No. 21-133

In the Supreme Court of the United States

JORGE ALEJANDRO ROJAS, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
MARK B. STERN
JEFFREY E. SANDBERG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether memorandums transmitted to federal agency attorneys from a consultant retained by the agency to assist the agency in performing its functions constitute "intra-agency memorandums or letters" under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 21-133

JORGE ALEJANDRO ROJAS, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-69a) is reported at 989 F.3d 666. The opinion of the initial panel of the court of appeals (Pet. App. 70a-112a) is reported at 927 F.3d 1046. The order of the district court (Pet. App. 113a-131a) is not published in the Federal Supplement but is available at 2016 WL 10651084.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2021. The petition for a writ of certiorari was filed on July 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 2015, the Federal Aviation Administration (FAA) rejected petitioner's application for an entry-level air-traffic-controller position. Pet. App. 7a-8a.

The FAA notified petitioner that it had determined that he was not eligible for the relevant vacancy based on his responses to the FAA's biographical assessment, explained that that test measured "job applicant characteristics that have been shown empirically to predict success as an air traffic controller," and noted that the test had been "independently validated." *Id.* at 8a.

The FAA developed the biographical assessment using services furnished by a human-resources consulting firm called APTMetrics. Pet. App. 8a, 73a. The FAA had entered into a services contract under which the FAA retained APTMetrics to review the agency's hiring processes, propose recommendations for improvement, and assist the agency in implementing improvements. *Id.* at 8a. Having developed the biographical assessment with APTMetrics's contract services, the FAA used the test in its 2014 hiring cycle and, after making revisions, in the 2015 hiring cycle in which petitioner applied. *Ibid.* APTMetrics, among other things, performed validation work on the revised version. *Ibid.*

b. This action under the Freedom of Information Act (FOIA), 5 U.S.C. 552, arises from petitioner's subsequent FOIA request to the FAA for records concerning the "empirical validation" of the "biographical assessment." Pet. App. 8a-9a. As relevant here, the case concerns three such records in the files of the FAA's Office of Chief Counsel that are dated December 2014, January 2015, and September 2015. *Id.* at 9a; see C.A. E.R. 296-299 (*Vaughn* index). Each record had been sent by APTMetrics to the FAA's Office of Chief Counsel after that Office had received "proposed notice of suit letters" concerning the FAA's selection of air-traffic controllers. C.A. E.R. 296-299. "[I]n anticipation of litigation," the Office of Chief Counsel had "re-

quest[ed] and direct[ed]" APTMetrics to produce "information related to the [FAA's] biographical assessment," and APTMetrics had prepared each of the responsive documents pursuant to that direction. *Ibid.*; *id.* at 305; see Pet. App. 10a.

FOIA imposes certain record-related obligations on an "'agency,'" which is defined as "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 of the term, because it is both "textually possible and much more in accord with the purpose of [the Exemption]." *Ibid.*

In *Klamath*, the Court considered the meaning of "intra-agency memorandum" in light of Justice Scalia's determination that the term 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)). 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. 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 jus-

tify 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.

The FAA invoked Exemption 5 to deny petitioner's FOIA request for the three communications from APT-Metrics to FAA's attorney personnel on the ground that each record is protected by the attorney work-product privilege. C.A. Supp. E.R. 103-104; Pet. App. 9a-10a.

2. After petitioner filed this FOIA action, the district court granted summary judgment to the government. Pet. App. 113a-131a. As relevant here, the court determined that the records are protected by the attorney work-product privilege and are exempt from disclosure under FOIA Exemption 5. *Id.* at 120a-129a.

3. a. A divided panel of the court of appeals initially reversed and remanded. Pet. App. 70a-112a. The majority opinion, authored by District Judge Molloy, rejected the view of "a number of [the court's] sister circuits" that hold that "'intra-agency' memorandums" under Exemption 5 encompasses certain "documents produced by an agency's third-party consultant." *Id.* at 81a-83a; see *id.* at 85a-89a. The majority concluded that those holdings are inconsistent with "Exemption 5's plain language," which the majority viewed as applying "only to records that the government creates and retains" because "[a] third-party consultant * * * is not an agency as that word is used in FOIA." *Id.* at 81a, 83a.

