CASE NO. 17-1346

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARGUS LEADER MEDIA, D/B/A *ARGUS LEADER*,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
Defendant,

FOOD MARKETING INSTITUTE,
Intervenor Defendant-Appellant.

On Appeal From the United States District Court
for the District of South Dakota — Sioux Falls
(4:11-cv-04121-KES)

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The *Argus Leader*, a Sioux Falls newspaper, made a Freedom of Information Act (FOIA) request for nationwide store-level Supplemental Nutrition Assistance Program (SNAP) data. The government discloses substantial information about its SNAP expenditures, but does not publish information regarding individual stores. Relying on Exemption 4 of FOIA and this Court's precedents, the United States Department of Agriculture (USDA) denied the request.

The district court incorrectly concluded that the data was not protected by Exemption 4 as "confidential" information. Even though competition in the grocery industry is "fierce," stores closely guard their SNAP data, and witnesses testified that competitors could use the released information to gain a substantial advantage, the district court dismissed that evidence on the grounds that competitors already use *other* information to compete. The district court also erroneously concluded that harms not directly caused by a competitor were "not relevant."

Appellant respectfully requests 20 minutes for oral argument for each side. Some of the issues raised in this appeal have not been previously resolved by any prior opinion from this Circuit. In addition, this case has been pending for more than six years, resulting in a relatively complex and lengthy record. Oral argument will provide the parties and the panel with a valuable opportunity to explore these questions of first impression and clarify any issues related to the record.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1A, Appellant Food Marketing Institute (FMI) makes the following disclosures:

FMI is a voluntary trade association, with headquarters in Arlington, Virginia, that represents more than 1,225 food retailer and wholesale members operating nearly 40,000 retail food stores across the United States and in several foreign countries. FMI has no parent corporation, and no publicly held corporations have an ownership interest in FMI.

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this Freedom of Information Act case under 5 U.S.C. § 552(a)(4)(B). The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291.

On November 30, 2016, the district court entered final judgment in favor of Appellee *Argus Leader* against the United States Department of Agriculture (USDA). App.234. After USDA signaled to SNAP retailers affected by the decision that it would not appeal the judgment, Appellant Food Marketing Institute (FMI) timely filed a motion to intervene, to stay the judgment, and for an extension of time to file a notice of appeal on January 27, 2017. App.235; FED. R. APP. P. 4(a)(1)(B)(ii), 4(a)(5)(A). The district court granted FMI's motion on January 30, 2017, including a 15-day extension to file the notice of appeal. App.8. FMI timely filed its notice of appeal on February 14, 2017. App.277.

This appeal is from a final judgment that disposes of all parties' claims.

STATEMENT OF ISSUES

1. Exemption 4 of the Freedom of Information Act protects "confidential" commercial or financial information. Information is confidential if it is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. Where *Argus Leader* failed to rebut USDA's evidence that the release of store-level SNAP redemption data was likely to cause substantial competitive harm to retailers, did the district court err in finding that the information was not confidential merely because retailers already fiercely compete with each other and may not all be harmed in identical ways?

   - 5 U.S.C. § 552(b)(4)
   - *Madel v. U.S. Dep't of Justice*, 784 F.3d 448, 453 (8th Cir. 2015)
   - *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981)
   - *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)

2. The district court relied exclusively on its conclusion that the release of store-level SNAP redemption data was not likely to harm retailers' competitive position in finding that the information was not confidential and ordering USDA to release the requested information. But "competitive harm" is not a statutory requirement for invoking Exemption 4. Instead, the

statute protects all "confidential" information, the plain meaning of which is "secret." Where USDA presented unrebutted evidence that the retailers keep their store-level sales data secret, did the District Court err in finding that the information was not "confidential"?

- 5 U.S.C. § 552(b)(4)
- *Brockway v. Dep't of Air Force*, 518 F.2d 1184, 1188-89 (8th Cir. 1975)
- *National Parks*, 498 F.2d at 770

3. As several Circuits have recognized, information may also be confidential under Exemption 4 if releasing that information would impair a government interest in program efficiency. Where USDA offered ample evidence that the release of store-level SNAP redemption data would impair the effectiveness of SNAP, did the district court err in dismissing those harms as "irrelevant"?

- 5 U.S.C. § 552(b)(4)
- *9 to 5 Org. for Women Office Workers v. Bd. of Governors of Fed. Reserve Sys.*, 721 F.2d 1, 11 (1st Cir. 1983)
- *National Parks*, 498 F.2d at 770

STATEMENT OF THE CASE

This appeal arises from a bench trial, following which the district court ordered USDA to release store-level annual SNAP redemption data for the years 2005 to 2010.

A. SNAP assists low-income Americans to purchase staple food items discreetly and in the normal channels of commerce.

The Supplemental Nutrition Assistance Program (SNAP) helps millions of low-income Americans purchase food—in April 2017, over 41 million individuals received SNAP benefits.[1] The Food and Nutrition Act of 2008 renamed and updated the familiar Food Stamp Program that had been created as part of the Johnson administration's "War on Poverty." H.R. 6124, 110th Cong. (2008). Like its predecessor, SNAP aims to increase the food purchasing power of eligible low-income households and enable them to obtain a more nutritious diet through normal economic channels. 7 U.S.C. § 2011. SNAP modernized the food stamp program by replacing the previously used coupon system with electronic benefit transfer (EBT) cards, with the intent of increasing program effectiveness and alleviating the unfortunate stigma associated with the use of food stamps.[2]

[1] Supplemental Nutrition Assistance Program: Number of Persons Participating, https://www.fns.usda.gov/sites/default/files/pd/29SNAPcurrPP.pdf.

[2] *See also* SNAP Name Change, https://www.fns.usda.gov/sites/default/files/SNAP_name.pdf.

I.RR.254.[3] State-issued EBT cards resemble ordinary debit cards and can be used at authorized retailers to redeem SNAP benefits for eligible food items. *See* I.RR.15, I.RR.104-105, I.RR.110.

Since 2005, approximately 321,000 retail stores have participated in SNAP, including traditional grocery stores such as FoodRite, convenience stores such as Cumberland Farms, and large national chains such as KMart. I.RR.99, I.RR.166-168, II.RR.319, I.RR.202. To be authorized to participate in SNAP by the U.S. Food and Nutrition Service (FNS), an agency of USDA, a retailer must adhere to the program's regulations, including stocking certain kinds and amounts of staple foods. 7 C.F.R. § 278.1(b)(1). All retailers are subject to inspections to ensure compliance. 7 U.S.C. § 2018; 7 C.F.R. § 278.1(b). When a SNAP beneficiary uses his EBT card to redeem eligible food items from an authorized retailer, a third-party processor verifies and approves the transaction. I.RR.15-16. These third-party processors record every SNAP transaction, and they forward that redemption data to USDA. I.RR.18. The retailer is then reimbursed for the sale. I.RR.20. SNAP accounted for $69 billion in sales in 2015,[4] well over 10% of all

[3] The trial transcript (Reporter's Record) is cited throughout this brief as Volume.RR.Page.

[4] Supplemental Nutrition Assistance Program (Data as of July 7, 2017), https://www.fns.usda.gov/sites/default/files/pd/34SNAPmonthly.pdf.

grocery retail as measured by the U.S. Census Bureau.[5]

USDA releases certain compilations of redemption data each month. Anyone may view the government's aggregate SNAP expenditures at the national-, state-, and ZIP-code-level on FNS's website. I.RR.103.[6] Data regarding the value of SNAP redemptions for each individual store is not publicly available, however, and SNAP retailers have participated in the program with the understanding that store-level data would be kept confidential. *E.g.*, I.RR.230-31; II.RR.292. Indeed, until a 2014 decision by this Court in a prior appeal in this case, USDA's position was that the Food and Nutrition Act of 2008 not only exempted store-level SNAP redemption data from disclosure, but actually provided for fines and imprisonment in case of publication or disclosure. *See Argus Leader Media v. U.S. Dep't of Agric.*, 740 F.3d 1172, 1175-76 (8th Cir. 2014) (holding that Exemption 3 does not permit USDA to withhold store-level SNAP data).

B. *Argus Leader* files a FOIA request for store-level SNAP data, which USDA denies.

Argus Leader is a newspaper based in Sioux Falls, South Dakota. An *Argus Leader* reporter filed a Freedom of Information Act (FOIA) request for SNAP data

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[5] Annual Retail Trade Survey 2015, Estimated Annual Sales of U.S. Retail and Food Services Firms by Kind of Business: 1992 through 2015, http://www2.census.gov/retail/releases/current/arts/sales.xls (estimating that grocery stores, including convenience stores, did $613 billion in sales in 2015).

