No. 18A146

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

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

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

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CORPORATE DISCLOSURE

Appellee, Argus Leader Media, d/b/a *Argus Leader*, is a subsidiary of Gannett Company, Inc., a public corporation.

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

Argus Leader Media ("*Argus*"), Respondent, respectfully requests that Food Marketing Institute's ("FMI") application for the extraordinary remedy of recall and stay of the issuance of the Eighth Circuit's mandate be denied. FMI's sudden antipathy for FOIA exemption 4's "substantial competitive harm" test and its wishful speculation about the likely disposition of the members of the Court do not begin to justify the grant of a stay under the rigorous *Rostker* standard that FMI must satisfy. *See Rostker v. Goldberg,* 448 U.S. 1306, 1308 (1980) (Brennan, J.).

PARTIES TO THE PROCEEDINGS BELOW

Respondent, *Argus*, was the Plaintiff in U.S. District Court for the District of South Dakota and the Appellee in the U.S. Court of Appeals for the Eighth Circuit.

Applicant FMI was not a party in the South Dakota District Court until its post-trial intervention. FMI was the Appellant in the Eighth Circuit appeal.[1]

OPINIONS BELOW

FMI has reproduced in its appendix two opinions:

- South Dakota District Court's November 30, 2016, memorandum opinion: *Argus Leader Media v. U.S. Dep't Agric.,* 224 F.Supp 3d 827 (D.S.D. 2016));
- Eighth Circuit's May 8, 2018 opinion affirming the District Court's judgment: *Argus Leader Media v. U.S. Dep't Agric.,* 889 F.3d 914 (8th Cir. 2018)).

[1] United States Department of Agriculture ("USDA") was the original Defendant in the South Dakota District Court. USDA was not a party on the appeal to the Eighth Circuit.

FMI has also reproduced the Eighth Circuit's July 13, 2018, order denying FMI's petition for rehearing *en banc,* the August 7, 2018, order denying FMI's motion to stay issuance of its mandate and the August 7, 2018, order issuing its formal mandate.

JURISDICTION

The South Dakota District Court had federal-question subject matter jurisdiction of this FOIA case under 5 U.S.C. §552(a)(4)(B). The Eighth Circuit had appellate jurisdiction under 28 U.S.C. §1291. *Argus* does not dispute the Supreme Court's jurisdiction to address FMI's stay request. However, *Argus* believes jurisdiction under 28 U.S.C. §1254 will be contingent on the merits of a petition for a writ of certiorari.

CONSTITUTIONS, STATUTES, AND RULES

This case involves various provisions of the Freedom of Information Act, 5 U.S.C. §552.

- 5 U.S.C. §552(a)(3)(A) provides: "…each agency, upon any request for records …shall make the records promptly available to any person."
- 5 U.S.C. §552(f)(1) provides: "'agency'…includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government, (including the Executive Office of the President), or any independent regulatory agency;"
- 5 U.S.C. §552(f)(2) provides: "'record' and any other term used in this section in reference to information includes—
  - (A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and
  - (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government

contract, for the purposes of records management.

- §552(b)(4) provides: "trade secrets and commercial or financial information obtained from a person and privileged or confidential [are exempt from FOIA disclosure requirements.]"

STATEMENT OF THE ISSUE

The single issue before the Court is whether FMI is entitled to a stay of the issuance of the Eighth Circuit's mandate pending disposition of its "forthcoming" petition for a writ of certiorari. The issuance of the mandate would allow *Argus* to have its January, 2011, FOIA request to see the federal government's SNAP records showing the annual amounts the government paid out to individual retailers voluntarily participating in the program fulfilled. On the other hand, FMI with its stay request asks that all previous litigation[2] and rulings in this case—related to FOIA exemption 4 and otherwise—be ignored and that an interpretation of exemption 4 be adopted that effectively eviscerates FOIA of its purpose.

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[2] In the course of litigating its FOIA right of access, *Argus* has consistently prevailed on exemption 4 and all collateral matters:

- On September 20, 2015, South Dakota District Court denied USDA's summary judgment motion based on FOIA exemptions 4 and 6;
- On November 30, 2016, the District Court, after conducting a two-day trial on the single issue of FOIA exemption 4 in May, 2016, again ruled in favor of *Argus*;
- On August 3, 2017, the District Court awarded *Argus* attorney fees and costs;
- On October 19, 2017, the District Court awarded *Argus* additional "fees on fees;"
- On May 8, 2018, following oral argument by *Argus* and FMI on March 14, 2018, a three-justice panel of the Eighth Circuit Court of Appeals voted unanimously to uphold the District Court's trial decision;
- On June 4, 2018, the Eighth Circuit granted *Argus's* motion and remanded the case to the District Court for the purpose of determining the availability of additional attorney fees;
- On July 13, 2018, without there having been any request for a vote, the Eighth Circuit denied FMI's rehearing petition, both *en banc* and panel;
- On August 7, 2018, the Eighth Circuit denied FMI's petition for a stay of the issuance of the mandate and issued the mandate.

The "well-established" *Rostker* test places the burden squarely on FMI to prove all of the following in every case:

1. there is a "'reasonable probability' that four Justices will consider the issue sufficiently" meritorious to grant certiorari or note probable jurisdiction;" and
2. there is a "fair prospect that a majority of the Court will conclude the decision below was erroneous;" and
3. there is a likelihood "irreparable harm [will] result from the denial of a stay."

Finally, "in a close case, it may be appropriate to 'balance the equities,'" meaning FMI would also have to demonstrate that the harm it would suffer for lack of a stay would outweigh the combined harm to *Argus* and the "interests of the pubic at large." *Rostker v. Goldberg,* 448 U.S. 1306, 1308 (1980) (Brennan, J.)

