Nos. 20-16416, 20-16538, 20-16826

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILL EVANS; THE CENTER FOR INVESTIGATIVE REPORTING,
Plaintiffs-Appellees/Cross-Appellants,

v.

U.S. DEPARTMENT OF LABOR,
Defendant-Appellee/Cross-Appellant,

and

SYNOPSYS, INC.,
Intervenor-Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 4:19-cv-01843 (Hon. Kandis A. Westmore)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF INTERVENOR-DEFENDANT-APPELLANT/CROSS-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America certifies that it is a non-profit trade association. The Chamber has no parent company, and no publicly held company has 10% or greater ownership in the Chamber.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber's members frequently submit sensitive information to the federal government, either voluntarily, as a condition of obtaining a government benefit, or under mandatory reporting provisions. That information is often protected from public disclosure under Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The release of a business's protected information can directly harm its financial position by, for example, providing competitors access to commercially valuable data. The

[1] All parties have consented to the filing of this brief. No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or person other than the Chamber, its members, and its counsel, contributed money to the preparation or submission of this brief.

Chamber's members accordingly have a substantial interest in preserving their ability to intervene in FOIA actions seeking their confidential information—including where, as here, the government chooses not to appeal a district court decision that wrongly orders the information released.

STATEMENT OF THE ISSUE

The issue addressed by *amicus curiae* is whether a private company has a legally protected interest sufficient to support intervention in a FOIA dispute seeking the disclosure of confidential commercial information the company has provided the government.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus curiae the Chamber of Commerce submits this brief to address the question whether a private party may intervene in a FOIA dispute to prevent the release of its confidential commercial information when the government initially defends against disclosure but then declines to appeal an adverse decision. The district court properly concluded that Synopsys had a "significant protectable interest related to the litigation" supporting its right to intervene for purposes of appealing the decision disclosing its sensitive employment records. 1-ER-FA-7 (citing *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)).[2]

[2] Following the convention adopted by the parties, this brief refers to the two volumes of excerpts of records in this case as "1-ER-FA" and "2-ER-FA."

In its cross-appeal, the government maintains that once an agency decides not to appeal, the company whose sensitive information is at stake lacks any protectable interest in pursuing the litigation further. The company therefore cannot intervene to seek reversal of a district court's determination that FOIA's exemptions do not apply. That position is incorrect. Although FOIA is principally a disclosure statute, the statutory exemptions reflect Congress's judgment that not all information can or should be disclosed; "legitimate governmental and private interests could be harmed by release of certain types of information." *FBI v. Abramson*, 456 U.S. 615, 621 (1982). Most relevant here, Congress exempted trade secrets and confidential commercial information from disclosure, seeking to safeguard the commercial interests of the myriad private entities that supply information to the federal government. *See* 5 U.S.C. § 552(b)(4). That, in turn, serves important government interests: The government requires information from regulated entities in order to function, and they are substantially more likely to provide the necessary information if assured that their private, sensitive information will not be publicly disclosed.

The government often secures the cooperation of private entities by promising not to disclose their confidential information. But as this case demonstrates, those assurances of confidentiality only go so far. The Department of Labor in this case *agrees* with Synopsys that the requested workforce data is confidential commercial information protected by Exemption 4, and it opposed disclosure on that basis in the

district court. Yet for unknown reasons, the Department chose not to appeal the district court's determination that Exemption 4 does not apply. The Department instead signaled that it was prepared to release the reports that it had long promised to keep in confidence.

In such circumstances, the companies that supplied the confidential information must be allowed to intervene to appeal and defend against disclosure. The rule governing intervention requires only a "significant protectable interest" in the litigation, *Donnelly*, 159 F.3d at 409, and companies whose confidential information is at risk of disclosure are asserting the very interests that Congress intended Exemption 4 to protect. As proper intervenors, the companies can appeal the district court's judgment even in the government's absence, as long as they can establish Article III standing—which no party disputes in this case. The Court should therefore affirm the district court's order permitting Synopsys to intervene for purposes of appeal.

A contrary ruling would have unfortunate consequences across all sectors of the national economy—and for the government itself. Each year, the government requires or requests an extraordinary variety of disclosures from companies in

industries as diverse as nuclear waste disposal,[3] banking,[4] real estate development,[5] manufacturing,[6] government contracting,[7] and agriculture,[8] just to name a few. The information at issue involves matters of great importance, including health,[9] safety,[10] and international relations.[11] As this case reveals, however, companies supplying confidential commercial information cannot safely presume that the government will take the steps necessary to protect their information from falling into competitors'

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[3] *Utah v. DOI*, 256 F.3d 967, 970 (10th Cir. 2001) (addressing information related to utility companies' storage of nuclear waste on tribal land).

