No. 18-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has not yet addressed Exemption 4 of the Freedom of Information Act, which protects from disclosure all "confidential" private-sector "commercial or financial information" within the Government's possession. 5 U.S.C. § 552(b)(4). The Circuits, however, have adopted a definition of "confidential" that departs from the term's ordinary meaning, holding that this exemption applies only if disclosure is "likely * * * to cause substantial harm to the competitive position of" the source of the information. *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The D.C. Circuit fashioned this atextual test from its own sense of FOIA's purposes based on witness testimony in a legislative hearing about a predecessor bill from a prior Congress. The amorphous test has produced at least five different circuit splits as the Circuits have grappled with what constitutes a likelihood of substantial competitive harm. The questions presented are:

1. Does the statutory term "confidential" in FOIA Exemption 4 bear its ordinary meaning, thus requiring the Government to withhold all "commercial or financial information" that is confidentially held and not publicly disseminated—regardless of whether a party establishes substantial competitive harm from disclosure—which would resolve at least five circuit splits?

2. Alternatively, if the Court retains the substantial-competitive-harm test, is that test satisfied when the requested information could be potentially useful to a competitor (as the First and Tenth Circuits have held), or must the party opposing disclosure establish with near certainty a defined competitive harm like lost market share (as the Ninth and D.C. Circuits have held, and as the Eighth Circuit required here)?

PARTIES TO THE PROCEEDING BELOW

Petitioner Food Marketing Institute was an intervenor-defendant in the U.S. District Court for the District of South Dakota and the appellant in the U.S. Court of Appeals for the Eighth Circuit.

The U.S. Department of Agriculture was the defendant in the district court but was not a party to the Eighth Circuit appeal.

Respondent Argus Leader Media was the plaintiff in the district court and the appellee in the Eighth Circuit.

CORPORATE DISCLOSURE STATEMENT

The Food Marketing Institute (FMI) is a voluntary trade organization, with headquarters in Arlington, Virginia, that represents almost 1,000 retail and wholesale food sales members operating nearly 33,000 retail food stores across the United States and in several foreign countries. FMI has no parent corporation, and no publicly held corporation has an ownership interest in FMI.

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Petitioner Food Marketing Institute respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's judgment (App. A) is reported as *Argus Leader Media* v. *U.S. Department of Agriculture*, 889 F.3d 914 (8th Cir. 2018). The court of appeals' judgment (App. B) and order denying rehearing *en banc* (App. O) are unreported.

The district court's memorandum opinion and order (App. C) is reported as *Argus Leader Media* v. *U.S. Department of Agriculture*, 224 F. Supp. 3d 827 (D.S.D. 2016). The district court's judgment (App. D) and order granting FMI's motion to intervene (App. J) are unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on May

8, 2018. The court denied rehearing *en banc* on July 13, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In relevant part, the Freedom of Information Act, 5 U.S.C. § 552, provides:

(a) Each agency shall make available to the public information as follows:

* * *

(8)(A) An agency shall—

(i) withhold information under this section only if—

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption describe in subsection (b); ***

* * *

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

* * *

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

* * * .

5 U.S.C. § 552(a)(8)(A)(i)(I), (b)(4).

PRELIMINARY STATEMENT

The private sector must disclose substantial amounts of information to the Government, including the information at issue here—redemption data from retailers participating in the Supplemental Nutrition Assistance Program, or SNAP. The Freedom of Information Act, however, protects significant portions of private-sector information from public release. This case turns exclusively on FOIA Exemption 4, which bars disclosure of "trade

secrets and commercial or financial information" that is "confidential." 5 U.S.C. § 552(b)(4). Participating SNAP retailers jealously guard store-level SNAP data from competitors and hold such data highly confidential. Unable to obtain this confidential data from any public source, Argus Leader sought to obtain it through FOIA.

But rather than give "confidential" its ordinary meaning, the Eighth Circuit followed a test the D.C. Circuit created based on a selective reading of legislative history. According to the court of appeals, "confidential" means that the release of the information would "likely * * * 'cause substantial harm to the competitive position'" of those whose data is disclosed. App., *infra*, 3a (quoting a series of Eighth Circuit cases that ultimately trace to *National Parks & Conservation Association* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).

The Eighth Circuit is hardly alone in having abandoned FOIA's plain text and permanently deferred instead to *National Parks*. But that D.C. Circuit decision came from a very different era of statutory construction. *National Parks* made no pretense of focusing on the statutory text. It instead decided that, despite its plain text, Exemption 4 did not encompass all confidential financial and commercial information obtained from a person, then supported that assumption with snippets of legislative history—witness testimony at hearings on a predecessor bill from a prior Congress. The court thus transformed the common, broad ordinary meaning of "confidential" into the far narrower and more fact-bound concept involving whether release would "substantial[ly]" harm a "competitive position." 498 F.2d at 770.

This Court has not yet construed Exemption 4, but the plain-text approach to FOIA that the Court has repeatedly employed cannot coexist with *National Parks*. The *National Parks* definition of "confidential" directly

conflicts with this Court's ordinary-meaning construction of that very statutory term in another nearby FOIA exemption. See *U.S. Dep't of Justice* v. *Landano*, 508 U.S. 165, 173 (1993) (giving "confidential" in FOIA Exemption 7 its ordinary meaning based on dictionary definitions).

The Circuits' fidelity to this amorphous, judicially-created test from *National Parks* has spawned a spate of circuit splits, as the Circuits repeatedly disagree about the elements required to show a likelihood of substantial competitive harm. See *infra* pp. 24-30. This substantial-competitive-harm test requires FOIA requesters, the Government, the parties whose data will be revealed, and the courts to expend considerable energy speculating about the future effects of releasing a particular set of data. Yet the test still generates disparate outcomes among (and within) the Circuits despite the vast resources required to implement it.