[6] *See also* https://www.fns.usda.gov/data-and-statistics.

in 2011.[7] App.4. For each SNAP retailer, *Argus Leader* specifically requested the store identifier, name, address, store type, and total SNAP sales for 2005 to 2010. *Id.* FNS released most of the information requested, but withheld the store-level sales data. App.5. FNS notified *Argus Leader* that it was denying that portion of the FOIA request in February 2011, citing the provision of the Federal Regulations prohibiting disclosure of SNAP data. *Id.* *Argus Leader* administratively appealed FNS's decision within the agency, and was unofficially denied in July 2011. *Id.*

C. *Argus Leader* challenges USDA's decision and prevails in the district court following a two-day bench trial.

On August 26, 2011, *Argus Leader* filed suit in the District Court for the District of South Dakota, challenging the decision to withhold the store-level SNAP redemption data. App.1. On behalf of FNS, USDA asserted on summary judgment that the data was exempt from release under three FOIA exemptions: Exemption 3, which protects information "specifically exempted from disclosure by statute," Exemption 4, which protects "trade secrets and commercial or financial information," and Exemption 6, which protects information "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." App.176; 5 U.S.C. § 552(b)(3), (4), (6). The district court granted summary judgment for USDA based on Exemption 3, finding that the information

[7] The record contains few details regarding the nature of the article that the *Argus Leader* will publish or why the publicly available SNAP redemption data at the national, state, and ZIP-code levels are insufficiently specific for its purposes.

sought by *Argus Leader* was specifically exempted from disclosure by statute. App.30. This Court reversed and remanded. *Argus Leader*, 740 F.3d at 1177.

On remand USDA moved for summary judgment based on Exemption 4, claiming the information was protected as confidential commercial or financial data, and Exemption 6, claiming that releasing the information would invade the privacy of sole proprietors and closely-held corporations.[8] App.31-32. The district court denied USDA's summary judgment motion. App.167.

USDA dropped its Exemption 6 argument before trial, App.221, and the district court held a two-day bench trial regarding solely whether Exemption 4 applied. Three USDA employees testified about how and why the agency operates SNAP and collects SNAP data, as well as the process it undertook to respond to *Argus Leader*'s FOIA request. Representatives from four retailers of varying sizes and types testified on behalf of USDA, including small supermarket chain Dyer Foods (13 stores), I.RR.166, large department store Kmart (890 stores), I.RR.201, large edited-assortment and wholesale grocer Supervalu/Save-A-Lot (1,300 stores), II.RR.302-03, and convenience store Cumberland Farms (560 stores), II.RR319. A representative from the National Grocers Association (NGA), representing 1,200 companies that own around 6,000 stores, also testified on behalf of USDA.

[8] USDA's second motion for summary judgment included a supporting affidavit from FMI. App.54.

I.RR.242.

USDA also presented the testimony of Bruce Kondracki, the vice president of a consumer research firm that performs market analysis, site location, and forecasting research. II.RR.381. Kondracki's firm creates models of consumer behavior, taking into account demographics and population statistics and the estimated sales volume of competitors. II.RR.388-89. Estimating these sales volumes is time-consuming and expensive, but critical to creating an effective model that allows Kondracki's clients to make decisions regarding store locations and sales strategies. II.RR.389-91. When Kondracki has access to sales volume for a particular store—which occurs only when Kondracki's client gives Kondracki access to its loyalty card data—Kondracki's model can simulate the real world for those stores with a .9 or .99 correlation.[9] II.RR.391. The model allows Kondracki's clients to test new locations for their stores. II.RR.391-92. Kondracki testified that the release of store-level SNAP redemption data would create a "windfall" for his company and other data analysis firms: this data would improve the model's accuracy as applied to *competitors'* stores, since Kondracki could feed the model the *competitors'* SNAP data—providing a significant competitive advantage to Kondracki's clients who want to target a particular competitor or

[9] In general, the closer a model's correlation is to 1.0, the more accurately the model reflects the real world.

area. II.RR.393-96. Kondracki believed this benchmarking could be "easily" accomplished by data analysts, II.RR.393-94, though he acknowledged that not every competitor uses data analysts. II.RR.398. Kondracki also testified that store-level SNAP data could be used to help his clients successfully identify and target high SNAP areas. II.RR.399. At the same time, this data could be used by other clients that perform poorly in high SNAP areas to gain a competitive advantage by avoiding those locations. II.RR.399.

The witnesses for both parties unanimously acknowledged the challenging competitive landscape facing food retailers. *See, e.g.*, II.RR.366 (testimony of *Argus Leader*'s expert Dr. Volpe). Peter Larkin, NGA's Chief Executive Officer, testified that food retailers net about $0.0091 of every dollar of gross sales—a small margin that forces retailers to rely on high sales volumes for profitability. I.RR.246. In recent years, traditional grocers have also faced unprecedented competition from superstores like Costco, new low-price format stores like Lidl, upscale organic format stores like Whole Foods, non-grocers like the Dollar Store, and even online retailers like Amazon.[10] I.RR.247-49.

Because of the highly competitive retail environment and because individual store data is commercially valuable to competitors, the retailers testified that they

[10] Amazon recently increased its activity in food retail substantially through the acquisition of Whole Foods. Nick Wingfield and Michael J. de la Merced, *Amazon to Buy Whole Foods for $13.4 Billion*, N.Y. TIMES A1 (June 17, 2017).

consistently and strenuously protect their sales data. Kmart, for example, tracks its internal individual store sales and specifically breaks out SNAP redemption data to "make sure that we're not passing up opportunities to be more efficient" and to "driv[e] the highest possible sales volume at each individual Kmart store." I.RR.206-07. Kmart safeguards that data using physical and computer security methods. I.RR.205-06.

USDA's witnesses unanimously agreed that disclosure of SNAP redemption data would, for several reasons, cause substantial competitive harm. First, stores with high SNAP redemptions would see increased competition from existing competitors for those SNAP customers. *E.g.*, II.RR.324. Second, new market entrants with business models that seek to attract price-sensitive shoppers, like foreign grocer Lidl, will use the SNAP data to determine where in the U.S. to build their stores. *E.g.*, I.RR.252-53. Third, SNAP redemption data could also be used to understand a retailer's overall sales, a highly valuable figure that competitors currently expend great resources trying to estimate. *E.g.*, II.RR.394-97.

The retailers also testified to their concerns that their SNAP-beneficiary customers may be stigmatized by the release of store-level data, to the detriment of those customers and the retailers that serve them. Joey Hays of Dyer Foods explained: "The reality of it is, there's a stigma attached to customers using EBT. People that don't use it sometimes look at that customer differently." I.RR.176.

Hays testified that if a store gets a reputation for doing a high volume of SNAP business, SNAP recipients may feel "singled out." I.RR.194. The retailers also testified that some non-SNAP customers may avoid high-SNAP stores, and even SNAP customers may prefer to avoid "that limelight" of shopping at a high-SNAP sales store. *Id*. A retailer's landlord, too, might put pressure on high-SNAP sales retailers because of perceived stigma. *E.g.*, I.RR.211-14.

Argus Leader called only two witnesses, neither of whom works in the food retail industry. Dr. Richard Volpe, an assistant professor in the agribusiness department at the California Polytechnic State University, opined that the potential for harm resulting from the disclosure of store-level SNAP redemption data is "very limited and very unlikely." II.RR.341, 348. Dr. Volpe believed that a food retailer's strategy consists of "readily apparent" aspects, such as prices, promotional activity, store layout, customer service, and product assortments, and that the additional insight gleaned from SNAP data "seems very limited." II.RR.351.

But Dr. Volpe agreed that it would be wrong to characterize SNAP information as having "no value," and that "it is possible that the release of a time series of annual SNAP data at the store level can enable . . . benchmarking analysis." II.RR.351-52. He also agreed that the release of SNAP data "could cause some harm to some retailers," and that it would be "naïve" to believe that the

release of the data would have no effect. II.RR.362, 366-67.

Argus Leader's second witness was Dr. Ryan Sougstad, a professor of business administration at Augustana University and a friend of *Argus Leader*'s counsel. II.RR.370. Dr. Sougstad testified that larger retailers, like Walmart and Target, have data analytics and business intelligence departments to leverage "big data." II.RR.374. Though Dr. Sougstad had no experience in the food retail industry or in what types of data retailers would use for market analysis, he claimed that the risk of substantial competitive harm from releasing store-level SNAP data was low, in part because retailers already make decisions based on their own data and publicly available demographic data. II.RR.375-76, 378.

