No. 18A146

IN THE
Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Applicant,

v.

ARGUS LEADER MEDIA, DBA ARGUS LEADER,

Respondent.

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

REPLY IN SUPPORT OF 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

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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 corporations have an ownership interest in FMI.

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INTRODUCTION

Argus Leader concedes that it would not suffer "measurable damage" if the Court grants FMI's Application, Resp. 27; nevertheless, the newspaper asks the Court to deny the Application and moot this case. If that happens, USDA will be obliged to release years of highly guarded and sensitive sales data from hundreds of thousands of grocery retailers nationwide. To reach this result, the Eighth Circuit analyzed FOIA Exemption 4 under a judicially created, atextual interpretative test that has generated widespread confusion among the lower courts. The Court has never addressed that test. The interpretation of Exemption 4 is ripe for the Court's review and this case presents the perfect vehicle. But the only way to preserve the status quo pending this Court's review is a recall and temporary stay of the Eighth Circuit's mandate pending disposition of FMI's forthcoming petition for certiorari.

Attempting to convince the Court otherwise, *Argus Leader* claims that a plain-text interpretation of Exemption 4 would "eviscerate" FOIA's purpose of broad disclosure and cause other ills. *Argus Leader*'s criticisms run counter to the Court's guidance favoring plain-text statutory interpretation, and the newspaper's endorsement of the *National Parks* test sidesteps the lower courts' substantially varying applications of that test. Although *Argus Leader* disputes that lower courts are inconsistently applying *National Parks*, the newspaper fails to identify any supporting authority for that position—and it does not even attempt to argue that the Eighth Circuit's application of the *National Parks* test in this case would be affirmed by a majority of the Court. The remaining stay criteria also support FMI's Application. *Argus Leader* disagrees that FMI and its

constituents would suffer irreparable harm if the Eighth Circuit issues its mandate, but bases that argument on the wrong legal standard. And *Argus Leader*'s concession that it will not suffer meaningful harm if the Court grants FMI's Application confirms that the balance of the equities favors FMI's position. FMI has satisfied the criteria for a stay and respectfully requests that the Court grant its Application.

I. There Is a Reasonable Probability the Court Would Grant Certiorari and Reverse the Eighth Circuit's Decision

A. The Court's Prior FOIA Cases Establish a Reasonable Probability That Certiorari Will Be Granted in This Case

Argus Leader attempts to dismiss out of hand FMI's argument that this Court's numerous prior grants of certiorari in FOIA cases, particularly cases regarding FOIA's exemptions, show a reasonable probability that the Court will grant certiorari in this case. *See* Appl. 12 (collecting cases). First, *Argus Leader* incorrectly characterizes these cases as having merely "reached" the Court. Resp. 11. In fact, the Court *granted* certiorari in these cases, meaning the Court deemed the issues of such importance as to elevate these cases from the thousands of others each year in which a party sought the Court's review. The Court's history of granting certiorari in FOIA cases indicates that the Court will be interested in addressing the interpretation of FOIA exemption at issue in this case, Exemption 4, a provision which the Court has not yet reviewed and the application of which has resulted in disagreement and inconsistent outcomes among the lower courts—and justifies a stay of the mandate. *See John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1309-1310 (1989) (Marshall, J., in chambers) (granting stay of the mandate in FOIA Exemption 7 case, in part because disagreement among the lower courts regarding application of the exemption created a "reasonable probability" the Court would grant

certiorari). *Argus Leader* misses the point in arguing that the Court's well-established interest in FOIA exemption cases is not "dispositive." Resp. 12. FMI must only show a "reasonable probability" that certiorari will be granted, not dispositive evidence. *See Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J.) (articulating stay standard). It is always presumptuous to predict how the Court will consider a matter. But that is essentially what *Rostker* requires, and FMI has met the requirements of *Rostker* here.