This Court granted petitioner's application to recall the Eighth Circuit's mandate and stay its judgment. App., *infra*, 82a. That stay prevented this case from becoming moot and depriving the Court of an opportunity to—at long last—consider Exemption 4's text. The very fact that circuit splits have resulted from *National Parks* illustrates why the first question presented warrants consideration: the nebulous and erroneous substantial-competitive-harm test is itself the root of those splits. But even if the Court retains that test, the resulting division among the Circuits still requires resolution of the second question presented and justifies reversal here. Either way, the Court should grant certiorari and eliminate the vast uncertainty that envelops FOIA Exemption 4.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Supplemental Nutrition Assistance Program (SNAP)—formerly, the Food Stamp Program—is a

federal program that provides nutritious food to low-income families through normal economic channels. 7 U.S.C. § 2011. USDA receives and maintains a record when a SNAP recipient makes an eligible purchase at a participating store. App., *infra*, 2a. The program's scope is considerable. In June 2018 alone, over 39 million individuals received SNAP benefits.[1]

USDA releases monthly compilations of SNAP redemption data. Anyone can view national, state, and even congressional-district level SNAP costs on USDA's website.[2] But USDA does not disclose data regarding the amount of SNAP redemptions at individual stores, and retailers have participated in the program with the understanding that store-level data would be kept confidential. App., *infra*, 88-89a.

B. Respondent Argus Leader is a newspaper in Sioux Falls, South Dakota. In 2011, an Argus Leader reporter filed a FOIA request for SNAP data. App., *infra*, 25a. For each SNAP retailer nationwide, Argus Leader requested the store identifier, name, address, store type, and total SNAP sales on an annual sales basis for 2005 to 2010. *Ibid.* USDA timely released most of the requested information but withheld the store-level SNAP sales data. *Id.* at 26a.

II. PROCEEDINGS BELOW

A. The lawsuit and initial litigation

After USDA refused to provide store-level data, Argus Leader brought suit in the U.S. District Court for the District of South Dakota. App., *infra*, 10a. USDA asserted several FOIA exemptions, including Exemption 4. The district court granted summary judgment for USDA

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[1] USDA, Supplemental Nutrition Assistance Program (Sep. 24, 2018), https://www.fns.usda.gov/sites/default/files/pd/34SNAPmonthly.pdf.

[2] SNAP, https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap (last visited Oct. 1, 2018).

based on Exemption 3—that the information was exempted from disclosure by statute. *Ibid.* The Eighth Circuit reversed as to Exemption 3. *Ibid.* Exemption 3 plays no further role in this case.

B. Proceedings in the district court

1. On remand, USDA again pressed its argument that FOIA's Exemption 4 protects store-level SNAP sales data. App., *infra*, 10a. That provision exempts from disclosure "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 has adopted the D.C. Circuit's approach to whether information is "confidential" from *National Parks & Conservation Association* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Under that test, Exemption 4's applicability turns on whether disclosure would likely cause substantial competitive harm. App., *infra*, at 16a. After denying USDA's summary-judgment motion, *id.* at 10a, the district court held a two-day bench trial to assess the competitive harms associated with releasing the requested data, *id.* at 11-13a & 87a.

USDA presented multiple industry witnesses who testified that retailers consistently and strenuously protect the requested information from their competitors. App., *infra*, 11a-12a & 88a-89a.[3] Competition in the food-retail industry is fierce and profit margins are narrow, forcing retailers to rely on high sales volumes for profitability. *Id.* at 12a & 17a. The witnesses explained how releasing store-level data would directly threaten stores' competitive positions.[4] Argus Leader presented no fact witnesses

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[3] Witnesses came from a supermarket chain, a large department store, a wholesale grocer, a convenience store, and the National Grocers Association. App., *infra*, 11a-12a.

[4] For example, USDA's witnesses testified that with this information, rivals could target an existing store's customers, decide where to build

at trial.

Expert testimony corroborated the fact witnesses' concerns. USDA's expert was Bruce Kondracki, the vice president of a consumer-research firm that performs market analysis, site location, and forecasting research in the food industry. App., *infra*, 13a. Kondracki explained that if retailers' SNAP data were released, that data could be used to target an existing store's customers, and to improve the accuracy of model forecasts used by competitor stores to determine where to add locations. *Ibid.* Argus Leader presented two expert witnesses, neither of whom works in the food-retail industry. These witnesses acknowledged the competitive nature of the industry, but maintained that the release of store-level SNAP data was likely to have only limited competitive effect. *Id.* at 12a-13a.

2. Following the bench trial, the district court entered judgment in favor of Argus Leader. App., *infra*, 22a. Despite finding, in accordance with all the testimony, that "competition in the grocery business is fierce," *id.* at 17a, the district court concluded that Exemption 4 did not apply because "any potential competitive harm from the release of the requested SNAP data is speculative at best," *id.* at 18a. Given the Eighth Circuit's adoption of *National Parks*, this level of competitive harm did not, in the district court's view, rise to the level where the SNAP data could be treated as "confidential" under Exemption 4. *Id.* at 20a.

3. USDA had already pursued this litigation for six years. Shortly after the district court issued its ruling, USDA informed retailers that it intended to release the store-level SNAP data, signaling it would not appeal.

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new stores, and determine a retailer's overall sales—all of which could ultimately cut into the SNAP retailers' profits. App., *infra*, 11a-13a, 18a.

App., *infra*, 72a. Petitioner Food Marketing Institute (FMI)—a trade association whose members operate tens of thousands of retail food stores, many of which participate in SNAP—moved to intervene and appeal the judgment. *Id.* at 72a-73a.

The district court granted FMI's motion to intervene and stayed its judgment pending appeal. App., *infra*, 77a-78a. The district court observed that whether Exemption 4 applies to store-level SNAP sales data "appears to be [an issue] of first impression in the Eighth Circuit" and that, "[b]ecause there is not a clearly established answer to this issue, FMI could succeed in an appeal." *Id.* at 76a.

C. Proceedings in the court of appeals

The Eighth Circuit affirmed. FMI urged reversal of the district court's opinion on the ground that "confidential" in Exemption 4 should be given its plain meaning, consistent with this Court's precedents. The unrebutted evidence showed that retailers keep secret and closely guard their store-level data. App., *infra*, at 11a-12a & 88a-89a. The court of appeals, nevertheless, disposed of this argument in a single footnote: the court would not consider the plain meaning of the word "confidential" because doing so purportedly "would swallow FOIA nearly whole," and would conflict with what the court of appeals believed to be this Court's guidance that FOIA exemptions should be narrowly construed. App., *infra*, 4a n.4.

