No. 14-1273

# In the Supreme Court of the United States

NEW HAMPSHIRE RIGHT TO LIFE,

*Petitioner,*

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

*Respondent.*

***On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the First Circuit***

**BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONER IN SUPPORT OF REVERSAL**

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 200
WASHINGTON, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com

*Counsel for Amicus Curiae*

## QUESTIONS PRESENTED

The Freedom of Information Act requires disclosure of public records subject to one of nine statutory exemptions. Respondent awarded a noncompetitive grant to Planned Parenthood of Northern New England. Petitioner sought documents concerning this grant. Respondent withheld and redacted documents under FOIA exemptions 4 and 5.

This Court has not interpreted exemption 4, which exempts "trade secrets and commercial or financial information." Courts have interpreted it to exempt documents that would substantially harm a third party's competitive position. While the District of Columbia, Fourth and Ninth Circuits require evidence of actual competition, the First Circuit requires only speculative future competition.

This Court has held that exemption 5 does not shelter communications made after a decision for the purpose of explaining it. Nonetheless, the First Circuit held it shields Respondent's post-decision communications regarding its public justification for its action. The questions presented are:

1. Whether exemption 4 permits nondisclosure due to speculative future competition and likelihood that disclosure would substantially harm the competitive position of a grant applicant.

2. Whether Exemption 5 shields documents and discussions about the agency's public justification for prior decisions.

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## INTEREST OF *AMICUS CURIAE*

*Amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum"),[1] a nonprofit Illinois corporation, has a longstanding interest in protecting not only unborn life from abortion but also taxpayers from funding abortions. Those two interests intersect in this case, where there are concerns that taxpayer funds under Title X were possibly being used to subsidize abortions, contrary to 42 U.S.C. §300a-6. Pet. App. 3a & n.1. The information that the federal

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; *amicus* has lodged the parties' written consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

agency has withheld from disclosure is directly related to that public-policy issue and wholly distinct from the commercial-competition rationale on which the agency relied to justify withholding the information. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

## STATEMENT OF THE CASE

*Amicus* Eagle Forum adopts the facts as stated by petitioner New Hampshire Right to Life ("NHRTL"). *See* Pet. at 6-9. In summary, prior to 2011, Planned Parenthood of Northern New England ("PPNNE") was a subgrantee to New Hampshire's Title X grant for family-planning services, but the State terminated PPNNE based on suspicions that PPNNE was subsidizing its abortion business with Title X funds,[2] among other things. The State sought alternate providers, but could not find one and so returned the Title X funds to HHS. In response, HHS issued a sole-source grant to PPNNE over the State's objections. NHRTL filed its request under the Freedom of Information Act, 5 U.S.C. §552 ("FOIA"), for information related to the decision to allow sole-source grant and to PPNNE's grant application. The federal Department of Health and Human Services ("HHS") – which administers Title X – denied

[2] Title X of the Public Health Services Act provides federal subsidies for family-planning services to low income individuals. Family Planning Services & Population Research Act of 1970, PUB. L. NO. 91-572, 84 Stat. 1504 (1970). "None of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6.

NHRTL's requests under FOIA's exemptions for confidential business information for PPNNE materials and intra-agency deliberative privileges for HHS information.

PPNNE is a member of the Planned Parenthood Federation of America ("PPFA"). PPFA is subdivided geographically across the United States. *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992); *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 55 (1976); *Ayotte v. Planned Parenthood of Northern New England,* 546 U.S. 320, 323 (2006). Significantly, the geographic subdivision of its operators allows PPFA to avoid the nationwide *res judicata* that otherwise would apply to its abortion operations when one of its subdivisions loses a lawsuit on the permissible scope of governmental regulation of the abortion industry. Because PPFA and its subdivisions benefit from their status as separate legal entities, it is important that their separateness remain in place when it cuts against them. Thus, whatever competitive harm PPFA and its non-PPNNE affiliates might suffer from the release of information submitted to HHS by PPNNE is wholly immaterial to the status of the information as confidential to PPNNE.

