No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,

Respondent.

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

BRIEF IN OPPOSITION

Jon E. Arneson
123 S. Main Avenue,
Suite #202
Sioux Falls, SD 57104

Robert M. Loeb
Counsel of Record
Thomas M. Bondy
Randall C. Smith
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
rloeb@orrick.com

Counsel for Respondent

BLANK PAGE

QUESTIONS PRESENTED

Exemption 4 of the Freedom of Information Act exempts from the FOIA's disclosure obligation "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The Eighth Circuit determined that Exemption 4 does not shield from release information generated and compiled by the government regarding the amounts of federal money disbursed to food retailers under the Supplemental Nutrition Assistance Program.

The petition raises three questions:

1. Should this Court jettison the objective approach to determining whether commercial information is "confidential" under Exemption 4, which every circuit that has addressed the issue has adopted, in favor of a subjective standard, which no circuit has adopted?

2. Did the Eighth Circuit correctly hold that the information sought here is not "confidential" under Exemption 4, where the evidence showed that disclosure would provide no material insight into any aspect of a retailer's business?

3. Does information generated and compiled by the government, regarding the disbursement of government funds, qualify as "obtained from a person" under Exemption 4, if some of the underlying data were obtained by third-party payment processors that effected transactions using federal money?

CORPORATE DISCLOSURE STATEMENT

Gannett MHC Media, Inc. is the corporate parent of the Argus Leader. The parent of Gannett MHC Media, Inc. is Gannett Co., Inc. Gannett Co., Inc. is a publicly traded company. Black Rock, Inc., a publicly traded company, owns ten percent or more of the stock of Gannett Co., Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules & Regulations

Legislative Materials

Other Authorities

INTRODUCTION

In its petition, the Food Marketing Institute urges this Court to take up a question on which it acknowledges there is no circuit split, in order to adopt a position that it concedes no court of appeals has ever adopted.

The Freedom of Information Act (FOIA) provides for access to records that enable the public to see what their government is doing. There are limited exceptions to FOIA's broad right of access to government information. One exception—Exemption 4—applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). More than four decades ago, the D.C. Circuit concluded that, to determine whether "commercial or financial information obtained from a person" qualifies as "confidential" under that provision, courts should look, in part, at whether disclosure 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). Since then, as Petitioner concedes, nearly every circuit has agreed with that standard; no circuit has rejected it. Pet. 14.

Petitioner's first question presented, therefore—which invites this Court to jettison this interpretation of "confidential" commercial information in favor of a new, subjective formulation, which no circuit has embraced—reflects the quintessential situation in which certiorari is *not* warranted: Petitioner argues that this Court should take up the *National Parks*

interpretation of "confidential" not because lower courts disagree about whether it is correct, but because the interpretation has been too widely and uniformly adopted. And though Petitioner offers up a second question presented, which purports to identify a conflict arising from the application of the *National Parks* interpretation, no such conflict exists. No circuit has adopted either of the two positions that Petitioner claims constitute that "circuit split."

Even if this Court were inclined to take up Petitioner's invitation to assess the lower courts' uniform and long-established interpretation of "confidential" commercial information under Exemption 4, this case would be a peculiarly bad vehicle for doing so. Exemption 4 applies to "commercial or financial information obtained from a person." The exemption operates in circumstances where private parties provide the government with their own, non-publicly disseminated materials. This case, by contrast, arose when a journalist at a local paper made a FOIA request to the U.S. Department of Agriculture for information relating to the amounts of federal funds disbursed to grocery stores under the government's Supplemental Nutrition Assistance Program (SNAP). The case, then, involves a request for the government's *own information*, compiled and stored on the government's own databases, relating to the government's own spending. Because this case does not involve the sort of information that is covered by Exemption 4, it provides no opportunity for this Court to address Petitioner's generalized objections to the way in which lower courts have consistently interpreted "confidential" commercial information under Exemption 4.

The petition should be denied.

STATEMENT OF THE CASE

1. The Supplemental Nutrition Assistance Program (SNAP)—formerly known as the food stamp program—is a government program that subsidizes the purchase of groceries for low-income families. *See* 7 U.S.C. § 2013. It is administered by the Food and Nutrition Service, a component of the U.S. Department of Agriculture (USDA). *See* 7 C.F.R. § 271.3(a).

Historically, the program operated via coupons—called food stamps—that were printed by the Treasury Department's Bureau of Printing and Engraving in various denominations and issued to qualifying households. Those food stamps could be used to purchase eligible products at retail food stores. The stores then redeemed the stamps with the Treasury Department. *See* Food Stamp Act of 1964, Pub. L. No. 88-525, § 4, 78 Stat. 703, 704 (1964).

Physical food stamps, however, are no longer used, and federal funds for the purchase of food items are now provided to qualifying households by Electronic Benefit Transfer or "EBT" cards. *See* 7 U.S.C. § 2016. When making a purchase at a retail food store, the SNAP beneficiary swipes the EBT card at the register and enters a four-digit personal identification code, essentially as if the beneficiary were making a purchase with a debit card. Pet. App. 51a. A third-party payment processor then transfers federal funds from the SNAP beneficiary's account to the retailer's account. Pet. App. 51a. Information on

these transactions and the federal funds disbursed is consolidated and stored on the Food and Nutrition Service's Store Tracking and Redemption System (the STARS database). Pet. App. 26a.

2. The Argus Leader is a newspaper published in South Dakota. Pet. App. 49a. It has been published since 1881 (originally as the Sioux Falls Argus), and today has the largest circulation of any newspaper in the State.

