No. 14-1273

In the Supreme Court of the United States

NEW HAMPSHIRE RIGHT TO LIFE, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether information submitted to the Department of Health and Human Services (HHS) by a grant applicant concerning the applicant's method of providing services under the grant and its charges for those services qualifies under Exemption 4 of the Freedom of Information Act (FOIA) as "confidential" commercial information, 5 U.S.C. 552(b)(4), when the applicant has not publicly disclosed the information and has treated it as confidential.

2. Whether internal agency deliberations concerning how HHS should communicate with, and what information it should convey to, the public about a grant are covered by the deliberative-process privilege under FOIA Exemption 5, 5 U.S.C. 552(b)(5).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 778 F.3d 43. The opinion of the district court (Pet. App. 24a-68a) is reported at 976 F. Supp. 2d 43.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2015. The petition for a writ of certiorari was filed on April 21, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. This action under the Freedom of Information Act (FOIA), 5 U.S.C. 552, concerns agency records related to the administration of Title X of the Public Health Service Act, 42 U.S.C. 300 *et seq.*, by the Department of Health and Human Services

(HHS). Title X authorizes HHS to make grants to, and enter into contracts with, public or nonprofit private entities "to assist in the establishment and operation of voluntary family planning projects." 42 U.S.C. 300(a). Those projects must "offer a broad range of acceptable and effective family planning methods and services," *ibid.*, but Title X prohibits the use of its funding in "programs where abortion is a method of family planning," 42 U.S.C. 300a-6. HHS often awards Title X grants directly to a State, which then disperses the Title X funds by providing subgrants to other entities. Cf. Pet. App. 3a.

Until 2011, HHS typically awarded Title X grants directly to the State of New Hampshire. Pet. App. 2a, 27a-28a. The State used the Title X funds to provide subgrants, which the State had historically awarded to Planned Parenthood and other organizations. *Id.* at 3a, 28a. In June 2011, the New Hampshire Executive Council decided not to award a subgrant to Planned Parenthood because, the Council stated, it was concerned that taxpayer funds were being used to subsidize abortions. *Ibid.* The State, however, failed to secure a replacement provider of Title X services in the "large portions of the [S]tate" that Planned Parenthood had served. *Id.* at 3a; see *id.* at 29a. The State thus relinquished to HHS its unutilized Title X funding. *Id.* at 3a, 29a-30a.

HHS thereafter considered options for providing Title X services to those areas of the State that the State had left without such services. Pet. App. 4a. On August 19, 2011, HHS decided to pursue a sole source replacement grant to Planned Parenthood for a 16-month period in order to ensure that Title X services would remain available throughout the State. *Ibid.*

About two weeks later, Planned Parenthood submitted a grant application to HHS. *Ibid.*

HHS evaluated the application and, on September 9, 2011, publicly announced on its website its intent to award a direct Title X grant to Planned Parenthood. Pet. App. 5a. On September 13, 2011, HHS formally issued a notice of grant award, which required that Planned Parenthood submit "institutional files" on a variety of its policies and procedures. *Ibid.* Planned Parenthood accordingly submitted documents that included, *inter alia*, its Manual of Medical Standards and Guidelines (Manual) and information about its fee schedule. *Ibid.*

On September 28, 2011, three of the New Hampshire Executive Council's five members submitted a letter to the Government Accountability Office (GAO) protesting the grant award. Pet. App. 18a. GAO concluded that it lacked authority to review HHS's decision. *Ibid.* After internal deliberations, HHS decided not to provide its own response to the protest. *Ibid.*

b. In December 2011, petitioner submitted a FOIA request for records concerning HHS's decision to proceed with a direct-award process, documents submitted to HHS by Planned Parenthood in connection with its grant application, and records relating to HHS's decision to award the grant to Planned Parenthood. Pet. App. 5a. Under FOIA, a federal agency must generally make agency records available to "any person" who has submitted a "request for [such] records," unless a statutory exemption or exclusion applies. 5 U.S.C. 552(a)(3)(A); see 5 U.S.C. 552(b) (FOIA exemptions) and (c) (exclusions); *United States Dep't of Justice* v. *Reporters Comm. for Freedom of*