After post-trial briefing regarding whether the requested information was "obtained from a person" and "confidential," the district court entered judgment in favor of *Argus Leader*. App.234. Despite finding that the SNAP data was "obtained from a person" and that "competition in the grocery business is fierce," the district court concluded that store-level SNAP data is not "confidential" because "any potential competitive harm from the release of the requested SNAP data is speculative at best." App.231. The court based this conclusion on testimony that competitors "already use a variety of publicly available information to make decisions," including "a store's location, layout, pricing, produce selection, and customer traffic." App.230. The court also relied on Kondracki's

testimony that some consumer behavior models could already reach correlations of .9 or .99, which the district court concluded was an indication that SNAP data "would not add significant insights into the grocery industry." *Id.* In doing so, the district court missed the fact that the .9 correlation is effective only for retailers predicting how their own stores will do, not for assessing the competition, and entirely ignored Kondracki's conclusion that the store-level data *would* create a valuable competitive windfall for his clients. *See supra* at 9-10.

The district court also dismissed the argument that SNAP households and retailers might face increased stigma in the wake of disclosure, declaring that "this type of harm is not relevant in an Exemption 4 analysis because it is not a harm caused by a competitor." App.231. The district court continued that even if harms caused by stigma were relevant, the testimony was "speculative" because it was equally plausible that high volumes of SNAP redemptions would attract or repel competitors. *Id.*

D. FMI intervenes and appeals the judgment.

FMI is a trade association whose members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing combined annual sales volume of almost $770 billion. App.253. FMI participated in the proceedings below by providing an affidavit in support of USDA's second motion for summary judgment. App.54. On January 19, 2017, eleven days before the deadline for

filing a notice of appeal, USDA informed SNAP retailers, many of which are FMI members, that it intended to release the store-level SNAP data—effectively signaling that it would not appeal the district court's judgment. App.240. FMI believes that disclosure of store-level SNAP data will harm its members. App.254. FMI therefore moved to intervene in order to bring this appeal and protect its members' interests.

The district court granted FMI's motion, finding that FMI had standing and that its intervention was timely under Rule 24(a)(2). App.273-74. The district court observed that the issue of whether Exemption 4 applies to store-level SNAP redemption data "appears to be one of first impression in the Eighth Circuit" and that "[b]ecause there is not a clearly established answer to this issue, FMI could succeed in an appeal." App.274. Furthermore, because "once the data is disclosed, it cannot be unseen," its erroneous release would cause irreparable harm to participating retailers. *Id.*

FMI timely appealed the judgment of the district court. App.277.

SUMMARY OF THE ARGUMENT

Because USDA was unable to precisely predict the exact effects that releasing store-level SNAP redemption data would have on various retailers, the district court ordered highly confidential data released. But the law does not require such specificity; instead, the government only needed to show that the

release is likely to cause substantial competitive harm. That standard was indisputably met. Both sides agreed at trial that competition in the retail industry is fierce. In addition, the district court credited the testimony of USDA's witnesses who testified that existing competitors can use store-level SNAP data to lure SNAP customers away from their competitors and that new market entrants can also use the data to target locations for new stores at the expense of existing retailers. As a matter of law, this evidence was sufficient to meet the requirements of FOIA Exemption 4 and protect the store-level SNAP redemption data from disclosure. The district court's conclusion that this evidence was "insufficient" was error, because it demanded more stringent proof of competitive harm than is necessary under this Court's precedent. *See infra* Part II.

The district court also erred in concluding that the store-level SNAP data was confidential *only* if USDA proved a likelihood of competitive harm. The likelihood of competitive harm test was set forth in *National Parks & Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). But, as the *National Parks* opinion and its progeny have made clear, that is not the *exclusive* test for proving confidentiality under Exemption 4. The plain meaning of "confidential" is "secret," and this Court—like the U.S. Supreme Court—has repeatedly made clear that statutory terms should be given their plain meaning. Because it was undisputed at trial that retailers closely guard and keep secret all

store-level data, including SNAP data, the information requested by *Argus Leader* was "confidential" under Exemption 4. *See infra* Part III.A.

In addition, store-level SNAP data is "confidential" under Exemption 4 even if the plain meaning of the term does not apply. *National Parks* and its progeny have recognized that certain government interests, such as an interest in program effectiveness, can also support finding that information is confidential and should be withheld under Exemption 4. Once again, USDA presented unrebutted evidence meeting this standard: its witnesses testified that they might be forced to choose protecting the privacy of their data over continuing to participate in SNAP, and that the release of this information would bring unwanted negative attention to SNAP beneficiaries, counter to the goals of SNAP. Consequently, USDA was entitled to judgment under this standard as well. *See infra* Part III.B.

ARGUMENT

I. Standard of Review

In an appeal from a bench trial, this Court reviews the trial court's findings of fact for clear error and the trial court's legal conclusions de novo. *Cooper Tire & Rubber Co. v. St. Paul Fire and Marine Ins. Co.*, 48 F.3d 365, 369 (8th Cir. 1995); *see also Johnston v. U.S. Dep't of Justice*, 163 F.3d 602, at *1 (8th Cir. 1998) (per curiam) (unpublished) (applying the *Cooper Tire* standard of review after a FOIA bench trial). Applicability of FOIA exemptions is also reviewed *de*

novo, so that no deference is due the trial court's legal conclusions. *Peltier v. F.B.I.*, 563 F.3d 754, 762 (8th Cir. 2009).

II. USDA proved that the release of store-level SNAP redemption data will likely cause substantial competitive harm under Exemption 4 of FOIA.

Releasing store-level SNAP redemption data reveals information about an individual SNAP retailer's sales and even enables competitors to decipher that retailer's total sales—information that is carefully guarded and highly valuable in a fiercely competitive industry. Additionally, if store-level SNAP redemption data is publicized, stores with high SNAP sales may lose SNAP customers to existing competitors and to new market entrants targeting those customers. Conversely, they may lose customers as a result of stigma against SNAP recipients. USDA's witnesses testified extensively as to the likelihood and seriousness of these harms, but the district court dismissed the harms as "speculative." Compared to the degree of specificity held sufficient by this Court to uphold the applicability of Exemption 4 as a matter of law in *Madel v. U.S. Dep't of Justice*, 784 F.3d 448, 453 (8th Cir. 2015), the district court placed an erroneously high burden on USDA.

A. Exemption 4 protects confidential commercial or financial information.

FOIA requires broad disclosure of government records upon request, unless one of nine statutory exemptions applies. 5 U.S.C. § 552(b). The exemptions are construed in light of FOIA's dominant objective of providing transparency and

disclosure to the public, but not interpreted so narrowly as to lack "meaningful reach and application." *John Doe Agency et al. v. John Doe Corp.*, 493 U.S. 146, 152 (1989). The only exemption at issue in this appeal is Exemption 4, which prevents disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

The parties stipulated that the requested SNAP data was commercial or financial, and the district court found that it was obtained from a person, based on this Court's determination that the information was obtained from third-party payment processors. App.226; *see also Argus Leader*, 740 F.3d at 1176. Therefore, the sole issue on appeal is whether the information is confidential.[11]

To assess whether the requested information is confidential, the district court applied the D.C. Circuit's *National Parks* test, adopted by this Circuit in *Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transp.*, 260 F.3d 858, 861-62 (8th Cir. 2001). Under *National Parks*, information is confidential if "disclosure of the information is likely to have either of the following effects: (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 861 (quoting *National Parks*, 498 F.2d at 770).

[11] The information *Argus Leader* seeks is not privileged. *See Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 400 (5th Cir. 1985) (holding that "privileges" refers only to privileges created by the Constitution, statute, or common law).

Because the parties agreed that the first effect was not implicated, the district court focused its analysis on the second effect, sometimes called the "competitive harm" prong. To show competitive harm under the test, one need not establish "actual competitive harm." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983). Instead, a showing of "actual competition and the likelihood of substantial competitive injury" will suffice. *Id.*

Once information has been released pursuant to a FOIA request, it is no longer "confidential" and cannot be withheld from subsequent requesters. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) ("As a general rule, if the information is subject to disclosure, it belongs to all."). Consequently, the competitive harm caused by the release of store-level SNAP data must be analyzed based on the assumption that this data will be made public, and not based on what *Argus Leader* might do with that information as the requester. *See, e.g.*, *National Parks*, 498 F.2d at 228-29 (assessing whether disclosure of audits of companies operating concessions in national parks will cause competitive harm to the companies if publicly disclosed, even though the requester was a non-profit educational organization, not a competitor); *see also Burke Energy Corp. v. Dep't of Energy*, 583 F. Supp. 507, 512 (D. Kan. 1984) ("[Requester]'s argument that it is not a competitor [of the submitter] . . . is totally without merit. The issue is whether the public disclosure of the information would

likely cause competitive harm to [the submitter], regardless of the source of the harm.").

