No. 21-469

IN THE

Supreme Court of the United States

TONY B. JOBE, ESQUIRE,

Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The NTSB's lengthy brief lacks a concrete textual explanation of how communications between federal agencies, a foreign government, and representatives of companies involved in a fatal helicopter crash could possibly be deemed "intra-agency" under FOIA Exemption 5.

Instead, the NTSB directs the Court to its textual analysis of why a consultant corollary could apply to outside, independent contractors in another case. BIO 14 n.4 (referencing the BIO in *Rojas v. FAA*, No. 21-133). And the NTSB argues that the Court should not exclude self-interested parties from this judicially created doctrine. BIO 17. However, the merits analysis the NTSB incorporates by reference—which deems a consultant's work "intra-agency" when the consultant is "agency personnel"—only highlights how these self-interested, regulated parties could never qualify.

The NTSB also argues that there is no split about whether self-interested parties fall within the corollary because the Ninth, Tenth, and D.C. Circuits might allow this if presented with the right fact pattern. BIO 21-24. This improperly discounts statements from each court indicating that self-interested parties like those at issue here do not fall within the corollary.

Finally, the NTSB asserts that this case has vehicle problems. It claims that the first question presented was waived, BIO 12-14, despite the binding circuit precedent that would have rendered any objection futile. And it claims that the interlocutory

posture should defeat certiorari, BIO 24, despite this Court's long history of granting certiorari to resolve important legal issues at this stage—including in FOIA cases. Neither argument should defeat this Court's review to restore the plain meaning of Exemption 5.

ARGUMENT

I. The Consultant Corollary Has Divided The Courts And Is Textually Indefensible.

a. The NTSB incorrectly asserts that "[n]o circuit has rejected the consultant corollary." BIO 14 (quoting Pet. App. 12a n.8). As detailed at greater length in the *Rojas* reply (at 3), *Lucaj v. FBI* analyzed the meaning of "intra" and held that the documents at issue were "not intra-agency memorandums or letters" because they were "sent without (i.e., to foreign governments)." 852 F.3d 541, 546 (6th Cir. 2017). And while *Lucaj* was principally about the common-interest doctrine, it also evaluated the "related[]" consultant corollary—an alternative theory for smuggling non-agency outsiders into the scope of "intra-agency" communications. *Id.* at 548-49; *see Hunton & Williams v. DOJ*, 590 F.3d 272, 280 (4th Cir. 2010) (the "same rationale" justifies both theories). The Sixth Circuit in *Lucaj* addressed—and rejected—both doctrines, 852 F.3d at 548-49, in direct conflict with the courts of appeals that have adopted the corollary.

b. The NTSB does not offer a textual basis for the consultant corollary, referring the Court to the government's analysis in *Rojas*. BIO 14 n.4. We address

below how that analysis cannot possibly render the documents at issue here intra-agency (at 5-9).

II. An Agency's Communications With Representatives Of Self-Interested, Regulated Parties And A Foreign Government Are Not "Intra-Agency."

a. The NTSB asserts that there is no circuit split about whether self-interested parties fall within the corollary. It does not deny that the Fifth Circuit held that such communications qualify. *See* Pet. 28-29; Pet. App. 2a (declining to read *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), for the "principle that a consultant's 'self-interest' always excludes it from Exemption 5"). Instead, the NTSB's position is that the Ninth, Tenth, and D.C. Circuits might eventually rule the same way. BIO 21-24.

The NTSB is wrong that there is no split. The en banc Ninth Circuit explicitly held that self-interested consultants fall outside the corollary. "To be deemed 'within' an agency for purposes of Exemption 5," the consultant "must 'not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it.'" *Rojas v. FAA*, 989 F.3d 666, 674-75 (9th Cir. 2021) (en banc) (quoting *Klamath*, 532 U.S. at 11). The NTSB asserts that the Ninth Circuit was "simply restat[ing] *Klamath*'s description of 'typical cases' involving the … consultant corollary," rather than articulating a rule. BIO 22. Not so. In "distill[ing]" these "general principles" from *Klamath*, the Ninth Circuit held that such principles "define the

outer boundaries of Exemption 5's reach." *Rojas*, 989 F.3d at 674.

