**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)

# APPELLANT FOOD MARKETING INSTITUTE'S REPLY BRIEF


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## INTRODUCTION

The district court ordered confidential store-level SNAP data released, largely because the court misapplied the likelihood-of-competitive-harm standard and misinterpreted the testimony of USDA's expert. To preserve that judgment, *Argus Leader* now asks this Court to endorse a novel reading of Exemption 4 that would require the party resisting disclosure to prove to a near certainty that every submitter would suffer actual and identical harm from the disclosure of its confidential information. That threshold is higher than any court has required and will rarely if ever be met, particularly in circumstances like these where hundreds of thousands of submitters are likely to be affected in different ways by the disclosure of their information. *Argus Leader* musters an assortment of irrelevant, unsupported, and outside-the-record observations in support of its interpretation—but it never squarely confronts the Exemption 4 case law discussed by FMI in its brief. *Argus Leader*'s musings and speculations cannot overcome the evidence adduced below regarding the likelihood of substantial competitive harm that retailers will face if their confidential information is disclosed, and do not justify the district court's ruling.

In its opening brief, FMI also identified two additional applications of Exemption 4 that require reversal of the district court's judgment and rendition of judgment in USDA and FMI's favor: the statute protects all secret information, in

accordance with the plain-text meaning of "confidential," and preserves the efficacy of government programs by shielding information whose disclosure would disrupt or undermine the functioning of the program. Contrary to *Argus Leader*'s claim, this Court may consider these legal arguments on appeal. Doing so is proper because both parties have had the opportunity to brief those arguments, and because it will permit the Court to clarify an important aspect of FOIA jurisprudence and reach the correct result in this appeal.

## ARGUMENT

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

The district court erred by requiring USDA to prove precisely how each retailer would be harmed by the release of store-level SNAP data and by refusing to consider evidence of harm from disclosure that did not arise from competitors. Under the correct legal standard, USDA's evidence was more than sufficient to establish a likelihood of substantial competitive harm. Finally, the court also ignored the external indicia of competitive harm that unequivocally showed that competitive harm was likely to result. For these reasons, the district court's judgment must be reversed, and judgment entered for USDA and FMI.

#### A. Like the district court, *Argus Leader* advocates for the wrong legal standard that would require USDA to present more conclusive evidence of harm than FOIA requires.

Throughout its brief *Argus Leader* repeatedly overstates FMI's burden on

appeal to challenge the district court's ruling. *Argus Leader* is correct that a district court's *factual* findings are reviewed for clear error. But whether the district court applied the correct *legal* standard in determining whether the requested information was "confidential" is reviewed *de novo*. *Peltier v. F.B.I.*, 563 F.3d 754, 762 (8th Cir. 2009); *Johnston v. U.S. Dep't of Justice*, 163 F.3d 602, at *1 (8th Cir. 1998) (unpublished).

As explained in FMI's opening brief, the district court did not apply the correct legal standard—and *Argus Leader* doubles down on these errors in its brief. Exemption 4 protects any "commercial or financial information obtained from a person [that is] confidential." 5 U.S.C. § 552(b)(4). In *National Parks*, the D.C. Circuit held that one way to prove that information is "confidential" under the statute is to show that releasing the information "is likely to . . . cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Without support from any case law, *Argus Leader* interprets these words to require the party resisting disclosure prove the information's release has "a high probability" of causing harm, or that there is "a requisite degree of certainty" that harm would result. Appellee's Br. 24-25 (citing MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1996); BLACK'S LAW DICTIONARY (4th ed. 1968)). According to *Argus Leader*, USDA failed to meet this standard

because its witnesses testified regarding how the release "could" or "might" affect retailers, and because some retailers might gain a competitive benefit from disclosure of other retailers' SNAP data. Appellee's Br. 39, 44 n.71.