FMI separately urged reversal on the basis that disclosing the requested information would result in sufficient competitive harm to trigger Exemption 4's protection under even the atextual *National Parks* test. But like the district court, the panel reasoned that while the requested data might make models marginally more accurate, the evidence did not support a finding that "this marginal improvement in accuracy is likely to cause *substantial* competitive harm." App., *infra*, 5a. The panel

emphasized that even if there was a "likelihood of commercial usefulness"—in other words, that third parties indeed could exploit information that their competitors had confidentially submitted to the Government—that was insufficient to trigger Exemption 4 because it was "not the same as a likelihood of substantial competitive harm." *Ibid.* The panel did not address the precedents from other Circuits that FMI had relied on in support of its position. See *id.* at 5a-6a.[5]

The Eighth Circuit denied both FMI's petition for rehearing *en banc*, App., *infra*, 85a-86a, and its motion to stay issuance of the mandate, *id.* at 79a-80a.

D. This Court's recall and stay of the Eighth Circuit's mandate

FMI filed an application with this Court to recall the Eighth Circuit's mandate and stay the judgment, arguing that all of the recall-and-stay factors were satisfied: (1) there was a reasonable probability the Court would grant certiorari; (2) there was a fair prospect that the Court would reverse the Eighth Circuit; (3) absent a stay, FMI's members would suffer irreparable harm; and (4) the balance of equities favored a stay.

Justice Gorsuch granted a temporary stay on August 9, 2018, and requested a response from Argus Leader. App., *infra*, 81a. After receiving the parties' submissions, Justice Gorsuch referred the application to the Court, which issued an order on August 29, 2018 joined by five Members of the Court that recalled the Eighth Circuit's mandate and stayed its judgment pending resolution of

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[5] The panel did, however, seek to distinguish another Eighth Circuit precedent, *Madel* v. *U.S. Department of Justice*, 784 F.3d 448, 451 (8th Cir. 2015). While the panel below acknowledged that the issues here "appear to mirror" those in *Madel*, it believed a different result was warranted because the *Madel* data was "not analogous to the data in this case." App., *infra*, 6a.

this petition. App., *infra*, 82a. The Eighth Circuit issued an order to the same effect. *Id.* at 83a-84a.

REASONS FOR GRANTING THE PETITION

National Parks' erroneous construction of "confidential" in FOIA Exemption 4 has been embraced by virtually all Circuits, but it conflicts with this Court's guidance about other FOIA exemptions. Bringing Exemption 4 into conformity with the rest of FOIA would independently justify review, particularly as there appears to be no real likelihood that the Circuits themselves will do so. *National Parks* has also generated subsidiary circuit splits that justify certiorari. The two questions presented are mutually reinforcing: Since *National Parks* is the source of the subsidiary circuit splits, disapproving *National Parks* will cause these circuit splits to vanish.

I. THE COURT SHOULD GRANT REVIEW OF THE FIRST QUESTION PRESENTED TO RESTORE FOIA'S PLAIN TEXT (AND ELIMINATE MULTIPLE CIRCUIT SPLITS)

This Court has repeatedly reviewed FOIA exemption cases, recognizing the national importance of properly enforcing *both* of Congress's directives in FOIA: to release information for public transparency *and* to protect some information from widespread public disclosure.[6] But Exemption 4 has thus far escaped the Court's review. That provision protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); see *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 136 S. Ct. 383, 383

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[6] This Court has previously examined Exemptions 2, 3, 5, 6, and 7. See, *e.g.*, *Milner* v. *Dep't of Navy*, 562 U.S. 562, 569 (2011) (Exemption 2); *Baldrige* v. *Shapiro*, 455 U.S. 345, 359 (1982) (Exemption 3); *Dep't of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) (Exemption 5); *U.S. Dep't of State* v. *Wash. Post Co.*, 456 U.S. 595, 598 (1982) (Exemption 6); *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 160 (2004) (Exemption 7).

(2015) (Thomas, J., dissenting from denial of certiorari) ("We have never interpreted Exemption 4[].").[7]

This Court's guidance on Exemption 4 is badly needed now. Despite occasional articulated misgivings, the Circuits have felt constrained by precedent and the goal of uniformity to ignore Exemption 4's unambiguous language, transforming the word "confidential" into something far from its ordinary definition.[8] Restoring this ordinary definition, in turn, would resolve multiple second-order circuit splits caused by the Circuits' attempts to give meaning to the convoluted and atextual *National Parks* test. Certiorari review of the first question presented is thus warranted, as resolving this antecedent question will make the subsidiary circuit splits disappear. See, *e.g.*, *Johnson* v. *United States*, 135 S. Ct. 2551, 2559-2560 (2015) (eliminating "numerous splits among the lower federal courts" regarding the application of the Armed Career

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[7] All citations to *New Hampshire Right to Life* v. *Department of Health and Human Services*, 136 S. Ct. 383 (2015), in this Petition are to Justice Thomas's dissent from denial of certiorari (joined by Justice Scalia). No opinion or other dissent was issued by the Court or its Members.

[8] Interpretive difficulties have not plagued other parts of Exemption 4. The terms "commercial or financial" have been given their ordinary meaning. *E.g.*, *Pub. Citizen Health Research Grp.* v. *Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) ("[W]e have consistently held that the terms 'commercial' and 'financial' in the exemption should be given their ordinary meanings."). The phrase "obtained from a person" has rarely attracted interpretive attention, given its obvious distinction with *government*-generated information. See Department of Justice Guide to the Freedom of Information Act 271 (2009) https://www.justice.gov/oip/foia_guide09/exemption4.pdf (observing that the "obtained from a person" criterion "is quite easily met in almost all circumstances") (hereinafter "DOJ FOIA Guide"). There is no dispute in this appeal that the information at issue is "commercial or financial information obtained from a person" as required by Exemption 4. App., *infra*, 2a & n.2.

Criminal Act by resolving the antecedent question that the Act's residual clause was unconstitutionally vague).

A. *National Parks*' substantial-competitive-harm test was wrong and should be replaced with the ordinary meaning of "confidential"

1. *The Circuits have developed an entrenched and atextual interpretation of "confidential" based on vague legislative history*

a. Lower courts started off on the wrong track by adopting an erroneous test for Exemption 4 initially fashioned by the D.C. Circuit in *National Parks*:

> [C]ommercial or financial matter is "confidential" for purposes of the exemption 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.

