No. 18-481

In the Supreme Court of the United States

FOOD MARKETING INSTITUTE, PETITIONER

v.

ARGUS LEADER MEDIA, DBA ARGUS LEADER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4), exempts from mandatory disclosure under FOIA "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Ibid.* The question presented is:

Whether an individual retail store's aggregate annual dollar amount of Supplemental Nutrition Assistance Program benefits that the store redeems under the Program qualifies as "confidential" commercial or financial information under FOIA Exemption 4.

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INTEREST OF THE UNITED STATES

The United States Department of Agriculture (USDA) determined that the records at issue in this case were exempt from the Freedom of Information Act (FOIA), 5 U.S.C. 552, and defended its decision in district court. More broadly, the United States has a substantial interest in FOIA's proper interpretation.

STATEMENT

1. Congress enacted FOIA, 5 U.S.C. 552, in 1966 as an amendment to Section 3 of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.* See FOIA, Pub. L. No. 89-487, 80 Stat. 250; *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989). Under FOIA, a federal agency must generally make agency records available to "any person" who has submitted a "request for [such] records." 5 U.S.C. 552(a)(3)(A).

"[FOIA] does not apply," however, to any matters identified in its exemptions. 5 U.S.C. 552(b). As relevant here, Exemption 4—the text of which Congress enacted in 1966 and has never amended—exempts matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4); see 80 Stat. 251. This case concerns whether certain USDA records relevant to the Supplemental Nutrition Assistance Program (SNAP) qualify under Exemption 4 as "confidential" commercial or financial information.

2. a. USDA's Food and Nutrition Service (FNS) administers SNAP (formerly the food-stamp program), 7 C.F.R. 271.3(a), under the Food Stamp Act of 1977, Pub. L. No. 95-113, Tit. XIII, 91 Stat. 958 (7 U.S.C. 2011 *et seq.*), now renamed the Food and Nutrition Act of 2008.[1] SNAP "permit[s] low-income households to obtain a more nutritious diet through normal channels of trade by increasing [their] food purchasing power." 7 U.S.C. 2011. Today, a state agency, after determining a household's SNAP eligibility, will issue to that household an electronic benefit transfer (EBT) card, akin to a debit card, to access the household's SNAP benefit allotment. 7 U.S.C. 2016(a), (b), and (h)(1), 2020(a)(1). The household may use its allotment "only to purchase food from retail food stores which have been approved for participation in [SNAP]." 7 U.S.C. 2013(a) (2012).

If a retail food store applies to participate in SNAP and USDA finds it qualified, USDA approves the store's participation for a five-year period. 7 U.S.C. 2018(a)(3); 7 C.F.R. 278.1(j). USDA, however, can also "periodic[ally] reauthoriz[e]" the store to participate, 7 U.S.C.

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[1] Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Tit. IV, Subtit. A, § 4001(a), 122 Stat. 1853.

2018(a)(2)(A), even before the five-year period expires, by evaluating updated information, 7 C.F.R. 278.1(j) and (n), and can withdraw authorization, 7 C.F.R. 278.1(*l*).

b. The food-stamp program originally utilized physical food-stamp coupons, which constituted an "obligation of the United States" for payment. 7 C.F.R. 271.5(a) (1979). An approved retail food store would collect such coupons from beneficiaries as payment, 7 C.F.R. 278.2(a) (1979), and redeem them "to banks for credit or for cash." 7 C.F.R. 278.4(c) (1979). Receiving banks then would cancel the coupons (like checks) and transmit them to a Federal Reserve Bank for payment by the government. 7 C.F.R. 278.5(a) and (b) (1979).

In addition, USDA required each store to complete a redemption certificate "show[ing] the value of the coupons redeemed" and to submit the completed form with the coupons to the redeeming bank, which was required to "forward[]" such certificates to FNS "at least once a week." 7 C.F.R. 278.4(c), 278.5(a) (1979). That certificate process, which operated in tandem with the payment process, enabled USDA to collect redemption information from retailers through intermediary banks.

The program's use of physical coupons ended in 2009, 7 U.S.C. 2016(f)(3), but USDA's parallel payment and redemption-information-collection processes continue under today's EBT system. When a SNAP beneficiary uses an EBT card at a retailer's point-of-sale device and enters a personal-identification-number (PIN) code to access his benefits, the device communicates with an "EBT processor," *i.e.*, a private company with which the relevant State has contracted to process SNAP transactions. J.A. 76-79. The EBT processor approves the transaction if it verifies the PIN, the sufficiency of the beneficiary's SNAP balance to cover the

transaction, and the store's SNAP authorization. J.A. 77; Pet. App. 40a n.4.

The EBT processor then initiates two distinct processes. See J.A. 108-109 (redemption flow chart). First, the EBT processor transmits a daily Automated Clearing House file to its bank to arrange payment to each retailer's designated bank account. J.A. 80-81, 108. If a retailer operates multiple approved retail-food-store locations, a single aggregate daily payment is made to the retailer's designated account. J.A. 81; Trial Tr. (Tr.) 36-39. The EBT processor then seeks reimbursement for those payments from the government. J.A. 81, 83.

Second, the EBT processor forwards the aggregate daily SNAP-redemption data from each retail food store to FNS, which FNS uploads into its Store Tracking And Redemption System (STARS). J.A. 74-75, 79; see 7 C.F.R. 274.8(a)(3)(viii) (requiring that "daily redemption activity" data be forwarded to FNS "at least once weekly").[2] FNS obtains "store-level SNAP redemption data" from no other source. J.A. 80. This case concerns a FOIA request for that redemption data from STARS. J.A. 41.

c. Congress authorized USDA to issue regulations providing for "the redemption of benefits accepted by retail food stores," 7 U.S.C. 2019 (2012), but that authorization does not specifically address USDA's collection of redemption data from stores. Instead, under Section 2018(c), USDA regulations "shall require an applicant retail food store * * * to submit information" that will permit a determination about whether "such

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[2] The EBT processor additionally forwards to FNS detailed data on each individual SNAP transaction, which FNS uploads into its Anti-fraud Locator using EBT Retailer Transactions (ALERT) system. J.A. 74, 79-80. That data is not at issue here.

applicant qualifies, or continues to qualify, for approval" under the Act. 7 U.S.C. 2018(c); see 7 U.S.C. 2018(c) (Supp. I 1977). Those regulations "shall provide for safeguards which limit the use or disclosure of information obtained under the authority granted by [Section 2018(c)] to purposes" specified therein. 7 U.S.C. 2018(c); see 7 U.S.C. 2018(c) (Supp. I 1977).

USDA's initial implementing regulations provided that the contents of applications and other information furnished by firms—including "their redemptions of coupons"—could "not be used or disclosed," except in circumstances not relevant here. 7 C.F.R. 278.1(*l*) (1979); accord 7 C.F.R. 278.1(q) (1996); cf. Tr. 125. In 1994, Congress amended Section 2018(c) to grant USDA authority to disclose covered information to law-enforcement and investigative agencies, and to add a criminal prohibition against disclosing "any information obtained under [Section 2018(c)]" "in any manner or to any extent not authorized by Federal law (including a regulation)." 7 U.S.C. 2018(c) (1994). USDA then revised its regulation to specify that "information required to be submitted by retail food stores" under Section 2018(c) "to determine continued eligibility"—including "redemption data"—"may be disclosed" in certain circumstances, 7 C.F.R. 278.1(r) (1997), and that USDA "shall determine [based on listed criteria] what information can be disclosed," 7 C.F.R. 278.1(r)(1) (1997). That regulation governing when "redemption data" "may be disclosed" remains materially unchanged today. 7 C.F.R. 278.1(q) and (1).