[4] *Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 242 (2d Cir. 2006) (addressing information in bank merger application submitted to Federal Reserve Board).

[5] *Nadler v. FDIC*, 92 F.3d 93, 94-95 (2d Cir. 1996) (addressing commercial terms of a real estate development agreement signed by a failed bank for which the Federal Deposit Insurance Corporation was appointed as receiver).

[6] *United Techs. Corp. ex rel. Pratt & Whitney v. FAA*, 102 F.3d 688, 689 (2d Cir. 1996) (addressing airplane-engine designs and product specifications submitted to Federal Aviation Administration for approval).

[7] Dep't of Labor Opening Br. 5-6 ("Federal contractors who have at least 50 employees and at least 2 establishments[] must annually report" demographic information about their employees).

[8] *Lion Raisins, Inc. v. USDA*, 354 F.3d 1072, 1076 (9th Cir. 2004) (addressing reports of inspections at raisin packing facilities), *overruled on other grounds by Animal Legal Def. Fund v. USDA*, 836 F.3d 987 (9th Cir. 2016).

[9] *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1282-84 (D.C. Cir. 1983) (affected parties were manufacturers of vision-correcting intraocular lenses).

[10] *Ctr. for Auto Safety v. NHTSA*, 244 F.3d 144, 145-47 (D.C. Cir. 2001) (involving "information on [automobile] airbag systems").

[11] *Stone v. Exp.-Imp. Bank of U.S.*, 552 F.2d 132, 133 (5th Cir. 1977) (affected party was an agency of the Soviet Union seeking U.S.-export financing).

hands. If companies cannot intervene once the government ceases to defend against disclosure, they are far less likely to share the sensitive information that no one disputes is "vital to [the government's] work." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019).

ARGUMENT

I. Companies That Submit Confidential Information to the Government Have a Significant Protectable Interest in Preventing Disclosure That Supports Intervention for Purposes of Appeal

To intervene as of right in a FOIA dispute where another party is not already representing its interests, as relevant here, a company need only establish a "significant protectable interest" in the litigation and that "the disposition of the action may, as a practical matter, impair or impede the [company's] ability to protect its interest." *Donnelly*, 159 F.3d at 409. When a district court has ordered disclosure and the government has decided not to appeal that decision, it is self-evident that the disposition of the case may "impair or impede" the company's ability to protect its interest in confidentiality. The other principal requirement for intervention is also plainly satisfied. A "significant protectable interest" is one that "is protected under some law" and related to the plaintiff's claims. *Id.* Where, as here, a case arises under a federal statute, the key question is whether the proposed intervenors are among the class of persons that Congress intended the statute to protect. *See*

California ex rel. Lockyer v. United States, 450 F.3d 436, 441 (9th Cir. 2006); *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980).

Applying this standard, companies whose confidential commercial information is sought under FOIA plainly have a "significant protectable interest" in appealing a disclosure order. As noted, FOIA's exemptions reflect Congress's determination that "legitimate governmental *and private interests* could be harmed by release of certain types of information." *Abramson*, 456 U.S. at 621 (emphasis added); *see* S. Rep. No. 89-813, at 38 (1965) (FOIA's disclosure provisions and exemptions "provid[e] a workable formula which encompasses, balances, and protects *all* interests" (emphasis added)). Exemption 4 reflects the judgment that companies should not have to make their trade secrets and confidential information available for public consumption as a condition of participating in federal programs or obtaining government benefits. Were it otherwise, companies' interests could be harmed in a number of concrete ways—competitors might gain access to confidential data, negotiations might fail, or third parties might copy their product designs or access proprietary data. *See, e.g.*, *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc) (acknowledging "the provider's interest in preventing [the] unauthorized release" of its confidential information); *Sharkey v. FDA*, 250 F. App'x 284, 288 (11th Cir. 2007) (recognizing that private

companies may "reserve a strong interest in ensuring the confidentiality of the information submitted").

