No. 21-469

In the Supreme Court of the United States

TONY B. JOBE, ESQUIRE, PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the phrase "intra-agency memorandums" in Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(5), can encompass communications between agency employees and the agency's non-employee consultants.

2. Whether non-employee technical advisors on a National Transportation Safety Board team investigating an aviation accident act as agency consultants whose communications with agency employees are "intra-agency" communications under the "consultant corollary" to FOIA Exemption 5.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 1 F.4th 396. The opinion of the district court (Pet. App. 28a-47a) is reported at 423 F. Supp. 3d 332.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2021. The petition for a writ of certiorari was filed on September 24, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action under the Freedom of Information Act (FOIA), 5 U.S.C. 552, arises from petitioner's requests to the National Transportation Safety Board (Board or NTSB) for agency records produced during the NTSB's investigation of a fatal 2011 helicopter crash in

Hawaii. Pet. App. 4a, 6a-7a. As relevant here, the requested records are communications between NTSB employees and other members of the NTSB's investigative team, which included representatives of the company that operated the helicopter (Blue Hawaiian), the NTSB's French counterpart, and the French manufacturers of the helicopter (Eurocopter) and its engine (Turbomeca). *Id.* at 4a, 7a-8a. The status of the non-NTSB-employee participants in the NTSB investigation is pertinent to the question whether those records qualify as "intra-agency memorandums or letters" that may be exempt from disclosure under FOIA Exemption 5, 5 U.S.C. 552(b)(5).

a. The NTSB is an independent establishment of the federal government that investigates aircraft accidents; determines the probable causes thereof; and makes safety recommendations to Congress, government agencies, and other interested persons in order "to reduce the likelihood of [future] accidents" and to make air transportation "as safe and free from risk of injury as possible." 49 U.S.C. 1116(a); see 49 U.S.C. 1111(a), 1131(a)(1)(A); 49 C.F.R. 831.4 (2016).[1] Consistent with those functions, NTSB "investigations are fact-finding proceedings with no formal issues and no adverse parties" and are specifically designed "not [to be] conducted for the purpose of determining the rights or liabilities of any person." 49 C.F.R. 831.4. Congress has accordingly provided that any NTSB final report about an accident's probable cause is not admissible as evidence in a damages action based on the accident.

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[1] Unless otherwise noted, citations to the Code of Federal Regulations in this brief are to the 2016 edition of that Code, which reproduces the regulations in effect during the 2011-2014 investigation at issue in this case. Cf. 82 Fed. Reg. 29,670 (June 29, 2017) (reformatting and revising 49 C.F.R. Pt. 831).

49 U.S.C. 1154(b); cf. 49 C.F.R. 835.2 (stating that factual reports made at a preliminary investigation stage are not subject to that statutory provision).

An NTSB employee designated as the "investigator-in-charge" (IIC) "conducts, controls, and manages the field phase of [each NTSB] investigation." 49 C.F.R. 831.8. That responsibility includes "supervis[ing] and coordinat[ing] all resources and activities of all personnel, both Board and non-Board, involved in the on-site investigation." *Ibid.* The IIC's authority includes designating parties to participate in the investigation and, in some contexts, removing participants from the investigation. See, *e.g.*, 49 C.F.R. 831.11(a).

The IIC may designate a party only if it satisfies two criteria: (1) It must have "employees, functions, activities or products [that] were involved in the accident," and (2) it must be able to "provide suitable qualified technical personnel actively to assist in the investigation." 49 C.F.R. 831.11(a)(1). The Federal Aviation Administration (FAA) is entitled to participate as a party in every civil aviation accident investigation. *Ibid.*; see 49 U.S.C. 1132(c). The operator of the aircraft involved, the aircraft's manufacturer, and the manufacturer of significant aircraft components (*e.g.*, engines) are also typically parties to the investigation. C.A. ROA 359-360. Representatives of parties who participate in the investigation are prohibited from "occupy[ing] a legal position" or "represent[ing] claimants or insurers." 49 C.F.R. 831.11(a)(3).