STATEMENT OF THE CASE

I. SNAP Background.

This FOIA case homes in on SNAP and its data. SNAP's purpose, codified in 7 U.S.C. §2011, is perfectly plain:

> It is declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households….To alleviate such hunger and malnutrition, a supplemental nutrition assistance program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.

And, so, too, is the SNAP retailers' role, described at 7 U.S.C. §2018(a)(1):

> Regulations issued pursuant to this chapter shall provide for the submission of applications for approval by retail food stores and wholesale food concerns which desire to be authorized to accept and

> redeem benefits under the supplemental nutrition assistance program and for the approval of those applicants whose participation will effectuate the purposes of the supplemental nutrition assistance program….

SNAP is a program in which the federal government pays for food for low-income households, *i.e.* the SNAP benefit recipients. SNAP households have accounts with the government and use a type of "debit card" to purchase eligible foods from retailers voluntarily participating in the program. The electronic processing of the SNAP transactions is the means by which the SNAP accounts are debited. In effect, it is the system by which the government pays the retailers for the SNAP purchases.[3]

Argus asked the government for its records of the gross annual amounts of SNAP payments the government made to individual retailers for the years 2005-2010. That government data showing payments under a government program hardly qualify as "sensitive business information collected by government." Clearly that program payment data are a bad fit for what Congress was intending to protect under FOIA.

One thing, upon which everyone can agree, is that SNAP is a humongous program. According to USDA's statistics, in recent years between 40,000,000 to 45,000,000 people have received annual SNAP benefits totaling between

[3] Under SNAP the money flows from the taxpayer to the government to the eligible SNAP households to the SNAP retailers from whom food is purchased. The crux of this government program is that government—with taxpayer dollars—buys groceries for low-income families from stores that wish to do business under the program.

$63,000,000,000 and $70,000,000,000[4] to buy food from approximately 263,000 participating retailers.[5]

II. Facts and Procedural History

In January, 2011, *Argus,* a Sioux Falls, South Dakota newspaper, filed a FOIA request with USDA wanting to know, among other things, the gross annual amounts of SNAP payments the U.S. government made to individual retailers participating in the program. After USDA denied the initial request and failed to provide a timely response to *Argus's* appeal, *Argus* filed a federal FOIA complaint against USDA in August , 2011 in South Dakota District Court. USDA was granted summary judgment on FOIA exemption 3 in September, 2012, but in January, 2014, an Eighth Circuit panel unanimously reversed that decision on appeal.

Upon remand, USDA set about to prove a basis for an exemption 4 summary judgment motion.[6] In the course of garnering "proof," USDA contacted each of the nearly 322,000 retailers who participated in SNAP between 2005 and 2010—by phone or by e-mail—alerting them that a request had been made for their annual SNAP sales, directing them to a Request for Information ["RFI"] in the Federal Register,[7] and encouraging them to submit comments. In conjunction with the RFI, USDA issued a press release in August, 2014, in which then USDA Under Secretary Kevin Concannon explained that the "goal is to provide more transparency so that

[4] https://fns-prod.azureedge.net/sites/default/files/pd/34SNAPmonthly.pdfover.

[5] https://fns-prod.azureedge.net/sites/default/files/snap/2017-SNAP-Retailer-Management-Year-End-Summary.pdf.

[6] The FOIA exemption 4 defense had been deferred until litigation on exemption 3 was completed.

[7] https://federalregister.gov/a/2014-18288.

people can have access to basic information about the among of SNAP benefits that individual grocery stores and retailers are redeeming."[8] In the RFI, itself, USDA pointedly asked:

> Are aggregated annual SNAP redemption data at the individual store level confidential business information? If yes, please explain why the disclosure is likely to cause substantial competitive harm and fully explain all other grounds upon which you oppose the disclosure of such information….

According to affidavits[9] of USDA SNAP administrators filed in support of summary judgment, 321,665 of the 321,988 SNAP retailers did not bother to respond. Of those who did, only 236 "opposed release…identifying it as confidential business information." Nevertheless, USDA filed a motion for summary judgment on exemptions 4 and 6.[10] As part of its presentation, USDA included a 28 U.S.C. §1746 declaration from FMI's "Regulatory Counsel."[11] The summary judgment motion was denied in September, 2015.[12]

In May, 2016, a bench trial was held solely on FOIA exemption 4 and, specifically, on the issue of "confidentiality." The parties and District Court were in agreement that the widely adopted test of confidentiality within the context of exemption 4 was whether disclosure of the annual store-level SNAP payment data was "likely to cause substantial competitive harm" to SNAP retailers. To prove its

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[8] USDA Release No. 0168.14.

[9] District Court Docket 54-1, ¶5; Docket 59, ¶¶'s 8-11.

[10] FOIA exemption 6 exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6).

[11] FMI's declaration included a single oblique reference to "proprietary information" possibly affecting the stock price of a public company. No pitch was made for a "plain-text" interpretation of "confidentiality." District Court Docket 59-4 (D1).

[12] USDA, subsequently, abandoned the exemption 6 defense.

exemption 4 defense, USDA called a handful of USDA employees and SNAP retailers as witnesses and a market research firm executive as a rebuttal expert.[13]

Argus presented testimony from two expert witnesses—one an assistant professor in agribusiness at Cal Poly, with a Ph.D. in agriculture and resource economics, who had spent several years as a research economist with USDA's Economic Research Service in Washington, D.C., and the second an associate professor of business administration at Augustana University, with a Ph.D. in business administration, with an emphasis on information and decision sciences. Each of them expressed the opinion that it was not likely disclosure of annual SNAP payments to retailers would cause them substantial competitive harm.