498 F.2d at 770 (footnote omitted).

National Parks came from an era when most courts were less than rigorous about statutory text—and *National Parks* exemplifies this approach. The opinion made no attempt to base its test on the plain-text definition of "confidential." Rather, the D.C. Circuit simply replaced the plain text with a legislative-purpose test based on an especially weak form of legislative history—witness testimony at a hearing that was actually about a predecessor bill from a prior Congress.

National Parks began by acknowledging that, "[i]n the past," interpretation of Exemption 4 had been "guided by" a Senate Report excerpt stating: "This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or

other inquiries, but which would customarily not be released to the public by the person from whom it was obtained." 498 F.2d at 766 (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)). Harmless enough, but the opinion then declared that "[a] court must *also* be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." *Id.* at 767 (emphasis added).

The court purported to find this legislative purpose in various excerpts from additional Senate and House reports, and statements made during a Senate committee hearing. *Id.* at 767-770. The bill under consideration—"the predecessor of the bill which became law," *id.* at 768—contained *no* exemption for trade secrets or commercial or financial information, and several witnesses testified to the necessity of such an exemption. In particular, the court observed that during hearings several witnesses urged an exemption that would "protect[] persons who submit financial or confidential data to government agencies from the competitive disadvantages which would result from its publication." *Ibid.* Based on this statement, the court equated the statutory term "confidential" (the term used in the later bill that became FOIA) with "likely to cause substantial harm to his competitive position." *Id.* at 770.[9]

Of course, the text Congress actually enacted says nothing about "competitive harm." Exemption 4 exempts *all* "confidential" commercial or financial information obtained from a person, without exception. 5 U.S.C.

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[9] The D.C. Circuit also held, based on the same legislative history excerpts, that information may be "confidential" based on the *government's* interest (rather than private interests), for instance "if disclosure of the information is likely * * * to impair the Government's ability to obtain necessary information in the future." 498 F.2d at 770. It "express[ed] no opinion as to whether other governmental interests are embodied in this exemption." *Id.* at n.17.

§ 552(b)(4). In *National Parks*, the D.C. Circuit substituted alternative language that was narrower than what Congress actually adopted; it took one stated problem that might have motivated Congress to act and assumed that, once alerted to the problem, Congress addressed *only* that problem despite choosing broader language. And even if that statutory revision were justifiable, the court did not explain why a showing of *substantial* competitive harm was required.

Since *National Parks*, the Circuits have fallen in line behind this atextual Exemption 4 test, and there is no indication they will return to FOIA's plain text. At least ten Circuits have embraced the *National Parks* test, and an eleventh has applied it in an unpublished decision; none has rejected it.[10]

b. But *National Parks* has attracted eminent critics. D.C. Circuit Judge Randolph, joined by Judge Williams, decried that test as "fabricated, out of whole cloth." *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 931 F.2d 939, 947 (D.C. Cir. 1991) (Randolph, J., concurring), *vacated*, 942 F.2d 799 (1991). Judge Randolph pointed out that under "ordinary usage," the term

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[10] See, *e.g.*, *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); *Am. Airlines, Inc.* v. *Nat'l Mediation Bd.*, 588 F.2d 863, 871 (2d Cir. 1978); *OSHA Data/CIH, Inc.* v. *U.S. Dep't of Labor*, 220 F.3d 153, 167 & 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. 1975); *Gen. Elec. Co.* v. *U.S. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402-1403 (7th Cir. 1984); *Madel*, 784 F.3d at 452; *Pac. Architects & Eng'rs* 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); *Nat'l Parks*, 498 F.2d at 770 (D.C. Cir.). The Eleventh Circuit has applied *National Parks* in an unpublished decision. See *Sharkey* v. *Food & Drug Admin.*, 250 F. App'x 284 (11th Cir. 2007).

"confidential" means "conveyed [and] acted on * * * in confidence" and "not publicly disseminated." *Ibid.* (quoting Webster's Third Int'l Dict. 476 (1981)). He further criticized the judicially-created "substantial harm test" on the grounds that "[i]nformation not customarily revealed to the public is no less confidential when disclosing it would cause only discomfort rather than objectively measurable harm." *Id.* at 948. "If this were a question of first impression," Judge Randolph wrote, "I would apply the common meaning of 'confidential' and reject this test, which has spawned a good deal of litigation including this case, now about to make its third trip to the district court." *Ibid.*

Judge Randolph's criticism led the D.C. Circuit to rehear *Critical Mass*—this time *en banc*—and reconsider *National Parks*. *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871, 872 (D.C. Cir. 1992) *(en banc)*. But the 7-4 majority opinion in *Critical Mass* ultimately retained the "well established" *National Parks* test: "Whatever our individual opinions as to the merits of the two-part test, we accept the wisdom of Justice Brandeis's observation, some sixty years ago, that '*stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *Id.* at 877 (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932)). (As described *infra* pp. 24-30, even this defense of *National Parks* was mistaken—as time has shown, courts' attempts to parse the D.C. Circuit's words and predict whether each tranche of requested information is "likely" to cause "substantial competitive harm" has led to unpredictable results and multiple circuit splits.)

The *en banc* D.C. Circuit also attempted to "correct some misunderstandings as to [the test's] scope and application," *id.* at 875, but that effort only caused further confusion. It reaffirmed that the *National Parks* substantial-competitive-harm test applies to information that parties

are *required* to submit to the government. *Id.* at 880. Information *voluntarily* provided, on the other hand, is protected by Exemption 4 so long as it "is not customarily release[d] * * * to the public"—the definition of confidentiality the court had embraced prior to *National Parks*. *Ibid.* The statute itself recognizes no such distinctions, and the court made no pretense to the contrary. The only supporting authorities for this modified test were quotes from *National Parks'* own summary of Exemption 4's legislative history. *Id.* at 877-878 (quoting "observations and conclusions" from *National Parks*). Additional inconsistencies have appeared because not all courts have adopted these variations. *See infra* p. 28-29.

