No. 21-133

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

REPLY BRIEF FOR PETITIONER

Robert M. Loeb
Thomas M. Bondy
Karim J. Kentfield
Monica Haymond
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

Naomi J. Scotten
Counsel of Record
Abigail Colella
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
nscotten@orrick.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTRODUCTION 1
ARGUMENT 2
I. The Courts Of Appeals Are Split. 2
II. The Government's Defense Of The Corollary Is Atextual. 4
III. This Case Is An Ideal Vehicle For The Court's Review. 11
CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Adm'r, FAA v. Robertson,
422 U.S. 255 (1975)..... 12

Cheney v. U.S. Dist. Ct.,
542 U.S. 367 (2004)..... 13

C*hrysler Corp. v. Brown*,
441 U.S. 281 (1979)..... 12

Church of Scientology of Cal. v. IRS,
484 U.S. 9 (1987)..... 12

CIA v. Sims,
471 U.S. 159 (1985)..... 12

Dep't of Interior v. Klamath Water Users Protective Ass'n,
532 U.S. 1 (2001)..... 2, 5, 6, 7, 9

DHS v. MacLean,
574 U.S. 383 (2015)..... 12

Digit. Realty Tr., Inc. v. Somers,
138 S. Ct. 767 (2018)..... 12

DOJ v. Julian,
486 U.S. 1 (1991)..... 8, 9

FCC v. AT&T Inc.,
562 U.S. 397 (2011)..... 12

Food Mktg. Inst. v. Argus Leader Media,
139 S. Ct. 2356 (2019).....6, 8

Hoffmann-La Roche v. Sperling,
493 U.S. 165 (1989).....13

Hunton & Williams v. DOJ,
590 F.3d 272 (4th Cir. 2010).....3

Jobe v. NTSB,
1 F.4th 396 (5th Cir. 2021).....2

Lucaj v. FBI,
852 F.3d 541 (6th Cir. 2017).....3

Mills v. Elec. Auto-Lite Co.,
396 U.S. 375 (1970).....13

Milner v. Dep't of Navy,
562 U.S. 562 (2011).....8

NLRB v. Sears, Roebuck & Co.,
421 U.S. 132 (1975).....6

Norfolk S. Ry. Co. v. Kirby,
543 U.S. 14 (2004).....12

Pub. Emps. for Env't Resp. v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico,
740 F.3d 195 (D.C. Cir. 2014).....4

SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC,
137 S. Ct. 954 (2017).....12

Tigue v. DOJ,
312 F.3d 70 (2d Cir. 2002) 4

DOJ v. Landano,
508 U.S. 165 (1993) 12

Statutes

5 U.S.C. § 552(a)(4)(F)(i) 5

5 U.S.C. § 552(b) 3, 10

Other Authorities

17 Charles A. Wright et al., *Federal Practice and Procedure: Jurisdiction and Related Matters* (3d ed. 2021) 11

H.R. Rep. No. 89-1497 (1966) 5

S. Rep. No. 88-1219 (1964) 8

Stephen M. Shapiro et al., *Supreme Court Practice* (10th ed. 2013) 11

U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (1967) 8

INTRODUCTION

The FAA claims that outside, independent contractors are "agency personnel." BIO 12-13. And as "agency personnel," the outside contractors' work is "intra-agency" under FOIA Exemption 5. *Id.*

That is an unwarranted expansion of the administrative state. If the FAA is correct, then it has transformed APTMetrics' employees—"outside experts" who performed "independent[]" work, Pet. App. 8a—into "agency personnel" whose work is shielded from disclosure. By extension, in *Jobe v. NTSB*, employees of regulated companies helping an agency to investigate their own employers' fatal helicopter crash are "agency personnel" too.[1]

Exemption 5 says nothing of the sort. It does not use the phrase "agency personnel"—let alone define it to include outsiders. The Exemption simply says that records must be "intra-agency memorandums or letters" to be covered. And no matter how hard you squint, correspondence reflecting work outsourced to private, outside parties cannot qualify.