The District Court ruled in *Argus's* favor in November, 2016, finding that the predictive fact that disclosure was likely to cause substantial competitive harm had not been proven and that *Argus* was entitled to the SNAP payment data.

In January, 2017, USDA announced that it was relinquishing its right to appeal, and, shortly thereafter, FMI successfully intervened to appeal the District Court's decision to the Eighth Circuit.[14] FMI was granted a stay during the pendency of the appeal.[15]

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[13] Although USDA's counsel had listed FMI's regulatory counsel as a potential witness in the course of discovery, FMI was conspicuously absent at trial.

[14] Having intervened, FMI, notably, did not appeal the District Court's denial of USDA's exemption 4 summary judgment motion to raise "plain-text" as the proper summary judgment standard.

[15] Curiously, FMI made much ado of the District Court's grant of the post-trial stay, pending appeal. While conveniently appreciating the District Court's reasoning for the first time, FMI implied it provided precedent for the grant of a post-appeal stay, pending disposition of a petition for a writ of certiorari. FMI ignores, however, that the bar is not the same. The *Rostker* bar is far higher for stays pending disposition of petitions for writs of certiorari. It makes eminent sense, considering those stages of litigation have markedly different specifications.

After briefs were submitted, the case was argued on March 14, 2018, before an Eighth Circuit panel. On May 8, 2018, the panel unanimously upheld the District Court in its FOIA exemption 4 holding. In keeping with its previous decision—and those of most of the other federal circuits—the Eighth Circuit relied on the "likelihood of substantial competitive harm" test for "confidentiality."

Noting FMI's "passing" distaste for the *National Parks* test, the Court concluded:

> FMI assets that "confidential" means "secret," so a record falls within Exemption 4 if it has previously been kept secret. We reject this argument as precluded by "the Supreme Court's admonition that FOIA exemptions 'must be narrowly construed.'" *Argus Leader,* 740 F.3d at 1176 (quoting *Milner v. Dep't of Navy,* 562 U.S. 562m 565 (2011). Under FMI's reading, Exemption 4 would swallow FOIA nearly whole.

Argus Leader Media v. U.S. Dep't of Agric., 889 F.3rd 914, at fn. 4 (8th Cir. 2018)

FMI made a motion for rehearing *en banc*,[16] which was denied on July 13, 2018, without any request having been made by a Circuit Justice for a poll. FMI next petitioned the Eighth Circuit for a stay of the issuance of the mandate, which was also denied on August 7, 2018.[17] On the same day, the Eighth Circuit issued the mandate, and FMI quickly filed its petition with this Court to recall and stay the Eighth Circuit's mandate. Shortly before the order and mandate were filed in the South Dakota District Court, this Court issued a temporary recall and stay, allowing *Argus* this opportunity to respond to FMI's arguments.

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[16] Under Eighth Circuit rules, the rehearing *en banc* motion automatically incorporates a motion for rehearing by panel. 8th Cir. Rules 40A.(b).

[17] A stay may be granted by a single justice, so the denial of the petition reflects that none of the Eighth Circuit Justices considered a stay to be warranted.

FMI DOES NOT SATISFY THE *ROSTKER* STAY CRITERIA

I. FOIA exemption 4 does not present a "substantial question" or create a "reasonable probablility" this Court will grant certiorari.

The first stay criterion FMI must establish is "that there is a 'reasonable probability' that four [Supreme Court] Justices will consider the issue sufficiently meritorious…." In its unsuccessful motion for a stay in the Eighth Circuit, FMI hedged its bets in trying to convince the Court that there would be a "substantial question" on certiorari. And FMI does the same thing now.

On the one hand, FMI asserts that this Court will be—or should be—predisposed to consider replacing the *National Parks* "substantial competitive harm" test used in the FOIA exemption 4 context with a "plain-text" interpretation that applies a literal, if subjective, definition of the word "confidential."[18] On the other hand, should the Court not be so inclined, FMI proposes that the Court would find the need to standardize the application of the *National Parks* test.[19]

It is an inexplicably presumptuous—and untenable—position. FMI, being fully apprised, chose not to participate in the trial on the issue of FOIA exemption 4's application to SNAP payments,[20] and its members showed little or no concern for the "confidentiality" of those annual SNAP payments when they were given the

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[18] FMI claims its "forthcoming petition for certiorari 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.'" FMI Application, p. 16.

[19] As FMI put it, "In the alternative, FMI's petition…has a reasonable probability of being granted because it will provide this Court with an opportunity to resolve a disagreement between Circuits regarding how the *National Parks* test should be applied." FMI Application, p. 19.

[20] FMI had the prerogative, of course, to intervene and/or appear as a witness. In view of FMI's professed interest in exemption 4's application and dire claims of "irreparable harm," it seems a strange decision.

opportunity.[21] With thinly veiled contempt for all previous decisions of the South Dakota District Court and the Eighth Circuit Court of Appeals, FMI now expects this Court to jump on board with it and let FMI dictate what the law should be.

That "FOIA is an important federal statute"— as FMI states—is self-evident, but that does not make exemption 4 an issue that desperately requires Supreme Court intervention and interpretation. To be sure, FMI did not like the summary judgment, trial or appeal results in this case, but that does not indicate a failure of the exemption 4 test or wide-spread judicial dysfunction. And while FOIA cases might be "frequently litigated," it is most unusual for them not to be determined on summary judgment. *Argus v. USDA* did go to trial. As a practical and theoretical matter, a FOIA exemption trial decision is likely less susceptible of an abrupt "matter of law" reversal by an appellate court than summary judgment decisions. In a response to a direct question from the Eighth Circuit panel during oral argument, counsel for FMI admitted that the existence of FOIA exemption 4 had been a question of fact for the District Court. In other words, "the likelihood disclosure would cause substantial competitive harm" was not determined or reviewable as a matter of law.

