No. 18-____

IN THE
Supreme Court of the United States

FOOD MARKETING INSTITUTE

Applicant,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,

Respondent.

On Application for Stay from the United States Court of Appeals for the Eighth Circuit

APPLICATION TO RECALL AND STAY MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT PENDING PETITION FOR WRIT OF CERTIORARI

To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Eighth Circuit

Daniel R. Fritz
BALLARD SPAHR LLP
101 South Reid Street, Suite 302
Sioux Falls, SD 57103
(605) 978-5205
dfritz@ballardspahr.com

Gavin R. Villareal
Counsel of Record
Thomas R. Phillips
Stephanie F. Cagniart
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701
(512) 322-2500
gavin.villareal@bakerbotts.com

Counsel for Applicant Food Marketing Institute

CORPORATE DISCLOSURE STATEMENT

FMI is a voluntary trade organization, with headquarters in Arlington, Virginia, that represents more than 1,225 food retailer and wholesale members operating nearly 40,000 retail food stores across the United States and in several foreign countries. FMI has no parent corporation, and no publicly held corporation has an ownership interest in FMI.

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TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rules 22 and 23, Applicant Food Marketing Institute ("FMI") respectfully requests an order recalling and staying the issuance of the mandate in the Eighth Circuit until this Court resolves FMI's forthcoming petition for a writ of certiorari, including any consideration on the merits. *See Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J.) (describing the "four-part showing" needed to justify the grant of a stay); SUP CT. R. 22, 23.

INTRODUCTION

FMI seeks an order recalling and staying the mandate and the judgment below because without such an order, years of closely guarded and competitively sensitive sales data from hundreds of thousands of grocery retailers nationwide will be publicly disclosed—an extraordinary release of confidential sales information that will irreparably harm those retailers and moot this case before this Court has an opportunity to review it. Respondent *Argus Leader*, a South Dakota newspaper, filed a Freedom of Information Act (FOIA) request with the U.S. Department of Agriculture (USDA) seeking disclosure of redemption data from every store participating in the national Supplemental Nutrition Assistance Program (SNAP) between 2005 and 2010. USDA refused, in part because the data was "confidential" commercial information and thus exempt from disclosure under FOIA's Exemption 4. *See* 5 U.S.C. § 552(b)(4). Following a bench trial, the U.S. District Court for the District of South Dakota disagreed and ordered the information to be released. However, because the district court acknowledged that the data's disclosure "could cause irreparable harm" to retailers and that an appeal from the judgment could be

successful given the unsettled nature of the law in this area, the district court stayed its judgment and allowed FMI—a trade association of food retailers—to appeal to the U.S. Court of Appeals for the Eighth Circuit. App., *infra*, 30a. The Eighth Circuit affirmed the judgment and denied FMI's petition for rehearing en banc. *Id.* at 8a-9a. On August 7, 2018, it also denied FMI's motion to stay the mandate pending disposition of FMI's Petition for Writ of Certiorari, and issued its mandate. App., *infra*, 32-33a. Fed. R. App. P. 41(b).

If the Eighth Circuit's mandate is not recalled and stayed, USDA will be obligated to disclose the redemption data, and FMI's members and thousands of other grocery retailers will be irreparably harmed. Closely guarded and commercially sensitive data from all retailers that participated in SNAP between 2005 and 2010 will be released and available to those retailers' competitors. And, in the words of the district court, "once the data is disclosed, it cannot be unseen." App., *infra*, 30a.

Denying FMI's application to recall and stay the Eighth Circuit's mandate would also effectively moot this appeal—even though there is a reasonable probability that, given the opportunity, this Court would grant certiorari and reverse the judgment below. Although FOIA is an important federal statute and this Court has, on numerous prior occasions, interpreted other FOIA exemptions, it has not yet interpreted Exemption 4. Without guidance, the Circuits have largely followed an atextual, judicially created "test" to decide when information is "confidential" and thus protected from disclosure under Exemption 4. That test considers not whether the information is "confidential" under the term's plain meaning, but instead requires a court to decide whether disclosure of the information would cause "substantial competitive harm." *Nat'l Parks & Conservation*

Ass'n v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The Circuits that have adopted this test do not apply it consistently, forcing parties to guess whether their competitors might be able to use FOIA to obtain through FOIA sensitive business information collected by the government. Worse, that test has no basis in the text of the statute itself, and does not accord with this Court's precedents on statutory interpretation. This appeal presents the Court the opportunity to clarify the standard of applicability for this important federal statute.

PARTIES TO THE PROCEEDING BELOW

Applicant Food Marketing Institute was an Intervenor-Defendant in the U.S. District Court for the District of South Dakota and the Appellant in the U.S. Court of Appeals for the Eighth Circuit.

The U.S. Department of Agriculture was the Defendant in the district court. USDA was not a party to the Eighth Circuit appeal.

Respondent *Argus Leader Media* was the Plaintiff in the district court and the Appellee in the Eighth Circuit appeal.

OPINIONS BELOW

The opinion of the Eighth Circuit affirming the district court's judgment (App. A) is reported as *Argus Leader Media* v. *U.S. Dep't Agric.*, 889 F.3d 914 (8th Cir. 2018). The judgment of the Eighth Circuit (App. B) is unreported. The order of the Eighth Circuit denying FMI's petition for rehearing en banc (App. C) is unreported.

The district court's memorandum opinion and order (App. D) is reported as *Argus Leader Media* v. *U.S. Dep't Agric.*, 224 F. Supp. 3d 827 (D.S.D. 2016). The district

court's judgment (App. E) is unreported. The district court's order granting FMI's motion to intervene (App. F) is unreported.

