No. 21-

IN THE

Supreme Court of the United States

TONY B. JOBE, ESQUIRE,

Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

1. Whether FOIA's Exemption 5 includes an unwritten "consultant corollary," under which documents prepared by private, outside consultants are deemed "intra-agency memorandums or letters."

2. Whether any "consultant corollary" in FOIA Exemption 5 could ever render "intra-agency" the communications between an agency and (1) employees of a private, regulated company with an economic interest in the agency's actions; or (2) the representative of a foreign government.

RELATED PROCEEDINGS

United States Court of Appeals for the Fifth Circuit:

Jobe v. National Transportation Safety Board, No. 20-30033 (5th Cir. June 17, 2021) (panel opinion).

United States District Court for the Eastern District of Louisiana:

Jobe v. National Transportation Safety Board, No. 18-10547 (E.D. La. Nov. 18, 2019) (district court opinion).

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INTRODUCTION

A helicopter crashed, killing five people. The National Transportation Safety Board investigated the cause. Representatives of the helicopter's operator, two French manufacturers, and a French government agency joined the NTSB's investigation. Employees of these private, regulated parties and a foreign government helped to shape the NTSB's conclusions—which was standard agency practice.

Tony Jobe, a lawyer for a crash victim's family, sought some of these communications under the Freedom of Information Act. The NTSB refused. It withheld the requested records as "intra-agency" memorandums and letters under FOIA Exemption 5. In so doing, the agency treated its correspondence with representatives of (1) private parties implicated in its investigation and (2) an interested foreign government, exactly like internal U.S. government emails.

The law does not permit this outcome. The district court rejected it, holding that the phrase "intra-agency" in Exemption 5 excludes communications between self-interested, private parties and an agency investigating their accident. However, a divided Fifth Circuit panel reversed, allowing the NTSB to withhold these communications under FOIA Exemption 5.

The Fifth Circuit's decision embraces an atextual doctrine. Exemption 5 protects "inter-agency or intra-agency memorandums or letters" not available in civil discovery. 5 U.S.C. § 552(b)(5). As Judge Ho explained in dissent, "[i]f the terms 'inter-agency' and 'intra-

agency' exclude anything," it would have to be "government communications with employees of the very entity the government is trying to regulate." Pet. App. 22a.

The Fifth Circuit is not alone. Rather, it is one of seven circuit courts to adopt this judicially created "consultant corollary" to the text of FOIA Exemption 5. The corollary arose out of 1970's-era dicta in a D.C. Circuit footnote that contained no textual analysis whatsoever. Several other circuits reflexively fell in line. Under this "corollary," the work of private, outside consultants—now, even representatives of regulated companies and a foreign government—is deemed "intra-agency" for purposes of FOIA.

The Sixth Circuit disagrees, adhering to the text that Congress enacted and finding no basis to read "intra-agency" to encompass documents to or from outsiders. *Lucaj v. FBI*, 852 F.3d 541, 549 (6th Cir. 2017). And while the Ninth Circuit adopted the corollary in a recent en banc opinion, four dissenting judges there would have rejected this atextual rule. *Rojas v. FAA*, 989 F.3d 666 (9th Cir. 2021) (en banc). A petition for certiorari in *Rojas* is currently pending, No. 21-133.

In *Department of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), this Court rejected the most extreme version of the consultant corollary—holding that, "*at the least*, 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 (emphasis added). The Court concluded

more broadly that any self-interest by the consultant would be atypical. *Id.* at 12. But *Klamath* left open whether the corollary could properly exist in any form.

Now, even courts that have adopted the corollary in some form disagree about how *Klamath* affects its scope. The Ninth, Tenth, and D.C. Circuits have applied the corollary to consultants who lack personal or economic self-interest in the agency's actions. In contrast, the Fifth Circuit held that agency communications with a self-interested outsider (including a regulated party and a foreign government) may qualify as "intra-agency."

This Court's intervention is needed. It should grant certiorari and reject the atextual consultant corollary outright. Or, at minimum, the Court should hold that a self-interested party helping an agency to investigate its own conduct cannot possibly create "intra-agency" communications.

OPINIONS AND ORDERS BELOW

The Fifth Circuit's decision is reported at 1 F.4th 396 and reproduced at Pet. App. 1a-27a. The district court's decision is reported at 423 F. Supp. 3d 332 and reproduced at Pet. App. 28a-47a.

JURISDICTION

The Fifth Circuit entered judgment on June 17, 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:
>
> ***
>
> (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;
>
> ***

STATEMENT OF THE CASE

The NTSB investigates a helicopter crash pursuant to its statutory mandate.

A sightseeing helicopter crashed in Hawaii, killing the pilot and all four passengers. Pet. App. 4a. The

National Transportation Safety Board (NTSB or Board) investigated the accident, along with a representative from the Federal Aviation Administration (FAA). Pet. App. 5a.

The NTSB "investigate[s] … and establish[es] the facts, circumstances, and cause or probable cause of" all domestic civil aviation accidents. 49 U.S.C. § 1131(a)(1); *see* 49 C.F.R. §§ 800.3(a), 831.4 (2016).[1] While "not technically a regulator," the "whole purpose of its work is to help regulators like the FAA determine how best to regulate companies to ensure public safety." Pet. App. 24a (Ho, J., dissenting). The NTSB reports its findings on each accident investigated to the public and makes public safety recommendations to prevent or mitigate the effects of similar future accidents. 49 U.S.C. § 1131(e); *see* 49 C.F.R. §§ 800.3, 831.4.