The majority also concluded that the FAA had failed to show that its search for responsive agency records was reasonable. Pet. App. 78a-80a. The court accordingly remanded for further proceedings. *Id.* at 94a.

b. Judge Christen dissented in relevant part. Pet. App. 94a-112a. Judge Christen reasoned that Exemption 5's text does not "dictate that an 'intra-agency memorandum' includes *only* those materials that agency employees (as opposed to retained consultants) prepare." *Id.* at 101a-102a. She instead concluded that the text's ordinary meaning "easily encompasses" the records in this case: "'intra' simply means 'within'" and the records remained "'within' the FAA" because they were prepared at FAA's instruction, for FAA's sole use, by a contractor retained by FAA. *Id.* at 102a-103a.

4. The en banc court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-69a.

a. A majority of the en banc court concluded that "'intra-agency memorandums'" include not only documents for which "the author and recipient are employees of the same agency" but also, "at least in some circumstances, documents prepared by outside consultants hired by the agency to assist in carrying out the agency's functions." Pet. App. 7a (citation omitted); see *id.* at 13a-19a; see also *id.* at 53a n.1 (Ikuta, J., dissenting in part) ("agree[ing] with the majority's interpretation of 'intra-agency memorandums'"). The majority explained that it must give FOIA's exemptions "'a fair reading,' just as [it] would any other statutory provision." *Id.* at 16a (quoting *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019)). And the majority explained that the term "intra-agency" does not itself resolve the interpretive question because even if it suggests that an agency document must be kept "in-

house," it does not address "who counts" as being in-house and thus does not resolve whether an agency properly acts through only "employees on the agency's payroll" or whether it may also act through "certain outside consultants whom the agency has hired to work in a capacity functionally equivalent to that of an agency employee." *Id.* at 13a-14a. Given that ambiguity in the "term 'intra-agency,'" *id.* at 16a, the court emphasized that "statutory context and purpose" matter and that both reflect the "broader understanding" of "'intra-agency' memorandums." *Id.* at 13a.

The majority reasoned that Exemption 5 requires that "the memorandum or letter" in question qualify as "'intra-agency'" and, for that reason, the proper inquiry requires a "document-by-document" analysis that looks to the status of the document's author when "creating the document." Pet. App. 18a. In this case, the court explained, APTMetrics "created the three documents at issue while performing work in the same capacity as an employee of the FAA" and "functioned no differently from agency employees" in doing so. *Ibid.*

Moreover, the majority explained that Congress designed Exemption 5 to protect agency communications in order to protect the quality of agency "'decisionmaking process[es]'" by preserving "the 'frank discussion of legal or policy matters' in writing [that] might be inhibited if the discussion were made public.'" Pet. App. 14a (quoting *Sears*, 421 U.S. at 150-151). Restricting Exemption 5 to communications between federal agency employees would enable litigants to circumvent the agency's "civil discovery privileges." *Id.* at 14a-15a. Such a reading, the majority explained, would perversely "assume that Congress saddled agencies with a strong disincentive to employ the services of outside ex-

perts, even when doing so would be in the agency's best interests," including when an agency "hir[es] outside counsel to represent it in litigation." *Id.* at 15a. The majority found that reading implausible, noting that "even [petitioner] appears to acknowledge that outside attorneys must be deemed 'within' an agency for purposes of Exemption 5." *Id.* at 16a.

The majority accordingly agreed with Justice Scalia's view, discussed in *Klamath*, that the proper interpretation of Exemption 5 is the one that is both "textually possible" and "much more in accord with the purpose of the provision," *i.e.*, intra-agency memorandums include communications by agency consultants who are "enough like the agency's own personnel to justify calling their communications 'intra-agency.'" Pet. App. 16a-17a (citations omitted). The majority concluded that a consultant qualifies when it is "hired by the agency to perform work in a capacity similar to that of an employee of the agency" and thus "'functions just as an employee would be expected to do.'" *Id.* at 17a (quoting *Klamath*, 532 U.S. at 11). That interpretation, the majority noted, is shared by the six other courts of appeals that have resolved the question. *Id.* at 17a & n.2.

Because APTMetrics created the relevant documents "while performing work in the same capacity as an employee of the FAA" and transmitted the documents only to the FAA's Office of Chief Counsel as directed, the majority held that the documents qualify under Exemption 5 as "'intra-agency.'" Pet. App. 18a-19a.

