NO. 14-1273

IN THE
Supreme Court of the United States

NEW HAMPSHIRE RIGHT TO LIFE,
Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Petitioner New Hampshire Right to Life ("NHRTL") is a New Hampshire not-for-profit corporation that has no parent company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

REPLY TO BRIEF IN OPPOSITION

I. THE SOLICITOR GENERAL'S SURVEY OF THS COURT OF APPEALS' VARIED AND CONFLICTING APPLICATIONS OF EXEMPTION 4 ONLY UNDERSCORES THE NEED FOR THIS COURT'S REVIEW.

Exemption 4 to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, only allows an agency to withhold documents when the agency can demonstrate that the documents contain "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). While, as the Solicitor notes, the statute provides no definition of "confidential," several Circuits have held that the agency must demonstrate that disclosure of the withheld or redacted documents would substantially harm the competitive position of the person who submitted the information. *Inner City Press/Cmty. on the Move v. Bd. of Governors of Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir. 2006); *Frazee v. U.S. Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988); *9 to 5 Org. v. Bd. of Governors*, 721 F.2d 1, 8 (1st Cir. 1983). This test was originally adopted by the U.S. Court of Appeals for the D.C. Circuit in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), and has been cited in numerous cases since then. In applying the *National*

Parks test, all of the Courts of Appeals, other than the First Circuit, require a showing of actual, non-speculative, competition with an identifiable competitor. The First Circuit has created a circuit conflict by allowing the withholding of documents on the possibility of potential future competition.

A. The Solicitor General's Rejection of Over Forty Years of Circuit Precedent for a Dictionary Definition of "Confidential" Underscores the Necessity of Further Review.

The Solicitor General's primary objection to granting *certiorari* is his belief that the First Circuit, the D.C. Circuit and all of the Courts of Appeals that have followed the *National Parks* test for decades are simply wrong. See Brief in Opposition, p. 9-13, n3 ("Neither the term 'confidential' nor any other textual aspect of Exemption 4 supports the definition of 'confidential' created by *National Parks*.") In the Solicitor General's view, courts should be applying the simple dictionary definition of confidential to mean "not publicly disseminated ... or practiced in confidence" and not the *National Parks* competitive harm test currently being utilized by several courts of appeals. Br. in Opp. 9. Nevertheless, even if the courts of appeals are incorrect to apply the *National Parks* test, that does not mean that the documents at issue in this case should have been exempt from disclosure. FOIA requires "full agency disclosure unless information is exempted under clearly delineated statutory language." *Fed. Open Mkt.*

Comm. of Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 351-52 (1979). "[C]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); *see also FBI v. Abramson*, 456 U.S. 615, 616 (1982) ("FOIA exemptions are to be narrowly construed"). Therefore, the definition of "confidential" must be narrowly construed to accomplish FOIA's purpose of broad disclosure. The documents at issue in this case, all relating to a rushed non-competitive grant by HHS after the state of New Hampshire refused to award funds over concerns that Planned Parenthood was unlawfully using taxpayer funds to subsidize abortions, could not have been done "in confidence." In fact, the state's decision not to award funds and HHS's decision to grant the funds were both highly publicized and of interest to many in New Hampshire and elsewhere. "[T]he protection of the public fisc is a matter that is of interest to every citizen." *Brock v. Pierce County*, 476 U.S. 253, 262 (1986). This interest is particularly acute when an agency is granting funds pursuant to a sole source contract only months after a state declined to award the same funds.

Regardless of whether the First Circuit erred in misapplying the *National Parks* test or, as the Solicitor General argues, the *National Parks* test should not be applied at all, certiorari should be granted to clarify the application of Exemption 4.

B. The Solicitor General's Opposition Recognizes a Conflict Between the D.C. Circuit and the First Circuit in Applying a Lessened Standard for Voluntary Submissions

While the D.C. Circuit applies the *National Parks* competitive harm test to required submissions, it applies a lessened standard for Exemption 4 when documents are submitted "voluntarily" and not as a required part of a grant application. See *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992). The First Circuit has only applied the *National Parks* competitive harm test and has never adopted the secondary lessened standard of *Critical Mass*. *See* App. 15a, n8. In his Brief in Opposition, the Solicitor General appears to argue that both the D.C. Circuit and the First Circuit are in error and that the *Critical Mass* test should be applied to all submissions. Petitioner disagrees with the Solicitor General's conclusions as to how Exemption 4 should be applied but agrees with the Solicitor that there should not be two separate tests and that there is a conflict between the First Circuit and the D.C. Circuit. Therefore, *certiorari* should be granted to provide instruction to the federal courts on how to apply Exemption 4.