The Board's "investigations are fact-finding proceedings" that do not determine the "rights or liabilities of any person." 49 C.F.R. § 831.4. The NTSB's probable cause determination—allocating fault for the accident—cannot be "admitted into evidence or used in a civil action for damages resulting from [the] matter mentioned in the report." 49 U.S.C. § 1154(b); *see* 49 C.F.R. § 835.2. However, the "factual accident report[]," which "contain[s] the results of the …

[1] Unless otherwise noted, citations to the NTSB regulations refer to the 2016 version, which were in effect at the time of the investigation and FOIA requests here. Pet. App. 4a n.1. The 2016 regulations are substantively similar in all relevant respects to the current regulations. *See* Investigation Procedures, 82 Fed. Reg. 29670, 29670 (June 29, 2017) ("reformatting" relevant regulations without altering their substance).

investigation"—namely, the facts of the accident—is admissible in a civil action. 49 C.F.R. § 835.2. Further, the FAA may adopt and implement the NTSB's safety recommendations, which may directly affect regulated entities. *See* 49 U.S.C. § 1135.

The outside parties implicated in the crash participate in the NTSB's investigation.

The NTSB does not investigate accidents alone. Its lead investigator (the investigator-in-charge) can add parties to the investigation when their products or employees are implicated. 49 C.F.R. § 831.11(a). In this case, the NTSB designated the private U.S. operator of the helicopter that crashed, Blue Hawaiian Helicopters, as a party to its investigation. Pet. App. 5a.

A French agency and two French companies were also involved. Under the Convention on International Civil Aviation, Apr. 4, 1947, 61 Stat. 1180, a foreign government may "appoint an accredited representative to participate in the investigation." Convention, Annex 13, § 5.18.[2] The foreign government may also appoint "advisers" to assist. *Id.* §§ 5.19, 5.20, 5.24. These parties may "participate in all aspects of the [NTSB] investigation, under the control of the

[2] The Convention established the International Civil Aviation Organization, which in turn adopted Annex 13. Pet. App. 5a-6a n.3. The version of Annex 13 in effect at the time of the investigation, and cited below, *id.*, is available at https://tinyurl.com/d3ku8zp5. This version has since been superseded but is not materially different from the current version.

[NTSB's] investigator-in-cha[r]ge." *Id.* § 5.25; *see* 49 C.F.R. § 831.22 (2017).

In this case, two French companies—Eurocopter and Turbomeca—manufactured the helicopter and its engine, respectively. Pet. App. 4a. Accordingly, France's accident investigation agency, the Bureau of Enquiry and Analysis for Civil Aviation Safety (BEA), joined the investigation as "an accredited representative" of the French government. Pet. App. 5a. The French agency in turn designated employees from Eurocopter and Turbomeca to participate in the investigation as technical advisers. Pet. App. 6a. These foreign companies were supervised by the French BEA, though subject to the investigator-in-charge's control. *Id.*; *see* Convention, Annex 13, §§ 5.24.1, 5.25.

The FAA also participated in the investigation. 49 C.F.R. § 831.21(a) (2017); Pet. App. 5a.

All participants in the investigation "were allowed to inspect the crash site, take notes, discuss accident scenarios with other team members, and perform other investigative activities." Pet. App. 6a. They gained timely and direct access to information from the crash site and the investigation, including documents and physical evidence. *See* 49 C.F.R. § 831.12.

Under the NTSB regulations, these party representatives could "submit to the [NTSB] written proposed findings," "proposed probable cause" determinations, and "proposed safety recommendations." *Id.* § 831.14(a).

Mr. Jobe submits information requests to the NTSB about the investigation.

In 2014, Tony Jobe, a lawyer representing the family of one of the crash victims, submitted an information request to the NTSB for documents relating to the helicopter crash. Pet. App. 6a. The agency converted the information request, filed under 49 C.F.R. §§ 837.1-.4, into a FOIA request. Pet. App. 6a. In response, the NTSB produced approximately 4,000 pages and withheld 2,349 pages under FOIA Exemption 5, claiming these were otherwise-privileged "inter-agency or intra-agency memorandums or letters." Pet. App. 6a-7a.

In 2016, Mr. Jobe submitted a new FOIA request to the NTSB for documents relating to the investigation's on-scene phase. Pet. App. 7a. In response, the Board released an additional 159 pages of the 2,349 pages it had initially withheld. Pet. App. 7a.

Mr. Jobe files suit under FOIA and the district court refuses to apply the "consultant corollary."

Mr. Jobe sued under FOIA to compel disclosure of 215 pages of documents from the on-scene phase of the crash investigation that the agency had withheld. Pet. App. 35a. These documents included communications between the NTSB and:

- The helicopter's American operator, Blue Hawaiian Helicopters;

- The helicopter's French manufacturers, Eurocopter and Turbomeca; and

- France's accident investigation agency, the BEA.

Pet. App. 34a, 41a-45a; *see* Pet. App. 48a-53a (*Vaughn* Index). The FAA was also involved in some of these communications between the NTSB and outside entities. *See* Pet. App. 48a-53a.

The NTSB replied that the documents were all privileged "intra-agency" communications shielded from disclosure by Exemption 5. In effect, the NTSB urged that each of these categories of documents should be treated exactly like communications among NTSB personnel for purposes of the Exemption. Pet. App. 41a.