Congress enacted FOIA as an amendment to – and expansion of – Section 3 of the Administrative Procedure Act. PUB. L. NO. 89-487, 80 Stat. 250 (1966). "FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the

Government be so disclosed." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press,* 489 U.S. 749, 774 (1989) (emphasis in original); S. REP. NO. 89-813, at 3 (1965) (FOIA gives "an informed electorate" access to the information "vital to the proper operation of a democracy"). FOIA thus "is an attempt to meet the demand for open government while preserving workable confidentiality in governmental decisionmaking." *Chrysler Corp. v. Brown,* 441 U.S. 281, 292 (1979). Significantly here, PPNNE is not a mere "*private citizen*" on which HHS happens to have information; PPNNE is a voluntary public contractor, albeit one under the reasonable suspicion that it may be implementing its Title X grant contrary to that statute's restrictions on federally funded abortions.

FOIA's disclosure requirements are subject to nine exemptions, 5 U.S.C. §552(b)(1)-(9), only two of which are at issue here:

> This section does not apply to matters that are – … (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; [or] (5) 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[.]"

*Id.* at §552(b)(4)-(5) ("Exemption 4" and "Exemption 5" respectively). "But [FOIA's] limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of the Air Force v. Rose,* 425 U.S. 352, 361 (1976). Instead, "FOIA … mandates that an agency disclose

records on request, unless they fall within one of nine exemptions," which the statute "explicitly made exclusive … and must be narrowly construed." *Milner v. Dep't of the Navy,* 131 S.Ct. 1259, 1262 (2011) (internal quotations omitted); *U.S. Dep't of Justice v. Landano,* 508 U.S. 165, 181 (1993) (recognizing courts' "obligation to construe FOIA exemptions narrowly in favor of disclosure"); *Rose,* 425 U.S. at 361. FOIA's narrow exemptions do not justify nondisclosure here.

In providing for *de novo* judicial review of FOIA denials, Congress squarely placed the burden of proof on the agency withholding documents. 5 U.S.C. §552(a)(4)(B) ("the court shall determine the matter *de novo,* and … the burden is on the agency to sustain its action"). Of course, "the general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC v. Morton Salt Co.,* 334 U.S. 37, 44-45 (1948). Indeed, this Court already has recognized that "the statute places the burden of justifying nondisclosure on the Government." *Reporters Comm. for Freedom of Press,* 489 U.S. at 778; *John Doe Agency v. John Doe Corp.,* 493 U.S. 146, 153 (1989). As explained below, HHS has not met its burden of proof under either Exemption 4 or Exemption 5.

## SUMMARY OF ARGUMENT

Two facets of the Exemption 4 dispute warrant this Court's review. First, as NHRTL explains, the circuits are split on whether "confidentiality" requires competitive harm from a known, existing

competitor versus the First Circuit's argument that an unknown future competitor would suffice. *Amicus* Eagle Forum respectfully submits that neither the facts here nor the law support nondisclosure based on hypothetical future exposure to competition.

Second, and perhaps more significantly, given that this Court has not previously addressed the scope of FOIA's Exemption 4, the scope of Exemption 4 arguably should be set by state law, rather than by agency regulations and circuit-court decisions under the federal common law. Certainly, with statutes like FOIA that delegate the same authority to multiple agencies, any one agency's implementing regulations cannot control a federal court's review. Instead, as with trade secrets and various litigation privileges that arise under FOIA's exemptions, the use of state law – either as dispositive in its own right or as the ready-made source of federal law – should determine what information is protected from disclosure.