The district court recognized the legal standards discussed above in its opinion. It purported to consider both the "actual competition" in the industry as well as whether there was a "likelihood of substantial competitive injury from the disclosure," and its analysis assumed that the information would be public if disclosed by USDA. *See* App.229. Despite this, and as explained in Parts B and C below, the district court misapplied those standards and consequently erred in ruling that Exemption 4 did not apply in this case. *See infra* at II.B and II.C.

B. USDA demonstrated a likelihood of substantial competitive harm.

USDA met the standards set forth by this Circuit and its sister Circuits for proving that the information at issue was confidential. In evaluating Exemption 4 in similar cases, courts consider not only the direct harm that a release of information might have, but also how the information would affect the competitive landscape in light of what other information is known to competitors. Courts are also permitted to consider other indicia of harm, such as whether the information could otherwise only be obtained, if at all, by investing substantial resources, and whether the submitters have consistently taken measures to protect the information's confidentiality.

1. USDA proved the release of data would likely cause substantial direct and indirect competitive harms.

(a) Under *Madel*, the evidence presented by USDA met its burden as a matter of law.

The court need not "conduct a sophisticated economic analysis of the likely effects of disclosure" in order to find "substantial competitive harm." *Pub. Citizen Health Research Group,* 704 F.2d at 1291. This was demonstrated in *Madel*, in which this Court held that the government was entitled to summary judgment because it proved as a matter of law that information similar to the information at issue in this case was confidential.[12] 784 F.3d at 453. In *Madel*, the FOIA requester sought information on oxycodone transactions between distributers and individual retailers, withheld by the government pursuant to Exemption 4. *Id.* at 451. The distributer-submitters provided affidavits to the government stating that the data "could be used to determine the companies' market shares, inventory levels, and sales trends in particular areas." *Id.* at 453. Both the distributer-submitters and government agreed that this information, in turn, would be used by competitors to "target specific markets, forecast potential business of new locations, or to gain market share in existing locations." *Id.* at 452. They did not

[12] Although this Court held in *Madel* that the DEA had proven the information was confidential for purposes of summary judgment, the judgment in *Madel* was nonetheless reversed and the case remanded because the district court failed to consider whether certain portions of the withheld documents were segregable. *Madel*, 784 F.3d at 453-54. Segregability is not at issue in this appeal.

specify exactly how each distributer-submitter would be affected, or show that each one would be similarly impacted by the information's release. These statements, this Court found, proved that substantial competitive harm was likely. *Id.* at 453. Each withheld document was linked to an identifiable competitive harm, and the requester offered no evidence to overcome the government's showing. *Id.*

As in *Madel*, the data sought by *Argus Leader* would disclose transactions on a retailer-by-retailer basis, revealing sales trends and other retailer-specific data. The submitters, like those in *Madel*, testified that SNAP redemption data could be used by competitors to target specific markets, identify lucrative new locations, or gain market share in existing locations. *E.g.*, I.RR.212 ("The primary [concern] would be the concern that that sort of detailed store-level data provides unique insights that would facilitate competitors' efforts to steal our customers."). And although SNAP sales make up only part of any grocery retailer's business, so too did oxycodone sales make up only a part of any of the distributers' businesses in *Madel*.[13] Point for point, USDA put evidence establishing the applicability of Exemption 4 at least as strong and well-supported as the government did in *Madel*.

[13] The website for Cardinal Health Inc., one of the distributer-submitters in *Madel*, advertises a wide array of products, including all manner of pharmaceuticals, equipment, and consumer medical products, as well as consulting, supply-chain, and management consulting. http://www.cardinalhealth.com/en.html.

(b) In addition, USDA presented evidence showing four specific ways in which release of the store-level SNAP redemption data would harm retailers.

Nor did USDA stop there. Altogether, it proved four ways in which release of store-level SNAP redemption data would likely cause substantial harm to authorized SNAP retailers. First, stores with high SNAP redemptions would see increased competition from their existing competitors for those SNAP customers. I.RR.215 ("Q: Now, what you're saying, I think, is that your biggest concern is that if your SNAP numbers are public, that you will be targeted, and people will take your SNAP business from you. Is that a fair assessment? A: I agree with that."). Andrew Johnstone of Kmart testified that if a competitor learns that Kmart has higher SNAP sales than the competitor's nearby store, this would alert the competitor that there is a market opportunity to lure Kmart's customers and provide a roadmap for doing so:

> It might also inform decisions about what other sort of products that you carry. If you know that SNAP customers at your stores also buy products in other categories, and you see that there's a high volume of SNAP purchasers in a particular area based on another competitor's data, then you might decide, 'Well, I need to add those product assortments or increase those product assortments in my store in the area, because I know those SNAP customers also buy these other items.'

I.RR.224. Competitors can also use SNAP redemption data in combination with the publicly-known demographics of a SNAP customer "as a proxy for a certain customer demographic, and [competitors] could use that information to target

[retailers] by delivering marketing programs that would appeal to that type of customer." II.RR.324.

Second, new market entrants with business models that either seek to attract price-sensitive shoppers, like foreign grocer Lidl, or that typically fare poorly with price-sensitive shoppers, will use the data to target locations where the incumbent's SNAP sales reveal advantageous territory. Competitive harm from potential new market entrants was specifically recognized as cognizable under Exemption 4 by the Eleventh Circuit in *Sharkey v. Food & Drug Admin.*, 250 Fed. App'x. 284, 290 (11th Cir. 2007). In *Sharkey*, the requester sought information about lots of Hepatitis B vaccines. *Id.* at 285-86. Although the Hepatitis B vaccine market had only two participants, the Eleventh Circuit acknowledged that the release of volume numbers for those manufacturers could be valuable information for potential market entrants, and affirmed the district court's summary judgment order exempting the information under Exemption 4. *Id.* at 289-91. As Peter Larkin of NGA testified, "anybody that wants to locate a new store or compete with their current competitor now knows, you know, X number of dollars are available that are going to that competitor, and they're going to do everything they can to capture [those dollars]." II.RR.291. Andrew Johnstone of Kmart testified that if an operation like Lidl—which seeks to attract price-conscious shoppers and has "announced very publicly plans to build hundreds of

new stores in the United States"—knew Kmart's SNAP sales at the store level, "I think you can be pretty sure where they would start putting their stores." I.RR.252-53. David Siebert of Supervalu/Save-A-Lot similarly explained that releasing SNAP redemption data would allow a market entrant like Lidl "to better identify where they see opportunity to enter the market and take a portion of those food dollars." II.RR.309.

Third, analysis of store-level SNAP redemption data will help retailers and data analysts better estimate the total volume of sales at a given location. As recognized by this Court's sister Circuits, whether information is confidential should be evaluated in light of information that is already known to competitors or publicly available. In some instances, even seemingly small pieces of information can make a significant competitive difference when added to the information already known by a submitter's competitors. Such information is protected under Exemption 4.

For example, in *Watkins v. U.S. Bureau of Customs & Border Protection*, 643 F.3d 1189, 1196 (9th Cir. 2011), the Ninth Circuit affirmed the district court's summary judgment applying Exemption 4 to protect information disclosed in "Notices of Seizure of Infringing Merchandise" issued by the U.S. Bureau of Customs and Border Protection. The FOIA requester sought all Notices of Seizure issued at eight different ports across the United States. *Id.* at 1192. Those Notices

are used to notify trademark owners when goods bearing an infringing counterfeit mark are seized, and include the date the seized merchandise was imported, description and quantity of merchandise, and names and addresses of the exporter, importer, and manufacturer. *Id.* at 1192. The Ninth Circuit held that releasing the information in the Notices of Seizure "poses a substantial likelihood of competitive injury to importers of non-counterfeit goods who zealously guard their supply chains." *Id.* at 1196. Specifically, the information contained in the Notices, when "combine[d] . . . with already public information," could reveal an importer's "entire distribution network and demand trends." *Id.*

Similarly, in *Gilda Industries, Inc. v. U.S. Customs & Border Protection Bureau*, 457 F. Supp. 2d 6, 10-12 (D.D.C. 2006), the names and addresses of 212 importers subject to a 100% duty over a three-month period were found to be confidential under Exemption 4. The court held that this seemingly innocuous information, "when cross-referenced with publicly available vehicle manifest information for specific shipments, would reveal information that could cause substantial competitive harm." *Id.* at 13. In particular, competitors could piece together what products had been imported by a particular party during a particular period in time, *id.* at 10-11, and use that information "to steal business away from or otherwise disrupt the operations of its competitors," *id.* at 13. Based on this evidence, the court granted summary judgment to the government. *Id.*

Here, although SNAP redemption data represents only a portion of a retailer's total sales, such data is valuable in large part because it can be effectively combined with currently available demographic data and data a competitor keeps about its own sales to give those competitors a substantial advantage. As Joey Hays of Dyer Foods testified: "if you knew what percentage of my sales was paid for in SNAP benefits, you could come to a rough estimate, a better estimate, let me put it that way, of what our store's sales are, and determine if you think there's more for you to get from us," I.RR.192.