Similarly, the Tenth Circuit—in concluding that a contractor with "deep-seated views" on relevant issues fell within the corollary—relied on the fact that the "possible adoption of th[ose] views does not mean that they have a personal or economic stake in the outcome." *Stewart v. DOI*, 554 F.3d 1236, 1245 (10th Cir. 2009). The NTSB asserts that the Tenth Circuit "did not determine what type of self-interest might be disqualifying." BIO 23. But the implication from *Stewart* is clear: a personal or economic stake in the outcome would be disqualifying.

The D.C. Circuit has likewise "confined the consultant corollary to situations where an outside consultant did not have its own interests in mind," following *Klamath. Pub. Emps. for Env't Resp. v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 201-02 (D.C. Cir. 2014) (Kavanaugh, J.). Given that clear statement, it is unsurprising that the D.C. district court understands "the law in th[e] [D.C.] Circuit" to "require that outside consultants lack an independent interest." *Am. Oversight v. HHS*, 380 F. Supp. 3d 45, 54 (D.D.C. 2019) (quotation marks omitted).[1]

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[1] As described in our petition, it is possible that some subset of self-interest remains acceptable in the D.C. Circuit. Pet. 28 n.6; *see* Pet. App. 23a n.1 (Ho, J., dissenting) (describing those older D.C. Circuit cases as "present[ing] categorically different concerns from the private regulated parties in this case").

Even if the NTSB were correct—that another circuit might broaden the corollary to include self-interested consultants in some future case, BIO 21-24—that is no reason to deny the petition. Here, representatives of self-interested, regulated parties and a foreign government are being treated like part of the agency. This untenable result is the culmination of a failed, decades-long effort across circuits to make the atextual consultant corollary administrable. The Court should grant certiorari and restore the plain meaning of Exemption 5.

b. The government's deeply flawed textual justification for the corollary in *Rojas*—which the NTSB incorporates by reference here, BIO 14 n.4—demonstrates why self-interested parties could never qualify.

In *Rojas*, the FAA argues that a record is "intra-agency" when it is a communication "among agency personnel." *Rojas* BIO 12. And, according to the FAA, an outside, independent contractor is "agency personnel" if it is "hired to assist" the agency "in performing its functions." *Id.* (quotation marks omitted).

Applying that justification for the corollary here makes no sense. No one could reasonably think that representatives of private companies involved in an airplane crash being investigated—or representatives of a foreign government—are "agency personnel." Congress does not. When FOIA uses the phrase "agency personnel," in 5 U.S.C. § 552(a)(4)(F)(i), it refers to *employees* of the agency (who make decisions about withholding documents). Similarly, in *Klamath*, this Court treated "outside consultants" and

"agency personnel" as separate categories. 532 U.S. at 10.

In other words, by the terms of the government's own textual justification for the consultant corollary in *Rojas*, the self-interested, regulated parties here are not "agency personnel" and thus do not qualify.[2] And the effort to shoehorn self-interested parties and foreign government representatives into this term (which is absent from Exemption 5 anyway) reveals how far the NTSB has strayed from the text.

The NTSB insists that a document is "intra-agency" if it is created by someone acting "'in a governmentally conferred capacity'—such as … 'consultant to the agency'—'to assist [an agency] in the performance of its own functions.'" BIO 17 (quoting *Klamath*, 532 U.S. at 9-10, which in turn quotes the dissenting footnote in *DOJ v. Julian*, 486 U.S. 1, 18 n.1 (1988)). However, nothing about an outside consultant helping an agency to perform its functions eliminates the external nature of the consultant's work. The agency retains this consultant precisely because of her extra-agency expertise—here, expertise about her company's helicopters or engines. *See* 49 C.F.R. § 831.11(a)(1); Pet. App. 4a-6a. And this outside consultant's differences from agency employees are only magnified when she is self-interested, and therefore conflicted. This self-interested party is (at best) producing helpful extra-agency work—she is not

[2] To the extent the NTSB believes certain specific actors are producing intra-agency documents, then it has the burden of establishing why. But a categorical rule deeming outside contractors "agency personnel" is not the right answer.

"agency personnel" producing "intra-agency" communications.

The NTSB falls back on the Fifth Circuit's amorphous standard: The consultants here generated intra-agency communications because they are "'enough like the [NTSB's] own personnel'" to be consultants under the consultant corollary." BIO 19 (quoting Pet. App. 20a) (brackets in original). As the petition explained, however, that is no standard at all, and simply invites the court to depart from the text. Pet. 25-26. The NTSB does not respond.