The district court granted in part and denied in part the parties' cross-motions for summary judgment. Pet. App. 47a. It explained that Exemption 5 requires, as a threshold matter, that documents be "inter-agency or intra-agency memorandum[s]." Pet. App. 38a (quoting 5 U.S.C. § 552(b)(5)). And FOIA expressly defines the word "agency" as an "authority of the Government of the United States." 5 U.S.C. §§ 551(1), 552(f)(1). The district court held that documents exchanged among the NTSB and "outside representatives" could not qualify. Pet. App. 41a-45a.

The court acknowledged that the Fifth Circuit had previously adopted the so-called "consultant corollary" to Exemption 5, which deems communications between an agency and outside

consultants "intra-agency" under the Exemption. Pet. App. 38a. It relied on this Court's prior decision in *Klamath* to hold, however, that the corollary does not apply to the self-interested parties here. It reasoned that an "agency's consultant" must be "disinterested and not 'represent[ing] an interest of its own, or the interest of any other client, when it advises the agency that hires it.'" Pet. App. 42a (quoting *Klamath*, 532 U.S. at 12, n.4). Here, in contrast, the private companies' employees were "the epitome of 'self-interested' individuals" because the companies involved in the crash had an inherent stake in the investigation's outcome. Pet. App. 42a.

The court explained that although the NTSB selected these private companies to assist in the investigation, they "also were undoubtedly there to collect information to prepare for inevitable future litigation" and thus "received a significant benefit" from being there. Pet. App. 42a-43a. Unlike the families of the accident victims, the companies—simultaneously "defendants in civil litigation" related to the fatal crash—had access "to the entire government investigation file and were given editorial license to the NTSB's draft and official" reports. Pet. App. 43a.

The district court thus ordered the NTSB to produce to Mr. Jobe the documents it had improperly withheld under Exemption 5. Pet. App. 44a-45a, 47a. This included communications between NTSB personnel, the FAA, the party representative for Blue Hawaiian, the accredited representative for the French BEA, and the BEA's technical advisers from French manufacturers Eurocopter and Turbomeca.

See Pet. App. 47a; Pet. App. 48a-53a (*Vaughn* Index). That order was stayed pending the NTSB's appeal. Pet. App. 8a.[3]

A divided panel of the Fifth Circuit reverses, holding the NTSB's communications with interested outside parties are "intra-agency."

In a split decision, the Fifth Circuit held that the consultant corollary to Exemption 5 applies. Pet. App. 2a-3a. Like the district court, the panel explained that the Fifth Circuit's precedents had already recognized the "consultant corollary" as extending the scope of Exemption 5 to communications between an agency and outside consultants. Pet. App. 2a, 11a-13a; *see Hoover v. U.S. Dep't of the Interior*, 611 F.2d 1132, 1137-38 (5th Cir. 1980); *Wu v. Nat'l Endowment for Humans.,* 460 F.2d 1030, 1032 (5th Cir. 1972). As such, the panel did "not enter into th[e] [existing] debate" concerning the "textual basis" and validity of the "corollary" itself. Pet. App. 12a.

According to the majority, the phrase "intra-agency" 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." Pet. App. 11a (quoting

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[3] The district court also concluded that the NTSB produced an adequate *Vaughn* Index addressing the withheld records, and that the NTSB reasonably segregated releasable information. Pet. App. 45a-47a. Furthermore, the court held that communications strictly between NTSB employees were exempt from disclosure under Exemption 5. Pet. App. 44a. Mr. Jobe did not appeal these rulings, and they are not at issue here.

Pub. Citizen, Inc. v. DOJ, 111 F.3d 168, 170 (D.C. Cir. 1997)). Holding that the corollary applied to the facts of this case, the panel majority reasoned that the district court had read *Klamath* "too broadly." Pet. App. 13a. The majority recognized that "*Klamath* contains language suggesting that self-interest of some kind may prevent outside experts from being deemed consultants." Pet. App. 19a. However, it determined that "[w]hatever that threshold might be, … it has not been reached here." Pet. App. 19a.

To reach this conclusion, the majority relied on "the overall context of the agency process," Pet. App. 20a—particularly, the NTSB's direction and supervision of the investigation and the possible loss of party status should a party representative violate NTSB regulations. *See* 49 C.F.R. § 831.11(a)(2), (b). It concluded that the private companies implicated in the helicopter crash were sufficiently like the NTSB for their communications to qualify as "intra-agency" under Exemption 5. Pet. App. 19a-20a. While a "close question," the court thus held that the helicopter's operator and foreign manufacturers were consultants whose communications could be deemed "intra-agency." Pet. App. 10a. Accordingly, the majority remanded the case to the district court to address whether the documents at issue were privileged, and thus covered by Exemption 5.

Judge Ho dissented. Pet. App. 22a-27a. "If the terms 'inter-agency' and 'intra-agency' exclude anything," he explained, it would have to be "government communications with employees of the very entity the government is trying to regulate." Pet. App. 22a. In particular, the terms must exclude "an

exchange between a government agency and the employee of a company with an interest in the outcome of that agency's actions." Pet. App. 22a.

