No. 19-____

IN THE

Supreme Court of The United States

ISRAEL K. NEGASH, an Individual, and ETHIO, INC., a Maryland Corporation d/b/a SUNOCO FOOD MART,

Petitioners,

-v-

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2016, a Supplemental Nutrition Assistance Program (SNAP) retailer was accused by the United States Department of Agriculture of trafficking in SNAP benefits. The basis for such allegations were circumstantial in nature and reliant upon undisclosed statistical analyses utilizing data from undisclosed sources. Without the benefit of discovery or cross-examination, and after an informal administrative process bereft of hearings and administrative judges, the retailer attempted to defend against the allegations by filing judicial review under 7 U.S.C. §2023.

Prior to the beginning of discovery or filing of an answer, the USDA filed a motion for summary judgment upon grounds that the retailer's explanations for the questioned transactions were insufficient and unsupported. The retailer requested discovery to support such explanations, and to uncover other discrepancies within the Government's analysis. The district court granted the motion for summary judgment on grounds that the retailer did not present a genuine issue of material fact or support its explanations. The circuit court upheld the decision.

The Question Presented to this Court is:

Should SNAP retailers accused of trafficking, especially through the use of circumstantial statistical analysis, be permitted to conduct discovery on judicial review under 7 U.S.C. §2023 prior to the issuance of summary judgment where: the retailer's 56(d) declaration seeks discovery including undisclosed and untested information and data upon which the Government based its disqualification?

PARTIES TO THE PROCEEDINGS

Petitioners are Israel K. Negash, an Individual and owner of Ethio, Inc., a Maryland Corporation d/b/a Sunoco Food Mart.

Respondent below is the United States Department of Agriculture, Food and Nutrition Services.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioner, Ethio, Inc. a Maryland Corporation d/b/a Sunoco Food Mart states that it has no parent company, and no publicly held corporation owns 10% or more of its stock.

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Petitioners, Israel K. Negash, an Individual and owner of Ethio, Inc., a Maryland Corporation d/b/a Sunoco Food Mart, respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinions below (*See* Pet. App. "A", 1a) are published at 772 Fed.Appx. 34. The opinions respecting the rehearing is not published. The district court's opinion (*See* Pet. App. "A", 8a) is published at 2018 WL 722481, and order denying reconsideration (*See* Pet. App. "A", 19a) at 2018 WL 3428716.

JURISIDICTION

The Federal Circuit entered judgment on May 7, 2019. *See* Pet. App. A, 1a. The Petitioners' Petition for Panel Rehearing was on July 12th, 2019. *See* Pet. App. "A", 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the following constitutional and statutory provisions are set forth in the Appendix to this Petition as indicated in the citations:

1. 7 U.S.C. §2021 (*See* Pet. App. "B", 1b)
2. 7 U.S.C. §2023 (*See* Pet. App. "B", 13b)

3. 7 C.F.R. §271.2 (definition of "trafficking") (*See* Pet. App. "B", 18b)
4. 7 C.F.R. §278.6(1)-(d)(7) (*See* Pet. App. "B", 19b)
5. U.S. Constitution, Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

INTRODUCTION

This case presents an opportunity for the Court to resolve a conflict between the circuits, and to provide cohesive guidance to a procedurally fractured and overlooked area of law impacting more than 200,000 Supplemental Nutrition Assistance Program (SNAP) retailers, their 36 million SNAP participant customers, and more than $60 billion in Federal financial assistance (formerly called "food stamps"). Despite the vast array of businesses and Government funds subject to it, the Court has never addressed the retailer compliance components of the Food Stamp/Supplemental Nutrition Assistance Program. At present, the process and procedure for judicial review of retailer disqualifications involving allegations of trafficking[1] is inconsistent within the different Federal districts and circuits. Without clear guidance, the district court procedures on judicial review have evolved erratically, and often in opposite directions. Results from factually similar (if not identical) cases vary dramatically, and as noted above and herein, the circuits have adopted different positions on how these cases should proceed.