Congress's subsequent actions confirm that it intended Exemption 4 to protect private companies' interests. In 2016, Congress amended FOIA to provide that the government may withhold records if, as relevant here, it "reasonably foresees that disclosure would harm *an interest protected by*" one of the statutory exemptions. 5 U.S.C. § 552(a)(8)(A)(i) (emphasis added). Many courts have held that one of the "interest[s] protected by" Exemption 4 is a private company's interest in preventing the dissemination of its confidential information. *See, e.g.*, *Ctr. for Investigative Reporting v. CBP*, 436 F. Supp. 3d 90, 113 (D.D.C. 2019) (holding that the foreseeable-harm standard requires a showing that disclosure "would harm an interest protected by this exemption, such as by causing 'genuine harm to [the submitter's] economic or business interests'"); *Leopold v. DOJ*, No. 19-3192, 2021 WL 124489, at *7 (D.D.C. Jan. 13, 2021) (same).

The government itself seems to recognize that private parties have an interest in safeguarding their confidential commercial information. Each federal agency is required by executive order to notify companies when the agency receives a FOIA request seeking their confidential records. *See* Exec. Order No. 12,600, 52 Fed. Reg. 23,781 (1987); *see also* Office of Info. Pol'y, U.S. Dep't of Justice, *Exemption 4 After the Supreme Court's Ruling in* Food Marketing Institute v. Argus Leader

Media (Oct. 4, 2019), https://bit.ly/2QURxlX (noting agencies' "long history of conducting predisclosure notification of submitters"). The executive order further instructs each agency to give companies an opportunity to object to disclosure of their information and to provide a written explanation if the agency disagrees with any objections. And tellingly, the order requires the agency to notify a company if the FOIA requester files suit—presumably to allow the company to take steps to protect its interests, including by intervening.

Companies thus have a legally protected interest in a FOIA action that seeks disclosure of their confidential information. The government nonetheless argues that intervention is inappropriate because a private company does not have a "cause of action" under FOIA to prevent the government from disclosing records. Dep't of Labor Opening Br. 29-30. But this Court has squarely rejected the argument that a party must have an "enforceable right[]" under a particular statute in order to claim a significant protectable interest in ongoing litigation. *Lockyer*, 450 F.3d at 441. The Court instead "take[s] the view that a party has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation." *Id.* And as discussed, the release of companies' protected information can directly impair their interests in a material way. *See Food Mktg. Inst.*, 139 S. Ct. at 2362 (holding that disclosure of store-level sales data was likely to cause retailers a financial injury sufficient to confer Article III standing);

100Reporters LLC v. DOJ, 307 F.R.D. 269, 276 (D.D.C. 2014) (noting that courts "generally treat the standing analysis for intervention as of right as equivalent to determining whether the intervenor has a 'legally protected' interest under Rule 24(a)").

For all of these reasons, "preventing the disclosure of commercially-sensitive and confidential information is a well-established interest sufficient to justify intervention under Rule 24(a)." *100Reporters*, 307 F.R.D. at 275. And courts therefore routinely permit private entities to intervene in Exemption 4 cases. *See Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 900 (D.C. Cir. 1999) (pharmaceutical company allowed to intervene in action seeking disclosure of abandoned drug applications); *Anderson v. HHS*, 907 F.2d 936, 940 (10th Cir. 1990) (in FOIA action seeking disclosure of clinical testing data, pharmaceutical company intervened and "defended the action on behalf of the FDA"); *In Def. of Animals v. USDA*, 501 F. Supp. 2d 1, 2 (D.D.C. 2007) (noting that private research facility "intervened in this litigation to protect its interest against divulging the investigatory records"). The district court thus correctly concluded here that Synopsys had a sufficiently protectable interest to justify intervention.[12]

The only remaining question is whether Synopsys, a private intervenor, can

[12] *Amicus curiae* agrees that Synopsys satisfies the remaining requirements to intervene as of right. *See* Synopsys Resp./Reply Br. 23-28.

pursue an appeal in the government's absence. As Synopsys has explained, this Court and the Supreme Court have repeatedly allowed intervenors to appeal in these circumstances so long as they can establish Article III standing. *See* Synopsys Resp./Reply Br. 14-17. No party argues that Synopsys lacks standing here. Nor could they, in light of the Supreme Court's decision in *Food Marketing Institute*. There, as here, the government declined to appeal a district court order compelling the disclosure of data that the government had argued was protected under Exemption 4. 139 S. Ct. at 2362. A private trade association intervened as of right to argue against disclosure, and the Supreme Court held that the trade association had Article III standing to pursue the appeal. *Id.* The disclosure order was likely to cause retailers "*some* financial injury" that would be redressed by a favorable ruling on appeal, as the government had "unequivocally" committed that it would not disclose the retailers' data absent a court order compelling disclosure. *Id.* Because those same circumstances are present here, *see, e.g.*, 2-ER-FA32 (government submission confirming that it will not disclose Synopsys' EEO-1 reports absent a final court order), Synopsys has Article III standing to appeal.