Judge Ho further explained that, under this Court's decision in *Klamath*, the consultant corollary cannot cover agency communications with a self-interested, outside party. Pet. App. 22a (stating that a "consultant does not represent an interest of its own" (quoting *Klamath*, 532 U.S. at 11)). And it is "obvious[]," Judge Ho noted, that the regulated companies at issue in this case had "an interest in the agency's work" and the scope and outcome of the NTSB's investigation—after all, the employees were in effect "seconded to the agency … to work on safety incidents *specifically* involving their companies." Pet. App. 25a.

Judge Ho explained that Congress may well decide as a policy matter that agency communications with "designated experts employed by interested companies" should be exempted from a mandatory disclosure obligation. Pet. App. 25a. But there is "no basis" in "the plain text of Exemption 5 … for extending [a] consultant corollary to the interested regulated entities who participate in an NTSB investigation." Pet. App. 26a.

REASONS FOR GRANTING THE WRIT

I. The Court Should Reject The Consultant Corollary And Restore Exemption 5's Plain Meaning.

A. The courts of appeals are split about whether Exemption 5 includes a consultant corollary.

The circuits are split about 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*, 460 F.2d at 1032 (relying on *Soucie*); *Lead Indus. Ass'n v. OSHA*, 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 did not resolve whether any such corollary exists. The Department of the Interior argued that it could withhold its communications with an Indian tribe as "intra-agency" under Exemption 5. This Court acknowledged that "neither the terms of [Exemption 5] nor [FOIA's] statutory definitions say anything about communications with outsiders." *Klamath*, 532 U.S. at 9. But the Court recognized that "some Courts of Appeals" had adopted a consultant corollary. *Id*. After surveying the law, the Court held that the fact that the Tribal parties "communicat[ed] … with their own, albeit entirely legitimate, interests in mind," "alone distinguishe[d] [their] communications" from the "typical" consultant corollary case. *Id.* at 12 & n.4. And it reasoned that the corollary—if it existed at all—could not encompass the communications at issue there: those by self-interested parties advocating before a government agency for a decision adverse to the interests of their competitors. *Id*. at 11-16. The Court left open whether a consultant corollary might exist in some form.

Following *Klamath*, the Fourth and Tenth Circuits adopted the corollary without any textual justification. 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 outside consultant that "functioned akin to an agency employee." *Stewart v. U.S. Dep't of the Interior*, 554 F.3d 1236, 1245 (10th Cir. 2009).

A sharply divided Ninth Circuit, sitting en banc, recently joined this trend by relying on Exemption 5's perceived purpose to rewrite its plain text. *See Rojas*, 989 F.3d at 672-73 ("[C]ontext and purpose suggest that Congress had in mind a somewhat broader understanding of 'intra-agency.'"), *petition for cert. pending*, No. 21-133. Four dissenting judges in the en banc court rejected the majority's efforts to "pick[] up its drafting pen" to "bestow[] on us a supposedly better law," *id.* at 693 (Bumatay, J., dissenting), by "cut[ting] out some words and past[ing] in others," *id.* at 689 (Wardlaw, J., dissenting) (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 573 (2011)).

In this case, the Fifth Circuit expressly followed its earlier precedent adopting the consultant corollary. Pet. App. 2a-3a, 11a-13a (citing *Hoover*, 611 F.2d at 1137-38; *Wu*, 460 F.2d at 1032). It noted that it was not wading into the debate over whether such a corollary reflects a legitimate construction of FOIA's text to begin with. Pet. App. 12a.

On the other side of the issue, the Sixth Circuit limits "intra-agency" to its plain meaning. *Lucaj*, 852 F.3d at 547-49. In *Lucaj*, the FBI argued that documents drafted by foreign countries working with the FBI 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. *Rojas*, 989 F.3d at 686 (Wardlaw, J., dissenting). Despite acknowledging the "concern of our sister circuits … that agencies have a strong interest in confidential and frank communication with outsiders," 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 548-49 (emphasis added). Accordingly, the Sixth Circuit refused to extend Exemption 5 to encompass communications between a U.S. government agency and an outside entity. *Id.*[4]

The circuit split is now firmly developed. On one side, the First, Second, Fourth, Fifth, Ninth, Tenth, and D.C. Circuits have embraced the so-called consultant corollary, going "beyond the text" of Exemption 5. *Pub. Emps. for Env't Resp. v. U.S. Section, Int'l*

[4] The majority below asserted that "[n]o circuit has rejected the consultant corollary," and that *Lucaj* only "cast[] doubt, in dicta, on the 'textual justification' for the corollary in [a] case addressing a related Exemption 5 doctrine" (known as the common-interest doctrine). Pet. App. 12a. But the Sixth Circuit's reasoning precludes the corollary because it excludes outsiders from being read into the term "intra-agency." *Lucaj*, 852 F.3d at 549.

Boundary & Water Comm'n, U.S.-Mexico, 740 F.3d 195, 201 (D.C. Cir. 2014) (Kavanaugh, J.). In contrast, the Sixth Circuit has rejected this approach. To be sure, the split is lopsided. But the entrenched, widespread adoption of this atextual rule and the continued recurrence of the issue only highlights the need for this Court's intervention.

