No. 13-17131

IN THE

United States Court of Appeals for the Ninth Circuit

ANIMAL LEGAL DEFENSE FUND,
Plaintiff-Appellant,

v.

UNITED STATES FOOD & DRUG ADMINISTRATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
DC No. 3:12-cv-04376-EDL
Hon. Elizabeth D. Laporte

PLAINTIFF-APPELLANT ANIMAL LEGAL DEFENSE FUND'S PETITION FOR REHEARING EN BANC

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INTRODUCTION AND RULE 35 STATEMENT

In an extraordinary per curiam concurring opinion, all three members of the panel "urge[d] [the] court to take up [this case] en banc," in order to reconsider "the appropriate standard of review" in Freedom of Information Act (FOIA) cases. Op. 18.[1] As the panel observed, under "ordinary principles," the district court's grant of summary judgment against petitioner Animal Legal Defense Fund (ALDF) "would not [have been] appropriate" because "the record contains a disputed issue of material fact." *Id.* Accordingly, the panel believed the proper course would have been to "reverse and remand for further proceedings." *Id.* The panel explained, however, that it was bound to affirm by this Court's separate, "peculiar" rule for FOIA cases, in which district courts are "allow[ed] . . . to make factual findings" on summary judgment and those findings are reviewed only "for clear error" on appeal. Op. 13.

The Ninth Circuit's "current FOIA standard" conflicts with the Federal Rules of Civil Procedure, FOIA's history and purpose, and the decisions of six other courts of appeals. And national uniformity on this issue is particularly important given the enormous number of FOIA summary judgments entered by district courts across the country—over 130 just last year—and the significant

[1] We cite to the Panel's Slip Opinion as Op. and to the Excerpts of Record as ER.

policy considerations that prompted Congress to enact FOIA. The right of "citizens to know what their Government is up to," *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (internal quotation marks omitted), should not depend on where in the country a FOIA request is filed or where a party files suit.

This court should therefore accept the panel's invitation and grant rehearing en banc to consider this question of exceptional importance. *See* Fed. R. App. P. 35(b)(1)(B) ("a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue."); 9th Cir. R. 35-1 ("When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for petitioning for rehearing en banc.").

STATEMENT OF THE CASE

ALDF Submits A FOIA Request For Information Regarding FDA's Inspections of Factory Poultry Farms.

Contaminated eggs produced at factory farms have recently led to nationwide outbreaks of salmonella. In August 2010, for example, egg producers recalled 380 million eggs from supermarket shelves because of a salmonella

outbreak traced to factory farm contamination. ER 764-766. An undercover exposé by the Humane Society revealed that the contamination was likely caused by unsanitary and inhumane caging conditions: One Texas-based factory in particular confined one million birds in 18 barns so tightly that many were trapped in wires and left to starve or die from dehydration, while others laid eggs on the carcasses of their dead cage mates. ER 414-423.

In 2011, ALDF submitted a FOIA request to the U.S. Food and Drug Administration (FDA), seeking information about FDA's inspections of 13 Texas factory poultry farms for conditions related to salmonella. ER 446-448. FDA produced its inspection reports, but redacted information directly relevant to its salmonella investigation: total hen population at each farm, number of hen houses, number of rows, tiers and floors per hen house, and number of hens per cage. ER 820-821. FDA based the redactions on FOIA Exemption 4, which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." ER 7-9; 5 U.S.C. § 552(b)(4).

After FDA failed to respond to ALDF's administrative appeal, ER 848-849, 855-860, ALDF filed suit to compel production of the withheld information. ER 873-917. FDA moved for summary judgment, arguing that it properly withheld the redacted information under Exemption 4 because its disclosure would likely cause "'substantial harm to the competitive position of the person from

whom the information was obtained'"—i.e., the factory farms. Dkt. 017 at 12 (quoting *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994)). In support, FDA submitted declarations from an FDA staff member and from senior executives at the various factory farms, testifying that the redacted information would enable a competitor to ascertain a factory farm's egg-production capacity, thus allowing the competitor to undercut its prices and lure away its customers. ER 767-815, 830-844, 863-867.

ALDF opposed FDA's motion for summary judgment, and filed its own cross-motion for summary judgment. ER79-109. In support, ALDF submitted declarations from a University of Chicago economist, a food industry professional, and a poultry industry consultant. ER110-143. ALDF's declarants testified that disclosure of the redacted information would not lead to underbidding or any other competitive harm to the factory farms. Specifically, the economist testified that underbidding requires knowledge of a competitor's cost and profit functions, which are undisputedly not included in the withheld data, and accordingly releasing the production capacity data would not result in competitive harm. ER 112-116. The other witnesses testified that factory farms regularly tout their production capacities on their websites, and the information is publicly available from other sources as well. ER 122-124.

ALDF also sought discovery from the factory farm executives who submitted declarations on behalf of FDA, which would confirm that the factory farms do not treat the withheld data as confidential, but the district court denied the request. ER 63-70.

The District Court Grants FDA's Motion for Summary Judgment.

The district court granted summary judgment to FDA with respect to all the withheld information except number of hens per cage. Despite the competing expert declarations, the court first concluded that "[b]ecause the facts are rarely in dispute in a FOIA case, the court need not ask whether there is a genuine issue of material fact." ER 5. The court then credited the testimony of FDA's declarants, refused to credit the testimony of ALDF's declarants, and found that "release of the entirety of the redacted information would support underbidding or undercutting that would be likely to cause substantial competitive harm" to the factory farms. ER 9-15; *see also* Op. 17-18 ("The district court ultimately decided that the FDA's declarations were more persuasive than those submitted by Plaintiff.").

The Panel Affirms, But Urges This Court To Reconsider The Standard Of Review In FOIA Cases En Banc.

In an opinion by Judge Graber, the panel held that "whether withheld information could be used by a food producer to undercut competitors is a determination that is grounded in … findings of fact," and therefore subject only to

clear error review under this Court's FOIA precedent. Op. 6-7 (internal quotation marks omitted). "[U]nder our special standard of review for FOIA cases," the panel saw no clear error in the district court's finding "that disclosure of the information was likely to cause commercial undercutting." Op. 10-11.

The panel then took the extraordinary step of writing separately, in a unanimous per curiam concurring opinion, "to explain why we think that our circuit should reconsider the standard of review that we apply in summary judgments in FOIA cases." Op. 13. As the panel explained, this Court generally reviews a district court's grant of summary judgment de novo, and summary judgment is only appropriate if "there are no genuine questions of material fact." *Id*. (internal quotation marks omitted). "In FOIA cases, by contrast," this Court "allow[s] the district court to make factual findings, and we review those findings for clear error." *Id*.

The panel then explained that it could identify "no good reason" for this "depart[ure] from our traditional standard of review … ." *Id.* Because ALDF and FDA "presented contradictory declarations as to the likelihood of substantial competitive harm" from disclosing the withheld information, "summary judgment is an inappropriate vehicle for resolving that issue." Op. 14. Nothing about the FOIA framework changed this conclusion: "Even if we assume that" deference to the district court is appropriate where it rests its factual findings solely on in

camera "review of withheld information," deference makes no sense where, as here, "the factual inquiry … does not depend on a review of withheld information," but instead on "declarations and testimony that [go] well beyond, and depend[] little on, the redacted information." Op. 17. And as to "what effect" release of the redacted information would have, "the district court was in no better position to make that determination at summary judgment than we are on appeal." Op. 17-18.