The Eighth Circuit's order denying FMI's motion to stay issuance of its mandate (App. G) is unreported. The Eighth Circuit's Mandate (App. H) is unreported.

JURISDICTION

The district court had federal-question subject-matter jurisdiction of this case under FOIA. 5 U.S.C. § 552(a)(4)(B). The Eighth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. The opinion of the Eighth Circuit affirming the district court's judgment was entered on May 8, 2018. The Eighth Circuit's order denying FMI's petition for rehearing en banc was entered on July 13, 2018. The Supreme Court of the United States has jurisdiction over this case pursuant to 28 U.S.C. § 1254.

CONSTITUTIONS, STATUTES, AND RULES

The Freedom of Information Act, 5 U.S.C. § 552, provides, in relevant part, that an agency may withhold information requested under FOIA if the agency "reasonably foresees that disclosure would harm an interest protected by an exemption" specified under the Act. 5 U.S.C. § 552(a)(8)(A)(i)(1). FOIA's Exemption 4 exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

STATEMENT OF THE CASE

I. Factual Background

The Supplemental Nutrition Assistance Program (SNAP) is a federal program that aims to provide nutritious food to low-income families through normal

economic channels. 7 U.S.C. § 2011. When a SNAP recipient makes a food purchase at a participating store, redemption data for that transaction is sent to USDA, and the store is reimbursed for the sale. App., *infra*, 11a. The scope of the program is considerable. Since 2005, approximately 321,000 retail stores have participated in SNAP, including traditional grocery stores, convenience stores, and large national chains. I.RR.166-168, II.RR.319, I.RR.202. In April 2018 alone, over 39 million individuals received SNAP benefits.[1]

USDA releases compilations of SNAP redemption data each month. Anyone can view the cost of SNAP at the national-, state-, and even ZIP-code-level on USDA's website.[2] Data regarding the value of SNAP redemptions for each individual store is not publicly available, however, and SNAP retailers have participated in the program with the understanding that store-level data would be kept confidential. *E.g.*, I.RR.230-231; II.RR.292.

II. Facts and Procedural History

Argus Leader is a newspaper based in Sioux Falls, South Dakota. In 2011, an *Argus Leader* reporter filed a FOIA request for SNAP data. App., *infra*, 11a. For each SNAP retailer nationwide, *Argus Leader* specifically requested the store identifier, name, address, store type, and total SNAP sales on an annual sales basis for 2005 to 2010. *Argus*

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[1] USDA, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: NUMBER OF PERSONS PARTICIPATING (Aug. 3, 2018), https://fns-prod.azureedge.net/sites/default/files/pd/29SNAPcurrPP.pdf.

[2] SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP), https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap (last visited July 31, 2018).

Leader Media v. *U.S. Dep't of Agric.*, 740 F.3d 1172, 1174 (8th Cir. 2014). USDA released most of the requested information but withheld the store-level SNAP sales data. *Ibid.*

Argus Leader challenged USDA's decision in the U.S. District Court for the District of South Dakota. App., *infra*, 11a. USDA asserted several FOIA exemptions in its defense, including that the information was exempted from disclosure by statute under Exemption 3. *Argus Leader*, 740 F.3d at 1173. The district court granted summary judgment for USDA based on Exemption 3, which the Eighth Circuit reversed on appeal. *Id.* at 1177.

On remand, USDA argued that the store-level SNAP sales data was protected by FOIA's Exemption 4, which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); App., *infra*, 3a. A two-day bench trial ensued solely on whether Exemption 4 applied—in particular, whether the requested information was "confidential." USDA presented testimony from a variety of industry witnesses, including representatives of a small supermarket chain, a large department store, a wholesale grocer, a convenience store, and the National Grocers Association, which represents 1,200 companies that own around 6,000 stores. App., *infra*, 12a-15a. The witnesses testified that retailers consistently and strenuously protect the requested information from their competitors. *Ibid.* Despite the differences in their store types, they agreed that the disclosure of store-level SNAP sales data would likely cause substantial competitive harm to their businesses. Competition in the food retail industry is fierce, and profit margins are very narrow, which forces retailers to rely on high sales volumes for profitability. I.RR.246; *see also* I.RR.247-254,

II.RR.366. The witnesses explained that if store-level data were released, then stores with high SNAP redemptions could see increased competition for those SNAP customers from existing rival stores (II.RR.324), that new market entrants could use the data to gain a competitive advantage in determining where to build their stores (I.RR.252-253), and that store-level SNAP redemption data could be used to determine a retailer's overall sales—a highly valuable figure that competitors in the industry currently expend great resources trying to estimate (II.RR.394-397). *Argus Leader* did not present any fact witnesses at trial.

The concerns described above were corroborated by expert testimony. USDA's expert was Bruce Kondracki, the vice president of a consumer research firm that performs market analysis, site location, and forecasting research. App., *infra*, 15a. In particular, the firm creates models of consumer behavior, taking into account demographics and population statistics and the estimated sales volume of its clients' competitors. II.RR.388-389. Estimating these sales volumes is time-consuming and expensive, but critical to creating an effective model that allows the firm's clients to make key decisions regarding store locations and sales strategies. II.RR.389-391. Mr. Kondracki testified that the release of store-level SNAP sales data would create a "windfall" for his company and other data-analysis firms, because store-level SNAP sales data would improve the model's accuracy, and thereby give the client a significant competitive advantage if it was attempting to target a particular competitor or geographic area. II.RR.393-396. In response, *Argus Leader* presented two expert witnesses, neither of whom work in the food retail industry. Both witnesses acknowledged the competitive nature of the industry, but

maintained that they believed that the release of store-level SNAP data was likely to have only a limited competitive effect. *See, e.g.*, II.RR.348, 351, 378.