This case presents the best opportunity for the Court to provide desperately needed guidance to the districts and circuits to preserve the integrity and consistency of the judicial review process, without

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[1] "Trafficking" is defined by 7 C.F.R. §271.2 in greater detail, but is loosely defined as the purchase of SNAP benefits for an exchange of cash or other consideration. This is to be distinguished, however, from the "sale of ineligible items" which is addressed as a separate matter under 7 C.F.R. §278.6 and includes transactions where non-food items (aside from drugs, ammunition and weapons) were purchased using benefits.

diving too deeply into how a district court can interpret evidence before it.

Furthermore, this case involves a rare instance where the aggrieved retailer has had the means (and discounted and pro-bono assistance from counsel) to bring the case this far into the judicial system. Most of the 200,000 plus SNAP retailers are small, immigrant family-owned businesses who lack the language skills, education and finances necessary to pursue a case such as this to the level of the Supreme Court. Many SNAP retailer disqualification cases fold quickly as the aggrieved retailer's business revenue plummets when SNAP Electronic Benefit Transfer (EBT) rights are suspended during the administrative phase. For this reason, this case is a rare opportunity for the Court to address the retailer operations side of SNAP as it impacts a large segment of the American small business community, as well as immigrant business owners, and the retail food services rendered to the underserved and needy members of our country.

STATEMENT OF THE CASE

The Petitioners operated a retail food store in Baltimore, Maryland. They applied for and received a SNAP retailer license from the Respondent, which permitted the store to accept EBT payments in exchange for eligible food items. These payments function like a debit card, and involve the entry of a Personal Identification Number (PIN) after swiping the card through the processing terminal.

On August 11th, 2016, the Government, acting through the USDA's Food and Nutrition Service (FNS), issued a Charge Letter to the Petitioner in compliance with 7 C.F.R. §278.6(b). (*See* Pet. App. "A",

8a, at 11a). The Charge Letter set forth an allegation that the Petitioner was trafficking in SNAP benefits as defined by 7 C.F.R. §271.2. *Id*. In support thereof, the Respondent provided three categories of transactions[2] which it contended were indicative of trafficking: (1) rapid and repetitive transactions in a short period of time from the same household (A.R.[3] 88-91); (2) transactions involving the depletion of the majority or all of a household's benefits in a short timeframe (A.R. 92-94); and (3) high dollar transactions (A.R. 95-100). *Id* at 2. There was no direct evidence of trafficking alleged by the Respondent, nor was there an undercover investigation. The entirety of the Government's case rested upon the transactions, none of which were specifically mentioned to have involved trafficking.

Notably, none of the charged transaction types are prohibited by SNAP's rules, and pursuant to 7 C.F.R. §278.2(b), a retailer is required to conduct SNAP transactions for eligible food items presented for purchase so long as the retailer would make such sale for cash. As such, a retailer has little input in how much and how often a SNAP participant can make purchases. Furthermore, retailers are prohibited from refusing EBT transactions on the grounds that the individual presenting the SNAP card is not the named individual on the card. 7 C.F.R.

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[2] These transactions included information about the household number (redacted), the transaction time and date (some of which predated the Charge Letter by six months), and the transaction amount. No statistical information or comparison data was provided, nor was the store visit.

[3] A.R. refers to the Administrative Record that was filed contemporaneously with the Respondent's Motion to Dismiss, or in the Alternative Motion for Summary Judgment.

§278.2(h). Transactions may only be denied if the retailer is specifically aware that the customer has no right to use the card presented. *Id*.

In support of the allegations set forth in the Charge Letter, the Respondent provided nothing more to the retailer than the list of transactions which comprised the cited categories. (*See* Pet. App. "A", 8a, at 11a). However, the Respondent had conducted an on-site inspection of the store (A.R. 30-35), and a statistical analysis of the Petitioner's transactions as set against competitor stores. *Id*. It was this statistical analysis and the store visit upon which the Respondent based its subsequent disqualification of the Petitioner. *Id*.

