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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Ilya Shapiro
William M. Yeatman*
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

J. Carl Cecere
Counsel of Record
CECERE PC
6035 McCommas Blvd.
Dallas, TX 75206
(469) 600-9455
ccecere@cecerepc.com

*Admitted to the D.C. Bar under D.C. App. R. 46-A. Supervised by D.C. Bar member.

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QUESTION PRESENTED

Whether the Ninth Circuit, in a sharply divided en banc decision, erred by holding that "intra-agency memorandums or letters" in FOIA's Exemption 5 encompasses documents prepared by a private, outside consultant.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual *Cato Supreme Court Review*.

This case concerns Cato because it concerns the critical role played by the Freedom of Information Act in providing transparency and public accountability in agency decision-making, even when—and especially when—those decisions are outsourced to unaccountable private contractors.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[T]he great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." See Federalist No. 51, 322 (James Madison) (Clinton Rossiter ed., 1961). This demand for governmental self-control must be addressed in any viable system of self-government. And in the American system, the Framers sought to address it by baking multiple mechanisms of

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[1] Counsel for all parties received timely notice of *amicus*'s intent to file this brief and have consented thereto. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* or its members made a monetary contribution to fund its preparation or submission.

accountability into our constitutional structure, from the rules we follow in choosing our elected representatives to the system of checks and balances by which individual liberty is protected by "ambition being made to counteract ambition." *Id*. These systems were all designed to force government officials to remain accountable to the governed and enlist every government official in holding others in check.

The growth of the administrative state has tested the durability of those constitutional accountability systems. As administrative agencies have grown in size and power, assuming ever-growing control over Americans' daily lives, the need for accountability has assumed greater importance. But the agencies themselves have become *less* accountable.

Yet even as the dangers from the administrative state have challenged the Constitution's ability to handle them, Congress has stepped in with a statutory accountability assist, in the form of the Freedom of Information Act, Pub. L. 89-554, 80 Stat. 383 (1966). FOIA provides a measure of assurance that the American government continues to do business as the American public expects, by making use of the Framers' insight that "'a dependence on the people' would be the 'primary controul on the government.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477, 501 (2010) (quoting Federalist No. 51) (cleaned up). FOIA arms private citizens with the best tool for them to conduct their own oversight: information. That informational access allows everyday Americans, nonprofits, and the press to require disclosure of officials' dealings, ensuring transparency in public policy and accountability for policymakers.

Protecting FOIA is thus critical to ensure that the American people can keep their government officials in check. And FOIA is doubly important in ensuring the government's private consultants keep properly focused on the people's business.

Yet the court below hobbled FOIA's ability to ensure transparency and accountability in an area where they are needed most: the government's interactions with its outside private consultants. The threat to individual liberty presented by the administrative state has only accelerated as many aspects of governmental administration within agencies have been outsourced to private contractors. That shift adds another bureaucratic layer between regulators and those charged with regulating them and puts essential government functions in the hands of those whose personal interests might be at odds with missions of the agencies they supplement.

The court held that FOIA exemption 5, which prevents disclosure of "inter-agency and intra-agency" communications that would be exempt from litigation discovery, covers private consultants *outside* the agency. 5 U.S.C. § 552(b)(5). The court recognized that this was not "the most natural" reading of the text," Pet. App. 13a, which limited exemption 5's protections to "intra-agency" communications, not those with agency outsiders. Yet the court decided that exemption 5's text ought to nonetheless be engrafted with an a-textual "consultant corollary" that brings agencies' communications with outside consultants within the protection provided by FOIA Exemption 5.

This Court cast doubt on this "consultant corollary" in *Dep't of Interior v. Klamath Water Users Protective*

Ass'n, 532 U.S. 1, 9 (2001), which declared that "neither the terms of [exemption 5] nor the statutory definitions say anything about communications with outsiders," and prohibited exemption 5 from being applied to "communications to or from an interested party seeking a Government benefit at the expense of other applicants." *Klamath* thus recognized that exemption 5's justifications ended at the agency's edge—even though it stopped short of overruling the "consultant corollary" entirely.