In 2011, an Argus Leader reporter submitted a FOIA request to the USDA. Pet. App. 61a. The request sought "data from the FNS STARS database" regarding the federal funds disbursed through SNAP. *See* C.A. App. 4. The information sought included the names and addresses of stores that received such federal funds, as well as the total amount of federal funds each store received each year from 2005 through 2010. Pet. App. 25a-26a. In response, the government provided some, but not all, of the information requested. Specifically, the USDA provided the names and addresses of the stores, but refused to provide the amounts of federal funds disbursed to particular stores under the SNAP program. Pet. App. 51a.

After the Argus Leader exhausted the internal agency appeals process, it filed a complaint in the U.S. District Court for the District of South Dakota in August 2011. Pet. App. 63a. The Argus Leader alleged that the USDA's refusal to provide the amounts of federal funds received annually by each retailer violated the FOIA. Pet. App. 24a. In response, the USDA argued that the FOIA's disclosure obligation

did not extend to the total amount of federal funds disbursed to particular stores.

3. In 2012, the district court granted the USDA's motion for summary judgment. Pet. App. 24a-45a. The court concluded that the information sought was exempted from the disclosure requirement under FOIA Exemption 3, which applies to information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). The USDA argued that the information at issue was specifically exempted from disclosure under a statute that authorizes regulations that "require an applicant retail food store or wholesale food concern to submit information, which may include relevant income and sales tax filing documents, ... which will permit a determination to be made as to whether such applicant qualifies" to receive federal funds under SNAP. 7 U.S.C. § 2018(c). The statute imposes penalties on "[a]ny person who publishes, divulges, discloses, or makes known ... information obtained under" the section. *Id.* The district court acknowledged that the statute did not expressly exempt information about the amounts of SNAP funds received by retail stores, but concluded that such data nevertheless fell under the "broad umbrella" of "income and tax information." Pet. App. 41a.

4. Argus appealed and, in 2014, the Eighth Circuit reversed. Pet. App. 48a-57a. The court of appeals observed that § 2018(c) applies only to information "submit[ed]" by "an applicant retail food store or wholesale food concern." Pet. App. 54a. The information sought, however, was not obtained from the retail stores. Rather, the Eighth Circuit explained

that "[t]he [D]epartment [of Agriculture], not any retailer, generates the information, and the underlying data is 'obtained' from third-party payment processors, not from individual retailers." Pet. App. 54a. The Eighth Circuit accordingly concluded that § 2018 did not shield the USDA's records of federal spending on SNAP from disclosure.

5. On remand, the USDA again moved for summary judgment, asserting this time that the requested federal spending data was shielded by FOIA Exemption 4, which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential," and also by Exemption 6, which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §§ 552(b)(4) & (6).

The district court denied the USDA's motion. Pet. App. 60a-70a. As to Exemption 4, the district court observed that, following the Eighth Circuit's decision, the USDA sought feedback from retailers about whether the federal SNAP spending data should be released. Pet. App. 64a. Only a tiny percentage of the retailers (less than 1%) responded to say that they opposed the release. Pet. App. 64a, 67a-68a. As a result, the district court found that "there is evidence that supports the inference that the majority of SNAP retailers are not concerned about any competitive harm that might stem from the disclosure of individual store data." Pet. App. 68a. As to Exemption 6, the district court concluded that a reasonable fact-finder could conclude that the public interest in knowing the amount of federal subsidies various food

retailers receive outweighs any interest in personal privacy. Pet. App. 68a-69a.

The USDA then withdrew its Exemption 6 claim, and the case proceeded to a bench trial on the Exemption 4 claim alone. Pet. App. 10a-11a. At trial, several government employees testified regarding their practices in generating and compiling the pertinent SNAP data. Further, the USDA offered the testimony of several executives of grocery chains. The executives testified that information about the amount of SNAP spending at individual retail food stores is not public knowledge, and asserted generally that disclosure of that information might be helpful to competitors. Pet. App. 11a-12a. One also speculated that, if the data showed a large volume of sales at a given retailer, revealing that fact could cause "potential stigma" for the store. Pet. App. 11a. On cross-examination, the executives conceded that information about a particular grocery store's business, such as location, product selection, and pricing, was already available to the public. Pet. App. 11a-12a. They also acknowledged that the total amount of federal SNAP money a store receives provides only a limited window into the store's operations, and that the disclosure of such information would not be tantamount to disclosing a store's net profits or revenues. Pet. App. 11a-12a.

The Argus Leader presented the testimony of two experts. They testified that yearly amounts of federal SNAP money received by a store would be of little value to a competitor. Pet. App. 12a-13a. A variety of different factors may affect the aggregate amount of SNAP spending at a given retail food store, from the

price of goods, to an individual store's customer demographics, to an overall increase in the number of households qualifying for SNAP subsidies. Pet. App. 13a. As such, bare totals of SNAP spending at a particular retailer over the course of a year would not play a significant role in a competitor's business decisions. Pet. App. 13a.

Based on the evidence presented, the district court found that the USDA failed to meet its burden to show that the information sought was protected from the FOIA's disclosure obligation under Exemption 4. Pet. App. 9a-21a. As to whether the information should be considered "obtained from the government" rather than "obtained from a person" outside of the government, the district court concluded that the Eighth Circuit's prior decision already resolved that question against the Argus Leader. Pet. App. 15a-16a.

The district court next addressed whether the information sought was "confidential" within the meaning of Exemption 4. The court explained that the Eighth Circuit had adopted the interpretation of "confidential" commercial information first articulated by the D.C. Circuit in *National Parks*. Pet. App. 16a. Under that reading of the exemption, commercial or financial "[i]nformation is confidential" for purposes of Exemption 4 "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." Pet. App. 16a (quoting *Contract Freighters, Inc. v.*

Sec'y of U.S. Dep't of Transp., 260 F.3d 858, 861 (8th Cir. 2001)).

