No. 21-

IN THE

Supreme Court of the United States

JORGE ALEJANDRO ROJAS,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Exemption 5 of the Freedom of Information Act provides that federal agencies need not release privileged "inter-agency or intra-agency memorandums or letters." 5 U.S.C. § 552(b)(5).

Seven courts of appeals have interpreted the phrase "intra-agency . . . memorandums or letters" to include a "consultant corollary," shielding from disclosure documents drafted by private, outside parties and sent to federal agencies. One court of appeals has rejected this atextual approach.

The question presented is: Whether the Ninth Circuit, in a sharply divided en banc decision, erred by adopting the consultant corollary and holding that "intra-agency memorandums or letters" in FOIA's Exemption 5 encompasses documents prepared by APT-Metrics, a private, outside consultant.

RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

Rojas v. FAA, No. 17-55036 (9th Cir. June 18, 2019) (panel opinion amending and superseding opinion issued Apr. 24, 2019)

Rojas v. FAA, No. 17-55036 (9th Cir. Mar. 2, 2021) (en banc opinion and judgment)

United States District Court for the Central District of California:

Rojas v. FAA, No. 2:15-cv-05811 (C.D. Cal. Nov. 10, 2016) (granting summary judgment)

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INTRODUCTION

Federal agencies must disclose their records under the Freedom of Information Act, unless those records fit into a set of narrowly drawn exemptions. In the 1970's and 80's, circuit courts began engrafting atextual terms onto these exemptions, in a purpose-driven effort to reach desired outcomes. This Court has rejected that "text-light approach," *Milner v. Department of Navy*, 562 U.S. 562, 573 (2011), as "a relic from a 'bygone era of statutory construction,'" *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

Despite this Court's clear prohibition of this practice, seven circuit courts have done it again—this time, adding a "consultant corollary" to the text of Exemption 5. Exemption 5 allows federal agencies to withhold privileged "intra-agency" documents. The consultant corollary is a judicially created rule that allows federal agencies to shield from disclosure documents authored by private, external consultants—simply by labeling that work "intra-agency."

The corollary arose out of 1970's-era dicta in a D.C. Circuit footnote that contained no textual analysis whatsoever. As in *Argus Leader* and *Milner*, other circuits reflexively fell in line. As of today, seven circuits have adopted the "consultant corollary," deeming private, outside contractors' work "intra-agency" for purposes of FOIA Exemption 5.

The Sixth Circuit disagrees, finding no basis to read "intra-agency" to encompass documents created by outsiders. The court explained that Congress chose

to limit Exemption 5'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, *independent contractors*, and entities that share a common interest with agencies." *Lucaj v. FBI*, 852 F.3d 541, 549 (6th Cir. 2017) (emphasis added).

A three-judge panel of the Ninth Circuit in this case agreed with the Sixth Circuit and rejected the consultant corollary. However, the Ninth Circuit granted en banc review at the Government's request. A sharply divided court held that the term "intra-agency" includes the work of an independent, outside consultant. The en banc majority openly acknowledged that the consultant corollary was not "the most natural" reading of the text, Pet. App. 13a, but believed that reading the Exemption to include independent contractors was necessary to achieve the perceived purpose of the statute.

Judge Bumatay dissented in relevant part, criticizing the majority position as a "judicial rewrite" justified by "*purpose* all the way down." Pet. App. 58a. He explained that the majority's interpretation was not "derived from the text of Exemption 5 or frankly any other legislation." Pet. App. 67a. And he warned that elevating "perceived legislative purpose" over statutory language is not just misguided in terms of divining Congress' intent; it is a "threat to the separation of powers" and a serious usurpation of the court's "limited judicial role." Pet. App. 62a, 66a. Judge Wardlaw, joined by two other judges, also dissented in relevant part, explaining that the text of Exemption 5 is "crystal clear: documents or

communications exchanged with *outside* consultants do not fall within that exemption." Pet. App. 39a.

In *Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), this Court rejected the most extreme version of the consultant corollary—finding that "communications to or from an interested party seeking a Government benefit at the expense of other applicants" could not possibly qualify as "intra-agency." *Id.* at 12 n.4. But the circuits diverge sharply about *Klamath*'s broader implications: the Sixth Circuit reasoned that *Klamath* rejected the corollary; the Tenth Circuit ruled that *Klamath* embraced the corollary; and the Ninth Circuit found that *Klamath* left the question open. Adding to the confusion, even courts adopting the corollary have applied inconsistent tests.

With the split en banc decision here, this important issue regarding the scope of Exemption 5 is now ripe for this Court's review. This Court should grant certiorari, restore the plain meaning of the text, and reject the consultant corollary.

OPINIONS AND ORDERS BELOW

The opinion of the en banc Ninth Circuit is reported at 989 F.3d 666 and reproduced at Pet. App. 1a-69a. The Ninth Circuit panel opinion is reported at 927 F.3d 1046 and reproduced at Pet. App. 70a-112a. The district court's decision is unreported and reproduced at Pet. App. 113a-131a.

JURISDICTION

The Ninth Circuit entered judgment on March 2, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In relevant part, the Freedom of Information Act, 5 U.S.C. § 552, provides:

(a) Each agency shall make available to the public information as follows:

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> (3)(A) *** each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> ***

(b) This section does not apply to matters that are—

***

> (5) 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, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;
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> ***

STATEMENT OF THE CASE

APTMetrics, an outside consultant, develops a personality test to screen air traffic controller applicants.

As detailed in a related FOIA case also brought by petitioner, to manage the nation's civil airspace, the FAA "retains more than 14,000 air traffic control specialists who work around the clock, communicating with pilots, monitoring the flow of airplanes, and maintaining safe airways for 2.7 million passengers who fly each day." *Rojas v. FAA*, 941 F.3d 392, 398 (9th Cir. 2019).[1] The job is "among the highest pressure jobs in America." *Id.*

Historically, the FAA filled those positions based on candidates' relevant skill sets and education. Applicants took the Air Traffic Selection and Training examination (AT-SAT), "a proctored, eight-hour examination that tested cognitive skills related to working as an air traffic controller." *Id.* Individuals with high AT-SAT scores and an aviation degree from an FAA-accredited school were placed on a Qualified Applicant Register that allowed them to apply for air traffic controller job openings. *Id.*

In 2014, however, the FAA "significantly changed its hiring system in order to recruit more diverse candidates." *Id.* In anticipation of a hiring surge, the FAA announced that it would place less emphasis on the

[1] The cited decision involved the same employment test at issue in this case, detailed further below. That decision resolved different legal issues concerning separate FOIA requests.

skills-based AT-SAT—which it determined had impeded diversity in the agency. The FAA also "eliminated the approximately 3,000 existing applicants from its Qualified Applicant Register." *Id.*

The FAA hired an outside consultant, Applied Psychological Techniques, Inc., also known as APTMetrics, to review and ostensibly improve the agency's air traffic controller hiring processes. Pet. App. 8a. APTMetrics' solution was to create a new, personality-based test called the Biographical Assessment, to serve as the initial screening mechanism for air traffic controller applicants. Pet. App. 73a-74a. This computerized test—developed for use in 2014 and revised in 2015—sought to measure attributes like "self-confidence, stress tolerance, and teamwork." Pet. App. 7a-8a. Applicants with enough "correct" answers would move forward in the hiring process and take the AT-SAT. *Rojas*, 941 F.3d at 399.