From *Argus's* post-trial, post-appeal vantage point, the U.S. Supreme Court's observations regarding the importance of FOIA take on special significance. *See*

[21] On December 2, 2014, and again on December 16, 2014, at USDA's request, FMI encouraged its members to provide affidavits describing "examples of the competitive harm that would be caused if [USDA] began disclosing individual SNAP redemption data." It was apparent from litigating the summary judgment motion in this case that FMI's request was met with categorical apathy. District Court Docket #142-9 and 10. The paltry number of responses to the RFI also serves to confirm that, for the most part, SNAP retailers did not care.

Dep't of the Air Force v. Rose, 425 U.S. 353, 360-361[22] ("[The] basic purpose [of FOIA] reflected a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."); *Milner v. Dep't of the Navy,* 562 U.S. 3 (2011) ("Congress intended FOIA to permit access to official information [of federal government agencies] long shielded unnecessarily from public view."); *U.S. Dep't of Justice v. Tax Analysts,* 492 U.S. 136, 151 (1989) ("FOIA exemptions are] consistently given narrow compass."); *FBI v. Abramson,* 456 U.S. 615, 630 (1982) ("[FOIA exemptions] must be narrowly construed."); *U.S. Dep't of State v. Ray,* 502 U.S. 164, 173 (1991) (The burden is always on those seeking "to justify withholding documents.")

That other FOIA exemptions have reached the Supreme Court is neither a compelling nor dispositive argument that certiorari will be or should be granted. Furthermore, it is abundantly clear that case law on other FOIA exemptions has limited probative influence on the merits of the *Argus* exemption 4 case. Listing names of various Supreme Court FOIA cases [FMI Application, p. 12] does not signify that exemption 4's time has come. To be perfectly blunt, nothing FMI has produced so far in expressing its dissatisfaction with the South Dakota District Court and the Eighth Circuit Court of Appeals provides the slightest indication that FMI has a better grip on FOIA exemption 4 than the member those Courts. Having said that, the cases do, collectively, merit some mention.

[22] The *Rose* Court also characterized full disclosure of agency records as Congress's "dominant objective" in enacting FOIA. *Id.* at 361.

First, as might be expected, all thirteen certiorari cases appear to be reviewing appeals of summary judgment decisions.[23] None appears to have involved an actual trial in which a District Court was uniquely positioned to judge the evidence and make a decision based on that evidence. As previously noted, in A*rgus v. USDA,* the District Court was the "fact finder [required] to predict either actual or hypothetical future reality." Margaret B. Kwoka, *The Freedom of Information Act Trial,* 61 AMERICAN U.L.REV. 217 (2011). *Id.* at 230 ("Questions of predictive fact are also consistently treated as factual questions by courts.") (*citing* Randell H. Warner, *All Mixed Up About Mixed Questions*, 7 J.APP.PRAC&PROCESS 101(2005).

Secondly, although the listed FOIA cases do not suggest any urgent need for this Court to review FOIA exemption 4, there are a number of signals that the Supreme Court was, is and will be completely attuned to the FOIA's overarching interest in promoting and sustaining government transparency—an interest that FMI plainly does not share. *See Milner v. Dep't of Navy,* 562 U.S. 562 (2011) (citing *FBI v. Abramson,* 456 U.S. 615 (1982) for principles that exemptions are "narrowly construed."); *Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157 (2004) (noting "FOIA's pro-disclosure purpose" in adopting a less stringent standard for challenging exemption 7(C).); *Dep't of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 9 (2001) ("The point of [exemption 5] is not to protect Government

[23] For those keeping score at home, six of them dealt with exemption 5, four with exemption 7, one with exemption 6, one with both exemptions 6 and 2 and one with exemption 3. In half of those cert cases (*Favish, Klamath Water, Reporters Committee, Grolier, Abramson, Rose,* the District Court and Court of Appeals had been in disagreement. Five of the cases came from the D.C. Circuit, and four came from the Ninth Circuit. The Eighth Circuit was unrepresented.

secrecy pure and simple."); *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 776 ("[C]ategorical decisions may be appropriate and individual circumstances disregarded when a case [rap sheet] fits into a genus [7(C) exemption] in which the balance characteristically tips in one direction."[24]); *United States v. Weber Aircraft Corp.,* 465 U.S. 792, 802 (1984) ("the legislative history [of exemption] does not contain the kind of compelling evidence of congressional intent that would be necessary to persuade us to look beyond the plain statutory language."[25]); *see also F.T.C. v. Grolier, Inc.,* 462 U.S. 19, 27 ("[P]lain" meaning argument fails when it leads to illogical result.); *F.B.I. v. Abramson,* 456 U.S. 615, 625 (1982) ("Moreover, that construction of the statute rather than the [more literal] interpretation [below] more accurately reflects the intention of Congress, is more consistent with the structure of [FOIA], and more fully serves the purposes of the statute."); *Baldrige v. Shapiro,* 455 U.S. 345, 353 (1982) ("The broad mandate of the FOIA is to provide for open disclosure of public information. The Act expressly recognizes, however, that public disclosure is not always in the public interest…."[26]); *U.S. Dep't of State v. Washington Post Co.,* 456 U.S. 595 (Court looked to legislative history for guidance.); *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill,* 443 U.S. 340, 352-353 (1979) ("It suffices to say that the purpose of

[24] This is readily distinguishable from the government payments under SNAP, in which the balance is decidedly against concealing government spending.