Expert Bruce Kondracki walked the court step by step through how competitors could exploit SNAP redemption data for this purpose. Competitors would begin by calculating the ratio between their *own* SNAP sales and total sales. II.RR.394. Using that ratio, and in combination with publicly available income and other demographic information, the competitor could extrapolate a competitor's total sales from its SNAP sales figure, which in turn could be used to develop an algorithm that would apply across the entire market. II.RR.395. While Kondracki can already create very accurate models to project his client's future sales, the release of SNAP data would create a "windfall" for his ability to predict competitor's sales. II.RR.391, 393. Knowing additional information about a competitor's sales would allow Kondracki's clients to target particular competitors and more confidently place new locations. II.RR.392, 397. Showing competitive

harm to this level of "sophisticated economic analysis" is not necessary to establish substantial competitive harm under Exemption 4, but USDA provided it nonetheless. The harms that it identified and explained in detail at trial were therefore at least as "substantial" as the competitive harms recognized in *Madel*, *Watkins* and *Gilda Industries*.

Finally, the retailers expressed concern that some stores with high levels of SNAP redemptions in particular areas may be stigmatized as catering to SNAP recipients, causing SNAP and non-SNAP customers alike to direct their business elsewhere to avoid being affiliated with SNAP. I.RR.194. The stigma may also cause landlords to put pressure on their retailer tenants, which would impede the retailer's ability to compete with other stores. I.RR.211-14.

2. USDA also presented unrebutted evidence of external indicia proving the disclosure of store-level SNAP data would likely cause substantial competitive harm.

The harms identified above are direct and indirect competitive harms that would be caused by release of store-level SNAP data. In addition to these, courts have recognized external indicia that can be used to show that disclosure of certain information would cause competitive harm, including whether and at what cost a competitor could obtain the requested information, and whether the party providing the information took measures to protect its confidentiality. USDA provided unrebutted evidence proving that both of those indicia apply here.

First, judges have recognized the difficulty in discerning "precisely which piece of information is necessary to complete the picture of that company's operations that would allow a competitor to undermine the company." *Gen. Dynamics Corp. v. Marshall*, 607 F.2d 234, 236 (8th Cir. 1979) (Gibson, C.J., concurring). Therefore, courts have turned to an external indicia—measuring the value of information by whether and at what cost a competitor could acquire the information—to determine harm. *See Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

The release of commercially valuable information that could be easily obtained or estimated through other means is not likely to cause competitive harm, because it is essentially already available to a market participant's competitors. *Id.* On the other hand, if "competitors can acquire the information only at considerable cost" or not at all, then releasing the information could provide a "windfall" to competitors that would disrupt the existing balance of relative costs and opportunities within the industry—a "competitive consequence[]" that was "not contemplated as part of FOIA's principal aim of promoting openness in government." *Id.* Such information is therefore protected from disclosure under Exemption 4. *See id.* (reversing the district court's grant of summary judgment authorizing release of the requested information and remanding, since the district court failed to determine whether the information could be obtained by competitors

and, if so, at what cost).

In this case, the retailers unanimously testified that store-level SNAP redemption data, like other store-specific sales information, is not available publicly, and there is no evidence that such information could be reverse engineered or otherwise obtained by a store's competitors. *E.g.*, II.RR.320. While market researchers have a wide variety of data from which to build models, Andrew Johnstone testified that "individual store-level data, like the SNAP data issue, is not something that is readily available" to those researchers. I.RR.220. Competitors desiring information about their competitors' actual sales today would have to invest significant resources to construct imperfect models that extrapolate estimates of store-level data from public information and their own distinct experiences. II.RR.397 (testimony that current forecasts have an accuracy threshold of plus or minus five to ten percent). As data-analyst expert Bruce Kondracki testified, when creating models, the "supply side," comprised of "the sales volumes of the competitors and their store sizes and ratings," is "by far, the most time-consuming and most expensive part *and most inaccurate part* of our whole modeling process." II.RR.389 (emphasis added). That is precisely why he characterized the potential release as a "windfall." II.RR.393. *Argus Leader*'s witnesses did not dispute that this information is currently difficult to obtain.

Second, another indicia of a likelihood of substantial competitive harm is

whether the submitter has taken consistent and detailed measures to protect the confidentiality of the requested information. *See Sharkey*, 250 Fed. App'x. at 290. In *Sharkey*, FOIA requesters sought records reflecting the net number of doses per lot of hepatitis B vaccine distributed in the United States. *Id.* at 286. The only domestic distributors of the vaccine were Merck & Co., Inc. and GlaxoSmithKline, Inc., and publicly-available information did not disclose each individual manufacturer's distribution data or the net number of doses per lot per manufacturer—all of which would be revealed if the FOIA request were granted. *Id.* at 289. The FDA and Merck claimed that this seemingly innocuous number could be used to reveal Merck's and Glaxo's market shares and sales volumes, which in turn could allow international competitors or new domestic market entrants to use that information against them, as well as to better estimate additional confidential information such as Merck's and Glaxo's "production capacity and manufacturing specifics." *Id.* at 289-90. The Eleventh Circuit determined that Merck's declaration detailing the measures taken by Merck to protect information regarding its market shares and sales volumes supported the conclusion that the information was confidential and that disclosure was likely to lead to substantial competitive harm, and affirmed summary judgment in favor of Merck and the FDA. *Id.* at 290.

In the district court below, the retailers unanimously testified that they take

measures to keep confidential store-level data of any kind. For example, the NGA's Peter Larkin testified that retailers limit sales data "to as few people as possible within their organization due to the confidential nature of that information." I.RR.251. Cumberland Farms' senior vice president of marketing Mary Gwen Forman testified that only "a very tight group of the senior management team" has access to sales and SNAP data. II.RR.320. And Kmart's associate general counsel Andrew Johnstone testified that Kmart trains its employees that "they have an affirmative obligation to maintain the confidentiality of our financial information," that Kmart physically secures the campus where it manages its financial data, and that Kmart employs an IT department to keep its data secure. I.RR.205-06.

USDA indisputably matched, and then exceeded, the evidence that was sufficient to justify summary judgment for the government in *Madel*. USDA demonstrated no fewer than four ways the release of store-level SNAP data would harm retailers: (1) an increase in competition for SNAP beneficiaries from existing competitors; (2) new market entrants using the data to place stores; (3) the data will reveal insights about a retailer's overall sales; and (4) stigma related to SNAP may drive some customers away. USDA also showed that the external indicia of harm—the information is impossible to obtain and well-protected—were present. Under this Court's precedents and those of other Circuits, USDA met its burden to

show a likelihood of substantial competitive harm as a matter of law.

C. The district court erred in finding that the competitive harms shown by USDA were speculative.

Despite the evidence presented above, the district court found that both the harm threatened by competitors and the harms arising from stigma were "speculative," and entered judgment in favor of *Argus Leader* on that ground. App.231. That conclusion misapplies the legal standard and is unsupported by the evidence, and must therefore be reversed.

1. The district court's conclusion that releasing the requested information would not have a substantial competitive impact because competition in the grocery retail industry is already fierce is both contradicted by the evidence and unsupported by any legal authority.

Despite the striking similarities to *Madel*, the district court found that USDA's "analysis" was "incomplete." App.230. Noting that "[c]ompetitors in the grocery industry already use a variety of publicly available information to make decisions," the district court concluded that the SNAP data "is a small piece in a much larger picture—disclosure would have a nominal effect on competition in the grocery industry," and stated that "SNAP data may be beneficial, [but] it would not add significant insights into the grocery industry." *Id.*

The district court's analysis falls short of the legal standard in several ways. First, courts should consider "the nature of the material sought and the competitive circumstances in which the [submitters] do business, relying at least in part on

relevant and credible opinion testimony." *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 683 (D.C. Cir. 1976) (affirming summary judgment for concessioners in national parks by taking into account the competition the concessioners face with retailers just outside the gates of the parks, who get the first and last opportunities to take tourism dollars). The district court did so, acknowledging the razor-thin profit margins in the grocery industry and the great effort competitors already make to divine competitive insights from public information, noting that companies use a competitor's "store's location, layout, pricing, product selection, and customer traffic" to make competitive decisions. App.229-30. But the court then perversely used the uncontroverted evidence of the high competition in the grocery industry *against* USDA and the submitters. *See* App.230. This was error.