Because the USDA conceded that the first prong of the test was inapplicable, the court noted that the decision here turned on whether the USDA met its burden, under the second prong, of showing that disclosure was likely to cause substantial competitive harm. As to that issue, the district court found that there was actual competition in the relevant market. Indeed, the court determined that "[c]ompetition in the grocery business is fierce." Pet. App. 17a. But the court concluded that the USDA failed to show by a preponderance of the evidence that disclosure of the materials at issue was likely to cause substantial competitive harm. Reviewing the witness testimony, the court noted that a range of information about a retail food store's business is already publicly available, and that the federal SNAP spending data "would not add significant insights into the grocery industry." Pet. App. 19a. Accordingly, "any potential competitive harm from the release of the requested SNAP data is speculative at best." Pet. App. 19a.

After the district court held that the information sought is thus not exempt from disclosure under Exemption 4, the USDA informed the Argus Leader that it was abandoning its claim that the aggregate SNAP spending amounts were exempt from FOIA and that it would therefore disclose the information. Pet. App. 72a. At that time, the Food Marketing Institute (FMI), a trade association for food retailers, moved to intervene in the litigation in order to pursue an appeal of the district court's decision. The district court granted intervention under Federal Rule of

Civil Procedure 24(a). Pet. App. 71a-78a. The court concluded that FMI had standing because "its members would otherwise have standing to sue in their own right because of the potential nonconsensual dissemination of private information." Pet. App. 75a.

6. FMI appealed to the Eighth Circuit. The court of appeals affirmed. Pet. App. 1a-6a. The court found no clear error in the district court's determination that the USDA had not shown that the information sought qualified as "confidential" under Exemption 4. The court observed that the "record evidence showed that the contested data—which are nothing more than annual aggregations of SNAP redemptions—lacked the specificity needed to gain material insight into an individual store's financial health, profit margins, inventory, marketing strategies, sales trends, or market share." Pet. App. 4a-5a. The court further explained that "FMI's assumption that stores would be stigmatized" by the release of the data "was speculative and not supported by any other evidence in the record." Pet. App. 5a. Finally, in a footnote, the court rejected FMI's suggestion that "confidential" commercial or financial information should be construed to mean simply that the information "has previously been kept secret," observing that, under that interpretation of "confidential," "Exemption 4 would swallow FOIA nearly whole." Pet. App. 4a.

FMI petitioned the Eighth Circuit for rehearing en banc. It focused its argument on the contention that it should have won under a prior Eighth Circuit case also applying the likelihood-of-substantial-competitive-harm test. *See* Appellant's Petition for

Rehearing En Banc at 7-16, *Argus Leader Media v. Food Marketing Institute*, No. 17-1346 (8th Cir. July 21, 2018), Dkt. 4674655. FMI did not invite the en banc Eighth Circuit to abandon the test altogether. The court denied the petition. Pet. App. 85a-86a.

FMI moved the Eighth Circuit to stay the mandate pending a petition for certiorari. The court of appeals denied the motion. Pet. App. 79a-80a. FMI then applied to this Court to recall the mandate and stay it pending a petition for certiorari. This Court granted the application; Justices Ginsburg, Sotomayor, and Kagan indicated they would deny the application. Pet. App. 81a-82a.

REASONS TO DENY CERTIORARI

The petition should be denied for three main reasons. *First*, it implicates no disagreement among the courts of appeals. Petitioner alleges no conflict at all on its first question presented. On the contrary, Petitioner concedes that, in the more than four decades since the D.C. Circuit first articulated the *National Parks* interpretation of "confidential" commercial information under FOIA Exemption 4, every circuit to have addressed the question has adopted that interpretation, and no circuit has rejected it. That is the opposite of a circuit split.

Though Petitioner does assert a circuit split on its second question presented, no such split exists: Neither the court of appeals here, nor any other circuit, has ever held that a "party opposing disclosure" must "establish with near certainty a defined competitive harm like lost market share" to

show that commercial information is confidential under Exemption 4, as Petitioner claims. Moreover, this case does not implicate any of the supposed subsidiary "circuit splits" arising from the application of *National Parks* that Petitioner posits, and most of these do not represent real circuit splits anyway—just different outcomes deriving from applying the same standard to different facts.

Second, this case presents a singularly poor vehicle for considering the interpretation of "confidential" commercial or financial information under Exemption 4, because Exemption 4 applies only to information "obtained from a person" outside of the government, whereas this case involves information generated and compiled by the government, relating to the government's own spending on a federal program. Thus, even if the courts of appeals' agreement on the *National Parks* standard otherwise presented a basis for this Court's review, the highly atypical and inapt factual context of this case would not be a suitable vehicle.

Finally, certiorari is unwarranted in any event because the lower courts' long-established and uniformly accepted interpretation of a "confidential" business record is correct and consistent with basic principles of statutory interpretation. The alternative, subjective interpretation of "confidential" that Petitioner proposes, and that no court has adopted, would be overly broad, unworkable, and inconsistent with the structure and purposes of FOIA.

I. The Case Does Not Implicate Any Circuit Split.

A. The courts of appeals have uniformly embraced the *National Parks* interpretation of "confidential" commercial information.

Petitioner's principal argument is that this Court should grant certiorari to correct the court of appeals' "erroneous construction of 'confidential' [commercial or financial information] in FOIA Exemption 4." Pet. 10. Petitioner concedes, however, that every circuit that has addressed the issue has adopted the same construction, and none has rejected it. Indeed, by Petitioner's own account, "the Circuits have fallen in line behind" the interpretation of "confidential" commercial information first articulated by the D.C. Circuit in *National Parks*, with "[a]t least ten Circuits hav[ing] embraced the *National Parks* test and an eleventh [having] applied it in an unpublished decision." Pet. 14. Petitioner thus concedes that there is no circuit conflict—courts of appeals throughout the country apply the same standard, ultimately drawn from the same D.C. Circuit decision, to determine whether "commercial" information qualifies as "confidential" under FOIA Exemption 4.[1]

---

[1] *See 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 7-10 (1st Cir. 1983); *Cont'l Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir. 1977); *OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 162 & n.24 (3d Cir. 2000); *Acumenics Research & Tech. v. U.S. Dep't of Justice*, 843 F.2d 800, 807 (4th Cir. 1988); *Cont'l Oil Co. v. Fed. Power Comm'n*, 519 F.2d 31, 35 (5th Cir.

