No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, d/b/a ARGUS LEADER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF CONVENIENCE STORES, NATIONAL GROCERS ASSOCIATION AND NATIONAL RETAIL FEDERATION IN SUPPORT OF PETITIONER FOOD MARKETING INSTITUTE

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are retail trade associations whose members regularly engage in transactions with Supplemental Nutrition Assistance Program ("SNAP") participants and are thus directly affected by the ruling below. The Eighth Circuit's ruling, following the D.C. Circuit's nebulous *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) standard, would require *amici*'s members to disclose highly sensitive, confidential SNAP sales data at a level of granularity that would seriously harm members' ability to compete in an already highly competitive industry. *Amici* seek here to preserve the confidentiality of this critical data while in the hands of the federal government.

Founded in 1961, the National Association of Convenience Stores (NACS) is a non-profit trade association today representing more than 2,500 retail and 1,600 supplier company members nationwide. NACS is the preeminent representative of the interests of convenience store operators. In 2017, the fuel wholesaling and convenience industry employed approximately 2.5 million workers and generated $601.1 billion in total sales.

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[1] Pursuant to Supreme Court Rule 37, amici curiae state that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity other than amici curiae and their counsel contributed money that was intended to fund preparing or submitting the brief. Both parties have consented in writing to the filing of this brief in blanket consents on file with the Clerk.

The National Grocers Association (NGA) is the national trade association representing retail and wholesale grocers that comprise the independent sector of the food distribution industry. Independent retailers are privately owned or controlled food retail companies operating in a variety of formats. They are responsible for generating $131 billion in sales, 944,000 jobs, $30 billion in wages, and $27 billion in taxes. The NGA appeared as amicus in the Eighth Circuit in support of petitioner's appeal.

The National Retail Federation (NRF) is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, "Main Street" merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the significant driver of the American economy, supporting 42 million working Americans and contributing $2.6 trillion to the annual GDP. As an association representing the interests of the vital retail industry, NRF advocates for fairness and opportunity for all sectors of retail, no matter their size. NRF regularly advocates for the interests of retailers, large and small, before the legislative, executive, and judicial branches of government.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Eighth Circuit's decision betrays the tenuous protections afforded confidential information under *National Parks* and the attendant need to return to the plain language of the Freedom of Information Act's ("FOIA") Exemption 4. *See* 5 U.S.C. § 552(b)(4) (exempting "trade secrets and commercial or financial information obtained from a person and privileged or confidential"). *National Parks*' atextual standard, which greatly narrows the class of "confidential" information covered by Exemption 4, should not be endorsed by this Court. Instead, as commonly understood, information is "confidential" if it customarily would not be released to the public and the party that provided the information to the government takes reasonable measures to protect against public disclosure. That simple textual standard should apply here.

National Parks departed from a commonsense reading of Exemption 4 in favor of a legislative purpose-oriented interpretation limiting its protection to information that would likely cause substantial competitive harm if disclosed. This standard has proven burdensome and unpredictable for businesses, agencies and the courts, largely because it requires them to speculate about the consequences of events that have yet to occur, often in reliance on limited evidence marshaled in haste. Judicial efforts to ameliorate the burdens and vagaries of *National Parks* have instead exacerbated them. Returning to the simple textual standard for

Exemption 4 protection would comport with this Court's preference for workable, objective rules under FOIA. It would also limit the use of FOIA as a weapon in the commercial intelligence wars, without impairing FOIA's fundamental purpose of enabling the public to ascertain what *government* agencies—as opposed to *private* business competitors—are up to.

Properly construed, Exemption 4 protects retailers' SNAP sales data here because of the significant measures retailers take to protect its confidentiality. Retailers have good reason to do so, since the public availability of SNAP redemption data is likely to give competitors more accurate insights into their SNAP and non-SNAP store sales. But retailers—like any private party who provides information to the government either voluntarily or under compulsion—should not be required to demonstrate anything more than their confidential handling of the data. It is not for government FOIA officials and judges to second-guess a business's reasons for protecting against public disclosure of sensitive business data or to require those businesses to demonstrate the harms they might incur from involuntary disclosure.