Following the bench trial, the district court entered judgment in favor of *Argus Leader*. Like other Circuits, the Eighth Circuit has adopted the test created by the D.C. Circuit in *National Parks*, which interprets "confidential" under Exemption 4 to mean that the disclosure is likely to result in "substantial competitive harm." *See Contract Freighters, Inc.* v. *Sec'y of U.S. Dep't of Transp.*, 260 F.3d 858, 861-862 (8th Cir. 2001) (adopting the test from *Nat'l Parks*, 498 F.2d at 770). Despite finding, in accordance with all of the testimony at trial, that "competition in the grocery business is fierce," the district court concluded that Exemption 4 did not apply because "any potential competitive harm from the release of the requested SNAP data is speculative at best." App., *infra*, 21a.

Shortly after the district court issued its ruling, USDA—which had already pursued this litigation on behalf of retailers for six years, including a prior appeal to the Eighth Circuit—informed SNAP retailers that it intended to release the store-level SNAP data, effectively signaling that it would no longer litigate the case. App., *infra*, 26a. FMI is a trade association whose members operate nearly 40,000 retail food stores, many of which participate in SNAP. FMI therefore moved to intervene and appeal the judgment. *Ibid.*

The district court granted FMI's motion to intervene and stayed its judgment pending FMI's appeal to the Eighth Circuit. App., *infra*, 25a. The district court observed that whether Exemption 4 applies to store-level SNAP sales data "appears to be [an issue] of first impression in the Eighth Circuit" and that, "[b]ecause there is not a clearly

established answer to this issue, FMI could succeed in an appeal." *Id.* at 30a. The district court also concluded that it was appropriate to stay its judgment during the appeal because FMI's members would be irreparably harmed by the data's disclosure. *Ibid.* In the district court's words, "once the data is disclosed, it cannot be unseen." *Ibid.* The district court also concluded that any harm to *Argus Leader* and the public from a stay was negligible. *Ibid.*

FMI urged the Eighth Circuit to reverse the district court's judgment on two main grounds: (1) the district court applied an overly stringent test for what constitutes "substantial competitive harm" that was inconsistent with prior opinions from both the Eighth Circuit and its sister Circuits, and (2) in the alternative, the Eighth Circuit should reject *National Parks*'s judicially created "substantial competitive harm" test and, in accordance with the Supreme Court's precedents, apply the plain meaning of "confidential" in interpreting Exemption 4.

After briefing and oral argument, the Eighth Circuit affirmed the lower court's judgment. Like the district court, the panel reasoned that while the requested data might make statistical models marginally more accurate, the evidence did not support a finding that "this marginal improvement in accuracy is likely to cause *substantial* competitive harm." App., *infra*, 6a (emphasis in original). The panel emphasized that even if there was a "likelihood of commercial usefulness"—in other words, that third parties would be able to take advantage and use information that their competitors had confidentially submitted to the government—that was insufficient to trigger Exemption 4 because it was "not the same as a likelihood of substantial competitive harm." *Ibid.* In a

prior ruling, the Eighth Circuit had held that a showing that information about a company that "could" be used to learn more information about its competitive positions was sufficient to trigger Exemption 4. *Madel* v. *U.S. Dep't of Justice*, 784 F.3d 448, 451 (8th Cir. 2015). Although the panel acknowledged that the issues in this case "appear to mirror" the issues in *Madel*, it stated that a different result was merited because the data in *Madel* was "not analogous to the data in this case." App., *infra*, 7a. The panel did not address the precedents from other Circuits that FMI had relied on in support of its position. *Ibid.* Finally, the panel disposed of FMI's plain-meaning argument in a footnote, holding that the plain meaning of the word "confidential" could not be considered because it "would swallow FOIA nearly whole." App., *infra*, 5a n.4.

FMI filed a petition for rehearing en banc, which was denied on July 13, 2018. *See* App. C. FMI then moved to stay the issuance of the Eighth Circuit's mandate pending its filing a petition for a writ of certiorari in this Court. That motion was denied and the mandate was issued on August 7, 2018. *See* App. G and H. FMI's deadline to file a petition for writ of certiorari is October 11, 2018. FMI intends to file its petition on or before that date.

REASONS TO GRANT THE APPLICATION

A well-established four-part test governs the grant of a stay application pending disposition of a petition for writ of certiorari:

> First, it must be established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. * * * Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. * * * Third, there must be a demonstration that irreparable

> harm is likely to result from the denial of a stay. * * * And fourth, in a close case, it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Rostker, 448 U.S. at 1308. This stay application satisfies all four criteria.

I. There is a Reasonable Probability that this Court Will Grant Certiorari

This case, if it is stayed pending this Court's review, presents an opportunity to resolve substantial confusion among the courts of appeal regarding what constitutes "confidential" commercial information under FOIA's Exemption 4. It is reasonably probable that this Court will grant certiorari for three reasons: (1) the Court regularly grants certiorari to interpret and clarify the exemptions to FOIA, an important and frequently invoked federal statute, but has never addressed Exemption 4; (2) FMI's petition would allow the Court to clarify that "confidential" should be given its plain meaning, consistent with this Court's precedents; and (3) in the alternative, FMI's petition would provide an opportunity for the Court to resolve disagreements between the Circuits regarding how to apply a judicially created "test" for interpreting the confidentiality requirement of Exemption 4 that has been adopted by a majority of the circuit courts.