the Press, 489 U.S. 749, 754-755 (1989). After HHS failed to produce the requested records within FOIA's 20-day statutory deadline, petitioner filed this action. Pet. App. 24a, 33a-34a. HHS subsequently responded to petitioner's FOIA request by releasing more than 2500 pages of records. *Id.* at 5a. The agency, however, withheld under FOIA Exemption 4 certain information that Planned Parenthood submitted to HHS, and withheld under FOIA Exemption 5 certain internal agency records. *Id.* at 5a-7a.

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Congress defined the term "person" to include an "individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. 551(2). Congress, however, did not define "confidential" as the term is used in Exemption 4. The first question presented in this case concerns the application of Exemption 4 to "confidential" commercial information.

Exemption 5 exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). The exemption therefore "incorporat[es] civil discovery privileges" that an agency may invoke, including the deliberative-process privilege. *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (*Klamath*); see *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149-154 (1975) (*Sears*). The deliberative-process privilege, in turn, protects from disclosure "recommendations and deliberations comprising part of a process by which

governmental decisions * * * are formulated." *Klamath*, 532 U.S. at 8 (quoting *Sears*, 421 U.S. at 150). The second question presented in this case concerns the application of the deliberative-process privilege to certain internal agency records.

2. The district court granted partial summary judgment to petitioner and partial summary judgment to HHS. Pet. App. 24a-68a. The court largely upheld HHS's withholdings under Exemptions 4 and 5. *Id.* at 26a, 38a-50a, 52a-62a.

As relevant here, the district court first concluded that HHS had properly invoked Exemption 4 to withhold portions of the Planned Parenthood Manual, its Fees and Collections Policy, and related materials. Pet. App. 38a-50a; see *id.* at 35a, 46a n.12 (describing agency's production of records with redactions). The court determined that Planned Parenthood had protected the relevant information from public disclosure pursuant to a written policy. *Id.* at 46a, 47a n.13, 49a. The court further concluded that the information—which Planned Parenthood had been required to submit to HHS—qualified as "confidential" commercial information under Exemption 4 because its disclosure would likely cause Planned Parenthood substantial competitive harm. *Id.* at 42a-44a, 47a-49a. In so ruling, the court observed that even petitioner did not dispute that "Planned Parenthood faces 'actual competition' for grants from hospitals and community health clinics" and that, at the very least, "those entities compete with Planned Parenthood for *patients*." *Id.* at 48a.

The district court further held that HHS had properly invoked Exemption 5 to withhold internal agency records discussing the agency's decisions con-

cerning the grant and its decision to announce the grant award publicly. Pet. App. 52a-60a. The court concluded that the deliberative-process privilege applied because the relevant records were both predecisional (*id.* at 56a-59a) and deliberative (*id.* at 59a-60a).

3. The court of appeals affirmed. Pet. App. 1a-23a.

a. The court of appeals held that the relevant portions of the Planned Parenthood Manual, fee schedule, and related documents constituted confidential commercial information under Exemption 4. Pet. App. 9a-15a.

Planned Parenthood, the court of appeals concluded, had itself "treated these documents as confidential information not generally available to the public." Pet. App. 14a-15a. Rather than rest its decision on that basis alone, however, the court explained that, under the judicial test adopted in *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*), commercial information that a person was required to submit to an agency is deemed "confidential" under Exemption 4 if its "disclosure is likely to either: (1) 'impair the Government's ability to obtain necessary information in the future'; or (2) 'cause substantial harm to the competitive position of the person from whom the information was obtained.'" Pet. App. 12a (quoting *9 to 5 Org. for Women Office Workers* v. *Board of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 21 (1st Cir. 1983)); see *id.* at 15a n.8 (noting without deciding whether a different "standard [applies] to voluntary submissions"). The court of appeals concluded that the second alternative under the *National Parks* test was satisfied here. *Id.* at 13a-15a.