Even assuming *National Parks'* "competitive harm" standard applies, the lower courts' application of that standard understates the competitive harm that would likely befall retailers from granting Argus Leader's FOIA request here. The court of appeals reasoned that, in light of other publicly available

information, Petitioner failed to demonstrate that disclosure of SNAP redemption data was likely to cause serious competitive harm. But, in reality, it is *because* other data is publicly available that SNAP redemption data can cause such harm. Each tile in the mosaic of available competitive data improves the models that are used to predict competitors' sales and target competitors' customers. The court of appeals recognized that possibility, but erroneously discounted it as insufficient to support relief. FOIA's Exemption 4 was not intended to give a court this power to substitute its judgment for that of a private business.

Amici submit this brief in support of Petitioner to correct the Eighth Circuit's misconstruction of FOIA Exemption 4 and ensure the protection of its members' confidential store-level SNAP redemption data. That result is best assured here by rejecting *National Parks'* standard and holding Exemption 4 satisfied when parties that provide information to the government demonstrate that they take reasonable steps to protect against its public disclosure.

ARGUMENT

I. THE COURT SHOULD RETURN TO THE PLAIN MEANING OF "CONFIDENTIAL" UNDER EXEMPTION 4

A. "CONFIDENTIAL" INFORMATION IS INFORMATION THAT WOULD CUSTOMARILY NOT BE RELEASED TO THE PUBLIC

FOIA's Exemption 4 is one of several (like Exemption 6) designed to protect private information in the hands of the government. Congress enacted FOIA to provide a means for citizens to know what their government is up to. *See FBI v. Abramson*, 456 U.S. 615, 621 (1982). At the same time, Congress realized that the goal of governmental transparency does not justify unfettered access to *private* information, the public release of which could harm legitimate public and private sector interests. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Exemption 4 thus affords protection to those persons who provide sensitive information to the federal government, while also seeking to ensure that the government has access to the information necessary to perform its broad functions. Exemption 4 thus exempts from FOIA disclosure any "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

Given this plain text, the application of Exemption 4 would seem simple. And, at least at the

beginning, it was. "Initially, the courts adopted a broad interpretation of the term 'confidential' under FOIA Exemption 4." *See* Peter R. Maier, Guest Article, "The Case Against *National Parks*," DOJ FOIA Update, Vol. IV, No. 4 (1983). Early courts interpreting the statute "deemed commercial information to be confidential within the meaning of Exemption 4 if it was furnished to the government with the expectation of confidential handling by the submitter and received by the government under a promise of confidential treatment." *Id.* (citing, *e.g.*, *Bristol-Myers Co. v. FTC,* 424 F.2d 935, 938 (D.C. Cir. 1970); *GSA v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969)).

The ordinary understanding of the statute's confidentiality requirement is consistent with these early decisions. "Confidential" information is information that is "communicated *in confidence*" or "*intended* to be held in confidence or kept secret." WEBSTER'S SECOND INT'L DICTIONARY 560 (1937) (emphasis added & alterations omitted)).

Under the ordinary meaning of "confidential," then, the expectations of the producing party are essential to determining FOIA's protections. As a House Committee report explained, the commercial confidentiality provision was intended to "exempt[] such material if it would not customarily be made public by the person from whom it was obtained by the Government." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); *see also* S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (exemption protects commercial

information that "would customarily not be released to the public by the person from whom it was obtained"); *see also Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971).

B. THE *NATIONAL PARKS* STANDARD DOES NOT ADEQUATELY PROTECT CONFIDENTIAL FINANCIAL AND COMMERCIAL INFORMATION

In *National Parks*, the D.C. Circuit moved away from the plain language meaning of "confidential" to a more legislative purpose-oriented definition. *See National Parks*, 498 F.2d at 767 ("A court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption."). The court identified two relevant legislative purposes—"that of the Government in efficient operation and that of persons supplying certain kinds of information in maintaining its secrecy," *id.*—and molded the statute's "confidentiality" requirement to fit those purposes.

As relevant here, based on its reading of the legislative history, the court reasoned that Exemption 4 was intended to "protect[] persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *Id.* at 768. Thus, it engrafted onto Exemption 4's "confidentiality" requirement the test that has generally controlled lower courts' consideration of Exemption 4 determinations: Commercial or financial material is "confidential" if "disclosure of the information is

likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 770.[2]

This *National Parks* standard requires private parties, government agencies and, ultimately, the courts to engage in the inherently speculative effort of predicting the consequences of events that have not yet occurred—*i.e.*, whether substantial competitive harm is likely to be caused by government disclosure of previously non-public information to the public. This effort often requires complex economic forecasts and is burdensome for both private parties and government agencies.