C. The Solicitor General's Conclusion That There Was Competition is Based on a Legally Impermissible Reading of the Factual Record Below.

The Solicitor General argues that the First Circuit applied the requirement of actual and present competition in the same manner as other circuits and that "Petitioner does not appear to dispute the existence of those competitors or that competition." Br. in Opp. at 15. This is an erroneous reading of the factual record. HHS determined, as it must prior to granting a sole source non-competitive grant, that Planned Parenthood had no actual competition. *See* App. 28a-29a ("HHS noted that, due to the Executive Council's decision, 'currently there is no funded entity to provide Title X services for [the] portion of the state' served by Planned Parenthood").[1] HHS cannot determine that there is no competition for the purpose of granting the funds and then determine that there was competition for the purpose of withholding documents related to the sole-source grant. The First Circuit's decision was not based on present competition in 2011 but on the First Circuit's determination that speculative competition may potentially occur in future Title X bids. In fact,

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[1] HHS did produce an affidavit from Planned Parenthood suggesting Planned Parenthood had competition, but this affidavit was contradicted by HHS's own statements that there were no other service providers thereby necessitating the sole source contract. *See Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (recognizing agency affidavits should "only [be relied upon] if they are not called into question by contradictory evidence in the record").

there was no competition for future Title X bids, either.[2]

II. THIS COURT SHOULD REVIEW THE FIRST CIRCUIT'S EXPANSION OF THE DELIBERATIVE PROCESS PRIVILEGE TO SHIELD AGENCIES' DECISIONS ON HOW AND WHAT THEY COMMUNICATE TO THE PUBLIC.

Exemption 5 of FOIA includes the Deliberative Process Privilege. The Deliberative Process Privilege protects from disclosure only pre-decisional and deliberative intra-agency communications and not "communications made after the decision and designed to explain it" *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975).

The First Circuit held that the decision to award the grant to Planned Parenthood was made on August 19, 2011.[3] *See* App. 18a. Therefore, agency

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[2] Planned Parenthood faced no competition for the sole source 2011 grant or the future 2013 Title X bids. Nevertheless, the First Circuit refused to consider the lack of competition for the 2013 Title X bids as it must "gauge the risk of substantial harm to Planned Parenthood's competitive position as of the time of the district court decision." App. 14a, n.7.

[3] August 19, 2011 is the date HHS's Justification Memo was signed. Petitioner argues that the decision to go forward with the grant was not made the date HHS formally justified its decision but was made on or before August 10, 2011, when the White House and Secretary Sebelius approved providing the grant to Planned Parenthood while deferring to HHS to get down to the pennies and nickels. *See* App. 17a-18a.

communications made after August 19, 2011 and designed to explain HHS's August 19, 2011 decision cannot be withheld under the Deliberative Process Privilege. Nevertheless, the First Circuit held that any communications relating to the "Department's decision of how and what to communicate to the public," could be withheld under the Deliberative Process Privilege. App. 20a. This is directly contrary to established precedents of this Court as well as earlier decisions of the First Circuit which had previously recognized that "post-decisional documents explaining or justifying a decision already made are not shielded" by the deliberative process privilege. *Sears, supra; Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995). Review is thus warranted. SUP. CT. R. 10(c).

In his Opposition, the Solicitor General suggests that further review is not warranted as, other than the First Circuit, no other court of appeals has ignored this Court's clear guidance in *Sears*. Br. in Opp. 18. He ignores the direct conflict with this Court's precedent. There was no doubt left in *Sears* that "communications made after the decision and designed to explain it" cannot be protected by the Deliberative Process Privilege. 421 U.S. at 152. This Court should not wait until other courts of appeal follow the First Circuit and allow agencies to withhold communications regarding "how and what to communicate to the public." App. 20a. FOIA was enacted "to permit access to official information long shielded unnecessarily from public

view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). No government agency should be allowed to cherry pick what information it will disclose in order to most effectively sell the agency's chosen policy choices. Such a conclusion runs directly contrary to the express purpose of FOIA.

CONCLUSION

For the reasons stated in the April 22, 2015 Petition for Writ of Certiorari as well as in this Reply Brief, the Petitioner respectfully requests that this Court grant review.

Respectfully submitted,

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