In such a highly-competitive environment, *any* additional insights into a competitor's business could have an outsized effect. *See Sharkey*, 250 Fed. App'x. at 288-89 (affirming summary judgment holding that a figure as seemingly insignificant as the net number of doses of a vaccine per lot was likely to result in substantial competitive harm). The district court distinguished *Sharkey* because it believed that the information in that case might reveal the submitters' "domestic market share and sales volume," while SNAP redemption data "does not disclose a store's profit margins, net income, or net worth." App.232. But in *Sharkey*, the

release of domestic market share and sales volume information was not harmful standing alone, but because *that* information could allow competitors to "better estimate even more confidential information, such as production capacity and manufacturing specifics." 250 Fed. App'x. at 289-90. In other words, the harm identified in *Sharkey* was the improved inferences it allowed competitors to make. *Id.* Similar harms were proved—and unrebutted—below: release of store-level SNAP data would enable competitors to better estimate competitor's highly confidential sales information, as well as determine how and where to compete for SNAP customers. I.RR.215, 224, 252-53, II.RR.291, 393-97. Indeed, courts have repeatedly recognized that the release of small pieces of information can make a significant competitive difference where, like here, they can be combined with already-known information to gain a competitive edge. *See supra* at II.B.1 (discussing *Madel*, 784 F.3d at 451-53; *Watkins*, 643 F.3d at 1196; *Gilda Indus.*, 457 F. Supp. 2d at 13).

This commonsense understanding of the importance of the competitive landscape is supported in other contexts where competitive information is acknowledged as protectable. For example, protective orders are based on the competitiveness of the relevant market. *See, e.g.*, *Stout v. Remetronix, Inc.*, 298 F.R.D. 531, 535 (S.D. Ohio 2014) (evaluating, among other things, the extent of measures taken to guard the secrecy of the project hour sheets, the value of the

information in those sheets to the submitter and to his competitors, and the ease or difficulty with which the information could be properly acquired or duplicated by others, and ordering disclosure of the project hour sheets on attorneys' eyes only basis). Decisions to seal court records similarly consider the competitiveness of the industry involved. *See, e.g.*, *Kruszka v. Novartis Pharm. Corp.*, 28 F. Supp. 3d 920, 942 (D. Minn. 2014) (declining to order documents relevant to "highly competitive" pharmaceutical industry unsealed). Non-compete agreements are also tailored to the circumstances of the relevant industry. *See, e.g.*, *Superior Consulting Co., Inc. v. Walling*, 851 F. Supp. 839, 847 (E.D. Mich. 1994), *appeal dismissed and remanded sub nom. Superior Consultant Co., Inc. v. Walling*, 48 F.3d 1219 (6th Cir. 1995) (applying Michigan law). In all of these circumstances, courts recognize that the existence of steep competition within an industry means that *any* additional information released to competitors could have a substantial impact on the market.

In addition to ignoring the above authorities, the district court misinterpreted the evidence before it. The district court supported its finding that any competitive impact from the release of the requested data was "speculative" by citing Kondracki's testimony that his algorithms can already model sales with .9 or even .99 accuracy. According to the district court, this testimony "appears to indicate that while SNAP data may be beneficial, it would not add significant insights into

the grocery industry." App.230. But at trial, Kondracki explained that he achieves this high correlation between the model and actual sales when he begins with the *client's own* loyalty-card data showing sales and trends, so the correlations apply to *his client's stores*, not a competitor's stores. II.RR.391. Kondracki did not testify that his models correlate with a *competitor's* sales by .9 or .99 percent—he cannot know how well his models correlate with a competitor's sales because that data is confidential. To the contrary, that information gap is precisely why Kondracki concluded that the release of store-level SNAP data would provide a "huge impact" for his clients looking for high-volume or low-volume competitors to target. II.RR.392-93.

SNAP redemption data, moreover, is not just any additional information: it is *real* sales data, year-over-year, at the individual retailer level, tied to a particular—though broad—class of products. Yet the district court failed to even consider the value in being able to compare real, concrete, year-over-year sales data with mere hypothetical models. Andrew Johnstone of Kmart testified that "any sort of information about the performance of individual stores, the particular sales at those stores, to the extent any additional information about a store is released, that provides a hook, a new way for our competitors to compete more effectively with us." I.RR.215. SNAP data would be unique among the information available to competitors and their hired market researchers, in that

"it's an outcome metric as opposed to a descriptive metric like practices, observable practices." II.RR.331-32. This concrete data would "create a windfall" for data analysts because it would allow them to confirm and test their models *for competitors' sales* at the store level. II.RR.393.

Finally, the district court extrapolated a lack of competitive harm from testimony that Dyer Foods had already seen its market "saturated" by Walmart, and that Walmart "took these actions without the requested SNAP data." App.230-31. The fact that one competitor is effective without the benefit of the SNAP data is in no way evidence that additional data will not help that competitor or others become even more successful. It also is not evidence that the additional data would not help other competitors who have not yet achieved that level of success, but may be able to capitalize on the new data to improve their competitive posture.

This conclusion also ignored evidence that the retail grocery business is extremely competitive, both in local markets and across the entire country, II.RR.367, and evidence that retailers face competition not just from large discount stores but also internet grocery retailers and non-grocery retailers. I.RR.208 (testifying that Amazon has entered the grocery business); I.RR.249 (testifying that pharmacies and the Dollar Store take "a huge chunk" of the food retail business). Dyer Foods is still in business—it still has customers to lose to Walmart or another retailer using SNAP data to improve its predictions. *See* II.RR.397 (testifying that

SNAP data will "minimize the risk to invest in new stores"). A submitter's "admittedly weakened financial position does not amount to a complete inability to suffer competitive harm." *Inter Ocean Free Zone, Inc. v. U.S. Customs Serv.*, 982 F. Supp. 867, 872 (S.D. Fla. 1997) (granting motion for summary judgment in favor of withholding information under Exemption 4). Indeed, a "struggling, perhaps even failing, business remains entitled to the protections that Exemption Four affords to any company." *Id.*

2. The district court erred in discounting as "irrelevant" evidence that retailers with high SNAP sales may be harmed because of stigmas associated with SNAP.

Testimony from the retailers confirmed that the release of store-level SNAP data is not only likely to lead to increased competition for SNAP customers specifically or for all customers, but could also negatively impact stores with high SNAP sales. The testimony of several witnesses confirmed that certain negative preconceptions are associated with SNAP recipients, and that release of store-level SNAP data could therefore impact the market. Joey Hays of Dyer Foods testified that "the reality of it is, there's a stigma attached to customers using EBT. People that don't use it sometimes look at that customer differently. I think that if a store is known for doing a lot of that business, I think there could be some impact there . . . . It scares me." I.RR.176. On cross-examination, Hays clarified that the stigma would embarrass customers, which in turn could impact sales. I.RR.196-

97. Andrew Johnstone of Kmart testified that "if landlords learn that a particular location where we are a tenant has a substantial SNAP customer base . . . they will react negatively to that and that they will put pressure on us, either to pay higher rent to maintain our location or that they will seek to force us out." I.RR.212.

The stigma might also cause non-SNAP recipients to avoid stores with high SNAP volume, either because of beliefs about the store or a fear of being perceived as SNAP customers. I.RR.194 (Testimony of Joey Hays that he's "concerned that customers would think, 'well, if I go in that store, [people will] think I'm paying for my food with SNAP.'").

The district court disregarded all of this testimony, relying solely on a footnote from an out-of-Circuit case to assert that "[c]ompetitive harm is limited to 'harm flowing from the use of proprietary information *by competitors*,'" and disregarded the testimony regarding stigma. App.228-29 (emphasis in original) (quoting *Public Citizen*, 704 F.2d at 1291 n.30). But *Public Citizen* cited no authority for this holding other than a law review article. *See* 704 F.2d at 1291 n.30 (citing Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 WIS. L. REV. 207, 230)). This academy-generated limitation is not based on the text of statute, which exempts from disclosure *all* "confidential" commercial or financial information. Nor has the limitation even been consistently observed in the D.C. Circuit. *See, e.g.*,

McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 306-07 (D.C. Cir. 1999) (accepting as a competitive harm the prospect that a *customer* will use released information to improve its bargaining position against the submitter of information). Limiting harms to only those caused by a competitor is not—and should not be—the law in the Eighth Circuit.

The district court also stated that it found the witnesses' testimony contradictory, noting that a high volume of SNAP sales might invite a competitor to enter the market *or* keep a competitor from entering the market. App.231. But these scenarios are not contradictory, considering the wide range of retailers participating in SNAP and competing in the grocery industry. Some retailers target the SNAP demographic, others do not perform well with that demographic. II.RR.389. Regardless, having store-level SNAP data will enable competitors and market entrants to refine their strategies to suit their best advantages—resulting in likely and substantial competitive harm.