No court has adopted the stringent standard advocated by *Argus Leader* and employed by the district court. Instead, courts follow the standard announced in *Public Citizen*, a later opinion issued by the D.C. Circuit that further developed on the *National Parks* test: "the court need not conduct a sophisticated economic analysis of the likely effects of disclosure" to determine whether Exemption 4 applies. *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *see also id.* (explaining that the party resisting disclosure need not establish "actual competitive harm," but instead can prevail by showing the existence of "actual competition and the likelihood of substantial competitive injury"). Raising the floor for Exemption 4's application to a "high probability" is not required by the statute and would artificially and unnecessarily limit the exemption's application. That is especially so for complicated cases such as this one, where the information to be released belongs to hundreds of thousands of submitters operating in a wide variety of markets, and it is virtually impossible to predict with certainty the effects of the release on all of those entities. Such a restrictive approach is contrary to the Supreme Court's clear instruction that FOIA exemptions must not be so strictly and narrowly interpreted that they no longer

have any "meaningful reach and application." *John Doe Agency et al. v. John Doe Corp.*, 493 U.S. 146, 152 (1989).

*Argus Leader*'s novel interpretation is also contrary to the law as established by this Circuit and other federal courts. *Madel v. U.S. Department of Justice*, 784 F.3d 448 (8th Cir. 2015), for example, contains no discussion of the "certainty" or "high probability" of substantial competitive harm that *Argus Leader* urges here. It was enough that "the data in the withheld spreadsheets [regarding transactions between distributors of oxycodone and individual retailers] *could* be used to determine the companies' market shares, inventory levels, and sales trends in particular areas." *Id.* at 453 (emphasis added) (reviewing district court's grant of summary judgment in favor of the government and confirming that Exemption 4 protected the information at issue). Evidence of what "could" or "might" happen was enough to trigger Exemption 4 in *Madel*—and should have been sufficient here too.

*Argus Leader* attempts to dodge *Madel* by arguing that the *information* in *Madel* was "markedly different" than SNAP data. Appellee's Br. 28. But the focus of the competitive harm test is on the *effects* that the release will have, and here the effects are the same: the release of the information will allow competitors to "target specific markets, forecast potential business of new locations, or to gain

market share in existing locations." *Madel*, 784 F.3d at 452 (internal quotation marks omitted); *see also* Appellant's Br. 23.

Other courts have also found competitive harm based on similar evidence. In *State of Utah v. U.S. Department of the Interior*, 256 F.3d 967, 970 (10th Cir. 2001), the Bureau of Indian Affairs (BIA) refused to let Utah participate in negotiations between a Native American tribe and a private nuclear waste storage corporation, and the state therefore requested that the BIA disclose the resulting leases. Like *Argus Leader*, Utah argued that disclosure of lease terms would have a negligible effect on competition—in that case because "regions would be about as anxious to attract a chance to store spent nuclear fuel as they would to encourage an outbreak of leprosy." *Id.* at 970-71. But the BIA had submitted affidavits showing that actual competition to provide nuclear waste storage existed and noting that competitors "could use" the lease information to improve their own bargaining positions, precisely the type of evidence presented by USDA. Appellant's Br. 24-29. Even when construing this evidence in favor of Utah as the non-movant, the Tenth Circuit concluded that the evidence constituted a sufficient showing of competitive harm to justify application of Exemption 4 as a matter of law. 256 F.3d at 971.

The requester in *Kahn v. Federal Motor Carrier Safety Administration*, 648 F. Supp. 2d 31, 33 (D.D.C. 2009), sought the Federal Motor Carrier Safety

Administration's written decisions on applications for self-insurance authorization in three particular cases. The FMCSA refused, arguing that the decisions contained sensitive static revenue, net worth, and income information about the submitter companies. *Id.* at 36. The only competitive harm identified by those companies was that releasing the information "may give the requesting party some competitive benefit that it is not otherwise entitled to and this information is not presently public information," and that the information was "extremely proprietary in nature . . . contain[ing] confidential financial information of which its disclosure is of no benefit other than to possible industry competitors." *Id.* at 37. This general assertion of competitive harm, bolstered by the principle that "it is 'virtually axiomatic' that the disclosure of such financial and commercial information is likely to cause competitive harm," entitled the FMCSA to summary judgment. *Id.* (quoting *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976)).