The Petitioner vehemently contested the allegation of trafficking, "offering a litany of explanations for the suspicious transactions. (A.R. 107-115)." *Id*. However, the Respondent found that the Petitioner's store was indistinguishable from a typical convenience store and disregarded the Petitioner's other explanations for the suspicious transactions without comment. *Id*. The Respondent found that trafficking had occurred and issued a permanent disqualification. *Id*.

The Petitioners sought administrative review of the decision to disqualify the store, and restated may of the same explanations offered in their initial reply to the Respondent's Charge Letter. *Id*. The administrative review, conducted by an "Administrative Review Officer" and not an administrative law judge, reviewed the Petitioner's response and upheld the agency's decision to disqualify the Petitioner. *Id*. Again, there was no formal record, nor was there an evidentiary process by

which the Petitioner could have reviewed and cross-examined the evidence presented by the Respondent. All that was available to the Petitioner was the Charge Letter and the attached transactions.

The Petitioners timely sough judicial review pursuant to 7 U.S.C. §2023(13)-(17). *Id*. The Respondent never filed an Answer in the judicial review. Instead, the Respondent filed a Motion to Dismiss, or in the Alternative, for Summary Judgment. (*See* Pet. App. "A", 8a, at 13a.) The district court reviewed the motion as a motion for summary judgment. *Id*.

Again, in opposition to the Motion for Summary Judgment, the Petitioner restated its beliefs pertaining to the origin of the transactions. *Id*. Furthermore, the Petitioner attacked the transaction categories themselves, which were identified by the Respondent's ALERT system. *Id*. The district court mistook the Petitioner's argument as one overstating the Respondent's reliance upon the ALERT system as a method of investigative detection rather than as intended, that the transaction categories themselves were not indicative of any particular wrongdoing.

Just as the Respondent had previously, the district court dismissed the remainder of the Petitioner's explanations as "unpersuasive." *Id*.

> "Absent any explanation to the contrary, the court draws the only logical conclusion possible based on this evidence: from February to August 11, 2016, Negash and the Store were trafficking in EBT benefits." *Id*.

The Petitioner had, however, filed a 56(d) declaration, seeking the opportunity to conduct

discovery to support its explanations, including but not limited to depositions of the households allegedly involved in the trafficking, and production of the comparison data upon which the Respondent based its disqualification. J.A.[4] 532 – 540. The Petitioner specifically stated the need for three depositions of Government employees (who were involved in compiling the transaction data and information against the Petitioner), as well as other witnesses that could be identified. *Id.*

The Petitioner filed a motion for rehearing, seeking an opportunity to conduct its discovery and pointed out the district court that it had never had a meaningful opportunity to compile evidence to make its arguments more persuasive. J.A. 570-582. Furthermore, the Petitioner argued that it should have the right to conduct discovery under the circumstances and cited a number of cases indicating as much. *Id.* The Petitioner further argued that without discovery, the entire SNAP retailer disqualification process was devoid of meaningful due process. *Id.* The Respondent countered, citing a number of cases supporting its position that retailers need not be granted discovery prior to summary judgment. J.A. 593-594. The Respondent states in its opposition to the Motion for Reconsideration,

> "While the [Petitioner's] Motion is replete with hyperbole, it is devoid [sic] issues requiring relief under Rule 59(e). Instead the Court's Memorandum and Order are consistent with numerous opinions

[4] J.A. is a reference to the Joint Appendix submitted to the Circuit Court for review in conjunction with the parties' briefs.

> granting the United States pre-discovery summary judgment in SNAP-disqualification cases, where the administrative record supports the conclusion that a SNAP retailer was trafficking in SNAP benefits." *Id*.

The district court denied the Motion for Rehearing, finding amongst other things that the Petitioner was raising a new argument about due process. (*See* Pet. App. "A", 29a) . The district court held,

> "Negash is not 'entitled' to discovery in this case. In fact, Negash had the opportunity to provide evidence rebutting the FNS's determinations." *Id*
>
> "In this case, given the fully developed administrative record,[5] together with Negash's inability to present a genuine dispute of material fact, [Respondent] was entitled to summary judgment in its favor." *Id* at 4.