1. Because FOIA is an important federal statute that this Court regularly reviews, there is a reasonable probability that four Justices would vote to grant certiorari—particularly since the Court has never interpreted Exemption 4 of the statute.

FOIA requires broad disclosure of government records upon request, unless one of nine statutory exemptions applies. 5 U.S.C. § 552(b). These exemptions serve to protect the confidentiality of sensitive and valuable information—information that can be as valuable to the ones seeking it as it is to its owners. As a result, they are frequently

litigated. This Court has granted petitions of certiorari in numerous cases specifically to review the interpretation of FOIA's exemptions by the lower courts—some exemptions (Exemption 5, for example) have been reviewed by this Court more than once. *See, e.g.*, *Milner* v. *Dep't of Navy*, 562 U.S. 562, 569 (2011) (Exemption 2); *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 160 (2004) (Exemption 7(C)); *Dep't of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001) (Exemption 5); *U.S. Dep't of Justice* v. *Reporters Comm. For Freedom of Press*, 489 U.S. 749, 762 (1989) (Exemption 7(C)); *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 798 (1984) (Exemption 5); *F.T.C.* v. *Grolier, Inc.*, 462 U.S. 19, 23 (1983) (Exemption 5); *F.B.I.* v. *Abramson*, 456 U.S. 615, 621 (1982) (Exemption 7); *Baldrige* v. *Shapiro*, 455 U.S. 345, 361 (1982) (Exemption 3); *U.S. Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 598 (1982) (Exemption 6); *Fed. Open Mkt. Comm. of Fed. Reserve Sys.* v. *Merrill*, 443 U.S. 340, 352 (1979) (Exemption 5); *N.L.R.B.* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978) (Exemption 7); *Dep't of Air Force* v. *Rose*, 425 U.S. 352, 358 (1976) (Exemption 6); *N.LR.B.* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (Exemption 5).

The only Exemption at issue in this case is Exemption 4, a provision that is of great importance to persons or entities participating in government programs because it prohibits the government from disseminating certain sensitive information received from these third parties—specifically, "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Unlike the provisions mentioned above, however, the Court has never interpreted Exemption 4. *See New Hampshire Right to Life v. Dep't of Health and Human Servs.*, 136 S. Ct. 383, 383 (2015) ("[W]e have never

interpreted Exemption 4's exception for 'trade secrets and commercial or financial information obtained from a person and privileged or confidential.'"). FMI's petition would provide an appropriate vehicle for this Court to interpret Exemption 4.

2. Second, FMI's petition for writ of certiorari will provide this Court with the opportunity to clarify whether Exemption 4 should be interpreted according to its plain meaning or by using an extra-textual test that was created by judicial fiat, as most circuit courts currently do. This Court has repeatedly emphasized that FOIA exemptions, like other statutory language, should be given their plain meaning. *See., e.g.*, *Milner*, 562 U.S. at 569 (rejecting a long-established atextual test for the application of Exemption 2 in favor of a plain-meaning interpretation of that provision). In addition, Justice Thomas (joined by Justice Scalia) has indicated that he would grant certiorari in an Exemption 4 case precisely in order to analyze the *National Parks* test, which he described as "nebulous," "atextual," "convoluted," and "amorphous." *See N.H. Right to Life*, 136 S. Ct. at 383-385). *See infra* at 16-17. Because the confusion that Justice Thomas alluded to has only grown in the past three years, and because this case—unlike *N.H. Right to Life*—presents a clean, single-issue vehicle with which to review the extra-textual *National Parks* test, there is a reasonable probability that the Court would grant FMI's petition.

Exemption 4 is not currently given its plainmeaning by the lower courts. The question that has bedeviled the lower courts—and the only part of the exemption implicated by this appeal[3]—is what type of financial or commercial information is "confidential." In

[3] There is no dispute that the information in this case is "commercial or financial information obtained from a person" as required by Exemption 4. App., *infra*, 3a & n.2.

1974, the D.C. Circuit was faced with this question and, instead of applying the plain meaning of the word "confidential," invented a test based on a portion of the exemption's legislative history. *Nat'l Parks*, 498 F.2d at 767. Relying on a passage from the Senate Report, the court stated that it had identified two legislative purposes behind the exemption, which became the two "prongs" of the *National Parks* test: information is "confidential" if its disclosure is likely to (1) "impair the Government's ability to obtain necessary information in the future" or (2) "cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 770. The 1974 test was "refined" by the D.C. Circuit two years later, when the court stated that to establish the second, "substantial harm" prong, the party opposing the information's disclosure did not have to "show actual competitive harm," and that "[a]ctual competition and the likelihood of substantial competitive injury" was sufficient. *Nat'l Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 685-686 (D.C. Cir. 1976) ("*National Parks II*").[4] To date, seven federal circuits have adopted the *National Parks* test, including the Eighth Circuit. *N.H. Right to Life*, 136 S. Ct. at 384 (collecting cases); *see also Contract Freighters*, 260 F.3d at 861-862 (adopting *National Parks* test).

Since the invention of the *National Parks* test, even judges of the D.C. Circuit have expressed doubts regarding its validity. In 1991, Judge Randolph described the test as "fabricated, out of whole cloth." *Critical Mass Energy Project* v. *Nuclear*

[4] In 1983, the D.C. Circuit again revisited *National Parks*, noting that in determining whether disclosure would cause "substantial competitive harm," the "court need not conduct a sophisticated economic analysis of the likely effects of disclosure." *Pub. Citizen Health Research Grp.* v. *FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (citing *National Parks II*, 547 F.2d at 685-686).