Each participant in an NTSB investigation is required to be "responsive to the direction of [NTSB] representatives." 49 C.F.R. 831.11(a)(2). In addition, all party representatives (other than FAA representatives) must sign an agreement with the NTSB in which

they affirm that they will participate in the investigation "to facilitate the NTSB's investigation and [its] ultimate goal of advancing transportation safety" and not "to prepare for litigation or pursue other self-interests," Pet. App. 17a (citation omitted). See 49 C.F.R. 831.11(a)(4) and (b); C.A. ROA 358; cf. 49 C.F.R. 831.11(d) (2020) (excepting representatives from all federal agencies). The investigative role of all participants is reinforced by the requirement that each must give "[a]ll information" obtained about the accident to the IIC before it may be "provided to any individual outside the investigation." 49 C.F.R. 831.13(b). And unless it is necessary to provide such information to a party's organization "for purposes of prevention or remedial action" or unless the NTSB has already released the information, a participant may provide the information to persons outside the investigative team only with "prior consultation and approval of the IIC." *Ibid.*

The IIC may remove participants from the investigation if, *inter alia*, their conduct is "prejudicial to the investigation" or they fail to "comply with their assigned duties and activity proscriptions or instructions." 49 C.F.R. 831.11(a)(2); see 49 C.F.R. 831.11(a)(3) and (b).

In some contexts, international entities may participate in NTSB investigations, generally by virtue of Annex 13 to the Convention on International Civil Aviation (Convention), Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295. See Convention art. 37(k), 61 Stat. 1191, 15 U.N.T.S. 322. The (now superseded) version of Annex 13 in effect at the time of the investigation in this case permitted accredited representatives from each country in which the aircraft was operated, designed, or manufactured (other than the country conducting the investigation) to participate in the investigation and to designate tech-

nical advisers to assist them. International Civil Aviation Org., *Annex 13 to the Convention on Int'l Civil Aviation: Aircraft Accident & Incident Investigation*, §§ 5.18-5.20, 5.24 (10th ed. July 2010).[2] The Annex provided that such participation was subject to both "the control of the [IIC]" and "the procedures of the [country conducting the investigation]." *Id.* § 5.25 & note 1.[3]

b. In this case, the NTSB's IIC formed an investigative team including representatives from the FAA and the helicopter's United States operator, Blue Hawaiian. Pet. App. 5a. Because the helicopter and its engine were manufactured by French companies, a representative of France's accident investigation agency—the Bureau of Enquiry and Analysis for Civil Aviation Safety (BEA)—joined the team in light of Annex 13 to the Convention. *Id.* at 5a & n.3. The BEA, in turn, designated under Annex 13 technical representatives from the helicopter and engine manufacturers, Eurocopter and Turbomeca. *Id.* at 6a. All members of the investigative team were subject to the IIC's control. *Ibid.*

In 2014, the NTSB issued its final investigation report. NTSB, *Aviation Accident Final Report: Accident No. WPR12MA034* (July 25, 2014), https://go.usa.gov/xek3q.

2. Petitioner is an attorney who represents the widow of the helicopter pilot who died in the crash. C.A. ROA 10, 116. In 2014 and 2016, petitioner submitted requests for records, which the NTSB processed as FOIA requests. Pet. App. 6a-7a.

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[2] https://www.pilot18.com/wp-content/uploads/2017/10/Pilot18.com-ICAO-Annex-13-Aircraft-Accident-and-Incident-Investigation.pdf.

[3] This case has been litigated on the assumption that the provisions of Annex 13 were legally binding. Pet. App. 5a n.3.

FOIA imposes certain record-related obligations on an "'agency,'" which is defined to mean "each authority of the Government of the United States" but not the Congress, federal courts, or certain other federal entities. 5 U.S.C. 551(1); see 5 U.S.C. 552(f)(1). An "agency, upon any request for records which * * * reasonably describes such records," must generally "make the records promptly available to any person." 5 U.S.C. 552(a)(3)(A).

As relevant here, FOIA Exemption 5 exempts from those requirements matters that are "inter-agency or intra-agency memorandums or letters that 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). That text "incorporates the privileges available to Government agencies in civil litigation"—including "the deliberative process privilege, attorney-client privilege, and attorney work-product privilege," *United States Fish & Wildlife Serv.* v. *Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021); see *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149-151, 154 (1975) (*Sears*)—for records that qualify as "inter-agency or intra-agency," *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001) (*Klamath*).