For businesses, the risk of an adverse outcome resulting in damaging public disclosures is magnified by statutorily established procedural burdens. For agencies and courts, the burden of adjudicating multitudes of Exemption 4 disputes is compounded by limitations on their knowledge regarding a vast range of relevant competitive markets.[3] As a result,

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[2] *National Parks* sought to protect the government's interest in obtaining confidential data as well, by protecting commercial and financial information where disclosure is likely "to impair the Government's ability to obtain necessary information in the future." *National Parks*, 498 F.2d at 770. That prong is not at issue in this case.

[3] USDA agencies alone applied Exemption 4 more than 400 times in 2017. *See* USDA 2017 Annual FOIA Report, Table V.B.(3); *see also*, *e.g.*, U.S. DOD 2017 Annual FOIA Report,

(Continued …)

National Parks does not reliably or effectively preserve the confidentiality of the information that the statute was intended to protect.

First, the procedural burdens imposed by FOIA and the APA make it difficult for private businesses to protect confidential data in the hands of the government. FOIA requests generally encompass large numbers of documents containing numerous separate items of information, and a business notified of a FOIA request (as required by Executive Order 12600 (1987)) must try to prove to the agency that substantial competitive harm is likely to result from disclosure of each type of confidential information covered by the request, in most cases before the 20-day statutory deadline for the agency's response to the requester.[4] This submission must be complete and compelling because there may be no further opportunity to submit evidence. If the agency decides against the business that submitted the data to the government, its only recourse at that point will be challenging the agency decision in district court on the existing agency record and under the

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Table V.B.(3) (989 Exemption 4 cases); U.S. DOL 2017 Annual FOIA Report, Table V.B.(3) (3686 Exemption 4 cases).

[4] 5 U.S.C. § 552(a)(6)(A)(i) requires agencies to make determinations on FOIA requests within 20 working days, and limits extensions of that time period to "unusual circumstances." Businesses can request additional time for their submissions in opposition to disclosure, but cannot rely on receiving this purely discretionary relief.

APA's highly deferential arbitrary and capricious standard. 5 U.S.C. § 706(2)(A).[5] These procedural disadvantages handicap most businesses' efforts to protect their confidential information.

On the other side of the ledger, FOIA *requesters* have no obligation to tell agencies why they want the information they have requested. Yet these FOIA requesters are often competitors seeking to further their own commercial interests.[6] The ability of competitors to pursue FOIA requests for private data in the hands of the government has transformed FOIA into a powerful weapon in the commercial war for market dominance.[7]

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[5] Unlike agency decisions to *withhold* confidential information, which can be challenged de novo under 5 U.S.C. § 552(a)(4)(B), decisions to *disclose* a business's confidential information may only be challenged under the APA.

[6] *See, e.g.*, David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 Penn. L. Rev. 1097, 1103 & n.33 (2017) ("Public-oriented inquiries by concerned citizens and their advocates . . . make up only a small fraction of the 700,000-plus FOIA requests submitted each year. Studies have consistently shown that the bulk of requests come from businesses seeking to further their own commercial interests by learning about competitors, litigation opponents, or the regulatory environment.") (footnotes omitted).

[7] *See* Pozen, *supra* n.6, at 1103; *cf.* Gregory L. Waples, Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 Colum. L. Rev. 895, 958 (1974) (observing that the "benefits of the Act have inured predominantly to ... corporation[s] seeking through disclosure an economic, competitive or legal advantage").

Second, these same handicaps often impair the agencies' predictive efforts, which are based on necessarily hastily assembled, incomplete responses, performed by overtaxed agency FOIA officers often unfamiliar with the competitive landscape and lacking in probative evidence from those who know best how the requested information would be used—the competitors themselves. FOIA officers lack firsthand knowledge of the relevant competitive context, and they have neither the time nor the training to digest the nuances of the non-uniform case law applying *National Parks*. Although some agencies make valiant efforts to get it right (as the USDA did here), others get it very wrong. *See, e.g.*, *McDonnell Douglas v. NASA*, 180 F.3d 303, 306 (D.C. Cir. 1999) (NASA's rationale for predicting no likelihood of substantial competitive harm deemed "too silly to do anything other than state it, and pass on") (Silberman, J.).