In an attempt to persuade this Court that a higher standard has been adopted by other courts, *Argus Leader* relies on a handful of government-contractor bid cases, which focus on whether the requested information is granular enough for competing contractors to decipher how winning bidders structured their bids and consequently undercut those bidders in the future. *See* Appellee's Br. 32 (citing *Ctr. for Pub. Integrity v. Dep't of Energy*, 191 F. Supp. 2d 187, 194 (D.D.C. 2002);

*GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1111 (9th Cir. 1994)). For example, courts have determined that the release of "overhead, and profits as well as related cost information" could be useful to a competing contractor, *Carmody & Torrance v. Def. Contract Mgmt. Agency*, 3:11-CV-1738 JCH, 2014 WL 1050908, at *10 (D. Conn. Mar. 13, 2014), but releasing a report on subcontracting goals with the identities of the contractor and subcontractor obscured is not, *GC Micro Corp*., 33 F.3d at 1115. These cases are not contrary to FMI's position. *Argus Leader* is requesting a decade's worth of real sales data—information that the retailers uniformly testified would reveal sensitive and well-guarded information about sales and trends at individual stores, and enable competitors to extract an ongoing picture of a retailer's economic health at the store level. *See* I.RR.215; II.RR.331-32; *see also* Sealed Testimony of Gwen Forman RR:6-14. That information is at least as valuable as the static information contained in a single bid that courts have held is protected by Exemption 4 in government contractor cases.[1]

[1] *Argus Leader* also cites *North Carolina Network for Animals, Inc. v. USDA*, 924 F.2d 1052 (4th Cir. Feb. 5, 1991) (unpublished) for the proposition that "Exemption 4 does not cover general information regarding sales and pricing that would not reveal submitter's costs, profits, etc." Appellee's Br. 32. *N.C. Network* is inapposite because there was a failure of proof as to actual competition, as well as no explanation of how the sales data could be used. 924 F.2d at *3. There is no dispute that there is actual competition, and USDA presented conclusive evidence of actual competition and explained in detail how the sales data could be used. II.RR.393-399; *see also* Sealed Testimony of Gwen Forman RR:6-15.

*Argus Leader*'s reliance on *Carmody* and *Lee v. FDIC*, 923 F. Supp. 451 (S.D.N.Y. 1996) for the proposition that the standard of proof of competitive harm is higher than what USDA presented is similarly misplaced. *Carmody* is about segregating sensitive information (that which reveals profits) from non-sensitive information (the disclosure of renovating costs for a single facility), not about requiring a higher degree of certainty to meet the "competitive harm" test. 2014 WL 1050908, at *10. *Lee*, meanwhile, concerned whether information available to the public in one format could be considered confidential when presented in a different format, an utterly distinguishable fact situation than the SNAP data at issue here. 923 F. Supp. at 455. The proper standard is simply that the allegations of harm cannot be merely conclusory. *Public Citizen*, 704 F.2d at 1291; *Gilda Indus., Inc. v. U.S. Customs & Border Prot. Bureau*, 457 F. Supp. 2d 6, 11 (D.D.C. 2006).

*Argus Leader* next argues—echoing the district court—that USDA failed to meet its burden because it is possible that not all of the hundreds of thousands of individual SNAP retailers will be affected in the same way by the disclosure of store-level SNAP data. Instead, some retailers might benefit from the disclosure because they will be able to effectively use that information their competitors. *See* Appellee's Br. 36, 39. But nothing in Exemption 4 or the case law applying it requires the government to prove that *all* submitters will be harmed by disclosure,

much less in identical ways. Such an illogical test would render Exemption 4 a nullity in complicated cases such as this one, where the hundreds of thousands of retailers that may be affected by the disclosure of SNAP data vary widely: some are large, national chains, others single-owner stores; some are convenience stores, others grocery, others mixed-retail; some do high volumes of SNAP business, others low; some have expansionary business models, others are just trying to hold on to the stores they have. The wide diversity of affected retailers means that there will not be a one-size-fits-all competitive harm scenario, and the law does not require USDA to develop one. It is enough that releasing the information is likely to cause substantial competitive harm to at least one submitter. 5 U.S.C. § 552(b)(4); *see also Nat'l Parks*, 498 F.2d at 770 (information is "confidential" if its release "is likely to . . . cause substantial harm to the competitive position of the person from whom the information was obtained"). USDA met this requirement by presenting evidence of how a variety of retailers would likely be affected. Appellant's Br. 24-28.

Finally, the district court erred by refusing to consider the evidence that USDA presented regarding the likelihood that some retailers will be harmed by the stigma that could follow disclosure of their SNAP sales; according to the district court, such harm is irrelevant because it would not be caused by *another competitor*. App. 228-29. But this Court has never limited competitive harm to

only those harms caused by a competitor, and *Argus Leader* makes no effort to defend the district court's erroneous view of the law on appeal. Appellee's Br. 40-42. Instead, *Argus Leader* insists that the stigma argument fails because not all stores will be harmed by that stigma. Appellee's Br. 42. As explained above, this argument lacks merit because the statute only requires a showing of harm to one or more submitters; the fact that others could benefit or be unaffected by disclosure does not override or nullify that harm.