The FAA represents that the personality test has been validated.

Controversy quickly ensued. "[O]ne news network reported (after a six-month investigation) that an FAA employee . . . was leaking Biographical Assessment answers to student members" of a group he belonged to. *Rojas*, 941 F.3d at 399. "In June 2014, ten members of Congress sent a letter to the FAA expressing concerns [about the test] and asking for information, including 'metrics on how the new hiring process has enhanced aviation safety overall.'" *Id.* at 400. "[F]ourteen members of Congress sent a follow-up letter asking the FAA to investigate the report of possible cheating." *Id.* (quotation marks omitted).

Senator Kelly Ayotte sought additional information about the process in July 2015. C.A. doc. 21-2 at 126-31 (Supp. Excerpts of Record). And "a member of the U.S. Commission on Civil Rights expressed concerns that the FAA's new hiring procedures discriminated on the basis of race against applicants in the prior pool." *Rojas*, 941 F.3d at 400.

Ultimately, the House Subcommittee on Aviation held a hearing about the FAA's 2014 and 2015 versions of the Biographical Assessment. *See A Review of the FAA's Air Traffic Controller Hiring, Staffing, and Training Plans: Hearing Before the H. Subcomm. on Aviation,* 114th Cong. 2-3 (2016) (Statement of Rep. LoBiondo), https://tinyurl.com/yyd3cw35 (hereinafter "Subcomm. Hearing"). A major question was whether the Biographical Assessment had been appropriately "validated"—meaning that passing scores had been statistically shown to predict workplace success. *Id.* at 8. The FAA insisted that its "consultants have done the validation work." *Id.* at 21; *see* Pet. App. 51a (Thomas, J., concurring in part and dissenting in part) ("[T]he FAA has repeatedly confirmed that both the 2014 and 2015 biographical assessments had been validated."). But the underlying validation studies were never made public.

Mr. Rojas applies for an air traffic controller position and is rejected based on the personality test.

Jorge Rojas was nearing graduation from an FAA-approved air traffic control training program when the agency changed its hiring process. Pet. App. 73a-74a. He applied for an entry-level air traffic controller

position in early 2015 and, as part of the application process, took the Biographical Assessment. Pet. App. 75a.

The FAA deemed Mr. Rojas unsuitable under the new personality criteria. In its rejection notice, it stated that Mr. Rojas was "NOT eligible" for the position based on his test responses. Pet. App. 8a. Consistent with the FAA's later representations to Congress, the notice asserted that the Biographical Assessment was "independently validated by outside experts." *Id.*

Seeking more information about the claimed validation, Mr. Rojas filed a FOIA request with the FAA. He sought "information regarding the empirical validation of the biographical assessment," including "any report created by, given to, or regarding APT-Metrics' evaluation and creation and scoring of the assessment." Pet. App. 9a.

The FAA denied the request. It withheld responsive documents under Exemption 5, which applies to privileged "inter-agency" and "intra-agency" records. Pet. App. 9a. Mr. Rojas filed an administrative appeal, at which point the agency realized it had mistakenly searched for documents related to the 2014 Biographical Assessment rather than the 2015 version Mr. Rojas had referenced. Pet. App. 75a. The FAA conducted a new search and identified three responsive documents—summaries of the test, of the test validation, and of the hiring process. Pet. App. 75a-76a. The FAA withheld all three summaries under Exemption 5. Pet. App. 76a. It asserted that APT-Metrics created each document at the FAA's request,

in response to potential litigation about the Biographical Assessment, and that the documents were "intra-agency" under Exemption 5. *Id.*

Mr. Rojas files suit under FOIA and the district court grants summary judgment for the FAA.

Mr. Rojas sued under FOIA to compel disclosure. Pet. App. 113a-114a. The district court granted summary judgment for the FAA. Pet. App. 131a. It deemed the requested records exempt from disclosure, noting that "courts have upheld the application of FOIA Exemption 5 to materials composed and supplied by outside contractors." Pet. App. 123a.[2]

The Ninth Circuit panel reverses, rejecting the consultant corollary.

A Ninth Circuit panel reversed, rejecting the consultant corollary. It explained that "[b]y its plain terms, Exemption 5 applies only to records that the government creates and retains." Pet. App. 81a.

Exemption 5's threshold requirement, the panel explained, is that the documents are "inter-agency or intra-agency memorandums or letters." Pet. App. 81a (quoting 5 U.S.C. § 552(b)(5)). And FOIA expressly

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[2] The district court also concluded that the search for responsive documents was adequate and that all three withheld records—purportedly prepared in anticipation of litigation alleging that the "biographical assessment resulted in discriminatory hiring practices"—were privileged as attorney work product, though not covered by the attorney-client privilege. Pet. App. 118a-20a, 123a-30a; *see* Pet. App. 95a.

defines the word "agency" as an "authority of the Government of the United States." Pet. App. 83a (quoting 5 U.S.C. §§ 551(1), 552(f)(1)). APTMetrics, a private contractor, is "not a government agency" under the statute's definition, so documents exchanged between it and the FAA cannot be "inter-agency or intra-agency" records. Pet. App. 82a, 91a.

The panel acknowledged that other circuits had adopted a so-called "consultant corollary" that "treats documents produced by an agency's third-party consultant as 'intra-agency'" records. Pet. App. 81a. But those decisions rested on "shaky foundation[s]" and made little effort to reconcile their "functional interpretation" with the terms of the statute. Pet. App. 81a, 87a. In contrast, the panel explained, the Sixth Circuit "explicitly rejected the consultant corollary as contrary to Exemption 5's plain text and the mandate to construe FOIA's exemptions narrowly." Pet. App. 90a. The panel declined to adopt the doctrine on the same basis, explaining that such an interpretation would "contravene[] Exemption 5's plain language" as well as FOIA's purpose of broad disclosure. Pet. App. 83a. Judge Christen dissented. Pet. App. 94a-112a.