3. In February 2011, respondent, a media organization, submitted a FOIA request for "data from the FNS STARS database" for FY2005-FY2010, including, as relevant here, "[t]he yearly redemption amounts, or

EBT sales figures, for each store." J.A. 41. USDA publicly reports annual SNAP-redemption data on a national, regional, state, and store-type basis, and has also disclosed county- and ZIP-code-level redemption data.[3] But it has not publicly disclosed redemption data for individual stores. USDA accordingly denied respondent's FOIA request for the store-level redemption information from roughly 321,000 participating stores. Pet. App. 27a; J.A. 87. Respondent then filed this FOIA action. Pet. App. 27a.

a. The district court initially granted summary judgment to USDA based on FOIA Exemption 3 and Section 2018(c). Pet. App. 24a-45a.

Exemption 3 applies to matters "specifically exempted from disclosure by statute" "if that statute" satisfies certain criteria. 5 U.S.C. 552(b)(3). Respondent did not "deny that § 2018 qualifies as a withholding statute" under Exemption 3. Pet. App. 38a; see *id.* at 53a. Respondent instead argued that the requested "redemption data is not the type of information" Section 2018(c) protects. *Id.* at 38a. The district court held that USDA collects SNAP-redemption data under Section 2018(c) "to determine if a retailer *continues* to qualify for SNAP participation" and that such "redemption data is

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[3] See, *e.g.*, USDA, *Fiscal Year 2017 At A Glance* 2-4 (2018), https://www.fns.usda.gov/sites/default/files/snap/2017-SNAP-Retailer-Management-Year-End-Summary.pdf; see also USDA, *SNAP Retailer Data*, https://www.fns.usda.gov/snap-retailer-data (last updated Sept. 19, 2018); USDA, *Data Access and Documentation Downloads*, https://www.ers.usda.gov/data-products/food-environment-atlas/data-access-and-documentation-downloads/ (last updated Mar. 27, 2018) . USDA has disclosed redemption data on a county- and ZIP-code basis where the data would not disclose the SNAP redemption of individual retailers. Def. Statement of Material Facts ¶¶ 287-288 (Jan. 20, 2015).

the type of information reached by [Section 2018(c)'s] plain language." *Id.* at 41a; see *id.* at 39a, 42a.

b. The Eighth Circuit reversed and remanded. Pet. App. 48a-57a. The court agreed with respondent that Section 2018(c) does not protect SNAP-redemption data. *Id.* at 53a-54a. It reasoned that Section 2018(c) authorizes USDA to require retail food stores to "submit[]" information and protects from disclosure information "obtained" under that authority, but that "the underlying [redemption] data [here] is 'obtained' from third-party [EBT] processors, not from individual retailers." *Id.* at 54a; see *id.* at 55a.

c. After the remand, USDA stated that, in light of its "long-standing policy" that protected "[store-level redemption] data as confidential" under regulations implementing Section 2018(c)—and its recognition that retailers that participated in SNAP from 2005-2010 "did so under the expectation that such data would be protected"—store-level "data w[ould] not be released." J.A. 71-72. The district court nonetheless denied USDA summary judgment under Exemption 4. Pet. App. 60a-70a. The court explained that the Eighth Circuit had adopted the D.C. Circuit's "*National Parks* test," under which information is deemed "confidential" under Exemption 4 if its disclosure is likely either "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 66a-67a (quoting decision quoting *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*)). USDA relied on the second prong of that test. The district court concluded, however, that a genuine issue of material fact existed over whether "disclosure

of an individual store's yearly redemption data is likely 'to cause substantial harm to [its] competitive position.'" *Id.* at 67a-68a.

The district court held a two-day bench trial on that question. See Tr. 1-455.[4] Several USDA "employees testified about the collection of SNAP data," and industry witnesses and academics "testified about the potential harm in disclosing the requested data." Pet. App. 11a; see *id.* at 11a-13a (describing testimony).

On November 30, 2016, the district court entered judgment for respondent. Pet. App. 22a-23a. In its opinion (*id.* at 9a-21a), the court concluded that store-level annual SNAP-redemption information was not "confidential" under the prong of the *National Parks* test invoked by USDA, because disclosure was not "likely" to "cause substantial competitive harm" to retailers. *Id.* at 16a-17a, 20a (citation omitted). Although the court found that "[c]ompetition in the grocery business is fierce" with thin "profit margins," *id.* at 17a-18a, it declined to rely on testimony of food-industry witnesses and determined that "any potential competitive harm" was "speculative at best," *id.* at 18a-19a.

4. a. In a memorandum dated January 18, 2017, USDA memorialized its "decision to comply with the [district] court ruling," rather than appeal. Resp. Mot. to Compel, Ex. 1 (Jan. 23, 2017).

Petitioner—an organization with food-retailer members, Pet. ii—then moved to intervene, stay the judgment, and extend the time to appeal. See Pet App. 72a-73a. The district court granted that motion. *Id.* at 71a-78a. USDA promptly informed the district court that,

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[4] The parties "stipulated that the information is commercial or financial" under Exemption 4. Pet. App. 15a.

"given the stay" of its judgment, USDA would "maintain" (not release) "the documents until the Eighth Circuit rule[d]." USDA Resp. to Mot. to Compel 2 (Feb. 3, 2017). Petitioner subsequently appealed.

b. The Eighth Circuit affirmed. Pet. App. 1a-6a. The court explained that the dispositive issue was whether "the contested data were 'confidential,'" because respondent agreed that the data were "commercial or financial" and did not contest that they were "obtained from a person" under Exemption 4. *Id.* at 2a & n.2. The court then applied the *National Parks* test, *id.* at 3a, and rejected petitioner's challenge to it, including petitioner's contention that the term "confidential" should reflect its "dictionary definition[]." *Id.* at 4a n.4.

The court of appeals determined that the district court did not "clear[ly] err[]" in finding that store-level redemption information was not confidential under *National Parks*. Pet. App. 4a-5a. Although the court noted a "likelihood of [the data's] commercial usefulness" to competitors "in a competitive marketplace," it determined that the trial evidence was insufficient to overturn the trial court's finding that disclosure was "[un]likely to cause *substantial* competitive harm." *Id.* at 5a.

c. After the court of appeals denied rehearing and declined to stay its mandate, Pet. App. 79a-80a, 85a-86a, this Court recalled and stayed the mandate pending its resolution of this case. *Id.* at 82a.

On December 20, 2018, Congress enacted the Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490. Section 4006(f)(3) of that Act amends Section 2018(c) to cover and protect SNAP "redemption data provided through the electronic benefit transfer system." See App., *infra*, 3a. Section 2018(c) thus now expressly applies to the data at issue in this case.

SUMMARY OF ARGUMENT

FOIA "does not apply" to matters identified in its Exemptions, 5 U.S.C. 552(b), including, under Exemption 4, "confidential" "commercial or financial information obtained from a person." 5 U.S.C. 552(b)(4). That text covers the store-level SNAP-redemption information here, which is "confidential" because it was communicated in confidence to USDA between FY2005 and FY2010 in light of the government's longstanding and repeated representations that it would not publicly disclose redemption data. The court of appeals' contrary holding rests on a flawed interpretation of "confidential."