Congress did not enact a definition for, as relevant here, the adjective "intra-agency" or the phrase "intra-agency memorandums." In *United States Department of Justice* v. *Julian*, 486 U.S. 1 (1988), although a majority of the Court resolved the case without addressing the issue, *id.* at 11 n.9, Justice Scalia addressed the meaning of intra-agency memorandum in Exemption 5, *id.* at 18 n.1 (Scalia, J., dissenting). Joined by two other Justices, Justice Scalia agreed with the "uniform[]" view in the courts of appeals that "the phrase 'intra-

agency memorandum'" embraces not only "a memorandum that is addressed both to and from employees of a single agency," but also "one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity," such as one acting "in a capacity as employee or consultant to the agency." *Ibid.* Justice Scalia concluded that, when "intra-agency memorandum" is read in its "present context" within Exemption 5, that reading is the proper interpretation, because it is both "textually possible and much more in accord with the purpose of [the Exemption]." *Ibid.*

The Court in *Klamath* later considered the meaning of "intra-agency memorandum" in light of Justice Scalia's determination, and the holdings of several courts of appeals, that the phrase includes communications with "a person acting in a governmentally conferred capacity" —such as a "consultant to the agency"—to "assist [the agency] in the performance of its own functions." 532 U.S. at 9-10 (quoting *Julian*, 486 U.S. at 18 n.1 (Scalia, J., dissenting), and citing, *e.g.*, *Hoover* v. *United States Dep't of the Interior*, 611 F.2d 1132, 1137-1138 (5th Cir. 1980)). The Court "assum[ed]," without deciding, that "consultants' reports * * * qualify as intra-agency under Exemption 5," but it concluded that certain records authored by Indian Tribes were not "analog[ous] to [such] reports." *Id.* at 12. Citing several appellate decisions—including the Fifth Circuit's *Hoover* decision —the Court observed that, in the "typical case[]" involving an agency's "independent contractors," "the consultant functions just as an [agency] employee would be expected to do" when "advis[ing] the agency that hires it." *Id.* at 10-11. The Court stated that such "consultants may be enough like the agency's own personnel to

justify calling their communications 'intra-agency,'" but the Tribes were not, because they had acted only as "self-advocates" pressing their claim to limited water resources "at the expense of others." *Id.* at 12. The "dispositive point" was that the tribal submissions to the agency were "ultimately adversarial [in] character," as "the apparent object of [those] communications" was to obtain "a decision by [the] agency" to support tribal claims "necessarily adverse to the interests of competitors." *Id.* at 14; see *id.* at 13 n.4.

In this case, the NTSB released approximately 4000 pages of records to petitioner, but withheld about 2200 pages, including communications between members of the NTSB's investigative team, on the basis of FOIA Exemption 5. Pet. App. 6a-7a.

3. After petitioner filed this action under FOIA, the district court granted him partial summary judgment. Pet. App. 28a-47a. As relevant here, the court held that communications between NTSB employees and other members of NTSB's investigative team were not "intra-agency" memorandums under Exemption 5. *Id.* at 42a-45a; see *id.* at 38a-39a. The court reasoned that under the Fifth Circuit's holding that intra-agency memorandums include "certain communications between agency employees and outside consultants," *id.* at 38a (citing *Hoover*, *supra*), "the agency's consultant [must] be disinterested and not 'represent[ing] an interest of its own, or the interest of any other client, when it advises the agency,'" *id.* at 42a (quoting *Klamath*, 532 U.S. at 12 n.4) (second set of brackets in original). The court concluded that Eurocopter and Turbomeca "undoubtedly" participated in the investigation at least in part "to collect information to prepare for inevitable future litigation," *ibid.*, and benefited from access to the investiga-

tive process, *id.* at 43a, and that neither they nor Blue Hawaiian "constitute 'disinterested' consultants under [the interpretation of 'intra-agency memorandums' known as] the 'consultant corollary,'" *id.* at 45a; see *id.* at 39a.

4. The court of appeals reversed and remanded. Pet. App. 1a-27a.

a. As in district court, petitioner did not argue that the consultant corollary reflects an erroneous interpretation of "intra-agency memorandums." He conceded that the Fifth Circuit's previous decisions had "applied the consultant corollary theory consistent with the U.S. Supreme Court's direction to apply the FOIA's statutory exceptions narrowly." Pet. C.A. Br. 21; see *id.* at 19-20 (discussing *Hoover* and *Wu* v. *National Endowment for the Humanities*, 460 F.2d 1030 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973)). But petitioner argued that those decisions did not consider "the unique circumstances, processes, and procedures of an NTSB investigation." *Id.* at 14. And in this case, he argued, the consultant corollary does not apply because, in petitioner's view, *Klamath* teaches that the consultant corollary is inapplicable where an agency's consultants represent interests of their own. *Id.* at 14-16; see *id.* at 19, 21-24.