Finally, in light of these many challenges, judicial review of agency predictions under *National Parks* yields inconsistent and unpredictable results. *See* U.S. Dep't of Justice, Office of Info. Policy, Department of Justice Guide to the Freedom Of Information Act, Exemption 4 at 309-13 (FOIA Guide), https://www.justice.gov/oip/doj-guide-freedom-information-act-0 (showing different outcomes in cases with similar fact patterns, sometimes resulting from "balancing" extraneous factors such as the "public interest"). As the FOIA Guide recognizes, "[t]he courts have tended to resolve

issues of competitive harm on a case-by-case basis rather than by establishing general guidelines." *Id.* at 309. All too often, courts fall back on rejecting as "speculative" competitive harm predictions which, by the very nature of the inquiry, cannot help but involve speculation. *See, e.g.*, Pet. App. at 21a (district court concluding that "any potential competitive harm from the release of SNAP data is speculative at best"); *see also id.* at 5a (court of appeals dismissing aspect of FMI's prediction of competitive harm as "speculative").

National Parks thus imposes a considerable burden on the courts. Each year, thousands of FOIA requests implicating Exemption 4 are submitted to federal agencies.[8] As a result, the courts are annually burdened with hundreds of cases challenging the agencies' resulting predictions of the likelihood of substantial competitive harm, either via de novo trials (as in the instant case) or via APA review of inadequate administrative records (in "reverse-FOIA" cases). This puts judges in the untenable position of deciding whether a business that has determined to devote very substantial time and resources to seeking judicial protection of its private business information is completely misguided in doing so.

In 1992, the *en banc* D.C. Circuit acknowledged the problems with the *National Parks* standard but

[8] *See* note 3, supra.

deemed them insufficient under principles of *stare decisis* to justify setting aside the decision entirely. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 877 (D.C. Cir. 1992); *see also id.* at 880 (Randolph, J. concurring) (noting "the test announced in *National Parks . . .* incorrectly interpreted Exemption 4 of the Freedom of Information Act," but concluding that stare decisis counsels against overruling the decision). In doing so, however, the *Critical Mass* court sought to "greatly simplify the application of Exemption 4" by confining the *National Parks* inquiry to *compulsorily* submitted information. For voluntarily submitted information, *Critical Mass* returns the Exemption 4 "confidentiality" inquiry to the plain meaning of that term, asking whether the information "would customarily not be released to the public by the person from whom it was obtained." *Id.* at 878.

This voluntary/involuntary distinction has only added to the complexity and uncertainty of Exemption 4 litigation. It has engendered further hair-splitting legal inquiries, such as whether the voluntary acceptance of a requirement to submit information (as by submitting a contract proposal in accordance with the terms of a government request for proposals) constitutes voluntary or compulsory submission of information. *See, e.g.*, *McDonnell Douglas v. NASA*, 180 F.3d at 305-06; *see also* FOIA Guide at 278-97 (containing 15-page discussion of post-*Critical Mass* cases wrestling with voluntariness issue).

Moreover, by disfavoring compulsorily submitted information, *Critical Mass* turns the protection of confidential business information on its head. Businesses should not be placed at a disadvantage in trying to protect their valuable confidential information when the government has obtained it by force of law and thus deprived those private parties of any ability to weigh the risks and benefits of providing it. While the voluntary/involuntary distinction of *Critical Mass* may have some relevance to the *government's* interest in *obtaining* information, it matters little to the businesses that want to protect their confidential data at all times. *Critical Mass* thus got the standard right, but was mistaken in extending it only to voluntarily provided information. This Court can correct that error by applying *Critical Mass*'s "not customarily released to the public" standard to *all* Exemption 4 cases.

C. THE PLAIN LANGUAGE OF EXEMPTION 4 PROVIDES A WORKABLE STANDARD THAT WILL NOT "SWALLOW FOIA NEARLY WHOLE"

At the same time it conforms to Congress's meaning, defining "confidentiality" in terms of the reasonable expectations of the submitter also establishes a simple workable rule for the parties, the agencies, and the courts. In opposing certiorari, Argus Leader expressed concerns about the "subjectivity" of a plain meaning confidentiality standard (see Opp. Cert. at 30-34). Those concerns can be allayed by requiring agencies to ascertain that

the source of the information has taken reasonable measures to protect it from public disclosure.