Similarly, two facets of the Exemption 5 dispute warrant this Court's review. First, HHS purports to have wrapped its post-decisional discussions on how to spin its decision into a new post-decision decision, for which HHS now claims the pre-decisional exemption from disclosure. If it allows that subterfuge to stand, the Court will have acquiesced to the creation of a new agency barrier to disclosure. Quite simply, any post-decisional document can be wrapped into a new decision on how to explain the prior decision. But a policy decision and a subsequent "spin" decision are not on equal footing, *vis-à-vis* the policy goals that FOIA serves. The United States has an interest in a deliberative

privilege for agencies' *policy* decisions. There is no corresponding national interest in protecting agency and White House staff from public oversight of their efforts to mislead the public.

Second, FOIA's placing the burden of proof for exemptions on HHS – not NHRTL – requires this Court to reject the First Circuit's HHS-friendly view of the fact that "[t]he [White House] was briefed and they are getting down to pennies and nickels." Pet. App. 18a. Whereas the First Circuit viewed that status report as showing that a decision remained to be finalized, *id.* at 19a, that would be true only if the Exemption 5 issue concerned the "pennies and nickels." The Exemption 5 issue concerns the ability of HHS to proceed via a sole-source grant, not the mere number of "pennies and nickels" in the final deal. As to the sole-source decision on which it seeks information, NHRTL credibly contends that that decision had been made at or before the White House briefing. HHS bore the burden of proving otherwise, and it has not met that burden.

## ARGUMENT

### I. THIS COURT SHOULD CLARIFY THE LAW APPLICABLE TO EXEMPTION 4

As NHRTL explains, this Court has not yet ruled on the scope of FOIA's Exemption 4, and the decision below splits with at least three other circuits on how to assess whether the submitter faces competitive harm from disclosure. Pet. at 15-18. While it agrees that those reasons compel this Court's review, *amicus* Eagle Forum also respectfully submits that the lower courts' (and federal agencies') *agreement* on how to analyze confidentiality under Exemption 4

also compels this Court's review because, *even where they agree,* the lower courts may have misread what Congress intended.

### A. This Court Must Resolve the Split in Circuit Authority on the Timing of Competition Required to Invoke Exemption 4

As NHRTL explains, the First Circuit split with the District of Columbia, Fourth, and Ninth Circuits on whether the competition that a submitter fears must be actual and imminent, as opposed to hypothetical. Pet. at 15-17. Indeed, HHS issued the sole-source grant precisely because New Hampshire was unable to locate an alternate provider. Moreover, NHRTL is not a competitor seeking information on PPNNE but rather a public-interest group that – like the State – suspects PPNNE of using Title X money to subsidize abortion. For the reasons that NHRTL argues, this is not a case that Congress intended the narrow FOIA exemptions to cover.

On the issue of timing, *amicus* Eagle Forum also notes that the First Circuit "gauge[d] the risk of substantial harm to Planned Parenthood's competitive position as of the time of the district court decision." Pet. App. 14a n.7. Evaluating that point in time is appropriate because documents can certainly *lose* their confidential status over the interval between an agency's action and a court's review, but using that time exclusively would run counter to the canon that courts evaluate agency decisions on the record on which the agency acted: "[i]t is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."

*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 50 (1983); *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947). For that reason, *amicus* Eagle Forum respectfully submits that courts should evaluate the agency's decision on the agency's record. If that record supports nondisclosure, the court also should confirm the ongoing status of the information at the time that the Court acts. While the timing does not appear to matter here, this Court could clarify the timing issue simply by the manner in which the Court analyzes the confidentiality issue.

### B. Federal Courts Should Look to State Law – Not Agency Regulations – to Determine What Information Is Confidential

While we acknowledge that circuit splits like the one identified in the petition and Section I.A, *supra,* provide more traditional reason for this Court to grant review, *amicus* Eagle Forum respectfully submits that areas of lower-court unanimity also can require this Court's review if they deviate from what Congress would have intended.