That is particularly true because the lower courts' disagreement about the corollary rests, in part, on their conflicting readings of *Klamath*. The Tenth Circuit, for its part, misunderstood *Klamath* to "recogniz[e] that Exemption 5 extends to government agency communications with paid consultants." *Stewart*, 554 F.3d at 1244. In other words, it read *Klamath* to affirmatively endorse the corollary. 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. And the Ninth Circuit adopted a third position: that *Klamath* "did not endorse the consultant corollary," but "define[d] the outer boundaries of Exemption 5's reach." *Rojas*, 989 F.3d at 674. Where, as here, the "implications" of "a prior Supreme Court opinion … are in need of clarification," Stephen M. Shapiro et al., *Supreme Court Practice* 254 (10th ed. 2013), this Court's review is necessary.

B. The consultant corollary is an atextual, purpose-driven judicial construction.

The atextual approach to Exemption 5 is wrong, and this Court should grant the petition to restore 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 an atextual, purpose-driven construction of Exemption 5.

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

The Fifth Circuit held that the term "intra-agency" "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.'" Pet. App. 11a (quoting *Pub. Citizen*, 111 F.3d at 170). This interpretation is incompatible with the statutory text and led directly to the stilted outcome in this case.

a. 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." *Rojas*, 989 F.3d at 685 (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 has two prongs, and both prongs have "independent vitality." 532 U.S. at 8, 12. This case concerns the first requirement: that the document in question be "inter-agency or intra-agency."

To start, none of the private, regulated companies at issue here—Blue Hawaiian, Eurocopter, and Turbomeca—is an "agency" under FOIA. Nor is the French BEA. "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 suggests that foreign governments or outside representatives—let alone employees of the private, regulated companies implicated in the accident being investigated—are part of a federal agency.

The word "intra" cannot accommodate these outside parties' 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 (1967).

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." *Rojas*, 989 F.3d at 684 (Wardlaw, J., dissenting). Accordingly, "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." *DOJ v. Julian*, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting). Communications with or between outside entities in contrast, do not fall within the Exemption, because outside parties, such as the private company employees here and the representative of a foreign government, "are, by definition, not 'within' a federal agency." *Rojas*, 989 F.3d at 685 (Wardlaw, J., dissenting).[5]

b. 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*, where "three dissenting justices suggested in

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[5] The government's own *Vaughn* Index illustrates how unnatural its reading is. The index describes the documents the NTSB withheld under Exemption 5. *See* Pet. App. 48a-53a. Tellingly, the agency differentiated (1) documents exchanged "within NTSB," from (2) documents "from" the NTSB "to" party representatives. *See* Pet. App. 50a. The *Vaughn* Index never describes documents exchanged with these outside parties as "within" the agency.

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.'" *Rojas*, 989 F.3d at 685-86 (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, it explained, "the intra-agency condition excludes, *at the least*, communications to or from an interested party seeking a Government benefit at the expense of other applicants." *Id.* at 12 n.4 (emphasis added); *see also id.* at 15.

While *Klamath* left the 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, for example, the NTSB withheld documents authored by employees of Blue Hawaiian, Eurocopter, and Turbomeca—private, regulated companies in the United States and France—discussing a fatal

helicopter crash in which their own companies were involved. These parties are entirely separate from, and independent of, the U.S. government. Correspondence to or from such parties is not "intra-agency."

c. Exemption 5's broader statutory context further confirms this plain-text understanding. The surrounding FOIA exemptions demonstrate that Congress knew how to explicitly protect communications with outsiders when it elected to do so. 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 chose not to use that language in Exemption 5. *See* 5 U.S.C. § 552(b)(5).

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

Despite Exemption 5's explicit limitation to "inter-agency or intra-agency" documents, many courts have held that agency communications with parties outside the U.S. government were included. How have the courts "justif[ied] this judicial rewrite? It's *purpose* all the way down." *Rojas*, 989 F.3d at 693

(Bumatay, J., dissenting). But this approach "is a relic from a bygone era of statutory construction," *Argus Leader*, 139 S. Ct. at 2364 (quotation marks omitted), and it misinterprets the purpose of Exemption 5 even on its own terms.

a. At every level, FOIA's statutory purpose conflicts with the consultant corollary. At the highest level, "disclosure, not secrecy, is the dominant objective of the Act." *Klamath*, 532 U.S. at 8; *see* Pet. App. 26a-27a (Ho, J., dissenting). "In FOIA, after all, a new conception of Government conduct was enacted into law, a general philosophy of full agency disclosure." *Klamath*, 532 U.S. 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." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (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." *Rojas*, 989 F.3d at 689 (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. *Klamath*, 532 U.S. at 8. There is "no textual justification for draining the first condition of independent vitality." *Id.* at 12.

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 only confirm that the consultant corollary misunderstands Exemption 5's purpose. 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—much less employees of private, regulated companies or representatives of foreign governments.

b. The Fifth Circuit reasoned that outside entities like those at issue here are "technical personnel" who act "enough like the [NTSB's] own personnel to justify calling their communications 'intra-agency' under Exemption 5." Pet. App. 19a-20a (quoting *Klamath*, 532 U.S. at 12). They should thus "be able to give their judgments freely … without fear of publicity'"—which, the court surmised, they might be hesitant to do if their communications were subject to disclosure. Pet. App. 20a (quoting *Wu*, 460 F.2d at 1032). But what does it mean to be "enough like" agency personnel to "justify" treating the document as intra-agency?

This amorphous and boundless inquiry asks how much a court can stretch the text to accommodate its own atextual policy goals. The answer is not at all. The Fifth Circuit's analysis reads outside actors into a statute even though the text and history exclude them.