A. 1. The ordinary meaning of "confidential" is "[c]ommunicated in confidence" or "secret." See, *e.g.*, *Webster's New International Dictionary* 560 (2d ed. 1957). That meaning encompasses two categories of information under Exemption 4. First, information may be confidential based on its treatment outside of the government, *i.e.*, where it "would customarily not be released to the public by the person from whom it was obtained." *Forsham* v. *Harris*, 445 U.S. 169, 184-185 (1980) (quoting committee report). Second, information may be confidential based on the circumstances under which an agency receives it, *i.e.*, where it was "given to an agency in confidence," because the agency "obligated itself in good faith not to disclose [such] documents or information." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

That understanding is reinforced by statutory context. FOIA's "core purpose" is to require disclosure when it will "contribut[e] significantly to public understanding *of the operations or activities of the government*." *United States Dep't of Justice* v. *Reporters*

Comm. for Freedom of the Press, 489 U.S. 749, 775 (1989). Just as the "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind," *id.* at 765, Congress did not design FOIA generally to require disclosing commercial or financial information of nongovernment entities. Exemption 4 protects such confidential information from mandatory disclosure, including to marketplace competitors.

2. The Eighth Circuit applied the *National Parks* test, which limits "confidential" information to contexts in which disclosure would likely "cause substantial harm to the [submitter's] competitive position" or "impair the Government's ability to obtain necessary information in the future." *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). That test has no basis in FOIA's text or context. Even respondent fails to offer any textual basis for it. The D.C. Circuit has since artificially limited *National Parks* to a subset of Exemption 4 contexts and elsewhere applies the ordinary meaning of "confidential," thus confirming the test's inherent flaws.

3. Respondent's other contentions do not salvage *National Parks*. A "narrow construction" of Exemption 4 cannot yield *National Parks'* atextual test; post-enactment statements during a different Congress do not support it; and respondent's remaining sources fail to provide any sound basis for departing from the text Congress enacted.

B. The store-level SNAP-redemption information here is "confidential." It is "confidential" under Exemption 4 because it was reasonably "communicated in confidence" to USDA. Stores submitted that redemp-

tion information in the context of USDA's repeated representations going back more than 40 years that it would *not* publicly disclose it.

C. Finally, in the circumstances of this case, petitioner had Article III standing to bring an independent appeal after the government declined to appeal itself. USDA had previously given independent assurances that it would not disclose store-level redemption data, and then, significantly, it provided an additional assurance that it would not disclose the relevant information during appellate proceedings. The government has now further determined that, *if* the district court's judgment mandating disclosure is reversed, it will not disclose that data in light of its legal obligations under Section 2018(c). A favorable appellate decision thus would likely redress petitioner's injury-in-fact. Accordingly, the Eighth Circuit's judgment should be reversed.

ARGUMENT

STORE-LEVEL SNAP-REDEMPTION INFORMATION IS "CONFIDENTIAL" UNDER FOIA EXEMPTION 4

FOIA Exemption 4 applies to matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). As the case comes to this Court, it is established that store-level redemption information —*i.e.*, the dollar amount that each individual retail food store redeems through SNAP—is "commercial or financial information" that was "obtained from a person" by USDA. Pet. App. 2a & n.2. That information is also "confidential" under Exemption 4 because it was communicated in confidence to USDA. The court of appeals erred in holding otherwise.

A. The Term "Confidential" In Exemption 4 Carries Its Ordinary Meaning

FOIA does not define the term "confidential." In the absence of a statutory definition, "[i]t is a 'fundamental canon of statutory construction'" that "'words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 227 (2014) (citation omitted). Dictionaries contemporary to the 1966 enactment of Exemption 4 establish that information that an agency has obtained from a person will be "confidential" if the information (1) would customarily not be released to the public by the person from whom it was obtained, or (2) was communicated in confidence to the government. That plain-language interpretation of "confidential" is confirmed by FOIA's statutory context and legislative history.

1. Exemption 4's text, context, and history show that "confidential" carries its ordinary meaning

a. The contemporary and ordinary meaning of "confidential" was—and still is—"[c]ommunicated in confidence" or "secret." *Webster's New International Dictionary* 560 (2d ed. 1957); see *Webster's Third New International Dictionary* 476 (1966) ("communicated, conveyed, acted on, or practiced in confidence : known only to a limited few : not publicly disseminated : PRIVATE, SECRET"); see also *American Heritage Dictionary* 279 (1970) ("Done or communicated in confidence; told in secret."); *Black's Law Dictionary* 370 (4th ed. 1951) ("intended to be held in confidence or kept secret"). Indeed, this Court in *United States Department of Justice* v. *Landano*, 508 U.S. 165 (1983), which construed "confidential" in FOIA Exemption 7(D), quoted the 1986 edition of *Webster's Third* defining that

word to mean "'communicated, conveyed, [or] acted on . . . in confidence: known only to a limited few: not publicly disseminated.'" *Id.* at 173 (citation omitted; brackets in original). Under that common understanding of the term, Exemption 4 protects two general categories of "confidential" information.

First, information may be "confidential" based on circumstances independent of the context in which the government receives it. Such information is "confidential" if it is generally held in confidence or kept secret by those who convey it to the government. The submission of such "confidential" information to the government does not automatically strip it of its confidential status because, "[i]n common usage, confidentiality is not limited to complete anonymity or secrecy." *Landano*, 508 U.S. at 173. So long as the context in which the information is provided does not indicate that the government would itself publicly disseminate it, the information remains confidential under Exemption 4.

That ordinary understanding of the term is reflected in the committee reports on FOIA as enacted in 1966. The reports emphasize that Exemption 4 protects "the confidentiality of information obtained by the Government" when it "would not customarily be made public by the person from whom it was obtained." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (*House Report*); accord S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (*Senate Report*). This Court has accordingly observed, citing those reports, that Exemption 4 "was designed to protect confidential information" where it "'would customarily not be released to the public by the person from whom it was obtained.'" *Forsham* v. *Harris*, 445 U.S. 169, 184-185 (1980) (citations omitted). Such information,

for instance, would typically "include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments." *House Report* 10; see *Senate Report* 9 (similar list including "business sales statistics"). Determining such information's confidentiality based on objective factors reflecting how the information is customarily treated outside of the government provides a straightforward and workable basis on which to apply Exemption 4's protections.

Second, information may be "confidential" because of the circumstances of its receipt by the government. If a person provides information to the government in the context of government statements or actions that are reasonably understood to show that the government will not publicly disclose it, such information is "communicated in confidence" and is therefore "confidential." Exemption 4's protective scope therefore "include[s] information which is *given to an agency in confidence*," and embodies the fairness-based principle that "where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations." *House Report* 10 (emphasis added).

b. The foregoing meaning of "confidential" is reinforced by FOIA's broader statutory context, including within Exemption 4 itself and in the analogous provisions of Exemption 7(D).

i. Exemption 4's protection for "confidential" information applies only if the information is commercial or financial information "obtained from a person," 5 U.S.C. 552(b)(4), *i.e.*, commercial or financial information that is "obtained [from] *outside* the Government." *Federal Open Mkt. Comm. of the Fed. Reserve Sys.* v. *Merrill*, 443 U.S. 340, 360 (1979) (emphasis added); see 5 U.S.C.

551(2) (defining "'person'" to include an individual or entity "other than an agency"). That limitation is significant, because FOIA's "core purpose" is simply to require disclosure of agency records that "contribut[e] significantly to public understanding *of the operations or activities of the government*," and thereby to "inform[] [citizens] about what their government is up to." *United States Dep't of Def.* v. *Federal Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (*DoD*) (quoting *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 775 (1989)). Just as the "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind," *Reporters Comm.*, 489 U.S. at 765, the disclosure of commercial or financial information about private individuals, businesses, and other organizations is not what Congress designed FOIA to address.

