that the name and identity of a company is "commercial" for Exemption 4 purposes when disclosure could have a commercial or financial impact on the company). The declarations that

the Bureau submitted below explained that disclosure of the companies' identities would affect their commercial operations because it "would subject the companies to a competitive disadvantage," "harassment, threats, and negative publicity leading to commercial decline," and "would deter them from . . . engaging in business transactions for future procurement of lethal injections substances." JA112-13, JA115.

The Bureau identified numerous instances where suppliers withdrew from the lethal-injection drug market after their identities became associated with executions because public participation in that market would be damaging to their other business interests. JA111-13, 132-33. The declarations explain that the "manufacturer of sodium thiopental[] stopped manufacturing this drug as a result of controversies over its use in executions." JA132 (citing Kimberly Leonard, The Center for Public Integrity, *Lethal injection drug access could put executions on hold* (April 4, 2012), https://perma.cc/NH7A-5HFL).

Likewise, a compounding pharmacy, "which agreed to provide lethal injection substances to the State of Texas" under an assurance of confidentiality, "demanded the return of its supply after information

that it manufactured the substance was released." JA133; *see also* Letter from Jasper Lovoi, Registered Pharmacist, The Woodlands Compounding Pharmacy, to Judge Larry Gist, Board Member, Texas Board of Criminal Justice, et al. (Oct. 4, 2013), https://perma.cc/TQR7-U3Y6 (stating "Had I known that this information would be made public, which the State implied it would not, I never would have agreed to provide the drugs to the [Texas Department of Criminal Justice]," and "demand[ing] that [the State] immediately return the vials of compounded pentobarbital" because the pharmacy was "very busy operating" and "do[es] not have the time to deal with . . . the press, the hate mail[,] . . . and possible future lawsuits"). A public "blog invited the public to write a negative review about the pharmacy on the pharmacy's Google page and to contact the American Pharmacist Association to lodge a complaint against the pharmacy." JA113 (citing The Pentobarbital Experiment, *The Pharmacist who approves the business of killing, but only under the veil of secrecy*, The Pentobarbital Experiment Blog (Oct. 6, 2013), https://perma.cc/G2U9-6X8P).

The declarations further noted that after Missouri "incorporate[d] the drug propofol into its lethal-injection protocol, the German drug

manufacturer that produced [it] announced it would no longer sell the drug to states for executions and shifted its distribution model." JA133 (citing Kevin Murphy, *German firm blocked shipments to U.S. distributor after drug sent for executions*, REUTERS (Oct. 10, 2013, 10:57 PM), https://perma.cc/963D-P5WU).

Other instances abound in which the risk of negative publicity and diminished sales caused pharmacies to fear exposure of their identities as sources of lethal injection drugs. *See Texas Dep't of Criminal Justice v. Levin*, 572 S.W.3d 671, 682 (Tex. 2019) (recognizing that a fear of negative publicity and declining sales was one of the reasons pharmacies do not want to be publicly identified as suppliers of lethal injection drugs); *McGehee v. Texas Dep't of Criminal Justice*, No. H-18-1546, 2018 WL 3996956, at *8-10 (S.D. Tex. Aug. 21, 2018) (describing drug providers' fears of exposure); *see also Gray v. McAuliffe*, No. 3:16-cv-982-HEH, 2017 WL 102970, at *7 (E.D. Va. Jan. 10, 2017) (noting that "[b]ecause death penalty opponents have made it difficult to obtain [Food & Drug Administration]–approved drugs customarily used in executions, Virginia has recently resorted to obtaining drugs from compounding pharmacies instead of traditional suppliers").

Finally, the Bureau's declarations described a Reuters news report that allegedly identified the independent laboratories that quality-tested the compounded pentobarbital, causing one to publicly declare that it would not provide testing services for pentobarbital that will be used in executions. *See* JA135; Allen, *supra*; E. Michael Pruett and Russel Odegard, *Testing Pentobarbital* (last visited June 21, 2022), https://perma.cc/MD96-ZC6C.