### B. *Argus Leader* is unable to justify the district court's weighing of the evidence under the correct standard.

Applying the wrong legal standard caused the district court to improperly weigh the evidence before it. *Argus Leader* makes the same mistake—and then adds to the district court's errors by advancing diversionary arguments that have no legal relevance to this appeal.

#### 1. Argus Leader relies on red herring arguments that have no legal bearing on competitive harm.

*Argus Leader* starts by arguing that USDA's decision not to appeal indicates that releasing the information will not cause substantial harm. Appellee's Br. 26. USDA does not have unlimited resources and must choose which appeals to pursue. The government will not suffer competitive harm[2]—the retailers will. USDA will not cease to exist if SNAP data is released—a retailer might. Even the

[2] The government's aims may be injured in other ways, see Appellant's Br. 52-55.

district court itself—the court whose decision is being reviewed on appeal—acknowledged that FMI "could succeed in an appeal" and that this justified allowing FMI to intervene in the case for purposes of appealing the judgment. App. 275.

Similarly, alleged comments made by the former Under Secretary for FNS to a reporter regarding his personal opinion about the "competitive situation" are wholly irrelevant. The comments quoted by *Argus Leader* are not part of the record, or even in the article *Argus Leader* cites. Appellee's Br. 26-27. In any event, USDA took the position that the information was confidential and could not be disclosed under FOIA. The personal opinion of a former government officer on this matter has no bearing on the issues before this Court.

*Argus Leader* also places great weight on what it characterizes as an "underwhelming response" to USDA's Request for Information from SNAP retailers. Appellee's Br. 37. *Argus Leader* tries to spin the data both ways—crooning that a "staggering number of SNAP retailers . . . did not care enough to react to this anticipated threat," only to complain on the next page that "nobody seems to claim any association with those on the winners' side [of releasing SNAP information]." Appellee's Br. 38-39. Of course, the response rate to the FNS's automated phone inquiry and email is legally irrelevant and indeed played no part in the district court's analysis. At trial, USDA presented evidence regarding

competitive harm from a wide variety of retailers, including organizations that represent large groups of retailers. There is no requirement that USDA prove harm for every submitter, only that the release of the information is likely to "cause substantial harm to the competitive position of the person from whom the information was obtained"—i.e., *any* submitter.[3] *Nat'l Parks*, 498 F.2d at 770.

Finally, *Argus Leader* repeatedly suggests that refusing to disclose store-level data is wrong because it is anti-competitive. Appellee's Br. 35-36, 51-52. Without citation to any evidence or authority, *Argus Leader* speculates that the competitive impact of releasing submitters' information would be a *benefit* because it would, according to *Argus Leader*, both help some retailers and improve overall competition in the industry for the benefit of consumers and the market. Appellee's Br. 35-36, 51-52. If anything, such recognition that the competitive landscape is likely to change as a result of the release of this information *supports* FMI's position. Congress created Exemption 4 to protect submitters' confidential commercial and financial information. The very nature of "competitive harm" assumes that for every *harmed* competitor there exists a competitor who benefits.

[3] In any case, there are any number of factors that could explain the response rate. For one, in the year of the RFI, 80% of all SNAP dollars were spent at only 37,536 locations, or less than 12% of the retailers contacted. Food and Nutrition Service, *Fiscal Year 2014 at a Glance*, https://fns-prod.azureedge.net/sites/default/files/snap/2014-SNAP-Retailer-Management-Year-End-Summary.pdf. Additionally, many may not have taken the time to listen to the message or may have relied on organizations like FMI to represent their interests.

Holding that Exemption 4 does not apply if there is a competitor who would *benefit* from disclosure would consequently turn the statute on its head and make Exemption 4 a nullity. Like *Argus Leader*'s other arguments described above, *see supra* at 10, this argument occupies substantial real estate in the response brief but has no relevance to the issues before this Court and cannot justify the district court's erroneous judgment.