II. Absent a Right to Intervene, Private Companies Across a Broad Range of Industries Will Be Deterred from Sharing Vital Information with the Government

The government regularly obtains a wide range of confidential information from companies that, if disclosed, could compromise their commercial interests. In

some cases, the government relies on its regulatory or investigatory authority to compel the production of information. *See, e.g.*, *Lion Raisins*, 354 F.3d at 1075 (involving agricultural inspections). But more often, the government obtains information only because companies choose to participate in federal programs, apply for government benefits, or otherwise voluntarily cooperate with federal agencies. If companies cannot intervene in FOIA cases seeking disclosure of confidential information they have provided the government, they will be discouraged from voluntarily supplying that information and from participating in beneficial government programs, jeopardizing efforts that serve public and private interests alike.

A. To Assist in Government Programs, Companies Routinely Submit Confidential Information to the Government

A principal way the government obtains confidential information from private entities is through voluntary federal programs like the national food-stamp program at issue in *Food Marketing Institute*, *i.e.*, the Supplemental Nutrition Assistance Program (SNAP). Retailers participating in the SNAP program perform a valuable public service by increasing the availability of subsidized food. But in order to participate, they must submit data about the number of food stamps redeemed annually at each retail store. *See Food Mktg. Inst.*, 139 S. Ct. at 2361-62. Retailers customarily keep this store-level sales data confidential, as disclosure could "help competitors win business" at their expense. *Id.* at 2362. Accordingly, "to induce

retailers to participate in SNAP and provide store-level information it finds useful to its administration of the program, the government has long promised them that it will keep their information private." *Id.* at 2363 (citing 43 Fed. Reg. 43,275 (1978)).

The SNAP program is far from unique. Many other government initiatives seek confidential commercial information as a condition of participating. While many of the entities that submit such information are companies, other entities, such as Indian tribes and labor unions, do so as well. *E.g.*, *Utah v. DOI*, 256 F.3d 967, 968-69 (10th Cir. 2001) (tribes); *American Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 864-85 (2d Cir. 1978) (unions). And they do so for a wide array of beneficial programs. The Department of Labor collected the data at issue here as a condition of companies serving the public interest by providing needed goods and services as a government contractor. *See* Dep't of Labor Opening Br. 5-6; *see also CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1134 (D.C. Cir. 1987) (similar); *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997) (company bidding on federal contracts submitted detailed cost and pricing information). Companies that help the federal government to "provide communities across the country [with] affordable telecommunications services" are required to provide the government a wide variety of confidential revenue data, customer information, and service pricing data. *See Skybridge Spectrum Found. v. FCC*, 842 F. Supp. 2d 65, 68-69 (D.D.C. 2012). Virtually any company that assists the government in implementing a

program will be required to turn over *some* information to the government as a condition of its participation.

There is likewise a wide variety of government benefits that require disclosures. That includes grants and loans, where private commercial information is used to determine eligibility. *See, e.g.*, *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 398 (5th Cir. 1985) (corporation had filed audit reports with Farmers Home Administration in order to obtain a loan). It also includes disclosures necessary to obtain permission to operate on federal land. *See, e.g.*, *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766-67 (D.C. Cir. 1974) (national park concessioners submitted financial records to obtain licenses to operate on federal land), *overruled by Food Mktg. Inst.*, 139 S. Ct. at 2364; *Story of Stuff Project v. U.S. Forest Serv.*, 366 F. Supp. 3d 66, 74-75 (D.D.C. 2019) (water bottling company submitted proprietary maps and diagrams to obtain permit to operate transmission facility on federal land). And it also includes disclosures necessary to obtain regulatory approvals. *See, e.g.*, *Henson v. HHS*, 892 F.3d 868 (7th Cir. 2018) (medical device company submitted information about manufacturing process in application for premarket approval); *United Techs. Corp.*, 102 F.3d at 689 (aircraft manufacturer submitted engine designs and specifications for agency approval); *Forest Cty. Potawatomi Cmty. v. Zinke*, 278 F. Supp. 3d 181 (D.D.C. 2017)

(contractor submitted projected revenues and other detailed financial information in application for Indian gaming license).