In 2015, two Members of this Court joined *National Parks'* critics. Justice Thomas, joined by Justice Scalia, dissented from the denial of certiorari in *New Hampshire Right to Life*, 136 S. Ct. at 385, a case that in part involved FOIA Exemption 4. This Court, Justice Thomas observed, has "rejected interpretations of other FOIA exemptions that diverge from the text." *Id.* at 383. Notably, the federal Government itself—the party opposing certiorari in *New Hampshire Right to Life*—did not defend Exemption 4's interpretation under those precedents. It instead conceded "that every court that has adopted the *National Parks* definition of 'confidential' information has turned its back on the statutory text." *Id.* at 385 n.*. Denying certiorari, Justice Thomas lamented, "perpetuate[d] an unsupported interpretation of an important federal statute and further muddie[d] an already amorphous test." *Id.* at 385.

The decision below confirms that the Circuits have not course corrected in light of Justice Thomas's and other jurists' criticisms. Given *National Parks*' entrenchment, this Court's review is necessary to restore the plain-text directive that Congress gave in Exemption 4 to protect all confidential business information from FOIA disclosure.

2. National Parks *contravenes this Court's precedents that require plain-text interpretations of FOIA exemptions*

Both as a matter of this Court's general statutory-construction principles and its specific FOIA case law, "confidential" should be given its ordinary meaning as information that is held in confidence and not publicly disseminated. In fact, the Court *already has* given it that meaning when it considered a separate FOIA exemption using that word.

a. This Court has repeatedly instructed that all statutory construction begin with the text and go no further when the statutory language is plain. See, *e.g.*, *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) ("The plain text of the Bankruptcy Code begins and ends our analysis."). Courts "assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose." *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013). "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) (citation omitted); *accord FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994).

Despite this Court's repeated instructions regarding statutory interpretation, the Court has had to rescue other FOIA exemptions from atextual glosses on multiple occasions. See, *e.g.*, *Milner* v. *Dep't of Navy*, 562 U.S. 562, 569 (2011) (giving "personnel" in Exemption 2 its plain meaning); *Dep't of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001) (seeking "textual justification" for proposed interpretation of Exemption 5); *U.S. Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 154 (1989) (declining to "read into the FOIA [language] that Congress did not itself provide"); *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 804 (1984) ("We * * * simply interpret Exemp-

tion 5 to mean what it says."); cf. *N.H. Right to Life*, 136 S. Ct. at 383 (describing the Court's repeated practice of "reject[ing] interpretations of * * * FOIA exemptions that diverge from the text").

b. Under the canons of construction, interpreting Exemption 4 should be straightforward. "Confidential" has an ordinary, commonly understood meaning, and Congress did not provide a different definition. Information is confidential if it is "[c]ommunicated in confidence; of the nature of confidence; secret," a "communication in confidence of private matters,"[11] or "intended to be held in confidence or kept secret."[12] See also, *e.g.*, *Critical Mass*, 931 F.2d at 947 (Randolph J., concurring) (noting that under the "ordinary usage" of the term, a report is "confidential" if it is "not publicly disseminated" or "conveyed [and] acted on * * * in confidence" (citing Webster's Third Int'l Dict. 476 (1981))).

Contrary to the *National Parks* formulation, the ordinary meaning of confidential contains no sense of *harm*, let alone harm that is "likely," "substantial," and "competitive." The D.C. Circuit erroneously imported such concepts into the interpretation of "confidential" based on testimony before congressional committees, not the statute's actual words. See *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98-99 (1991) (where a statute contains an unambiguous word, 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").

c. Nor should it even be an open question that

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[11] Webster's Second Int'l Dictionary 560 (1957); see also Black's Law Dictionary 370 (4th ed. 1951) ("private; secret"); Oxford English Dictionary, http://www.oed.com/ ("2. Of the nature of confidence; spoken or written in confidence; characterized by the communication of secrets or private matters") (last visited Oct. 9, 2018).

[12] Webster's Seventh New Collegiate Dictionary 174 (1963).

Congress used "confidential" in its ordinary sense. Congress used the same word in Exemption 7, just a few paragraphs after Exemption 4, and this Court authoritatively gave that word its ordinary meaning in *U.S. Department of Justice* v. *Landano*, 508 U.S. 165, 173 (1993). For at least three reasons, *Landano* should be dispositive of this question.

First, the Court specifically gave Exemption 7's use of "confidential" its ordinary meaning, observing that the word "is not limited to complete anonymity or secrecy." *Ibid.* (citing Webster's Third New Int'l Dict. 476 (1986)).[13] "A statement can be made 'in confidence' even if the speaker knows the communication will be shared with limited others, as long as the speaker expects that the information will not be published indiscriminately." *Ibid.* Consequently, "[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." *Id.* at 174.

Second, the Court specifically *rejected* an alternative definition of the term that "relie[d] extensively on legislative history" and, in particular, on testimony given before Senate and House committees. *Id.* at 178. The Court emphasized that, "[h]ad Congress meant to create" the particular rule advocated in the legislative testimony, "it could have done so much more clearly." *Ibid.* In other words, this Court accepted what *National Parks* rejected (plain text), and rejected what *National Parks* embraced (legislative history to generate an unusual interpretation).

Third, "[a] term appearing in several places in a

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[13] Exemption 7 permits the government to withhold information that "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D).

statutory text is generally read the same way each time it appears." *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994). The Court has in fact applied this very principle *to FOIA exemptions*. *Milner* used the appearance of "personnel" in Exemption 6—"just a few short paragraphs down" from Exemption 2—to bolster its interpretation of the same word in Exemption 2: giving "personnel" its ordinary meaning. 562 U.S. at 570. Exemption 7's use of "confidential" is likewise "just a few short paragraphs down" from Exemption 4's use of that term, and it should likewise be given its ordinary meaning.

d. The flawed *National Parks* test for "confidential[ity]" in Exemption 4 has also had the collateral consequence of marring that exemption's separate "trade secrets" prong. After the D.C. Circuit fabricated the substantial-competitive-harm test to define "confidential," the same court in *Public Citizen* was confronted with how to distinguish confidential commercial or financial information from "trade secrets." *Pub. Citizen Health Research Grp.* v. *Food & Drug Admin.*, 704 F.2d 1280, 1288-1289 (D.C. Cir. 1983). *Public Citizen* acknowledged that a broad common-law definition of trade secrets was widely accepted in other areas of the law. *Ibid.* But that broad definition overlapped—perhaps entirely—with *National Parks*' judicially-created definition of "confidential," and would "render[] meaningless the second prong of Exemption 4." *Id.* at 1289.