**2. The evidence before the district court showed a likelihood of substantial competitive harm.**

The relevant evidence that is in the record required the district court to enter judgment for USDA. The district court credited the testimony of USDA's witnesses. App. 230. *Argus Leader* now complains that the testimony of USDA's witnesses was overly speculative and vague, but fails to support these claims with any specific references to the record. *E.g.*, Appellee's Br. 13-14, 30, 31, 33, 35-36 44. Contrary to *Argus Leader*'s unsupported contention, USDA's witnesses presented extensive and detailed explanations concerning what harm was likely to occur if the data was disclosed, and how that harm would come about. *See, e.g.*, Appellant's Br. at 23-29, 38 (discussing testimony). To the extent that *Argus Leader*'s complaint is that the witnesses at times discussed what "might" or "could" happen if the information is disclosed, that position is without merit. As previously explained, such testimony is sufficient to trigger Exemption 4 and should have been given determinative weight by the district court. *See supra* at 4-

5. If Exemption 4 bars all evidence of what "might" or "could" happen, the exemption becomes a near nullity, since testimony about a hypothetical future will always contain some degree uncertainty.

*Argus Leader* fares no better when it turns to the expert testimony at trial. The district court relied heavily on the statistical analysis of USDA's expert Bruce Kondracki in rendering its judgment, particularly Kondracki's statement that his projections can reach correlations of .9 or .99. According to the district court, this proved that competitors already have good insight into each other's total sales and thus that competition would be negligibly affected, if at all, by the availability of store-level SNAP data. App. 230. But FMI explained in its opening brief that this was a misinterpretation of Kondracki's testimony, *see* Appellant's Br. 34-35, and *Argus Leader* does not dispute this or attempt to defend the district court's analysis. Appellee's Br. 45. Kondracki testified that he can only create such accurate models when he starts with real sales data provided by his customer, and that the models reach these levels of accuracy only as to *his customer's stores*, not a competitor's. II.RR.391. He then explained exactly how he could use store-level SNAP data on behalf of a client to predict a competitor's sales and empower those clients to compete more effectively in existing markets and target new markets. II.RR.391-96.

*Argus Leader* attacks Kondracki's testimony as being "oblique," claiming that Kondracki "did not venture the opinion that disclosure was likely to cause substantial competitive harm to existing SNAP retailers." Appellee's Br. 18. But while Kondracki may not have used the exact verbiage put forth in *National Parks*, his opinion on the consequences of disclosure was clear:

> Q: And do you have an opinion about how the release of individual-store SNAP data will impact the modeling process and the forecast?
> A: Yes. It will create a windfall for us and for our competitors to be able to target and to benchmark these store sales.

II.RR.393. He further elaborated that retailers that can afford retail forecasting will "get to sites quicker than the folks who aren't doing this data, and the first one there is the one who wins in this scenario . . . . **It's a huge competitive advantage**." II.RR.397-98 (emphasis added). This clear testimony was considerably more definite and specific than testimony that courts have found establishes confidentiality as a matter of law. *E.g.*, *State of Utah*, 256 F.3d at 970; *Kahn*, 648 F. Supp. 2d at 33.

*Argus Leader*'s two experts did not discount the possibility of harm; rather, they disputed how widely spread the harm would be and posited that some competitors might benefit from the release of store-level SNAP data. *E.g.* II.RR.378 (Testimony of Dr. Sougstad "Q: … [W]ere you saying that there will be no loss of profitability from the release of this information? A: No."); II.RR.367

(Testimony of Dr. Volpe agreeing that "it would be naïve to believe that release of . . . SNAP data would have no effect."); II.RR.362 (Testimony of Dr. Volpe agreeing that releasing the SNAP data "could cause some harm to some retailers"). Dr. Volpe based his conclusion on the fact that "the construction of this data set and the proper analysis . . . would be very difficult, expensive, time-consuming, and highly unlikely to occur." II.RR.356. But Dr. Volpe then agreed that it would be "very easy" to use store-level sales and SNAP data to calculate a correlation. II.RR.367-68. This is the exact same point that Kondracki made: using his customer's store-level sales and his customer's SNAP data, Kondracki could easily calculate a correlation that can then be applied using a competitor's released SNAP data to reverse-engineer the competitor's total sales. II.RR. 394-97. The testimony of Dr. Sougstad not only confirmed Kondracki's testimony that retailers could use their own data to make competitive decisions, but further explained that some retailers expend enormous resources to perfect their data analytics. II.RR.374, 376. Taken together, *Argus Leader*'s experts confirm exactly what the retailers fear: SNAP data *can* be used to reveal sensitive overall sales data, and certain retailers *will* leverage their data analytics departments (or hire experts like Kondracki) to do so.