This purpose-driven approach is a "bald assertion of an unspecified and hence unbounded judicial power to ignore what the law says." *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 [court] sees it—version of the law." *Rojas*, 989 F.3d at 693 (Bumatay, J., dissenting) (quoting *Reading Law* 19). Stretching the text of the Exemption to accommodate purported policy concerns is particularly improper given *Klamath*'s teaching that the 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.

Indeed, "nothing 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. *Rojas*, 989 F.3d at 689 (Wardlaw, J., dissenting). Congress "has proven itself more than willing to do [so]." *Id.* (citing examples).

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

A. The courts of appeals disagree about whether self-interested parties fall within the corollary.

Even those circuits accepting the atextual consultant corollary differ about how *Klamath* affects the corollary's scope—i.e., whether the corollary covers communications with self-interested parties. The text of Exemption 5—which excludes the corollary altogether—provides no guidance, explaining the discordance that has ensued. These differing interpretations of *Klamath* call for this Court's clarification.

Several courts recognizing the corollary have found a consultant's independent stake in the agency's actions disqualifying. Most recently, the en banc Ninth Circuit attempted to impose such a limit.

Relying on *Klamath*, it held that for the corollary to apply, the consultant "must 'not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it.'" *Rojas*, 989 F.3d at 675 (quoting *Klamath*, 532 U.S. at 11). Likewise, the Tenth Circuit has applied the corollary only when the consultant lacked a "personal or economic stake in the outcome" of the agency's action. *Stewart*, 554 F.3d at 1245.

The D.C. Circuit has similarly observed that "[i]n the wake of *Klamath*," it had "confined the consultant corollary to situations where an outside consultant did not have its own interests in mind." *Public Employees*, 740 F.3d at 201-02 (Kavanaugh, J.); *see also McKinley v. Bd. of Governors of the Fed. Rsrv. Sys.*, 647 F.3d 331, 337 (D.C. Cir. 2011) (consultant "[did] not represent an interest of its own, or the interest of any other client, when it advise[d]" the agency (alterations in original)).[6]

In contrast, the Fifth Circuit does not find such self-interest disqualifying. It has now held that an agency's communications with self-interested,

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[6] Prior to *Klamath*, the D.C. Circuit had applied the corollary to senators and former presidents with personal interests in the agency's actions. *See Pub. Citizen*, 111 F.3d at 169-72; *Ryan*, 617 F.2d at 789-91. *Klamath* explicitly called those cases into question. 532 U.S. at 12 n.4. Following *Klamath*, the D.C. Circuit left open the question of whether the corollary allows such self-interest. *See Nat'l Inst. of Mil. Just. v. U.S. Dep't of Def.*, 512 F.3d 677, 685 (D.C. Cir. 2008). The court has not directly addressed the vitality of this element of *Ryan* or *Public Citizen*—for example, whether those cases are now confined to their facts involving current and former U.S. government officials.

regulated parties qualify as "intra-agency" under the consultant corollary. According to the Fifth Circuit, "*Klamath* does not stand for the broad principle that a consultant's 'self-interest' always excludes it from Exemption 5." Pet. App. 2a. And it reasoned that, whatever the "threshold" for disqualifying self-interest "might be," it "has not been reached" in this case. Pet. App. 19a.

Thus, in the Fifth Circuit, the employees of self-interested companies involved in a fatal helicopter crash, and the representative of an interested foreign government, can create "intra-agency" communications with an agency investigating the crash. Judge Ho, in dissent, agreed with the Ninth Circuit—stating that "[c]ommunications involving an interested party … would not be subject to Exemption 5 … according to *Klamath*." Pet. App. 23a.

The disagreement following *Klamath* is stark: The Ninth, Tenth, and D.C. Circuits have applied the corollary only to outsiders who, in their assessments, lack personal or economic self-interests. In contrast, the Fifth Circuit does not consider self-interest to be disqualifying. Rather, in the Fifth Circuit's view, the consultant corollary applies unless and until some unspecified level of self-interest is reached. This disagreement about the corollary's scope is unsurprising. Because the corollary is based on policy considerations rather than statutory text, "courts lack the normal guideposts for ascertaining its coverage." *Milner*, 562 U.S. at 577 n.8 (rejecting similarly atextual approach to Exemption 2).

Only this Court can resolve these conflicting interpretations of *Klamath* by clarifying the meaning of its earlier decision.

B. An agency's communications with representatives of self-interested, regulated companies and a foreign government are not "intra-agency."

As shown above, the "consultant corollary" is an improper, atextual add-on to begin with. But even if some form of the corollary were appropriate, no tenable version could extend to communications with self-interested, regulated parties and an interested foreign government.

The panel majority concluded that—whatever the degree of self-interest here—it did not reach a disqualifying "threshold." Pet. App. 19a. Instead, the outside participants were "technical personnel" who acted "enough like the [NTSB's] own personnel to justify calling their communications 'intra-agency' under Exemption 5." Pet. App. 19a-20a (quoting *Klamath*, 532 U.S. at 12). As discussed above, this analysis lacks any textual foundation.

