18-481 FOOD MARKETING INSTITUTE V. ARGUS LEADER MEDIA

DECISION BELOW: 889 F3d. 914

LOWER COURT CASE NUMBER: 17-1346

QUESTION 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)?

CERT. GRANTED 1/11/2019