Now the Court needs to step in to prevent the "consultant corollary" from completely overriding the text that Congress wrote. The lower courts may have justified the rule by noting the potential costs of allowing disclosure, including potential chilling of open dialogue during agency deliberations and issues surrounding attorney-client privilege. But Congress has already weighed those costs and still considered disclosure the better option. The lower courts' decision to substitute their own judgment for Congress and elevate intent over statutory text presents a "threat to the separation of powers" and a serious usurpation of the court's "limited judicial role." Pet. App. 62a, 66a. It is up to this Court to put a stop to it by granting the petition, resolving the split among the courts of appeals, and getting rid of the "consultant corollary" once and for all.

ARGUMENT

THE COURT SHOULD TAKE THIS CASE TO RESTORE FOIA'S ESSENTIAL ROLE IN ENSURING THAT FEDERAL AGENCIES AND THEIR PRIVATE CONSULTANTS REMAIN ACCOUNTABLE TO THE AMERICAN PEOPLE

The "consultant corollary" was birthed in 1970s dicta from a D.C. Circuit opinion, *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971), during an era where such "text-light," *Milner v. Department of Navy*, 562 U.S. 562, 573 (2011), readings of FOIA exemptions were common. And it has passed unexamined from circuit to circuit ever since. But this "relic from a 'bygone era of statutory construction,'" *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019), cannot be squared with FOIA's plain text. And if this atextual expansion of exemption 5 is left standing, it will deprive the public of a sorely needed mechanism to provide oversight where it is needed most: in the federal agencies' interactions with their private consultants.

A. Federal agencies have never been more powerful, and less accountable—especially when they work through private consultants.

1. The modern administrative state has gradually outgrown the Constitution's mechanisms for controlling it. It has grown massive in size. Hearing on "Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity" before the Senate Comm. on the Judiciary, 114th Cong., Sess. 1 (2015) (statement of Senator Grassley) (noting the existence of over "430 departments, agencies, and sub-

agencies in the federal government"). And it has grown vast in power, accreting power from all the major branches of the government. "[A]s a practical matter [agencies] exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 313–14 (2013) (Roberts, C.J., dissenting). And this aggregation of power has made federal agencies a singular force on the American landscape, "'wield[ing[vast power and touch[ing] almost every aspect of daily life.'" *Free Enter. Fund*, 561 U.S. at 499.

2. But even as the administrative state's size and authority have grown, the mechanisms capable of holding it in check have withered. As the result of both congressional policymaking and their sheer size, federal agencies enjoy such a "significant degree of independence" *City of Arlington*, 569 U.S. at 314 (Roberts, C.J., dissenting), that they risk "slip[ping] from the Executive's control, and thus from that of the people." *Free Enter. Fund*, 561 U.S. at 49. "[T]he bureaucratic form" of the administrative state—"in its proportions, its reach, and its distance"—has thus proven "impervious to full public understanding, much less control." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2332 (2001).

The coordinate branches are faring no better at controlling federal agencies than the Executive. "[J]udicial oversight" is lacking. *City of Arlington*, 569 U.S. at 314 (Roberts, C.J., dissenting) And Congress more often finds itself in the role of agency-power

enabler than constrainer, often deeming it convenient to duck the "ramifications that come with hard decisionmaking" by "announcing vague aspirations and then assigning others"—like administrative agencies—"the responsibility of . . . realiz[ing] its goals." *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). Ambition is thus being made to *facilitate* ambition.