Determining whether a business took reasonable measures to protect its confidential information is a simpler, more manageable task for government officials, who are already required to follow strict protocols to guard against the release of certain private and sensitive information. *See, e.g.*, Privacy Act, 5 U.S.C. § 552a; 18 U.S.C. § 798 (prohibiting disclosure of classified information). As evident from the plain language of Exemption 4, Congress desired this simplicity. A submitter is well positioned to provide—even on short notice—ample evidence to establish that it protects information as secret. There will be less need to march in lawyers and economic experts to hypothesize what third parties might do with the information if they got their hands on it and what harms may thus befall the submitter.

As evident in this case, allowing agencies to apply a straightforward "confidentiality" test—determining that the submitter took reasonable measures to protect the secrecy of the information—also "serve[s] a pragmatic function, encouraging participation in activities that involve the collection of sensitive information." Studies of Welfare Populations: Data Collection and Research Issues, ch. 8, at 230 (The National Academies Press 2001), https://www.nap.edu/read/10206/chapter/10. Food retailers who know that reasonable measures to protect against disclosure are not enough to satisfy Exemption 4 may be less inclined to participate in

SNAP. *See id.* at 230-31 ("Guarantees of confidentiality are considered essential in encouraging participation in potentially stigmatizing programs."). Thus, as this case illustrates, more rigorous confidentiality protections may prevent withdrawal from critical government programs. *See, e.g.*, Doc. 59-13 at 8 ("The potential for SNAP redemption data to cause both competitive and reputational harm to the Kmart brand, and any future stores operated by Kmart, will be a major factor in Kmart's decision to continue participating in the SNAP program.").

Experience with *Critical Mass* illustrates the workability of this standard. Exemption 4 litigation following *Critical Mass* has only rarely posed substantial questions about whether information is of a kind not customarily released to the public. *See* FOIA Guide at 293-96. This is as it should be, given FOIA's "purpose of expediting disclosure by means of workable rules." *U.S. v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 779 (1989).[9]

[9] In contrast, as noted above, the *National Parks* standard has resulted in case-by-case, inconsistent rulings. For these reasons, applying the straightforward confidentiality test will not interfere with any settled expectations (because the unpredictable *National Parks* standard has engendered none), but rather will at last enable businesses to reliably predict how their confidential information will be treated when requested under FOIA.

As for the Eighth Circuit's fear that FOIA would be "swallow[ed] nearly whole" by applying the plain meaning (see Pet. App. at 4a-5a n.4), this conclusion is patently absurd in light of the vast range of government-originated information unaffected by Exemption 4. Petitioner has correctly pointed out that these governmental information requests constitute the majority of FOIA requests. *See* Pet. at 21 n.15. In any event, *Critical Mass* has not completely immunized all privately generated information from FOIA disclosure in cases decided under its "not customarily released to the public" standard. *See, e.g.*, *Parker v. Bureau of Land Mgmt.*, 141 F. Supp. 2d 71, 80-81 (D.D.C. 2001) (voluntarily submitted information not protected by Exemption 4 because it was identical to information that was already publicly available).

Finally, the federal government is not powerless to require disclosure where appropriate. Both Congress and the Executive Branch can, through specific statute or rule, require disclosure of particular types of privately generated information residing in government files. *See, e.g.*, 16 U.S.C. § 824t (requiring Federal Energy Regulatory Commission to disseminate pricing information collected from utilities); 48 C.F.R. § 52.227-14 (mandatory government contract clause regarding government's rights to receive and disclose technical data developed by contractors). The difference in those instances where the government exercises that authority is that both parties, private and government, understand in advance that information

submitted will be disclosed. Insofar as there is ever any public interest in disclosure of privately generated information, it thus can and should be dealt with on a particularized basis rather than by using the indiscriminate *National Parks* standard, which inefficiently and unfairly inflicts a broad range of damaging and unwarranted disclosures on the private sector.

II. SNAP STORE-LEVEL REDEMPTION DATA IS EXEMPT FROM DISCLOSURE BECAUSE RETAILERS TREAT IT AS PRIVATE AND CONFIDENTIAL

The SNAP redemption data at issue in this case easily satisfies the plain meaning definition of "confidential" financial data. Indeed, such "business sales statistics" are at the core of the confidential commercial data that Congress thought protected by Exemption 4. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (exception meant to protect "business sales statistics, inventories, customer lists, and manufacturing processes"). The record below demonstrates the wisdom of Congress's judgment.