Majorities of the en banc court nevertheless determined that a remand to district court was warranted for two reasons. First, although the court recognized that the FAA's *Vaughn* index described all three records at issue as records produced in anticipation of litigation at

the request of FAA attorneys, Pet. App. 10a, a majority concluded that the FAA's declaration (C.A. E.R. 300-303)—which attached the *Vaughn* index (*id.* at 296-299) describing the documents, *id.* at 302 ¶ 18—specifically discussed only two of the documents in detail and did not separately describe the September 2015 document to demonstrate that the attorney work-product privilege applied. Pet. App. 19a-22a. Second, like the panel, a majority of the en banc court determined that the FAA had failed to show that it had conducted an adequate search of agency records for responsive material. *Id.* at 23a-24a. The court accordingly remanded for further proceedings. *Id.* at 25a.

b. Judge Collins concurred in the majority opinion but wrote separately to emphasize why the majority's interpretation is faithful to Exemption 5's text. Pet. App. 25a-35a. The dissenting opinions, he explained, overlook that the text "require[s] only that the '*memorandum*' be 'intra-agency,' not necessarily that the *authors and recipients* be formal *employees* of that agency." *Id.* at 27a (citation and brackets omitted). Judge Collins explained that Justice Scalia had concluded that, when the statute is read in its proper context, the best reading of "intra-agency memorandums" extends to documents received by agency personnel "from a person acting in a governmentally conferred capacity" to "assist [the agency] in the performance of its own functions," such as a "consultant to the agency." *Id.* at 25a-26a (quoting *Julian*, 486 U.S. at 18 n.1 (Scalia, J., dissenting)); see *id.* at 31a; see also *id.* at 27a-34a. Given the en banc court's holding, Judge Collins added, "no circuit split" exists on that issue. *Id.* at 34a & n.8.

c. Judge Wardlaw, joined by Chief Judge Thomas and Judge Hurwitz, dissented in relevant part. Pet.

App. 35a-50a. Judge Wardlaw argued that Exemption 5 should be "narrowly construed," *id.* at 44a (citation omitted), and that, so construed, it applies only to documents "addressed both to and from employees of a single agency," *id.* at 38a (quoting *Klamath*, 532 U.S. at 9).

d. Chief Judge Thomas dissented separately (Pet. App. 50a-52a) to state his view that, even if the records here were deemed "intra-agency," regulations governing employee-selection procedures might require the records to be "made publicly available." *Id.* at 50a-51a. Because "the present record is not fully developed" on that issue, he stated that it could be considered on remand. *Id.* at 52a.

e. Judge Bumatay also dissented in relevant part. Pet. App. 57a-69a. He concluded that, as a textual matter, "'intra-agency memorandums'" do not include documents created by those "outside an agency's employment." *Id.* at 58a (citation omitted). He stated that he would reserve the question whether an agency's privileged communications with "outside counsel" would qualify as "intra-agency." *Id.* at 67a-68a & n.10.

ARGUMENT

Petitioner contends (Pet. 17-30) that "intra-agency memorandums" are limited to communications between an agency's employees, which do not include other personnel retained by the agency to assist it in performing the agency's functions. Petitioner further contends (Pet. 13-17, 32-35) that the courts of appeals are divided on that issue. The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Even if review were otherwise warranted, the interlocutory posture of this case would make it a poor candidate for review. The Court should deny certiorari.

1. The court of appeals correctly determined that the records in dispute are "intra-agency memorandums" under FOIA Exemption 5. 5 U.S.C. 552(b)(5). Giving Exemption 5 the "fair"—not narrow—construction required to honor the "important interests" that it serves in the statute, *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (citations omitted), "intra-agency memorandums" covers not only communications between agency employees but also agency employees' communications with contractors or consultants to the agency who act in a governmentally conferred capacity in assisting the agency in the performance of its own functions.

a. FOIA imposes certain obligations on an "agency," *e.g.*, 5 U.S.C. 552(a)(3)(A), which means "each authority of the Government of the United States" with some exceptions, 5 U.S.C. 551(1), but including "any executive department," "any other establishment in the executive branch of the Government," and "any independent regulatory agency," 5 U.S.C. 552(f)(1). Under that definition, an "agency"—an "authority" of the government—is an abstract entity, not a tangible thing. An agency therefore discharges its functions through persons retained for that purpose. An agency, for instance, may utilize persons hired as federal employees under federal civil-service rules. But the agency may also use contractors and other consultants to assist it in performing its functions. Such federal employees, contractors, and other consultants retained by an agency to discharge its duties can all be properly understood to act "in a governmentally conferred capacity" when they "assist [the agency] in the performance of its own functions." *United States Dep't of Justice* v. *Julian*, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting).