This petition for rehearing en banc followed.

REASONS FOR GRANTING THE PETITION

The Court should accept the panel's recommendation to take this appeal en banc in order to reconsider its summary judgment framework in FOIA cases. As the panel explained and six other courts of appeals have recognized, there is "no good reason" to depart from traditional summary judgment standards in the FOIA context. Op. 13. To the contrary, allowing district courts to make factual findings on summary judgment that are reviewed only for clear error is contrary to the Federal Rules of Civil Procedure, FOIA's history and purpose, and common sense.

1. Pursuant to the Federal Rules of Civil Procedure, summary judgment is proper only "if the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). Accordingly, "[b]y definition, summary judgment may be granted only when there are no disputed issues of material fact, and thus no factfinding by the district court." *Yonemoto v. Dep't of Veterans*

Affairs, 686 F.3d 681, 688 n.5 (9th Cir. 2012). And because summary judgment is appropriate only when one party is entitled to judgment as a matter of law, the courts of appeals review a grant of summary judgment de novo, "viewing the evidence in the light most favorable to the nonmoving party." *Dawson v. Entek Int'l*, 630 F.3d 928, 934 (9th Cir. 2011); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52 (1986) (summary judgment only proper where the evidence would necessitate a directed verdict at trial).

This court follows that rule generally, reversing a district court's grant of summary judgment where "there exist genuine issues of material fact" that should be resolved at trial. *See, e.g., Sherman Oaks Med. Arts Ctr., Ltd. v. Carpenters Local Union No. 1936*, 680 F.2d 594, 595 (9th Cir. 1982). But in FOIA cases, this Court follows a different rule, allowing a district court to make findings of fact on a motion for summary judgment, and then reviewing those factual findings only for clear error—essentially, treating summary judgment "as if it were a bench trial" under Federal Rule of Civil Procedure 52. Op. 15-18; *Yonemoto*, 686 F.3d at 688 & n.5.

This Court first applied its "peculiar" FOIA summary judgment framework in *Church of Scientology v. U.S. Dep't of the Army*, 611 F.2d 738 (9th Cir. 1980). The panel in that case gave no explanation for its departure from the traditional rules, but rather relied on a footnote in a D.C. Circuit opinion that also failed to

explain why clear error review would be appropriate in this context. *Id.* at 743 (citing *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 n.13 (D.C. Cir. 1977)). The D.C. Circuit subsequently abandoned its position in that footnote and now applies ordinary summary judgment principles in FOIA cases. *See Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1433 & n.3 (D.C. Cir. 1992). This Court has also questioned why FOIA summary judgments would be subject to a different rule than all other summary judgments. *See* Op. 15-18; *Yonemoto*, 686 F.3d at 688 & n.5 (this Court's cases "do not explain why" summary judgment is treated differently in a FOIA case and "one can question whether it should be").

Rightly so. As the government acknowledged at oral argument, even in FOIA cases, "[t]ypically on summary judgment, if there is a disputed issue of fact, then summary judgment is not appropriate." Oral Argument at 24:43-25:07, *ALDF v. FDA*, No. 13-17131 (9th Cir. Dec. 9, 2015), *available at* http://www.ca9.uscourts.gov/media/view.php?pk_id=0000015196. Allowing district courts to render factual findings on summary judgment that are reviewed only for clear error is contrary not only to the Federal Rules of Civil Procedure, but to FOIA's history and purpose. Unlike many statutory schemes requiring courts to defer to federal agency determinations, FOIA provides for de novo review by the district court. The Senate Report explains that de novo review "is essential" to

"prevent [judicial review] from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 89-813, at 8 (1965), 112 Cong. Rec. 26,823 (1965). Congress later amended FOIA to make clear that de novo review extends to virtually all documents withheld by agencies under a FOIA exemption, including those subject to national security classifications. *See* Pub. L. No. 93-502, 88 Stat. 1561 (1974). As then-Representative Harry Reid explained, the amendment was necessary to make clear that courts "have a duty to look behind any claim of exemption, which all too often in the past has been used to cover up inefficiency or embarrassment" by the government. 120 Cong. Rec. 36,626 (1974).

It is unfathomable that Congress would have been so purposeful about ensuring meaningful judicial review of agency exemption determinations, yet intended that its silence on appellate review be interpreted to allow for a dramatic downward departure from the traditional standards of review applied by the courts of appeals. The disconnect is particularly acute because the vast majority of FOIA summary judgments affirm the government's decision to withhold requested information.[2] Limiting appellate review of those judgments to clear error cannot be squared with FOIA's "mandate … for broad disclosure of Government

[2] Of 89 reported district court decisions fully granting a motion for summary judgment in a FOIA case in 2015, 16 were decided in favor of the plaintiff and 73 were decided in favor of the government.

records," *CIA v. Sims*, 471 U.S. 159, 166 (1985), which requires "that FOIA exemptions … be narrowly construed," *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988); *see Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999) ("the *de novo* standard is more faithful to the text, purpose, and history of FOIA" which establishes "'a general, firm philosophy of full agency disclosure'") (citation omitted).

2. The current FOIA summary judgment framework also makes no sense as a practical matter. To the limited extent that courts have suggested any justification for applying clear error review under these circumstances, it is premised on the notion that the traditional adversarial process is inadequate in the FOIA context, because the party opposing summary judgment does not have access to the redacted materials from which to dispute the government's factual assertions. Instead, the district court must itself test the government's factual assertions by reviewing, in camera, the redacted materials. And because it would be unduly burdensome for the court of appeals to review the redacted materials a second time, it may rely on the district court's in camera examination, and review the "factual findings" resulting from such examination only for clear error. *See, e.g.*, *Assembly of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 919 (9th Cir. 1992); *Lame v. U.S. Dep't of Justice*, 767 F.2d 66, 70 (3d Cir. 1985); *Becker v. I.R.S.*, 34 F.3d 398, 402 (7th Cir. 1994).

But even if this rationale were persuasive, which it is not, it applies only to "factual dispute[s] between the parties as to the very nature of the withheld documents" where "determining the factual nature of the withheld documents was dispositive of those plaintiffs' FOIA claims." *News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1187-89 (11th Cir. 2007). It has no application where, as here, the factual dispute concerns not what the documents say, but "what effect their release would have." Op. 17. There is no dispute as to what the documents withheld in this case say: All agree that FDA withheld total hen population at each farm, number of hen houses, number of rows, tiers and floors per hen house, and number of hens per cage. ER 820-821. The parties disagree only as to the effect of releasing this information. FDA submitted declarations that releasing the information would allow competitors to undercut the prices of the factory farm from which the data was obtained; ALDF submitted declarations that it would not. As the panel pointed out, in determining which party's "declarations were more persuasive" on that question, "the district court was in no better position to make that determination at summary judgment than [this Court is] on appeal." Op. 17-18.

Moreover, when a district court makes factual findings on disputed questions of fact at the summary judgment stage that are then reviewed only for clear error, the losing party—almost always the party seeking disclosure, *see supra* n.2—is

deprived of her right to a trial to determine disputed facts, where a district court can assess the credibility of the witnesses. *See* Rebecca Silver, *Standard of Review in FOIA Appeals and the Misuse of Summary Judgment*, 73 U. Chi. L. Rev. 731, 732, 757 (2006).