On this basis, the district court properly determined that the identities of the companies are "commercial" because the "competitive harm" from disclosure is "quite clear": "revelation of the companies' identity could lead to harassment, cost them business, or force them to exit the pentobarbital market entirely." JA419.

B. CREW's Arguments To The Contrary Are Unpersuasive

CREW resists the district court's common-sense conclusion and urges instead that the identities of the companies are not "commercial" information under Exemption 4 because they have no intrinsic commercial value. Br. 31. But courts in other contexts have properly recognized that businesses have a commercial interest in their names. *See Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, 272 (1908)

(explaining that the "name" Hall had "commercial value as an advertisement even when divorced from the notion of succession in business, a sort of general good will, owing to its long association with superior work"); *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 n.10 (9th Cir. 1974) ("It would be wholly unrealistic to deny that a name[] . . . can have commercial value."). And in any event, the government has not invoked Exemption 4 with respect to the names of the companies in a vacuum. In the context presented here, releasing the identities of the companies necessarily discloses significant additional information about their business operations—namely, that they are involved in the procurement or testing of pentobarbital for use in capital punishment. The examples provided above demonstrate how the association of a company's name with certain information about its business operations can affect the company's reputation, sales, and overall business success.

Neither *Getman v. National Labor Relations Board*, 450 F.2d 670 (D.C. Cir. 1971), nor *Judicial Watch, Inc. v. U.S. Department of Health and Human Services*, 525 F. Supp. 3d 90 (D.D.C. 2021), on which CREW relies, supports CREW's position. The plaintiffs in both cases

sought the disclosure of certain names and addresses—in *Getman*, the names and addresses of employees eligible to vote in certain representation elections, 450 F.2d at 671, and in *Judicial Watch*, the names and addresses of contract laboratories, 525 F. Supp. 3d at 98. The court in each case held that the record failed to establish in the specific circumstances presented that the information sought was commercial. These holdings, however, were fact-specific rather than categorical. Indeed, the *Judicial Watch* court acknowledged that "[i]t is, of course, plausible that [a government contractor] could have a commercial interest in the names and addresses of its contract laboratories," even though the "information is not obviously commercial." 525 F. Supp. 3d at 98. Both cases are readily distinguishable, as the record here establishes the companies' commercial interest in their identities and the way in which disclosure of that information would affect their commercial interests. *E.g.*, JA112-14.

Citing the legislative history, CREW next asserts that "the downstream consequences of . . . disclosure" have no bearing on "[w]hether information is 'commercial.'" Br. 21. But the legislative

history of FOIA "firmly supports an inference that [Exemption 4] is intended for the benefit of persons who supply information as well as the agencies which gather it." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767-70 (D.C. Cir. 1974), *abrogated on other grounds by Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019). Nothing in that history forecloses consideration of commercial consequences as a means of determining whether an information-owner has a commercial interest in the information. And this Court has explained that "commercial information" is not limited to information that "reveal[s] basic commercial operations, such as sales statistics, profits and losses, and inventories, or relate[s] to the income-producing aspects of a business," but instead reaches any information in which the owner has "a commercial interest." *Public Citizen*, 704 F.2d at 1290.

Relying on language in FOIA Exemption 6, which exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and Exemption 7, which exempts "records or information compiled for law enforcement purposes" if their "production" would result in certain consequences, 5 U.S.C. § 552(b)(6), (7), CREW asserts

that the absence of similar "disclosure" language in Exemption 4 indicates that Congress did not intend for the consequences of disclosure to form part of the commercial inquiry. Br. 19-20.

This Court has rejected that view. In *Norton*, the Court stressed that "information is 'commercial' . . . if, 'in and of itself,' it serves a 'commercial function' or is of a 'commercial nature.'" 309 F.3d at 38 (quoting *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978)). The Court explained that information is "of a commercial nature" if it has a "connection with a commercial enterprise." *Id.* at 38-39 (quotation marks omitted). And it "serves a commercial function" if "the parties who supplied the . . . information *have a commercial interest at stake in its disclosure*." *Id.* (emphasis added and quotation marks omitted). Under this standard, the companies' identities here are commercial information: the companies' business names are "connect[ed] with [their] commercial enterprise[s]," and the Bureau's declarations demonstrate that the companies "have a commercial interest at stake in [the] disclosure" of their identities. *Id.* at 39.