FOIA Exemption 5 applies to "intra-agency memorandums or letters." 5 U.S.C. 552(b)(5). Congress, however, did not define the adjective "intra-agency" or the phrase "intra-agency memorandums and letters," and the statutory definition of the noun "agency" does not resolve their meaning. See *FCC* v. *AT&T Inc.*, 562 U.S. 397, 402-403 (2011) (rejecting view that "personal" in FOIA Exemption 7(C) carries an adjectival meaning of the defined term "person"). Instead, the combination of the adjective (intra-agency) and noun (memorandums) in the phrase "intra-agency memorandums" (or letters), 5 U.S.C. 552(b)(5), reflects a meaning greater than the "sum of [the] two words." *AT&T Inc.*, 562 U.S. at 406.

"Memorandums" (and letters) are written documents often transmitted between two or more persons. The prefix "intra-" in the adjective "intra-agency" suggests that intra-agency memorandums are communications "within" an agency, *i.e.*, among agency personnel. See *Webster's Third New International Dictionary* 1185 (1961) ("intra-"). But as the court of appeals explained, the "term 'intra-agency'" does not address "who counts" as the agency personnel among whom the memorandums (or letters) must be distributed. Pet. App. 13a. It does not address whether the personnel are only federal "employees on the agency's payroll" or whether they may include "certain outside consultants whom the agency has hired" to assist it in performing its functions and who often "work in a capacity functionally equivalent to that of an agency employee." *Id.* at 13a-14a.

Context resolves that ambiguity. See *Sturgeon* v. *Frost*, 577 U.S. 424, 438 (2016) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (citation omit-

ted). Two contextual features are most salient. First, formal agency employees, as well as contractors and other consultants, regularly enable an agency to perform its functions, including in many areas involving an agency's legal and policy decisions. And second, Exemption 5 is designed to protect communications that would "normally [be] privileged" in civil discovery, improving the quality of agency deliberations by safeguarding the "'frank discussion of legal or policy matters' in writing" that would be impaired by publicly disclosing such communications. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149-150 (1975) (citation omitted); see p. 3, *supra*. That context strongly indicates that Congress intended Exemption 5 to capture more than just the communications between an agency's formal employees. The phrase "intra-agency memorandum" is thus best read to cover written communications between persons "acting in a governmentally conferred capacity"—"*e.g.*, in a capacity as *employee or consultant* to the agency"—when they are "assist[ing] [the agency] in the performance of its own functions." *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9-10 (2001) (quoting *Julian*, 486 U.S. at 18 n.1 (Scalia, J., dissenting)) (emphasis added).

That reading is the longstanding and uniform interpretation of Exemption 5. The Attorney General's 1967 memorandum on FOIA, to which this Court has looked in construing the statute, reflects the contemporaneous understanding that Exemption 5's protection for intra-agency memorandums includes written communications "prepared by agency staff personnel *or consultants* for the use of the agency." U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Infor-*

mation Section of the Administrative Procedure Act 35 (1967) (emphasis added).[1] And as Justice Scalia explained in *Julian*, the "uniformly" held view in the courts of appeals that communications with "outside consultants" are covered is not only "textually possible," it is the best understanding of the term when the "phrase 'intra-agency memorandum'" is read in "its present context" because it is "much more in accord with the purpose of the provision." *Julian*, 486 U.S. at 18 n.1 (Scalia, J., dissenting). Given the reality that agencies perform their functions through a combination of federal employees, contractors, and other consultants, a contrary reading would improperly "exclude[] many situations where Exemption 5's purpose of protecting the Government's deliberative process is plainly applicable." *Ibid.*

Since *Julian*, the courts of appeals to have considered the matter have uniformly continued to hold that Exemption 5 applies to communications with agency consultants. Pet. App. 17a & n.2 (citing illustrative cases). And when Congress in 2016 amended Exemption 5 to impose a 25-year sunset on the government's FOIA assertion of the deliberative-process privilege, Congress reenacted the same operative text—"inter-agency or intra-agency memorandums or letters"—against the backdrop of that longstanding interpretation. FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2(2), 130 Stat. 540; see *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 169 (2004) ("We

---

[1] See, *e.g.*, *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 169 (2004); *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 602 n.3 (1982); *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 151 (1980).

can assume Congress legislated against this background * * * when it amended [a FOIA] Exemption.").

b. That interpretation is supported by the real-world context of how agencies perform their functions and by Congress's clear intent to protect the quality of agency decisionmaking by incorporating litigation privileges in Exemption 5.