3. There is no doubt that this Court's FOIA summary judgment framework "directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity."[3] 9th Cir. Rule 35-1. *Six* courts of appeals have rejected this framework and instead review grants of summary judgment in FOIA cases de novo. *See* Op. 15-16 (citing *Petroleum Info. Corp.*, 976 F.2d at 1433 & n.3, and *ACLU of Mich. v. FBI*, 734 F.3d 460, 465 (6th Cir. 2013)); *see also Carpenter v. DOJ*, 470 F.3d 434, 437 (1st Cir. 2006); *Halpern*, 181 F.3d at 287); *Hulstein v. DEA*, 671 F.3d 690, 694 (8th Cir. 2012); *Stewart v. U.S. Dep't of the Interior*, 554 F.3d 1236, 1241 (10th Cir. 2009).

[3] There is also arguably an intra-circuit conflict on this issue. *See Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1997) ("Recent cases in this circuit have applied different standards [of review in FOIA cases]: some have reviewed the summary judgment *de novo*, while others have decided only whether the district court's ruling was clearly erroneous." (internal citations omitted)); *TPS, Inc. v. U.S. Dep't of Defense*, 330 F.3d 1191, 1194 (9th Cir. 2003) ("If an adequate factual basis exists [for a FOIA summary judgment], we variously use de novo review or clear error review.").

Five others use some form of a "deferential standard of review," similar to this Court's. *See* Op. 16 (citing *Stephenson v. IRS*, 629 F.2d 1140, 1144 (5th Cir. 1980); *Chilivis v. SEC*, 673 F.2d 1205, 1210 (11th Cir. 1982); *Antonelli v. DEA*, 739 F.2d 302, 303 (7th Cir. 1984) (per curiam); *Lame*, 767 F.2d at 70; *Willard v. IRS*, 776 F.2d 100, 104 (4th Cir. 1985)); *but see Hanson v. U.S. Agency for Int'l Dev.*, 372 F.3d 286, 290 (4th Cir. 2004) (stating that grant of summary judgment in FOIA action is issue of law, reviewed de novo); *Office of the Capital Collateral Counsel v. DOJ*, 331 F.3d 799, 802 (11th Cir. 2003) (applying a de novo standard of review because "issues in this appeal are limited to the legal application" of a FOIA exemption); *see also Dep't of Justice Guide to the Freedom of Information Act: Litigation Considerations* 130-33, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/litigation-considerations.pdf ("[T]he case law on [the standard for appellate review in FOIA cases] is not consistent among the various circuits, and conflicting decisions are not uncommon even within the same circuit.").

Although this Court's en banc adoption of traditional summary judgment standards for FOIA cases will not alone resolve the discord among the courts of appeals, it would certainly bring this Court into alignment with the trend toward de novo review, moving the courts one step closer to national uniformity. Indeed, two courts of appeals—the D.C. Circuit and the Sixth Circuit—have already switched

sides and now apply the traditional summary judgment framework, and the Fifth Circuit has suggested its interest in doing the same. *See* Op. 15 n.2, 16 (discussing cases).

Nor is there any doubt of the importance of national uniformity in this area of law. The Supreme Court has "[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action" in general. *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999). Even more so when it comes to review of an agency's decision to withhold documents under FOIA. "FOIA is … a means for citizens to know 'what their Government is up to.'" *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The statute thus adopts a firm philosophy of "'full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Reporters Comm.*, 489 U.S. at 773 (citation omitted). That policy of disclosure should not vary based on where in the country the documents are located or where a lawsuit is ultimately filed. In order to accomplish the goal of promoting the dissemination of information about what our government is up to, it is crucial that there be uniformity amongst the courts regarding the scope of judicial review.

This problem is becoming more acute which each passing year. The federal government received a total of 714,231 FOIA requests in FY 2014, continuing a

four-year trend of beating all previous records of the number of requests received. *Dep't of Justice, Office of Information Policy, Summary of Annual FOIA Reports for Fiscal Year 2014*, at 2, https://www.justice.gov/sites/default/files/oip/pages/attachments/2015/05/01/fy_2014_annual_report_summary.pdf. The additional 9,837 requests received in FY 2014 represented a 1.4% increase from the previous record high number of requests received in FY 2013. *Id.* And FOIA cases that eventually wind up in the federal district courts are overwhelmingly decided on motions for summary judgment. *See Litigation Considerations*, *supra*, at 104 ("Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved"). In 2015 alone, there were more than 130 reported district court summary judgment opinions in FOIA cases.

This Court should thus accept the panel's invitation and grant rehearing en banc to determine the proper standard of review in FOIA cases decided on summary judgment.

CONCLUSION

For the foregoing reasons, this Court should grant ALDF's petition for rehearing en banc.

Respectfully submitted,

/s/Karen Johnson-McKewan

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May 26, 2016

CERTIFICATE OF COMPLIANCE
PURSUANT TO NINTH CIRCUIT RULES 35-4 AND 40-1

Pursuant to Ninth Circuit Rules 35-4 and 40-1, I certify that the attached petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more, and contains 3750 words.

Dated: May 26, 2016

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Karen Johnson-McKewan
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 26, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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APPENDIX
(PANEL OPINION)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND, *Plaintiff-Appellant*, v. FOOD AND DRUG ADMINISTRATION, *Defendant-Appellee.*	No. 13-17131 D.C. No. 3:12-cv-04376-EDL OPINION

Appeal from the United States District Court
for the Northern District of California
Elizabeth D. Laporte, Magistrate Judge, Presiding

Argued and Submitted
December 9, 2015—San Francisco, California

Filed April 11, 2016

Before: Susan P. Graber, Kim McLane Wardlaw,
and Mary H. Murguia, Circuit Judges.

Opinion by Judge Graber;
Per Curiam Concurrence

SUMMARY*

Freedom of Information Act

The panel affirmed the district court's summary judgment in favor of the Food and Drug Administration ("FDA"), and its holding that under Freedom of Information Act ("FOIA") Exemption 4, the FDA properly withheld categories of information requested by the Animal Legal Defense Fund regarding egg-production farms in Texas.

FOIA Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The district court concluded that the FDA had established that the release of five categories of redacted information – total hen population, number of hen houses, number of floors per house, number of cage rows per house, and number of cage tiers per house – was likely to result in substantial competitive harm due to underbidding among egg producers; and the information was protected under Exemption 4.

The panel held that the district court had an adequate factual basis to reach its decision. The panel also held that the district court did not clearly err in finding that disclosure of the redacted information was likely to cause substantial competitive harm to the affected egg producers and farmers. Finally, the panel held that the district court did not abuse its discretion by denying third-party discovery.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

In a concurring per curiam opinion, the panel wrote separately to explain why it thought that the court should reconsider en banc the standard of review that is applied to appellate review of summary judgments in FOIA cases.