A sharply divided en banc court grants rehearing and adopts the consultant corollary.

The Ninth Circuit granted the FAA's petition for rehearing en banc. Pet. App. 12a. In a split decision, the en banc court adopted the consultant corollary to Exemption 5.

The majority opinion, authored by Judge Watford, acknowledged that "'the most natural meaning'" of

"intra-agency memorandum" is "'a memorandum that is addressed both to and from employees of a single agency.'" Pet. App. 13a (quoting *DOJ v. Julian*, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting)). But it posited that the phrase "could just as plausibly be read to include certain outside consultants whom the agency has hired to work in a capacity functionally equivalent to that of an agency employee." Pet. App. 13a-14a.

The majority chose between the "two interpretations" by looking to the Exemption's "purposes"—especially its goal of encouraging the free exchange of ideas in the policymaking process. Pet. App. 14a. Because "[o]utside consultants would presumably be just as hesitant as agency employees to engage in frank discussion" if their advice could be made public, the court reasoned, Congress could not have intended to "limit[] Exemption 5's coverage to communications authored by agency employees." Pet. App. 15a. On that basis, the majority held that outside consultants are "'within' an agency for purposes of Exemption 5" if they "acted in a capacity functionally equivalent to that of an agency employee in creating the . . . documents the agency seeks to withhold." Pet. App. 17a-18a. APTMetrics' work—produced as a private, outside consultant—was therefore deemed "intra-agency." Pet. App. 18a-19a.[3]

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[3] The majority reversed the district court on the adequacy of the search and reversed in part on privilege. It held that the FAA's declarations failed to demonstrate that the search for responsive documents was adequate, and failed to show that one of the three documents was privileged. Pet. App. 19a-24a. Those

Judge Collins joined the majority but wrote separately to note his view that the "context" of Exemption 5, including its "purpose" of incorporating civil discovery privileges, supports the consultant corollary. Pet. App. 31a-32a.

Judge Wardlaw, joined by Chief Judge Thomas and Judge Hurwitz, dissented in relevant part. Pet. App. 35a. Judge Wardlaw emphasized that statutory interpretation must start with the text and that this text is clear: "intra" means "within," and FOIA explicitly defines "agency" as "'each authority of the Government of the United States.'" Pet. App. 36a-38a. Nothing about this renders a document authored by a person *outside* the agency "intra-agency." *Id.* Judge Wardlaw added that, even if there were "two equally plausible readings," the tie must go to disclosure. Pet. App. 44a.

Judge Wardlaw traced the development of the "consultant corollary" in the courts of appeals, observing that "[a]s in *Milner* and *Argus Leader,*" this is a situation where an atextual doctrine spread through "judicial inertia" without any "meaningful analysis of [FOIA's] text or structure." Pet. App. 40a, 43a. "Only the Sixth Circuit," Judge Wardlaw explained, "has bucked the . . . trend and, at the least, cast serious doubt on whether the consultant corollary can be found in Exemption 5's text." Pet. App. 42a.

Chief Judge Thomas joined Judge Wardlaw's dissent in full, and also wrote separately to note that,

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questions, which were remanded to the district court, are not at issue in this petition.

"even if the consultant corollary could be grafted onto Exemption 5, it would not protect the information Rojas sought in his FOIA request," because the agency had an independent legal obligation to make validation studies available to the public. Pet. App. 52a.

Judge Bumatay separately dissented in relevant part. He decried the majority's purpose-driven "judicial rewrite" of Exemption 5. Pet. App. 58a. "While [the majority's] test might make normative sense," Judge Bumatay explained, "none of it is derived from the text of Exemption 5 or frankly any other legislation." Pet. App. 66a-67a. And elevating "perceived legislative purpose" over statutory language "subvert[s] any legislative compromise baked into [the] enacted text" and is a "threat to the separation of powers." Pet. App. 62a, 65a-66a.

REASONS FOR GRANTING THE WRIT

I. The Courts Of Appeals Are Split About Whether Exemption 5 Includes A Consultant Corollary.

The circuits are split regarding whether courts should engraft a "consultant corollary" onto the plain text of FOIA's Exemption 5. This Exemption allows an agency to shield from disclosure privileged "inter-agency" or "intra-agency" documents. 5 U.S.C. § 552(b)(5). The corollary first arose in purpose-driven dicta in a footnote in a 1970's-era D.C. Circuit opinion, which suggested that the term "intra-agency" should include private contractors' work. *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971) (hypothesizing that a consultant corollary might be justified by

an agency's "special need" for outside consultants' opinions).

The Fifth and Second Circuits quickly adopted that position, providing no textual analysis of their own. *See Wu v. Nat'l Endowment for Humans.*, 460 F.2d 1030, 1032 (5th Cir. 1972) (relying on *Soucie*); *Lead Indus. Ass'n v. Occupational Safety & Health Admin.*, 610 F.2d 70, 83 (2d Cir. 1979) ("[W]e have nothing that can usefully be added to Chief Judge Bazelon's statement in *Soucie*."). Then, buttressed by these other circuits, the D.C. Circuit adopted its earlier dicta in *Soucie* as binding law, reasoning circularly that the consultant corollary was a "common sense interpretation" of Exemption 5 that "has been consistently followed by the courts." *Ryan v. DOJ,* 617 F.2d 781, 790 (D.C. Cir. 1980). The First Circuit, thereafter, simply followed suit with no analysis of its own. *Gov't Land Bank v. GSA*, 671 F.2d 663, 665 (1st Cir. 1982) (noting that parties agreed that an independent contractor's work was intra-agency).

In 2001, this Court considered the consultant corollary, but it did not resolve the question presented here. The Department of the Interior argued that it could withhold its communications with an Indian tribe as "intra-agency" documents under Exemption 5. This Court acknowledged that "neither the terms of [Exemption 5] nor the statutory definitions say anything about communications with outsiders." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001). But the Court recognized that "some Courts of Appeals" had adopted a consultant corollary. *Id*. After surveying the law, the Court held that the consultant corollary—if it existed at all—could

not encompass the communications at issue there: those by self-interested parties advocating for themselves. *Id*. at 11-16. The Court left open whether a consultant corollary exists in some form.

Following *Klamath*, the Fourth and Tenth Circuits adopted the corollary without any textual justification for the rule. The Fourth Circuit ruled expansively that documents covered by the "common interest privilege" are "intra-agency," though not drafted by agency actors. *Hunton & Williams v. DOJ,* 590 F.3d 272, 275, 277-81 (4th Cir. 2010) (relying on "Congress's whole purpose in drafting Exemption 5"). The Tenth Circuit likewise adopted the corollary without engaging with Exemption 5's text—simply applying it to a paid consultant that "functioned akin to an agency employee." *Stewart v. U.S. Dep't of Interior*, 554 F.3d 1236, 1245 (10th Cir. 2009).