Exemption 4 thus serves an important limiting function by protecting commercial and financial information about nongovernment entities obtained from outside the government and information furnished in confidence. Those protections are necessary to prevent FOIA from being transformed into a means to obtain commercial and financial data about marketplace competitors and other private individuals and entities whose information is aggregated in government files. See Pet. Br. 34.

ii. This Court's interpretation of FOIA Exemption 7(D) also reinforces the foregoing construction. Exemption 7(D) protects both the "identity of a confidential source" who has provided "information on a confidential basis" and the information he has furnished. 5 U.S.C. 552(b)(7)(D). In *Landano*, the Court adopted the "common usage" of the word "'confidential'"—as

embodied in its dictionary definition—to conclude that "[a] statement can be made 'in confidence'" where "the speaker expects that the information will not be published indiscriminately." 508 U.S. at 173. That understanding is consistent with the Conference Report on the 1974 amendments that enacted Exemption 7(D), which explained that the Exemption protects information about a source's identity "if the source 'provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.'" *Id.* at 172 (citation omitted).

Landano approved an objective test for determining whether "an implied assurance of confidentiality fairly can be inferred," based on "generic circumstances" surrounding the communication that would "characteristically support an inference of confidentiality." 508 U.S. at 177, 179. Circumstances supporting a "reasonable" inference that a typical informant would "normally expect [his] cooperation * * * to be kept confidential," the Court explained, include factors such as the "nature of the informant's ongoing relationship with the [government]" and "the nature of the crime and the source's relation to it." *Id.* at 179.

That analytical approach to Exemption 7(D) closely parallels the objective assessment of whether information is "confidential" under Exemption 4 above, which considers how the information is customarily treated outside the government and objective factors surrounding submission of information to the government. Where such context supports a "reasonable expectation of confidentiality," *Landano*, 508 U.S. at 173, the information is "confidential" under Exemption 4.

2. The D.C. Circuit's National Parks *test is atextual and wrong*

In 1974, the D.C. Circuit in *National Parks* held that information is "'confidential'" under Exemption 4 if its disclosure "is likely" either "(1) to impair the Government's ability to obtain necessary information in the future"; or "(2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770. Although respondent purports to defend "the *National Parks* interpretation of 'confidential' commercial information," Br. in Opp. 30, respondent never attempts (*id.* at 29-34) to identify any textual basis for it.

a. *National Parks* likewise never attempted to base its reformulation of "confidential" on FOIA's text. Before *National Parks*, the D.C. Circuit had construed "confidential" in accord with its ordinary meaning. See, *e.g.*, *Sterling Drug Inc.* v. *FTC*, 450 F.2d 698, 709 (1971) (Exemption 4 protects "the type [of information] 'which would customarily not be released to the public by the person from whom it was obtained.'"); *Grumman Aircraft Eng'g Corp.* v. *Renegotiation Bd.*, 425 F.2d 578, 582 (1970) (Exemption 4 protects what the submitter "would not reveal to the public."). The *National Parks* court acknowledged those earlier decisions, 498 F.2d at 766-767, but determined that, notwithstanding its prior understanding of "'confidential,'" "[a] court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption," *id.* at 767. *National Parks* then divined that "purpose" principally from witness statements about certain dangers of disclosure in congressional hearings held in a prior Congress *before* text had been drafted for Exemption 4.

Id. at 768-769. And after inferring that Exemption 4's purpose was to "encourag[e] cooperation with the Government by persons having [useful] information" and prevent "competitive disadvantages which would result from [the] publication" of "financial or commercial data," the court narrowed Exemption 4 to cover those two situations. *Id.* at 768, 770.

That flawed analytical approach reflects a bygone era of statutory construction and is untethered to any appropriate interpretive guideposts. This Court has emphasized that it is not the courts' role "to rewrite [a] statute so that it covers only what [they] think is necessary to achieve what [they] think Congress really intended." *Lewis* v. *City of Chicago*, 560 U.S. 205, 215 (2010). It is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Those provisions are interpreted according to the actual text of the "law enacted by Congress," which "need not be seconded by a committee report"—much less by witness statements in hearings predating the legislative text—to have "operati[ve]" effect. *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 326 (2008).

Moreover, nothing in the ordinary meaning of "confidential" supports *National Parks'* view that commercial information furnished to the government is "confidential" only if its disclosure would be likely "to impair the Government's ability to obtain necessary information in the future" or "to cause substantial harm to the competitive position of the person from whom the information was obtained," 498 F.2d at 770. The government's ability to obtain *other* information in the future does not determine whether the particular com-

mercial information at issue in the FOIA request is currently "confidential." Nor is a likelihood of future competitive harm—or, more precisely, competitive harm that qualifies as "substantial" in the view of an agency or court—the measure of whether information is, in fact, "confidential." Had Congress intended such complicated inquiries under Exemption 4, it would have provided a textual basis for them. Cf. Pet. Br. 36 n.21 (citing statutes requiring similar inquiries).

b. In 1991, the government petitioned the en banc D.C. Circuit to overturn *National Parks'* interpretation of "confidential," which members of that court had already criticized as "'fabricated, out of whole cloth.'" *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871, 872, 875 (1992) (en banc) (*Critical Mass*) (quoting prior opinion), cert. denied, 507 U.S. 984 (1993). But rather than overrule *National Parks*—and without determining whether *National Parks* was correctly decided—the en banc court upheld its "definition of 'confidential'" as a matter of stare decisis, *id.* at 875-879, but limited that definition to contexts involving "information that persons are *required* to provide the Government," *id.* at 872 (emphasis added). The en banc court then adopted a *different* definition of "'confidential'" for information "given to the Government voluntarily." *Ibid.* Under that alternative definition—which reflects the term's ordinary meaning—information is "confidential" if "it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Id.* at 879; see *id.* at 872, 880.

The result is that the D.C. Circuit has now created disparate definitions for the same term to apply in different contexts. That effectively creates, without a textual basis, two distinct exemptions. This Court recently

rejected a similarly anomalous doctrine creating "High" and "Low" versions of Exemption 2 without textual justification. *Milner* v. *Department of the Navy*, 562 U.S. 562, 566-567, 569-570 (2011). The Court should follow the same course here.

3. *Respondent's arguments for adopting the* National Parks *test are unpersuasive*

Rather than address Exemption 4's text, respondent invokes (Br. in Opp. 30-34) a principle of narrow construction and non-statutory sources to support *National Parks*. None of those contentions has merit.

a. First, respondent invokes this Court's statement that "FOIA exemptions are to be narrowly construed." Br. in Opp. 30 (quoting *FBI* v. *Abramson*, 456 U.S. 615, 630 (1982)); see, *e.g.*, *Milner*, 562 U.S. at 571-572 (applying narrow construction by simply "confining the provision's meaning to its words"). But this Court has not yet applied that principle to Exemption 4, and, if applied here, the Court should apply it with caution.

This Court has made clear that Congress established in FOIA a "basic policy" favoring disclosure, but also sought to protect the "important interests served by the exemptions." *Abramson*, 456 U.S. at 630-631. The Court has therefore concluded that FOIA's Exemptions —which embody Congress's determination that "public disclosure is not always in the public interest," *CIA* v. *Sims*, 471 U.S. 159, 166-167 (1985)—should be given "meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989).