Argus Leader gives great weight to the fact that the Court has previously denied certiorari in Exemption 4 cases. *See* Resp. 15-16 (identifying four denials). Two Justices, however, issued a detailed and rare dissent from denial of certiorari as to the most recent petition involving application of Exemption 4. *N.H. Right to Life* v. *Dep't of Health and Human Servs.*, 136 S. Ct. 383, 384 (2015) (Thomas, J., dissenting). In that dissent, Justice Thomas zeroed in on the very issues FMI will raise in its forthcoming petition: Circuits applying Exemption 4 have "turned [their] back on the statutory text" by adopting the atextual *National Parks* test, and that test, troublingly, "has different meaning in different Circuits." *Id.* at 385 & n.*. Describing the confusion wrought by *National Parks*, Justice Thomas cited two Circuit opinions issued *after* the last time the Court was asked to consider Exemption 4 in 2010, showing that this problem had become more pressing and deserved the Court's attention. *See id.* at 384 (discussing *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 778 F.3d 43, 51 (1st Cir. 2015); *Watkins* v. *Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1196 (9th Cir. 2011)).

Argus Leader contends that because the Court denied review in *New Hampshire Right to Life*, the ineluctable conclusion is that the Court will similarly deny

FMI's forthcoming petition. But there are compelling reasons to believe that FMI's petition will succeed where *New Hampshire Right to Life* did not, *see* Appl. 18-19—reasons to which *Argus Leader* offers no response. In the last three years, for example, the confusion among the Circuits regarding the *National Parks* test has only increased, making it more likely that other Justices will now agree with Justice Thomas that this issue is sufficiently developed and pressing to merit this Court's review. *See, e.g., Argus Leader Media* v. *U.S. Dep't of Agric.*, 889 F.3d 914 (8th Cir. 2018); *see also Henson* v. *Dep't of Health & Human Servs.*, 892 F.3d 868, 877 (7th Cir. 2018) (noting ongoing disagreement regarding the meaning of "commercial" among courts interpreting Exemption 4). In addition, the *New Hampshire Right to Life* petition asked the Court to also reviewed FOIA Exemption 5, a provision the Court had already addressed on multiple occasions and that may not have held new interest.[1] FMI's petition, in contrast, will present (1) argument regarding only Exemption 4, (2) an exemption that this Court has never addressed, and (3) an exemption that members of the Court have expressed unusually strong interest in reviewing. These factors, in combination with this Court's long-standing interest in clarifying FOIA's exemptions and ensuring that the lower courts uniformly interpret them, establish the requisite reasonable probability that FMI's petition will be granted.

[1] *See* Br. for Petitioner at i, *N.H. Right to Life*, 136 S. Ct. 383 (2015) (No. 14-1273), http://www.scotusblog.com/wp-content/uploads/2015/10/1-USSC-Petition-for-Writ-of-Certiorari.pdf (last visited Aug. 18, 2018) (presenting questions for review, including whether Exemption 5 would permit nondisclosure of information at issue).

B. There Is a Fair Prospect That This Court Would Adopt a Plain-Text Interpretation of Exemption 4, in Accordance with Its Precedents and Congress's Intent

The bulk of *Argus Leader*'s Response aims to persuade the Court that even if certiorari is granted, this Court will reject FMI's plain-text interpretation of Exemption 4 in favor of the atextual *National Parks* test. *Argus Leader* fails to identify any apposite decision from this Court supporting this argument. To the contrary, this Court has consistently adopted a plain-text approach to statutory construction—including for FOIA's exemptions. *See* Appl. 16-17, 23.

Argus Leader does suggest that *Milner* v. *Department of the Navy*, 562 U.S. 566 (2011), supports its argument that this Court would reject FMI's proposed plain-text interpretation of Exemption 4. Resp. 17. *Milner* concerned FOIA Exemption 2, which protects from disclosure material that is "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). According to *Argus Leader*, *Milner* rejected an interpretation of Exemption 2 that was "based on the plain text * * * alone," because the Court believed such a reading would be contrary to FOIA's pro-disclosure purpose. Resp. 17 (quoting *Milner*, 562 U.S. at 577).