Because the commercial consequences of disclosure can indicate whether information is commercial in nature or serves a commercial function, this Court routinely considers the commercial effect of disclosure in assessing whether an entity has a "commercial interest in the requested information." *Public Citizen*, 704 F.2d at 1290. In *Public Citizen*, the Court held that "[b]ecause documentation of the health and safety experience of [intraocular lens manufacturers'] products will be instrumental in gaining marketing approval for [those] products, it seems clear that the manufacturers . . . have a commercial interest in the requested information." *Id.* Likewise, in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 830 F.2d 278, 281 (D.C. Cir. 1987), *vacated on other grounds by* 975 F.2d 871 (D.C. Cir. 1992), the Court concluded that information regarding "health and safety problems" at the Institute for Nuclear Power Operations' constituent "nuclear power plants" was "commercial" because the power plants' "commercial fortunes . . . could be materially affected by . . . disclosure." And in *Baker & Hostetler LLP*, 473 F.3d at 320, this Court explained that certain lumber companies had a "commercial interest" in letters that "describe[d] favorable market conditions" for their operations,

because "disclosure would help rivals to identify and exploit those companies' competitive weaknesses."

District courts in this Circuit have followed suit. In *Electronic Privacy Information Center,* 117 F. Supp. 3d at 62-63, the district court held that the government properly withheld the names of participants in its cyber-security pilot program on account of the commercial consequences of disclosure. The court acknowledged that "a company may not always have a commercial interest in its name and identity." *Id.* But it nevertheless held that in context—where disclosure of the participants' identities could reveal their cyber vulnerability and subject them to "increased cyber targeting" and "competitive disadvantages or market loss"—such information was commercial and exempt from disclosure under Exemption 4. *Id.* at 64 (quotation marks omitted).

As these cases demonstrate, the commercial consequences of disclosure can shed light on whether information is "commercial" in nature. As in *Public Citizen*, *Critical Mass*, *Baker & Hostetler LLP*, and *Electronic Privacy Information Center*, the government's unrebutted declarations highlight the legitimate risks to the "commercial fortunes"

of the companies in the government's pentobarbital supply and testing chain that would result from disclosure of their identities. *Critical Mass*, 830 F.2d at 281; *see* JA112-13 (describing the likelihood of "commercial decline"). The companies therefore have a "commercial interest" in keeping their identities private with respect to their involvement in the government's procurement of lethal injection drugs.

Applying Exemption 4 in this manner does not, as CREW suggests, render the exemption "boundless." Br. 40. Courts have repeatedly compelled disclosure where the government's declarations do not adequately support the conclusion that the information at issue is commercial. *See Judicial Watch*, 525 F. Supp. 3d at 98; *COMPTEL v. Federal Commc'ns Comm'n*, 910 F. Supp. 2d 100, 116 (D.D.C. 2012) (assuming that "corporations can have a commercial interest in the names of certain staff" but finding that the government had made an insufficient showing that there was a "commercial interest in the names of every one of [the corporation's] employees"); *Besson v. U.S. Dep't of Commerce*, 480 F. Supp. 3d 105, 112 (D.D.C. 2020) (explaining that because "a person's identity" is not "the type of commercial information [typically] protected by Exemption 4," "an agency seeking to withhold

employee names . . . must identify specific evidence demonstrating something unique about the names that logically or plausibly renders them commercial in nature or function" (quotation marks omitted)). And the confidentiality requirement serves as a further meaningful limitation on the reach of Exemption 4.