Such a balanced approach to FOIA is warranted because "no law pursues its purpose at all costs," and when Congress enacts "textual limitations upon a law's scope"—like FOIA's Exemptions—those limitations

"are no less a part of its 'purpose' than [the law's] substantive authorizations." *Kucana* v. *Holder*, 558 U.S. 233, 252 (2010) (citation omitted). Indeed, Congress designed FOIA to "balance the opposing interests" involved, and thereby sought to achieve the "fullest *responsible* disclosure" by adopting "a workable formula which encompasses, balances, and protects all interests." *Senate Report* 3 (emphasis added); see *House Report* 6 (FOIA "strikes a balance" between "the right of the public to know" and the need "to keep information in confidence.").

Moreover, no proposition of narrow construction warrants adding atextual limitations to the language that Congress enacted in Exemption 4. This Court has construed FOIA's Exemptions "consistent with the plain meaning of [their text]," *Milner*, 562 U.S. at 581, and has rejected interpretations that "require[] [the court] to read into the FOIA [language] that Congress did not itself provide," *United States Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 154 (1989). No understanding of the term "confidential" and nothing in FOIA's statutory context can salvage *National Parks*.

b. Second, respondent relies (Br. in Opp. 16, 30-31) on a 1978 committee report, H.R. Rep. No. 1382, 95th Cong., 2d Sess. (*1978 Report*), to defend *National Parks'* substantial-competitive-harm test. But nothing that a committee of the 95th Congress may have said in that report could shed meaningful light on the intent of the 89th Congress that enacted Exemption 4. This Court has repeatedly held that such "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.'" *United States* v. *Woods*, 571 U.S. 31, 48 (2013) (quoting *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 242 (2011)) (brackets in original).

The 1978 Report, which did not report on any proposed legislation, did not even purport to determine the proper interpretation of Exemption 4. It simply described the then-current state of the lower courts' decisional law without "consider[ing] the merits of the substantial competitive harm test" or "delv[ing] deeply into the scope of [E]xemption 4." *1978 Report* 22. Indeed, the report acknowledged that *National Parks* "ha[d] been severely criticized"; recognized that "[m]any contend that [its test] is too narrow to protect all business records that should be accorded confidential treatment" under Exemption 4; and emphasized that it was "not yet clear that [the D.C. Circuit had] reached the only right answer." *Id.* at 21.

c. Finally, respondent states (Br. in Opp. 31) that the "likelihood-of-substantial-competitive-harm analysis has been adopted in numerous federal regulations" as the test for "confidential" information. But such regulations governing records disclosure simply reflect that the government has been required to operate under the lower courts' widespread adoption of the *National Parks* test. After *National Parks* had taken root, the President issued Executive Order No. 12,600, 3 C.F.R. 235 (1987 comp.) (5 U.S.C. 552 note), to require agencies to "establish procedures" governing the processing of FOIA requests for "'[c]onfidential commercial information'" when it is "arguabl[e]" that "disclosure could reasonably be expected to cause substantial competitive harm." §§ 1, 2(a), 3 C.F.R. 235-236. Those procedures—which require notifying submitters of a possible disclosure of their information and instruct agencies to consider the grounds that submitters identify for non-disclosure, §§ 1, 4-5, 3 C.F.R. 235-237—are a practical necessity for agencies to evaluate, as

National Parks requires, whether disclosure would likely cause "substantial" competitive harm to private parties. That need to make that determination underscores *National Parks'* defects. "Congress' intent [in FOIA was] to provide '*workable* rules' of FOIA disclosure." *Landano*, 508 U.S. at 180 (emphasis added; citations and internal quotation marks omitted); accord *Reporters Comm.*, 489 U.S. at 779; *FTC* v. *Grolier Inc.*, 462 U.S. 19, 27 (1983). Yet *National Parks*, through its "atextual" and "unsupported interpretation" of Exemption 4, has necessitated an unduly complicated and "amorphous test" requiring "judicial speculation about" the likely degree of competitive downstream effects of disclosure. *New Hampshire Right to Life* v. *Department of Health & Human Servs.*, 136 S. Ct. 383, 384-385 (2015) (Thomas, J., dissenting from the denial of certiorari) (criticizing *National Parks*).

B. Store-Level Redemption Information Is "Confidential"

Applying the correct understanding of "confidential," store-level SNAP-redemption information is "confidential" under Exemption 4. Although such information is not customarily released publicly by retailers, that factor is likely insufficient in itself to render it "confidential" in this particular context. The information is nevertheless "confidential" under Exemption 4 because it was reasonably communicated in confidence to USDA in the context of USDA's repeated assurances that such redemption data would not be publicly disclosed.

1. Stores maintain their SNAP-redemption data as confidential

The record reflects that retail food stores do not customarily disclose publicly their SNAP-redemption data.

See Pet. Br. 43-46. That showing would be sufficient in many contexts to establish the "confidentiality" of the information under Exemption 4. After all, Exemption 4 was understood at the time of its enactment to protect "business sales statistics," which "would not customarily be made public by the person from whom it was obtained." *House Report* 10. SNAP-redemption information—a type of business sales statistic—fits that description.

But whether particular information is properly considered "confidential" must also take into account the context in which that information appears. Certain information obtained from nongovernment entities, for instance, is itself intimately linked to the government's own actions, actions that one would not reasonably expect to be kept confidential absent some agreement or requirement to that effect. And if disclosure of the government's own actions would effectively disclose the information in question, no expectation of confidentiality would be objectively reasonable.

The amount that the government pays a private entity to supply goods or services to the government, for instance, is information about *action taken by the government itself*, which may generally be disclosed to the public. See, *e.g.*, Federal Funding Accountability and Transparency Act of 2006, Pub. L. No. 109-282, §§ 2(a)(2), (b)(1)(A), and (B), 3, 120 Stat. 1186-1187, 1189 (generally requiring public disclosure of the "name" of the recipient, and the dollar "amount," of unclassified federal "contracts, subcontracts, purchase orders," "grants, subgrants, loans," and similar federal awards); 5 C.F.R. 293.311(a)(1) and (4) (requiring public disclosure of names and salaries of most federal employees); 48 C.F.R. 4.603(a) ("[A]ll unclassified Federal [contract] award

data must be publicly accessible."). FOIA's "core purpose" is to "inform[] [citizens] about what their government is up to" by making available information about the "activities of the government." *DoD*, 510 U.S. at 495 (citations and emphasis omitted). Among the most significant actions a federal agency takes is action expending public funds. Indeed, the "protection of the public fisc is a matter that is of interest to every citizen," *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 262 (1986), and FOIA was enacted in part to address dissatisfaction with earlier failures to disclose information about agency management of "billions of dollars' worth of Federal construction projects," *House Report* 6. Disclosure of the amount and source of government procurements is important to democratic accountability. Such disclosure allows an appropriately informed public debate about the expense of government action, the entities from which the government procures products and services, the payments they receive in return, and how such agency expenditures can affect winners and losers in the marketplace.

In this case, store-level SNAP-redemption data necessarily corresponds to the government's own payments of federal funds (through EBT processors) to the stores. That fact significantly diminishes any basis for finding the information to be "confidential" for purposes of Exemption 4. Indeed, if not for other statutory constraints on its ability to disclose the information, USDA informs this Office that it would now likely elect to release store-level redemption data nationwide.[5]

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[5] USDA has also informed this Office that if Congress had not recently amended Section 2018(c), it might have explored changing its position to permit the release of store-level redemption data collected after such a change.