That test, the court of appeals explained, does not require proof of "actual competitive harm"; instead, it is satisfied by a showing of "actual competition and a likelihood of substantial competitive injury." Pet. App. 12a (citing *Public Citizen Health Research Grp.* v. *FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983)). The "'actual competition' requirement" was satisfied, the court continued, because Planned Parenthood not only "face[s] actual competitors—community health clinics—in a number of different arenas," including "in future Title X bids," it also "faces plenty of competition from other entities for patients." *Id.* at 13a; see *ibid.* (noting that one such clinic had requested information from HHS in 2011 "about applying for the same grant" that Planned Parenthood ultimately received). The second requirement of a likelihood of "substantial competitive harm" was also satisfied, the court explained, because a "future competitor could take advantage" of the information in the "specific documents" at issue to better "compete with Planned Parenthood for patients, grants, or other funding." *Id.* at 14a; see *id.* at 15a (concluding that the information in Planned Parenthood's fees and collections policies "is undoubtedly valuable information for competitors").

b. The court of appeals separately upheld HHS's withholding of internal agency records under Exemption 5. Pet. App. 15a-23a. The court explained that such records must be both "deliberative" and "predecisional" to fall within the deliberative-process privilege, and that petitioner challenged only the predecisional nature of the records because, under petitioner's theory, the records were created after HHS's decision to "proceed with a direct award process." *Id.*

at 17a, 19a. The court determined that records produced before the agency's August 19 decision to proceed in that manner were predecisional. *Id.* at 18a-19a. The court also determined that other records produced after August 19 were predecisional because they concerned the agency's subsequent decisions (1) to announce publicly its "intent to issue the grant award to Planned Parenthood" and (2) not to respond "to New Hampshire's protest of that direct award." *Id.* at 19a-20a. Petitioner's focus on the initial August 19 decision, the court explained, "simply misidentifies the decision to which [the post-August 19] documents relate." *Id.* at 20a.

ARGUMENT

The court of appeals determined that HHS properly withheld under FOIA Exemption 4 certain commercial information submitted to it by a Title X grant applicant. The court further concluded that HHS properly withheld under Exemption 5 certain deliberative internal agency records. The court of appeals' judgment is correct and its decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. a. FOIA Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). The exemption thus covers two general categories of materials: "trade secrets" and certain "commercial or financial information" that is "privileged or confidential." The court of appeals correctly held that the commercial information that Planned Parenthood submitted to HHS in connection with its application for Title X funds is "confidential" commercial information under Exemption 4.

Congress did not provide a statutory definition of the term "confidential" as the term is used in Exemption 4. The term is thus properly understood to carry its "ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). The ordinary meaning of "confidential" information encompasses information that is "not publicly disseminated" or that is "communicated, conveyed, acted on, or practiced in confidence." *Webster's Third New International Dictionary* 476 (1961). Exemption 4's legislative history confirms Congress's intent to adopt that meaning. Congress designed the exemption to protect, as relevant here, commercial information that "would not customarily be made public by the person from whom it was obtained," including information in the form of "business sales statistics, inventories, customer lists," and "technical or financial data." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); accord S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). Exemption 4's application to "confidential" information "also include[s] information which is given to an agency in confidence." H.R. Rep. No. 1497, at 10 (explaining that "a citizen must be able to confide in his Government").

The commercial information in this case fits squarely within that understanding of "confidential" commercial information. As the courts below concluded, Planned Parenthood has in fact "treated these documents as confidential information not generally available to the public" as reflected, *inter alia*, by its "written policy" prohibiting public dissemination. Pet. App. 14a-15a, 46a, 49a. Indeed, Planned Parenthood continued to take steps to prevent public disclosure of the information after petitioner filed its FOIA request

by prosecuting a reverse-FOIA action against HHS under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, to enjoin the release. Pet. App. 6a, 35a.[1] Because Planned Parenthood would not customarily disclose that commercial information to the public, the information qualifies as "confidential" information under Exemption 4.

b. Consistent with the ordinary meaning of "confidential," the en banc D.C. Circuit has held that commercial information voluntarily provided to the government is "'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871, 872, 879-880 (1992) (*Critical Mass*), cert. denied, 507 U.S. 984 (1993); see *United Techs. Corp.* v. *United States Dep't of Defense*, 601 F.3d 557, 559 n.3 (D.C. Cir. 2010). The en banc D.C. Circuit, however, declined the government's request in *Critical Mass* to overturn the more circumscribed definition of "confidential" that the court had previously developed in *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974), for other Exemption 4 contexts involving information provided to the government under compulsion. See *Critical Mass*, 975 F.2d at 872, 880.