This evidence is extremely significant in evaluating the likelihood of substantial competitive harm—but neither the district court nor *Argus Leader*

acknowledge the importance and properly weigh the evidence due to their misapprehension of the governing legal standard and due to the district court's misunderstanding of Kondracki's testimony. It is undisputed that the grocery industry is highly competitive and that competitors already gather significant public information about one another's retail practices. The district court assumed that this meant that the disclosure of one more piece of information would have no significant impact, and *Argus Leader* parrots this speculation even though it can identify no evidence or authority to support it. *See* Appellee's Br. 29. But as numerous courts have recognized, and as the experts confirmed at trial, I.RR.192, 252-53; II.RR.291, releasing additional data in such an environment is highly likely to have a substantial competitive impact because of what competitors can learn and deduce by adding the new information to their existing knowledge—establishing the confidential nature of that information. *See* Appellant's Br. 26-27, 32 (discussing *Watkins v. U.S. Bureau of Customs & Border Protection*, 643 F.3d 1189, 1196 (9th Cir. 2011); *Gilda Indus.*, 457 F. Supp. 2d at 11; *Sharkey v. Food & Drug Admin.*, 250 Fed. App'x. 284, 290 (11th Cir. 2007) (unpublished)). *Argus Leader*'s response to these authorities is silence. Silence, however, cannot fix the district court's failure to view the effect of the release of store-level SNAP data in light of the information already known to competitors in the industry, and thus properly evaluate the evidence before it. This finding was key to the district

court's order, and that order cannot survive without it. App. 230-31.

Under the standard set by *Madel*, USDA proved that releasing store-level SNAP data is likely to lead to competitive harm.[4] The district court committed clear error in misinterpreting Kondracki's analysis, and its application of the wrong legal standard led it to give incorrect weight to evidence, and rely on irrelevant factual findings. *E.g.*, App. at 230-31 (commenting on the methods retailers currently use to compete with each other and observing that one retailer already faced steep competition from Wal-Mart). No deference is due such a decision. *Peltier*, 563 F.3d at 762. These errors require reversal of the district court's judgment, and rendition of judgment in favor of USDA and FMI.

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[4] *Argus Leader* attempts to circumvent *Madel* by emphasizing that the requester in that case did not counter the government's evidence. Appellee's Br. 30. That is a distinction without a difference. *Madel* held that the information presented by the government in that case sufficed to prove confidentiality as a matter of law—and the evidence presented here is the same. While *Argus Leader* presented expert testimony in support of its request for information, that testimony—as explained above—did not establish that SNAP data would not affect the competitive landscape. Under the standard established in *Madel*, therefore, that testimony does not justify the judgment.

*Argus Leader* also points out that on remand in *Madel*, the district court lost patience with the government for releasing a report it had previously argued was confidential and for failing to justify its refusal to segregate with specificity the confidential information from the requested reports. Appellee's Br. 30-31; *Madel v. U.S. Dep't of Justice*, CV 13-2832 (PAM/FLN), 2017 WL 111302, at *3 (D. Minn. Jan. 11, 2017). The district court's comments have no relevance here, as neither of these issues is present in this appeal.

### C. The external indicia of harm all support a finding of competitive harm.

The district court never considered any of the other indicia of harm recognized by other courts, and *Argus Leader* similarly ignores cases that analyze other indicia of competitive harm. For example, in *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981), the D.C. Circuit measured the value of information by whether and at what cost competitors could acquire the information. *Argus Leader* complains that even if external indicia are valid, there is no evidence in the record of what the competition would pay for a retailer's SNAP sales. Appellee's Br. 43. But the uncontradicted testimony was that SNAP data is currently impossible to obtain at any cost, I.RR.22 & II.RR.320, and Dr. Sougstad testified that while projections of total sales are currently available for a fee, those projects are of unknown reliability, and are based on *less* concrete data than real, year-over-year benchmarks (such as store-level SNAP data for each year from 2005 to 2010). II.RR.376. Moreover, any lack of information regarding whether this data could be obtained and at what cost favors remand, not affirmance of the district court's judgment. *See Worthington*, 662 F.2d at 51 (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).