Regulatory Comm'n, 931 F.2d 939, 947 (D.C. Cir. 1991), *vacated*, 942 F.2d 799 (1991) (internal quotation marks omitted). Perhaps cognizant of controversy surrounding the test, the D.C. Circuit reconsidered *National Parks* in a 1992 en banc decision, nearly twenty years after the circuit court's original opinion in the matter. *See Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871, 872 (D.C. Cir. 1992) (en banc). The en banc court reaffirmed the *National Parks* test in cases "in which a FOIA request is made for financial or commercial information a person was *obliged* to furnish the Government." *Id.* at 877, 879-880 (emphasis added). It then adopted a *different* definition of "confidential" to be used when "the information [sought] is provided to the Government *voluntarily*." *Id.* at 878 (emphasis added). As a result, the *National Parks* test became more, not less, amorphous, with different versions of the *National Parks* test (and different definitions of the word "confidential") used depending on different contexts.[5] This Court has not looked

[5] Additional inconsistencies have appeared because not all courts have adopted these new variations. Several Circuits, including the First, Second, and Fourth Circuits, have declined to adopt the "voluntary/involuntary" *Critical Mass* modification to the definition of "confidential; others, including the Tenth Circuit, adopted it; and still others have not decided the issue. *Compare, e.g.*, *N.H. Right to Life*, 778 F.3d at 52 n.8 (declining to adopt *Critical Mass*); *Am. Mgmt. Servs., LLC* v. *Dep't Army*, 703 F.3d 724, 731 n.6 (4th Cir. 2013) (declining to adopt *Critical Mass*); *Inner City Press/Cmty. on the Move* v. *Bd. Governors Fed. Reserve Sys.*, 463 F.3d 239, 245 n.6 (2d Cir. 2006) (declining to adopt *Critical Mass*); with *Madel*, 784 F.3d at 452 (assuming adoption of *Critical Mass*); *Utah* v. *U.S. Dep't of Interior*, 256 F.3d 967, 969 (10th Cir. 2001) (applying *Critical Mass*). Even the D.C. Circuit has struggled to analyze confidentiality under *Critical Mass*—in two cases, for example, the majorities' application of *National Parks*, as modified by *Critical Mass*, led the court to exempt certain military price-quote information from disclosure, leading two judges to write separately to criticize that outcome. *See McDonnel Douglas Corp.* v. *U.S. Dep't Air Force*, 375 F.3d 1182, 1195-1196 (Garland, J., dissenting) (arguing that the majority erred in holding Air Force price quotations voluntarily submitted information exempt from disclosure under *Critical Mass*); *Canadian Comm. Corp.* v. *Dep't Air Force*, 514 F.3d 37, 43 (D.C. Cir. 2008) (Tatel, J., concurring) (agreeing with Judge Garland's dissent in *McDonnel Douglas*.

with favor on interpretations of FOIA exemptions that differ depending on context. *See Milner* v. *Dep't of Navy*, 562 U.S. at 566-567, 570 (rejecting "High" and "Low" versions of FOIA Exemption 2).

FMI's forthcoming petition for certiorari, in contrast, will ask the Court to reject the *National Parks* test and apply the statute as it was enacted by Congress by giving "confidential" its "ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). The ordinary meaning of "confidential" encompasses information that is "not publicly disseminated" or that is "communicated, conveyed, acted on, or practiced in confidence." MERRIAM-WEBSTER ONLINE DICTIONARY, http://unabridged.merriamwebster; OXFORD ENGLISH DICTIONARY, http://www.oed.com/ ("2. Of the nature of confidence; spoken or written in confidence; characterized by the communication of secrets or private matters"); *see also* BLACK'S LAW DICTIONARY 339 (9th ed. 2009) (defining "confidential" as "meant to be kept secret"). In addition to comporting with well-established legal principles, relying on the plain-text meaning of "confidential" when applying Exemption 4 fulfills Exemption 4's clear goal of protecting the privacy of those who submit sensitive, private data to the government without agreeing to disseminate it to the public at large, and will not generate the inconsistent and unpredictable outcomes that have flourished in the wake of National Parks and its . *See* 5 U.S.C. § 552(b)(4).

There is a reasonable probability that the Court would grant FMI's petition to resolve this issue because this Court has repeatedly directed that FOIA exemptions should be interpreted according to their plain text—not according to extra-textual judicial gloss. *See, e.g.*, *N.H. Right to Life*, 136 S. Ct. at 383 (Thomas, J., dissenting) ("[W]e have

rejected interpretations of * * * FOIA exemptions that diverge from the text"); *Klamath Water Users Protective Ass'n*, 532 U.S. at 12 (seeking "textual justification" for proposed interpretation of Exemption 5); *U.S. Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 154 (1989) (declining to "read into the FOIA [language] that Congress did not itself provide"); *Weber Aircraft Corp.*, 465 U.S. at 798 ("We * * * simply interpret Exemption 5 to mean what it says").

In accordance with that directive, this Court has previously granted certiorari to address an atextual interpretation of a FOIA exemption, and has reversed lower court decisions applying such interpretations instead of the plain text of the statute. In *Milner*, for example, Justice Kagan—writing for an 8-1 majority—abrogated extra-textual tests that the D.C. Circuit had developed to interpret and apply FOIA's Exemption 2. *See id.*, 562 U.S. at 579-580 (abrogating *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc)). Justice Breyer dissented, arguing that the *Crooker* test, which at least three circuit courts had adopted over three decades, was too entrenched to justify reforming. *See id.* at 585-586 (Breyer, J., dissenting). No Justice joined Justice Breyer in dissent. Instead, the eight-Justice majority rejected the *Crooker* test on the grounds that "[o]ur consideration of Exemption 2's scope starts with its text," *id.* at 569, and replaced it with a plain-text reading of Exemption 2. *Id.* at 581 ("Exemption 2, consistent with the plain meaning of the term 'personnel rules and practices,' encompasses only records relating to issues of employee relations and human resources.").