2. The government has for decades assured retailers that their SNAP data will not be publicly disclosed

This Court need not determine whether store-level SNAP-redemption information is "confidential" based on how stores treat the data, however, because the information was communicated in confidence to USDA in light of the government's repeated and consistent statements over several decades that it would not publicly disclose it. Where, as here, "the Government has obligated itself in good faith not to disclose documents or information which it receives," such materials are "confidential" under the ordinary meaning of the word, and Exemption 4 enables the government "to honor such obligations." *House Report* 10.

a. The government's public assurances from 1978 onward about the confidentiality of stores' redemption data were made during USDA's implementation of the regulatory framework first established in 1977 by Section 2018(c). Section 2018(c) then, as now, contains two salient components. First, Section 2018(c) provides that USDA regulations "shall require an applicant retail food store * * * to submit information" that will permit a determination to be made whether "such applicant qualifies, or continues to qualify, for approval." 7 U.S.C. 2018(c); see 7 U.S.C. 2018(c) (Supp. I 1977). Second, Section 2018(c) protects such information in two independent ways: (1) It has directed since 1977 that regulations "shall provide for safeguards which limit the use or disclosure of information obtained under the authority granted by [Section 2018(c)] to purposes" specified therein, and (2) it has made it a criminal offence since 1994 to "publish[], divulge[], disclose[], or make[] known in any manner or to any extent not authorized by Fed-

eral law (including a regulation) any information obtained under [Section 2018(c)]." 7 U.S.C. 2018(c); see 7 U.S.C. 2018(c) (Supp. I 1977).

The government's long history of assurances began with USDA's 1978 implementing regulations announcing that "information furnished [to USDA] by firms" under Section 2018(c) included "*their redemptions of coupons*," and that such redemption information "*may not be used or disclosed* to anyone except for purposes directly connected with the administration and enforcement of the Food Stamp Act and these regulations." 7 C.F.R. 278.1(*l*) (1979) (emphases added).

By 1985, Congress itself understood that, because of Section 2018(c)'s prohibition against disclosure, "State agencies [could not] be informed of * * * redemption information" that USDA collected from retail stores. H.R. Rep. No. 271, 99th Cong., 1st Sess. Pt. 1, at 155 (1985). To allow USDA to share such information with "State agencies administering the special supplemental food program for women, infants and children (WIC)," *ibid.*, Congress amended Section 2018(c) to authorize disclosures for that purpose. Food Security Act of 1985, Pub. L. No. 99-198, § 1521, 99 Stat. 1579-1580. USDA accordingly announced that the 1985 amendment authorized it to share with WIC agencies the "food stamp redemption figures * * * obtained from firms" that Section 2018(c) otherwise protected from disclosure. 51 Fed. Reg. 43,612, 43,613 (Dec. 3, 1986). USDA then updated its regulation prohibiting disclosure of "redemptions of coupons" to add that exception. 7 C.F.R. 278.1(r) (1988).

In 1994, Congress again revised Section 2018(c) because it prohibited disclosure of "information provided by retail food stores"—including "food stamp redemp-

tion information"—to law-enforcement and investigative agencies. H.R. Rep. No. 352, 103d Cong., 1st Sess. 5 (1993). That amendment to Section 2018(c) authorized disclosure to such agencies and, in addition, added a new criminal prohibition against disclosing "any information obtained under [Section 2018(c)]" when disclosure is "not authorized by Federal law (including a regulation)." Food Stamp Program Improvements Act of 1994, Pub. L. No. 103-225, § 203, 108 Stat. 108-109.

USDA again amended its regulation to reflect that "expan[sion]" of its authority to share information from "retail food concerns—including information about food stamp redemptions"—with law-enforcement and investigative agencies. 61 Fed. Reg. 68,119, 68,120 (Dec. 27, 1996); see 60 Fed. Reg. 25,625, 25,626 (May 12, 1995) (explaining the new authorization to disclose "food stamp redemption data"). In light of Section 2018(c)'s new criminal prohibition against disclosing information obtained from retailers under Section 2018(c) except when authorized by law or regulation, USDA altered its implementing regulation—which had previously stated that information *may not* be disclosed except as provided—to provide that "redemption data" and other information obtained under Section 2018(c) for determining a firm's "continued eligibility" "*may* be disclosed" in the circumstances it identified. 7 C.F.R. 278.1(r) (1997) (emphasis added); accord 7 C.F.R. 278.1(q).

USDA has also repeatedly announced in the Federal Register that the information it obtains from retailers under Section 2018(c) and uploads to STARS "includes * * * redemption data" that may be disclosed only as authorized under Section 2018(c). 75 Fed. Reg. 81,205, 81,207 (Dec. 27, 2010); see also 64 Fed. Reg. 17,604, 17,606 (Apr. 12, 1999) (explaining that Section 2018(c)

governs disclosure of "redemption data"); 61 Fed. Reg. 63,815, 63,815 (Dec. 2, 1996) ("[S]ection 9(c) of the Food Stamp Act," *i.e.*, Section 2018(c), regulates disclosure of "redemption data.").

Those consistent and repeated public statements by USDA reflect a "long-standing policy" of protecting store-level SNAP-redemption data as confidential under regulations implementing Section 2018(c). J.A. 71. Retailers that have participated in SNAP have accordingly done so under a reasonable expectation that such data would not be publicly disclosed. For that reason, the redemption information was "communicated in confidence" and is thus "confidential" under Exemption 4.

b. In 2014, the Eighth Circuit concluded in this case that Section 2018(c)'s criminal prohibition against disclosure did not apply to SNAP-redemption data. It recognized that Section 2018(c) both applies to information "submit[ted]" by retail stores and prohibits disclosing information "obtained under [Section 2018(c)]," 7 U.S.C. 2018(c) (2012), but it concluded that Section 2018(c) did not apply to the redemption data requested by respondent because USDA "actually obtained [that data] from third-party [EBT] processors, not the retailers themselves." Pet. App. 54a-55a. That conclusion is incorrect, because that information is furnished by retailers to USDA through the EBT system. But this Court need not resolve definitively whether the Eighth Circuit erred, because even if it were correct, USDA's repeated statements that store-level SNAP-redemption data would not be publicly disclosed show that the information was communicated in confidence at the time. Even if USDA's underlying reasons for its assurances were incorrect, a retail store would have reasonably

concluded when it submitted the 2005-2010 information at issue that it was to be held by USDA in confidence.

The reasonableness of that conclusion flows not only from USDA's longstanding regulatory statements, but also from the recognition that USDA is properly understood to "obtain" redemption information from stores under Section 2018(c), even though the information is transmitted *through* the EBT system—just as USDA would be properly understood to "obtain" information from a store that had mailed it, even though the information was transmitted through the postal system. The EBT system is designed to transmit redemption information between the store and USDA, just like its predecessor system was designed to transmit food-stamp redemption-certificate forms from a store, through a bank, to USDA. See pp. 3-4, *supra*. Indeed, Congress has recently clarified—while certiorari was pending in this case—that Section 2018(c)'s application to information "submit[ted]" by stores "include[s] * * * redemption data provided *through* the [EBT] system." App., *infra*, 3a (emphasis added); see p. 9, *supra*.

C. Respondent's Jurisdictional Contention Lacks Merit

In its brief in opposition, respondent argued (at 28) that this is an "atypical" Exemption 4 case because the government declined to appeal the district court's judgment and that petitioner lacked Article III standing to pursue an independent appeal. Cf. *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). The procedural posture of this case is indeed atypical, but the government concludes, under the circumstances of this case, that petitioner had Article III standing to appeal.