To avoid this surplusage problem, *Public Citizen* gave "trade secret" a narrow meaning: "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort" that has a "direct relationship" to the productive process. *Id.* at 1288. As the Department of Justice has recognized, this holding "represented a distinct departure from what until

then had been almost universally accepted by the courts—that a 'trade secret' encompasses virtually any information that provides a competitive advantage."[14]

Information qualifying as a trade secret for a protective order or under the Uniform Trade Secret Act, therefore, may well *not* be a trade secret for FOIA purposes, according to the D.C. Circuit—and all to accommodate *National Parks*' idiosyncrasy.

3. Giving "confidential" its ordinary meaning is consistent with FOIA's purposes

The Eighth Circuit refused to give "confidential" its ordinary meaning, disposing of FMI's plain-text argument with a conclusory footnote that reading the exemption plainly would "swallow FOIA nearly whole." App., *infra*, 4a n.4.[15] But a plain-text reading of a FOIA exemption does not undermine the statute's purpose or violate congressional intent. As noted by this Court in *Milner*, such an approach does the opposite: it "gives the exemption the [meaning] Congress intended." 562 U.S. at 572.

a. FOIA unquestionably promotes broad disclosure of government information, but not without limits. "FOIA reflects a general philosophy of full agency disclosure *unless information is exempted under clearly delineated*

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[14] DOJ FOIA Guide at 264.

[15] Exemption 4 could not swallow FOIA whole; it applies only to a subset of information that can be requested from the Government, which invokes Exemption 4 in fewer than 2% of annual FOIA request denials. Office of Information Policy, U.S. Department of Justice, *Summary of Annual Reports for Fiscal Year 2017* at 8, available at https://www.justice.gov/oip/page/file/1069396/download (last visited Oct. 10, 2018). But many parties, litigants, and agencies are still affected—the less than 2% of FOIA denials accounts for approximately 4,700 requests for untold numbers of documents. See *id.* at 7 (reporting that 302,658 FOIA requests were released in part (and thus denied in part) and 38,749 FOIA requests were denied in full).

statutory language." *U.S. Dep't of Def.* v. *Fed. Labor Relations Auth.*, 510 U.S. 487, 494 (1994) (emphasis added) (citation omitted). "When disclosure touches upon certain areas defined in the exemptions, however, the statute recognizes limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it." *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 172 (2004).

Simplistic arguments about general purpose are possible for *all* statutes. "But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (*per curiam*). FOIA's exemptions reflect Congress's determination of how far is far enough. Exemption 4 is not an inconvenience; it is the law and must be interpreted accordingly. Cf. *Landano*, 508 U.S. at 173 (rejecting a narrow definition of "confidential"); *Weber*, 465 U.S. at 798 ("The plain language of [Exemption 5] itself, as construed by our prior decisions, is sufficient to resolve the question presented.").

Regardless, nothing suggests that FOIA will cease to serve its larger purpose if its terms are applied as written. FOIA's purpose, in part, is to contribute to "public understanding of the operations or activities *of the government*." *Fed. Labor Relations Auth.*, 510 U.S. at 495 (citation omitted). Exemption 4 serves a limited but important role: it shields from disclosure certain information that was "obtained from a person"—*i.e.*, non-governmental third parties. 5 U.S.C. § 552(b)(4).[16] Imposing extra-

[16] See *Bd. of Trade of City of Chicago* v. *Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1980) (concluding Exemption 4

textual restrictions on what Exemption 4 means by "confidential" does little if anything to improve public understanding of the Government's activities—and it does so at the expense of those who do business with the Government.

b. Restoring "confidential" to its ordinary meaning would also create a workable standard. The amorphous substantial-competitive-harm standard established by *National Parks* has, as described below, resulted in extensive litigation and unpredictable and inconsistent results. See *infra* pp. 24-30. Without a more predictable standard, private parties cannot make an informed decision about whether to participate in government programs that require them to disclose their confidential information to government agencies; nor do they (or the agencies in possession of their information) have the information they need to properly present their position at trial if a FOIA request is made for the submitted information. Restoring the ordinary meaning of "confidential" would allow a readier assessment of whether the data was confidentially held and not otherwise publicly disseminated by its source.

c. *National Parks* should not survive merely because of its entrenchment in the lower courts. In many contexts, including FOIA, this Court has rejected similarly longstanding but atextual statutory interpretations. In *Milner*, for example, the Court addressed FOIA Exemption 2, which shields from disclosure material that is "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The Court abrogated extra-textual tests that the D.C. Circuit had developed, and replaced them with a plain-text interpretation of the exemption that was based on dictionary definitions of

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is "restrict[ed]" to information that has "not been generated within the Government").

"personnel." 562 U.S. at 579-580 (abrogating *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (*en banc*)). "Our consideration of Exemption 2's scope starts with its text," the Court explained—regardless of how entrenched an atextual decision had become. *Id.* at 569.

A proper understanding of Exemption 4 would have required a different outcome here. Argus Leader has never disputed that the requested data is not publicly available and is carefully safeguarded by retailers. This should not have been a close case, let alone one requiring a two-day trial.

B. Rejecting *National Parks*' substantial-competitive-harm test would eliminate at least five circuit splits

The *National Parks* test for FOIA Exemption 4 has spawned multiple circuit splits requiring certiorari review. Because this test underlies all of those splits, the easiest way to resolve them would be to review the first question presented, adopt the ordinary meaning of "confidential," and reject the substantial-competitive-harm test.