In *National Parks*, the court of appeals recognized that its earlier Exemption 4 decisions had deemed information to be confidential if the information "would customarily not be released to the public by the person from whom it was obtained." 498 F.2d at

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[1] The reverse-FOIA action was later administratively closed without prejudice to the possibility of being reopened. Pet. App. 35a. That action is not at issue here.

766 (emphasis omitted) (quoting S. Rep. No. 813, at 9, and citing, *e.g.*, *Sterling Drug Inc.* v. *Federal Trade Comm'n*, 450 F.2d 698, 709 (D.C. Cir. 1971)). The *National Parks* panel, however, stated that "[w]hether particular information would customarily be disclosed to the public by the person from whom it was obtained is not the only relevant inquiry in determining whether that information is 'confidential' for purposes of section 552(b)(4)." *Id.* at 767. The court explained that it "must also be satisfied that nondisclosure is justified by the legislative purpose which underlies" Exemption 4. *Ibid.* Based on its assessment of what the court deemed to be relevant policy interests protected by the exemption, *National Parks* held that information "is 'confidential' for purposes of the exemption if disclosure of the information is likely" either "(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." *Id.* at 770 (footnote omitted); see *id.* at 767-770.

Rather than overrule *National Parks*, and without considering whether *National Parks* was correctly decided, the en banc D.C. Circuit in *Critical Mass* concluded that it should reaffirm *National Parks*' two-prong "definition of 'confidential'" as a matter of *stare decisis*. *Critical Mass*, 975 F.2d at 875-879. The court, however, limited *National Parks*' definition of "confidential" to "information that persons are required to provide the Government," and adopted a different definition of the same term (which reflects the term's ordinary meaning) when "the information sought is given to the Government voluntarily." *Id.* at 872. As a result, the D.C. Circuit has adopted dispar-

ate definitions of the term "confidential" to apply in different Exemption 4 contexts. That effectively creates two exemptions—a "high" and a "low" version of Exemption 4. Cf. *Milner* v. *Department of the Navy*, 562 U.S. 562, 566-567, 570 (2011) (rejecting a similar court of appeals doctrine that had created "High" and "Low" versions of Exemption 2 in 1981).

As petitioner notes (Pet. 15-16), several courts of appeals have adopted the *National Parks* definition of "confidential" information that persons are required to submit to the government.[2] That judicial definition, however, is not grounded in the statutory text. See *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 931 F.2d 939, 947-948 (D.C. Cir.) (Randolph, J., concurring) (finding "no legitimate basis" for the *National Parks* test, which was "fabricated, out of whole cloth," and is inconsistent with the "common meaning of 'confidential'"; concurring in the judgment on the ground that *National Parks* was binding precedent) (citation omitted), judgment vacated, 942 F.2d 799 (D.C. Cir. 1991) (en banc) (per curiam). The ordinary meaning of the word "confidential" does not support the view that commercial information that is

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[2] Several courts of appeals, including the court of appeals in this case, have noted the D.C. Circuit's differing analyses for "voluntarily submitted information" and "information submitted mandatorily," but those courts have so far avoided either adopting or rejecting the *Critical Mass* test for deciding whether voluntarily submitted information is "confidential." See *Inner City Press/Cmty. on the Move* v. *Board of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 245 n.6 (2d Cir. 2006); see also, *e.g.*, Pet. App. 15a n.8 (1st Cir.); *Wickwire Gavin, P.C.* v. *USPS*, 356 F.3d 588, 597 (4th Cir. 2004); *OSHA Data/CIH, Inc.* v. *United States Dep't of Labor*, 220 F.3d 153, 166 n.30 (3d Cir. 2000); *Frazee* v. *United States Forest Serv.*, 97 F.3d 367, 371-372 (9th Cir. 1996).