First, the data at issue is customarily maintained as confidential by retailers. "There is *no place* where [competitors] can get the actual data" of a store's SNAP sales. (Doc. 186 at 32:3-4 (emphasis added)).[10]

[10] "Doc." cites are to the district court docket on PACER. The full trial transcript was filed in the district court, but certain portions are not accessible on PACER. Those portions include testimony from Peter Larkin (CEO of the National

(Continued …)

There is good reason for retailers' protection of store-level SNAP redemption data. Retailers adopt strong measures against public disclosure to protect their market shares and maintain profitability. Food retailers, in particular, operate on "razor-thin" margins, with average net (pre-tax) profits under one percent. Doc. 139-1 at 3; Doc. 186 at 11:23-12:7; Doc. 185. Confidentiality of store-level sales information is critical in light of the fierce competition retailers face from superstores, drug stores, warehouse clubs, small format/limited assortment grocery stores, and more recently, internet-based food delivery services. There is a "relatively inelastic amount of dollars in any given market that are available for food at home," and when a new competitor succeeds in taking away SNAP business, "[i]t has to be at somebody's expense." (Doc. 186 at 27:9-16, 30:11-16).

A retailer's customer base is a valuable asset built over many years by providing excellent customer service and developing in-depth understanding of customer preferences and trends. Food retailers know that if competitors obtain store-level sales data, they can more readily secure a foothold in a local market and target the customers of existing retailers. *See* Doc 185 at 173:16-19 ("I mean sales is what we're all after. When you figure

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Grocers Association) and Joey Hays (owner of Dyer Foods, Inc., a supermarket chain in Tennessee), and are identified as "Doc. 185" herein.

out where the sales are, then we go after it a little bit harder. I don't want anybody to know our sales.").

As a result of these concerns, food retail stores regularly adopt and enforce reasonable policies and procedures to maintain the secrecy of their SNAP redemption data. According to NGA's CEO Peter Larkin, a store's sales information, including SNAP redemption data, is not publicly available and is confidential, closely guarded information. (Doc. 185). In fact, this secrecy does not involve mere avoidance of public disclosure. Sales data is often kept secret from internal company personnel that do not have a need to know the data. Such information is not typically known "beyond just a couple of people." (Doc. 186 at 17:1-13).

SNAP redemption data is usually maintained by retailers on a strict "need-to-know" basis. A senior executive at Cumberland Farms, Inc., a convenience store chain in the Northeast, testified that less than 5% of its employees have access to the company's SNAP redemption data, and disclosure of that data outside the company requires a nondisclosure agreement. (Doc. 59-11 at 6). Dyer Foods, which operates 13 stores in small towns in Tennessee, keeps SNAP redemption data "private" because once you "figure out where the sales are, then [you] go after [that market] a little bit harder." (Doc. 185; *see also* Doc. 119 at 9:19-12:12 (describing Sears Holding Management Corporation's measures to maintain confidentiality of sensitive business information, including store-level sales)).

Moreover, electronic benefit transfer (EBT) processors, which handle the processing of SNAP transactions, are duty bound to safeguard the secrecy of SNAP redemption data. EBT processors play a central role in the handling of SNAP transactions. When a benefit recipient swipes the electronic payment card at a point-of-sale device, the details of the purchase are transmitted from the retailer to the EBT. The EBT processor confirms the retailer is an authorized SNAP-participant, checks the amount of benefits available, and instantly transmits an approval (or denial) to the retailer. (Doc. 118 at 7:14-8:18, 9:23-10:10).

Each state contracts with an EBT processor to administer SNAP benefits for citizens of that state. The agreements between states and their EBT processors include strict confidentiality provisions directed at retailer information, such as store-level SNAP redemption data, that EBT processors are required to send to USDA. For instance, Arkansas's EBT agreement provides:

> [The] Contractor must treat all information, and *in particular* information relating to *retailers*, all applicants for and recipients of human services . . . and providers of such services . . ., which is obtained by it through its performance under the Contract, as *private or confidential*

> *information* . . . and shall restrict access to and disclosure of such Information in compliance with federal and state laws and regulations.

(Doc. 186 at 4 (Trial Ex. 202, at pp. 17-18) (emphasis added)). The agreement specifically prohibits the EBT processor from using any such information "in *any* manner except as necessary for the proper discharge of its obligations." (*Id.* at 17 (emphasis added)).