The court of appeals observed that "[e]very circuit to address th[e] issue * * * has concluded that intra-agency communications are not limited to those between or among an agency's employees," that such courts interpret the term to embrace certain communications with outside consultants, and that, in this case, the court had no occasion to consider "the [consultant] corollary's textual *bona fides*." Pet. App. 11a, 12a n.8. The court therefore addressed—and rejected—petitioner's defense of the district court's view that, where companies' personnel serve as part of the NTSB investigative team and

are included on NTSB communications, "the consultant corollary [is] inapplicable because of the companies' 'self-interest.'" *Id.* at 13a; see *id.* at 13a-21a. That particular issue concerning NTSB investigations, the court observed, was one of "first impression in the federal circuit courts." *Id.* at 10a.

The court of appeals explained that the Court in *Klamath* determined that the "tribes [there] were not 'enough like the agency's own personnel to justify calling their communications "intra-agency"' under Exemption 5" and that the "'dispositive'" point in *Klamath* was that the tribes had sought a decision by the agency on their claim to "a share of water" that was "'inadequate to satisfy everyone'" and thus sought to advance "'a claim . . . necessarily adverse to the interests of competitors.'" Pet. App. 14a-15a (quoting *Klamath*, 532 U.S. at 12, 14). The court concluded that that reasoning did not apply to representatives working with the NTSB investigative team for "multiple" reasons. *Id.* at 15a.

The court of appeals stated that the companies connected to the NTSB's investigation provided "technical expertise" important to the investigation through "'suitable qualified technical personnel'" and were "not making 'claims'" adverse to anyone because the investigation was a "'fact-finding proceeding with no adverse parties'" that did not "'determin[e] the rights or liabilities of any person.'" Pet. App. 15a, 18a (brackets and citations omitted). Moreover, the court emphasized that, unlike in *Klamath*, the companies' participation was at all times subject to "the control of the agency-appointed IIC," that participants could be removed if they "fail[ed] to follow instructions" or acted in a manner prejudicial or disruptive to the investigation, and

that no participant could "disclose information" obtained in the investigation without NTSB approval (with a limited exception for information necessary for preventative or remedial action). *Id.* at 16a-17a & n.12. The court accordingly concluded that although "self-interest of some kind may prevent outside experts from being deemed consultants," the threshold "has not been reached here," where "the companies were 'enough like the [NTSB's] own personnel to justify calling their communications "intra-agency."'" *Id.* at 19a-20a (citation omitted; brackets in original).

Because the district court failed to resolve whether relevant intra-agency documents were, in fact, privileged, the court of appeals remanded for the court to complete its Exemption 5 analysis. Pet. App. 20a-21a.

b. Judge Ho dissented. Pet. App. 22a-27a. Like the majority, Judge Ho did not address whether the consultant corollary generally reflects the proper reading of Exemption 5. He instead concluded that the companies here were sufficiently "interested" to preclude consultant status because the relevant communications were communications "between the regulator and the regulated." *Id.* at 22a-23a. Judge Ho observed that the NTSB is "not technically a regulator," but he stated that its work "help[s] regulators like the FAA" and that companies advising in an investigation therefore "have a genuine interest in the content of the agency's findings." *Id.* at 24a. Judge Ho stated that Exemption 5 should be "narrowly construed" and, if so construed, should exclude "communications with the employees of regulated parties." *Id.* at 27a.

ARGUMENT

Petitioner seeks this Court's review on two questions: First, whether the phrase "intra-agency memo-

randums" in FOIA Exemption 5 can ever encompass communications between agency employees and non-employee consultants, Pet. 14-27, and second, if it can, whether a technical expert from a self-interested regulated company or a foreign government could qualify as such a consultant, Pet. 27-34. See Pet. i. The first question is not properly before this Court because petitioner waived it below and, even if the issue had been presented, no division of authority on the question exists that might warrant this Court's review. The court of appeals correctly resolved the second question in the context of the NTSB investigation here, and its resolution of that narrow, factbound issue does not conflict with any decision of this Court or any other court of appeals. Moreover, the interlocutory posture of this case would make it a poor vehicle for review. The Court should deny certiorari.

1. a. Petitioner contends (Pet. 18-27), for the first time in this case, that the phrase "intra-agency memorandums" in FOIA Exemption 5, 5 U.S.C. 552(b)(5), encompasses only communications between a federal agency's employees and not those between employees and agency consultants whom the agency retains to assist it in the performance of its functions and who act in a governmentally conferred capacity as agency employees would.

This Court's "traditional rule * * * precludes a grant of certiorari" when "'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). With respect to an "issue expressly decided by a federal court" based on its prior precedent, the Court has acknowledged that it will exercise discretion to grant certiorari notwithstanding a petitioner's failure to raise

the issue below when the petitioner *did* contest the issue earlier "as a party to the recent proceeding" that produced the circuit precedent *and* "*did not* concede in the current case the correctness of that precedent." *Id.* at 44-45 (emphasis added).