The district court further cited four other district court cases where pre-discovery summary judgment was granted against an accused SNAP retailer. *Id*.

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[5] The Fourth Circuit's reference here to the "fully developed administrative record" indicates that it was under the belief the Petitioner had an opportunity to confront and rebut the Respondent's evidence more fully than what actually occurred. Furthermore, it may indicate the Circuit Court's mistaken belief that the Administrative Record was sufficient on its own under 7 U.S.C. §2023(15) for a determination, despite the Petitioner's request for discovery.

The Petitioner timely sought review from the Fourth Circuit. In their brief, the Petitioner sought reversal of the district court's judgment so that it could have the opportunity to conduct discovery and support its position. The Circuit Court affirmed the district court's decision and honed in on two of the several discovery requests set forth by the Petitioner in its 56(d) declaration from the district court: (1) the identity of the households, and (2) the comparison store data. (*See* Pet. App. "A", 1a, 4a). The Circuit Court determined that the evidence presented by the Respondent was sufficient to uphold the administrative disqualification, taking issue again with the Petitioner's lack of sufficient evidence to support its position. *Id* at 5a-6a.

The Petitioner timely filed a Motion for Rehearing, citing that the Circuit Court had overlooked the additional discovery requests presented in the 56(d) declaration at the district court level. The Circuit Court denied the Motion for Rehearing on July 12th, 2019. (*See* Pet. App. "A", 7a) This Petition for Writ of Certiorari follows therefrom.

CIRCUIT & DISTRICT CONFLICT

In application and substance, the Fourth Circuit's decision in this case conflicts with a Sixth Circuit decision in the matter *Saunders vs. U.S.*, 507 F.2d 33 (6th Cir. 1974).[6] The *Saunders* court addressed an enforcement action taken against a

[6] The district court distinguished this case from *Saunders* on the grounds that there was no issue of fact. However, the facts of the *Saunders* case mirrored those of this matter with the exception that *Saunders* pre-dated the EBT system, and instead involved and undercover investigation.

SNAP retailer (a "food stamp retailer" at the time) wherein the Government moved for summary judgment before discovery got off the ground. *Id* at 35. There, as here, the Government argued that it had sufficiently presented evidence to substantiate its claims of violation, and as such, the retailer could not rebut the allegations. *Id*. The district court in *Saunders* found the Government's argument compelling and entered summary judgment. *Id*. The Sixth Circuit, however, took issue with the fact that the retailer was expected to produce sufficient evidence to rebuff the motion for summary judgment without the benefit of discovery or to test the evidence of the Government by cross-examination. *Id* at 36. The *Saunders* court stated the predicament of the retailer succinctly:

> "Since the procedures followed at the administrative level do not provide for discovery or testing the evidence of the Department of Agriculture by cross-examination, it is particularly important that an aggrieved person who seeks judicial review in a trial de novo not be deprived of these traditional tools unless it is clear that no issue of fact exists." *Id*

In the case *Harijot Enterprises, Inc., et al., vs. United States of America*, S.D. of Ohio, Case No. 2:16-cv-00917, Doc. 33 (presently unpublished in Westlaw) (**Appendix Citation?**), the Government moved for pre-discovery summary judgment in a trafficking case similar to the one at bar. The district court held,

> "given that the court's review of this matter is not limited to the

> administrative record and that the plaintiffs should not be deprived of the traditional tools of discovery, the court finds that the [Government's] filing of a motion for summary judgment on the same day it filed its answer, before any discovery had taken place, did not provide the Plaintiffs an appropriate opportunity to investigate and prosecute." *Id* at 5.

The *Harijot* court cited the *Saunders* case in coming to its decision and has been supported by other district court decisions.