[25] This is in sharp contrast to the exemption 4 legislative history that evinces no intention of pulling government spending into the exemption's web. *See* H.R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966) (Congressional concern was to "assure confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies…." SNAP payment data is distinctively different in both type and derivation.

[26] It is axiomatic that public disclosure of government spending is in the public interest.

the FOIA is 'to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.") (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)); *N.L.R.B. v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 220 (1978) ("As we have repeatedly emphasized, 'the Act is broadly conceived' *EPA v. Mink* [410 U.S. 73, 80 (1973)] and 'its basic policy' is in favor of disclosure, *Dep't of Air Force v. Rose,* [425 U.S. 352, 361 (1976)]); *N.L.R.B. v. Sears, Roebuck & Co.,* 421 U.S. 132, 136 (1975) ("As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions.")

It is evident that this litany of FOIA cases does not naturally lead to any reasonable expectation that this Court will suddenly sense that FOIA exemption 4 poses a "substantial question" that the Court must answer. More directly, the *Argus* case—the rare FOIA trial—is an unlikely candidate for certiorari review and, therefore, presents a very difficult problem for FMI to overcome with its stay argument.

Interestingly, this Court has had some opportunities to do precisely what FMI now wishes it to do and the Court has declined. A quick search discovered that there have been several certiorari petitions presented to this Court asking it to address FOIA exemption 4. None was accepted. *See, e.g., Critical Mass Energy Project v. Nuclear Regulatory Commission,* 1992 WL 12073433 (1992); *Clearing House Ass'n v. Bloomberg L.P.,* 2010 WL 4232635 (2010); *Clearing House Ass'n v.*

Fox News Network, 2010 WL 6625774 (2010); *New Hampshire Right to Life v. Dep't of Health & Human Services,* 2015 WL1870358 (2015).

II. FMI's "plain text" proposal creates neither a "reasonable probability" the Court will grant certiorari nor a "fair prospect" the Court will reverse the Eighth Circuit's decision.[27]

In advocating the adoption of a "plain-text" interpretation, FMI leans heavily on Justice Thomas's dissenting opinion in *New Hampshire Right to Life v. Dep't of Health and Human Services,* 136 U.S. 383 (2015). In that opinion, Justice Thomas criticized what he perceived to be erratic application of the "atextual" exemption 4 "competitive harm" test and indicated his preference for employing the ordinary meaning of "confidential."

In the first place—as counsel's high school English literature teacher was fond of saying—"one bird doesn't prove spring." With all due respect, Justice Thomas is one vote.[28] He was joined in his opinion by the late Justice Scalia, leaving seven members of the Court not choosing to a grant of the cert petition.

Secondly, in lobbying this Court to discard the *National Parks* "likelihood of substantial competitive harm" test, FMI is asking the Court to abandon a standard that has been implicitly accepted for decades. Essentially, the Courts of Appeals—with this Court's tacit approval—have tried to apply a reasonable interpretation of "confidentiality" in the context of FOIA, generally, and exemption 4, specifically.

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[27] Since FMI makes a similar "plain text" argument under both *Rostker's* "certiorari" and "reversal" criteria, *Argus* will consolidate its discussion of them here.

[28] And in fairness to Justice Thomas, it cannot be inferred from his apparent interest in a "plain-text" interpretation that he has any intention of expanding the scope of exemption 4.

FMI points to the alleged "inconsistencies" in the application of *National Parks,* but different results do not necessarily reflect a bad standard. The so-called inconsistencies are due in large part to the differing factual scenarios to which the exemption is being applied.

The *Argus* case would not involve or implicate any of the claimed confusion relating to the bifurcation in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n,* 975 F.2d 871 (D.D.Cir. 1992). Moreover, it does not run afoul of the decision in *Milner v. Dep't of Navy,* 562 U.S. 566 (2011). Instead, *Milner* offers support for *Argus's* position. In that exemption 2 case, the Court rejected a government construction the government "based on the plain text…alone," noting that it "would produce a sweeping exemption, posing the risk that FOIA would become less a disclosure than a 'withholding statute.'" The Court later added that the "['clean slate'] reading violates the rule favoring narrow construction of FOIA exemptions." FMI's "plain text" case and adherence to a "common meaning" of "confidentiality" would also "produce a sweeping [and unsupportable] exemption."

Deriding the "atextual" *National Parks* test, FMI claims the "textual" interpretation, *i.e.* the ordinary meaning of "confidential," is the better choice, in keeping with traditional rules of "plain meaning" construction. But there are some serious flaws in FMI's reasoning.

The most egregious problem is that FMI believes its SNAP retailer members are the final arbiter of what is "confidential." The self-serving thesis is that if a person or entity considers something to be secret then—according to FMI—it is

"confidential" for purposes of exemption 4's protection. It is, to be frank, a conceptual nightmare and represents the antithesis of "narrow construction."

FMI, in its reply brief to the Eighth Circuit [at p. 25], actually declared, *"'Confidential' is not ambiguous, and its ordinary meaning is naturally subjective: 'confidential' is in the eye of the beholder."*[29] (Emphasis added.) In other words, FMI thinks it should decide. To support this bold claim, FMI cites *West Virginia Univ. Hosps., Inc. v. Casey,* 499 U.S. 88, 98-99 (1991) for the proposition that "confidential" is "unambiguous" and therefore, not subject to expansion or contraction. The Court wrote:

> The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous -- *that has a clearly accepted meaning in both legislative and judicial practice* -- we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.

Id, at 98-99. (Emphasis added.) FMI left out the italicized section, leaving a partial quotation with a completely different—and misleading—slant. The omission is particularly strange, since FMI has spent 18 months claiming that "confidential" does *not* have a "clearly accepted meaning in both legislative and judicial practice" and desperately needs one.