In *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992), the en banc D.C. Circuit was presented with the opportunity to jettison the interpretation of "confidential" commercial information "obtained from a person" that the court had adopted approximately two decades earlier in *National Parks*. Not one judge on that court ultimately thought the court should do so. The court highlighted "the widespread acceptance of *National Parks* by other circuits," noting that, at that time, "seven ha[d] adopted its test of confidentiality" and "none ha[d] rejected it." *Id.* at 876. The court further noted that Congress had done nothing that would call into question its interpretation of "confidential" commercial or financial information; on the contrary, "Congress has taken cognizance of the [*National Parks*] case in enacting subsequent legislation," and "accepted" the standard it articulated "as appropriate." *Id.* at 876-77 (internal citations omitted). Finally, the en banc court noted that the court's interpretation of "confidential" commercial or financial information had "not proven ... 'unworkable' in practice"; rather, decisions applying the standard simply showed, at worst, the inherent "difficulties that can arise whenever judicial lines are drawn." *Id.* at 877.

1975); *Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984); *Contract Freighters, Inc.*, 260 F.3d at 861; *Pac. Architects & Eng'rs Inc. v. U.S. Dep't of State*, 906 F.2d 1345, 1347 (9th Cir. 1990); *Anderson v. Dep't of Health & Human Servs.*, 907 F.2d 936, 946 (10th Cir. 1990); *Sharkey v. Food & Drug Admin.*, 250 F. App'x 284, 286 (11th Cir. 2007).

Two and a half decades have passed since *Critical Mass* and it remains the case that no circuit has rejected the *National Parks* approach. On the contrary, the number of circuits embracing the *National Parks* interpretation of "confidential" commercial or financial information has increased, so that now virtually every circuit has adopted it.[2] And this Court has repeatedly denied requests to review cases applying Exemption 4.[3]

Furthermore, although it has frequently amended FOIA over the years,[4] Congress has not amended Exemption 4 to reject the interpretation embraced by all of the circuits that have addressed the question. Shortly after the *National Parks* decision, a subcommittee of the House of Representatives held a

---

[2] *See OSHA Data/CIH*, 220 F.3d at 162 & n.24; *Contract Freighters*, 260 F.3d at 861; *Sharkey*, 250 F. App'x at 286.

[3] *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, cert. denied, 507 U.S. 984 (1993) (No. 92-1043); *Clearing House Ass'n, L.L.C. v. Bloomberg L.P.*, cert. denied, 562 U.S. 1303 (2011) (No. 10-543); *Clearing House Ass'n, L.L.C. v. Fox News Networks, LLC*, cert. denied, 562 U.S. 1303 (2011) (No. 10-660); *N.H. Right to Life v. Dep't of Health & Human Servs.*, cert. denied, 136 S. Ct. 383 (2015) (No. 14-1273).

[4] *See, e.g.*, Privacy Act of 1974, Pub. L. No. 93–579, 88 Stat. 1896; Government in the Sunshine Act, Pub. L. No. 94–409, 90 Stat. 1241 (1976); Freedom of Information Reform Act of 1986, Pub. L. No. 99–570, §§ 1802, 1803, 100 Stat. 3207-48, 3207-49; Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048; Intelligence Authorization Act for Fiscal Year 2003, Pub. L. 107–306, § 502, 116 Stat. 2383, 2405-07; OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; OPEN FOIA Act of 2009, Pub. L. No. 111-83, § 564, 123 Stat. 2184; FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538.

hearing on requests for business records under FOIA. *See Business Record Exemption of the Freedom of Information Act: Hearings Before a Subcomm. of the H. Comm. on Gov't Operations*, 95th Cong., 1st Sess. 2 (1977); *see also* Office of Information Policy, U.S. Dep't of Justice, FOIA Update, *Protecting Business Information* (Vol. IV, No. 4 Jan. 1, 1983) (noting that "subsequent wide acceptance and application of this *National Parks* test prompted congressional hearings"). The subcommittee ultimately released a report concluding that "[t]he rapid general acceptance of the substantial competitive harm test ... is strong evidence that the court in *National Parks* made a significant stride in dealing with the problems of confidential business information." House of Representatives Committee on Government Operations, *Freedom of Information Act Requests for Business Data and Reverse FOIA Lawsuits*, H.R. Rep. No. 95-1382, at 20-21 (1978). The report rejected arguments in favor of a "'promise' or 'expectation' test of confidentiality"—the very approach Petitioner advocates here—concluding that this alternative approach was "not convincing" and was "generally inconsistent with the language of the fourth exemption as well as the policy underlying FOIA." *Id.* at 21. And the report likewise rejected a test based on "actual business policies for the release of information," concluding that such a test "w[ould] prove to be inadequate because of the widespread practice of withholding information whether or not there is a legitimate reason for the withholding." *Id.* at 18.

Finally, as explained in more detail below, the *National Parks* interpretation has proven workable.

Virtually all of the supposed subsidiary "circuit splits" that Petitioner claims have arisen in the application of the interpretation actually just represent different outcomes deriving from the application of the same legal standard to different factual circumstances. *See infra* at 17-25. Petitioner offers no reason to believe its proffered standard, or any other, would be any more workable. *See infra* at 29-35.