CREW similarly errs in contending that reputational harm from disclosure is "irrelevant" to determining whether information is commercial in nature. Br. 34-45. This Court has not held that reputational harm has no bearing on the commerciality requirement. Instead, the cases on which CREW relies addressed reputational harm in connection with Exemption 4's *confidentiality* requirement. In *United Technologies Corp. v. U.S. Department of Defense*, 601 F.3d 557, 563-64 (D.C. Cir. 2010), for example, the parties agreed the information was commercial; the only issue left to resolve was whether the information was also confidential. Applying the "substantial competitive harm" test for confidentiality, which has since been rejected by the Supreme Court in *Argus Leader*, this Court explained that a showing of reputational harm was insufficient to demonstrate that disclosure would cause competitive harm. *Id.*; *see also Occidental*

Petroleum Corp. v. Securities & Exch. Comm'n, 873 F.2d 325, 341 (D.C. Cir. 1989); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987); *Public Citizen*, 704 F.2d at 1291 n.30.

CREW's reliance on *Public Citizen v. U.S. Department of Health & Human Services*, 975 F. Supp. 2d 81 (D.D.C. 2013), is also misplaced. Unlike here, the district court in *Public Citizen* noted that "no defendant declarant has provided any information revealing how [names of ineligible persons] could be 'commercial,'" and the government likewise failed to "[]explain[]" its "assertions" that the "identity of the agency conducting the investigation" is "commercial." *Id.* at 105-07. The district court then wrongly applied the substantial competitive harm analysis from *United Technologies*, *CNA Financial*, and *Occidental* to the commerciality prong.

In any event, contrary to CREW's assertions, this case is not about mere reputational harm; the declarations show that disclosure of the information will cause the companies to suffer economic consequences, and, as explained above, the economic consequences that flow from disclosure are relevant to the commerciality inquiry. *See Argus Leader*, 139 S. Ct. at 2368 (Breyer, J., concurring in part and dissenting in part)

(the "focus on 'commercial' . . . information[] . . . implies that the harm caused by disclosure must . . . cause some genuine harm to an owner's economic or business interests").

That harm is not, as CREW suggests, "unquantifi[able]" or "attenuated." Br. 39, 41. To the contrary, the Bureau provided numerous examples of businesses suffering economic consequences, including being forced to exit the market, once the public learned of their ties to lethal injection drugs. *E.g.*, JA112-14. And while CREW asserts that withholding these companies' identities "turns FOIA's pro-transparency purpose upside down," Br. 39, Congress has already concluded that the public's interest in transparency does not trump a supplier's interest in keeping its "commercial information" "confidential," *see* 5 U.S.C. § 552(b)(4).

Finally, CREW contends that this information should not be exempt from disclosure because Congress has not enacted legislation that "specifically order[s] the identities of entities that participate in the lethal injection process be kept confidential." Br. 40. But Exemption 4 already protects any information that is both confidential and commercial, and Congress's failure to enact more targeted legislation

has no bearing on the scope of the term "commercial" as used in Exemption 4. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." (quotation marks omitted)).

II. The Bureau Of Prisons Properly Withheld Contract Terms That The Information-Owners Designated As Confidential

CREW also challenges the application of Exemption 4 to "key contract terms in [the Bureau's] pentobarbital contracts"—namely, "drug price, quantity, expiration dates, invoices, container units, lot numbers, purchase order/reference numbers, substance description, concentration, packaging details, and dates of purchase, service, and/or delivery." Br. 45. CREW does not dispute that this information is commercial in nature, or that it was "obtained from a person" as required under Exemption 4. 5 U.S.C. § 552(b)(4). Instead, CREW contends that the Bureau failed to carry its burden of showing that this information is confidential. The district court correctly rejected that contention.

A. The Companies At Issue Treat The Requested Information As Confidential

For purposes of Exemption 4, information is "confidential" when it is "customarily and actually treated as private by its owner," at least where it has been "provided to the government under an assurance of privacy."[3] *Argus Leader*, 139 S. Ct. at 2366. Here, the government's declarations establish that the companies in the government's pentobarbital supply and testing chain "typically [keep]" the contract terms CREW seeks "private, have specifically designated the information as . . . confidential, and have expressly required or requested that the Government maintain the information as confidential to the greatest extent possible under the law." JA112; *see also* JA168 ("[T]he few companies that are willing to manufacture, produce, distribute, or otherwise engage in conversation for the procurement of lethal injection substances[] do so only under assurance of confidentiality . . . ."). The declarations also explain that the