To support its atextual interpretation, the FAA relies on supposed practical considerations connected to agencies' use of private contractors. BIO 14-19. Those concerns ignore other FOIA exemptions protecting sensitive documents, and are fundamentally a

[1] The government is simultaneously opposing certiorari in *Jobe v. NTSB*, No. 21-469.

thinly veiled request for a "judicial rewrite" of the statute. Pet. App. 58a (Bumatay, J., dissenting).

The FAA also asserts that there is no circuit split, despite the fact that the courts are divided on at least three relevant axes: (1) whether Exemption 5 includes a consultant corollary; (2) whether this Court's decision in *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), embraced, allowed, or rejected the corollary; and (3) what test applies if Exemption 5 includes a corollary. The FAA largely ignores the latter two conflicts.

Finally, the FAA asks the Court to ignore the widespread confusion stemming from *Klamath*, asserting that this case's interlocutory posture creates a vehicle problem. BIO 27-28. But the Court frequently takes cases—including FOIA cases—in interlocutory postures to resolve important legal questions and resolve circuit splits. The FAA's suggestion that Mr. Rojas may lose interest in the documents at issue if he gains access to *other* documents on remand, BIO 28, is deeply mistaken and contrary to FOIA.

ARGUMENT

I. The Courts Of Appeals Are Split.

The FAA argues that the circuit courts are uniform, because any "'doubt'" the Sixth Circuit cast on the corollary was "'dicta.'" BIO 25 (quoting *Jobe v. NTSB*, 1 F.4th 396, 404 n.8 (5th Cir. 2021)). Not so.

The FAA relies heavily on the Sixth Circuit's statement that "'the only question' presented" in

Lucaj "was 'whether [DOJ's requests] are *inter*-agency memorandums or letters.'" BIO 25 (quoting *Lucaj v. FBI*, 852 F.3d 541, 547 (6th Cir. 2017)). This misunderstands the case. In *Lucaj*, the court first analyzed the meaning of "intra" and held that the documents at issue were "not intra-agency memorandums or letters" because they were "sent without (i.e., to foreign governments)." 852 F.3d at 546-47. Only after rejecting the notion that the documents were "intra-agency" did the court state: "Therefore, the only question in this case is whether the [documents] are inter-agency memorandums or letters." *Id.* at 547.

The Sixth Circuit specifically addressed whether the "common-interest doctrine" could render the documents "'intra-agency' for purposes of Exemption 5." *Id.* at 548-49. To answer this question, it surveyed circuits that had adopted that doctrine and the "[r]elated[]" consultant corollary. *Id.* at 548; *see Hunton & Williams v. DOJ*, 590 F.3d 272, 280 (4th Cir. 2010) (explaining that the "same rationale" justifies both theories). The court then rejected this entire body of law, holding that "Congress chose to limit the exemption's reach to 'inter-agency or intra-agency memorandums or letters,' … *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) (quoting 5 U.S.C. § 552(b)(5)). Relying on *Klamath*, the Sixth Circuit explained that the agency's "interest in confidential and frank communication with outsiders"—the same justification the FAA urges here, BIO 13, 24—could not alter FOIA's plain text. *Lucaj*, 852 F.3d at 548-49. This ruling directly conflicts with those of courts embracing the corollary.

The FAA is silent about the other splits implicated here. It does not dispute that to determine who falls within the consultant corollary, the Ninth and Tenth Circuits apply one test; the D.C., Second, and Fifth Circuits another; and the Fourth Circuit another still. Pet. 31-33. There is no coherence because the doctrine is wholly atextual.

Nor does the FAA address the courts of appeals' wildly different conclusions about the implications of *Klamath*. The Sixth Circuit interpreted *Klamath* to reject the consultant corollary; the Tenth Circuit thought that *Klamath* embraced the corollary; and the Ninth Circuit (and others) found that *Klamath* left the question open. Pet. 31; *see*, *e.g.*, *Pub. Emps. for Env't Resp. v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico,* 740 F.3d 195, 201 (D.C. Cir. 2014); *Tigue v. DOJ*, 312 F.3d 70, 78 n.2 (2d Cir. 2002).