Similarly, in *Sharkey*, the Eleventh Circuit analyzed the submitter's consistent and detailed measures to protect the confidentiality of the information in finding a likelihood of competitive harm. 250 Fed. App'x. at 290. The uncontradicted testimony from the retailers in this case was that they all take extensive efforts to protect their sales data. I.RR. 205-06, 251; II.RR.320. Once again, *Argus Leader* ignores this authority and the uncontroverted evidence. These unrebutted indicia of harm all compel a finding of competitive harm.

## II. The competitive harm test is not the only measurement of whether information is "confidential" under FOIA.

### A. This Court can interpret FOIA as a matter of law for the first time on appeal.

*Argus Leader* contends that any argument that "confidential" under Section 552 of FOIA includes all "secret" information or embraces other government interests beyond those articulated in *National Parks* has been waived. The issue of which matters to consider on appeal lies within this Court's discretion. *Struempler v. Bowen*, 822 F.2d 40, 42 (8th Cir. 1987). The interpretation of "confidential" is a purely legal question. Where, as here, an "issue can be resolved as a matter of law and the pertinent record has been fully developed," this Court has been willing to entertain new arguments on appeal. *Wright v. Newman*, 735 F.2d 1073, 1076 (8th Cir. 1984) (considering strict liability theory for the first time on appeal); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273

F.3d 1229, 1241 (9th Cir. 2001) (considering statutory interpretation argument presented for the first time on appeal because the other party was not prejudiced by the failure to raise it below).

*Argus Leader* cites *Roth v. U.S. Department of Justice*, 642 F.3d 1161, 1179–80 (D.C. Cir. 2011), for the proposition that an argument must be raised below "in a manner sufficient to put [the other party] on notice of the need to rebut it." Appellee's Br. 1, 47, 50. But *Roth* expressly noted that the other party had been deprived of the opportunity to put on new *evidence* to rebut the argument raised on appeal. 642 F.3d at 1179. The government challenged for the first time on appeal an inmate's reliance on documents produced 17 years after trial in a *Brady* argument. "Had the government raised this challenge in the district court, Roth might have responded with an affidavit stating that the information produced in 2001 was not disclosed at the time of [the] trial." *Id.* The inmate's inability to timely respond to the government's argument with relevant evidence prevented the court of appeals from considering the new argument. *Id.*

There is no evidence necessary for this Court to decide whether to enforce a plain-text reading of the statute, and *Argus Leader* has mustered its best legal arguments in its response brief. *See* Appellee's Br. 47-52. Moreover, USDA elicited relevant evidence regarding both the secrecy of SNAP data and the potential effect on government efficacy. *See* Appellant's Br. 32-33 (secrecy); 52-

55 (harm to SNAP). *Argus Leader* does not contest this evidence on appeal or claim that it was deprived of any opportunity to counter this evidence at trial. It is therefore appropriate for this Court to exercise its discretion to resolve this legal issue.

*Argus Leader* similarly cites *Jenkins by Agyei v. State of Missouri*, 962 F.2d 762, 766 (8th Cir. 1992), to encourage the Court to refuse to consider FMI's argument. Appellee's Br. 1, 47, 50. This case, too, fails to support *Argus Leader*'s position. The appellants in *Jenkins* presented a brand new *claim* for the first time on appeal. After confining their arguments for a refund of unprotested taxes at the trial court to statutory protest procedures, on appeal the appellants contended for the first time that the refusal of a refund was a taking without just compensation. 962 F.2d at 766. FMI is not making a new claim; like USDA at trial, FMI contends that SNAP data is protected from release under FOIA Exemption 4. FMI is merely presenting statutory interpretations of Exemption 4 to enable the Court to rule on this issue and develop this important area of the law. No legal principle or precedent bars FMI from raising this argument for the Court's consideration. Moreover, no precedent of this Court establishes the competitive harm test as the exclusive arbiter of "confidential." *See* Appellant's Br. 44, 46-48.

### B. A plain-text interpretation of "confidential" improves the statute's applicability in less-common FOIA situations.

Relying on the plain-text meaning of "confidential" when applying Exemption 4 comports with well-established legal principles and is easier to apply in a wider variety of circumstances than the judicially-created "competitive harm" test. *Argus Leader* asserts that "those in the private sector choosing to do business with the government should reasonably expect to sacrifice some privacy in relation to the conduct of that business." Appellee's Br. 50. But Exemption 4 exists precisely to *protect* the privacy of those who do business with the government.