Here, however, petitioner "waived [any] argument [concerning the first question he presents] by conceding" below that previous circuit precedents applying the consultant corollary were correct. *Loughrin* v. *United States*, 573 U.S. 351, 356 n.3 (2014). Petitioner did not merely acknowledge that the court of appeals had previously interpreted the phrase "intra-agency memorandums" to include at least some agency consultants, he affirmatively conceded that the court of appeals in *Hoover* v. *United States Department of the Interior*, 611 F.2d 1132 (5th Cir. 1980), and *Wu* v. *National Endowment for the Humanities*, 460 F.2d 1030 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973), had "applied the consultant corollary theory consistent with the U.S. Supreme Court's direction to apply the FOIA's statutory exceptions narrowly." Pet. C.A. Br. 21; see *id.* at 19-20; see also p. 9, *supra*. Petitioner has thus never previously argued that the consultant corollary is an erroneous interpretation of Exemption 5; he argued only that the personnel from aviation companies who participated in the NTSB investigation were "'self-interested' individuals" and thus "*not 'consultants' under the 'consultant corollary*.'" Pet. C.A. Br. 24 (emphasis added; citation omitted); see *id.* at 21-24, 27. The court of appeals accordingly emphasized that it "need not enter into th[e] debate" over "the [consultant] corollary's textual *bona fides*," Pet. App. 12a n.8, and merely resolved petitioner's argument that "the companies' 'self-interest'" made "the consultant corollary inapplicable" in this

NTSB-investigation context, *id.* at 13a; see *id.* at 13a-20a. Judge Ho likewise limited his dissent to that case-specific question. *Id.* at 22a-27a. As a result, the first question that petitioner presents is not properly before the Court.[4]

b. In any event, even if petitioner had properly presented his first question, no further review would be warranted. As the court of appeals observed, "[e]very circuit to address this issue * * * has concluded that intra-agency communications are not limited to those between or among an agency's employees." Pet. App. 11a; see *id.* at 12a n.8 ("No circuit has rejected the consultant corollary.").

Petitioner bases his assertion of a circuit conflict (Pet. 14-17) solely on the Sixth Circuit's decision in *Lucaj* v. *FBI*, 852 F.3d 541 (2017), which petitioner describes as "refus[ing] to extend Exemption 5 to encompass communications between a U.S. government agency and an outside entity," Pet. 16-17. As the court of appeals observed, *Lucaj* contains "dicta" that potentially "cast[] doubt" on the textual justification for the consultant corollary. Pet. App. 12a n.8. But mere dicta do not create a conflict warranting this Court's review. Cf. *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011) ("[T]his Court reviews judgments, not statements in opinions.") (citation omitted).

In *Lucaj*, the FBI had conducted a criminal investigation of Lucaj, who the FBI had reason to believe was

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[4] The petitioner in *Rojas* v. *FAA*, No. 21-133 (filed July 29, 2021), who is represented by the same counsel as petitioner here, presents the same question, which was properly pressed in, and passed upon by, the Ninth Circuit in that case. The government's response in *Rojas* therefore addresses the merits of the question. See Br. in Opp. at 11-24, *Rojas*, *supra* (filed Nov. 29, 2021).

connected with attacks in Montenegro. 852 F.3d at 543. The FOIA case concerned two requests for evidentiary assistance in the investigation that a component of the Department of Justice (DOJ) had transmitted to its counterparts in Austria and in a second unnamed country. *Id.* at 544. DOJ invoked FOIA Exemption 5 over both written requests, asserting that they were protected by "the 'common interest doctrine,' which 'permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims.'" *Id.* at 545 (citation omitted). In doing so, the government defended the application of Exemption 5 on grounds unique to the common-interest privilege, Gov't C.A. Br. at 15-28, *Lucaj*, *supra* (No. 16-1381), and made clear that "the 'consultant corollary' doctrine [had] not [been] invoked" in the case, *id.* at 25.