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OPINION

GRABER, Circuit Judge:

Plaintiff Animal Legal Defense Fund filed a Freedom of Information Act ("FOIA") request with the Food and Drug Administration ("FDA") regarding egg-production farms in Texas. The FDA released almost 400 pages of documents but redacted data regarding total hen population, number of hen houses, number of floors per house, number of cage rows per house, number of cage tiers per house, and number of birds per cage for each farm in question. Plaintiff filed this FOIA action seeking to compel the FDA to release the redacted data. The district court ordered the release of information regarding the number of birds per cage at each farm. But the

court held on summary judgment that, under FOIA Exemption 4, the FDA properly withheld the other categories of information because its release was "likely to cause substantial competitive harm." *See* 5 U.S.C. § 552(b)(4). We affirm.

FACTUAL AND PROCEDURAL HISTORY

In late 2011, Plaintiff submitted a FOIA request to the FDA that sought the following:

- All FDA documents since April 26, 2011, relating to egg safety in Texas, egg production in Texas, or egg-production facilities in Texas;
- All FDA communications with Texas state government agencies since April 26, 2011, relating to egg safety, egg production, or egg-production facilities; and
- All communications between the FDA and egg producers in Texas since April 26, 2011.

The FDA released records related to inspections of eleven chicken egg-production facilities; one quail egg-production facility and food manufacturer; one food warehouse; and one food distribution center. But redactions appeared on 277 of the 398 pages that the FDA produced.

Plaintiff filed a complaint for injunctive and declaratory relief under FOIA, 5 U.S.C. § 552, seeking to compel the production of the following information regarding inspected egg-production facilities: total hen population; number of hen houses; number of floors per house; number of cage rows

per house; number of cage tiers per house; and number of birds per cage. The FDA moved for summary judgment on the ground that FOIA Exemption 4—which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential," *id.* § 552(b)(4)—protected the redacted data. In support of its motion, the FDA submitted several declarations from experts who stated that releasing the requested information would enable competitors to learn a given egg producer's production rate, which in turn would allow the competitors to undercut the egg producer's prices and lure away customers. Plaintiff filed a cross-motion for summary judgment, supported by its own declarations from an economist and a food industry consultant. Those experts attested that releasing the withheld information would *not* facilitate competitive underbidding.

Plaintiff also asked to suspend briefing of FDA's summary judgment motion in order to permit discovery directed to whether the information sought was publicly available. The district court denied that request because, among other things, Plaintiff had not shown that the discovery it sought "is essential to litigating the motion for summary judgment."

After briefing and oral argument, the district court granted in part and denied in part both parties' summary judgment motions. The district court held that the FDA had fallen short of showing how releasing the number of birds per cage would "threaten any competitive harm" and ordered disclosure of that information. But the court concluded that the FDA had established that the release of the other five categories of redacted information—total hen population, number of hen houses, number of floors per house, number of cage rows per

house, and number of cage tiers per house—was likely to result in substantial competitive harm due to underbidding.

Plaintiff timely appeals the court's grant of summary judgment in favor of the FDA on the redaction of those five categories of information, as well as the denial of third-party discovery.

STANDARDS OF REVIEW

"Our review of a grant of summary judgment in a FOIA case . . . is slightly different than for other types of cases . . . ." *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 688 (9th Cir. 2012). We first determine, de novo, whether an adequate factual basis supports the district court's decision. *Id.* "Whether a particular set of documents gives the court an adequate factual basis for its decision is a question of law that the court reviews *de novo*." *Lion Raisins, Inc. v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1078 (9th Cir. 2004). If no adequate factual basis exists, the case must be remanded for further development of the record. *Yonemoto*, 686 F.3d at 688.

If such a factual basis exists, we next treat the judgment as "if it were a bench trial," so that "the district court's conclusions of fact are reviewed for clear error." *Id.* (internal quotation marks omitted). On the other hand, "legal rulings, including [the district court's] decision that a particular exemption applies, are reviewed *de novo*." *Id.* As we noted in *Lion Raisins*, whether withheld information could be used by a food producer to undercut competitors is a determination that is "grounded in . . . findings of fact." 354 F.3d at 1078. Therefore, if we determine that the district court had an adequate factual basis for reaching its decision, we must

review for clear error the district court's conclusion that releasing the redacted information likely would cause substantial competitive harm. *Id.*

We review for abuse of discretion a district court's denial of discovery before ruling on summary judgment. *U.S. Cellular Inv. Co. of L.A., Inc. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002).

DISCUSSION

A. *Disclosure Under FOIA*

"Disclosure, not secrecy, is the dominant objective of FOIA." *Shannahan v. IRS*, 672 F.3d 1142, 1148 (9th Cir. 2012) (internal quotation marks and brackets omitted). "We construe narrowly FOIA's nine exemptions." *Id.* The FDA relies on Exemption 4, 5 U.S.C. § 552(b)(4), "which is available to prevent disclosure of (1) commercial and financial information, (2) obtained from a person or by the government, (3) that is privileged or confidential."[1] *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994). Commercial information qualifies as "confidential" when disclosure is "likely . . . to cause

[1] Title 5 U.S.C. § 552(b)(4) specifically provides:

> This section [requiring disclosure of information] does not apply to matters that are—
>
> . . . .
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]

substantial harm to the competitive position of the person from whom the information was obtained." *Id.* 1112–13 (citing *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).

B. *Adequate Factual Basis*

As noted above, we first must determine whether the district court had an adequate factual basis to reach its decision. *Lion Raisins*, 354 F.3d at 1079. "In making this determination, we may rely solely on government affidavits so long as the affiants are knowledgeable about the information sought and the affidavits are detailed enough to allow the court to make an independent assessment of the government's claim." *Kowack v. U.S. Forest Serv.*, 766 F.3d 1130, 1132 (9th Cir. 2014) (internal quotation marks omitted). That threshold is met here.

Several of the declarations by the FDA's experts stated that the egg-production industry was "highly" or "extremely competitive." One emphasized that "anything that changes costs by even a penny can make a huge difference." According to the experts, the redacted information was likely to cause substantial competitive harm because the competitors of the egg producers in question could use the information to form accurate estimates of each farm's or producer's rate of production and use those estimates to underbid. For example, one declarant stated that, once a competitor knows the production rate at an egg farm, the competitor is able to "enter the farm's regional market and offer to produce the same number of eggs per day for a lower price or a greater number of eggs per day for the same price and thereby lure away the farm's customers." As in *Lion Raisins*, 354 F.3d at 1079–80, the declarations in this case

established an adequate factual basis. The declarations provided the district court with the identity of the information sought and the claimed exemption, and provided the necessary detail about the specific competitive harm that could arise from the release of the redacted information. *See also Bowen v. FDA*, 925 F.2d 1225, 1227–28 (9th Cir. 1991) (holding that government affidavits that described the documents withheld, the statutory exemptions claimed, and the specific reasons for the agency's withholding provided an adequate factual basis for application of Exemption 4).

C. *Review of District Court's Analysis for Clear Error*

We next must decide whether the district court clearly erred in determining that the redacted information fell within Exemption 4's protection. "[The clear error] standard is significantly deferential, and we will accept the lower court's findings of fact unless we are left with the definite and firm conviction that a mistake has been committed." *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 848–49 (9th Cir. 2004) (internal quotation marks omitted).

"An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *GC Micro Corp.*, 33 F.3d at 1113. "While conclusory and generalized allegations of competitive harm are insufficient to show that requested information is 'confidential,'" the government need not show that releasing the documents would cause "actual competitive harm." *Id.* "Rather, the government need only show that there is (1) actual competition in the relevant market, and (2) a likelihood of substantial competitive injury if the information were released." *Lion Raisins*, 354 F.3d at 1079.