Even where retailers and their associations retain third-party researchers to analyze sales data, measures are taken to preserve strict confidentiality. "Retailers are often reticent to provide sales data because they are concerned this data could be used by their competitors to gain an advantage, an understandable concern given the tight margins of food retailers." Molly De Marco, Ph.D., et al., *A Researcher's Checklist for Working with Sales Data to Evaluate Healthy Retail Interventions*, DUKE-UNC USDA CTR. FOR BEHAVIORAL ECON. & HEALTHY FOOD CHOICE RESEARCH, June 2017, at 4, https://becr.sanford.duke.edu/research-hub/becr-briefs. "Because of this very salient concern to retailers, it is essential to explain how the research team will keep a retailer's sales data . . . secure and confidential." *Id. Amicus* NACS itself collects and publishes extensive industry information for the benefit of its members, "but not before an extraordinary degree of aggregation and anonymization." Doc. 59-11 at 15. Members provide

their sensitive financial information only "on the explicit and repeated condition that it will be kept 'completely' and 'strictly' confidential." *Id.*

Retailers thus participate in SNAP with the expectation that their store-level redemption data will be kept confidential. *See, e.g.*, Doc. 59-10 at 1-2, Doc. 59-12 at 1-2, Doc. 59-16 at 2-3, Doc. 59-17 at 1-2, Doc. 59-18 at 1-2. As one witness put it, "when our members signed up for the program, they *always* felt that it was confidential, private, and it was *never* going to be released." Doc. 186 at 32:5-7 (emphasis added). Under the plain meaning of "confidential," food retailers' reasonable expectations that their private sales data will remain private are sufficient to warrant the protections of Exemption 4.

III. SNAP DATA SHOULD BE PROTECTED FROM DISCLOSURE EVEN UNDER *NATIONAL PARKS*

Even assuming this Court retains *National Parks*' standard, the Court of Appeals erred in its application. Relying on *National Parks*, the Court of Appeals concluded that plaintiffs had not demonstrated that the disclosure of SNAP redemption data was likely to cause substantial harm to the competitive position of retailers from whom the government obtained the information. Pet. App. at 4a-5a. The court did so based on trial evidence it read to show that the grocery store industry "is already rich with public-available data that market participants use to model their

competitor's sales." Pet. App. at 5a. While the court allowed that "releasing the contested data is likely to make the statistical models marginally more accurate," it reasoned that this marginal improvement is insufficient to show a likelihood of substantial competitive harm. *Id.*

But contrary to the Eighth Circuit's legal conclusion, it is *because* so much other information is readily available that the individual store SNAP redemption data has such competitive value. Every bit of information about competitors' sales helps form a clearer picture of a store's bottom line. The volume of a target store's SNAP redemptions helps competitors derive more accurate estimates of that store's *overall* sales, which is the crown jewel of confidential business information. Testimony below confirmed that "retailer-specific transactional data from SNAP sales could be combined with other existing public information . . . to reasonably approximate total gross revenues for [that] retailer."[11]

Injecting this additional piece of information enhances the accuracy of research models designed

[11] Doc. 59-11 at 16; *see also* Doc. 59-13 at 7 ("The SNAP redemption data could also provide our competitors with insight with respect to individual Kmart stores' profits."); Doc. 185 (knowing a store's SNAP sales data is "helpful" and can give a competitor "a better estimate" of its total sales); *id.* (SNAP redemption data gives competitors a "back door into determining what your sales are").

to evaluate a particular market. (Doc. 119 at 26:8-9 ("I would say that from the perspective of market research, the more information you can get, the better.")). When inserted into predictive models that utilize other available information, store-level SNAP redemption data improves the accuracy of what otherwise is often simply an educated guess. (Doc. 186 at 133:20-137:19). That accuracy helps both other potential market entrants and existing stores to evaluate competitive opportunities.

In this sense, the confidential data here is much like a tile in the mosaic of competitive data. In other contexts, this "mosaic" theory has been used to protect from FOIA disclosure what might otherwise appear in isolation to be innocuous government data. As this Court recognized in the national security context, "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *CIA v. Sims*, 471 U.S. 159, 178 (1985) (applying FOIA Exemption 1); *see also Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 928-29 (D.C. Cir. 2003) (applying mosaic theory under law enforcement Exemption 7). "Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate." *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978). While the stakes may not be as high in the food industry as they are at the CIA or FBI, the competitive exploitation of information is much the same. Far

from a "nominal effect on competition," Pet. App. at 18a, store-level sales data is an important piece of a larger competitive puzzle.