Argus Leader's reliance on *Milner* is misplaced. The rejected interpretation to which *Argus Leader* refers was proposed by the Respondent in that case, who argued that the phrase "internal personnel rules and practices" in Exemption 2 should be broadly interpreted to mean all "records concerning an agency's internal rules and practices for its personnel to follow in the discharge of their governmental functions." *Milner*, 562 U.S. at 577. The Respondent, *not the Court*, described this expansive reading as based on the

exemption's "plain text * * * alone." *Ibid.* (quoting Respondent's Brief). The Court (in an 8-1 decision) disagreed, explaining that the Respondent's interpretation was contrary to "ordinary parlance" and "stripp[ed] the [key] word 'personnel' of any meaning." *Id.* at 578. In other words, the Court rejected the Respondent's interpretation in *Milner* because it was *not* true to the statute's plain text.

Milner also soundly rejected an atextual interpretation of FOIA Exemption 2 that bore striking resemblances to the *National Parks* test. *See* Appl. 17, 23 (explaining that *Milner* struck down a long-standing atextual interpretation of Exemption 2 derived from its legislative history, an interpretation that multiple Circuits had adopted). The reading of Exemption 2 that the Court ultimately adopted was a plain-text interpretation based on Webster's and Random House Dictionaries' definition of "personnel." *See* 562 U.S. at 569-570 (explaining that "[o]ur consideration of Exemption 2's scope starts with its text" and holding that Exemption 2 covers "rules and practices dealing with employee relations or human resources," in accordance with the plain meaning of "personnel"). Far from troublesome authority, *Milner* shows FMI's position accords with the Court's precedent.

Argus Leader next claims that this Court will decline to interpret Exemption 4 according to its plain text because doing so would allegedly "expand[]" and "blast a hole in FOIA Exemption 4," and "eviscerate[] FOIA of its purpose." Resp. 3, 16 n.28, 17 & 20. As explained above, this Court's precedent belies this argument, *supra* at 5-6, and it is also contrary to common sense. A plain-text reading of a FOIA exemption does not undermine the statute's purpose and violate congressional intent. As noted in *Milner*, such an

approach does the opposite and "gives the exemption the [meaning] Congress intended." *Milner*, 562 U.S. at 572 (internal citation and punctuation omitted).

Argus Leader's prediction that a plain-text interpretation of Exemption 4 will "eviscerate" FOIA's purpose is also flawed and one-sided. In discussing the statute's purpose, *Argus Leader* chooses to focus solely on FOIA's role in promoting governmental disclosure of certain information. But "FOIA reflects a general philosophy of full agency disclosure *unless information is exempted under clearly delineated statutory language*." *U.S. Dep't of Def.* v. *FLRA*, 510 U.S. 487, 494 (1994) (emphasis added) (citation and quotation omitted). Exemption 4 is undisputedly a delineated exemption enacted by Congress. The exemption also serves a limited (but important) purpose: it shields from disclosure certain information that was "obtained from a person"—i.e., information submitted to a government agency by third parties. 5 U.S.C. § 552(b)(4). Given this context and Exemption 4's limited scope, *Argus Leader*'s dire prediction that adopting a plain-text interpretation of Exemption 4 would cripple FOIA is meritless, as is its reliance on cases discussing the pro-disclosure nature of other parts of the statute. *See* Resp. 13-15 (citing a "litany" of FOIA cases, none of which involve Exemption 4).

Finally, *Argus Leader* argues that a plain-text interpretation of Exemption 4 is inappropriate because it will make the standard for "confidential" information improperly subjective, such that SNAP retailers would be the "final arbiter of what is 'confidential.'" Resp. 17, 21. The future would not be as gloomy as *Argus Leader* predicts. Parties claiming the exemption would still have to prove, for example, that the information at issue was *in fact* considered and kept a secret rather than publicly disseminated—an objective and

verifiable standard. And the courts would always be the "final arbiters" of whether the agency or submitters met that standard. USDA met that standard below, as it was undisputed at trial that retailers closely guard store-specific data, including by using physical and computer security methods. *See, e.g.*, I.RR.205-206.