Companies also share information with the government voluntarily to work toward solving regulatory challenges and to advance policy initiatives. For example, the Environmental Protection Agency has actively sought the participation of businesses in dozens of information-sharing programs, ranging from a "voluntary program seeking to … promot[e] the use of environmentally beneficial combined heat and power[,]" to an effort to "[r]educe methane emissions at confined animal feedlot operations by promoting the use of biogas recovery systems." *See* EPA, List of Programs, http://bit.ly/2MNUcYj (last updated Feb. 20, 2016). As part of an effort to combat online movie and music piracy, entertainment companies have voluntarily participated in a government effort to create a response system to deter infringing activity, and in the process submitted confidential commercial information to facilitate negotiations. *See Soghoian v. OMB*, 932 F. Supp. 2d 167, 173-74 (D.D.C. 2013). And after a nuclear accident, an industry group voluntarily supplied the regulatory agency with detailed safety reports about the construction and operation of nuclear power plants. *See Critical Mass Energy Project*, 975 F.2d at 874. There are numerous other examples. *See, e.g.*, Occupational Safety and Health Admin., Strategic Partnerships Overview, https://bit.ly/3dsmJR9 (last visited Apr. 5, 2021) (describing initiative in which "OSHA enters into an extended,

voluntary, cooperative relationship with groups of employers, employees and employee representatives"); Fed. Aviation Admin., Partnership for Safety Plan Program, https://bit.ly/3dnvITt (last updated Feb. 3, 2021) (describing partnership between FAA and unmanned aircraft industry to "share mutually beneficial information" regarding safety and operations). Through all these various programs, the federal government has become custodian of vast amounts of companies' confidential commercial information.

B. Denying Companies the Right to Intervene to Protect Confidential Information from Disclosure Would Deter Companies from Assisting the Government

The government's position in this case heightens the risk that a company's confidential commercial information will wind up in the public domain, potentially in competitors' hands. The government maintains that it can unilaterally end a FOIA dispute by deciding not to seek review of an order compelling the disclosure of confidential data and that companies have no right to intervene to oppose disclosure on appeal. If that position were correct, it would create the kind of uncertainty that deters companies from supplying the government with critical information in the first place.

As noted, companies often share information on the express or implied understanding that the government will keep that information confidential. *See, e.g.*, *Food Mktg. Inst.*, 139 S. Ct. at 2363; 2-ER-FA69 (noting that the Department of

Labor has assured federal contractors for more than a decade that it would "protect the confidentiality of the EEO-1 data to the maximum extent possible"). The Supreme Court left open whether specific assurances of confidentiality are necessary for information to be protected under Exemption 4. *See Food Mktg. Inst.*, 139 S. Ct. at 2363. But courts have since concluded that *all* privately held information should be treated as confidential "absent an express statement by the agency that it would *not* keep information private, or a clear implication to that effect (for example, a history of releasing the information at issue)." *Renewable Fuels Ass'n v. EPA*, No. 18-2031, 2021 WL 602913, at *8 (D.D.C. Feb. 16, 2021); *see also Gellman v. DHS*, No. 16-635, 2020 WL 1323896, at *11 & n.12 (D.D.C. Mar. 20, 2020); U.S. Dep't of Justice, *Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person is Confidential under Exemption 4 of the FOIA*, https://bit.ly/3rOZ6ra (last updated Oct. 7, 2019) (information that "the submitter customarily keep[s] … private or closely-held" is deemed confidential if "the government has effectively been silent" about whether it would disclose the information).

As long as the government provides assurances of confidentiality (or does not expressly warn companies that their information may be released), companies will be encouraged to provide sensitive information without undue fear that their commercial interests may be compromised. But as this case demonstrates, private

parties cannot know in advance how far the government's commitment to confidentiality will extend. The government may fully represent the companies' interests in the district court, arguing that Exemption 4 protects the information from disclosure, yet later decide not to defend that position on appeal. Importantly, that decision often has nothing to do with the agency's position on the merits—*i.e.*, whether the agency continues to believe the information is protected under FOIA. In this case, for example, the Department of Labor continues to maintain that Exemption 4 protects contractors' EEO-1 reports from disclosure. The agency has therefore confirmed that it "will not disclose the contested reports unless compelled to do so by court order." 2-ER-FA32; *see also Food Mktg. Inst.*, 139 S. Ct. at 2362 (noting that government chose not to appeal the disclosure order but agreed not to release the data unless compelled to do so). That makes it even more difficult for private parties to predict the government's litigation decisions.