The Department of Justice has recognized that the mosaic theory can be applied to Exemption 4's "competitive harm" inquiry. *See* FOIA Guide at 315. "Some courts have utilized a 'mosaic' approach to sustain a finding of competitive harm, thereby protecting information that would not in and of itself cause harm, but which would be harmful when combined with information already available to the requester." *Id.* at 315 & n.313 (citing, *e.g.*, *Timken Co. v. U.S. Customs Serv.*, 491 F. Supp. 557, 559 (D.D.C. 1980) (protecting data reflecting sales between parent company and its subsidiary, because even if disclosing such data "would be insufficient, standing by itself, to allow computation of the cost of production, this could would be ascertainable when coupled with other information.")).

Determining where to focus resources in the supercompetitive retail market—such as the decision where to site a retail food store—is not a precise science. While many sources of information are available to retailers, including firms that specialize in analytics such as market potential analysis, demographic, census, and customer profiling, store-level sales data, including SNAP redemption data, remains closely guarded. Sales information is "the most important information . . . in the decision whether to enter into a new market or not or buy a new store." (Doc. 185 at 171:2-5). The government's

release of SNAP redemption data is a "game-changer" (Doc. 186 at 17:21) that is "very, very dangerous fuel" in the marketplace (Doc. 185 at 255:3).

As petitioner Food Marketing Institute explained below, disclosure provides retailers "with valuable insights into the operational strengths and weaknesses of their competitors resulting in selecting pricing, market concentration, expansion plans and possible take-over bids facilitated by the knowledge [of the store-level SNAP data]." (Doc. 59-4 at 1-2). Moreover, if a store's SNAP redemption data reflect a long-term trend of decreasing sales, "it would be reasonable for the competitors to extrapolate from that trend that the store is vulnerable and its market position weak," making it "more likely that the potential competitor would open a competing store in an area." (Doc. 59-8 at 3 (T. Gresham, CEO of Double Quick)).

Bruce Kondracki, the USDA's expert and VP of Consumer Research at Dakota Worldwide Corporation,[12] explained how software-based predictive modeling for "repositioning" a retailer's stores in the market is at the cutting edge of industry research. High-tech modeling is premised on balancing the model's "demand side" with the "supply side"; while the demand side is relatively

[12] Dakota is one of the longest serving market research firms serving the food industry. (Doc. 186 at 121:13-18).

simple to calculate and "fairly predictable" (*e.g.*, population, demographics, street and highway networks), the supply side "is, by far, the most time-consuming and most expensive part and most inaccurate part of the whole modeling process." (Doc. 186 at 128:11-132:6). Store-level sales factor in the supply side, and "without [an] accurate supply side, you'll never balance the model." (*Id.* at 130:19-24).

If researchers know the *precise* amount of a competitor's store-level sales, a research firm like Dakota (hired by a competitor retailer) can engage in reverse engineering by continually tweaking the model's algorithms (using other known variables such as demographics and income). (*Id.* at 134:3-135:9). The updated model can then be used to predict *the client's* sales if it opened a store across the street. (*Id.* at 136:12-22). The client can "then . . . play God," searching an entire marketplace and testing possible expansion locations to determine what "a particular threshold for a store's sale performance" would be *before* pulling the trigger and breaking ground at that site. (*Id.* at 131:24-132:6). Such enhanced models will result in greatly diminished risk for new market entrants. (*Id.* at 137:1-19). It is for this reason that the industry so jealously guards against disclosure of this information. And it is for this reason that one additional data point in the universe of publicly available information could do substantial harm to retailers, who are compelled to provide this information to the government.

At the same time, the dollar value of SNAP redemptions at each of the quarter-million plus SNAP-authorized retailers across the country will not shed any additional light on what the *government* is up to. Argus Leader—and anyone with an internet connection—can already ascertain the aggregate dollar value of SNAP redemptions at the national, state, and even zip code level. (Doc. 118 at 42:14-21, 99:22-100:4).

CONCLUSION

This Court should reverse the Eighth Circuit's decision, discard the *National Parks* test in favor of a plain meaning definition of "confidentiality," and hold that the data at issue in this case is "confidential" commercial or financial data protected by FOIA Exemption 4.

Respectfully submitted,

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