Plaintiff does not contest that there is actual competition in the egg-production market, and it also concedes that the redacted information could be used to estimate an egg farm's production capacity. The parties disagree, however, as to whether releasing the redacted information would likely cause "substantial competitive harm" to the affected egg producers and farmers.

Whether or not releasing the requested data would create a likelihood of substantial competitive harm was subject to dispute. But, on this record, the district court did not clearly err in finding that disclosure of the information was likely to cause commercial undercutting. The FDA provided declarations that explained how the information would facilitate accurate estimates of a farm's egg-production capacities and how those estimates could facilitate undercutting. For example, one declarant explained that the egg-production industry has a "tight profit margin"; industry experts estimate that an average profit is approximately 6.7 cents per dozen eggs sold. If a national egg producer were able to determine the production rates of its smaller competitors, it could direct its resources toward that market; and if the national producer were able to offer lower prices, "even a penny can make a huge difference" in the local company's ability to keep its customers.

Although the information sought may not provide a national egg producer with every piece of information that it would consider before entering a new market, knowing the production capacity of potential competitors could make the decision of whether or not to enter a competitor's market easier. By becoming aware of potential limitations in its competitors' production capabilities, a national producer could decide to focus all its resources on egg markets in

which it could out-produce local competitors—whether in terms of efficiency, price, or total quantity. *See Lion Raisins*, 354 F.3d at 1081 (holding that releasing information that allows a raisin farmer to "infer the volume of its competitors' raisin sales" could facilitate undercutting and, therefore, create a likelihood of substantial competitive harm).

Plaintiff submitted its own declarations, which asserted that the production information it seeks is insufficient to affect the market. Nevertheless, under our special standard of review for FOIA cases, and in view of the extensive FDA affidavits, we see no clear error. The incomplete data could allow egg producers to make *more* accurate—if imperfect—estimates of their competitors' production capabilities and sales than they could without the redacted information. Due to the competitiveness of the egg-production industry, where "even a penny can make a huge difference," even a slight upgrade in the accuracy of projections *might* have a large effect on competition. Although the information may not afford egg producers their competitors' exact profit-per-egg statistics, the FDA need only establish, as the district court correctly noted, "a likelihood of substantial competitive harm, not a certainty."[2]

[2] We are likewise unpersuaded by Plaintiff's argument that the redacted information is already publicly available and, therefore, cannot be considered likely to cause substantial competitive harm. The sought-after data is more detailed and more specific than anything currently available in the public domain. For that reason, Plaintiff's argument fails. *See Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) ("Prior disclosure of similar information does not suffice; instead, the *specific* information sought by the plaintiff must already be in the public domain by official disclosure."); *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) ("[T]he information requested must be as specific as the information previously released.").

D. *Third-Party Discovery*

The district court did not abuse its discretion by denying third-party discovery. In response to a summary judgment motion, a non-moving party may obtain relief pursuant to Federal Rule of Civil Procedure 56(d) if it "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." A party seeking further discovery must show that there is "some basis for believing that the information sought actually exists." *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1091 n.5 (9th Cir. 2009) (internal quotation marks omitted). Further, a party seeking discovery must show that it lacks the "essential facts" to resist the summary judgment motion. *Cal. Union Ins. Co. v. Am. Diversified Sav. Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990).

Plaintiff here sought additional discovery to show that the sought-after information was already publicly available. The district court ruled that the evidence Plaintiff sought was not sufficiently similar to the information requested through discovery; Plaintiff's request was grounded in speculation; and allowing discovery of "an individual farm's egg production could improperly give Plaintiff information that it could not obtain through its FOIA request." That ruling fell within the district court's range of discretion.

AFFIRMED.

PER CURIAM, concurring:

We write separately to explain why we think that our circuit should reconsider the standard of review that we apply to summary judgments in FOIA cases.

We generally review de novo a district court's grant of summary judgment. "Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine questions of material fact and the district court correctly applied the underlying substantive law." *Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d 820, 824–25 (9th Cir. 2011). Typically, of course, the district court does not make factual findings at summary judgment. *Rand v. Rowland*, 154 F.3d 952, 957 n.4 (9th Cir. 1998) (en banc).

In FOIA cases, by contrast, we allow the district court to make factual findings, and we review those findings for clear error. *Schiffer v. FBI*, 78 F.3d 1405, 1409 (9th Cir. 1996). That peculiar standard means that a dispute of material fact does not necessarily defeat summary judgment. *See Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 688 n.5 (9th Cir. 2012) ("Our cases do not explain why [we review for clear error], and one can question whether it should be. By definition, summary judgment may be granted only when there are no disputed issues of material fact, and thus no factfinding by the district court."). But we see no good reason to depart from our traditional standard of review in FOIA cases. *See generally* Rebecca Silver, Comment, *Standard of Review in FOIA Appeals and the Misuse of Summary Judgment*, 73 U. Chi. L. Rev. 731 (2006) (arguing that de novo review should apply in FOIA appeals).

As a threshold matter, "[s]ummary judgment is the procedural vehicle by which nearly all FOIA cases are resolved." Office of Information Policy, U.S. Dep't of Justice, *Guide to Freedom of Information Act: Litigation Considerations* 104 (2013). In this case, though, the parties presented contradictory declarations as to the likelihood of substantial competitive harm, making summary judgment an inappropriate vehicle for resolving that issue. *See In Def. of Animals v. U.S. Dep't of Agric.*, 501 F. Supp. 2d 1, 8 (D.D.C. 2007) (stating that summary judgment in a FOIA case is "improper" when a "dispute is genuine and factual," even though the contention on which it is based may be "doubtful on the basis of the evidence before the court"); *Pub. Citizen Health Research Grp. v. FDA*, 953 F. Supp. 400, 403 (D.D.C. 1996) (concluding that "contradictory" claims by the parties made summary judgment "an inappropriate vehicle" for resolution of a FOIA case and scheduling a bench trial).

Our past cases reasoned that we owe substantial deference to the district court in FOIA cases because of their unique nature. *See, e.g.*, *Assembly of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 919 (9th Cir. 1992). "Because there will rarely be any genuine issues of material fact—the document says whatever it says—the case may usually be decided on summary judgment." *Id.* To make its decision, the district court often reviews sensitive documents in camera, a process that we have described as "a trial on a hidden record." *Id.* The district court's characterization of the document in this context "more closely resembles a finding of fact than a conclusion of law." *Id.* Therefore, we grant substantial deference to the district court. *Id.*; *see also Schiffer*, 78 F.3d at 1409 ("[W]e endorsed the [clear error] standard because in FOIA cases the district court's findings

of fact effectively determine our legal conclusions." (internal quotation marks omitted)).

Although the FOIA statute requires that *district courts* "determine the matter de novo," it is silent as to the appropriate standard of review for *appellate courts*. 5 U.S.C. § 552(a)(4)(B).[1] We originally adopted our deferential standard of review in reliance on a D.C. Circuit Court's footnote, without explanation. *See Church of Scientology of Cal. v. U.S. Dep't of Army*, 611 F.2d 738, 743 (9th Cir. 1980) (citing *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 251 n.13 (D.C. Cir. 1977)). The D.C. Circuit has since abandoned the FOIA-specific standard of review, and it now applies ordinary summary judgment principles in FOIA cases. *See Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1433 & n.3 (D.C. Cir. 1992) (noting that the D.C. Circuit "applies in FOIA cases the same standard of appellate review applicable generally to summary judgments" but that, in contrast, the Ninth Circuit applies "a clearly erroneous standard"). Likewise, the Second, Sixth,[2]

[1] The relevant portion of the statute reads: "On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera . . . ." 5 U.S.C. § 552(a)(4)(B).