To be sure, *Klamath* posited (without resolving) that "consultants may be enough like the agency's own personnel" when they "have *not* been communicating with the Government in their *own interest* or on behalf of" another. 532 U.S. at 12 (emphasis added).[3] But the consultants here—including representatives of parties directly implicated in the crash under investigation—are patently self-interested. Pet. 30-34. The Fifth Circuit dissent acknowledged this, Pet. App. 23a-25a; *see* Pet. 32, and even the majority did not deny it, *see* Pet. App. 19a-20a.

The NTSB assures the Court that no "regulated companies" are involved. BIO 21 (quotation marks

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[3] The NTSB maintains that *Klamath* left the question open—the corollary might apply provided the self-interested communications are not "adversarial in character." BIO 19-20. But that argument only highlights the need for this Court's guidance. Further, the communications here implicate interests that are adverse to the interests of others, as explained in our petition and by Judge Ho. Pet. 34 (citing Pet. App. 23a-24a).

omitted). That is incorrect. As our petition noted, "'while not technically a regulator,'" the NTSB's "'whole purpose'" is "'to help regulators like the FAA determine how best to regulate companies to ensure public safety.'" Pet. 5 (quoting Pet. App. 24a (Ho, J., dissenting)). Further, as the NTSB acknowledges, "some of the entities" represented in the investigation "are regulated by the FAA." BIO 21. The NTSB simply ignores that the FAA too is a party to multiple withheld communications at issue in this case. Pet. App. 50a-51a (*Vaughn* Index).

The NTSB also depicts the representatives from Eurocopter and Turbomeca as mere "technical advisors." BIO 20; *see* BIO I (question presented). But the Eurocopter and Turbomeca employees were "technical advisors" *to the French government agency* involved (the BEA), not to the NTSB. *See* Pet. App. 5a-6a. And regardless of which government they were advising, Eurocopter and Turbomeca employees undisputedly had their own interests, separate from the NTSB's. *Supra* 7.

The NTSB's main point is that actual self-interest of outside parties is irrelevant, because the NTSB's "constraints temper the risk of self-interested action." BIO 20. Notably, the NTSB is not—even now—claiming that it can completely eliminate the effects of these parties' bias. Further, as Judge Ho's dissent recognized, the fact that the "'agency needs regulations to try to mitigate the impact of the employees' contrary interests'" demonstrates that the communications are not "intra-agency." Pet. 33 (discussing Pet. App. 25a). These parties—whose self-interest must (all agree) be monitored and controlled—do not

"function[] just as an employee would be expected to do." BIO 18 (quoting *Klamath*, 532 U.S. at 11). They are not "like" agency employees, BIO 19 (quoting Pet. App. 20a), even if that were somehow the applicable legal standard.

The NTSB also argues that the companies involved have no reason to "distort" the NTSB's investigation. BIO 20. Of course they do; they are implicated in a fatal accident, which carries significant financial implications. Pet. 31-32.

Finally, the NTSB suggests that any self-interest is unimportant, because the documents here all "concern the 'on-scene' phase of the investigation." BIO 20 (quoting Pet. App. 37a). It is not clear how allowing self-interested parties to participate in fact-finding mitigates the effects of their bias, rather than amplifying it. More fundamentally, the suggestion that the particular phase of an investigation is at all relevant to whether work is "intra-agency" demonstrates how far the consultant corollary has departed from FOIA's text. The statute is simple. The "corollary," in contrast, necessitates an endless series of unmoored factual inquiries. *See Rojas*, 989 F.3d at 697 & n.7 (Bumatay, J., dissenting).

III. This Case Presents An Ideal Vehicle To Resolve Both Questions Presented.

a. The NTSB asks this Court to ignore the first question presented, arguing that (1) Mr. Jobe "conceded" that "previous circuit precedents applying the consultant corollary were correct," and (2) the Fifth Circuit "accordingly" chose not to enter into the

debate. BIO 13. Both arguments rely on erroneous factual premises.

Mr. Jobe never conceded that the consultant corollary is a correct interpretation of Exemption 5. To the contrary, he criticized it as a "judicially created rule" and highlighted that the Ninth Circuit had (at the time) "declined" to adopt the consultant corollary as "'contrary to Exemption 5's text and FOIA's purpose to require broad disclosure.'" Pet. C.A. Br. 7-8, 19 & n.10.