3. The dangers of the administrative state have only grown as the federal government has outsourced the administration of many programs to private contractors—including individuals, businesses, and "large social service nonprofits." Michael Gerson, "Taming Big Government by Proxy," *Wash. Post*, Feb. 16, 2015, https://wapo.st/3BhvasW. Now "millions of employees show up for work every day to do work once performed by federal employees." Paul C. Light, *The Government Industrial Complex: The True Size of the Federal Government, 1984-2018*, 88 (2019). Those private consultants now comprise over 40 percent of the federal workforce. *See* Paul C. Light, *The True Size of Government: Tracking Washington's Blended Workforce*, Volcker Alliance Issue Paper (2017). And they have taken over huge swaths of the responsibilities involved in running the federal government. Private contracting is "now ubiquitous in military combat, . . . rule promulgation, environmental policymaking, prison administration, and public-benefits determinations." Jon D. Michaels, *Privatization's Progeny*, 101 Geo. L.J. 1023, 1025 (2013); *see also, e.g.*, Jody Freeman & Martha Minow, eds., *Government by Contract: Outsourcing and American Democracy* (2009).

So significant is this outsourcing trend that many agencies today serve as little more than "financier, arranger, and overseer" of outside contractors. John J. Dilulio et al., *Improving Government Performance: An Owner's Manual* 32 (1993). The U.S. Department of Health and Human Services (HHS), for example, has eleven operating divisions, a nearly $500 billion budget, and over 65,000 employees whose main work is framing, processing, and monitoring literally hundreds of grant programs featuring literally thousands of nongovernmental grantees." John J. Dilulio, Jr., *Response Government by Proxy: A Faithful Overview*, 116 Harv. L. Rev. 1271, 1272–73 (2003). HHS's contractors have also taken over much of the work in making Medicaid coverage decisions and providing services to program beneficiaries. Nicholas Bagley, *Bedside Bureaucrats: Why Medicare Reform Hasn't Worked*, 101 Geo. L.J. 519, 527–528, 532 (2013).

Outsourcing to private contractors is nearly as ubiquitous in the EPA. That agency employs an army of "private, for-profit contractors" to help with technical analysis and even make "policy decisions." Dilulio, *Response Government by Proxy*, *supra* at 1275. And these consultants' determinations are often granted the same deference as enjoyed by the agency itself. For instance, in *Oklahoma v. EPA*, the Tenth Circuit granted deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) to determinations made by one of EPA's private consultants in upholding an EPA-proposed rule that would impose sulfur-dioxide emission limits on certain coal-fired power plants under section the Clean Air Act, 42 U.S.C. § 110. 723 F.3d 1201, 1204, 1205, 1207 (10th Cir. 2013). Faced with the competing arguments of the

"parties' experts" on the "suitability and costs" of installing "scrubbers" to bring sulfur-dioxide levels down to permissible limits, the court gave "deference to the EPA," as it involved a "technical or scientific matter[] within the agency's area of expertise." *Id.* at 1206, 1216–17. Accordingly, many private contractors take part in vital governmental functions, and often enjoy the same governmental authority as agency personnel themselves.

4. Yet these private consultants and contractors are usually far less accountable to the executive than their counterparts inside the agency. Their relationship to the agency is usually attenuated and circumstantial. And the chief means that agency officials might use keep those contractors "accountable—by removing them from office, if necessary," is severely blunted. *Free Enter. Fund*, 561 U.S. at 483. Absent debarment for some serious infraction under the Federal Acquisition Regulations, 48 C.F.R. § 9.406-2(a)(5) & (c); 48 C.F.R. § 9.407-2(c) the worst agency officials can do to a consultant is threaten cancellation of their contract—often one of many the consultant possesses.

Private consultants also sometimes possess private agendas that put them at odds with agency missions. Many work for for-profit entities that direct their energies more toward obtaining profit than serving the public good. And some may suffer divided loyalties as the result of dividing their time between consulting for regulators and regulated industries. Accordingly, the relationships between federal agencies and their contractors is one of the areas of government where the *need* for oversight is greatest, but the normal *mechanisms* for governmental oversight are lacking.

B. FOIA plays an essential role in providing oversight and accountability for federal agencies and their armies of private consultants.