[2] Like the D.C. Circuit, the Sixth Circuit originally had a deferential standard of review similar to our own but has since done away with it. *Compare Ingle v. Dep't of Justice*, 698 F.2d 259, 267 (6th Cir. 1983) ("Initially, the reviewing court must establish that the district court had an adequate factual basis for its decision. Secondly, the court on appeal must ascertain upon the factual foundation developed below if the conclusion of the trial court is clearly erroneous."), *with Jones v. FBI*, 41 F.3d 238, 242 (6th Cir. 1994) (reviewing de novo the district court's grant of

Eighth, and Tenth Circuits also apply de novo review when evaluating FOIA summary judgment decisions. *See TPS, Inc. v. U.S. Dep't of Def.*, 330 F.3d 1191, 1194 n.5 (9th Cir. 2003) (collecting cases).

We acknowledge that some other circuits appear to use a deferential standard of review similar to our own. *See* Silver, 73 U. Chi. L. Rev. at 740–43. But those circuits all appear to have adopted the standard without explanation or analysis, and at least one has questioned whether a deferential standard of review is appropriate. *See Stephenson v. IRS*, 629 F.2d 1140, 1144 (5th Cir. 1980); *Chilivis v. SEC*, 673 F.2d 1205, 1210 (11th Cir. 1982); *Antonelli v. DEA*, 739 F.2d 302, 303 (7th Cir. 1984) (per curiam); *Lame v. U.S. Dep't of Justice*, 767 F.2d 66, 70 (3d Cir. 1985); *Willard v. IRS*, 776 F.2d 100, 104 (4th Cir. 1985). *But see Flightsafety Servs. Corp v. Dep't of Labor*, 326 F.3d 607, 611 n.2 (5th Cir. 2003) (per curiam) (noting the circuit split and choosing not to take a firm stand because the case's outcome remained "the same whether the district court's judgment [was] reviewed *de novo* or for clear error").

De novo review would be consistent with our usual summary judgment standards. As the Second Circuit has explained, de novo review also is consistent with FOIA's history and purpose:

> In striking a balance between the incompatible notions of disclosure and privacy when it

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summary judgment in a FOIA case), *and ACLU of Mich. v. FBI*, 734 F.3d 460, 465 (6th Cir. 2013) (holding, in a FOIA case, that "[t]he propriety of the district court's grant of summary judgment is likewise reviewed de novo on appeal").

> enacted FOIA in 1966, Congress established—in the absence of one of that law's clearly delineated exemptions—a general, firm philosophy of full agency disclosure, and provided *de novo* review by federal courts so that citizens and the press could obtain agency information wrongfully withheld. *De novo* review was deemed essential to prevent courts reviewing agency action from issuing a meaningless judicial imprimatur on agency discretion. We are not unmindful of the institutional pressures that might make a more deferential standard of review seem appealing. Yet . . . the *de novo* standard is more faithful to the text, purpose, and history of FOIA . . . .

Halpern v. FBI, 181 F.3d 279, 288 (2d Cir. 1999) (citations, internal quotation marks, and paragraph break omitted).

Even if we assume that the sensitive nature of documents withheld under a FOIA exemption calls for deference in some contexts, why we defer to the district court in cases such as this one—where the factual inquiry on which the summary judgment turns is one that does not depend on a review of withheld information—remains unclear. Here, the district court found that the release of the egg-production data was likely to cause substantial competitive harm by reviewing declarations and testimony that went well beyond, and depended little on, the redacted information. That review process did not concern what the documents said; rather, it centered on what effect their release would have because of the *kind* of data involved. The district court ultimately decided that the FDA's declarations were more persuasive

than those submitted by Plaintiff. But the district court was in no better position to make that determination at summary judgment than we are on appeal. *See Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 n.2 (2d Cir. 1999) (holding that, in a FOIA case where "no witnesses were heard and no credibility findings were made," "the district court was in no better position to evaluate the record than" the circuit court).

In sum, if ordinary principles applied, summary judgment would not be appropriate because the record contains a disputed issue of material fact, and we would reverse and remand for further proceedings. Under our current FOIA standard, however, we must affirm. We urge our court to take up, en banc, the appropriate standard of review in FOIA cases.

No. 13-17131

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND,

Plaintiff-Appellant,

v.

UNITED STATES FOOD AND DRUG ADMINISTRATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California

RESPONSE TO PETITION FOR REHEARING EN BANC

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INTRODUCTION AND SUMMARY

Further review is unwarranted in this case because the government is entitled to summary judgment regardless of the standard of review applied. The district court did not identify any disputed issues of material fact, nor did it purport to make any factual findings. Although plaintiff submitted declarations to support its view that the redacted information is not confidential within the meaning of Freedom of Information Act (FOIA) Exemption 4, the substance of those declarations does not conflict in any material respect with the detailed and specific evidence submitted by the government.

The undisputed evidence shows that the information at issue is confidential within the meaning of Exemption 4 and was therefore properly redacted by the U.S. Food and Drug Administration (FDA). Plaintiff concedes that the egg industry is highly competitive, and that the redacted information can be used to form an accurate view of a farm's production capacity. *See* ER 8. In nevertheless urging that the information should be disclosed because it is not the *only* information that may be relevant to competitors in formulating a bid, plaintiff "ignores the fact that competitors can acquire or accurately estimate other pieces of information to combine with the totality of the redacted information to cause competitive harm," ER 11, and it misapprehends the standard for confidentiality explained in *Lion*

Raisins, Inc. v. Department of Agriculture, 354 F.3d 1072, 1081 (9th Cir. 2004). Under that standard, disclosure need not give a competitor *all* potentially relevant information, but rather only enough to likely cause a substantial harm. *See id.* In such a highly competitive market, even the disclosure of limited information may satisfy that standard. *See id.* Moreover, requiring disclosure in these circumstances would likely deter producers from voluntarily providing such information to FDA in the first place, thereby undermining the agency's ability to obtain this and other information important to its public-health mission.

STATEMENT

A. FOIA Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). With respect to information that a party is required to disclose to the government, this Court has held that information is confidential if there is "actual competition" in the relevant market and disclosure of the information is likely to "cause substantial harm to the competitive position of the person from whom the information was obtained." *Lion Raisins, Inc. v. Department of Agric.*, 354 F.3d 1072, 1079 (9th Cir. 2004) (quotation marks omitted). As discussed below, the Court has held open the possibility that a

different standard may apply to information that a party voluntarily provides to the government. *See Frazee v. U.S. Forest Serv.*, 97 F.3d 367, 371-72 (9th Cir. 1996).