The *Lucaj* court emphasized that, as it understood the case, "the only question" presented was "whether [DOJ's requests] are *inter*-agency memorandums or letters" under Exemption 5, and the court ultimately "h[e]ld that the [requests from DOJ to its counterparts in] Austria and the unnamed country are not *inter*-agency." *Lucaj*, 852 F.3d 547 (emphases added). In reaching that holding, the court observed that, "[r]elatedly," other courts had "recognized a 'consultant corollary' to Exemption 5" when interpreting the provision's use of the term "'intra-agency.'" *Id.* at 548 (citations omitted). And in rejecting the government's common-interest-privilege argument, the court stated that "Congress chose to limit the exemption's reach to 'inter-agency or intra-agency memorandums or letters,' 5 U.S.C. § 552(b)(5), not to 'memorandums or letters among agencies [inter-agency], independent contractors [intra-

agency], *and* entities that share a common interest with agencies [the issue in *Lucaj*]." *Id.* at 549 (emphasis added). The court believed that it should "'narrowly construe'" Exemption 5's text, and it concluded that Exemption 5 did not apply because "the Central Authority of Austria and an unnamed foreign government are not, so far as Congress has defined the term, *agencies*," and DOJ's requests for assistance were therefore not documents transmitted among agencies. *Ibid.* (brackets and citation omitted).

It is unclear whether the *Lucaj* court's reference to "independent contractors" was merely an acknowledgment that courts have interpreted "intra-agency" to include communications with contractors or a subtle critique of the consultant-corollary theory. But even if the latter, the critique would at most be dicta in a case in which the government never presented a consultant-corollary theory for "*intra*-agency" communications and in which the court emphasized that the "only question" before it was whether the disputed documents were "*inter*-agency," *Lucaj*, 852 F.3d at 547 (emphasis added). Because "prior-panel dictum has no binding effect," a future Sixth Circuit panel confronting the government's actual reliance on a consultant-corollary theory will not be bound by statements in *Lucaj*. *In re Davis*, 960 F.3d 346, 357 (6th Cir. 2020). Moreover, when a Sixth Circuit *holding* conflicted with the otherwise-uniform FOIA decisions of the courts of appeals, the Sixth Circuit (in a case litigated by petitioner's counsel) reconsidered and corrected its outlier precedent when presented with full briefing on the matter, thus eliminating the division of authority in the courts of appeals. See *Detroit Free Press Inc.* v. *United States Dep't of Justice*, 829 F.3d 478, 480 (6th Cir. 2016) (en banc), cert.

denied, 137 S. Ct. 2158 (2017). *Lucaj* accordingly provides no justification for further review of the first question that petitioner presents.

2. The court of appeals correctly determined that the consultant corollary includes communications between members of an NTSB investigative team. That factbound conclusion implicates no division of authority and warrants no further review.

a. The only question that has been litigated in this case is whether the purported self-interest of persons on an NTSB investigative team precluded them from being consultants for purposes of the consultant corollary. The court of appeals correctly concluded that the answer is no.

The consultant corollary reflects the understanding that when "a person act[s] in a governmentally conferred capacity"—such as "in a capacity as employee or consultant to the agency"—"to assist [an agency] in the performance of its own functions," and that person, acting in that capacity, communicates with agency employees, the communication is properly understood to be an "intra-agency" communication under Exemption 5. *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9-10 (2001) (quoting *United States Department of Justice* v. *Julian*, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting)). Such a consultant may possess "a definite point of view" on the matters on which it advises the agency. *Id.* at 10. And in "typical cases," the "consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency." *Id.* at 11. In those contexts, the consultant's obligations "are to truth and its sense of what good judgment calls for, and in those respects the con-

sultant functions just as an employee would be expected to do." *Ibid.*

The Court in *Klamath* considered whether communications between Indian Tribes and the Department of the Interior about the allocation of limited water resources were "analog[ous] to consultant reports." 532 U.S. at 12. In doing so, the Court emphasized that it did "not decide" whether consultants may have "their own, independent interests." *Id.* at 13 n.4. The Court instead more narrowly determined that the Tribes were not "enough like the agency's own personnel" to be considered agency consultants because the "*function* [*of their communications* to the agency was] quite apparently to support the[ir] tribal claims" that were "necessarily adverse to the other claimants." *Id.* at 12-13 (emphasis added). "[T]he dispositive point" for the Court was that the "*object of the Tribe's communications*" was to obtain "a decision by an agency" to support tribal claims that were "necessarily adverse to the interests of its competitors." *Id.* at 14 (emphasis added); see *ibid.* (concluding that "the only fair inference" was that the "tribal submissions" were "ultimately adversarial [in] character"). In other words, the adversarial character of the relevant records demonstrated that the Tribes acted only as "self-advocates at the expense of others seeking [a government decision involving limited resources] inadequate to satisfy everyone." *Id.* at 12. That position, the Court determined, was "a far cry from the position of the paid consultant." *Id.* at 15.