A 2015 dissent from a denial of certiorari provides another indication of the Justices' probable interest in FMI's petition. *N.H. Right to Life*, 136 S. Ct. at 383 (Thomas,

J., dissenting from denial of certiorari). *New Hampshire Right to Life* involved Exemptions 4 and 5 of FOIA. When the Court denied certiorari, Justice Thomas, joined by Justice Scalia, took the unusual step of dissenting from the denial. *Ibid.* In his dissent, Justice Thomas described the confusion caused by the *National Parks* test, stating: "The courts' reliance on *National Parks* to determine whether information is 'confidential' commercial information has produced confusion[:] Courts cannot seem to agree on what kind of 'actual competition' must be shown * * * . Courts of Appeals also disagree over what a 'substantial likelihood of competitive harm' means." *Id.* at 384. The Court's denial of certiorari, Justice Thomas continued, "perpetuate[d] an unsupported interpretation of an important federal statute and further muddie[d] an already amorphous test." *Id.* at 385.

FMI's petition for certiorari will raise the very issue in which Justices Thomas and Scalia expressed interest, and has a stronger chance for success than did the *New Hampshire Right to Life* petition. Unlike *New Hampshire Right to Life*, FMI's petition implicates *only* Exemption 4, not Exemptions 4 and 5, and consequently provides a clean vehicle for interpreting that provision. It also focuses only on the meaning of "confidential," and will not require the Court to address other parts of the exemption in rendering its decision. Second, the petitioner in *New Hampshire. Right to Life* did not advocate for a plain-text reading of Exemption 4 that would eliminate the *National Parks* test, consistent with this Court's precedents. It only asked the Court to consider which interpretation of *National Parks* was correct. In contrast FMI's petition—like its briefing below—squarely presents for this Court's consideration an interpretation of FOIA that is in harmony with the Court's precedent, and one that, as to other FOIA exemptions, this

Court has granted certiorari to reaffirm. Together, these factors indicate a reasonable probability that the Court would grant certiorari in this case.

3. In the alternative, FMI's petition for writ of certiorari has a reasonable probability of being granted because it will provide this Court with the opportunity to resolve a disagreement between the Circuits regarding how the *National Parks* test should be applied.

As explained above, seven Circuits have adopted the *National Parks* test to interpret Exemption 4. But the consistent *adoption* of that test by the courts has not equated to its consistent *application* by them. In *New Hampshire Right to Life*, the First Circuit found "substantial competitive harm" was satisfied based on evidence regarding *hypothetical* harm from a "potential future competitor." *See. N. H. Right to Life*, 778 F.3d at 51 (1st Cir. 2015) (finding that agency met its burden to show substantial competitive harm because a "potential future competitor could take advantage" of information). In contrast, the D.C., Fourth, and Ninth Circuits all require an agency to show evidence of actual, not hypothetical, competition in order to establish "substantial competitive harm." *See CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987) (Exemption 4 requires a showing of "actual competition"); *Hercules, Inc.* v. *Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988) (finding the prospect of future competitors too "speculative); *Frazee* v. *U.S. Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996) (must show "actual competition"). The fact-intensive and amorphous *National Parks* test of "substantial competitive harm" has led to a panoply of outcomes: Thirty-six pages of the Department of Justice's guide to FOIA Exemption 4 are devoted to the numerous complexities and inconsistencies wrought by the "substantial

competitive harm" test.[6] Among the identified inconsistencies were divergent rulings in cases where customer names were sought to be exempted from disclosure under Exemption 4—in some cases, that information was held exempt as "confidential," based on competitive harm, and in others, it was ordered released. *See* DEP'T OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT 309-310 (*comparing, e.g.*, *Goldstein v. ICC*, No. 82-1511, 1984 WL 3228, at **6-7 (D.D.C. July 31, 1985) (reopening case and protecting customer names); *with Ivanhoe Citrus Ass'n v. Handley*, 612 F. Supp. 1560, 1566 (D.D.C. 1985)).

The inconsistent application of *National Parks* affected this litigation as well. The Eighth Circuit held that FMI had at most shown that the requested SNAP data could be commercially useful to the affected retailers' competitors if it was released, but that this was not sufficient to prove the information was "confidential" because it did not to show the release of store-level SNAP data would cause "substantial" competitive harm to those retailers. Other courts, however, have held that the *National Parks* test may be met by showing that the requested data could be useful to competitors, even if that use is speculative and not quantified. *See, e.g., State of Utah* v. *U.S. Dept. of the Interior*, 256 F.3d 967, 970 (D.C. Cir. 2001) (holding that evidence that data "could" be used by competitors to improve their negotiating positions when competing against the affected parties was sufficient to prove the data was "confidential" under Exemption 4)*; Kahn* v. *Federal Motor*

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[6] DEP'T OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT 305-347 (2016), *available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption4_0.pdf#_PAGE43 (subsection regarding "substantial competitive harm" prong of *National Parks* test) ("The courts have tended to resolve issues of competitive harm on a case-by-case basis rather than by establishing general guidelines.").