Many circuits have adopted a federal definition of confidential information from *Nat'l Parks & Conservation Ass'n v. Morton,* 498 F.2d 765, 770 (D.C. Cir. 1974), identifying information as confidential if disclosure would be likely "(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." *Am. Mgmt. Servs. v. Dep't of the Army,* 703 F.3d 724, 730 (4th Cir. 2013); *Anderson v. Health & Human Servs.,* 907 F.2d 936,

946 (10th Cir. 1990); *Pacific Architects & Engrs., Inc. v. U.S. Dep't of State,* 906 F.2d 1345, 1347 (9th Cir. 1990); *Calhoun v. Lyng,* 864 F.2d 34, 36 (5th Cir. 1988); *Sharkey v. FDA,* 250 Fed. Appx. 284, 288 (11th Cir. 2007); *Contract Freighters v. Sec'y of U.S. DOT,* 260 F.3d 858, 861 (8th Cir. 2001); *Continental Stock Transfer & Trust Co. v. SEC,* 566 F.2d 373, 375 (2d Cir. 1977); *cf. OSHA Data/CIH, Inc. v. U.S. DOL,* 220 F.3d 153, 162 n.24 (3d Cir. 2000) (*dicta*); *accord* 45 C.F.R. §5.65(b)(4)(i)-(ii).[3] But this impressive lower-court agreement on the test misses an important alternate source of guidance on what constitutes confidential information under Exemption 4.

Absent a "need for a nationally uniform body of law," courts often adopt "state law … as the federal rule of decision." *U.S. v. Kimbell Foods, Inc.,* 440 U.S. 715, 728 (1979); *Empire Healthchoice Assur., Inc. v. McVeigh,* 547 U.S. 677, 691-92 (2006) ("prudent course … is often to adopt the ready-made body of state law as the federal rule of decision until Congress strikes a different accommodation") (internal quotation omitted). Certainly the other two types of information in Exemption 4 – trade secrets and privileged information – are typically governed

[3] That the HHS regulations adopt the same language is of no moment because FOIA does not delegate interpretive authority to any one agency, which thus denies all agencies the power to compel courts to any one agency's interpretation. *U.S. v. Mead Corp.,* 533 U.S. 218, 227-28 (2001); *Bowen v. Am. Hospital Ass'n,* 476 U.S. 610, 643 n.30 (1986) (plurality); *Wachtel v. O.T.S.,* 982 F.2d 581, 585 (D.C. Cir. 1993).

by state law.[4] A uniform federal rule of decision is generally not required if – as is the case here – the claim "will have *no direct effect upon the United States or its Treasury*." *Boyle v. United Tech. Corp.,* 487 U.S. 500, 520 (1988) (*quoting Miree v. DeKalb County,* 433 U.S. 25, 29 (1977)) (emphasis in *Boyle*). For these reasons, the Congress that enacted FOIA would likely have understood that federal courts would use state-law analyses to guide the federal-law issue of interpreting the protections of Exemption 4.

The difference between state law and federal law potentially leads to different outcomes, depending on the scope of state law. For example, New Hampshire eliminated protections for confidential information that does not rise to the level of a statutory trade secret. *Mortgage Specialists, Inc. v. Davey,* 153 N.H. 764, 779, 904 A.2d 652, 665-66 (N.H. 2006) ("the common law no longer protects confidential information from mere misuse unless it is a statutory trade secret"). *Amicus* Eagle Forum respectfully submits that this Court should review not only the area where the First Circuit deviated from its sister circuits, *see* Section I.A, *supra,* but also this area where the circuits have more or less aligned.