Frankly, any SNAP retailer who "expects" confidential treatment from the government with regard to the amount of tax dollars the government pays it for its

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[29] FMI's cited *United States v. Falcon,* 766 F.2d 1469, 1476 (10th Cir. 1985), a 4th Amendment search case. The Tenth Circuit held that while the defendant might have had a "subjective expectation" his video tape labeled "Confidential, Do Not Play," would remain "safe," the expectation was "objectively unreasonable" since it was not "locked away, hidden or sealed." If anything, *Falcon*, serves to undermine FMI's premise that "confidentiality" under FOIA exemption 4 should be a subjective determination.

voluntary participation in a government program is irrational. Common sense suggests that those choosing to do business with the government and, consequently being paid with taxpayer dollars have relinquished any reasonable expectation that the amounts paid are "confidential." [30]

Equally troubling is FMI's failure to take into account the context in defining/interpreting "confidential." It is imperative that the word be interpreted within the structure of a law that is designed to "permit access, and within the context of an exemption that must be "narrowly construed." If "confidential" is viewed in isolation and defined in a vacuum, it loses its connection with the surrounding text, which can lead to illogical results. For "confidential" to function meaningfully within the exemption, the dictionary definition of "confidential" must adapt to the language, purpose and logic of the exemption as a whole.

FMI insistence that "confidential" be given its "ordinary meaning" allows it to lift itself by its own bootstraps. The argument goes something like this: SNAP data is "not publicly disseminated;" therefore, SNAP data is "confidential." It is an absurdly spurious rationalization, glossing over, as it does, that there could be something wrong with the status quo. Needless to say, *Argus* takes serious issue with the notion that just because the SNAP payment information was "not publicly disseminated" did not mean it should not have been publicly disseminated.

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[30] *Cf. Racal-Milgo Gov't Sys. v. S.B.A.,* 559 F.Supp. 4, 6 (D.D.C. 1981) ("Disclosure of prices charged the Government is a cost of doing business with the Government."); *EHE,* No. 81-1087, slip op. at 4 (D.D.C. Feb 24, 1984) ("[O]ne who would do business with the government must expect that more [information] is more likely to become known to other than in the case of a purely private agreement.")

To adopt FMI's "plain text" argument would blast a hole in FOIA exemption 4, through which one could drive a very wide truck. The more FMI focuses on the "subjective," the more apparent it becomes that some "objective" modification is essential if "confidential" is to be a workable term within the law.

In essence, the "competitive harm" test survives because it reflects a common understanding that words have to be read in context of the statute *and* of the facts of the case.[31] FMI is reluctant to do that in the SNAP setting. FMI is intent on permanently privatizing the amounts of the government's SNAP payments to retailers.

The major problem is one of misconception. Understanding the true nature of the information in issue is vitally important in any discussion of "confidential." But that understanding does not serve FMI's purpose, so it has been a hard sell.

Argus believes that the SNAP data are the records of government's expenditures, *i.e.* what it pays out to allow low-income households to buy food. FMI, meanwhile, likes to think of the data as the records of a "business transacted between a customer and a retailer, not the retailer and the government." [FMI reply brief.] However, FMI chooses to overlook the fact the government is paying

[31] Another obvious virtue of the *National Parks* test is that it keeps the exemption "honest," so to speak, by eliminating the subjectivity FMI favors. *See, 9 to 5 Org. for Women Office Workers v. Bd. Of Governors of Fed. Reserve Sys.,* 721 F.2d 1, 9 (1st Cir. 1983) (Rejecting a "disclosure policy…contingent on the subjective intent of those who submit information….The emphasis [of exemption 4 protection] should be placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential."); *see also, Wash. Post Co., v. Dep't of Health & Human Services,* 690 F.2d 252 (D.C. Cir. 1982) (Tamm, J., dissenting) ("The test for confidentiality under Exemption 4 is an objective one, and neither the submitter's preference for secrecy nor the government's assurances to that effect can be dispositive.") (*citing National Parks,* at 766-67)).

the bill, which puts it squarely on the "customer" side of the transaction. And even if the government is not considered the ultimate customer, the record of any transaction between a SNAP recipient and a SNAP retailer is not "confidential" information in the hands of the SNAP recipient.[32]

FMI has argued that exemption 4 "exists precisely to *protect* the privacy of those who do business with the government." [FMI reply brief] But, again, there is a critical difference between government having a record of private business information requested in order to create a business relationship with a private entity and the payment record of the business actually conducted. Is there really any serious thought that a SNAP retailer has an exclusive ownership interest in information that is no more and no less than the amount government pays the retailer in a government program?

Argus believes this Court will recognize that what FMI proposes with its "plain text" argument amounts to a non-contextual definition of "confidential." It is highly doubtful that four members of the Court will see any sound reason to grant certiorari that is predicated on an unworkable, dangerously expansive

[32] To characterize SNAP payments as information that "belongs to" or in which SNAP retailers have any exclusive property right is at odds with the reality of the program. As a practical matter, the only reason it can even be said the SNAP data are "obtained from a person" is because of the program's process. The debit card system is a matter of expedience and expedition. It should not obscure the fact that the essence of SNAP is the government buying food for the low-income families. If the government went directly to the store, bought the food and then distributed it to the eligible households, nobody would question the public's right to know where the money is spent. So, too, the same information could be gathered from the records of the SNAP recipient's debit card transactions. Without invading any rights of privacy, calculations could be made providing totals of SNAP money going to any given retailer. In short, the manner in which the transaction is handled does not alter the program's basic structure and certainly does not make it something other than a government program funded by the taxpaying public. There is no independent ownership of the SNAP payment data. It simply reflects the money the SNAP retailer gets back from selling products to government.

interpretation of FOIA exemption 4. And it is even more improbable that a majority of this Court would ever reverse the Eighth Circuit under the same circumstances.