[3] *Argus Leader* left open the question whether both conditions must be met, or whether only the first condition—the requirement that the information be customarily kept private by the owner—is sufficient. 139 S. Ct. at 2363. This Court need not resolve the issue because, as in *Argus Leader*, CREW does not dispute that the Bureau has promised to keep this information confidential. *See* Br. 45 n.11.

government "agreed to abide" by that "condition." JA112. In particular, the Bureau emphasized that it "restricted communications with, and knowledge of, providers of lethal injection substances only to those within the agency who were directly involved in the process of obtaining the substances or had a need to know the information in the performance of their duties." JA115.

CREW mistakenly contends that in order to satisfy the confidentiality requirement, the Bureau had to "substantiate" the companies' decision to treat the information as confidential. Br. 48-50. But nothing in the text of Exemption 4 requires an information-owner to supply a reason for keeping certain information private, and CREW identifies no instance where a court examined an information-owner's basis for asserting confidentiality. To the contrary, as the district court explained, "[c]ompanies need not justify why they keep information confidential." JA421. And the Supreme Court has cautioned against reading additional requirements into the text of Exemption 4. *See Argus Leader*, 139 S. Ct. at 2363-64 (rejecting the practice of requiring proof that disclosure would result in "substantial competitive harm"). It therefore does not matter why a company has chosen to keep certain

information private; what matters is whether the information is in fact "customarily kept private, or at least closely held, by the person imparting it." *Id.* at 2363; *see also Center for Auto Safety v. National Highway Traffic Safety Admin.*, 244 F.3d 144, 148 (D.C. Cir. 2001) (explaining that the confidentiality requirement turns on "how the particular party customarily treats the information, not how the industry as a whole treats" it). The Bureau's declarations demonstrate that the companies customarily keep these contract terms private, and the district court correctly declined to investigate the companies' basis for treating the information that way.

CREW's focus on the adequacy of the Bureau's "justification" for withholding the information as confidential is similarly misplaced. *See* Br. 51. Although an agency must provide a detailed and specific explanation for applying a particular FOIA exemption, that requirement is met where, as here, the agency specifically avers that the information-owner keeps the information at issue private. The Bureau's declaration is entitled to a presumption of good faith, *see SafeCard Servs. v. Securities & Exch. Comm'n*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), and nothing more is required to show that "the

information withheld logically falls within the claimed exemption," *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

As noted above, the Bureau described the information withheld as "confidential because the individuals/companies providing the information have typically kept it private, have specifically designated the information as . . . confidential, and have expressly required or requested that the Government maintain the information as confidential." JA112. CREW asserts that this statement "meant that contractors in the pentobarbital supply chain 'have typically kept' *identifying information private*; 'have specifically designated' *their participation in pentobarbital supply and testing as private*; and 'have expressly required or requested' express assurances from the government that *this identity information* will remain private." Br. 47 (emphases added). But the Bureau's declaration means what it says: The companies have designated as private and confidential all of the information CREW has requested. That is all that is necessary to invoke Exemption 4.

In the course of responding to CREW's opening brief, the government learned that certain responsive records withheld in full had

already been filed publicly with limited redactions as part of the administrative record in *Execution Protocol Cases*. Consequently, the government provided those redacted records to CREW. That limited release does not defeat the confidentiality of the information contained in the *other* records that CREW seeks. The district court in *Execution Protocol Cases* ordered the Bureau to file the administrative record on the public docket, *see* Minute Order, *Execution Protocol Cases*, No. 1:19-mc-00145 (D.D.C. Nov. 12, 2019), and the agency neglected to redact a handful of references to confidential concentrations and expiration dates. The release of those particular responsive records does not render Exemption 4 inapplicable to similar information contained in other records that have not been publicly disclosed. Although this Court has suggested that the availability of information in the public domain can defeat a claim of confidentiality, it has done so only in connection with the "competitive harm" analysis of Exemption 4's confidentiality requirement that the Supreme Court has since rejected in *Argus Leader*, 139 S. Ct. at 2363, and only where the supplier of the information itself was responsible for making the information public. *See, e.g.*, *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169