In this case, the court of appeals correctly concluded that the non-NTSB-employee members of the NTSB investigative team were "technical personnel" whose participation in the NTSB's non-adversarial "fact-finding investigation" reflected the role of "the kind of experts

typically accorded consultant status under Exemption 5." Pet. App. 19a. The court explained that "the overall context of the agency process" showed that they were "enough like the [NTSB's] own personnel" to be consultants under the consultant corollary. *Id.* at 20a (brackets in original). The court emphasized, for example, that all NTSB team members were both "under the control" of the NTSB's IIC and prohibited from sharing nonpublic information with their employers without the NTSB's consent. *Id.* at 16a-17a. The court added that consultant status was supported not only by "this degree of agency control," but also by the NTSB's "logical" focus on the consultants' "technical expertise" to assist in the NTSB's "'fact-finding proceeding,'" which is designed "solely to issue safety recommendations," has "'no adverse parties,'" and does not "'determine[e] the rights and liabilities of any person.'" *Id.* at 15a, 17a-19a (brackets and citation omitted).

Petitioner suggests (Pet. 33-34) that *Klamath* shows that non-employee technical personnel in NTSB investigations cannot be consultants because *Klamath* stated that "the self-interest of the tribes at issue '*alone* distinguishe[d] [their] communications' from the typical consultant," Pet. 34 (quoting *Klamath*, 532 U.S. at 12) (brackets in original). That is incorrect. *Klamath* made clear that it "need not decide" whether decisions in which consultants "had their own, independent interests" properly fell within the consultant corollary. 532 U.S. at 13 n.4. The Court therefore did not hold that Indian Tribes—which necessarily serve their tribal membership—could *never* be agency consultants in light of such independent interests. The Court instead addressed a particular type of self-interest plainly manifested in the documents in question, emphasizing that

the "dispositive point" was the "adversarial character of [the] tribal submissions" to the agency, the "object of [which was] a decision by [the] agency * * * to support a claim by the Tribe that [wa]s necessarily adverse to the interests of competitors." *Id.* at 14; see p. 18, *supra*. Nothing here indicates that the communications at issue were similarly adversarial in character.

Petitioner argues (Pet. 33; see Pet. 30-32) that the constraints imposed on the technical consultants on NTSB investigative teams prove the consultants' self-interest. But petitioner does not confront the fact that those constraints temper the risk of self-interested action, particularly given the non-adversarial context of NTSB investigations. Petitioner, for instance, provides no reason why personnel from the BEA, the French equivalent of the NTSB, would undermine the NTSB's attempt to collect evidence to determine the actual facts surrounding an aviation accident. Nor is there a sound reason to believe that the technical advisors from Eurocopter and Turbomeca would distort the investigative process in light of the control exercised by NTSB and the fact that such companies are repeat players in the field. Advisors from Blue Hawaiian operating under the supervision of NTSB employees likewise brought operational knowledge that enhanced, not detracted, from the investigative process. Tellingly, petitioner identifies no real-world example of similar technical consultants operating under close supervision by agency personnel taking actions that would distort the results of an investigation that is ultimately driven by the real-world facts and the application of technical expertise.

That conclusion is particularly compelling here, where all of the documents at issue concern the "on-scene" phase of the investigation, Pet. App. 37a, *i.e.*, the

early days of the investigation when investigators were primarily gathering factual material and discussing possible accident scenarios. See C.A. ROA 361-362. None of those documents involved an attempt to offer input on the agency's draft safety recommendations, draft probable cause reports, or even its draft factual reports. See Pet. App. 31a-32a (describing relevant FOIA request); *id.* at 48a-52a (describing the documents at pages 1-61, 123-156, and 175-206, which are still at issue, cf. 3/31/2020 D. Ct. Order).[5]

Petitioner's suggestion (Pet. 30) that some employers of the members of the investigative team are "regulated companies" is misplaced. While some of the entities are regulated by the FAA, they are not regulated by the NTSB, which is an independent agency that conducts factual investigations and makes nonbinding safety recommendations. Moreover, the NTSB properly protects the confidentiality of the communications of its investigative teams precisely so that participants, including its technical consultants with specialized expertise, are willing to "talk openly and freely." C.A. ROA 362. The need for such "candor, which improves agency decisionmaking," *United States Fish & Wildlife Serv.* v. *Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021), is particularly acute in this context where the agency's investigations are geared to determining the probable cause of air accidents.