*Argus Leader* next attempts to insulate the information from the statute's reach by claiming that "SNAP payment information is not pre-existing information about a person or entity that is being submitted to qualify to go into business with the government. It is, instead, a record of that business actually being conducted." Appellee's Br. 49. This characterization is incorrect. What the SNAP data sought by *Argus Leader* memorializes is not government expenditure (which occurs when the funds are transferred to the EBT account, *see* I.RR.29-30) but the results of a customer's choice to shop at a particular retailer and apply SNAP benefits towards particular items. It is a record of business transacted between a customer and a retailer, not the retailer and the government.

Finally, *Argus Leader* relies on an excerpt from a House Committee Report quoted in *9 to 5 Org. for Women Office Workers v. Bd. of Governors of Fed.*

*Reserve Sys.*, 721 F.2d 1, 9 (1st Cir. 1983) for the proposition that a subjective test of confidentiality is contrary to Congressional intent. Appellee's Br. 48 (describing the Committee as rejecting a "disclosure policy . . . contingent on the subjective intent of those who submit information"). It is a tried and true rule of statutory interpretation that where the statute contains an unambiguous word—like "confidential"—the court will not "permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). "Confidential" is not ambiguous, and its ordinary meaning is naturally subjective: "confidential" is in the eye of the beholder. *E.g.*, *United States v. Falcon*, 766 F.2d 1469, 1476 (10th Cir. 1985) (labeling of tape "Confidential. Do Not Play" reveals a subjective expectation of privacy).

### C. Releasing store-level SNAP data would undermine the efficacy of SNAP.

*Argus Leader* resists the government's interest in keeping SNAP data confidential in two ways: first, *Argus Leader* disputes that the release of data could force some retailers to stop participating in SNAP, and second, *Argus Leader* argues that disclosing the data might prevent fraud. Appellee's Br. 51-52. Neither argument is persuasive.

*Argus Leader* speculates, based on "fundamental economics" and "business sense," that SNAP retailers would not stop participating in SNAP if store-level

data were released. *See* Appellee's Br. 51-52. But this Court should not, and does not need to, speculate regarding what retailers might do if the SNAP data is released: the retailers discussed it in their testimony, making the record evidence uncontroverted on this point. The retailers discussed ceasing participation in SNAP. *E.g.*, II.RR.294 (retailers "might think twice about remaining a part of a program where their sales figures were released); I.RR.232 (testimony of Andrew Johnstone that ending SNAP participation is an option to avoid disclosure of Kmart's confidential information). The retailers also testified regarding their concerns that their customers may experience psychological harm if public attention is dragged to high-SNAP participation stores. I.RR.76; I.RR.194; *see also* Sealed Testimony of Gwen Forman RR:17-19. *Argus Leader*'s speculation about how "fundamental economics" might play out over time in an complex billion-dollar industry has no weight in the face of actual testimony from the retailers.

*Argus Leader* also claims that disclosure of store-level data will help prevent SNAP fraud. Appellee's Br. 52. Of course, this too is mere speculation: FNS already has access to store-level data as well as the mandate to detect and confront SNAP fraud. Indeed, the government has all the motivation to investigate SNAP fraud, as it is government money at stake. Just as importantly, speculation that disclosure of information might have an ancillary benefit because Argus Leader

intends to use it to investigate potential fraud is not relevant. Whether disclosure would cause competitive harm is evaluated by assuming the data will be made public and used by third parties, and not focused on how *Argus Leader* might use the information as the requester. Appellant's Br. 20 (gathering cases).

## CONCLUSION

This Court is free to interpret the statutory language of Exemption 4 more broadly than what the competitive harm test can reach. But even under the traditional competitive harm test relied on by the district court, USDA mustered sufficient evidence to prove competitive harm will likely result if SNAP data is released. This Court should reverse the judgment of the district court and render judgment for USDA and FMI.

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Respectfully submitted,

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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 6,499 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 6,500 word limit. This brief 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 file of this brief has been submitted to the Clerk via the Court's CM/ECF system and the file has been scanned for viruses and are virus free.

Dated: November 30, 2017

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief were served, this 30th day of November, 2017, through CM/ECF on all registered counsel.

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