Governmental authorities have long acted through personnel other than full-time civil servants. See, *e.g.*, *Filarsky* v. *Delia*, 566 U.S. 377, 384-388 (2012). And in 1954, President Eisenhower directed a "shift * * * to private enterprise [of those] Federal activities which can be more appropriately and more efficiently carried on in that way." Staff of Senate Comm. on Gov't Operations, 88th Cong., 1st Sess., *Government Competition with Private Enterprise* 24 (Comm. Print 1963) (asterisks in original); see *id.* at 28-32 (discussing government procurement instructions for services). By 1966, the predecessor to the Office of Management and Budget (OMB) issued Circular No. A-76 to "restate[] the guidelines and procedures" for agencies to use when deciding whether "services used by the Government are to be provided by private suppliers or by the Government itself." Bureau of the Budget, Circular No. A-76, at 1 (Mar. 3, 1966).

Congress has also repeatedly facilitated federal agencies' use of personnel other than civil-service employees to perform agency functions. Agencies, for instance, may temporarily retain by contract certain "experts or consultants" under appropriations or other statutory authority. 5 U.S.C. 3109(b) (formerly 5 U.S.C. 55a (1952)). More generally, the Federal Activities Inventory Reform Act of 1998 (FAIR Act), Pub. L. No. 105-270, 112 Stat. 2382, as amended (reproduced as

amended at 31 U.S.C. 501 note), builds upon OMB Circular No. A-76 and reinforces federal agencies' long-standing authority to choose either federal employees or contractors to perform many activities necessary to carry out agency functions.

Under the FAIR Act, each agency compiles a list of the non-inherently-governmental activities that it performs by "us[ing] Federal Government employees." FAIR Act §§ 2(a), 5(1). If an agency head "considers contracting with a private sector source for the performance of such an activity," the agency must use a "competitive process" to select the source, including a "realistic and fair" comparison of the cost of performing the activity through contractor personnel versus government employees. *Id.* § 2(d) and (e); see 48 C.F.R. 7.302(b)(2) and (3); OMB Circular No. A-76 (Revised) (May 29, 2003), https://go.usa.gov/xejx5, see also OMB Circular No. A-76 (Aug. 4, 1983 rev. 1999) (superseded), https://go.usa.gov/xejxR.[2] Although "inherently governmental functions" (*i.e.*, functions "so intimately related to the public interest as to require performance by Federal Government employees") are exempt from those lists and competitions, Congress has specified that activities such as "gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials" are normally activities that must be listed and that agencies may perform them through contractors rather than agency employees. FAIR Act §§ 2(a), 5(2)(A) and (C)(i). Therefore, while

[2] Congress has suspended the use of competitions though which agencies could further "conver[t] to contractor performance * * * function[s] performed by Federal employees" by withholding appropriations for those competitions. See, *e.g.*, Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 741, 134 Stat. 1440.

contractor personnel cannot "decide on the [agency's] overall course of action" or determine "agency policy, such as [by] determining the content and application of regulations," an agency may utilize such personnel to "develop options or implement a course of action." Office of Fed. Procurement Policy, OMB, *Policy Letter 11-01*, § 5-1(a)(1)(ii)(B) & App. A, 76 Fed. Reg. 56,227, 56,237, 56,240 (Sept. 12, 2011).

As a result, agencies may use contractors to perform tasks that might otherwise be performed by federal employees. Contractors "routinely, and properly, * * * perform[] functions for the Federal Government" by, *inter alia*, "providing advice, opinions, or recommended actions, emphasizing certain conclusions," and "deciding what techniques and procedures to employ" in doing so. *Policy Letter 11-01*, § 5-1(a)(1)(ii)(B), 76 Fed. Reg. at 56,237-56,238; see 48 C.F.R. 7.503(a), (d)(3), (4), and (18). By using contractor personnel, agencies can take "advantage of a contractor's expertise and skills to support the agency in carrying out its mission." 76 Fed. Reg. at 56,232 (preamble). Agencies thus have an "important responsibility, in cases where work is not inherently governmental, to evaluate how to strike the best balance in the mix of work performed by Federal employees and contractors to both protect the public's interest and serve the American people in a cost-effective manner." *Id.* at 56,230.