The Ninth Circuit in this case has now joined this trend by relying on Exemption 5's perceived purpose to rewrite its plain text. *See* Pet. App. 13a ("[C]ontext and purpose suggest that Congress had in mind a somewhat broader understanding of 'intra-agency.'"). Thus, as of today, seven circuits (the First, Second, Fourth, Fifth, Ninth, Tenth, and D.C. Circuits) have adopted the so-called "consultant corollary" that deems a private, outside contractor's work "intra-agency" for purposes of Exemption 5. "As in *Milner* and *Argus Leader*, a decades-old D.C. Circuit decision that contained no meaningful analysis of FOIA's text gave birth to an atextual doctrine." Pet. App. 43a (Wardlaw, J., dissenting); *see supra* 1. "And as in those cases, other circuits followed the D.C. Circuit's

lead without meaningful analysis of the text or structure of Exemption 5." *Id*.

The Sixth Circuit, in contrast, limits "intra-agency" to its plain meaning. *Lucaj v. FBI*, 852 F.3d 541, 547-49 (6th Cir. 2017). In *Lucaj*, the FBI argued that documents drafted by foreign countries working with the FBI—and thus subject to the common-interest privilege—were "intra-agency" under Exemption 5. *Id*. at 545-49. Rejecting that position, the Sixth Circuit "bucked" the majority view that Exemption 5 covers documents drafted by outside actors. Pet. App. 42a (Wardlaw, J., dissenting). The court acknowledged the "concern of our sister circuits . . . that agencies have a strong interest in confidential and frank communication with outsiders." *Lucaj*, 852 F.3d at 548. It nevertheless held that the text of Exemption 5 did not accommodate those courts' reasoning:

> 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, *independent contractors*, and entities that share a common interest with agencies."

Lucaj, 852 F.3d at 549 (emphasis added). Accordingly, the Sixth Circuit refused to apply Exemption 5 to these external documents. *Id.*[4]

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[4] The en banc majority here recognized that *Lucaj* "arguably . . . question[ed] the validity of the consultant corollary." Pet App. 17a n.2. The majority nevertheless asserted that *Lucaj* does not

Four dissenting judges in the Ninth Circuit agreed with the Sixth Circuit's position. Judge Wardlaw, with two other judges joining, explained that there is no "textual hook for thinking of outside contractors as part of a federal agency." Pet. App. 37a. She emphasized that "we cannot 'tak[e] a red pen to the statute' and 'cut[] out some words and past[e] in others.'" Pet. App. 48a (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 573 (2011)). Judge Bumatay likewise rejected the majority's efforts to pick "up its drafting pen" to "bestow[] on us a supposedly better law." Pet. App. 58a.

The circuit split is now firmly developed. On one side, the First, Second, Fourth, Fifth, Ninth, Tenth, and D.C. Circuits have adopted the consultant corollary—albeit over two strong dissents by four judges in the Ninth Circuit. In contrast, the Sixth Circuit has rejected it. To be sure, the split is lopsided. But the entrenched, widespread adoption of this atextual rule only highlights the need for this Court's intervention. This Court should grant certiorari and put an end to the judicially created consultant corollary.

II. The Court Should Grant Certiorari To Restore Exemption 5's Plain Meaning.

The atextual approach to Exemption 5 is wrong, and this Court should grant the petition to restore

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create a circuit split because *Lucaj* was not about independent contractors—but rather foreign parties. Pet. App. 34a-35a n.8. But the Sixth Circuit's reasoning precluded all outsiders—independent contractors and foreign parties alike—from being read into the term "intra-agency." 852 F.3d at 549.

Exemption 5's plain meaning. This Court has repeatedly granted certiorari to correct longstanding but atextual interpretations of FOIA exemptions. In *Argus Leader*, this Court granted review to overrule the D.C. Circuit's atextual, purpose-driven construction of Exemption 4, despite its universal adoption among the courts of appeals that considered it. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362-66 (2019). In *Milner*, this Court similarly granted certiorari to overrule the D.C. Circuit's atextual but widely adopted interpretation of Exemption 2—emphasizing that "we have no warrant to ignore clear statutory language on the ground that other courts have done so." 562 U.S. at 576. Review is likewise warranted here to correct the "judicial rewrite" of Exemption 5. Pet. App. 58a (Bumatay, J., dissenting).

A. The consultant corollary is contrary to the statutory text.

1. Judicial "consideration of [Exemption 5's] scope starts with its text." *Milner*, 562 U.S. at 569; *see Argus Leader*, 139 S. Ct. at 2364. That is also where the analysis should end, as "Exemption 5's text is crystal clear: documents or communications exchanged with *outside* consultants do not" constitute "*intra*-agency memorandums." Pet. App. 39a (Wardlaw, J., dissenting).

Exemption 5 protects from disclosure "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). As this Court recognized in *Klamath*,

Exemption 5 is a two-pronged provision and both prongs have "independent vitality." 532 U.S. at 8, 12. This case concerns the threshold requirement: that the document in question be "inter-agency or intra-agency."

To start, "all agree" that APTMetrics "is not an agency under" FOIA. Pet. App. 59a-60a (Bumatay, J., dissenting). FOIA defines the term "agency" to include only governmental entities. "With exceptions not relevant here, 'agency' means 'each authority of the Government of the United States,' . . . and 'includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . ., or any independent regulatory agency.'" *Klamath*, 532 U.S. at 9 (quoting 5 U.S.C. §§ 551(1), 552(f)). "Nothing in this definition provides a textual hook for thinking of outside contractors as part of a federal agency." Pet. App. 37a (Wardlaw, J., dissenting).

The word "intra" cannot accommodate an outside consultant's work either. FOIA does not define the term. "So, as usual, we ask what [its] ordinary, contemporary, common meaning was when Congress enacted FOIA in 1966." *Argus Leader*, 139 S. Ct. at 2362 (quotation marks omitted). As it does now, the term "intra" then meant "in" or "within." *Black's Law Dictionary* 957 (rev. 4th ed. 1968); *Webster's Seventh New Collegiate Dictionary* 444 (1961).