C. *Argus Leader* Does Not Meaningfully Dispute That Under *National Parks*, Exemption 4 Has Been Inconsistently Applied Across Circuits—A Disagreement That Warrants Review and Reversal of the Eighth Circuit's Decision

This is the rare case where a second justification for recalling and staying the mandate exists: even if the Court eschews a plain-text interpretation of Exemption 4 in favor of the *National Parks* test, the Circuits' disagreement regarding the application of that test is a compelling further reason to grant certiorari and reverse the Eighth Circuit's decision. *See* SUP. CT. R. 10(a); *Thompson* v. *Keohane*, 516 U.S. 99, 106 (1995) (certiorari granted where the Circuits disagreed on the proper application of a federal statute "[b]ecause uniformity among federal courts is important on questions of this order"). A stay is consequently justified under *Rostker*, so that this Court may have the opportunity to consider the issues raised in FMI's petition.

Argus Leader does not dispute that the *National Parks* test has been roundly criticized. *See, e.g.*, *N.H. Right to Life*, 136 S. Ct. at 383-385 (Thomas, J., dissenting) (decrying the test as "nebulous," "atextual," "convoluted," and "amorphous"); *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 931 F.2d 939, 947 (D.C. Cir. 1991) (the *National Parks* test was "fabricated, out of whole cloth" by a panel of the D.C. Circuit) (internal quotation marks omitted). But the newspaper asks this Court to ignore the troubling inconsistencies in outcomes in cases applying *National Parks*, declaring that

courts have reached different results simply because each case has "a different set of facts." Resp. 23. That is a straightforward explanation that, if true, would be easy to prove—yet *Argus Leader* fails to describe the factual variations that caused such different results or identify a single case, secondary source, or other authority to support its position. *See id.* at 22-24. Instead, the cases and authorities that FMI identified in its Application—all of which *Argus Leader* ignores—disprove *Argus Leader*'s hypothesis. Courts faced with similar facts reach different decisions, based on conflicting interpretations of what constitutes "substantial competitive harm." Appl. 19-20.

This case is no exception. Based on its narrow interpretation of the *National Parks* "substantial competitive harm" test, the Eighth Circuit concluded that USDA had failed to meet its burden of proof, despite the extensive evidence and testimony USDA presented at trial. *See* Appl. 20. But opinions from other courts show that such courts likely would have come to the *opposite* conclusion, based on the very same evidence and factual findings. *Id.* at 20-21 (discussing and collecting cases). Without this Court's intervention, there is little reason to believe that the lower courts will resolve the inconsistencies in the application of *National Parks*, as most Circuits have now staked out a position on the test. This state of affairs—conflict among the lower courts on an important and recurring issue of statutory interpretation—demonstrates a "reasonable probability" that FMI's petition will be granted, and thus that a stay is appropriate. *See California* v. *Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J.) (granting a stay of the mandate because "[g]iven the conflict among the lower courts on this important and recurring issue and the need for

uniform enforcement of federal antitrust laws, I think it fair to say that there is a reasonable probability that the petition for a writ of certiorari will be granted in this case").

FMI also showed that, if this Court grants certiorari to clarify the *National Parks* test, there is a "fair prospect" that FMI will prevail. Appl. 22-25. *Argus Leader* does not meaningfully dispute this. It instead insists that on the existing record, FMI would not be entitled to judgment because USDA failed to show that disclosure would create a "likelihood of substantial competitive harm." Resp. 23-24. But *Argus Leader* does not reconcile this conclusion with the fact that USDA's evidence *would* have met that standard in other jurisdictions. Appl. 23-25. *Argus Leader* then asks the Court to deny FMI's Application because "there is no guarantee a Justice voting to grant certiorari will also vote to reverse." Resp. 24. That is not the standard; it is, of course, impossible to "guarantee" how any Justice will vote on any case. Because FMI *has* met the "fair prospect" standard, however, the Court should grant its Application to recall the mandate. *See Rostker*, 448 U.S. at 1308.

D. Many of *Argus Leader*'s Arguments in Response are Irrelevant to FMI's Application

Throughout its response, *Argus Leader* urges the Court to deny FMI's Application because the district court conducted a trial in this case, and because—according to *Argus Leader*—FMI has not shown a sufficient interest in the dispute. These incorrect and unsupported arguments have no relevance to the legal issues raised by FMI's Application.