Further, even assuming the text supported such a construction, the outside parties in this case are nothing "like" agency personnel. The representatives and advisers are on the payroll of outside parties with an economic interest in the outcome of the NTSB's investigation. They represent several regulated companies—including two foreign companies—involved in a multiple-fatality helicopter crash. And one represents the interests of the French government. These parties

were weighing in on an agency's investigation of who was at fault. They could not possibly be classified as disinterested parties who "function[ed] just as an [NTSB] employee would be expected to do." *Klamath*, 532 U.S. at 11. Rather, these were extra-agency actors with their own, outside vantage points and an inherent self-interest. Documents by or to such parties cannot "possibly constitute" "intra-agency" work, Pet. App. 22a (Ho, J., dissenting)—even if agency communications with disinterested paid consultants somehow could.

Indeed, as the district court explained, representatives of private companies implicated in an accident under investigation are "the epitome of 'self-interested' individuals." Pet. App. 42a. For example, NTSB "factual accident reports," which contain "the results of the investigator's investigation of the accident," are admissible in civil litigation. 49 C.F.R. § 835.2. Private companies involved in a crash thus have a "clear interest" in "steering" the investigation towards favorable factual findings. Pet. App. 23a (Ho, J., dissenting). Such communications concerning draft factual reports are a category of withheld documents challenged here. *See* Pet. App. 48a-53a (*Vaughn* Index).

Further, the representatives of private companies participating in the investigation are also self-interested because the NTSB's conclusions concerning an accident's "probable causes"—while not admissible in civil litigation—are made publicly available. *See* 49 C.F.R. § 801.32. An official government finding that a manufacturer or operator was responsible for a crash could cause a significant "market penalty." Nancy L.

Rose, *Fear of Flying? Economic Analysis of Airline Safety*, J. Econ. Persps., Spring 1992, at 89. It could also prompt private lawsuits, and "influence litigation strategies." Eric Fielding et al., *The National Transportation Safety Board: A Model for Systemic Risk Management*, J. Inv. Mgmt., 1st Quarter 2011, at 26 n.10.

Significantly, even the Fifth Circuit did not hold that the private companies and the French government here lacked *any* interest in the investigation. *See* Pet. App. 24a (Ho, J., dissenting) ("No one disputes that the NTSB's findings can have a meaningful impact on the companies, and that the companies therefore have a genuine interest in the content of the agency's findings."). Rather, the court concluded that "Blue Hawaiian, Eurocopter, and Turbomeca's self-interest" did not reach the "threshold" to "disqualif[y] them as consultants for purposes of Exemption 5." Pet. App. 19a. The majority's struggle to rationalize the "right" level of self-interest that allows an outside entity to be deemed "intra-agency" only underscores the corollary's fundamentally atextual nature.

The majority relied on a belief that there are sufficient guardrails in place to manage the participants' self-interest. It found significant that the NTSB's probable cause determinations are not admissible in civil litigation. Pet. App. 2a-3a, 15a-16a n.11. As described above, however, the NTSB's factual accident reports are admissible, *see* 49 C.F.R. § 835.2, and there are significant incentives for the outside parties to seek to influence the investigation.

The majority also noted that all "parties to NTSB investigations," and their disclosures, "are under the control of the agency-appointed [inspector-in-charge]." Pet. App. 16a (citing 49 C.F.R. §§ 831.8; 831.11(a)(2)). And it observed that a representative may lose its party status if it violates NTSB regulations. Pet. App. 17a (citing 49 C.F.R. § 831.11(a)(2)). Further, the majority found that parties must sign a Certification of Party Representative stating that their primary role is "to facilitate the NTSB's investigation and ultimate goal of advancing transportation safety," not to "prepare for litigation or pursue other self-interests." *Id.*

As Judge Ho explained, however, while it may be laudable for the NTSB to take steps to "insulate itself from being captured by industry interests," "that just proves [the] point": The NTSB's "regulations and restrictions are necessary precisely because these employees remain on the payroll of the regulated companies and expect to return to their employers when" the investigation is "completed." Pet. App. 25a. "It would be pure fiction for a government agency like the NTSB to expect these designated private employees to ignore their sense of loyalty and duty to their employers." *Id.* "To the contrary, that's why the agency needs regulations to try to mitigate the impact of the employees' contrary interests." *Id.* In other words, the NTSB employs measures to manage outside self-interests precisely because communications to and from those entities are *not* "intra-agency."

The majority also believed that the types of interests at issue differentiate this case from *Klamath*. It reasoned that these are "fact-finding proceeding[s]

with no adverse parties," and that the private companies here "are not making claims that are necessarily adverse to those of the crash victim's families"—in contrast to the tribes in *Klamath*. Pet. App. 15a (quotation marks omitted). But *Klamath* did not hold that *only* such conflicts of interest preclude the corollary's application. Rather, this Court found that the self-interest of the tribes at issue "*alone* distinguishe[d] [their] communications" from the typical consultant corollary case. 532 U.S. at 12 (emphasis added).

In any event, even if parties needed to have such independent, adverse interests to be disqualified under *Klamath*, that is the case here: the company representatives had "a clear interest" in "steering the NTSB" towards conclusions that were "adverse" to other parties, Pet. App. 23a-24a (Ho, J., dissenting)—implicating the very sort of "zero-sum competition" this Court found disqualifying in *Klamath*, *see* Pet. App. 15a-16a.

Fortunately, the statute as actually written calls for no such inquiries into the degree of an outsider's interest in and influence over an agency's investigation. The term "intra-agency" easily excludes the kinds of communications at issue here. By eliminating the atextual consultant corollary, this Court can put this long-lasting confusion to rest.