Carrier Safety Admin., 648 F. Supp. 2d 31, 33 (D.D.C. 2009) (awarding summary judgment to agency based on a general assertion of potential competitive harm: that disclosure "may give the requesting party some competitive benefit that it is not entitled to," and that the information was "extremely proprietary in nature"); *see also Pub. Citizen Health Research Grp.* v. *Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (to prove "substantial competitive harm," "the court need not conduct a sophisticated economic analysis of the likely effects of disclosure"). Even the Eighth Circuit has held, in a prior case, that commercial information is confidential if its disclosure "could" help a competitor determine a party's "market shares, inventory levels, and sales trends in particular areas"—precisely the type of information USDA's witnesses testified their competitors might be able to discern if store-level SNAP data is released. *See Madel*, 784 F.3d at 453; *see also* II.RR.324, II.RR.394-397.

Supreme Court review is warranted to resolve this confusion. The lower courts are inconsistently applying the *National Parks* test, such that a litigant cannot know exactly *how* a court will interpret "substantial competitive harm." Without this information, private parties cannot make an informed decision about whether to participate in government programs that require them to disclose their confidential information to government agencies; nor do they have the information they need to properly present their position at trial if a FOIA request is made for the submitted information. Further, the *National Parks* test is entrenched—after the en banc D.C. Circuit reaffirmed it as modified, it is difficult to imagine it being clarified other than by Supreme Court review.

II. There is a Fair Prospect that this Court Will Reverse the Court of Appeals' Decision.

The Eighth Circuit erred when it affirmed the district court's decision in this case, and there is a fair prospect that those errors would cause this Court to reverse the judgment. First, the Eighth Circuit declined to adopt a plain-text reading of FOIA Exemption 4. Second, and in the alternative, the Eighth Circuit erroneously interpreted and applied the *National Parks* test.

1. The plain text of Exemption 4 states that *any* "confidential" information is protected from disclosure. Because the statute does not define "confidential," that word should be given its ordinary or natural meaning. *See FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of * * * a definition, we construe a statutory term in accordance with its ordinary or natural meaning."); *Perrin*, 444 U.S. at 42 ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). As explained in Part I above, "confidential" means "meant to be kept secret," and ordinarily encompasses information that is "not publicly disseminated" or that is "communicated, conveyed, acted on, or practiced in confidence." *Supra* at 15-16 (citing MERRIAM-WEBSTER ONLINE DICTIONARY; OXFORD ENGLISH DICTIONARY; BLACK'S LAW DICTIONARY 339). Under that definition, the data that USDA refused to disclose to *Argus Leader* was unquestionably protected: USDA's witnesses unanimously testified at trial, and *Argus Leader* has never disputed, that store-level SNAP data is not publicly available and is carefully safeguarded by retailers, including by using physical and computer security methods. *See, e.g.*, I.RR.205-207.

There is a fair prospect that this Court would adopt the plain reading of Exemption 4 urged by FMI and reverse the judgment of the Eighth Circuit. FMI is aware of no plain-text definition of "confidential" that includes the "likely to cause competitive harm" standard advanced in *National Parks* and adopted by the Eighth Circuit. That standard comes entirely from a Circuit's reading of legislative history. It is a tried and true rule of statutory interpretation that where a statute contains an unambiguous word—like "confidential"—the Court will not "permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991).

This Court has repeatedly applied these well-established rules, rejecting extra-textual "tests" and instructing lower courts to read FOIA exemptions pursuant to their plain text. *See supra* at 16 (collecting cases). And this Court has reversed judicially created tests for interpreting FOIA exemptions that do not accord with a plain-text approach, even where they are long-standing. *See, e.g.*, *Milner*, 562 U.S. at 569 (abrogating *Crooker*, 670 F.2d at 1051). The same approach should prevail here.

2. FMI also has a fair prospect of prevailing before this Court if the Court declines to eliminate the *National Parks* test and instead uses this opportunity to address disagreements between the Circuits and clarify how the extra-textual test should be applied. USDA presented unrebutted evidence showing release of the requested data would give competitors valuable information they did not previously have and enable them to discern information about each others' sales volumes – information that could then be used to gain a competitive edge against SNAP participants. This required USDA meet a

stringent standard that other Circuits have not required, and that requires a level of specificity that few litigants could ever meet. *See Madel* v. *U.S. Dep't Justice*, 784 F.3d 448, 452-453 (8th Cir. 2015) (finding that a likelihood of substantial competitive harm was proven where the DEA argued that, if released, the requested information would enable competitors to discern one another's location-specific market shares and inventory and sales estimates); *Sharkey* v. *Food & Drug Admin.*, 250 F. App'x 284, 289-90 (11th Cir. 2007) (per curiam) (affirming summary judgment holding that a figure as seemingly insignificant as the net number of doses of a vaccine per lot was likely to result in substantial competitive harm because that information could allow competitors to "better estimate even more confidential information, such as production capacity and manufacturing specifics"); *Utah*, 256 F.3d at 970 (holding that lease information was confidential as a matter of law under Exemption 4 despite arguments that its disclosure would have a negligible effect on competition, because competitors "could use" the information to improve their own bargaining positions).

Under the *National Parks* test as it has been applied by most Circuits, USDA more than satisfied its evidentiary burden to establish that the SNAP data's disclosure would likely cause substantial commercial harm. Point for point, USDA put evidence establishing the applicability of Exemption 4 at least as strong and well-supported as the government did in *Madel*, in which the Eighth Circuit affirmed summary judgment under Exemption 4. USDA's fact witnesses explained that the release of store-level data would enable existing competitors to target the retailers' SNAP customers and estimate the total volume of sales at a given location. I.RR.192. USDA's rebuttal expert walked the court

step by step through how the retailers' competitors could exploit this key data to their advantage. II.RR.391-95.