A decision just last month in *Betesfa, Inc., et al. vs. United States*, 2019 WL 4451967 (Dist. Columbia 2019) addressed circumstances identical to those in this case: the Government filed a Motion to Dismiss, or in the Alternative, For Summary Judgment prior to filing an Answer. *Id* at 3-4. In addressing the same issue presented to this court, the *Betesfa* court notes

> "Although an unadorned denial, standing alone, might not be sufficient to withstand a motion for summary judgment, [p]laintiffs also reasonably seek discovery regarding the comparators that FNS used and the methodology it employed in determining that Plaintiff committed trafficking. The court has reviewed [d]efendant's submission, including the report prepared by the FNS investigative Analysis Branch… and agrees that the bases for the comparisons that the FNS draws are not always obvious or

> explained in sufficient detail to permit a thorough response. Under these circumstances, the [c]ourt concludes that [p]laintiffs should be provided an opportunity to present their case on the merits." *Id* at 7.

Other cases that follow the *Saunders* line of logic include *Sue Tha Lei Paw*, 2018 WL 1536736 (S.D. CA Mar. 29 2018), in which the district court denied a pre-discovery motion for summary judgment in favor of permitting discovery to occur so as to allow the opportunity to fairly dispute the Government's undisclosed data and comparison stores. *Id* at 4-5. "The court is not inclined to deprive [p]laintiffs of the opportunity to develop their case, particularly when material evidence remains within Defendant's exclusive control." *Id* at 5. *ANS Food Mkt. vs. United States,* 2015 WL 1880155, 3-4 (D. Md. Apr. 22, 2015) (denying a pre-discovery motion for summary judgment because the evidence against the retailer was not "undeniable," and the retailer submitted a 56(d) declaration); and *Rodriguez Grocery & Deli v. United States*, 2011 WL 1838290, 5-6 (D. Md. May 12, 2011) (denying Government's pre-discovery summary judgment motion despite strong evidence of trafficking because certain data used by the agency in making its determination remained within its exclusive control).

This case at bar, however, stands to in diametric opposition to *Saunders* and those district court cases noted above. In essence, it requires a retailer to come to court, having never seen the Administrative Record, having never cross-examined the evidence, having no access to the undisclosed data,

statistical analysis or other information upon which the Government based its allegations, and provide explanations for that which it cannot know.

In this matter, just as in *Saunders*, the Government has presented evidence which it contends represents an incontrovertible basis for the disqualification. Unlike *Saunders*, and perhaps lesser for it, this case involves undisclosed circumstantial, statistic data derived from undisclosed sources rather than firsthand accounts.

In this matter, just as in *Saunders*, the Petitioner has provided a number of explanations to support its position and has requested discovery to supplement and support its explanations. However, both the district and Circuit courts in this case rejected the Petitioner's explanations as "unpersuasive" and otherwise evidentiarily unsupported.

Though this conflict between *Saunders* and the Fourth Circuit's ruling in this case is not certified, it is present nevertheless. Without a decision from this Court, continued disjointed and inconsistent judicial review outcomes will continue.

REASONS FOR GRANTING PETITION

The Court should grant the writ to decide the question this case presents, and to resolve a widening split between circuits: should SNAP retailers accused of trafficking, especially through the use of circumstantial statistical analysis, be permitted to conduct discovery upon application to do so where such discovery requested includes undisclosed and untested information and data, upon which the Government based its disqualification?

I. Standardize A Rudderless Process

The statutes giving rise to both the Government's retailer disqualification process (7 U.S.C. §2021) and the retailer's right to judicial review (7 U.S.C. §2023) leave too much room for interpretation, which has resulted in the inconsistent and often lopsided approaches taken by the districts and circuits. The Government relies on 7 U.S.C. §2021(a)(2), in which Congress grants it the right to issue disqualifications on the basis of evidence established through "inconsistent redemption data, or evidence obtained through a transaction report." This language could mean just about anything, but the Respondent, and more specifically FNS, has interpreted this to give them the right to utilize statistical data analysis as evidence against a potentially violative retailer.