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

At the center of this dispute is whether courts can rewrite a statute to treat communications between an

agency and an outside entity with a powerful interest in the agency's actions as internal government communications. If the answer is yes, then agency capture is now enshrined in law.

This Court should intervene. It already considered the judicially created consultant corollary once, in *Klamath*, paring the corollary back from its most extreme form. But it did not reach the broader question of whether the corollary properly exists at all. 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 issue is also recurring. Only six months before *Jobe* was decided, the Ninth Circuit, sitting en banc, adopted the consultant corollary in *Rojas*. And in the last three years alone, numerous district court opinions allowed agencies to withhold documents by applying the consultant corollary to Exemption 5.[7] We

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[7] *See, e.g.*, *New York Times Co. v. Dep't of Health & Hum. Servs.*, 513 F. Supp. 3d 337, 350 (S.D.N.Y. 2021), *appeal pending,* No. 21-211 (2d Cir. Feb. 3, 2021); *Jud. Watch, Inc. v. U.S. Dep't of State*, No. CV 15-687, 2021 WL 3363423, at *8 (D.D.C. Aug. 3, 2021); *Laws.' Comm. for C.R. Under L. v. U.S. Dep't of Just.*, No. 18-CV-167, 2020 WL 7319365, at *26 (D.D.C. Oct. 16, 2020), *report and recommendation adopted*, No. CV 18-167, 2021 WL 1197730 (D.D.C. Mar. 30, 2021); *New York Times Co. v. U.S. Dep't of Just.*, No. 19 CIV. 1424, 2021 WL 371784, at *20 (S.D.N.Y. Feb. 3, 2021); *Am. Oversight v. U.S. Dep't of the Treasury*, 474 F. Supp. 3d 251, 265, 274 (D.D.C. 2020); *Democracy Forward Found. v. Ctrs. for Medicare & Medicaid Servs.*, No. CV 18-635, 2020 WL 1508508, at *1, *4 (D.D.C. Mar. 30, 2020);

can expect this trend to continue, given that Exemption 5 is "one of the most important and frequently invoked [FOIA] exemptions." *Julian*, 486 U.S. at 22 (Scalia, J., dissenting); *see* 33 Charles A. Wright, *Federal Practice & Procedure* § 8441 (1st ed.) (courts continually recognize Exemption 5's exceptional importance because of the frequency with which agencies invoke it).

The circumstances of this case only heighten the need for review. The NTSB will now confidently assert that its communications with private, regulated parties can create "intra-agency" communications under Exemption 5. That means outside entities helping to investigate their own fatal plane, train, highway, pipeline, and marine accidents across the country can potentially participate in and influence the NTSB's safety investigations, and yet largely evade public scrutiny. *See* 49 C.F.R. § 831.2. And the Fifth Circuit's decision may encourage other agencies to start claiming their communications with regulated parties are "intra-agency" under the corollary. The result is not only contrary to the goals of FOIA, but a dangerous expansion of the administrative state. *See generally* Amicus Br. of Cato Institute at 5-19, *Rojas v. FAA*, No. 21-133 (S. Ct. Sept. 1, 2021).

Pavement Coatings Tech. Council v. U.S. Geological Surv., 436 F. Supp. 3d 115, 129-30 (D.D.C. 2019), *aff'd in part and rev'd in part*, 995 F.3d 1014 (D.C. Cir. 2021); *Heffernan v. Azar*, 417 F. Supp. 3d 1, 15-18 (D.D.C. 2019); *Ctr. for Biological Diversity v. U.S. Env't Prot. Agency*, 369 F. Supp. 3d 128, 135-39 (D.D.C. 2019); *Elec. Priv. Info. Ctr. v. DOJ*, 320 F. Supp. 3d 110, 120-21 (D.D.C. 2018); *Jud. Watch, Inc. v. U.S. Dep't of State*, 306 F. Supp. 3d 97, 106-16 (D.D.C. 2018).

Without public disclosure of the documents that outsiders—including interested parties—generate and share with agencies (and documents from agencies to outsiders), there is little possibility for oversight or democratic accountability in this context. Instead of being "a tool used to probe the relationship between government and business," FOIA, under the Fifth 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, as illustrated by this case, 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.*

This Court has repeatedly taken up cases involving Exemption 5 to resolve disagreements. *See, e.g.*, *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777 (2021); *Klamath*, 532 U.S. at 5; *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). It should do so once again here.

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

This case presents an ideal vehicle to resolve both circuit conflicts at issue here and to restore the plain text of Exemption 5. The questions presented were the explicit and exclusive basis for the decisions below. The Fifth Circuit held that the first condition of Exemption 5 is satisfied because: (1) the Exemption

contains a "consultant corollary," and (2) the corollary encompasses agency communications with outside, self-interested parties. Pet. App. 10a-20a. The Fifth Circuit then remanded for the district court to evaluate Exemption 5's second condition—whether the disputed documents would be privileged in discovery. Pet. App. 20a-21a.

If this Court grants review and reverses as to either question presented, then a remand will no longer be warranted. If the Court reverses as to the first question—concluding that "intra-agency" communications do not encompass agency exchanges with outside entities—then Exemption 5 will not apply. The same is true if the Court reverses on the second question by holding that Exemption 5 at a minimum excludes agency communications with self-interested, outside parties. Because the Exemption's applicability is squarely presented and the questions presented are outcome-determinative, this is an ideal vehicle to consider both issues.

CONCLUSION

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

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