F.3d 16, 19 (D.C. Cir. 1999); *CNA Fin. Corp.*, 830 F.2d at 1163. That is not so here, where the companies at issue were not responsible for making the information public. The government provided CREW's counsel with the documents contained in the administrative record. No further disclosures are required. *Cf. Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 930-31 (D.C. Cir. 2003) (stating, in the Exemption 7 context, that "[t]he disclosure of a few pieces of information in no way lessens the government's argument that complete disclosure would provide a composite picture of its investigation and have negative effects on the investigation").

B. Although Not Required By Exemption 4, The Government Amply Explained Why The Contract Terms CREW Seeks Must Be Kept Confidential

Although not necessary to establish confidentiality, the Bureau has explained at length how the contract terms CREW seeks, such as "invoices, . . . dates and times of purchase and/or delivery of products or services, and specific descriptions of the substance(s) and/or service(s), such as item/stock/UPC numbers, price, quantity, concentration, . . .

expiration dates, container units and lot numbers" "could reveal the identity of those involved."[4] JA134.

First, "dates, times, or the specific description of a substance or service could be compared to heightened email activity, or activity reported in accordance with government reporting requirements, within a certain timeframe to determine, or [at] least narrow down, the identity of such persons/companies." JA134. For instance, the Drug Enforcement Administration's recordkeeping regulations require purchasers or transferors of Schedule I or II substances, such as pentobarbital, to complete Form 222 and provide information regarding the supplier, drug quantity, weight, description, and date shipped. *See* 21 C.F.R. §§ 1304.03, 1304.11, 1304.21, 1305.03, 1305.13. Thus, information regarding drug quantity, timing, and "dates of purchases" could "be compared" to these "reporting logs" or other "databases maintained by the Drug Enforcement [Administration]," or to other

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[4] CREW also contests the Bureau's withholding of information pertaining to "packaging details." Br. 50. Although the *Vaughn* Index identifies Records 6 and 115 as containing, among other things, "packaging details," JA365-66, 391, government counsel has reviewed those records and determined that this language was inadvertently added, as neither record includes information regarding packaging.

"publically-available data, or data gained through other non-related requests or discovery." JA134. "Expiration dates can also be compared to [Drug Enforcement Administration] logs and data to narrow down or identify suppliers or potential suppliers of lethal injection substances." JA135.

"[T]he description of a particular substance, including the manner in which it is produced, packaged, sold or identified," can also "reveal the identity of the individual or company responsible for producing, packaging, selling, and/or testing lethal injection substances." JA134. As the Bureau explained, "if a particular company is known or discovered to . . . price a substance in a particular way, or test a product in a particular way, the manner in which it is described in [the Bureau's] records could be used to trace the substance back to that particular provider by the process of comparison and elimination." JA134-35.

The agency further explained that "invoices, even in redacted format, could be analyzed and compared to those obtained either in a public forum or through other FOIA requests to specifically identify which company(ies) produced them." JA135. The distinctive formatting

of such invoices alone could provide a basis for identifying the companies.

The possibility that the public could draw connections between any of this information and companies in the government's pentobarbital supply and testing chain is not "speculation," Br. 52. The Bureau's declaration described a 2020 Reuters investigation that illustrates how easily the information at issue here could be pieced together to identify a particular company. JA135. In July 2020, Reuters published an article purporting to reveal the identity of three laboratories that were involved in testing compounded pentobarbital. *See* Allen, *supra*. The article described how Reuters accessed and reviewed "redacted laboratory reports" that the government had produced as part of the administrative record in *Execution Protocol Cases*. *Id.* The reports in the administrative record had been partially redacted to hide the names, addresses, logos, and contact information of the laboratories that performed independent testing services on the government's supply of pentobarbital. *See id.* The reports also included partial redactions of lot numbers, but not the dates of service, concentrations, expiration dates, or substance description. From