B. The claimed split is illusory.

While Petitioner concedes that the courts of appeals have uniformly embraced the *National Parks* approach, it argues that this case nevertheless implicates a conflict regarding how to apply the approach. Petitioner contends that, while some courts have held that a party may show that commercial information is "confidential" under FOIA's Exemption 4 by demonstrating that it "could be potentially useful to a competitor," other circuits have held that "the party opposing disclosure" must "establish with near certainty a defined competitive harm like lost market share." Pet. i. Petitioner asserts that the Eighth Circuit here applied the latter standard, and that Petitioner would have won had the court applied the former standard.

The split Petitioner purports to identify does not in fact exist. The *National Parks* standard requires a "*likelihood* of substantial harm to the competitive positions of the parties from whom [the information] has been obtained." 498 F.2d at 771 (emphasis added). This means "the parties opposing disclosure need not show actual competitive harm; evidence revealing actual competition and the likelihood of substantial

competitive injury is sufficient to bring commercial information within the realm of confidentiality." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (internal citations omitted). The decisions Petitioner identifies as supposedly "disagree[ing]" on this issue all articulate that same standard. *See N.H. Right to Life*, 778 F.3d at 50; *Utah v. U.S. Dep't of Interior*, 256 F.3d 967, 970 (10th Cir. 2001); *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994).

Not surprisingly, given that they are all reading from the same *National Parks* playbook, none of the decisions Petitioner cites actually adopts either of the positions that Petitioner now presents as reflecting a "split" warranting this Court's review. None holds that the likelihood of substantial competitive harm can be shown simply by demonstrating that the information "could be potentially useful to a competitor." Pet. i. For instance, Petitioner suggests the Tenth Circuit adopted that standard in *Utah v. U.S. Department of Interior*, but nothing in the Tenth Circuit's decision supports that characterization. The court there held that the government had established a likelihood of substantial competitive harm where the government offered multiple affidavits indicating that the release of certain documents provided to the government by an Indian tribe would put the tribe "in a weaker position at the bargaining table in negotiating any future deals." 256 F.3d at 970; *see also id.* (noting affidavit "declar[ing] that disclosure of the withheld information would give ... competitors an unfair advantage 'in undercutting prices, structuring their transactions, and marketing'").

Likewise, none of the decisions Petitioner cites holds or even suggests that a "likelihood of substantial competitive injury" actually means a "near certainty" of "a defined competitive harm." Pet. i. On the contrary, the decisions that Petitioner references as "requir[ing] significantly more certainty and specificity," Pet. 26, actually emphasize that, to establish that materials are "confidential" under Exemption 4, a party need not "prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would 'likely' do so," *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004), and that "the law does not require the [party resisting disclosure] to engage in a sophisticated economic analysis of the substantial competitive harm to its contractors that might result from disclosure," *GC Micro Corp.*, 33 F.3d at 1115.

Furthermore, nothing in the Eighth Circuit's decision here required a showing of a "defined competitive harm" with "near certainty." The court of appeals determined that the district court's decision was not clearly erroneous because the evidence showed, at best, that release of the information sought might make the "statistical models" used by competitors in the grocery business "marginally more accurate," but did "not support a finding that this marginal improvement in accuracy is likely to cause *substantial* competitive harm." Pet. App. 5a (emphasis in original). Nothing distinguishes that analysis from that of all of the other circuits that have likewise adopted the *National Parks* interpretation of "confidential" commercial or financial information under Exemption 4.

Like most of the other supposed "circuit splits" to which Petitioner alludes, the purported split about "what constitutes a likelihood of substantial harm" is drawn from Justice Thomas's dissent from this Court's denial of certiorari in *N.H. Right to Life,* 136 S. Ct. 383, but relies on a misreading of that dissent. There, Justice Thomas, joined by Justice Scalia, stated that "courts' reliance on *National Parks* to determine whether information is 'confidential' commercial information has produced confusion." *Id.* at 384. Justice Thomas, however, did not say anything to suggest that this disagreement entailed some courts requiring a showing of a "near certainty" of a "defined competitive harm." And the only decision that Justice Thomas identified as departing from the requirement that a party show it would "likely suffer some defined competitive harm" is the First Circuit's decision in *N.H. Right to Life*, which Justice Thomas believed the Court should review.

The First Circuit's decision in *N.H. Right to Life* involved a distinctive set of circumstances. The materials sought there—Planned Parenthood's "Manual of Medical Standards and Guidelines," as well as information on its fee schedules and personnel practices—were provided in the context of a non-competitive application for a federal grant. 778 F.3d at 47, 51. The First Circuit nevertheless held that the Department of Health and Human Services had established that disclosure of those items was likely to cause substantial competitive harm, observing that, "[a]lthough Planned Parenthood admittedly did not compete for the federal grant in 2011, it certainly does face actual competitors—community health clinics—in a number of different arenas, and in future

Title X bids," and that "[a] potential future competitor could take advantage of the institutional knowledge contained in the Manual ... to compete with Planned Parenthood for patients, grants, or other funding." *Id.* at 51.

Whether or not *N.H. Right to Life* correctly applied the *National Parks* interpretation to the particular circumstances presented there, where the materials sought were provided to the government by a non-profit organization in a non-competitive bid for federal funding, the circumstances of the present case are quite different. The Eighth Circuit recognized "that the grocery industry is highly competitive," Pet. App. 5a, but Petitioner lost because the court found that disclosure of the information sought, which consists simply of total amounts of SNAP dollars received by a given retailer in a year, was not likely to cause substantial competitive harm. Pet. App. 5a. Justice Thomas's criticism of the First Circuit for allowing withholding even though the government couldn't show that disclosure was "likely to result in any negative consequences for the entity whose information was disclosed" provides no support for Petitioner's argument that, in the different setting of this case, the Eighth Circuit erred by applying an overly stringent standard for determining whether commercial information is "confidential" under Exemption 4.