Absent a right to intervene to protect their interests, companies are likely to assume that any information provided to the government—even sensitive commercial information that the government *agrees* is protected—may well be exposed to the public. That will inevitably discourage businesses from sharing information with the government, participating in beneficial government programs, and seeking government benefits that are recognized to promote the public interest. As the en banc D.C. Circuit has recognized, disclosure of confidential information

deters companies from voluntarily furnishing similar information in the future. As the court explained, "[i]t is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will … jeopardize its continuing ability to secure such data on a cooperative basis[.]" *Critical Mass Energy Project*, 975 F.2d at 879.

Concern about chilling the voluntary provision of information to the government extends to *all* of the government programs and initiatives described above. Even where the government mandates disclosures from companies participating in federal programs, it is just as much "a matter of common sense" that private parties may hesitate to participate if there is a significant risk that the information they provide will ultimately be released to the public under FOIA. *Id.* Some retailers, for example, choose not to participate in the SNAP program. *See Food Mktg. Inst*., 139 S. Ct. at 2363. The same is true of government contracts and benefit programs, which condition receipt of a federal contract or benefit on the provision of information—including, for example, the EEO-1 reports at issue here. Depending on the nature of that information, some private parties may conclude that obtaining a particular contract or benefit is not worth the risk that their sensitive information may be exposed. *See, e.g.*, *Nat'l Parks*, 498 F.2d at 767 (without assurances of confidentiality, companies "may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will

be impaired"); *Gilmore v. U.S. Dep't of Energy*, 4 F. Supp. 2d 912, 923 (N.D. Cal. 1998) (corporations will "no doubt" be "less likely to enter into joint ventures with the government to develop technology if that technology can be distributed freely through the FOIA"). These deterrent effects could have widespread consequences, as there are countless examples of programs and initiatives where the government seeks information from participating entities.

FOIA requests seeking this kind of confidential commercial information are often quite expansive. *See, e.g.*, *FlightSafety Servs. Corp. v. DOL*, 326 F.3d 607, 609 (5th Cir. 2003) (requesting "all raw data collected" by the Bureau of Labor Statistics to create wage determination schedules for various markets); *Continental Oil Co. v. Fed. Power Comm'n*, 519 F.2d 31, 35 (5th Cir. 1975) (seeking "a contract by contract, field by field exposition of the petitioners' product marketing"). In the face of such requests, businesses have demonstrated that they will go to great lengths to avoid the disclosure of sensitive information covered by these requests. *See, e.g.*, *Donovan*, 830 F.2d at 1134-36 (describing company's sustained opposition to disclosure of sensitive information in litigation that the D.C. Circuit called a "five-year odyssey" and a "tortuous journey"). That businesses will go to such lengths underscores the importance they place on maintaining the confidentiality of commercial information. It clearly indicates that they will be more likely to decline to participate in otherwise mutually beneficial programs, to voluntarily participate

in government initiatives, or to seek benefits for which they are eligible, if doing so would risk exposing sensitive commercial information under FOIA.

* * * * *

Companies that provide sensitive commercial information to the government have a substantial "protectable interest related to the litigation" sufficient to support their right to intervene for purposes of appeal. Companies whose confidential information is at risk of disclosure are asserting the very interests that Congress intended Exemption 4 to protect. A contrary ruling would have unfortunate consequences across all sectors of the national economy—and for the government itself. If companies cannot intervene once the government ceases to defend against disclosure, they are far less likely to share the sensitive information that no one disputes is "vital to [the government's] work." *Food Mktg. Inst.*, 139 S. Ct. at 2366.

CONCLUSION

The Court should affirm the district court's order permitting Synopsys to intervene for purposes of appeal.

Dated: April 5, 2021

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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Signature s/ John P. Elwood **Date** Apr 5, 2021

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I hereby certify that on April 5, 2021, I electronically filed the foregoing brief with the Court via the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 5, 2021

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