This Court should grant the petition and resolve the entrenched confusion surrounding *Klamath* and the consultant corollary.

II. The Government's Defense Of The Corollary Is Atextual.

a. The FAA says "intra-agency memorandums" categorically includes work outsourced to contractors like APTMetrics. BIO 12. To get to this atextual interpretation of Exemption 5, the FAA presents a multi-step analysis that ultimately abandons the statute altogether.

First, "intra-agency memorandums are communications 'within' an agency." BIO 12. (We agree.)

Second, "communications 'within' an agency" are communications "among agency personnel." BIO 12. The phrase "among agency personnel" appears in the House Report, *see* H.R. Rep. No. 89-1497 at 31 (1966), but not in Exemption 5. On its face, the phrase suggests that communications with agency outsiders are *excluded*. *See* Pet. 26.

Third, according to the FAA, "agency personnel" 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.'" BIO 12 (emphasis added). The FAA says the text is simply ambiguous in this regard. *Id*.

And this is where the analysis really goes off the rails. "[A]gency personnel" does not include outside contractors. When FOIA actually uses the phrase "agency personnel" in 5 U.S.C. § 552(a)(4)(F)(i), it refers to *employees* of the agency (who make decisions about withholding documents). *Klamath* further refutes this theory—there, the Court treated "outside consultants" and "agency personnel" as separate categories of individuals. 532 U.S. at 10. If the opposite were true, then the administrative state would be almost limitless. An agency's personnel would include—in the government's view—virtually every private contractor and consultant the agency retains.

Nothing about the fact that an outside consultant like APTMetrics might help an agency to perform its

functions eliminates the external nature of that consultant's work. An agency retains such a consultant precisely because of its extra-agency expertise. Indeed, the FAA in this case publicly *touted* the fact that APTMetrics was an "outside expert[]" that "independently validated" its new behavioral assessment, Pet. App. 8a, recognizing the value of APTMetrics' separateness. That makes APTMetrics (at best) an outside contractor producing helpful extra-agency work—not "agency personnel" producing "intra-agency" communications.

Fourth, the FAA takes an additional leap away from the text. It argues that the Court should use "context" to resolve the purported statutory ambiguity. BIO 12-13. According to the FAA, Exemption 5 is meant to facilitate frank discussions, including of legal and policy matters. BIO 13. And because outside contractors may assist with that work, the term "intra-agency" should extend to such contractors' communications. *Id.* (relying on *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149-150 (1975)).

This could make sense only if the scope of covered privileges determines what is also intra-agency. But *Klamath* established the opposite: the "point" of Exemption 5 "is not to protect Government secrecy pure and simple." 532 U.S. at 9. Instead, the term "intra-agency" has "independent vitality," apart from what materials may be privileged. *Id.* at 9, 12; *see Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (a "fair reading" of a FOIA Exemption

cannot "*expand* [it] beyond what its terms permit" (quotation marks omitted)).[2]

Further, the FAA discounts important surrounding statutory language in focusing on this "context." As described in the petition (at 22-23), Exemptions 4 and 8 demonstrate that Congress knew exactly how to address outside actors when it wanted to—and that Congress's decision not to do so in Exemption 5 was deliberate.

The FAA's excruciating effort to reconcile its interpretation of "intra-agency" with the meaning of "agency records" underscores the corollary's textual bankruptcy. According to the FAA, there is no dissonance in the Ninth Circuit's position that APTMetrics can author and possess "intra-agency" documents which are not "agency records." BIO 22-23. The critical distinction, in the FAA's view, is that to be an "agency record," the FAA must also have "control" over the documents—and the FAA does not necessarily have the requisite control over APTMetrics' private files. *Id*. But even assuming that is correct, the fact that APTMetrics' work with the FAA is *outside* the FAA's control is a glaring sign that APTMetrics' work is *extra*-agency.

b. Beyond the text, the FAA invokes a supposed "longstanding and uniform interpretation of

---

[2] Nothing about *Sears* changes this. *Sears* examined the scope of privileges incorporated into Exemption 5—it never considered whether the phrase "intra-agency" imposed an additional limiting principle, as *Klamath* later held it does. *See Klamath*, 532 U.S. at 8.