C. This case does not implicate any of the other subsidiary circuit splits identified by Petitioner.

Petitioner lists four other "circuit splits" that it claims have arisen from the *National Parks* interpretation of "confidential" commercial information. Notably, petitioner does not even claim that *any* of these supposed "splits" is actually implicated by this case. For good reason. None of them is.

Two of the purported splits involve what a party must demonstrate to show "actual competition." Pet. 26-28. But, as noted, here the Eighth Circuit acknowledged that "the grocery industry is highly competitive," so the adverse ruling did not turn on the standard for showing "actual competition." Pet. App. 5a. The third supposed split involves "whether bad publicity or 'embarrassment' in the marketplace is the type of competitive harm against which Exemption 4 protects." Pet. 28. But the Eighth Circuit here determined that, even if potential embarrassment could be a basis for competitive harm, "FMI's assumption that stores would be stigmatized" by the disclosure of the aggregate amount of SNAP dollars they receive "was speculative and not supported by any other evidence in the record." Pet. App. 5a. So that issue, too, is not presented. The fourth purported split involves whether the likelihood-of-substantial-competitive-harm test applies only to information that the government requires to be provided, or applies also to information provided voluntarily. Pet. 28-29. That issue is not presented here because the district court found that the information at issue was

not supplied voluntarily, and no one disputed that finding on appeal. Pet. App. 16a. Because none of the ostensible subsidiary "circuit splits" is actually implicated here, this case offers no opportunity to address them.

Petitioner's apparent point, in listing these "splits" that this case in reality provides no opportunity to resolve, is to show that *National Parks* has generated "widespread confusion," which would be eliminated by abandoning altogether the Exemption 4 standard it embodies. Pet. 29. But digging into the decisions Petitioner identifies demonstrates just the opposite: Most of the decisions Petitioner describes as showing "circuit splits" reflect no such splits at all. Rather, they simply show courts applying the same test to different facts, resulting in different outcomes.

Take, for instance, the supposed split about "what kind of 'actual competition' must be shown." Pet. 26-27. The two decisions Petitioner cites as illustrating this split do not recognize any disagreement on the point. And Petitioner's characterization of the purported disagreement between these two decisions does not jibe with what they actually say. The decision that Petitioner identifies as articulating a *narrow* approach to defining the relevant market actually defined the relevant market rather broadly, as the entirety of the "United States import market." *Watkins v. U.S. Bureau of Customs & Border Protection*, 643 F.3d 1189, 1196 (9th Cir. 2011). Meanwhile, the decision that Petitioner identifies as taking an "expansive view of what the relevant market is" defined the relevant market in terms of

competition for patients, grants, and other funding in the medical field. *N.H. Right to Life*, 778 F.3d at 51.

Likewise, consider the supposed split about "whether 'actual competition' can be shown based on the possibility of competition from a hypothetical future competitor." Pet. 27. None of the decisions that Petitioner identifies as purportedly "account[ing] for hypothetical future competitors" rested entirely on the nature and existence of such competitors; all found that there was actual, current competition in the market for the services at issue. *See People for the Ethical Treatment of Animals v. United States Dep't of Health & Human Servs.*, 901 F.3d 343, 350 (D.C. Cir. 2018) (finding that the party resisting disclosure established competitive market for the importation of nonhuman primates); *N.H. Right to Life*, 778 F.3d at 51 (concluding that "Planned Parenthood faces plenty of competition from other entities for patients" because "[m]any of Planned Parenthood's services are also provided by hospitals and health clinics"); *Sharkey*, 250 F. App'x at 290 (party resisting disclosure faced both domestic and international competition in the market for vaccines). Petitioner does not identify any decision in which a court held that "actual competition" can be established on the basis of hypothetical future competitors alone.

Ultimately, Petitioner's discussion of ostensible "circuit splits" arising out of the *National Parks* interpretation establishes the opposite of what Petitioner hopes to show. The *National Parks* test has been around for more than four decades, has been adopted by nearly every circuit, and has been rejected by none. Yet in attempting to show the "widespread

confusion" it has supposedly generated, the best Petitioner can offer is a hodgepodge of a dozen or so decisions, most of which show no apparent disagreement at all. This state of affairs confirms, as the en banc D.C. Circuit found more than two and a half decades ago, that the *National Parks* test is sound and has in fact not proven unworkable in practice. *Critical Mass*, 975 F.2d at 877.

II. The Case Is A Poor Vehicle For Assessing *National Parks.*

Even if this Court were inclined to review the long-established interpretation of "confidential" commercial information under FOIA Exemption 4, which has been adopted by every circuit that has addressed the issue, this case would provide a singularly poor vehicle for doing so.

Exemption 4 applies only to confidential commercial information "obtained from a person." 5 U.S.C. § 552(b)(4). The exemption typically operates in circumstances where private parties provide documents with confidential commercial or financial information to the government. The exemption does not apply, however, to information generated by the government itself—a point that Petitioner concedes. Pet. 11; *see also Department of Justice Guide to the Freedom of Information Act* 271-72 (2009) ("The courts have held ... that information generated by the federal government itself is not 'obtained from a person' and is therefore excluded from Exemption 4's coverage.").

The information at issue fails to meet that threshold requirement—it was not obtained from Petitioner or its members. The Argus Leader seeks records generated and maintained by a federal agency, stored on a federal database, relating to the government's own spending under a federal program. Far from implicating Exemption 4, the information sought here is the classic type of government information that Congress sought to make available under FOIA, to help shed light on what the government itself is doing. "FOIA is often explained as a means for citizens to know what their Government is up to." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004) (internal quotation marks omitted); *see also U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 774 (1989) ("FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny."). And there can be little dispute that "the protection of the public fisc is a matter that is of interest to every citizen." *Brock v. Pierce Cty.*, 476 U.S. 253, 262 (1986).