Certainly, the Respondent has the right to include statistical analysis (derived from redemption data and transaction reports) in its cases against retailers at the administrative level.[7] However, the statute stops short in identifying a statistical analysis as *prima facie* evidence of the very specific act of trafficking.

Instead, when read together with the retailer's right to *de novo trial* review by the district courts in 7 U.S.C. §2023, it's clear that Congress did not intend the Government to simply issue administrative disqualifications and receive rubber-stamp approval at the judicial level. The plain language of 7 U.S.C. §2023(15)-(16) creates an evidentiary review system

[7] Such evidence could also be used at the judicial level, if it was admissible.

by which the district courts and the parties were not bound by the administrative record, intentionally leaving open cross-examination and the discovery of new evidence not presented in the administrative portions of the case. Such an approach makes sense because the administrative proceedings are conducted informally, without so much as the involvement of an administrative judge or an evidentiary hearing.

Conversely, the approach adopted by the district and Fourth Circuit in this case bound the Petitioners to the administrative record, and effectively penalized the retailer for not coming to court with evidence in hand to rebut the Government's evidence it was unaware of. Furthermore, the district and Fourth Circuit appear to have weighed the evidence (or comparative lack thereof) in their analyses and assigned credibility to the Government's position while taking issue with "unpersuasive" explanations presented by the Petitioner.

This approach by the Circuit and district foregoes two of the three categories of knowledge and evidence for which the discovery process and tools are designed to address. The three categories of knowledge and evidence the discovery process is designed to address include: (1) the known-knowns (that information and evidence of which a party is aware and can readily locate or produce); (2) the known-unknowns (that information or evidence which a party knows exists and is material, but remains undefined and undiscovered); and (3) the unknown-unknowns (that which a party is utterly unaware of at the outset of discovery but stumbles upon during the process). The Fourth Circuit's decision denied the Petitioners access to the latter two categories. The Petitioners requested information that they were at

least partly aware of but remained elusive (the comparison store data and household testimony to name two) and sought an opportunity to identify unknown-unknowns through depositions of the Respondent's fact witnesses. The courts saw little value in these categories to the Plaintiffs – a position which presupposed the contents of such discovery.

This case is the antithesis of what Congress intended in it construction of 7 U.S.C. §2023, and thus the best opportunity for the Court to provide some needed guidance while preventing further misapplication of the statute.

The Petitioner does not seek a bright-line rule that no SNAP judicial review cases may be resolved by summary judgment prior to discovery as not all judicial disqualifications require discovery. However, where the retailer requests discovery of undisclosed information in good faith, the bar should be set low enough that the retailer is permitted meaningful opportunity to cross examine evidence presented against it, and to identify and bring forth admissible evidence to support its explanations that is unavailable to it but for the discovery process.

II. Prevent Assembly Line Justice

This writ is vital to preserve the judicial role in and integrity of the SNAP retailer violation regulatory and statutory system. Should the Court deny the writ, it will leave intact a decision which encourages district courts to adopt the findings and evidence of the USDA without exposing the basis for those decisions to meaningful scrutiny, or permitting the retailer to distinguish their business from others to whom they are unfairly compared. Further, because the

underpinnings of the Respondent's findings are compiled by a computer system, the mere presence of otherwise non-violative transactions will result in virtually automatic disqualifications.

As soon as a store's transactions reach an undisclosed and unscrutinized threshold level that has an undisclosed and unscrutinized correlation to the act of trafficking, the Government will send out a Charge Letter for which the retailer has no hope of fully responding (as he or she will never be made aware of the evidence compiled against them and thus will never be able to provide a sufficient explanation to those questions – like why their transactions differ from a store located in a different neighborhood – which are never asked). The administrative review officer will uphold the decision, as he or she has access to the Government's evidence and information, but the retailer does not, and will pick apart issues never presented to the retailer before. For example, in this case the administrative review officer took issue with absence of certain transactions after the review period concluded (February through July, 2016). This was an issue which was not part of the Charge Letter, nor ever identified for the retailer to respond to until the review officer issued the final agency decision. (*See* Pet. App. "A", 8a, 12a).

