***Food Marketing Institute v. Argus Leader Media,* No. 18-481**

Today, the Supreme Court held by a 6-3 vote that Exemption 4 of the Freedom of Information Act (FOIA), which protects from disclosure "confidential" private-sector "commercial or financial information," does not require a showing that disclosure of the information would cause "substantial competitive harm."

Background: Under FOIA, a federal agency must generally make agency records available to anyone who submits a request for such records. FOIA does not apply, however, to any matters identified in its exemptions. Exemption 4 exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In applying Exemption 4, lower courts have employed a so-called "substantial competitive harm" test, under which commercial information could not be deemed "confidential" unless disclosure was likely to cause substantial harm to the competitive position of the person from whom the information was obtained.

Issue: Whether Exemption 4 of FOIA requires "substantial competitive harm."

Court's Holding: In an opinion by Justice Gorsuch, the Court rejected the "substantial competitive harm" test. After holding that the petitioner had standing, the Court employed traditional principles of statutory construction to determine the meaning of "confidential" in Exemption 4. The Court explained that "[c]ontemporary dictionaries" suggest "two conditions" that "might be required for information communicated to another to be considered confidential." One condition is that the information "is customarily kept private, or at least closely held, by the person imparting it"; the other is that "the party receiving [the information] provides some assurance that it will remain secret." The Court held that the first condition must be satisfied but declined to decide whether the second must be, because both conditions were satisfied in this case.

As for the "substantial competitive harm" requirement, the Court found any mention of it to be "[n]otably lacking" from "dictionary definitions" or "any other usual source that might shed light on the statute's ordinary meaning." The Court criticized the first decision to adopt the "substantial competitive harm" test—a 1974 decision of the D.C. Circuit called *National Parks*—for having relied almost entirely on FOIA's legislative history. The Court said that it "cannot approve such a casual disregard of the rules of statutory interpretation."

In a dissenting opinion joined by Justices Ginsburg and Sotomayor, Justice Breyer said that he would add a third condition for confidentiality to the two identified by the majority: that release of the information would "cause genuine harm to the owner's economic or business interests." In contrast to the lower courts, the dissenting Justices would not require that the harm be either "competitive" or "substantial."