That this case involves the government's own records about government spending makes this case an unsuitable vehicle for considering *National Parks*. To begin with, because the information in the records here is not "obtained from a person," 5 U.S.C. § 552(b)(4), there is a separate basis for holding that Exemption 4 does not apply. If this Court were to grant review, the Argus Leader would advance the not "obtained from a person" issue as a threshold, independent ground for affirming the judgment of the court of appeals. If this Court agreed, then it would not reach the questions about the proper

interpretation and application of the confidentiality requirement.[5]

---

[5] In a footnote in the Eighth Circuit's decision, the court stated that "[t]he district court found that the contested data were obtained from a person, and neither party contests that finding on appeal." Pet. App. 2a. The threshold "from a person" issue has, however, been adequately raised and preserved for this Court's review. In the first appeal to the Eighth Circuit, the Argus Leader pressed the argument that it was simply seeking the government's own information, and not information obtained from retailers. Pet. App. 42a; Appellant's Brief at 10, *Argus Leader Media v. U.S. Dep't of Agric.*, No. 12-3765 (8th Cir. Jan. 16, 2013), Dkt. 3994956. The Eighth Circuit agreed that the information was not obtained from the retailers, but also found that "the underlying data is 'obtained' from third-party payment processors." Pet. App. 54a. On remand, again the Argus Leader argued that the information at issue was not "obtained from a person" under Exemption 4. Pet. App. 15a. ("Argus contends that the government is essentially keeping track of its own spending."). The district court rejected that argument based on the law-of-the-case doctrine, finding that the Eighth Circuit "held that the requested information is 'obtained' from third-party payment processors." Pet. App. 15a. Because the district court held that the Eighth Circuit's prior decision already resolved the issue, the Argus Leader in the second appeal before the Eighth Circuit did not reiterate its argument that the information sought was the government's own records of federal spending. That did not amount to a waiver, however. Waiver doctrine does not require a party to press arguments that are foreclosed by circuit precedent or law-of-the-case, much less to reiterate arguments that have already been rejected by the court of appeals in that very matter. *See U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 n.7 (2013); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007). Furthermore, as the prevailing party before the district court, the Argus Leader was not required to raise every possible alternative ground for affirmance. *See, e.g., Schering Corp. v. Illinois Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996) ("We certainly agree that the failure of an appellee to have raised all possible alternative

Moreover, the fact that this case involves a request for the federal government's own records of spending means that Petitioner here does not have standing. For most of the life of this case, the defendant has been the U.S. Department of Agriculture, which actually creates and maintains the records sought. The USDA abandoned its Exemption 4 position after it lost at trial, at which point FMI intervened. FMI claimed to have associational standing, arguing its members "would ... have standing to sue in their own right because of the potential nonconsensual dissemination of private information." Pet. App. 75a. Because neither Petitioner nor its members can identify any of their own "private information" at issue here, however, they cannot establish "an invasion of a legally protected interest" necessary to establish their standing to litigate the matter. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (plaintiffs could not establish standing to challenge government surveillance where they could not demonstrate that their own communications would be imminently intercepted).

Even if the threshold issue could be avoided, the fact that the information sought here is the government's own information, and not information obtained from the retailers that are now objecting to its disclosure, makes this an atypical Exemption 4

---

grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver.").

case, and thus a poor vehicle for assessing the lower courts' interpretation of the provision. Because the *National Parks* standard has been in place for more than four decades and has been adopted by every circuit that has addressed the issue, a substantial body of precedent has developed applying the approach to a wide range of possible materials. If this Court were to consider sweeping that body of law away and replacing it with a new test that no court to date has applied, it should do so in the context of a typical Exemption 4 case that would enable it to explicate and apply the new approach it announces. This is not such a case: It involves federal spending data on a government program, and the only information obtained from outside the government comes from third-party payment processors, not the retailers themselves that now object to its disclosure.

The present case, for all of these reasons, does not present a suitable vehicle for deciding what FOIA's exemption for confidential commercial information obtained from a person means.

III. The Decision Below Is Correct.

Review is also unwarranted because the court of appeals' determination that the information sought here is not "confidential," affirming the district court's findings made after a trial on the merits, is correct. The information sought is simply the aggregate amount of SNAP dollars spent at a given retailer over the course of the year. The court of appeals correctly concluded that such information "lack[s] the specificity needed to gain material insight into an individual store's financial health, profit margins,

inventory, marketing strategy, sales trends, or market share," and thus cannot be considered "confidential." Pet. App. 4a-5a.

Petitioner's core grievance with the *National Parks* interpretation of "confidential" commercial information is that it is, in its view, "atextual." Pet. 11. Petitioner would read the term "confidential" as demanding no inquiry into potential competitive harm resulting from disclosure of information the government obtained from a private person. Instead, Petitioner would replace the objective inquiry uniformly adopted by the courts of appeals with a subjective inquiry into whether the private party that was the source of the information "intended" it to be further disseminated. Pet. 18.

As an initial matter, that reading of Exemption 4 flouts this Court's repeated admonition that "FOIA exemptions are to be narrowly construed." *FBI v. Abramson*, 456 U.S. 615, 630 (1982). Petitioner's subjective test is hardly a narrow reading of the exemption. Indeed, it is about the broadest possible reading of the exemption. It would allow private parties to dictate the application of the exemption, "making the Government's disclosure policy contingent on the disclosure policy of the individual submitter." *9 to 5 Org. for Women Office Workers*, 721 F.2d at 7. But as Congress understood, "disclosure policy cannot be contingent on the subjective intent of those who submit information. For example, it clearly would be inappropriate to withhold all information, no matter how innocuous, submitted by a corporation with a blanket policy of refusing all public requests

for information." H.R. Rep. No. 95–1382, 95th Cong., 2d Sess. 18 (1978).