1. The current procedural posture, in which the government did not participate on appeal, is extraordinarily atypical for a FOIA action. When the government declines to appeal from a judgment requiring disclosure under FOIA, it presumptively signals "its acceptance of that decision, and its lack of interest in" continuing to withhold the requested agency records. See *Diamond* v. *Charles*, 476 U.S. 54, 63 (1986). Regardless of the outcome of an appeal brought by another person, the appeal could not result in any limitation on the agency's discretion to disclose its own records, because "FOIA is exclusively a disclosure statute" that prohibits only the improper "'*withholding* [of] agency records'" and does "not limit an agency's discretion to disclose information." *Chrysler Corp.* v *Brown*, 441 U.S. 281, 292, 294 (1979) (quoting 5 U.S.C. 552(a)(4)(B)) (emphasis added). "FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information," and it therefore confers no "right to enjoin agency disclosure." *Id.* at 293-294; see *GTE Sylvania, Inc.* v. *Consumers Union of the U.S., Inc.*, 445 U.S. 375, 378 n.2 (1980). Indeed, even if a district court's order *requiring* disclosure under FOIA is stayed pending appeal, the government could simply release the records itself, rendering any appeal moot. In short, nothing in an appeal by a nongovernment person could prevent the agency's disclosure of its own records.

For those reasons, a person opposing disclosure could not properly intervene as of right in a FOIA action under Federal Rule of Civil Procedure 24. Such a person is unable to plead its own FOIA-based "claim for relief" or a FOIA-related "defense[] to [any] claim asserted against it," Fed. R. Civ. P. 8(a) and (b)(1)(A), and

therefore cannot properly submit, as it must, a "pleading" asserting a "claim or defense" on which it might intervene as a party. Fed. R. Civ. P. 24(c); see *Diamond*, 476 U.S. at 76-77 (O'Connor, J., concurring in part and concurring in the judgment); *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 548 & n.9 (1986) (stating that this pleading requirement is "particularly important"); *SEC* v. *Prudential Sec. Inc.*, 136 F.3d 153, 156 n.4 (D.C. Cir. 1998) (putative intervenor's proffered "pleadings [must] allege a legally sufficient claim or defense") (citation omitted). The litigant would also lack Rule 24(a)(2)'s requisite "significantly protectable interest," *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971), to justify intervention under a pure FOIA theory, because FOIA offers no "legal protection" to such an interest. *Diamond*, 476 U.S. at 75 (O'Connor, J., concurring in part and concurring in the judgment) (explaining that *Donaldson* held that an individual's interest in preventing his employer's disclosure of the employer's records showing monetary payments to him was insufficient to warrant intervention as of right, because the interest in "overcom[ing] his employer's 'willingness, under summons, to comply and to produce records'" was not an interest enjoying "legal protection") (citation omitted).

The only proper course for a person opposing an agency's disclosure of records is to assert a so-called "reverse"-FOIA claim invoking the legal protection of a *different* statute creating a cause of action to set aside an agency decision to disclose records. That person, for instance, may sue under the APA to challenge agency action to disclose records on the ground that disclosure would be contrary to some other non-FOIA source of

law. *Chrysler Corp.*, 441 U.S. at 317-318. A plaintiff asserting such a claim could timely seek intervention in an existing FOIA case on the basis of that opposing claim, and the district court would then be able to resolve the FOIA and reverse-FOIA claims simultaneously.[6]

2. Petitioner did not assert any such claim in this case. But any separate objection to its intervention—including petitioner's failure to file a pleading to assert its own claim or defense under a statute (such as Section 2018(c)) independent of FOIA—was neither raised on appeal nor in respondent's brief in opposition. Such defects were thus forfeited on appeal and waived in this Court. See Sup. Ct. R. 15.2.

We also conclude, in the circumstances of this case, that petitioner had Article III standing to appeal. Although USDA in 2017 announced it would comply with the district court's judgment rather than appeal, it had previously given independent assurances that it would not disclose store-level redemption data, and then, significantly, it affirmatively assured the court that it would not release that data during petitioner's expected appeal. See pp. 7-9, *supra*. That background and forbearance, even though USDA could have released the data without a court order requiring disclosure, could reasonably be understood to create by the time that petitioner appealed a sufficient likelihood that petitioner's

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[6] Another litigant did file an action against USDA in August 2018 in Texas with respect to the subset of store-level SNAP-redemption data in this case pertaining to Texas retailers, but it incorrectly did so as a belated collateral attack on the district court's judgment in this case. *Texas Retailers Ass'n* v. *USDA*, No. 18-50895, 2019 WL 548966 (5th Cir. Feb. 11, 2019) (per curiam) (vacating preliminary injunction prohibiting disclosure with instructions to await this Court's decision in this case).

threatened injury of disclosure would be redressed if petitioner prevailed on appeal. See *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 618-619 (1989). And now, USDA has confirmed that, if the district court's judgment mandating disclosure is reversed, USDA will not disclose that data in light of its understanding of its legal obligations under Section 2018(c), as recently amended. See pp. 30-31, *supra*.[7]

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to enter judgment against respondent.

Respectfully submitted.

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[7] If this Court concludes that the court of appeals correctly held that withholding was not permitted by Exemption 4, it would be appropriate for the Court to vacate and remand to the Eighth Circuit for further consideration in light of Congress's intervening amendment to Section 2018(c).

APPENDIX

1. 5 U.S.C. 551 provides in pertinent part:

Definitions

For the purpose of this subchapter—

* * * * *

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

* * * * *

2. 5 U.S.C. 552 provides in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* * * * *

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

* * * * *

3. 7 U.S.C. 2018 (Supp. II 2014), as amended by the Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 4006(f)(3), 132 Stat. 4638 (enacted Dec. 20, 2018), provides in pertinent part:

Approval of retail food stores and wholesale food concerns

* * * * *

(c) Information submitted by applicants; safeguards; disclosure to and use by State agencies

Regulations issued pursuant to this chapter shall require an applicant retail food store or wholesale food concern to submit information, which may include relevant income and sales tax filing documents, purchase invoices, records relating to electronic benefit transfer equipment and related services, transaction and redemption data provided through the electronic benefit transfer system, or program-related records, which will permit a determination to be made as to whether such applicant qualifies, or continues to qualify, for approval under the provisions of this chapter or the regulations issued pursuant to this chapter. The regulations may require retail food stores and wholesale food concerns to provide written authorization for the Secretary to verify all relevant tax filings with appropriate agencies and to obtain corroborating documentation from other sources so that the accuracy of information provided by the stores and concerns may be verified. Regulations issued pursuant to this chapter shall provide for safeguards which limit the use or disclosure of information obtained under the authority granted by this subsection to purposes directly connected with administration and enforcement of the provisions of this chapter or the regulations issued pursuant to this chapter, except that

such information may be disclosed to and used by Federal law enforcement and investigative agencies and law enforcement and investigative agencies of a State government for the purposes of administering or enforcing this chapter or any other Federal or State law and the regulations issued under this chapter or such law, and State agencies that administer the special supplemental nutrition program for women, infants and children, authorized under section 17 of the Child Nutrition Act of 1966 [42 U.S.C. 1786], for purposes of administering the provisions of that Act [42 U.S.C. 1771 et seq.] and the regulations issued under that Act. Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law (including a regulation) any information obtained under this subsection shall be fined not more than $1,000 or imprisoned not more than 1 year, or both. The regulations shall establish the criteria to be used by the Secretary to determine whether the information is needed. The regulations shall not prohibit the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law.