Despite *Argus Leader*'s repetition, it is irrelevant that this case was decided after a trial rather than on summary judgment. *See, e.g.*, Resp. 11, 13, 15, 22, 23. FMI is

not challenging any procedural aspects of the trial, nor is it asking this Court to overturn the credibility determinations and other factual findings made by district court. Instead, FMI's position is and always has been that the district court and Eighth Circuit erred because they applied the wrong *legal standard* to those factual findings. This legal argument—and the way it is reviewed by the Court—would be the same if the case had been decided on summary judgment rather than pursuant to a trial. Indeed, this case is a good vehicle precisely because it presents a purely legal issue for review.

Argus Leader's repeated contention that FMI and its members do not have a genuine or compelling interest in this case is both irrelevant and baseless. *See, e.g.,* Resp. 6-8, 10-11, 27. USDA, the government agency to which *Argus Leader* directed its FOIA request, agreed with FMI that store-level SNAP data was exempt from disclosure, and spent years litigating that issue and protecting the interests of FMI and its members. FMI provided support for USDA's position in the district court, including by submitting an affidavit in support of an agency summary judgment motion. While USDA defended the confidentiality of SNAP data in the district court, FMI had no reason to intervene, attempt to assert control, or disrupt USDA's efforts. FMI intervened at the earliest appropriate time: as soon as USDA indicated that it would not appeal the district court's adverse judgment. The district court concluded that FMI's intervention was timely and appropriate, Appl. App. 25a, and *Argus Leader* never challenged those conclusions.

Argus Leader also gives weight to the fact that many individual retailers did not respond to an automated informational request sent out by the Food and Nutrition Service. Resp. 6-7. There are of course any number of factors that could explain why some

individual retailers did not respond to an unsolicited automated phone and e-mail blast; many may not have listened to or read the mass message, and others may have correctly expected that FMI and other trade associations would represent their interests in litigation with industry-wide implications. Such explanatory information is not in the record, as it was irrelevant below and remains so in this Court. At trial, USDA presented testimony from a wide variety of diverse retailers and a retail-association representative to establish the confidentiality of the requested data. Appl. App. 12a-15a. FMI, which represents thousands of retailers nationwide, has undertaken the expense of intervening and appealing this case. While irrelevant to the legal issues in the Application, these efforts demonstrate that FMI's constituents place value and priority on this litigation.

II. *Argus Leader* Has No Legitimate Response to the Irreparable Harm FMI's Members' will Suffer if the Mandate is Not Recalled

Argus Leader does not dispute that retailers will suffer "irreparable" harm if the SNAP redemption data is disclosed, conceding that the "records once disclosed 'cannot be unseen.'" Resp. 25. Instead, *Argus Leader* insists a stay is unwarranted because the lower courts failed to find that disclosing the data would create a "likelihood of substantial competitive harm." *Ibid.* This circular argument is nonsensical.

Releasing the data will irreparably harm retailers regardless of whether it *also* causes "substantial competitive harm," as that term of art was understood and interpreted by the lower courts, since it is undisputed that any injury experienced by the retailers would be irreversible. Moreover, in determining whether there is a likelihood of irreparable harm, the Court "assum[es] the correctness of the applicant's position"—here, that releasing store-level SNAP data *would* cause substantial competitive harm to the

affected retailers. *Barnes* v. *E-Sys., Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J.) (granting stay). The district court understood this distinction. Although it found that USDA had not proven a "likelihood of substantial competitive harm," the district court stayed its judgment pending appeal to the Eighth Circuit because the harm retailers would suffer from the disclosure of their information was "irreparable." Appl. App. 30a.[2]

Argus Leader's contention that disclosure would not moot this appeal is also wrong, as this Court has recognized in granting stay applications in other FOIA cases. Resp. 25. If the mandate issues and USDA releases the requested SNAP redemption data, there will no longer be a live controversy for this Court to resolve—the very definition of mootness, and itself a form of irreparable harm that justifies a stay. *See* BLACK'S LAW DICTIONARY 465 (3d ed. 2006) ("American courts will not decide moot cases—that is, cases in which there is no longer any actual controversy."); *John Doe Agency*, 488 U.S. at 1309-1310 (granting stay of mandate in FOIA Exemption 7 case, in part because "[t]he fact that disclosure would moot [an appeal to the Supreme Court] would * * * create an irreparable injury"). *Argus Leader*'s belief that the Eighth Circuit's decision will be "precedent" that