III. Absent a Stay, Applicants' Members Will Suffer Irreparable Harm.

The district court that oversaw litigation and trial in this matter recognized that without a stay pending appeal, FMI and its members could suffer irreparable harm because "once the data is disclosed, it cannot be unseen." App., *infra*, 30a. It consequently stayed its judgment pending while FMI appealed to the Eighth Circuit. *Ibid.*

The same danger still exists. The district court's judgment, affirmed by the Eighth Circuit, requires that USDA release store-level SNAP data, App., *infra*, 22a)—data reflecting actual sales by hundreds of thousands of grocery retailers, whose disclosure of which has been opposed for seven years of litigation. Without a stay of the Eighth Circuit's mandate and judgment until Appellant's petition is disposed of, USDA could release the data at any time and the affected retailers, including FMI's members, would be left without recourse.[7] Disclosure of the requested data would moot this appeal. And even if it were later determined that USDA should not have disclosed the data, the damage could not be undone: the confidentiality of the information would be lost forever, and SNAP retailers exposed to the competitive harms they testified about at trial.

Granting a stay is also consistent with this Court's practice. This Court has previously granted stays during FOIA appeals because the likelihood of irreparable injury

[7] USDA, *Decision Memo* (Jan. 18, 2017), https://fns-prod.azureedge.net/sites/default/files/snap/Argus-Leader-Decision-Memo-1-18-2017.pdf (memorializing USDA's decision to comply with the district court's order that the SNAP retailer redemption data be disclosed).

is so high, particularly since the disclosure itself moots any appeal. *See, e.g., John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1308–1309 (1989) (Marshall, J., in chambers) (issuing stay in FOIA case because, in part, "[t]he fact that disclosure would moot [an appeal to the Supreme Court] would * * * create an irreparable injury."); *cf. Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, J.) ("When, as in this case, the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted." (internal quotation omitted)). Under these circumstances, when denying a stay would effectively constitute a decision on the merits by ending a party's opportunity to seek review of an adverse decision, a stay is warranted.

IV. The Balance of Equities Favors a Stay.

Finally, equity favors a recall of the mandate and a stay in this matter. In granting a stay of its judgment pending appeal to the Eighth Circuit, the district court recognized that while FMI would be irreparably harmed absent a stay, *Argus Leader* and the public would not:

> The issue before the court was whether FOIA Exemption 4 applied to individual SNAP retailer redemption data. The issue appears to be one of first impression in the Eighth Circuit Court of Appeals. Because there is not a clearly established answer to this issue, FMI could succeed in an appeal. The disclosure of the requested SNAP data could also cause irreparable harm to FMI members—that is the issue FMI seeks to appeal. And once the data is disclosed, it cannot be unseen. In contrast, Argus and the public will not suffer irreparable harm if the data is not disclosed immediately. Assuming Argus prevails on appeal, Argus will have access to the SNAP data and will be able to publish news articles based on the information. Any harm would be temporary and not irreparable.

App., *infra*, 30a.

Argus Leader's request for store-level SNAP data has been pending for more than seven years. The newspaper does not claim that the passage of time has mooted its request for the SNAP data. The relatively slight additional delay occasioned by this Court's consideration of FMI's petition for certiorari will not impose any legitimate harm on *Argus Leader*—and certainly not in any proportion to the harm that FMI and its constituent retailers and wholesalers would suffer should the stay be denied.

The public interest also favors a stay in this case. If store-level SNAP data is released, substantial competitive harm will be felt by thousands of retailers across the country, from small convenience stores to large national chains. That threat weighs heavily in favor of keeping the status quo and preserving the confidentiality of the data until FMI's petition has been disposed of by this Court. A limited delay, in contrast, would not harm the public interest, as the public has no pressing or time-sensitive need to review store-level SNAP data from 2005-2010

Moreover, the public interest favors a stay that will allow this Court to address and resolve an important legal issue: the interpretation of FOIA's Exemption 4. That is especially true when, as explained above and recognized by the district court, there is a reasonable probability that the judgment below will be reversed if the appeal were permitted to proceed.

CONCLUSION

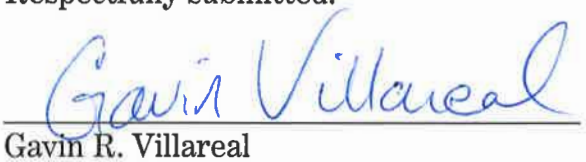
Due to the substantial competitive harms its members are likely to face should this information be released, FMI made the extraordinary effort to intervene after the district court's judgment and appeal this case. USDA and FMI have presented a clear case for non-disclosure under Exemption 4, but the district court and the Eighth Circuit

have erroneously relied on and interpreted the atextual *National Parks* test to hold that FOIA requires USDA to release confidential store-level SNAP redemption data. Recalling the mandate and staying the case pending FMI's filing a petition for a writ of certiorari in this Court would present the Supreme Court a fresh opportunity to speak on the interpretation of this "important federal statute." *N.H. Right to Life*, 136 S. Ct. at 385.

For the aforementioned reasons, the application for a recall of the Eighth Circuit's mandate, pending the filing and disposition of a petition for a writ of certiorari in this Court should be granted.

Dated: August 7, 2018

Respectfully submitted.



Gavin R. Villareal
Counsel of Record
Thomas R. Phillips
Stephanie F. Cagniart
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701
(512) 322-2500
gavin.villareal@bakerbotts.com

Daniel R. Fritz
BALLARD SPAHR LLP
101 South Reid Street, Suite 302
Sioux Falls, SD 57103
(605) 978-5205
fritzd@ballardspahr.com