Exemption 5." BIO 13. But this Court recently reversed a FOIA case in the face of a longstanding and uniform but nonetheless atextual interpretation. *See Argus Leader Media*, 139 S. Ct. at 2362-66. And it intervened to restore FOIA's plain meaning even when doing so "upset[] three decades of agency practice." *Milner v. Dep't of Navy*, 562 U.S. 562, 580 (2011).

Moreover, the FAA's characterization of the consultant corollary as a "uniform interpretation" is incorrect. The FAA starts with a 1967 memorandum by the Attorney General which adopts a broad, self-serving reading of Exemption 5 that includes consultants' work. BIO 13-14 (citing U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 35 (1967)). But the Attorney General's pro-withholding interpretation, written a year *after* FOIA was enacted, cannot possibly change what Congress thought (or said) at the time it created this pro-disclosure statute. For example, the contemporaneous Senate Report focused on the need for candor from "Government officials" communicating with their "superiors and coworkers." Pet. 26 (quoting S. Rep. No. 88-1219 at 13-14 (1964)). That does not include outsiders like APTMetrics.

The FAA's next support for its purportedly "uniform" interpretation of Exemption 5 is a decades-old dissenting footnote in *DOJ v. Julian*, 486 U.S. 1, 18 n.1 (1991) (Scalia, J., dissenting). *See* BIO 3-4, 9, 11, 14, 20, 22. There, Justice Scalia rejected the "most natural meaning of the phrase 'intra-agency,'" because, in context, he thought that meaning "excludes many situations where Exemption 5's purpose of

protecting the Government's deliberative process is plainly applicable." *Julian*, 486 U.S. at 18 n.1.

But this purpose-driven footnote predated *Klamath* and is incompatible with it. As discussed above, *Klamath* recognized a two-pronged analysis—whether a document is "inter-agency or intra-agency" and whether it is privileged—and both prongs have "independent vitality." 532 U.S. at 8, 12. That approach is inconsistent with Justice Scalia's expansive interpretation of the phrase "intra-agency," which was simply designed to maximize the scope of privileged documents covered. To be sure, *Klamath* acknowledged Justice Scalia's *Julian* footnote and reserved the possibility that the corollary might exist in some form. 532 U.S. at 9-10. Because *Klamath* did not reach that question, however, it did not grapple with whether the logic of the dissenting *Julian* footnote was compatible with its decision. It is not.

The FAA also insists the circuit courts have "uniformly" adopted the corollary. BIO 14. As discussed above, however, the Sixth Circuit's holding in *Lucaj* defies that consensus. *Supra* 3. Moreover, there is disagreement even among courts adopting the corollary about the applicable test. *Supra* 4.

Finally, the FAA suggests that Congress ratified the consultant corollary by amending FOIA in 2016 without changing the relevant text. BIO 14-15. However, this Court in 2001 explicitly left open the question of whether the consultant corollary exists at all. *Klamath*, 532 U.S. at 12. The only thing that Congress could have "ratified" is that uncertainty.

c. The FAA's core argument is that the "real-world context"—that agencies frequently use consultants—makes the corollary necessary. BIO 15. In support, the FAA highlights a series of governmental actions in the early 1960's designed to privatize a portion of the administrative state. *Id.* However, the fact that agencies were using outside contractors when Exemption 5 was enacted makes Congress's *silence* about such outside actors—in both Exemption 5 and the relevant legislative history—that much starker.

The FAA also points out that agencies may retain outside contractors in varying circumstances so long as those contractors do not perform "[]inherently governmental activities." BIO 16. But the fact that such contractors are restricted in the work they do is wholly consistent with Congress's choice not to categorically include them in Exemption 5.

The FAA next enumerates positions that an independent contractor might hold. BIO 17-18. The implication is that it would be imprudent to publicly release such contractors' communications. The FAA ignores, however, that there are many FOIA exemptions beyond Exemption 5 that protect sensitive material. Those include Exemption 1 (national security), Exemption 3 (exempted by statute), Exemption 4 (trade secrets), and Exemption 7 (law enforcement). *See* 5 U.S.C. § 552(b). The desire to withhold even more information exchanged with outside contractors is not a basis to rewrite the statute. And to the extent the government believes that certain specific actors are producing intra-agency documents, then it is the agency's burden to establish why. *Cf.* Pet. App. 60a.