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[2] *Argus Leader* suggests that because the data is "dated" it cannot have "any significant competitive value." Resp. 25. Again, "significant competitive value" is the wrong standard. Moreover, declaring that the requested information cannot be valuable because it is several years old is facile and contradicted by the record. First, *Argus Leader* has submitted FOIA requests for additional SNAP redemption data through 2016 and intends to rely on the precedential value of the lower courts' decisions as support for the release of that information. *See* Resp. 25. Second, retailers closely guard and protect the information that *Argus Leader* requests in this case, and the release of six years' worth of detailed, annual store-level sales information would cause substantial competitive harm. *See, e.g.*, I.RR.205-206, II.RR.391-399. Finally, FMI's ongoing efforts to appeal adequately demonstrate the importance to its members of maintaining the confidentiality of that data.

will empower *Argus Leader* to obtain additional SNAP data from *other* years, *see* Resp. 25, has no effect on whether *this* case will be mooted. It does however, illustrate that this case is representative of recurring FOIA requests, and further highlights the immediate need for this Court's review—all factors that justify a stay. *See Am. Stores Co.*, 492 U.S. at 1307 (granting stay pending petition for writ of certiorari regarding disagreement between the lower courts on issue of federal law).

III. The Balance of Equities Favors Stay of the Mandate Because, Unlike the Retailers, Neither *Argus Leader* nor the Public Interest Will be Harmed by Any Delay

The final factor—a balance of the equities—also supports FMI. *Argus Leader* concedes that it will not "suffer measurable damages" if FMI's Application is granted. Resp. 27. Instead, it asks the Court to find that the public's "right to be informed" outweighs any harm that retailers will suffer from the immediate disclosure of their information. *Id.* at 26. But even if *Argus Leader* were ultimately to prevail in this Court, all that a stay would do is delay the release of the requested SNAP redemption data. *Argus Leader* does not identify any way in which a temporary delay would harm the public—especially when balanced against the Court's strong interest in clarifying the interpretation of a frequently litigated and important federal statute, and the likelihood that, upon further review, this Court may determine that the retailers' information should not be disclosed at all. Where, as here, no parties will suffer irreparable harm from the delay, a stay is proper. *Barnes*, 501 U.S. at 1305 (granting a stay and explaining that "[t]he balancing [of the equities] seems to me quite easy in the present case, since I am aware of no irreparable harm that granting the stay would produce").

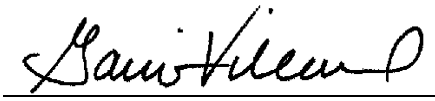
Argus Leader speculates that Congress might pass a farm bill containing language that would exempt certain SNAP data from disclosure under FOIA. Resp. 27. *Argus Leader* itself describes this as "an unquantifiable risk," *ibid.*, and it is right. Guessing whether, how, or when Congress might act on a potential piece of legislation is sheer speculation. No one—not even Congress—knows what the next farm bill will contain, much less whether it will include any relevant SNAP-data-non-disclosure provisions. Nor does anyone know whether or when the President would sign that bill. Even if Congress were to pass a farm bill with relevant non-disclosure provisions, it might not become law until after this Court has resolved FMI's petition for writ of certiorari. Such an immensely and admittedly speculative argument cannot tilt the balance of equities in *Argus Leader*'s favor. To the contrary, *Argus Leader*'s argument reduces to a desire to be protected both from this Court's review and from potential future action by Congress—the very body that created the law under which *Argus Leader* claims a right to disclosure. That inequitable position does not outweigh the harm that FMI's constituents will suffer if the mandate is not recalled, and the information of hundreds of thousands of retailers is released.

CONCLUSION

FMI respectfully requests that the Court grant its Application, and recall and stay the Eighth Circuit's mandate pending disposition of FMI's petition for a writ of certiorari.

Dated: August 21, 2018

Respectfully submitted,



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