required to be furnished to the government is "confidential" only if its disclosure would be likely "to impair the Government's ability to obtain necessary information in the future" or "to cause substantial harm to the competitive position of the person from whom the information was obtained," *National Parks*, 498 F.2d at 770. The government's ability to obtain *other* information in the future does not determine whether the particular commercial information at issue in the FOIA request is currently "confidential." Nor is a likelihood of future competitive harm—or, more precisely, competitive harm that qualifies as "substantial" in the eyes of an agency or court—the only measure of whether information is, in fact, "confidential." Had Congress intended such complicated inquiries under Exemption 4, it would have provided a textual basis for them.[3]

c. Petitioner's first question presented asks this Court to decide whether "speculative future competition" and a "likelihood that disclosure would substantially harm the competitive position of a grant applicant" (Pet. i) are sufficient to show that commercial information is "confidential" under Exemption 4. In

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[3] Although FOIA exemptions are often narrowly construed (see Pet. 3), courts "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *United States* v. *Stevens*, 559 U.S. 460, 481 (2010) (quoting *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 884 (1997)); see, *e.g.*, *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964) (explaining that courts must thus "ask whether the statute that Congress did enact will permissibly bear [a proffered narrowing] construction" before adopting such a construction to avoid constitutional doubt). Neither the term "confidential" nor any other textual aspect of Exemption 4 supports the definition of "confidential" created by *National Parks*.

petitioner's view, Exemption 4 embodies an "actual competition requirement" for determining whether commercial information is "confidential," and that requirement cannot "be satisfied by speculating about the possibility of competition in the future." Pet. 10-11. Petitioner argues (Pet. 17) that "there is no statutory basis for" the court of appeals' application of the *National Parks* test. But, as noted above, the underlying test itself lacks a basis in the statutory language. It is not surprising, therefore, that courts applying the *National Parks* test have been called upon to demarcate a line between "confidential" and non-"confidential" information based on assessments of the competitive effects that would likely flow from disclosure. For that reason alone, review of the court of appeals' assessment of the likely competitive harm of disclosure in this case is not warranted.

In any event, further review is unwarranted even assuming *arguendo* the validity of the *National Parks* definition of "confidential" information. Petitioner asserts (Pet. 11-12) that certiorari is warranted to resolve a division of authority about the showing required by the second half of the *National Parks* test, which deems commercial information "confidential" when there is a "likel[ihood]" that disclosure would "cause substantial harm to the competitive position of the person from whom the information was obtained," Pet. 15 (quoting *National Parks*, 498 F.2d at 770). No such conflict exists.

The court of appeals here determined that the "actual competition" element of the *National Parks* test had been satisfied because Planned Parenthood "face[s] actual competitors—community health clinics—in a number of different arenas," including "in fu-

ture Title X bids" and, in addition, "faces plenty of competition from other entities for patients." Pet. App. 13a; see *id.* at 48a (district court). Petitioner does not appear to dispute the existence of those competitors or that competition. Instead, petitioner appears to argue (Pet. 16) that the court of appeals should have "require[d]" a "showing that [Planned Parenthood] had competitors for the federal grant at issue" that led it to submit its commercial information to HHS. But petitioner identifies no holding by any court of appeals suggesting such a particularized showing or narrow inquiry, much less a division of authority warranting this Court's review.