Finally, the district court also repeated its conclusion that too many factors influence competition in the grocery industry for SNAP data to make a difference. App.220. As already discussed above, it is in part *because* the grocery industry is so intensely competitive that the release of SNAP data will make a huge difference to those with the ability to use it. *See supra* at II.B. In particular, and as Dr. Sougstad testified, large retailers like Walmart and Target have departments

devoted to business intelligence and data analytics. II.RR.374. The district court therefore erred in discounting harms arising from stigma attaching to SNAP retailers. App.231.

3. The district court erred in disregarding the fact that the likely competitive harm to SNAP retailers outweighs any public benefit to releasing store-level SNAP data.

Finally, courts applying FOIA must balance the interests that Congress intended to protect through the statute's exemptions with the public's interest in disclosure. *U.S. Dept. of Defense v. FLRA*, 510 U.S. 487, 495 (1994) (evaluating Exemption 6). "[T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the 'core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." *Id.* (internal quotation marks omitted).

Argus Leader argued in closing that "We want to know what is the Government paying, taxpayer dollars, to people voluntarily participating in the program." II.RR.423. But the public already knows how much the government pays. SNAP data is available to everyone at the national, regional, state, county, and ZIP-code level. I.RR.103; *see also* SNAP (data as of July 2017), https://www.fns.usda.gov/sites/default/files/pd/34SNAPmonthly.pdf. USDA also releases the amount the average SNAP recipient and SNAP household receives, and publishes an annual report detailing redemptions by store type at the national

level. *Id.*[14] All of this information sufficiently answers the question "what is the Government paying," and does so with significant geographic specificity by revealing the amounts according to ZIP code, *without* disclosing confidential store-specific numbers that will cause competitive harm to individual retailers. The current system already reflects an appropriate balance between the public's interest in information and the retailer's interest in confidentiality.

* * *

FOIA does not require USDA and its witnesses to have a crystal ball that can perfectly predict the outcome of releasing store-level SNAP redemption data. Nonetheless, USDA presented ample evidence that releasing the data will have a substantially harmful effect on the submitters, and even *Argus Leader*'s own experts conceded that there could be some loss of profitability. II.RR.364, 378. The district court's apparent belief that USDA did not meet its burden of proof placed a higher burden on USDA than the law requires, especially in light of the harms that this Court held to be sufficient as a matter of law in *Madel*. Moreover, the district court's reasons for discounting USDA's evidence—its view that the release of the information would have no meaningful impact and that other

[14] *See also* SNAP Retailer Data, https://www.fns.usda.gov/snap-retailer-data, breaking down SNAP redemptions across seventeen different types of retailer and eight types of non-retailer SNAP participants (e.g., homeless shelters, shelters for battered women, and substance abuse treatment programs).

evidence presented by USDA was irrelevant—was contradicted by the record before it, and unsupported by any relevant authority. The judgment for *Argus Leader* should therefore be reversed, and judgment rendered in favor of USDA and FMI. In the alternative, considering the district court's failure to consider relevant evidence, *see supra* at 24-34, this Court should vacate the judgment below and remand for further consideration.

III. USDA was also entitled to judgment because it proved that the requested information was "secret" and that its release would impair a government program, both of which independently establish that the information is "confidential."

USDA proved a likelihood of substantial competitive harm and was entitled to judgment on that ground alone. *See supra* Part II. However, the definition of confidential information in Exemption 4 is not limited to that which would "cause substantial harm to the competitive position of the person from whom the information was obtained." *Contract Freighters*, 260 F.3d at 861. That narrow definition, embraced by the district court, arises from judicial gloss, nothing more, and should be rejected. The plain text of the statute protects *any* "confidential" information, including that which the submitters protect from disclosure. Moreover, as other Circuits have recognized, Exemption 4 also protects information that may damage government program efficiency. Because USDA proved conclusively at trial that the SNAP data was confidential under both of these standards, it was also entitled to judgment on those grounds. In the

alternative, the district court's failure to consider and apply these standards requires the case to be remanded for further consideration.

A. The plain text of Exemption 4 protects all "confidential" information—not just that which is likely to cause competitive harm—which includes store-level SNAP redemption data that is carefully guarded by retailers.

FOIA exempts from disclosure "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Because the statute does not define "confidential," the word should be given its ordinary or natural meaning. *See FDIC v. Meyer*, 510 U.S. 471, 476 (1994). "Confidential" means "meant to be kept secret." BLACK'S LAW DICTIONARY 339 (9th ed. 2009). Appellant has been unable to uncover any dictionary that defines *confidential* as "likely to cause competitive harm," much less limits the term to that narrow definition.[15]

In most contexts, and consistent with its plain meaning, confidential means *secret*. For example, an attorney's duty of confidentiality extends to all of a client's information, not just that which may "cause competitive harm" to the client. *See ABA Model Rules of Professional Conduct* Rule 1.6. Similarly, one

[15] *E.g.*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://unabridged.merriam-webster.com/ ("1. communicated, conveyed, acted on, or practiced in confidence : known only to a limited few : not publicly disseminated : private, secret"); OXFORD ENGLISH DICTIONARY, http://www.oed.com/ ("2. Of the nature of confidence; spoken or written in confidence; characterized by the communication of secrets or private matters").

who completes a marketing or political survey accompanied by a promise of confidentiality would hardly be mollified when subsequent public disclosure is justified by the blithe response that "your answers will cause you no competitive harm."

This Court has already established that a plain text interpretation should be given to Exemption 4. *Brockway v. Dep't of Air Force*, 518 F.2d 1184, 1188-89 (8th Cir. 1975). In that case, this Court determined that witness statements were not "commercial or financial" information under Exemption 4. *Id.* at 1189. This Court refused to endorse a construction of "commercial or financial" that "torture[d] the plain language of the exemption." *Id.* at 1188; *see also Fed. Open Market Comm. v. Merrill*, 443 U.S. 340, 353-54 (1979) (rejecting an argument regarding Exemption 5 that was "fundamentally at odds with the plain language of the statute.").

A construction of "confidential" that confines the term to something that is "likely to cause competitive harm" likewise "tortures" the plain language of the statute. Applying the plain-text rationale of *Meyer* and *Brockway* would exempt all confidential—meaning, simply, *secret*—commercial or financial information. Here, USDA showed that store-level SNAP redemption data is secret. I.RR.205 ("We do not publish or make available in any way SNAP information."); I.RR.251 (testifying that retailers never publicly release financial information). *Argus*

Leader's witnesses never contradicted the confidentiality of the store-level SNAP data.

There is no compelling reason to depart from the plain meaning of the term, and interpret Exemption 4 as only protecting information likely to cause competitive harm. Such a tortured reading could only be based on a judicial gloss on the statute first that appeared in *National Parks*, due to a somewhat dubious reading of legislative history. *See* 498 F.2d at 766. The D.C. Circuit, after observing that it had been guided by the passage from the Senate Report that defined "confidential" as "would customarily not be released to the public," added that the "court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." *Id.* at 767. According to the D.C. Circuit, those two legislative purposes were (1) protecting the government's ability to continue to obtain information that was provided voluntarily by submitters (who might refuse to do so if they believed the information would be disclosed), and (2) protecting submitters from commercial disadvantage. These became the two "prongs" of the *National Parks* test—a test "fabricated, out of whole cloth." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n* (*Critical Mass II*), 931 F.2d 939, 947 (D.C. Cir. 1991) (Randolph, J., concurring) (quoting Note, *Trade Secrets and the Fifth Amendment*, 54 U. CHI. L. REV. 334, 364 (1987)).

National Parks itself expressly disclaimed that the two interests it identified were exclusive. 498 F.2d at 770 n.17. Since then, the D.C. Circuit has expressly recognized that "[i]t should be evident . . . that the two interests identified in the *National Parks* test are not exclusive." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n (Critical Mass III)*, 975 F.2d 871, 879 (D.C. Cir. 1992)).

The first and only time this Court applied the *National Parks* test in an Exemption 4 case was in *Madel*. 784 F.3d at 452. *Madel* did not hold that the *National Parks* prongs are the exclusive tests for confidentiality, and no other definitions of confidentiality were proposed to the Court. *See* Appellee's Brief, *Madel*, 2014 WL 4987115, *17 ("The parties agree that information is confidential under Exemption 4 if its disclosure 'is likely to have either of the following effects: (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.'").

This Court should decline to adopt any extra-textual limitations on "confidential," and hold that the term has its plan meaning when used in FOIA: Exemption 4 protects all commercial or financial information shown to be *secret.* Here, the witnesses universally agreed that store-level SNAP data is not currently available and is carefully guarded by retailers. *See supra* at Part II.B.2. It is, therefore, "confidential," and should remain so.

B. Exemption 4 also protects the government's interest in a program's effectiveness, and therefore prohibits disclosure of the SNAP information requested by *Argus Leader*.