Combining these two words does not give them the opposite meaning. The term "intra-agency" "clearly signals the idea of being 'in' or 'within' a

federal agency." Pet. App. 37a (Wardlaw, J., dissenting). Accordingly, as even the en banc majority acknowledged, "the most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency." Pet. App. 13a (quoting *Julian*, 486 U.S. at 18 n.1 (Scalia, J., dissenting)). "[C]ommunications exchanged with *outside* consultants," in contrast, "do not fall within th[e] exemption." Pet. App. 39a (Wardlaw, J., dissenting). "For 'outside consultants' are, by definition, not 'within' a federal agency." *Id.*

The en banc majority nevertheless held that the term "intra-agency" should be read to include documents created by "certain outside consultants." Pet. App. 13a-17a. To reach that counterintuitive conclusion, the majority reasoned that a document is "intra-agency" so long as it is intra-agency "in character," or in "function[]." Pet. App. 13a-14a. But the statute does not include that hedge, and it would not make a difference in any event. A document coming from the *outside* is not intra-agency in character, even if in some circumstances (though not here) it might serve a similar functional role. On the one metric Congress identified—whether the document is "intra"-agency or not—it does not qualify.

2. This Court has not yet resolved whether Exemption 5 contains a "consultant corollary," but its precedent demonstrates why the corollary is irreconcilable with the Exemption's text.

This Court first touched on the consultant corollary "in the early days of the textualist revolution" in

Julian, 486 U.S. 1 (1988), where "three dissenting justices suggested in a footnote without much analysis that the consultant corollary doctrine, though not the 'most natural meaning' of Exemption 5, was 'a permissible and desirable reading of the statute.'" Pet. App. 41a (Wardlaw, J., dissenting) (quoting *Julian*, 486 U.S. at 18 n.1 (Scalia, J., dissenting)). However, those justices "did not . . . explain why this meaning was 'textually possible,' what 'the purpose of' Exemption 5 was, or why that purpose should trump the exemption's plain text." *Id.*

This Court then addressed the corollary in *Klamath*. It explained that "neither the terms of [Exemption 5] nor the statutory definitions say anything about communications with outsiders." 532 U.S. at 9. The Court noted the footnote in *Julian*, *id.*, but it did not resolve whether a consultant corollary might exist in some form. Instead, it reasoned that to be intra-agency, a document's "source must be a Government agency." *Id.* at 8. And "communications to or from an interested party seeking a Government benefit at the expense of other applicants" could not possibly qualify—regardless of whether a corollary exists or not. *Id.* at 12-15 & n.4.

While *Klamath* left this question open, its reasoning does not support the adoption of a consultant corollary. If a document is intra-agency only when its "source . . . [is] a Government agency," it would defy logic to extend Exemption 5 to documents whose "source" is an outsider. *Id.* at 8. In this case, the source of the records is APTMetrics—a private consulting firm that is separate from, and independent of, the Executive Branch. Indeed, it is the

quintessential outsider: the FAA held APTMetrics out as an "outside expert[]" that "independently validated" its personality test. Pet. App. 8a. The "source" was not a government agency as required by *Klamath*.[5]

3. Exemption 5's broader statutory context further confirms this plain-text understanding. First, the surrounding FOIA exemptions demonstrate that Congress knew how to explicitly protect communications with outsiders when it elected to do so. Pet. App. 38a (Wardlaw, J., dissenting). Exemption 4 applies to "trade secrets and commercial or financial information *obtained from a person* and privileged or confidential." 5 U.S.C. § 552(b)(4) (emphasis added). And Exemption 8 shields information "contained in or related to examination, operating, or condition reports prepared by, *on behalf of*, *or for the use of* an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. § 552(b)(8) (emphasis added). Notably, the language of Exemption 8—shielding documents prepared "on behalf of" or "for the use of an agency"—could just as well have been describing the consultant corollary. But Congress

[5] The en banc majority ruled that APTMetrics' underlying validation work might not be intra-agency because the FAA held that work out as outside and independent. Pet. App. 19a n.3. But it ruled that APTMetrics' *summaries* of that validation work—prepared for the FAA, purportedly in anticipation of litigation—were intra-agency documents. Pet. App. 18a-19a. This makes no sense, given that the same party (APTMetrics) produced all of this work for the same entity (the FAA), as part of the same project (validating the personality test). The "source" of the documents was the same across the board.

chose *not* to use that language in Exemption 5. *See* 5 U.S.C. § 552(b)(5).

The plain-text reading of "intra-agency" memorandums also "runs parallel to the judicial interpretation" of "*inter*-agency'" memorandums. Pet. App. 39a (Wardlaw, J., dissenting). The phrase "intra-agency" allows for the "withholding of memorandums or letters exchanged 'within' agencies," while the phrase "*inter*-agency" memorandums "permit[s] the withholding of memorandums or letters exchanged '*between*' agencies." *Id.* (emphasis added). The consultant corollary, in contrast, makes a mess of the "intra-" versus "inter-" agency distinction. In the D.C. Circuit, for instance, documents are "intra-agency" under the corollary where they are "submitted" by parties outside the agency "in response to an agency's request for advice." *Nat'l Inst. of Mil. Just. v. U.S. Dep't of Def.*, 512 F.3d 677, 681 (D.C. Cir. 2008) ("*NIMJ*"). But that broad definition of "intra-agency" would sweep in neutral advice memorandums provided by employees of *other agencies*—documents that this Court has explained are "*inter*-agency" memorandums. *See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 188 (1975) (exemption for "inter-agency" memorandums "permit[s] one agency possessing decisional authority to obtain written recommendations and advice from a separate agency"). A statutory interpretation that says a given memorandum is simultaneously "inter-agency" and "intra-agency" is inconsistent with ordinary usage.

The consultant corollary is also in tension with FOIA's threshold definition of "agency records." *See* 5 U.S.C. § 552(a)(4)(B). A document is an "agency

record," and thus subject to disclosure under the statute, if it was created or obtained by the agency and is in the agency's "control," i.e., its "possession." *U.S. Dep't of Just. v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Applying *Tax Analysts*, the Ninth Circuit here held that any underlying validation studies (as opposed to summaries of those studies) were not "agency records"—and thus were exempt from disclosure—because they were in "*APTMetrics'* possession," but not "in the *agency's* possession." Pet. App. 23a (emphasis added). But if APTMetrics is distinct from the agency for purposes of the statute's disclosure obligations—such that documents authored and possessed by APTMetrics are not "records" of the "agency"—it defies ordinary usage to say that communications *between* APTMetrics and the agency are nonetheless "*intra*-agency" memorandums. By instead limiting "intra-agency memorandums" to those that originate within the agency itself, the terms "intra-agency memorandum" and "agency record" are harmonized.

