SUPREME COURT OF THE UNITED STATES

NEW HAMPSHIRE RIGHT TO LIFE *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES

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

No. 14–1273. Decided November 16, 2015

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting from the denial of certiorari.

The Freedom of Information Act (FOIA), 5 U. S. C. §552, requires federal agencies to "make [agency] records promptly available to any person" who requests them, unless the information that they contain falls under a specifically enumerated exemption. §§552(a)(3)(A), (b). One of those exemptions, Exemption 4, authorizes agencies to withhold documents that contain "trade secrets and commercial or financial information obtained from a person and privileged or confidential." §552(b)(4).

We have long maintained that "FOIA reflects a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of Defense* v. *FLRA,* 510 U. S. 487, 494 (1994) (internal quotation marks omitted). And we have rejected interpretations of other FOIA exemptions that diverge from the text. *E.g.*, *Milner* v. *Department of Navy*, 562 U. S. 562, 573 (2011) (rejecting interpretation due to its "patent flaw: It is disconnected from Exemption 2's text").

Though we often have considered other FOIA exemptions, we have never interpreted Exemption 4's exception for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." §552(b)(4). In the meantime, Courts of Appeals have declined to interpret the word "confidential" in Exemption

4 according to its ordinary meaning. Here, for instance, the Court of Appeals for the First Circuit upheld the Department of Health and Human Services' refusal to disclose Planned Parenthood's Manual of Medical Standards and Guidelines, a document that the Government had required Planned Parenthood to submit in connection with a non-competitive grant application. See *New Hampshire Right to Life* v. *Department of Health and Human Services*, 778 F. 3d 43, 49–52 (2015). The First Circuit based this conclusion not on the ordinary meaning of the term "confidential," but on conjectures as to whether disclosure could harm Planned Parenthood's competitive position. The court deemed the manual confidential because "[a] potential future competitor could take advantage of the institutional knowledge contained in the Manual" to compete with Planned Parenthood at some later date. *Id.,* at 51.

The decision below reflects a wider development. Courts of Appeals have embraced varying versions of a convoluted test that rests on judicial speculation about whether disclosure will cause competitive harm to the entity from which the information was obtained. In 1974, the Court of Appeals for the D. C. Circuit decided *National Parks and Conservation Assn.* v. *Morton*, 498 F. 2d 765, which construed the word "confidential" in Exemption 4 by looking to legislative history and the "legislative purpose which underlies the exemption." *Id.,* at 767; see *id.,* at 766–770. That court determined that commercial information is "confidential" if, *inter alia*, disclosure would "cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.*, at 770. The D. C. Circuit later elaborated that there was no need to "show actual competitive harm," and that "[a]ctual competition and the likelihood of substantial competitive injury" sufficed. *Public Citizen Health Research Group* v. *FDA*, 704 F. 2d 1280, 1291 (1983) (internal quotation

marks omitted). Seven other Circuits adopted the *National Parks* test. See *Critical Mass Energy Project* v. *NRC*, 975 F. 2d 871, 876 (CADC 1992) (en banc) (collecting cases).

In 1992, the D. C. Circuit granted rehearing en banc to reconsider *National Parks*, after two judges of that court described its test as "fabricated, out of whole cloth." *Critical Mass*, 975 F. 2d, at 875 (internal quotation marks omitted). The full court declined to overrule it entirely. *Id.*, at 876–877, 880. Instead, the court "confine[d]" the *National Parks* test "to information that persons are required to provide the Government," and adopted a different test for voluntarily provided information. 975 F. 2d, at 872, 880.

Since then, every Court of Appeals to consider Exemption 4 has interpreted it by parsing *National Parks*' nebulous language about "actual competition" and a "substantial likelihood of competitive harm." The courts' reliance on *National Parks* to determine whether information is "confidential" commercial information has produced confusion. Courts cannot seem to agree on what kind of "actual competition" must be shown. Some require factual justifications and market definitions to show that there is "actual competition in the relevant market" in which the entity opposing the disclosure of its information operates. *Watkins* v. *Bureau of Customs and Border Protection*, 643 F. 3d 1189, 1196 (CA9 2011). Others, including the First Circuit below, take an expansive view of what the relevant market is, and do not require any connection between that market and the context in which an entity supplied the requested information. 778 F. 3d, at 51.

Courts of Appeals also disagree over what a "substantial likelihood of competitive harm" means. In some courts, there must be evidence that the entity whose information is being disclosed would likely suffer some defined competitive harm (like lost market share) if competitors used the

information. *E.g.*, *McDonnell Douglas Corp.* v. *Department of Air Force*, 375 F. 3d 1182, 1187 (CADC 2004); *GC Micro Corp.* v. *Defense Logistics Agency*, 33 F. 3d 1109, 1115 (CA9 1994). But the First Circuit here accepted that competitors' possible use of the information alone constitutes harm—even if this would not likely result in any negative consequences for the entity whose information was disclosed. See 778 F. 3d, at 51. Similarly, some courts hold that competitive harm exists if a competitor could use the disclosed information to publicly embarrass the originator of the information. *E.g., Nadler* v. *FDIC*, 92 F. 3d 93, 96–97 (CA2 1996). Others hold that this can never be competitive harm. *E.g., United Technologies Corp.* v. *Department of Defense*, 601 F. 3d 557, 563–564 (CADC 2010). We should not leave the meaning of Exemption 4 up to an atextual test that has different limits in different Circuits.*

By failing to address the Courts of Appeals' abrogation of Exemption 4's text, we have also created a disconcerting anomaly. We have interpreted FOIA Exemption 5—applicable to agency memoranda that "would not be available by law to a party . . . in litigation with the agency," §552(b)(5)—to encompass a "privilege for confidential commercial information" created by the Government. *Federal Open Market Comm.* v. *Merrill*, 443 U. S. 340, 360 (1979). Yet, in that context, we defined confidential commercial information to mean information "generated in the process of awarding a contract," which "would in fact be privileged in civil discovery." *Id.,* at 361. It is odd for one definition of confidential commercial information to apply to Government-generated records and for a different test

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*The Government apparently agrees. Rather than defending the Courts of Appeals' tests, the Government's brief opposing certiorari states that every court that has adopted the *National Parks* definition of "confidential" information has turned its back on the statutory text.

to apply if nongovernmental actors created them. It is especially strange given our recognition that the only difference between confidential commercial information covered by Exemption 4 and Exemption 5 is that the latter "is necessarily confined to information generated by the Federal Government itself." *Id.,* at 360.

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The First Circuit's decision warrants review. It perpetuates an unsupported interpretation of an important federal statute and further muddies an already amorphous test. For these reasons, I respectfully dissent from the denial of certiorari.