III. FMI's alternative proposal for reapplication of *National Parks* "substantial competitive harm" test creates neither a "reasonable probability" the Court will grant certiorari nor a "fair prospect" the Court will reverse the Eighth Circuit's decision.[33]

FMI's alternative plan is to have the Court to fall back on the *National Parks* test that FMI disdains. FMI request this Court to "resolve a disagreement between [sic] Circuits regarding how the *National Parks* test should be applied." Although FMI is not now asking the Court to reject "substantial competitive harm," it is still trying to steer the Court to a determination that the *Argus* case was incorrectly decided.

Despite having admitted the "likelihood that disclosure would cause substantial competitive harm" was a factual decision for the District Court, FMI expects this Court, as a matter of law, to impose a sweeping exemption 4 test that would seemingly attach whenever there is any kind or level of competition. FMI wants to convert the case from a predictive fact issue determined by expert testimony to an open and shut question of law.

Presumably, this Court will not follow FMI's suggestion and casually disregard that there *was* a trial in District Court and that the District Court's *trial* decision was unanimously upheld by the Eighth Circuit on appeal. Then, too, this Court is certain to take note that FMI was unable to persuade a single justice in

[33] Again, because FMI makes an alternative argument for reapplication of *National Parks* test under both *Rostker's* "certiorari" and "reversal" criteria, *Argus* will consolidate its discussion of them here.

Eighth Circuit that it deserved a rehearing—or, for that matter, a stay. It seems implausible that this Court will conclude that FMI is probably right and the lower courts probably wrong.

FMI complains that the *National Parks* has been inconsistently applied, but, as previously noted, in actuality the different results generally reflect that a law is being applied to a different set of facts. There is nothing inherently wrong with different results. There is no cause for alarm. The decisions do not establish exemption 4 chaos. What FMI really expects from "consistent application" of the *National Parks* test is the certainty that "likelihood of substantial competitive harm" will be found.

The underlying facts of the *Argus* case make it a particularly poor vehicle for the delivery of an issue for certiorari. And it most definitely does not present FMI with a very good opportunity to persuade the Court to reverse. As a practical matter, at trial common sense and expert testimony dispelled the basic myth that the release of the annual store-level SNAP payment information would have a substantial impact on the competitive landscape.

Even it were assumed that *National Parks* needed to be "clarified," it would not lead where FMI thinks it should go. Regardless of any reapplication of *National Parks,* the need to prove the "*likelihood* of *substantial* competitive harm" would remain. And that is not a simple matter if those words are given the meaning they should have in the context. At trial, USDA tried and failed to prove there was "a

high probability" that disclosure would cause competitive harm "considerable in quantity." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, 10th ed. (1996)

In the final analysis, the *National Parks* "competitive harm" test was fairly and evenly applied, decided and reviewed. The proponents of secrecy were unable to prove the critical elements on summary judgment, at trial or on appeal. It would After all of that, FMI should not prevail in its attempt turn a question of predictive fact into a matter of law. And that is especially true when FMI's mission is so at odds with FOIA's broad purpose and narrow exemptions.

It is inconceivable that the *Argus* case makes certiorari a probable direction for the Court. That a majority of the Court will find reversible error from the long record in the case is more improbable.

Although *Argus* is not going to presume to tell this Court how it would vote, it would appear that those members who have not shown an interest in dealing with exemption 4 on certiorari will not find cause to change their minds here. Furthermore, it bears mention that there is no guarantee a Justice voting to grant certiorari will also vote to reverse. In that regard, Justice Thomas's *N.H. Right to Life,* dissent is illustrative. His willingness to review exemption 4 does not necessarily suggest that he would be in disagreement with the results in the *Argus* trial or appeal. [34]

[34] Actually, Justice Thomas's apparent concern in *N.H. Right to Life* that the First Circuit's "competitive harm" standard was less than rigorous suggests that he might well lean toward an interpretation that tightens, rather than loosens, exemption 4.

III. Applicant's members will not suffer "irreparable harm."

It's more than a little ironic that FMI, having consistently expressed a categorical disdain for any use of "competitive harm," now wants this Court to accept that the very same "predictive harm" is an inevitable reality necessitating a stay.

1. That issue was litigated on summary judgment. *Argus* prevailed.
2. That issue then litigated at trial. *Argus* prevailed.
3. That issue was then resurrected on appeal. *Argus* prevailed.

It would appear that FMI is standing in the batter's box wanting a fourth strike.

Even if this Court considered "competitive harm" to remain a viable issue for FMI, FMI would still have to prove the likelihood of the harm. While it is true that records once disclosed "cannot be unseen," FMI would have to convince the Court that annual SNAP payment records between 8-13 years old have any significant competitive value. There should be no assumption that such dated material will expose SNAP retailers to the same "competitive harms they testified about at trial."

Finally, *Argus* questions FMI's assertion that disclosure would "moot the appeal." Although it is expected the *Argus* decisions would serve as precedent for succeeding years, it is *Argus's* understanding that the issuance of the mandate would probably lead to disclosure at this time only of the 2005-2010 records that were the specific subject matter of the original FOIA lawsuit. If that is the case, then FMI's purported stake in the case would not be terminated by a lifting of the stay.

IV. The "balance of equities" favors immediate issuance of the mandate.

This is not a close case, so there is no need to "balance the equities." However, assuming, *arguendo,* that a balance was in order, FMI's alleged harm that has been judicially determined to be less than substantial[35] must be weighed against what is at stake for *Argus* and the public.