B. Exemption 5's purpose is consistent with its plain meaning.

Despite Exemption 5's explicit limitation to "inter-agency or intra-agency" memorandums, the en banc majority held that agency communications with non-governmental, outside consultants were protected from FOIA's mandatory disclosure obligation. How did the majority "justify this judicial rewrite? It's *purpose* all the way down." Pet. App. 58a (Bumatay, J., dissenting). But this approach "is a relic from a bygone era of statutory construction," Pet. App. 40a (Wardlaw, J., dissenting) (quoting *Argus Leader*, 139

S. Ct. at 2364), and it also misinterprets the purpose of Exemption 5 even on its own terms.

1. "On every level," FOIA's statutory purpose "cuts against the consultant corollary." Pet. App. 44a (Wardlaw, J., dissenting). At the highest level, "disclosure, not secrecy, is the dominant objective of the Act." *Klamath*, 532 U.S. at 8. "In FOIA, after all, a new conception of Government conduct was enacted into law, a general philosophy of full agency disclosure." *Id.* at 16 (quotation marks omitted). "Congress believed that this philosophy, put into practice, would help ensure an informed citizenry, vital to the functioning of a democratic society." *Tax Analysts*, 492 U.S. at 142 (quotation marks omitted). "Giving Exemption 5 its fair compass, and nothing more, lives up to these ideals, and ensures that the workings of the Executive Branch are transparent to the American people." Pet. App. 49a-50a (Wardlaw, J., dissenting).

Exemption 5's text reveals its purpose: to shield from mandatory disclosure a narrow band of documents satisfying "two conditions": (1) that the document is an "intra-agency" or "inter-agency" memorandum or letter, and (2) that it is not disclosable in ordinary litigation discovery. *See Klamath*, 532 U.S. at 8. There is "no textual justification for draining the first condition of independent vitality." *Id.* at 12. As discussed above, the text demonstrates that Exemption 5 was not meant to shield agency communications with outside consultants. *Supra* § II.A.

This Court should not resort to legislative history to "muddy clear statutory language." *Milner*, 562 U.S. at 572. "Indeed, this Court has repeatedly refused to

alter FOIA's plain terms on the strength only of arguments from legislative history." *Argus Leader*, 139 S. Ct. at 2364. But even if that history were relevant, it would simply confirm that the consultant corollary relies on a misunderstanding of Exemption 5's purpose. Both the House and Senate Reports accompanying FOIA's enactment focus on the importance of protecting communications between government employees—not with outside contractors. The House Report discusses the importance of full and frank "internal communications," including "advice from staff assistants and the exchange of ideas among agency personnel." H.R. Rep. No. 89-1497 at 31 (1966). The Senate Report likewise singles out the need for candor from "Government officials" communicating with their "superiors and coworkers." S. Rep. No. 88-1219 at 13-14 (1964). There is no indication that Exemption 5 was meant to shield communications with people or entities *outside* the agency, including documents exchanged with independent contractors specifically hired for their outside expertise.

2. To justify its "judicial rewrite" of the statute, Pet. App. 58a (Bumatay, J., dissenting), the Ninth Circuit's en banc majority reasoned that outside consultants must be read into the phrase "intra-agency" because "[o]utside consultants would presumably be just as hesitant as agency employees to engage in frank discussion" if their communications were disclosed. Pet. App. 15a. In other words, the majority read outside actors into a statute (and its legislative history) despite the fact that the text and history exclude them at every level. This "invocation of purpose" is "a 'bald assertion of an unspecified and hence unbounded judicial power to ignore what the law says.'"

Pet. App. 59a (Bumatay, J., dissenting) (quoting *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1077 (2020) (Thomas, J., dissenting)) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 343 (2012)). It "creates an 'escape route from the prison of the text,' by invoking Exemption 5's supposed purpose and imposing a more faithful—as the majority sees it—version of the law." Pet. App. 58a-59a (quoting *Reading Law* 19).

The Ninth Circuit en banc majority also tried to justify going beyond Exemption 5's plain text on the grounds that "without the protection afforded by Exemption 5, an agency's litigation opponents could obtain under FOIA the same privileged communications they were barred from obtaining under civil discovery rules." Pet. App. 14a. In so holding, the en banc majority "reverse engineer[ed] [its] interpretation" of "intra-agency memorandum," Pet. App. 67a (Bumatay, J., dissenting)—stretching that term to be coextensive with the discovery privilege, *see* Pet. App. 14a-16a. But this rationale relied on pre-*Klamath* cases like *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984), that "addressed only [the privilege-focused] half of the Exemption 5 inquiry." Pet. App. 46a (Wardlaw, J., dissenting). This approach contravenes *Klamath*'s teaching that Exemption 5's first condition—"intra-agency memorandum"—is not "a purely conclusory term" for any privileged "document the Government would find it valuable to keep confidential." 532 U.S. at 12. Rather, "Congress had to realize that not every secret under the old law would be secret under the new." *Id.* at 16.

3. In adopting the consultant corollary, the en banc majority was also motivated by "a consequentialist . . . fear" of the "types of government documents that may enter the public domain if we take Congress at its word in Exemption 5." Pet. App. 48a (Wardlaw, J., dissenting). In particular, the majority was concerned that the plain-text reading of the Exemption could lead to the disclosure of communications between an agency and an attorney retained as outside counsel. Pet. App. 15a-16a. However, this "concern for the protection of an agency's outside counsel's work product" is "a red herring," as "that is not this case." Pet. App. 67a (Bumatay, J., dissenting). "APTMetrics is not outside counsel and no one suggests it is the functional equivalent of one." Pet. App. 67a-68a. It makes little if any sense to adopt a broad, atextual consultant corollary to address concerns about a specific set of cases that might implicate a distinct "attorney corollary."

Nor are the courts authorized to "amend" FOIA to accommodate such concerns. Pet. App. 67a (Bumatay, J., dissenting). "[N]othing in FOIA either explicitly or implicitly grants courts discretion to expand (or contract) an exemption on th[e] basis" of concerns about "workable agency practice." *Milner*, 562 U.S. at 571 n.5. Rather, in "enacting FOIA, Congress struck the balance it thought right—generally favoring disclosure, subject only to a handful of specified exemptions—and did so across the length and breadth of the Federal Government." *Id.* Accordingly, this Court has given FOIA exemptions their plain meaning even when doing so would "upset[] . . . decades of agency practice" and "force considerable adjustments." *Id.* at 580.

Congress, after all, "can always amend FOIA" if it determines that greater protection for an agency's communications with outsiders is appropriate. Pet. App. 49a (Wardlaw, J., dissenting). Congress "has proven itself more than willing to" do so. *Id.* (citing examples). Policy disagreements with the scope of disclosure are thus "properly addressed to Congress, not to this Court." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 123-24 (1980).