Petitioner cites (Pet. 11-12, 15-16) three decisions from the D.C., Fourth, and Ninth Circuits that petitioner contends are in conflict with the decision below. But those decisions merely restate the *National Parks* requirement of "actual competition," and nothing in those decisions conflicts with the court of appeals' finding of "actual competition" here.[4] Indeed,

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[4] See *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1152, 1154-1155 (D.C. Cir. 1987) (stating in reverse-FOIA action brought under the APA that the *National Parks* test requires "a showing of actual competition and a likelihood of substantial competitive injury"; concluding that the agency proposing a FOIA release was not arbitrary and capricious in its assessment of the "long-range consequences of the release of the [requested] data"), cert. denied, 485 U.S. 977 (1988); *Hercules, Inc.* v. *Marsh*, 839 F.2d 1027, 1029-1030 (4th Cir. 1988) (explaining in APA reverse-FOIA action that agency was not arbitrary or capricious in deciding to produce under FOIA a government contractor's telephone directory; rejecting as too "speculative" the contractor's argument that its "contractual relationship may become more competitive" after the production without addressing whether harm to such a contractual relationship is the only type of competitive harm relevant under the *National Parks* test); *Frazee*, 97 F.3d at 371 (9th Cir.) (quoting

the D.C. Circuit's second *National Parks* decision is inconsistent with the view that the type of competition required to satisfy the *National Parks* definition of "confidential" is competition for the resources of the government agency in question or for the specific contract to which the requested agency records pertain. See *National Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 681-683 (1976) (agreeing that injury to national-park concessioners from "'competition' for contract renewal" was unlikely, but holding that Exemption 4 applied because the concessioners faced "day-to-day competition with businesses offering similar goods and services both within and outside the national parks").

2. Under FOIA Exemption 5, a federal agency may withhold from disclosure internal agency records protected by the deliberative-process privilege. *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). The court of appeals correctly rejected petitioner's contention that records dated after the agency's August 19 decision "to proceed with a direct award process" failed to qualify as "predecisional" records. Pet. App. 19a-20a. The court concluded that the relevant records were predecisional because they related to *different* decisions made by the agency after August 19: the agency's decision about "how and what to communicate to

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the *National Parks* test and agreeing with the district court's conclusion that disclosure was "unlikely to cause substantial competitive harm" because the information was "freely or cheaply available from other sources"). Cf. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 285, 291-294, 312-316 (1979) (discussing differences between a reverse-FOIA action brought under the APA and an action brought under FOIA).

the public" about its intent to award a Title X grant directly to Planned Parenthood, and its subsequent decision whether to respond to a protest of its final grant decision. *Id.* at 20a. By continuing to focus on the August 19 decision, petitioner continues "simply [to] misidentif[y] the decision to which these documents relate," *ibid.*

Petitioner does not contend that the court of appeals' decision conflicts with any decision of any other court of appeals. Instead, petitioner argues (Pet. 18-19) that the court of appeals' decision conflicts with this Court's 1975 companion decisions in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975), and *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975). The ruling below conflicts with neither of those decisions.

In *Sears*, the Court observed that the courts of appeals had concluded that the deliberative-process privilege protects only "predecisional communications," and not post-decisional communications, because the "quality of a decision will [not likely] be affected by communications with respect to the decision occurring after the decision is finally reached." 421 U.S. at 151-152. The Court explained that those appellate rulings indicated that "communications made after the decision and designed to explain it" fall outside the privilege. *Id.* at 152. Nothing in that description conflicts with the court of appeals' ruling here. The agency communications at issue here reflected deliberations about subsequent agency decisions that related to the prior agency decision, including decisions about the best way to communicate the agency's actions to the public.

Renegotiation Board is equally unhelpful. *Renegotiation Board* notes that the Court in *Sears* distinguished "postdecisional memoranda setting forth the reasons for an agency decision already made" from privileged predecisional records. 421 U.S. at 184. *Renegotiation Board* then concludes that the agency reports at issue, which were "used by the Board in its deliberations," were privileged under Exemption 5 because they were "not final opinions." *Id.* at 184-185. Like *Sears*, *Renegotiation Board* is consistent with the conclusion that deliberative records concerning agency decisions that have a relationship to an earlier agency decision can be predecisional with respect to the *subsequent* decisions. Petitioner's failure to identify any contrary court of appeals authority in the 40 years since *Sears* and *Renegotiation Board* underscores that further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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