Consistent with that responsibility, agencies regularly use contractors rather than federal employees in a wide variety of settings. The U.S. Marshals Service, for instance, uses contractors to provide security at about 440 federal court facilities. See 28 C.F.R. 0.112(c); Office of the Inspector Gen., U.S. Dep't of Justice, *Audit of the United States Marshals Service Judicial Secu-*

rity Division's Court Security Officers Procurement Process 1 (Mar. 2018), https://go.usa.gov/xeN35. The government operates some immigration detention facilities through contractors, *United States* v. *California*, 921 F.3d 865, 882 n.7 (9th Cir. 2019), cert. denied, 141 S. Ct. 124 (2020), and has operated "nuclear production facilit[ies]" through "private contractor[s] * * * under federal control" such that the facilities' "federal [nuclear-weapons and nuclear-fuel] function" was "carried out by [those] private contractor[s]," *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180-181 (1988). NASA's Jet Propulsion Laboratory "is staffed exclusively by contract employees" whose duties are "functionally equivalent to those performed by civil servants" but who are employed directly by a nonfederal entity "under a Government contract." *NASA* v. *Nelson*, 562 U.S. 134, 139, 150-151 (2011). The FAA operates over 250 air-traffic-control towers using approximately 1400 contract controllers who are "employees of private companies rather than [the FAA]." FAA, U.S. Dep't of Transp., *FAA Contract Tower Program*, https://go.usa.gov/xeBxb. And the government uses contractors to provide analysis and documents necessary for environmental reviews of proposed federal projects. See, *e.g.*, 40 C.F.R. 1506.5(a) and (b); 43 C.F.R. 46.105.

Federal agencies have also long had "authority to contract for legal services." United States Gen. Accounting Office, *Private Attorneys: Information on the Federal Government's Use of Private Attorneys* 3 & App. I (1992), https://go.usa.gov/xe5uS (identifying 123 federal agencies with such authority, about half of which used contract legal services in FY1991. And although agencies other than the Department of Justice must normally use attorneys for legal tasks other than "the

conduct of litigation," 5 U.S.C. 3106, Congress has authorized agencies to litigate cases using contract attorneys in numerous settings.[3] The Department of Justice itself uses contract attorneys in certain contexts, including for litigation to collect debts owed to the United States. See 31 U.S.C. 3718(b); 28 C.F.R. 11.1-11.3; Department of Justice, *Debt Collection Management Staff* (Sept. 10, 2021), https://go.usa.gov/xe5JW (discussing Private Counsel Program); cf. *Constitutional Limits on "Contracting Out" Dep't of Justice Functions under OMB Circular A-76*, 14 Op. O.L.C. 94, 100-102 (1990), https://go.usa.gov/xejYm. Congress has also exempted from normal competitive-contracting procedures the use of contractor experts for litigation and similar disputes. 41 U.S.C. 3304(a)(3)(C) and (D).

c. Petitioner's contrary contentions (Pet. 18-30) lack merit. First, petitioner incorrectly asserts (Pet. 18-20) that the court of appeals adopted an atextual reading of Exemption 5. The term "agency" standing alone does not address the meaning of "intra-agency memorandums," much less suggest that such documents must be distributed only among agency employees and not agency consultants. Petitioner's observation that an agency *contractor* like APTMetrics "'is not an agency under' FOIA," Pet. 19 (quoting Pet. App. 60a (Bumatay, J., concurring in part and dissenting in part)), is beside the point. Like a contractor, an agency *employee* is also not an "agency" under FOIA. Petitioner simply fails to recognize that agencies act through their personnel and have long used both agency employees as well as con-

---

[3] See, *e.g.*, 7 U.S.C. 1981(c); 12 U.S.C. 635(a)(1), 1819(a); 20 U.S.C. 4414(a)(5); 22 U.S.C. 2199(d); 38 U.S.C. 3730(a); 39 U.S.C. 409(g)(2) and (3)(B); 42 U.S.C. 1480(d)(1)(C).

tractor and consultant personnel to carry out agency functions.