As Judge Bumatay explained, it is also entirely unclear exactly how such a case "would arise" in practice. Pet. App. 68a. For example, the FAA cannot "just retain any lawyer of its choice." *Id.* Rather, "by law, the Department of Justice provides it legal counsel and *must* represent it in all litigation." *Id.* (citing statutes). And there is no question that communications between an agency and its *inside* counsel constitute "inter-agency or intra-agency memorandums" within Exemption 5's scope. While the FDIC—a different agency not at issue in this case—is authorized by law to hire outside counsel, its unique relationship with those attorneys is not part of this record. *See* Pet. App. 68a n.10.

If such a case were ever to arise, the Government would be free to argue that communications between an agency and its outside counsel are "intra-agency memorandums" due to the particular relationship at issue. It might claim that it was relevant, for instance, if a person, acting as the agency's attorney, were legally authorized to speak for the agency and bind it in judicial proceedings. *See* Pet App. 102a (Christen, J., dissenting) (when a common-law agent "acts on the principal's behalf," "the agent's acts *are the principal's*

acts" (emphasis added) (quotation marks omitted)). Evaluating the issue in the context of a concrete dispute, if it ever arises, would help to clarify these and other potentially relevant aspects of the outside-counsel relationship. *See* Pet. App. 68a n.10 (Bumatay, J., dissenting) (cataloging unbriefed facts such as whether "outside counsel are hired as special Government employees," or "if other federal laws, such as conflicts and ethics requirements, apply to outside counsel"). Here, however, the Government successfully argued below that records created and possessed by APTMetrics are not "agency records" precisely because APTMetrics is *distinct* from the FAA. Pet. App. 23a; *supra* § II.A. The Government cannot have it both ways.

III. This Case Presents An Issue Of Recurring Significance In Need Of This Court's Resolution.

At the center of this dispute is whether courts can rewrite a public disclosure statute to narrow the scope of documents that federal agencies must release. This Court has already considered this judicially created consultant corollary once, in *Klamath*, paring it back from its most extreme form, without reaching the broader question of the validity of engrafting any form of the consultant corollary onto Exemption 5. In the decades since *Klamath*, the consultant corollary—divorced from FOIA's text—has become a standardless tool for withholding that is not only wrong, but is also inconsistently applied across the circuits that have adopted it. This Court's intervention is again needed.

1. To start, this Court's review is necessary to resolve widespread confusion about both what this Court held in *Klamath*, and how a consultant corollary might work. The Tenth Circuit, for its part, misunderstood *Klamath* to affirmatively "recogniz[e] that Exemption 5 extends to government agency communications with paid consultants." *Stewart*, 554 F.3d at 1244. It therefore adopted the consultant corollary without any analysis at all. *Id.* In contrast, the Sixth Circuit concluded the opposite—that "the Supreme Court rejected" the arguments underlying the consultant corollary. *Lucaj*, 852 F.3d at 548. The Ninth Circuit here adopted a third position: that *Klamath* "did not endorse the consultant corollary," but "define[d] the outer boundaries of Exemption 5's reach." Pet. App. 17a. This Court often accepts review "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification." Stephen M. Shapiro et al., *Supreme Court Practice* 254 (10th ed. 2013). Given that the circuits have reached at least three different conclusions about whether *Klamath* allows, requires, or prohibits the consultant corollary, this Court's review is plainly warranted.

Unmoored from the text, even those courts that have accepted the corollary have established amorphous and inconsistent tests to determine the conditions under which documents created by agency outsiders are somehow "intra-agency." The inconsistency is unsurprising: because the consultant corollary "is nowhere evident in the statute, courts lack the normal guideposts for ascertaining its coverage." *Milner*, 562 U.S. at 577 n.8 (rejecting similarly atextual approach to Exemption 2).

For example, the Ninth and Tenth Circuits reason that the consultant corollary extends to paid outside consultants when those individuals function as agency employees. *See* Pet. App. 18a (asking "whether the consultant acted in a capacity functionally equivalent to that of an agency employee in creating the document or documents the agency seeks to withhold"); *Stewart*, 554 F.3d at 1245 (applying corollary to a "paid consultant" who "functioned akin to an agency employee").

The D.C., Second, and Fifth Circuits sometimes echo that standard, but they apply a different lens, focusing principally on the role that the withheld document played in the deliberative process. *See NIMJ*, 512 F.3d at 681 ("[T]he pertinent element is the role, if any, that the document plays in the process of agency deliberations.") (quotation marks omitted); *Lead Indus. Ass'n*, 610 F.2d at 80-83 (Exemption 5 covered documents "clearly implicated in the deliberative process"); *Jobe v. Nat'l Transp. Safety Bd.*, 1 F.4th 396, 404 (5th Cir. 2021) ("intra-agency" also "embraces records of communications between an agency and outside consultants . . . if they have been created for the purpose of aiding the agency's deliberative process"(quotation marks omitted)).[6]

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[6] This distinction—focusing more on the document's role than the nature of the document's author—is important. In the Fifth and D.C. Circuits, for example, documents drafted by self-interested parties have repeatedly been deemed "intra-agency" because of the role the documents played in the deliberative process—despite the fact that the documents' authors (including regulated parties, Senators, and former Presidents) were plainly

The Fourth Circuit has applied yet another test, finding a document intra-agency when "the public interest and the [author of the document's] interest . . . converged" under the common-interest doctrine. *Hunton & Williams,* 590 F.3d at 280. In *Hunton & Williams*, Exemption 5 shielded from disclosure the DOJ's communications with the maker of BlackBerry in advance of patent reexamination proceedings. *Id.* at 274-75, 278-81. Yet no one would argue that BlackBerry was functioning akin to a DOJ employee under the Ninth and Tenth Circuit tests.

This confusion is the predictable result of a doctrine "derived [not] from the text of Exemption 5 or frankly any other legislation," but "simply made . . . up" based on policy concerns. Pet. App. 66a-67a (Bumatay, J., dissenting). Two decades after *Klamath* left the question open, it is clear that the consultant corollary is neither textually grounded nor judicially administrable.

2. The negative consequences stemming from the amorphous consultant corollary are not theoretical. FOIA Exemption 5 is "one of the most important and frequently invoked exemptions." *Julian*, 486 U.S. at 22 (Scalia, J., dissenting); *see* 33 Charles A. Wright, *Federal Practice & Procedure* § 8441 (1st ed.) (noting that courts continually recognize the exceptional importance of Exemption 5 because of the frequency with which the Government invokes it). This Court has thus repeatedly taken up Exemption 5 to resolve disagreements. *See*, *e.g.*, *U.S. Fish & Wildlife Serv. v.*

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not functioning as agency employees. *See infra* 35 (discussing *Jobe*, *Ryan*, and *Public Citizen*).