As previously explained, at least ten Circuits have adopted the substantial-competitive-harm test from *National Parks*, *see supra* p. 14, but they have been unable to consistently apply it. Courts' attempts to parse the D.C. Circuit's language, rather than the statute itself, have yielded splits on every facet of that test. See *N.H. Right to Life*, 136 S. Ct. at 383-385 (*National Parks* test is "nebulous," "convoluted," and "amorphous," with "different limits in different Circuits"). As the Department of Justice has recognized, without guidance from Congress or this Court, lower courts have "tended to resolve issues of competitive harm on a case-by-case basis rather than by

establishing general guidelines."[17] It takes forty-three pages for the Department of Justice's guide to Exemption 4 to explore dozens of opinions that have applied the substantial-competitive-harm test, including cataloguing courts' varying approaches, and the different outcomes that courts facing similar fact patterns have reached.[18]

National Parks' inability to generate consistent and predictable outcomes is further evidence that *National Parks* has been wrong all along. Instead of turning on a predictable standard, whether a private party's information must be released by the Government currently "rests on judicial speculation about whether disclosure will cause competitive harm." *N.H. Right to Life*, 136 S. Ct. at 384. The five circuit splits below provide illustrative, though not exhaustive, examples of these inconsistencies:

1. Importantly for the instant case, the Circuits disagree about what constitutes a likelihood of substantial competitive harm. The First and Tenth Circuits have held that "competitors' possible use of the information alone constitutes harm—*even if this would not likely result in any negative consequences for the entity whose information was disclosed*." *N.H. Right to Life*, 136 S. Ct. at 384 (emphasis added) (citing *N.H. Right to Life* v. *Dep't of*

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[17] DOJ FOIA Guide at 309.

[18] *Id.* at 305-347. As further evidence of *National Parks*' systemic unpredictability, even panels within the same Circuit, reviewing the same facts, have been unable to apply consistently the substantial-competitive-harm test. *E.g.*, *id.* at 309 (reporting a case in which the D.C. Circuit originally affirmed the district court's determination that Exemption 4 applied but, upon reconsideration following a panel member's death, reversed and remanded on the same record—and observing that this case "well illustrate[s]" the "individualized and sometimes conflicting determinations indicative of competitive harm holdings" (citing *Greenberg* v. *Food & Drug Admin.*, 775 F.2d 1169, 1172-1173 (D.C. Cir. 1985), and *Greenberg* v. *Food & Drug Admin.*, 803 F.2d 1213, 1215, 1219 (D.C. Cir. 1986)).

Health & Human Servs., 778 F.3d 43, 51 (1st Cir. 2015)); see *State of Utah* v. *U.S. Dep't of Interior*, 256 F.3d 967, 970 (10th Cir. 2001) (testimony that competitors might be able to use information to improve their bargaining positions established likelihood of substantial competitive harm, despite contention that this effect might be negligible). Petitioner met that standard here—USDA proved the information would likely be commercially useful in the competitive marketplace, App., *infra*, at 5a—and thus would have prevailed if respondent had been a newspaper in the First or Tenth Circuits.

The Eighth, Ninth, and D.C. Circuits, however, have required significantly more certainty and specificity, through a detailed showing that the disclosing party would suffer a "defined competitive harm (like lost market share) if competitors used the information." *N.H. Right to Life*, 136 S. Ct. at 384 (citing *McDonnell Douglas Corp.* v. *Dep't of Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004); *GC Micro Corp.* v. *Def. Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994)). The Eighth Circuit concluded that Exemption 4 did not apply because USDA's evidence that the requested information would allow competing "grocery retailers to make better decisions," "[a] likelihood of commercial usefulness" was "not the same as a likelihood of substantial competitive harm." App., *infra*, 5a.

2. The D.C. Circuit requires a showing of "actual competition" for Exemption 4 to apply. *Nat'l Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 685-686 (D.C. Cir. 1976).[19] But "[c]ourts cannot seem to agree on what kind

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[19] The first *National Parks* panel remanded the case for further consideration in light of the newly-enunciated test, and the district court held two additional hearings. See *Nat'l Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 678 (D.C. Cir. 1976). The outcome of this second appeal was a harbinger of things to come: holding more evidence was needed to determine whether the substantial-competitive-harm

of 'actual competition' must be shown." *N.H. Right to Life*, 136 S. Ct. at 384. Some Circuits require "factual justifications and market definitions to show that there is 'actual competition in the relevant market' in which the entity opposing the disclosure of its information operates." *Ibid.* (citing *Watkins* v. *U.S. Bureau of Customs & Border Protection*, 643 F.3d 1189, 1196 (9th Cir. 2011)). Other Circuits "take an expansive view of what the relevant market is, and do not require any connection between that market and the context in which an entity supplied the requested information." *Ibid.* (citing *N.H. Right to Life*, 778 F.3d at 49-52).

3. The Circuits likewise disagree about whether "actual competition" can be shown based on the possibility of competition from a hypothetical future competitor, or only from a competitor who is already participating in the relevant market.

At least three Circuits will account for hypothetical future competitors. *E.g.*, *People for the Ethical Treatment of Animals* v. *U.S. Dep't of Health & Human Servs.*, 901 F.3d 343, 351-352 (D.C. Cir. 2018) (finding substantial competitive harm where the requested information would, among other things, help new companies enter the market); *N.H. Right to Life*, 778 F.3d at 51 (First Circuit finding that agency met its burden because a "potential future competitor could take advantage" of the information at issue, including in "different arenas"); *Sharkey* v. *Food & Drug Admin.*, 250 F. App'x 284, 289-290 (11th Cir. 2007) (finding substantial competitive harm in domestic market for vaccines based on giving international competitors or new domestic market entrants a competitive advantage).

The Fourth Circuit, in contrast, has taken a narrower

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test was met, the court of appeals partially reversed and remanded the case for yet a third determination. *Id.* at 687.

view and required the party resisting disclosure to show evidence of existing, non-hypothetical competition. *Hercules, Inc.* v. *Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988) (finding the prospect of future competitors too "speculative" to justify applying Exemption 4). And, at times, the D.C. Circuit too has concluded that evidence of "future or potential competition" is "legally inadequate under the *National Parks* standard." *Niagara Mohawk Power Corp.* v. *U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999).

4. Circuits have also reached different conclusions regarding whether bad publicity or "embarrassment" in the marketplace is the type of competitive harm against which Exemption 4 protects. The Second Circuit, for example, has upheld a finding of substantial competitive harm based on the possibility that competitors would use disclosed information to "embarrass" the submitter in the marketplace. See *Nadler* v. *FDIC*, 92 F.3d 93, 97 (2d Cir. 1996). But the D.C. Circuit has held that competitive harm caused by "[c]alling customers' attention to unfavorable agency evaluations or unfavorable press" can never be covered by Exemption 4. See *United Techs. Corp.* v. *U.S. Dep't of Def.*, 601 F.3d 557, 563-564 (D.C. Cir. 2010).