Nor is it correct to suggest (Pet. 20) that Justice Scalia concluded in *Julian* that the better reading of "'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency." *Julian*, 486 U.S. at 18 n.1 (Scalia, J., dissenting). Justice Scalia indicated that that reading might be more natural if the phrase were considered "[*a*]*part from its present context*." *Ibid.* (emphasis added). But, in context, Justice Scalia (and two other Justices) determined that it is not only "textually possible" but "much more in accord" with Exemption 5's function in the statute to read the phrase as including communications "from a person acting in a governmentally conferred capacity"—"*e.g.*, in a capacity as *employee or consultant* to the agency"—"to assist [the agency] in the performance of its own functions." *Ibid.* (emphasis added). No Member of this Court has ever suggested otherwise.

Petitioner states (Pet. 21-22) that "*Klamath* left this question open" but somehow "its reasoning does not support the adoption of a consultant corollary." That is incorrect. *Klamath*'s observation that the "source [of a document] must be a Government agency," 532 U.S. at 8, does not resolve whether an employee or consultant could be the source. That is precisely why the Court "assum[ed]" without deciding that "[consultant] reports may qualify as intra-agency under Exemption 5." *Id.* at 12. Petitioner's related observation (Pet. 22 n.5) that the court of appeals suggested the possibility that other materials produced by APTMetrics might not qualify as "intra-agency" fails to identify any analytical defect. The court of appeals did not decide whether other documents would qualify as "intra-agency" if "outsider"

status were "essential to th[at] work." Pet. App. 19a n.3. And even if such a distinction could be drawn, it would at best suggest that APTMetrics was acting in a *different* capacity when it produced *other* documents.

Petitioner's reliance (Pet. 22-23) on FOIA Exemptions 4 and 8 is equally unpersuasive. Those provisions apply to documents received from a much different (and more expansive) category of persons, not just those acting in a governmentally conferred capacity to assist an agency. 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). And because "'person'" is defined to "include[] an individual, partnership, corporation, association, or public or private organization *other than an agency*," 5 U.S.C. 551(2) (emphasis added), it covers submissions from all persons other than agency personnel and concerns privileges held by, and information confidential to, the submitters (not the agency). Exemption 8, in turn, covers information in "reports prepared by, on behalf of, or for use of [a banking-regulation] agency." 5 U.S.C. 552(b)(8). It therefore focuses on reports received by a relevant agency from anyone, including those who "everyone would agree are outsiders." Pet. App. 30a (Collins, J. concurring). Those provisions provide no meaningful insight into the phrase "intra-agency memorandums." "[T]he wording of the three exemptions is so completely dissimilar that the comparative inference [petitioner] tr[ies] to draw is unwarranted." *Ibid.*

Nor is petitioner's construction supported by his focus (Pet. 23-24) on the exemption for "inter-agency" communications and the concept of "agency records." First, memorandums may be transmitted between personnel (whether employees or otherwise) acting for one

agency to the personnel of another agency and be considered "inter-agency" regardless of whether one agency was responding to a request for advice in a way that could parallel the relationship between an agency and a consultant. That does not impermissibly blur the distinction between inter-agency and intra-agency.

Second, to qualify as an "agency record," an agency must "'either create or obtain' the requested materials" and, in addition, "be in *control* of the requested materials at the time the FOIA request is made." *United States Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 144-145 (1989) (emphasis added; citation omitted). Memorandums sent to agency personnel by a contractor like APTMetrics would presumably exist in the agency's files and thus be within the agency's control. Moreover, when the contractor transmits such materials "to assist [the agency] in the performance of its own functions," the contractor is "acting in a governmentally conferred capacity" as part of the agency's (nonemployee) personnel. *Julian*, 486 U.S. at 18 n.1 (Scalia, J., dissenting). But the fact that a contractor acts in that capacity in some contexts does not mean that the contractor (which may have other work) always acts in that capacity. And unless the contractor is charged with storing and maintaining agency records, an agency would not necessarily have "control" of materials in the contractor's own files. Cf. *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 157 (1980) (holding that documents written by Henry Kissinger when he worked at the White House were not "State Department records" after they were "physically taken to [his new] office at the Department of State" because they "were not in the control of the State Department at any time" and "were not used by the Department for any purpose"). Accord-

ingly, the fact that the court of appeals concluded that the FAA did not need to conduct a search of APTMetrics's files, Pet. App. 22a-23a, does not undermine the conclusion that communications sent to FAA attorneys by APTMetrics in its role as a contractor consultant constitute intra-agency communications under FOIA Exemption 5.