At the very core of a democracy is the public's right to know, not to mention its need to know. Without it there is no assurance of accountability or honest representation. It is indisputable that public spending is critical component of government's function and responsibility. The public has a legitimate and logical right to know about government spending, including answers to the questions of "to whom," "how much" and "for what."[36] And try as USDA did and FMI now does to misdirect attention to the SNAP retailers' fanciful right of privacy in what it receives from government, the focus of this case is has always been on the government's spending.

The Supreme Court has stressed that the public's right to be informed of the workings of its government is a constant and significant interest. *See, NARA v. Favish,* 541 U.S. 157, 171-72 (2004) ("FOIA is often explained as a means for citizens to know 'what their Government is up to.'…This phrase should not be dismissed as a convenient formalism….It defines a structural necessity in a real

[35] The harm of which FMI continues to complain is the very harm that the South Dakota District Court did not find on summary judgment or at trial and that the Eighth Circuit did not find on appeal. As a practical matter, "substantial competitive harm" not only was not proven, but also was effectively *disproven.*

[36] It is worth point out here that Argus actually chose to limit its FOIA request to the first two. And while a persuasive argument can be made that the public also should have a right to know "what" is being bought with SNAP dollars, that fight was left for another day.

democracy." (*quoting Dep't of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749 (2989)).

Should a stay be granted pending the filing of the petition for a writ of certiorari, *Argus* cannot claim it would suffer measurable damage. But that it not to say there is no harm. *Argus* believes it has built up a significant equity balance while having to wait for data that it should have received, theoretically, in January, 2011.

Beyond that, there is an unquantifiable risk that lobbyists, such as FMI, have or will persuade Congress to incorporate a blanket confidentiality provision in the next farm bill that would effectively deprive the Argus—and public—of ever receiving the SNAP records to which it earned access in court and from ever knowing where the SNAP dollars are going. The very possibility of an impending secrecy clause has effectively made time of the essence for the *Argus,* and every meritless delay puts *Argus* one day closer to forever losing the 2005-2010 SNAP data that it has fairly won in the federal judicial system.

Finally, any consideration of "equity" should take into account the history of FMI's unusual involvement in this case. For whatever reason(s), FMI chose to disengage before trial and then reattach when things did not go its way. Beyond that, FMI is now trying to carve it's own channel that effectively circumvents the lower courts to push its agenda onto the Supreme Court. This Court should reject the effort with a resounding "no."

CONCLUSION

There is good reason to think that the Supreme Court will be inclined to tread softly around the Eighth Circuit's opinion and the *Argus* case as a whole. FMI is asking the Court to consider and then reverse a FOIA case that has gone through trial. Trial is a FOIA rarity and is likely to give the Court pause. FMI seemingly wants the Court to "retry" the case as a matter of law, and the Court should decline any involvement. This is not an appropriate case for certiorari and not one that demands reversal. Whether applying its so-called "plain-text" test or a reboot of *National Parks* "substantial competitive harm" test, FMI is trying to manipulate exemption 4 for the purpose of concealing the government's SNAP payment records. FMI should not be permitted to continue its mission to downsize FOIA.

In *Dep't of Air Force v. Rose, supra,* at 361, 362, the Court wrote:

> Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. [The exemption subsection] is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not `an easy task to balance the opposing interests, but it is not an impossible one either. . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.' S. Rep. No. 813, p. 3.

Nearly forty years later, in the opening paragraph of *Argus Leader Media v. U.S. Dep't of Agric.,* 740 F.3d 1172, 1173 (8th Cir. 2014), the Eighth Circuit succinctly described a case in which the "balance of opposing interests" should not prove too

difficult—particularly in view of the judiciary's commitment to maintaining the "fullest responsible disclosure":

> Amid increasing public scrutiny of this burgeoning program [SNAP]…*Argus Leader* wondered how much money individual retailers received from taxpayers each year through the program. Invoking the federal law meant to bring disclosure sunlight to the government bureaucracy, Argus requested this spending information from [USDA] under [FOIA]….

That was written three years after *Argus* filed its original FOIA request with USDA. Now, four and one-half years later—having prevailed at every significant legal stage—*Argus* is still waiting to receive the USDA records that show the amounts the federal pays out annually to SNAP retailers.

In recognizing courts of appeals' "inherent power to recall their mandates" in *Calderon v. Thompson,* 523 U.S. 538, 549 (1998), the Court added the following caveat:

> In light of "the profound interests in repose" attaching to the mandate of a court of appeals, however, the power can be exercised only in extraordinary circumstances. 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §3938, p. 712 (2d ed. 1996). The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies.

Presumably, the same concern applies to the Supreme Court's use of the "recall power." FMI two-pronged attack comprises: 1) invoking the "plain-meaning" interpretation as a pretext for a self-styled subjective determination of "confidentiality; or, in the alternative, 2) subverting the District Court and Eighth Circuit decisions by transforming "likelihood of substantial competitive harm" into a "lenient" question of law. Under either approach, FMI seems to believe it has a

better understanding of what the FOIA exemption 4 law should be than the South Dakota District Court and the Eighth Circuit Court of Appeals. This Court should put an end to FMI's fantasy.

This case was correctly decided at trial and correctly decided on appeal. There is no real substance to FMI's argument that it has a winnable case on certiorari before this Court. FMI should not be allowed—with help of extraordinary relief—to continue to block *Argus's* access to the SNAP payment data it earned in lower court proceedings. To that end, counsel respectfully requests that this Court lift the recall and stay and allow the mandate to reissue.

Dated this 16th day of August, 2018.

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