1. The government's interest in a program's efficiency and effectiveness is protected by Exemption 4.

Even beyond the plain language of the statute, there is significant precedent for recognizing that "confidential" in the FOIA context means more than just "likely to cause competitive harm." The *National Parks* court noted that "problems of compliance and program effectiveness are mentioned as governmental interests possibly served by this exemption" in the hearings regarding FOIA, however it "express[ed] no opinion as to whether *other* governmental interests are embodied in this exemption." *Id.* (emphasis added).

Promoting the effectiveness of government programs was definitely recognized as one of the "protectable government interests" that justify non-disclosure under Exemption 4 by the First Circuit in *9 to 5 Org. for Women Office Workers v. Bd. of Governors of Fed. Reserve Sys.*, 721 F.2d 1, 3 (1st Cir. 1983). In that case, the court evaluated whether salary survey information collected by a private cooperative organization and shared with the Federal Reserve Bank of Boston was confidential under Exemption 4. The Federal Reserve Board directs its banks to base salaries on those in the community, and the Bank of Boston provided responsive information to the survey. *Id.* The First Circuit held that there is a "legitimate governmental interest of efficient operation," and concluded that "it

would do violence to the statutory purpose of Exemption 4 were the Government to be disadvantaged by disclosing information which serves a valuable purpose and is useful for the effective execution of its statutory responsibilities." *Id.* at 11. Because the district court failed to properly consider this principle, its judgment was vacated and the case remanded. *Id.* at 10-11.

The government's interest in not harming the effectiveness and efficiency of its own programs has since been recognized by other courts on multiple occasions.[16] *E.g.*, *Ctr. for the Study of Servs. v. United States Dep't of Health & Human Servs.*, 130 F. Supp. 3d 1, 15 (D.D.C. 2015) (considering whether government met its burden to show harm to program effectiveness); *Pub. Citizen Health Research Grp. v. Nat'l Institutes of Health*, 209 F. Supp. 2d 37, 54 (D.D.C. 2002) ("[I]mpairment of the effectiveness of a government program is a proper factor for consideration in conducting an analysis under FOIA Exemption 4.").

[16] Only the Second Circuit has disclaimed "program effectiveness" as a viable government interest supporting non-disclosure. *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 150 (2d Cir. 2010) (analogizing from *Fed. Open Market Comm. v. Merrill*, 443 U.S. 143, 354 (2d Cir. 2010), which rejected "public interest" as an extra-textual reason to withhold information the Second Circuit determined that "program effectiveness" was essentially analogous to the "public interest" standard rejected by the Supreme Court). *Id.* (citing *Merrill*, 443 U.S. at 354). This analysis fails to recognize that the Supreme Court rejected the "public interest" standard for going beyond the text of the statute, which all attempts to limit "confidential" similarly do.

2. Store-level SNAP data is protected from disclosure by Exemption 4 because releasing that data will harm the effectiveness of SNAP.

USDA provided ample evidence that releasing SNAP data would harm the effectiveness of SNAP. The district court, however, discounted all non-competitive harms to the effectiveness of SNAP as "not relevant" because they would not be caused by a competitor. As explained above, *see supra* at Part.II.C.2, that was legal error. The district court was required to consider testimony that the disclosure of SNAP data would have the tendency to stigmatize SNAP recipients, thereby directly impeding one of the goals of SNAP: permitting Americans to receive food aid with dignity through the normal channels of commerce. That uncontradicted evidence, further, entitled USDA to judgment in its favor. At the very least, the district court's failure to consider this evidence in the proper legal context requires the case to be remanded for further consideration. *See 9 to 5*, 721 F.2d at 10-11.

The central goal of SNAP is to increase the food purchasing power of low-income households through normal economic channels. 7 U.S.C. § 2011. But the district court ignored evidence that some retailers, if faced with the release of store-level SNAP data, may choose to opt out of participation in SNAP, necessarily weakening the ability of SNAP to meet that goal. Participation in SNAP by retailers is voluntary—and necessary for the program to function. But as

NGA's Peter Larkin testified, some stores "might think twice about remaining a part of a program where their sales figures were released." II.RR.294; *see also* I.RR.232 (testimony of Andrew Johnstone admitting that leaving the SNAP program is an option to avoid disclosure of Kmart's confidential information).

The unrebutted evidence at trial was that retailers agreed to participate in SNAP with the understanding that their sales information "would be kept confidential." *E.g.*, I.RR.230-31. Thus, some retailers may opt out of participating in the program if they face regular disclosure of their sales data, thereby harming SNAP recipients' ability to obtain nutritious food through the normal channels of commerce. In response to a question from the district court about whether retailers would have signed up to participate in SNAP if they knew their information would not be kept confidential, Peter Larkin from the National Grocers Association responded:

> I believe it's going to be a store-by-store -- or really a company-by-company decision, and it's probably going to depend on their SNAP sales to their volume. I can see that some companies might think twice about remaining a part of a program where their sales figures were released. I think there are probably others that it's such an important component of their customer base, that they're going to have a very, very difficult decision on their hands.

II.RR.294. Even if only a portion of SNAP retailers feel that disclosure of SNAP will harm them more than they can withstand, any reduction in the number of participating retailers hamstrings the effectiveness of the SNAP program by

forcing affected recipients to travel farther to redeem their benefits. Food deserts may be enlarged or created. Even if the district court is correct that the release of SNAP data will cause only minimal competitive harm, retailers may choose to end their participation based on the danger *they* perceive, weakening the effectiveness of SNAP.

A second "reason or part of one of the benefits of moving from paper Food Stamps to EBT . . . was to help remove the stigma and make the SNAP customer less obvious as they were going through the checkout line, because they were just swiping a card, like everybody else, instead of handing out paper Food Stamps." I.RR.254. Congress intended for SNAP beneficiaries to be able to acquire nutritious food through the usual avenues of commerce through a discreet EBT card, doing away with the more noticeable and stigmatized food stamp coupons.

But the retailers testified that they were concerned that any attention brought to individual stores with high SNAP redemption might tend to stigmatize those customers, undoing some of the good that came with switching to EBTs under SNAP. Joey Hays of Dyer Foods testified, "The reality of it is, there's a stigma attached to customers using EBT. People that don't use it sometimes look at that customer differently." I RR 176. Hays testified that if a store gets a reputation for doing a high volume of SNAP sales, SNAP beneficiaries may feel "singled out."

I.RR.194. "[T]he majority of the people that go to that store use SNAP, and they don't want to be in that limelight." *Id.*

Releasing SNAP data inevitably will draw the public's eye to SNAP, and in particular to customers who shop at stores with high SNAP sales. This unwanted attention counteracts SNAP's purpose of permitting beneficiaries to transact with discretion, and dignity.

CONCLUSION

FMI took the extraordinary step of intervening post-judgment to pursue this appeal because of the substantial competitive harms its members will face should USDA be required to release store-by-store SNAP redemption data. USDA presented a robust case for non-disclosure of this data under Exemption 4, in harmony with this Court's decision in *Madel*. But the district court erred by setting the bar for showing competitive harm too high. USDA did not need to prove with mathematical certainty exactly how the release of SNAP data would harm each individual submitter. Some will be harmed because low-price format stores see their high SNAP redemption numbers as a rich target. Others will be harmed because data analysts use SNAP redemption data to create more effective algorithms for forecasting where to put new stores. Others still will be harmed because their low SNAP redemption numbers indicate the area is ripe for a higher price point, "luxury" store. And some may be harmed by unfortunate lingering

stigmas. These harms are not inconsistent or speculative: they reflect a diverse competitive field.

Moreover, the district court erroneously followed the extra-textual and unfairly narrow approach of interpreting "confidential" as exclusively limited to the likelihood of substantial competitive harm and, by so doing, failed to consider the plain meaning of the statute as well as other the non-competitive harms that have been part of Exemption 4 analysis for more than four decades.

For all these reasons, the Court should reverse the judgment of the district court and should enter judgment for USDA and FMI. In the alternative, the district court's failure to consider relevant evidence and to apply the proper definition of "confidential," this Court should vacate the judgment below and remand the case for further consideration.

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Respectfully submitted,

By: /s/_____

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CERTIFICATE OF COMPLIANCE

The undersigned counsel states that this brief complies with FED. R. APP. P. 32(a)(7) because it contains 12,822 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f), as counted by a word processing system and, therefore, is within the 13,000 word limit. This motion also complies with typeface and type-style requirements of FED. R. APP. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this Brief and accompanying Addendum have been submitted to the Clerk via the Court's CM/ECF system and the files have been scanned for viruses and are virus free.

Dated: August 15, 2017

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief were served, this 11th day of August, 2017, through CM/ECF on all registered counsel.

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