Petitioner contends (Pet. 24-30) that the court of appeals rewrote Exemption 5 by judicial interpretation based only on the purpose of Exemption 5. But as explained above, the relevant text does not resolve whether it captures communications between just agency employees or also agency consultants and contractors. Moreover, statutory text is properly construed "not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski* v. *United States*, 573 U.S. 169, 179 (2014) (citation omitted). The consideration of purpose—as "derived from the text" of the statute itself—is thus an established tool of statutory interpretation that "shed[s] light * * * on deciding which of various textually permissible meanings should be adopted." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56-57 (2012) (emphasis omitted).

Even petitioner does not appear to embrace the logic of his construction. In the court of appeals, petitioner "appear[ed] to acknowledge that [communications with] outside attorneys" would count as intra-agency communications, Pet. App. 16a, but argued that "this case does not present" that contract-attorney question. C.A. En Banc Oral Argument 3:20-4:20, 6:45-7:40. Although petitioner continues (Pet. 28) to avoid directly addressing what he labels "a distinct 'attorney corollary,'" he tellingly offers no textual basis for limiting "intra-agency"

communications to communications between agency employees while also capturing communications with non-employee contract attorneys. If petitioner's reading of Exemption 5 were adopted, it would prevent the exemption from applying in numerous longstanding contexts in which agencies have retained counsel and related litigation experts by contract. Cf. pp. 18-19, *supra*. And beyond that, petitioner turns a blind eye to the many non-legal contexts in which agencies use other contractors and consultants to assist them in performing other important functions. Cf. pp. 17-18, *supra*.

If petitioner's reading of Exemption 5 were correct, agencies would be deprived of the confidentiality needed for the full and "frank discussion[s] of legal or policy matters" with their contractors, *Sears*, 421 U.S. at 150 (citation omitted), which would provide a very "strong disincentive to employ the services of outside experts, even when doing so would be in the agency's best interests," Pet. App. 15a. Indeed, adopting petitioner's position would encourage federal agencies to expand their civil-service staff and unwind longstanding efforts by both the Executive and Congress to facilitate agencies' use of contractor personnel when that is otherwise in the public interest. Petitioner provides no sound reason for that significant change in the law.

2. In any event, no further review is warranted because every court of appeals to have addressed the issue has concluded that intra-agency communications are not limited to those between or among an agency's employees. Pet. App. 17a & n.2; see Pet. 15 (stating that seven courts of appeals have adopted that consultant-corollary interpretation).

Petitioner bases his assertion of a circuit conflict (Pet. 13-17) solely on the Sixth Circuit's decision in *Lu-*

caj v. *FBI*, 852 F.3d 541 (2017), which petitioner describes as "refus[ing] to apply Exemption 5" to encompass communications to an agency's contractors. Pet. 16 & n.4. Although *Lucaj* contains "dicta" that potentially "cast[] doubt" on the textual justification for the consultant corollary, *Jobe* v. *NTSB*, 1 F.4th 396, 404 n.8 (5th Cir. 2021), petition for cert. pending, No. 21-469 (filed Sept. 24, 2021), 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 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 this Court's review.

Petitioner identifies no other disagreement in the courts of appeals relevant to the disposition of this case, which the court below resolved on the premise that APTMetrics created the documents at issue "while performing work in the same capacity as an employee of the FAA" and "functioned no differently from agency employees" in doing so, Pet. App. 18a. Cf. Pet. 31-33. If the question presented recurs as frequently as petitioner predicts (Pet. 33-34), this Court will have ample opportunity to review if a meaningful division of authority eventually develops.

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 one of the three documents in dispute is privileged, Pet. App. 19a-20a, and to determine whether the FAA's search for responsive records was sufficient, *id.* at 23a-24a. If the proceedings on remand are resolved

in petitioner's favor, petitioner could potentially obtain information that would satisfy his interest in the FAA's 2014-2015 screening processes for air-traffic controllers. 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.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
MARK B. STERN
JEFFREY E. SANDBERG
Attorneys

NOVEMBER 2021