5. In addition to disagreement over how to define each term of the test, the D.C. Circuit's *Critical Mass* opinion modifying *National Parks* has created further fault lines. Under *Critical Mass*, the substantial-competitive-harm test applies in cases "in which a FOIA request is made for * * * information a person was *obliged* to furnish the Government," but a different definition of "confidential" controls when the information at issue was "provided to the Government *voluntarily*." 975 F.2d at 880 (emphases added).

To date, the voluntary/involuntary *Critical Mass* test has been adopted by the D.C. and Tenth Circuits. *State of*

Utah, 256 F.3d at 969. The First Circuit, in contrast, has declined to follow *Critical Mass*'s "lessened standard for voluntary submissions." *N.H. Right to Life*, 778 F.3d at 52 n.8. The Second, Fourth, and Ninth Circuits have, to date, also declined to adopt this standard, specifying however that the voluntary/involuntary distinction was not relevant to the outcome of the appeal before them, or had not been raised by the parties. See *Inner City Press/Cmty. on the Move* v. *Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 245 n.6 (2d Cir. 2006); *Am. Mgmt. Servs., LLC* v. *Dep't of the Army*, 703 F.3d 724, 731 n.6 (4th Cir. 2013); *Frazee* v. *U.S. Forest Serv.*, 97 F.3d 367, 372 (9th Cir. 1996). Thus, in the First Circuit, all "confidential" information sought to be withheld under Exemption 4 must undergo the *National Parks* analysis, whereas in the D.C. Circuit, only information that is "required" to be provided to the Government is subject to this test.

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In sum, the Court should grant review of the first question presented to restore FOIA Exemption 4's plain text. Doing so would bring Exemption 4 into line with this Court's jurisprudence about statutory construction (generally and for FOIA specifically); it would also have the salutary effect of eliminating widespread confusion and multiple splits among the Circuits.

II. The Court Should At Least Grant Review Of The Second Question Presented And Resolve The Outcome-Determinative Circuit Split Presented On This Record

Even if the Court declines to repudiate the judicially-created *National Parks* test, the second question presented equally merits certiorari review so that the Court can resolve the outcome-determinative circuit split implicated on these facts. Petitioner would have prevailed in the First or Tenth Circuits, which require only that the

requested information could be potentially useful to a competitor; but the Eighth, Ninth, and D.C. Circuits have held that the disclosing party must make a detailed showing that the information will in fact result in a defined competitive harm, like lost market share. See *supra* pp. 25-26 (discussing this split).

Substantial evidence at trial showed how the requested SNAP redemption data would be useful to a competitor. USDA's fact witnesses explained that the release of store-level data would enable existing and potential future competitors to target the retailers' SNAP customers and estimate the total volume of sales at a given location. App., *infra*, 11a-12a. An expert witness walked the court, step-by-step, through how these competitors could apply this data to their competitive advantage. *Id.* at 13a.

Given this significant evidence, the Eighth Circuit concluded that USDA had proven that the requested data "might prove useful" to the retailers' competitors if it were released. App., *infra*, 5a. That showing would have been sufficient in the First and Tenth Circuits to prevent the disclosure of petitioner's information. See *N.H. Right to Life*, 778 F.3d at 51; *State of Utah*, 256 F.3d at 971. Nonetheless, the Eighth Circuit found this showing insufficient because "[a] likelihood of commercial usefulness—without more—is not the same as a likelihood of *substantial* competitive harm." App., *infra*, 5a (emphasis added). This case therefore squarely implicates the circuit split between the First and Tenth Circuits, versus the Eighth, Ninth, and D.C. Circuits.[20]

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[20] Further confirming the confusion spawned by the *National Parks* substantial-competitive-harm test, the Eighth Circuit could and should have reached a different conclusion based on its own prior precedent. In *Madel*, 784 F.3d at 453, a party invoked Exemption 4 and provided affidavits stating that information "could be used to determine the companies' market shares, inventory levels, and sales

This case is thus an excellent example of the widespread confusion among the Circuits in applying the *National Parks* substantial-competitive-harm test. This Court's review of either or both questions presented is warranted to address these exceptionally important questions regarding FOIA Exemption 4.

III. This Case Presents An Ideal Vehicle For Review Of FOIA Exemption 4 And Both Questions Presented

Though this Court has reviewed other FOIA exemptions—some several times—it has never interpreted Exemption 4. See *supra* p. 10. This case presents a clean vehicle for the Court to restore clarity to Exemption 4 and resolve the confusion in the Circuits. The Court's grant of petitioner's application to recall the Eighth Circuit mandate, App., *infra*, 82a, shows that a majority of the Court has already recognized that the case is likely worthy of certiorari review and likely warrants reversal.

No other issues cloud this case. The definition of "confidential" in Exemption 4 was the *only* issue decided in the judgment below. There is no dispute in this appeal that the requested information otherwise qualifies for protection under the exemption as "commercial or financial information obtained from a person." 5 U.S.C. § 552(b)(4). The Court can therefore narrowly focus on this question of statutory interpretation without having to resolve tangential or fact-laden issues related to the rest of the statute.

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trends in particular areas." Although the affidavits did not specify how each distributer actually would be affected beyond these generalities, *Madel* found that this was sufficient to prevent disclosure. *Ibid.* Although the panel below acknowledged that the issues in this case "appear to mirror" the issues in *Madel*, it cryptically declared that a different result was merited because the data in *Madel* was "not analogous to the data in this case." App., *infra*, 6a.

The *National Parks* test for "confidential" under FOIA Exemption 4 has been entrenched for years among the Circuits, and there is no indication that any Circuit can or will fix the confusion in this area. Thus, further percolation will not aid this Court's review, and there is no likelihood that the Circuits will resolve the interpretation of "confidential" on their own. Instead, the lower courts will continue to disregard the plain meaning of "confidential" and apply the *National Parks* test in myriad inconsistent ways.

The Court's resolution of one or both questions presented will be dispositive of this case. Undisputed evidence was presented at trial that retailers closely guard and keep store-level SNAP data secret. *See supra* p. 6. This information is therefore "confidential" under that term's plain meaning. Likewise, the outcome of this appeal in the Eighth Circuit would have been different, and petitioner would have prevailed, had the Eighth Circuit adopted the construction of likelihood of substantial competitive harm advocated by petitioner and embraced by at least the First and Tenth Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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