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4. 7 U.S.C. 2018 (2012) provides in pertinent part:

Approval of retail food stores and wholesale food concerns

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(c) Information submitted by applicants; safeguards; disclosure to and use by State agencies

Regulations issued pursuant to this chapter shall require an applicant retail food store or wholesale food concern to submit information, which may include relevant income and sales tax filing documents, which will permit a determination to be made as to whether such applicant qualifies, or continues to qualify, for approval under the provisions of this chapter or the regulations issued pursuant to this chapter. The regulations may require retail food stores and wholesale food concerns to provide written authorization for the Secretary to verify all relevant tax filings with appropriate agencies and to obtain corroborating documentation from other sources so that the accuracy of information provided by the stores and concerns may be verified. Regulations issued pursuant to this chapter shall provide for safeguards which limit the use or disclosure of information obtained under the authority granted by this subsection to purposes directly connected with administration and enforcement of the provisions of this chapter or the regulations issued pursuant to this chapter, except that such information may be disclosed to and used by Federal law enforcement and investigative agencies and law enforcement and investigative agencies of a State government for the purposes of administering or enforcing this chapter or any other Federal or State law and the regulations issued under this chapter or such law, and State agencies that administer the special supplemental

nutrition program for women, infants and children, authorized under section 17 of the Child Nutrition Act of 1966 [42 U.S.C. 1786], for purposes of administering the provisions of that Act [42 U.S.C. 1771 et seq.] and the regulations issued under that Act. Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law (including a regulation) any information obtained under this subsection shall be fined not more than $1,000 or imprisoned not more than 1 year, or both. The regulations shall establish the criteria to be used by the Secretary to determine whether the information is needed. The regulations shall not prohibit the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law.

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5. 7 U.S.C. 2018 (Supp. I 1977) provides in pertinent part:

Approval of retail food stores and wholesale food concerns

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(c) Information submitted by applicants; safeguards

Regulations issued pursuant to this chapter shall require an applicant retail food store or wholesale food concern to submit information which will permit a determination to be made as to whether such applicant qualifies, or continues to qualify, for approval under the provisions of this chapter or the regulations issued pursuant to this chapter. Regulations issued pursuant to this chapter shall provide for safeguards which limit the

use or disclosure of information obtained under the authority granted by this subsection to purposes directly connected with administration and enforcement of the provisions of this chapter or the regulations issued pursuant to this chapter.

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6. 7 C.F.R. 278.1 provides in pertinent part:

Approval of retail food stores and wholesale food concerns.

* * * * *

(q) *Use and disclosure of information provided by firms.* With the exception of EINs and SSNs, any information collected from retail food stores and wholesale food concerns, such as ownership information and sales and redemption data, may be disclosed for purposes directly connected with the administration and enforcement of the Food and Nutrition Act of 2008 and these regulations, and can be disclosed to and used by State agencies that administer the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). Such information may also be disclosed to and used by Federal and State law enforcement and investigative agencies for the purpose of administering or enforcing other Federal or State law, and the regulations issued under such other law. Such disclosure and use shall also include companies or individuals under contract for the operation by, or on behalf of FNS to accomplish an FNS function. Such purposes include the audit and examination of such information by the Comptroller General of the United States authorized by any

other provision of law. Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law or regulations any information obtained under this paragraph shall be fined not more than $1,000 or imprisoned not more than 1 year, or both. Safeguards with respect to employee identification numbers (EINs) are contained in paragraph (q)(2) of this section. Safeguards with respect to Social Security numbers (SSNs) are contained in paragraph (q)(3) of this section.

(1) *Criteria for requesting information.* FNS shall determine what information can be disclosed and which government agencies have access to that information based on the following criteria:

(i) Federal and State law enforcement or investigative agencies or instrumentalities administering or enforcing specified Federal and State laws, or regulations issued under those laws, have access to certain information maintained by FNS. Such agencies or instrumentalities must have among their responsibilities the enforcement of law or the investigation of suspected violations of law. However, only certain Federal entities have access to information involving SSNs and EINs in accordance with paragraph (q)(1)(ii) of this section;

(ii) Except for SSNs and EINs, information provided to FNS by applicants and authorized firms participating in the FSP may be disclosed and used by qualifying Federal and State entities in accordance with paragraph (q)(1)(i) of this section. The disclosure of SSNs and EINs is limited only to qualifying Federal agencies or instrumentalities which otherwise have access to SSNs and EINs based on law and routine use. Release of information under this paragraph shall be limited to

information relevant to the administration or enforcement of the specified laws and regulations, as determined by FNS;

(iii) Requests for information must be submitted in writing, including electronic communication, and must clearly indicate the specific provision of law or regulations which would be administered or enforced by access to requested information, and the relevance of the information to those purposes. If a formal agreement exists between FNS and another agency or instrumentality, individual written requests may be unnecessary. FNS may request additional information if needed to clarify a request;

(iv) Disclosure by FNS is limited to: Information about applicant stores and concerns with applications on file; information about authorized stores participating in the FSP; and information about unauthorized entities or individuals illegally accepting or redeeming SNAP benefits;

(v) Requests for information disclosure by FNS may involve a specific store or concern, or some or all stores and concerns covered by paragraph (q)(1)(iv) of this section. In addition, FNS may sign agreements allowing certain government entities direct access to appropriate FNS data, with access to EINs and SSNs limited only to other Federal agencies and instrumentalities that otherwise have access to such numbers.

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7. 7 C.F.R. 278.1 (1996) provides in pertinent part:

Approval of retail food stores and wholesale food concerns.

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(q) *Safeguarding privacy*. Except for employer identification numbers (EINs) and social security numbers (SSNs), the contents of applications or other information furnished by firms, including information on their gross sales and food sales volumes and their redemptions of coupons, may not be used or disclosed to anyone except for purposes directly connected with the administration and enforcement of the Food Stamp Act and these regulations, except that such information may be disclosed to and used by State agencies that administer the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). Such purposes shall not exclude the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law. For safeguards with respect to EINs, see § 278.1(q)(1) below. For safeguards with respect to SSNs, see § 278.1(q)(2) below.

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8. 7 C.F.R. 278.1 (1988) provides in pertinent part:

Approval of retail food stores and wholesale food concerns.

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(r) *Safeguarding privacy*. The contents of applications or other information furnished by firms, including information on their gross sales and food sales volumes and their redemptions of coupons, may not be used or

disclosed to anyone except for purposes directly connected with the administration and enforcement of the Food Stamp Act and these regulations, except that such information may be disclosed to and used by State agencies that administer the Special Supplemental Food Program for Women, Infants and Children (WIC). Such purposes shall not exclude the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law.

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9. 7 C.F.R. 278.1 (1983) provides in pertinent part:

Approval of retail food stores and wholesale food concerns.

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(*o*) *Safeguarding privacy*. The contents of applications or other information furnished by firms, including information on their gross sales and food sales volumes and their redemptions of coupons, may not be used or disclosed to anyone except for purposes directly connected with the administration and enforcement of the Food Stamp Act and these regulations. Such purposes shall not exclude the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law.

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10. 7 C.F.R. 278.1 (1979) provides in pertinent part:

Approval of retail food stores and wholesale food concerns.

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(*l*) *Safeguarding privacy*. The contents of applications or other information furnished by firms, including information on their gross sales and food sales volumes and their redemptions of coupons, may not be used or disclosed to anyone except for purposes directly connected with the administration and enforcement of the Food Stamp Act and these regulations.

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