B. In December 2011, plaintiff Animal Legal Defense Fund (ALDF) submitted a FOIA request to FDA seeking certain records relating to egg-production farms in Texas. ER 818-19, 847. FDA released hundreds of pages of records in response to the request, including copies of Establishment Inspection Reports describing findings made at specific facilities. Pursuant to Exemption 4, FDA redacted from those pages the (1) total hen population; (2) number of hen houses; (3) number of floors per house; (4) number of cage rows per house; (5) number of cage tiers per house; and (6) number of birds per cage.[1] ER 821. The records at issue include information from twelve farms owned by six different companies.

ALDF filed suit in August 2012, seeking disclosure of the redacted information. The district court first denied plaintiff's motion for discovery with respect to public availability of the redacted information, noting that FDA's declarants had provided substantial evidence regarding the extent to which the information is guarded, and that plaintiff failed to identify any basis for calling into question the declarants' statements. ER 68, 70.

[1] FDA also made other redactions pursuant to Exemptions 3 and 6, 5 U.S.C. § 552(b)(3), (6). ER 821. Those redactions are not at issue in this litigation.

The court then granted summary judgment for FDA with respect to all but one category of information, concluding that the evidence showed a likelihood of competitive harm in the form of underbidding with respect to egg sales in the event the redacted information was disclosed. ER 16. In holding that the information was properly redacted, the court identified no disputed issue of material fact.

The court first noted that "[t]here is no dispute that there is actual (indeed robust) competition in the relevant market," or that "the redacted information may be used to calculate an egg farm's production capacity." ER 8. In addition, FDA's declarants explained that "competitors can use accurate estimates of production capacity to underbid the egg producers at issue in this case and lure customers away." ER 9 (citing the myriad statements by FDA's declarants supporting this contention). Although "[p]laintiff's expert opine[d] that one would need to know cost and profit information to estimate a competitor's bid" with precision, ER 10, plaintiff "ignore[d] the fact that competitors can acquire or accurately estimate other pieces of information to combine with the totality of the redacted information to cause competitive harm," ER 11. "While Plaintiff is correct that other information beyond the redacted information is needed to undercut competitors, Defendant has shown that such other information can be estimated from other publicly available

sources, so competitors could obtain the information that Plaintiff's expert says is needed to combine with the redacted information." ER 11.

In addition, the court found no evidence to support plaintiff's contention that the redacted information is already publicly available. ER 15. The court thus concluded, based on the undisputed evidence, that disclosing even the limited information at issue "would allow others to infer important competitive information." ER 14 (discussing *Lion Raisins*, 354 F.3d at 1081). Because summary judgment was appropriate on this basis, the court did not separately consider the other types of competitive harm identified by the government. ER 7-8.

C. A panel of this Court affirmed, holding that the district court did not clearly err in concluding that disclosure of the redacted information would likely cause substantial competitive harm. *ALDF v. FDA*, 819 F.3d 1102, 1108 (9th Cir. 2016). The panel explained that, "[a]lthough the information sought may not provide a national egg producer with every piece of information that it would consider before entering a new market, knowing the production capacity of potential competitors could make the decision of whether or not to enter a competitor's market easier." *Id.* For example, "[b]y becoming aware of potential limitations in its competitors' production capabilities, a national producer could decide to focus all its resources on egg markets in which it could out-produce local competitors—whether

in terms of efficiency, price, or total quantity." *Id.* "[I]n view of the extensive FDA affidavits," the panel saw "no clear error" in the district court's decision. *Id.* at 1109.

The panel was "likewise unpersuaded by Plaintiff's argument that the redacted information is already publicly available and, therefore, cannot be considered likely to cause substantial competitive harm. The sought-after data is more detailed and more specific than anything currently available in the public domain. For that reason, Plaintiff's argument fails." *ALDF*, 819 F.3d at 1109 n.2 (citing *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007).

In a per curiam concurring opinion, the panel questioned the practice of "allow[ing] the district court to make factual findings" in FOIA cases and then "review[ing] those findings for clear error," *ALDF*, 819 F.3d at 1110, noting that "[d]e novo review would be consistent with [the Court's] usual summary judgment standards," *id.* at 1111. Here, the panel asserted, "[t]he district court ultimately decided that the FDA's declarations were more persuasive than those submitted by Plaintiff. But the district court was in no better position to make that determination at summary judgment than we are on appeal." *Id.* at 1112. The concurrence concluded that, "if ordinary principles applied, summary judgment would not be appropriate" in this case "because the record contains a disputed issue of material fact, and we would reverse and remand for further proceedings." *Id.*

ARGUMENT

There Are No Disputed Issues of Material Fact, and Summary Judgment for the Government Was Thus Appropriate Under Any Standard.

A. Further review is unwarranted in these circumstances because the outcome of this case does not turn on the standard of review. *Cf. Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1997) (finding it unnecessary to resolve this question where the outcome would be the same under either standard). Contrary to the panel's suggestion, there are no disputed issues of material fact, and summary judgment for the government was appropriate under even the standard for which plaintiff now advocates.

The mere fact that plaintiff has argued that the redacted information is not likely to cause substantial competitive harm and submitted declarations that repeat that conclusion does not serve to create a triable issue. The substance of the parties' declarations must be considered to determine whether, in their particulars, the information provided therein creates a dispute with respect to any fact material to the analysis. The district court undertook that inquiry, and it found no such conflict. Summary judgment was thus appropriate even under ordinary summary judgment principles.

1. The undisputed evidence shows that disclosure of the redacted information would facilitate underbidding with respect to egg sales. As the district

court observed, there is no dispute that the egg industry is highly competitive, or that egg producers can use the information at issue to form an accurate view of a farm's production capacity. ER 8. There is likewise no dispute that the redacted data, which includes information about the layout and structure of a farm's hen houses, provides important information about the relative efficiency of a farm's production processes. *See* ER 839.

The government's declarants offered substantial evidence that incremental information about a farm's efficiency and production capacity could be used by competitors to the detriment of the producer whose information is disclosed. "The factors most important to the competitive position of an egg farm" include "its production capacity (the number of eggs it can produce in a day), and how efficient the farm is." ER 774. If disclosed, this production and efficiency information would assist competitors in determining whether and how to enter a producer's regional market to compete for customers. *See* ER 774, 839-40.

The evidence submitted by plaintiff does not undermine the government's contention that the redacted information could be used by competitors in these ways. Instead, plaintiff's declarant asserts that production capacity is not the *only* information that might be relevant to a competitor in deciding how best to compete, emphasizing that "the production rate of a firm is not enough to *fully* determine the

price of eggs on a given market," and that other variables are also relevant. ER 114 (emphasis added). But even if true, this statement is not material to the analysis because Exemption 4 does not require the government to show that disclosure would give competitors perfect information.

This Court's decision in *Lion Raisins, Inc. v. Department of Agriculture*, 354 F.3d 1072 (9th Cir. 2004), makes clear that information disclosed to competitors need not be complete to present a likelihood of substantial competitive harm. There, the Court held that disclosure of the "limited information" the plaintiff sought "would allow [it] to infer critical information about its competitors' volume," including the amount and type of raisins being prepared for market, which could in turn be used in making strategic attempts to outbid those competitors. *Id.* at 1081. The plaintiff could use the information "to its advantage by cutting its prices for the types of raisins its competitors pack in large volumes in order to underbid them." *Id.* The Court nowhere suggested that such information would be relevant only if the plaintiff could additionally determine with precision the price at which its competitors' raisins were being sold. In the context of the highly competitive raisin market, even incremental information could present a significant advantage and was thus subject to withholding pursuant to Exemption 4.