b. In any event, the court of appeals' decision does not conflict with any decision of any other court of appeal and thus does not warrant further review. Petitioner briefly asserts (Pet. 27-28) a conflict based on *Ro-*

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[5] The government did not appeal the district court's judgment to the extent it ordered the release of the email at pages 165-166. Gov't C.A. Br. 9 n.5.

jas v. *FAA*, 989 F.3d 666, 675 (9th Cir. 2021) (en banc), petition for cert. pending, No. 21-133 (filed July 29, 2021); *Stewart* v. *United States Dep't of the Interior*, 554 F.3d 1236, 1245 (10th Cir. 2009); and *Public Employees for Environmental Responsibility* v. *United States Section, International Boundary & Water Commission*, 740 F.3d 195, 201-202 (D.C. Cir. 2014). No such conflict exists.

Petitioner quotes the Ninth Circuit's statement that a "consultant 'must "not represent an interest of its own, or the interest of any other client"'" when advising an agency. Pet. 28 (quoting *Rojas*, 989 F.3d 675, which quotes *Klamath*, 532 U.S. at 11). But that statement simply restates *Klamath*'s description of "typical cases" involving the consultant corollary, *Klamath*, 532 U.S. at 11, and *Klamath* made clear that it "need not decide" whether advisors having "their own, independent interests" should be excluded, *id.* at 13 n.4. The Ninth Circuit likewise had no occasion to consider that issue because *Rojas* involved a human-resources consultant that "represented neither its own interests nor those of any other client," *Rojas*, 989 F.3d at 675. The court thus did not consider whether any arguable self-interest, much less the type alleged in this NTSB context, would preclude agency-consultant status. Indeed, petitioner himself argued below that "the unique circumstances, processes, and procedures of an NTSB investigation" distinguish this case from other consultant-corollary contexts. Pet. C.A. Br. 14. That issue remains open for future cases in the Ninth Circuit.

The Tenth Circuit's decision in *Stewart* is further afield. *Stewart* described *Klamath*'s analysis based on the Tribes' demonstrated role as "'self-advocates'" that asserted water claims "in competition with non-tribal claimants." *Stewart*, 554 F.3d at 1245 (citation omitted).

But it did so for the purpose of *rejecting* the district court's determination that an agency contractor who had "deep-seated views" about the issues on which he advised the agency could not be a consultant under the consultant corollary. *Ibid.* (citation omitted). The Tenth Circuit observed that the potential "intellectual satisfaction" to be gained if the agency adopted the expert's views did not reflect any "personal or economic stake in the outcome," *ibid.*, but it did not determine what type of self-interest might be disqualifying.

The D.C. Circuit in *Public Employees for Environmental Responsibility* made no relevant holding on the scope of Exemption 5. The court observed that if officials from a Mexican commission "did not actually assist in preparing [the agency document at issue]," then Exemption 5 would apply; and "[i]f the Mexican agency did assist," the court took "no position * * * on whether [the document] would be covered by the consultant corollary." 740 F.3d at 202 & n.3. Rather than resolve the scope of that doctrine, the court simply vacated and remanded "to determine [as a factual matter] whether [Mexican] officials" did provide relevant "assist[ance]." *Id.* at 202. In so ruling, the court observed in dicta that, after *Klamath*, the D.C. Circuit had "confined the consultant corollary to situations where an outside consultant did not have its own interests in mind." *Id.* at 201-202 (citing *McKinley* v. *Board of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 336-337 (D.C. Cir. 2011), cert. denied, 565 U.S. 1113 (2012)). But as the court's citation to *McKinley* suggests, the D.C. Circuit after *Klamath* has applied the consultant corollary in cases where no issue of self-interest is presented without rejecting the possibility that some self-interest remains permissible. See *McKinley*, 647 F.3d at 336-337 (apply-

ing consultant corollary in a "'typical' case" that was unlike that of the Tribes in *Klamath*) (citation omitted). Thus, as petitioner himself concedes (Pet. 28 n.6) the question whether "self-interest" precludes consultant status remains open in that court.

3. Finally, even if petitioner's contentions were otherwise meritorious, review in the interlocutory posture of this case would be unwarranted. The court of appeals remanded the case for the district court to determine "whether the documents at issue are subject to a litigation privilege." Pet. App. 3a. If they are not, petitioner will obtain the requested records regardless of whether they are "intra-agency." And if they are, further proceedings could result in a more complete record describing the disputed records that would facilitate this Court's plenary review. In any event, the absence of a final judgment is "a fact that of itself alone furnishe[s] sufficient ground for the denial of [certiorari]." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); accord *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2021