But a categorical rule deeming outside contractors "agency personnel" is not the right answer.

Finally, the FAA warns that adopting a consultant corollary is necessary to protect a separate attorney corollary. BIO 23-24. This is a red herring. APTMetrics' consultants were not lawyers. And it makes no sense to adopt a far-reaching atextual rule to ward against the risk of facts that might be presented in a future case. Indeed, *Klamath* itself declined to do so by choosing not to reach every permutation of the doctrine. The government is free to argue if the question arises that something about the attorney-client relationship—perhaps the degree of control, fiduciary duties, the structure of the relationship, historical norms, and/or common-law agency principles—renders communications "intra-agency." Regardless, the much broader *consultant* corollary—which sweeps in the work of outside, independent, and even regulated parties—is utterly atextual and cannot stand.

III. This Case Is An Ideal Vehicle For The Court's Review.

The FAA asserts that this Court should deny the petition because there is no final judgment in the underlying litigation. BIO 27-28. However, "certiorari has been granted to review many nonfinal dispositions without any further explanation, even over dissenting objection that the case was not yet ready for review." 17 Charles A. Wright et al., *Federal Practice and Procedure: Jurisdiction and Related Matters* § 4036 (3d ed. 2021); *see* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 283 (10th ed. 2013)

(explaining that the "interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation").

This includes FOIA cases. *See FCC v. AT&T Inc.*, 562 U.S. 397, 400-02 (2011) (review at government's request after court of appeals remanded to apply Exemption 7(C)), *DOJ v. Landano*, 508 U.S. 165, 170-71 (1993) (review at government's request after court of appeals remanded for record supplementation regarding Exemption 7); *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 14 n.2 (1987) (review after court of appeals remanded to "conduct a new search" and "justify any withholding"); *CIA v. Sims*, 471 U.S. 159, 166 (1985) (review at government's request after court of appeals remanded to consider Exemption 3); C*hrysler Corp. v. Brown*, 441 U.S. 281, 289 (1979) (review after court of appeals remanded for record supplementation in "reverse-FOIA" case, given issue's "general importance" and "conflict in the Circuits"); *Adm'r, FAA v. Robertson*, 422 U.S. 255, 260 (1975) (review at government's request after court of appeals held Exemption 3 inapplicable but remanded to consider other exemptions).[3]

[3] More broadly, the Court frequently grants certiorari in an interlocutory posture presenting important legal questions. *See, e.g.*, *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776 (2018); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 959 nn.1, 2 (2017); *DHS v. MacLean*, 574 U.S. 383, 385-89 (2015); *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14,

The scope of the term "intra-agency" in Exemption 5 is a clear-cut and outcome-determinative legal issue, and no reason exists to await final judgment. The Ninth Circuit has conclusively ruled here that two of the three validation summaries at issue are privileged and intra-agency. Pet. App. 19a-22a. The FAA will thus argue that it is entitled to withhold those documents unless this Court grants certiorari and reverses on the "intra-agency" question.

The FAA's argument that Mr. Rojas might lose interest in these summaries if he obtains *other* documents on remand (BIO 27-28) is speculative and contrary to how FOIA works—FOIA makes no provision for the substitution of requested documents with other materials. Mr. Rojas has pursued the release of these documents for years. He and the rest of the public are entitled to them.

CONCLUSION

The Court should grant the petition.

18-22 (2004); *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 372, 377-78 (2004); *Hoffmann-La Roche v. Sperling*, 493 U.S. 165-69 (1989); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 381 (1970).

Respectfully submitted,

Robert M. Loeb
Thomas M. Bondy
Karim J. Kentfield
Monica Haymond
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

Naomi J. Scotten
Counsel of Record
Abigail Colella
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
nscotten@orrick.com

December 13, 2021