In contrast, the interpretation adopted by every circuit that has addressed the issue is an objective standard. That objective formulation is consistent with the way courts have approached the identification of "confidential" business or financial information in analogous contexts. For instance, though this Court has long recognized a general public right to inspect and copy judicial records, it has identified an exception for "business information," defined as information "that might harm a litigant's competitive standing." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). Similarly, Federal Rule of Civil Procedure 26(c) allows a court to order the sealing of "commercial information," yet courts have repeatedly rejected the assertion that the rule "furnish[es] an absolute privilege against disclosure of material that a party might wish to mark confidential." *In re Violation of Rule 28(d)*, 635 F.3d 1352, 1357 (Fed. Cir. 2011); *see also Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) (objecting to litigants in commercial cases agreeing to seal discovery documents as well as pleadings and exhibits filed with the court). And the likelihood-of-substantial-competitive-harm analysis has been adopted in numerous federal regulations and state statutes for determining when business and financial information is considered confidential. *See, e.g.*, 40 C.F.R. § 2.208(e)(1); 40 C.F.R. § 710.37(c)(ii); Del. Code Ann. tit. 16, § 6308(f)(3); Fla. Stat. § 377.606; Iowa Admin. Code r.561-2.5 (2011); Miss. Code. § 25-11-121(11).

Moreover, a fundamental precept of statutory interpretation requires courts to construe statutory language in context. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("[C]ontext is a primary determinant of meaning."). Here, it is thus relevant that Exemption 4 also refers to "trade secrets," whose status has also long been held to turn on whether they give their possessor "an opportunity to obtain an advantage over competitors" or are "commercially valuable." *Pub. Citizen Health Research Grp.*, 704 F.2d at 1286-87.[6]

In *U.S. Department of Justice v. Landano*, 508 U.S. 165 (1993), this Court construed "confidential" as that term is used in a different FOIA exception—Exemption 7, which protects "records [and] information compiled for law enforcement purposes" where disclosure "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C.

---

[6] Petitioner is wrong to assert that the *National Parks* interpretation of "confidential" has "marr[ed] th[e] exemption's separate 'trade secrets' prong" by forcing the D.C. Circuit to reject the "broad common-law definition of trade secrets [that] was widely accepted in other areas of the law." Pet. 20. The D.C. Circuit did not identify a single common-law definition of "trade secrets," as Petitioner claims. Pet. 20. Rather, the court concluded that "the term 'trade secrets' has been defined both broadly and narrowly at common law." *Pub. Citizen Health Research Grp.*, 704 F.2d at 1286. The court ultimately settled on the narrower of the two common-law definitions because it thought that the broader one, "tailored as it is to protecting businesses from breaches of contract and confidence by departing employees and others under fiduciary obligations," was "ill-suited for the public law context in which FOIA determinations must be made." *Id.* at 1289.

§ 552(b)(7). The Court explained that the proper reading of "confidential" was driven both by common usage and by the specific context in which the term is used in Exemption 7: "A source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes." 508 U.S. at 174. And in explicating how this definition should be applied, this Court discussed a variety of factors that courts should consider, such as whether the source is a "paid informant," the "nature of the crime[,] and the source's relation to it." *Id.* at 179.

The discussion of these factors in *Landano*—a decision Petitioner sees as a correct, textually-driven approach to the FOIA exemptions—demonstrates that this Court does not blindly interpret statutes based on bare dictionary definitions divorced from context. Rather, it considers the common usage of a term, informed by the statutory context in which the language appears. The same approach has been properly applied by the circuits in rejecting a subjective standard for the term "confidential" under Exemption 4, and in embracing an objective standard that assesses whether "commercial or financial information" qualifies as "confidential" in terms of the likely competitive harm resulting from its disclosure.

The application of Petitioner's proposed subjective standard for determining confidentiality would also raise a host of ambiguities. For instance, Petitioner asserts that the information at issue here would clearly be deemed exempt under its newly minted standard because the information is "not

publicly available and is carefully safeguarded by retailers." Pet. 24. But how can the government's own information about federal spending on a federal program be said to be "safeguarded by retailers" who did not generate the information in the first place?

Finally, Petitioner's proposed subjective standard would severely undermine the predictability of FOIA law. An objective approach to whether commercial information qualifies as "confidential" under Exemption 4 promotes consistency and predictability: Once a court determines whether the disclosure of a particular type of material is or is not likely to cause substantial competitive harm, that holding will apply to other materials of the same type. As a result, private parties that are asked or required to provide materials to the government can predict whether they will be subject to disclosure. And the objective approach also helps the government comply with its FOIA obligations, by allowing it to determine more readily and efficiently whether the information sought is subject to disclosure. Under Petitioner's contrary reading, however, even if a court had previously determined that a particular type of information is or is not subject to disclosure, that would not be dispositive regarding a subsequent FOIA request for materials of the same type—after all, the particular entity that provided the newly-sought information might have done so with a different subjective intent or expectation about whether the information would be disclosed; it might have a different internal disclosure policy; it might have taken different steps to "safeguard" the information.

In sum, the long-established and uniformly-accepted interpretation of "confidential" commercial information under Exemption 4 is consistent with both the statutory text and the underlying purposes of FOIA. In the more than forty years over which the interpretation has been applied, it has not proven unworkable. There is no reason to upend the decades of precedent that have developed from the application of that interpretation to adopt a new interpretation that no circuit has embraced, and that would likely prove highly unworkable in application.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Jon E. Arneson
123 S. Main Avenue,
Suite #202
Sioux Falls, SD 57104

Robert M. Loeb
Counsel of Record
Thomas M. Bondy
Randall C. Smith
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
rloeb@orrick.com

December 14, 2018