The NTSB points to Mr. Jobe's statement that the Fifth Circuit has "applied the consultant corollary theory consistent with the U.S. Supreme Court's direction to apply the FOIA's statutory exemptions narrowly." BIO 13 (quoting Pet. C.A. Br. 21). Read in context, however, Mr. Jobe was simply explaining that *Klamath* narrowed any consultant corollary to consultants who "have not communicated with the Government in their own interest" or on behalf of others' interests. Pet. C.A. Br. 21. He was not conceding that the Fifth Circuit's decades-old precedent should have been adopted in the first instance.

It would not have made sense for Mr. Jobe to address the issue in greater detail. The Fifth Circuit had twice ruled that the consultant corollary is good law. *See Hoover v. DOI*, 611 F.2d 1132, 1138 (5th Cir. 1980); *Wu v. Nat'l Endowment for Humans.*, 460 F.2d 1030, 1032 (5th Cir. 1972). There was no reason to waste time arguing that this controlling circuit precedent was incorrect—particularly given the strength of the argument (with which the district court agreed)

that the self-interested parties in this case could not possibly trigger the corollary.

The NTSB's suggestion that the Fifth Circuit chose not to address whether a consultant corollary should exist *because* of Mr. Jobe's purported concession is likewise incorrect. *See* BIO 13. The Fifth Circuit acknowledged the textualist case against the corollary, and surveyed that law. Pet. App. 11a-13a. It ultimately did not "enter into this debate" "[b]ecause our circuit precedent accepts the corollary." Pet. App. 12a n.8 (citing *Wu*, 460 F.2d at 1032). This was a recognition that the court was bound by circuit precedent—not by any concession by Mr. Jobe.

Mr. Jobe forcefully argued in both the court of appeals and the district court that Exemption 5 was inapplicable, and that the documents at issue are not "intra-agency." *See, e.g.*, Pet. C.A. Br. 13-24; Pet. D. Ct. Cross-MSJ 30-32, 35. This Court can, and should, entertain "any argument in support of that claim." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Further, where the Fifth Circuit "passed upon" this issue by recognizing the debate and finding it was resolved by binding Fifth Circuit precedent, the issue was fully preserved for review. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

b. The NTSB also asks the Court to deny the petition because the underlying litigation is not yet final. BIO 24. However, as the *Rojas* reply describes at greater length (at 11-13), the Court frequently grants certiorari to review nonfinal dispositions, including in FOIA cases. *See* 17 Charles A. Wright et al., *Federal Practice and Procedure: Jurisdiction and Related*

Matters § 4036 (3d ed. 2021); Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 283 (10th ed. 2013); *FCC v. AT&T Inc.*, 562 U.S. 397, 400-02 (2011); *DOJ v. Landano*, 508 U.S. 165, 169-71 (1993); *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 10-14 & n.2 (1987); *CIA v. Sims*, 471 U.S. 159, 166 (1985); *Chrysler Corp. v. Brown*, 441 U.S. 281, 289-90 (1979); *Adm'r, FAA v. Robertson*, 422 U.S. 255, 260 (1975).[4]

The NTSB likewise contends the question of whether the documents are privileged should be decided *before* this Court weighs in on whether the documents are "intra-agency." BIO 24. However, *Klamath* did what we are asking the Court to do here: it ruled that documents were not "intra-agency" before the court of appeals evaluated whether they were privileged. *See* 532 U.S. at 7; *see also Klamath Water Users Protective Ass'n v. DOI*, 189 F.3d 1034, 1039 (9th Cir. 1999). Because the "intra-agency" prong of the Exemption 5 analysis has "independent vitality," *Klamath*, 532 U.S. at 12, there is no reason to wait for a privilege determination.

The questions here are pressing. An agency's communications with a foreign government and with representatives of self-interested, regulated parties

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[4] Outside the FOIA context too, the Court frequently grants certiorari in nonfinal cases presenting important legal questions. *See, e.g.*, *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776 (2018); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 959 nn.1, 2 (2017); *DHS v. MacLean*, 574 U.S. 383, 385-89 (2015); *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 18-22 (2004); *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 372, 377-78 (2004); *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 167-69 (1989); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 381 (1970).

about their fatal helicopter crash are being treated like internal agency communications. The atextual consultant corollary justifying this problematic outcome is deeply flawed and implicates multiple disagreements among the courts of appeals. This Court's review is warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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