On judicial review, the USDA will no doubt argue that the transactions identified differ materially from undisclosed comparison stores, and otherwise must be trafficking as the retailer never provided any evidence to account for why his or her store was different the other unidentified stores to which the transactions were compared. The retailer will have no way to call to court their alleged co-violators (the households) to derive specific

explanations for their shopping habits, as the district courts will cite this case and note that raising such discovery request would not materially alter the fact that the transactions identified by the Government fell into "suspicious" categories.

Furthermore, the district courts, relying upon this case, will deny the retailer the opportunity to identify inappropriate comparison retailers utilized by the Respondent (like candy-stores, which are qualified as "convenience stores" for SNAP purposes despite offering a completely different inventory), or customer shopping trends that are unique to certain neighborhoods or transportation routes (for instance, comparatively close proximity to homeless or battered women's shelters, where the occupants are more likely to have EBT benefits and less likely to have ready access to transportation). Further unknown-unknowns (like participants selling their EBT cards to third parties outside of the knowledge of the retailer, resulting in transactions not consistent with normal shopping patterns) which are legitimate explanations for transactions will never be discovered.

III. Avoid a Kafka-esque Approach to Regulatory Enforcement

Finally, and briefly, the Court should grant this writ to prevent the SNAP retailer disqualification process from sliding into a Kafka-esque state. Though the Petitioner and his counsel took no small amount of derision from the Respondent at the district and circuit levels of this case for raising this argument, it is salient nevertheless.

The process the Petitioner has endured to this point involves allegations of regulatory violations

based upon undisclosed statistical analysis,[8] utilizing undisclosed processes[9] and undisclosed data sources,[10] and sets out violative acts that the Petitioner allegedly completed in communion with undisclosed co-conspirators.[11]

This is not our system of law. Due process, as contemplated by the Fifth Amendment to the United States Constitution, requires procedural safeguards to prevent erroneous deprivation of an interest in liberty or property. *Grayson vs. King*, 460 F.3d 1328, 1340 (C.A. 11 2006) (citing *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)). The procedural safeguards in the SNAP retailer disqualification process are located in the judicial review. See *Cross v. United States*, 512 F.2d 1212, 1217 (4th Cir. 1975). If this Court were to deny this writ, and the Government were permitted to seek and be granted summary judgment without ever even filing an answer, let alone disclosing material portions of the bases of its disqualification,[12] then there would be no procedural safeguards to prevent erroneous deprivation of a retailer's SNAP licensure, and thus inadequate procedural due process.

It is vital to this otherwise casual administrative system, that the judicial review component be rigorous and thorough so as to balance out process, especially considering the fact that the Agency's disqualification of an accused retailer at the administrative level holds through the judicial review (unless a preliminary injunction is granted). 7 U.S.C.

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[8] The analysis was never fully revealed in this case.

[9] The method of evaluating and comparing the Petitioner's data to other data sets is not apparent in the record.

[10] The comparison retailers utilized by the Respondent.

[11] The unidentified households.

[12] For which the retailer requests such discovery in good faith.

§2023(18). The USDA risks nothing in terms of SNAP program integrity by being subjected to the discovery process at the district court level. Furthermore, there is little to be gained by the district courts in granting early summary judgment in these cases without so much as the filing of an answer by the Respondent.

Under these circumstances, it is the retailer who stands to lose the most by losing the discovery process, and it is the retailer who is already the bearer of the burden of evidence upon filing of the case.

CONCLUSION

This Court should grant certiorari so as to resolve a meaningful conflict between the Fourth and Sixth Circuits with respect to a retailer's ability to conduct discovery in a SNAP disqualification action; so as to provide guidance in a significant area of the law which has never had the benefit of this Court's attention and direction; and so as to protect the role of the judiciary in the procedural due process protections contemplated by Congress in its construction of 7 U.S.C. §2021 and §2023,

Respectfully submitted,

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