Similarly, even "incomplete data could allow egg producers to make *more* accurate—if imperfect—estimates of their competitors' production capabilities and sales than they could without the redacted information." *ALDF v. FDA*, 819 F.3d 1102, 1109 (9th Cir. 2016). For example, "[b]y becoming aware of potential limitations in its competitors' production capabilities, a national producer could decide to focus all its resources on egg markets in which it could out-produce local competitors—whether in terms of efficiency, price, or total quantity." *Id.* at 1108. "Due to the competitiveness of the egg-production industry, where 'even a penny can make a huge difference,' even a slight upgrade in the accuracy of projections might have a large effect on competition." *Id.* at 1109. (quoting ER 839) (emphasis omitted). Thus, "[a]lthough the information may not afford egg producers their competitors' exact profit-per-egg statistics, the FDA need only establish, as the district court correctly noted, 'a likelihood of substantial competitive harm, not a certainty.'" *Id.*

Plaintiff's argument is further undermined by the undisputed fact that much of the additional information that may be relevant in determining a producer's prices is publicly available. *See* ER 11, 769, 839. As the district court observed, it is only by "ignor[ing] the fact that competitors can acquire or accurately estimate other pieces of information to combine with the totality of the redacted information" that

plaintiff is able to argue that disclosure does not present a likelihood of harm in these circumstances. ER 11. Plaintiff likewise ignores the fact that the redacted data provides valuable information about the efficiency of the farms' production processes, which is further relevant in estimating price. *See* ER 839.

Plaintiff similarly failed to create a disputed issue in asserting that producers routinely disclose the type of information at issue. To support that contention, plaintiff submitted over two hundred pages of articles and other materials that disclose certain egg-producer information. *See* ER 144-411. But those materials only underscore the fact that the redacted information is *not* publicly available.

As the panel observed, "[t]he sought-after data is more detailed and more specific than anything currently available in the public domain." *ALDF*, 819 F.3d 1109 n.2. For example, "[w]hile some [of plaintiff's] Exhibits contain estimated or aggregate summary data related to Cal-Maine's operations as a whole, none of the Exhibits reveal the date and farm specific confidential information about specific Cal-Maine houses and production facilities as set forth in the [inspection reports]." SER 21. Plaintiff has failed to demonstrate that any of the specific data redacted by FDA has been publicly disclosed. *See* ER 15, 776-77; SER 9-19, 21-23.

As the foregoing shows, when the particulars of the parties' declarations are considered, there is no dispute with respect to any fact that is material to the legal

question in this case. Summary judgment was therefore appropriate, and the district court's judgment should be affirmed under any standard of review.

2. The district court's judgment could also be affirmed on a second theory of competitive harm that plaintiff continues to ignore. The government submitted undisputed evidence that the redacted information, if disclosed, could be used to disrupt farm sales. *See* ER 8. "[T]he redacted information reveals the inventory of the egg producer," and much of that information is of a type that is "considered in the purchase price" negotiated by the parties. SER 26. A competitive bidder could use the redacted information in context of a farm sale "to offer better inventory for the same price or equivalent inventory for a better price and thereby harm the competitive position of the selling egg producer." *Id.*

One of plaintiff's declarants touched upon the subject of farm sales, but without responding to the substance of the government's evidence. The declarant explains that sales of small farms are often motivated by generational milestones or financial or strategic considerations. ER 129-30. But this nonexhaustive list of reasons why a producer may decide to sell is unresponsive to the point that the redacted information is of a type that is considered a farm's purchase price, and that a competitor familiar with the inventory of a farm whose sale is underway may see an opportunity to make a competitive bid to sell its own facilities—an opportunity that

would not exist but for the disclosure of the redacted information. Plaintiff offers nothing to counter FDA's evidence that disclosure of this information would likely cause substantial competitive harm to producers seeking to sell their farms.

Although the district court did not reach this issue, the Court can—and should—affirm on any grounds supported by the record. *See Glick v. Edwards*, 803 F.3d 505, 508 (9th Cir. 2015).[2]

B. One additional issue further counsels against rehearing in this case. There is uncertainty among the courts of appeals as to the correct standard to apply in assessing confidentiality in Exemption 4 cases. Although this question is one the Court should consider, it should do so in a case in which the standard is dispositive and the issue is squarely presented.

Some courts apply one test of confidentiality when information is voluntarily disclosed to the government and another standard when the disclosure is compelled.

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[2] As the foregoing shows, a remand in this case would almost certainly be futile. The district court could again grant summary judgment for the government based on the farm-sale theory, with respect to which there are no disputed issues of material fact. Or the court could hold a bench trial (a fairly extraordinary measure in a FOIA case). But plaintiff has not suggested any additional evidence that it would introduce to counter the government's testimony that disclosure of the redacted information would facilitate underbidding. Indeed, the district court has already denied plaintiff's motion for discovery, ER 70, and the panel affirmed that ruling, *ALDF*, 819 F.3d at 1109. For these reasons, the bench trial would likely favor the government, and the district court's factual findings would at that point be reviewed on appeal for clear error. In either scenario, a remand would put the parties to considerable expense for no evident purpose.

For example, when disclosure is mandatory, the D.C. Circuit asks whether releasing the information to the public would likely cause a substantial competitive harm. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). But when disclosure is voluntary, the court asks whether the information "is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (1992) (en banc), *cert. denied*, 507 U.S. 984 (1993). This Court has applied the *National Parks* standard for mandatory disclosures but has not determined what standard should apply when information has voluntarily been provided to the government—as happened in this case. *See Frazee v. U.S. Forest Serv.*, 97 F.3d 367, 371-72 (9th Cir. 1996). For the reasons explained above, the undisputed evidence in this case supports withholding under either standard.

As the government has elsewhere explained, Exemption 4's text and the plain meaning of the term "confidential" more naturally suggest that information should be withheld as confidential consistent with the standard set forth in *Critical Mass*—*i.e.*, "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *See* U.S. Br. in Opp. at 9-13, *New Hampshire Right to Life v. Department of Health & Human Servs.*, 136 S. Ct. 383 (2015) (No. 14-1273) 2015 WL 4550358. That standard should apply regardless of whether the

information was disclosed to the government on a voluntary or mandatory basis; the statute nowhere suggests that the meaning of "confidentiality" should depend upon the circumstances of the disclosure.

Because the undisputed evidence shows that the information plaintiff seeks is confidential under either standard, it is unnecessary to resolve this issue here. If the Court were nevertheless to grant rehearing, however, the government would urge the Court also to consider the appropriate standard for assessing confidentiality under Exemption 4, and to reject the "convoluted test that rests on judicial speculation about whether disclosure will cause competitive harm" in favor of an interpretation that reads the word confidential "according to its ordinary meaning." *New Hampshire Right to Life v. Department of Health & Human Servs.*, 136 S. Ct. 383, 383-84 (2015) (Thomas, J., dissenting from denial of cert.).

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and does not exceed the fifteen-page limit established by this Court's order of May 27, 2016.

s/ Lindsey Powell
LINDSEY POWELL

CERTIFICATE OF SERVICE

On June 17, 2016, I electronically filed the foregoing Brief for Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Lindsey Powell
LINDSEY POWELL