## II. THIS COURT SHOULD CLARIFY THE LAW APPLICABLE TO EXEMPTION 5

This Court already has long held that Exemption 5 does not include federal agencies' post-decisional "memoranda setting forth the reasons for an agency

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[4] The *National Parks* test does not apply to privileged information. *Washington Post Co. v. U.S. Dep't of Health & Human Servs.,* 690 F.2d 252, 267 n.50 (D.C. Cir. 1982).

decision already made," *Renegotiation Board v. Grumman Aircraft Eng'g Corp.,* 421 U.S. 168, 184 (1975), much less "communications made after the decision and designed to explain it." *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 152 (1975). Under the circumstances here, HHS cannot possibly succeed on its effort to expand Exemption 5 by misdirecting review away from the agency's policy decision (*i.e.,* the sole-source contract) to the new, subsequent decision on how to explain that initial policy decision. Further, the facts here suggest that crucial decision – again, the availability of a sole-source contract – was made before the Administration and PPNNE agreed on the final "pennies and nickels" of the deal. While mere factual error might not rise to the level of warranting this Court's review, the issue here is *the law* that HHS – not NHRTL – bears the burden of showing its entitlement to the FOIA exemption. Thus, the factual implausibility of the HHS position is not necessary; instead, it is enough that NHRTL's position is plausible, given that HHS bears the burden of proof.

### A. Agencies Cannot Hide Post-Decisional Documents in a New Decision on How to "Spin" the Initial Decision

HHS creatively seeks to expand Exemption 5 to include post-decisional documents that explain the sole-source decision by folding those post-decisional documents into a new decision on how to explain the prior sole-source decision. Pet. App. 20a. Because FOIA's exemptions are narrow, this Court should not allow HHS's novel position for the reasons set forth by NHRTL. Pet. at 18-19. Given that "commun-

ications made after the decision and designed to explain it" fall outside of Exemption 5, *Sears,* 421 U.S. at 152, HHS's position here is simply sophistry. If agencies could fold their post-decisional spin into a subsequent decision on how to explain their initial decision, there would never be any post-decisional documents: agencies could create new decisions *ad infinitum*.

### B. The Narrow Scope of FOIA Exceptions Requires Disclosure, Given HHS's Weak Support from the "Pennies and Nickels" Evidence

Several documents qualify as pre-decisional (and thus exempt) or post-decisional (and thus not exempt) based on whether the decision's date is the August 10 White House briefing versus the formal August 19 HHS sign-off on the sole-source contract. *See* Pet. at 7 n.1; Pet. App. 19a. On this issue, *amicus* Eagle Forum respectfully submits that HHS has not met its burden – as the party seeking an exemption – to establish its eligibility for that exemption.

Significantly, NHRTL seeks the information on the PPNNE sole-source grant, not the financial justification for the final financial terms of the grant. While it is true that a failure to agree on the financial terms of a business transaction means that a contract has *generally* not yet been formed, *MacThompson Realty v. City of Nashua,* 160 N.H. 175, 179, 993 A.2d 773, 776 (N.H. 2010); *R. F. Robinson Co. v. Drew,* 83 N.H. 459, 460, 144 A. 67, 68 (N.H. 1928), administrative agencies can form a binding policy with a mere press release. *CropLife America v. EPA,* 329 F.3d 876, 883 (D.C. Cir. 2003).

There is no requirement that for signing an approval document.

Where "[t]he [White House] was briefed and they are getting down to pennies and nickels," Pet. App. 18a, it is entirely plausible – and *amicus* Eagle Forum respectfully submits wholly more likely – that the *decision on the availability of the sole-source mechanism* had already been decided. Consequently, the First Circuit likely was wrong *on the facts* that the "phrase 'getting down to pennies and nickels' plainly suggests a pending decision, not a final decision for Exemption 5 purposes." Pet. App. 19. But more importantly, the First Circuit was wrong *on the law:* HHS bore the burden of showing that the sole-source decision had not yet been made, and HHS did not make that showing.

Instead, it is enough that HHS could not prove that the formal agency sign-off (*i.e.,* after working out the "pennies and nickels") was when the HHS decided that it could issue a sole-source grant to PPNNE. Even though the precise financial contours had not yet been worked out, the decision on the sole-source issue clearly had been made earlier, in conjunction with or advance of the White House briefing.

## CONCLUSION

The Court should grant the petition for a writ of *certiorari.*

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Respectfully submitted,

Lawrence J. Joseph
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for *Amicus Curiae*