viewing these partially redacted laboratory reports—some of which have been identified as responsive records in this litigation—Reuters claimed to have identified the independent laboratories, presumably by comparing the contents and formatting of the reports to other information available in the public domain. Eventually, "[a]ll three [laboratories] confirmed that they had produced the test results" that appeared in the administrative record. *Id.* Thus, far from asserting only "categorical description[s] of redacted material," Br. 51 (quotation marks omitted), and "conclusory" recitations of the "statutory standard[]," *Hayden v. National Sec. Agency*, 608 F.2d 1381, 1387 (D.C. Cir. 1979), the Bureau's explanations and reliance on the Reuters example amply satisfy any burden to prove that the information withheld is identifying.

CREW's arguments to the contrary are unpersuasive. Relying on *McDonnell Douglas Corp. v. U.S. Department of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004), *Acumenics Research & Technology v. U.S. Department of Justice*, 843 F.2d 800 (4th Cir. 1988), and *WP Co. v. U.S. Small Business Administration*, 502 F. Supp. 3d 1 (D.D.C. 2020), CREW asserts that BOP's declarations are "insufficient." Br. 53. But none of

these cases supports that view. Both *McDonnell Douglas* and *Acumenics Research* concerned the government's burden to satisfy this Court's standard for substantial competitive harm, which, as previously noted, is no longer a requirement for establishing confidentiality under Exemption 4 after *Argus Leader*. *See* 375 F.3d at 1191-93; 843 F.2d at 807. And unlike in *WP Co.*, where the agency *conceded* that the "requested loan data" was not itself "confidential business information" as it is not "customarily and actually treated as private," 502 F. Supp. 3d at 13 (quoting *Argus Leader*, 139 S. Ct. at 2366), the Bureau has expressly averred that *all* of the information CREW seeks is kept private by the companies. JA115. As explained above, the agency has not sought to withhold any information that the companies have not expressly designated as confidential.

Any additional explanation laying out in step-by-step fashion the process by which small pieces of information could be pieced together to identify the companies would provide the public with a roadmap for evading Exemption 4's protections. In this regard, CREW's reliance (Br. 53-54) on *Campbell v. U.S. Department of Justice*, 164 F.3d 20 (D.C. Cir. 1998), is misplaced. *Campbell* concerned the FBI's application of

FOIA Exemption 1. The Court acknowledged the general principle that "requiring too much detail in a declaration could defeat the point of the exemption" but concluded that the government's declaration was far too vague in that it contained no "language suggesting that the FBI tailored its response to a specific set of documents." *Id.* at 30-31. The Court explained that a proper declaration "need not exhaustively explain each redaction and withholding, but it must provide sufficient information to permit Campbell and the district court to understand the foundation for and necessity of the FBI's classification decisions." *Id.* at 31. The Bureau's declarations readily clear that bar: the agency provided detailed descriptions of the information it has withheld and why. CREW is not entitled to additional explanation regarding *how* that information could be used to identify the companies.

Finally, CREW suggests (Br. 52, 54) that some of the information, such as "drug concentrations," "container units," "lot numbers," or "purchase order/reference numbers," may not itself have "identifying power." Even if that were true, the disclosure of multiple categories of information increases the likelihood that the information becomes identifying when pieced together as part of the same "puzzle" or

"mosaic." *Shapiro v. U.S. Dep't of Justice*, 239 F. Supp. 3d 100, 115 (D.D.C. 2017) (applying FOIA Exemption 7); *see also CIA v. Sims*, 471 U.S. 159, 178 (1985) (applying FOIA Exemption 3 and stating that although an "individual piece" of information on its own may not be "of obvious importance in itself," "bits and pieces" of information "may aid in piecing together bits of other information" (quotation marks omitted)). Thus, "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *Sims*, 471 U.S. at 178 (alteration in original and quotation marks omitted). Here, the Reuters article demonstrates how it is possible to reconstruct bits of information into identifying material. The district court properly determined that the withheld information is confidential.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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*The Principal Deputy Assistant Attorney General is recused.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9007 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

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