Sierra Club, Inc., 141 S. Ct. 777 (2021); *Klamath*, 532 U.S. at 5; *Weber Aircraft*, 465 U.S. at 792; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

Just last year, the Government invoked Exemption 5 to shield documents in over 59,000 records requests. *See* Report: Disposition of FOIA Requests – Number of Times Exemptions Applied (2020), https://tinyurl.com/6wsmsprs. And in the last two years, lower courts have considered over 300 cases touching on Exemption 5, with nearly 20 cases applying the consultant corollary doctrine.

These cases involve federal agencies contracting with private parties regarding a huge range of social and regulatory issues—with absolutely no visibility for the public. *See*, *e.g.*, *Jobe*, 1 F.4th at 407 (Exemption 5 covers NTSB's communications with the private entities it regulates when those private parties assist in the safety investigations of their own aircraft following crashes); *Lead Indus. Ass'n*, 610 F.2d at 73, 80 (Exemption 5 covers communications with consultants hired to analyze standard for regulations about occupational exposure to lead).

Several courts have explicitly acknowledged that these private consultants may bring their own views and interests to the table—and yet they still hold that Exemption 5 shields these private influences from public scrutiny. *See Stewart*, 554 F.3d at 1245 ("We find no support for a limitation on paid consultants that they must lack 'deep-seated views.'"); *Pub. Citizen, Inc. v. DOJ*, 111 F.3d 168, 171 (D.C. Cir. 1997) (Exemption 5 protects communications between former Presidents and the National Archives and

Records Administration, even though the Presidents had "independent . . . interests."); *Ryan,* 617 F.2d at 791 ("Expressions of personal views or recommendations of a Senator, on the other hand, are clearly exempt from disclosure."). While this Court called *Public Citizen* and *Ryan* into question in *Klamath*, 532 U.S. at 12 n.4, both remain good law in the D.C. Circuit. And the Fifth Circuit just relied on both in holding that "*Klamath* does not stand for the broad principle that a consultant's 'self-interest' always excludes it from Exemption 5." *Jobe*, 1 F.4th at 400. Yet as Judge Ho explained in a powerful dissent in that case, a "communication between the regulator and the regulated—between parties with conflicting public versus private interests—is the very opposite of an internal government communication." *Id*. at 409 (Ho, J., dissenting).

Without public disclosure of the documents that outsiders—including interested parties—generate and share with agencies, there is little possibility for oversight or democratic accountability. Instead of being "a tool used to probe the relationship between government and business," FOIA, under the Ninth Circuit's rule, will become "unavailable whenever government and business wish it so." *Argus Leader*, 139 S. Ct. at 2368 (Breyer, J., concurring in part and dissenting in part). The consultant corollary legitimizes "the temptation, common across the private and public sectors, to regard as secret all information that need not be disclosed" and deprives "the public of information for reasons no better than convenience, skittishness, or bureaucratic inertia." *Id.*

3. This case presents an especially stark example of the dramatic effect of an agency's withholding of documents created by private, outside consultants. The FAA hired a private company—APTMetrics—to develop a personality test to screen for prospective air traffic controllers. The FAA told Mr. Rojas that the test was independently validated by outside experts. Pet. App. 8a. And it told members of Congress the same thing—that APTMetrics had validated the personality test. Subcomm. Hearing at 21 ("[O]ur consultants have done the validation work."); *see* Pet. App. 51a (Thomas, J., concurring in part and dissenting in part) ("[T]he FAA has repeatedly confirmed that both the 2014 and 2015 biographical assessments had been validated."). The FAA recognized that validation work as a "legal[] . . . obligation." *Id.*

To this day, it is nevertheless hard to know exactly what validation work actually occurred. The FAA's appellate brief refers to "interim validation work"—without explaining what about it was unfinished. C.A. Doc. 20 at 19 (Answering Brief). This should not be a mystery. APTMetrics knows exactly what work it did and did not do. But APTMetrics is a private company, so work solely in its possession is not an "agency record" subject to release under FOIA. The FAA also knows what APTMetrics did—APTMetrics gave the agency (at a minimum) written summaries of its work. But the FAA is refusing to release those summaries—in its view the only agency records showing what exactly transpired—because the exact same private, external, independent contractor's memos are "intra-agency," and thus shielded from release. In other words, APTMetrics' work was simultaneously private enough to be totally outside the scope

of FOIA, and public enough to be intra-agency and thus shielded by a FOIA exemption. That absurd consequence is the natural result of the atextual consultant corollary.

IV. This Case Is An Ideal Vehicle To Resolve The Question Presented.

This case presents an ideal vehicle to resolve the circuit conflict and restore the plain text of Exemption 5. The question presented "was fully litigated below." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). The en banc court generated four separate opinions on the issue—two on each side, *see* Pet. App. 12a-22a (en banc majority); Pet. App. 25a-35a (Collins, J., concurring); Pet. App. 35a-50a (Wardlaw, J., dissenting); Pet. App. 57a-69a (Bumatay, J., dissenting), in addition to the majority and dissent by the original panel, *see* Pet. App. 80a-91a (panel majority), Pet. App. 94a-112a (Christen, J., dissenting).

The question presented will also conclusively determine whether Exemption 5 applies. The Ninth Circuit ruled that two validation summaries are privileged—fulfilling the second condition of Exemption 5. The dispositive issue is thus whether the documents are "intra-agency"—i.e., whether Exemption 5 includes an atextual "consultant corollary." *Compare* Pet. App. 18a-22a (en banc majority) (adopting corollary and finding summaries satisfy Exemption 5), *with* Pet. App. 35a-36a (Wardlaw, J., dissenting) (rejecting corollary and concluding summaries do not

satisfy plain-text reading of Exemption 5); Pet. App. 58a-60a (Bumatay, J., dissenting) (same).[7]

Finally, this case provides a highly representative context to resolve the issue. The communications at issue here are memoranda "prepared for an agency by outside experts" retained as "temporary consultants." *Soucie*, 448 F.2d at 1078 n.44. These are exactly the type of documents that prompted the D.C. Circuit to invent the consultant corollary in the first place, and records like these remain at the heart of the corollary today.

[7] As noted above, the court of appeals declined to apply Exemption 5 to a third requested document because the FAA failed to show it was privileged. Pet. App. 21a (discussing document dated September 2, 2015). The court remanded on that question. Pet. App. 22a. The outcome of that privilege determination will have no effect on the resolution of whether Exemption 5 covers the two documents already adjudicated to be privileged.

CONCLUSION

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

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