1. FOIA plays an irreplaceable role in providing accountability in agencies' dealings with their private consultants—by making them disclosable to the public. FOIA is Congress's tool to fulfill "the need for transparency," Kagan, *supra* at 2332, created by the "the very vastness of our Government and its myriad of agencies," S. Rep. No. 89-813, at 3 (1965). The Act serves "to ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). It arms the people with information—sometimes pried from "unwilling officials." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360–61 (1976). And thus armed, the public can open the "black box" of government bureaucracy, "the places where exercises of coercive power are most unfathomable and thus most threatening." Kagan, *supra* at 2332. Citizens can expose dark places within the government to "the sharp eye of public scrutiny," *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 779 (1989), enabling the people to serve as a "check against corruption and hold the governors accountable to the governed." *Robbins Tire & Rubber Co.*, 437 U.S. at 242.

FOIA is thus governed by the ethos that "Public Business is the public's business," Harold L. Cross, *The People's Right to Know* xiii (1977), and "disclosure, not secrecy, is the dominant objective of the Act." *Klamath*, 532 U.S. at 8. Consistent with this objective, "FOIA . . . mandates that an agency disclose records

on request, unless they fall within one of nine exemptions, [which] are 'explicitly made exclusive,' and must be 'narrowly construed,' " *Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011) (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973) and *FBI v. Abramson*, 456 U.S. 615, 630 (1982)).

2. And in FOIA, Congress demonstrated a clear intent to extend its mandate of accountability and transparency to agencies' communications with their outside consultants, because those communications generally fall *outside* FOIA exemptions. An agency's communications with private contractors might become shielded from disclosure when those consultants share information covered by Exemption 4, which concerns records containing "trade secrets and commercial or financial information" that is "privileged or confidential." 5 U.S.C. § 552(b)(4). They might also enjoy protection under Exemption 8 if the communications include 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).

But communications between agencies and contractors will not be covered by exemption 5. That exemption covers "inter-agency" and "intra-agency" communications—*i.e.*, communications *between* and *among* government agencies. An "agency" is an "authority of the Government of the United States." Pet. App. 83a (quoting 5 U.S.C. §§ 551(1), 552(f)(1)). A contractor is thus "not a government agency" under the statute's definition, so documents exchanged with it

cannot be "inter-agency" or "intra-agency" records. Pet. App. 82a, 91a. It really is that simple.

C. The atextual "consultant corollary" cripples critical oversight and accountability for agencies' private consultants.

Shielding agency communications with contractors under the "consultant corollary" prevents the public from accessing information that Congress thought should be disclosed. And doing so cripples the oversight and accountability FOIA meant to provide, because Congress had numerous reasons for focusing on the interactions between agencies and their private consultants and making them available to the public.

1. For one thing, communications between agencies and consultants may be the only information the public can obtain about agencies' private consultants. Those private consultants' *internal* deliberations cannot be examined via FOIA, because they do not involve interactions with government agencies and therefore generate no "agency record" within the agency's "control" or "possession" that would be subject to FOIA disclosure. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989). Only when private contractors communicate with agencies will an agency record be generated that the public *could* obtain, making these communications the only means by which the public can examine whether these private consultants are doing their jobs properly.

Denying the public access to these records would therefore prevent citizens from obtaining answers to vital questions about how outsourcing is transforming government, whether essential functions are being

performed by competent consultants, whether those consultants are capable of delivering work as promised, whether the work they deliver is accurate and grounded in sound science, or whether it is systemically biased, infringing individual rights, or even doing the job it is intended to do. Preventing access to this information will also deny the public information about whether agencies are providing proper oversight to those consultants.

The answers to these questions can be life-altering—as FEMA demonstrated during Katrina, when its private contractors systematically failed to deliver as promised, and the costs were measured in incalculable pain and human suffering. *See generally* House Comm. on Gov't Reform-Minority Staff, *Waste, Fraud, and Abuse in Hurricane Katrina Contracts*, 109th Cong., 2d Sess. (2006).

This is also why access to the records at the center of this case is so critical. They concern a test that determines whether people who have invested time, money, and effort into becoming Air-Traffic Controllers will be permitted to get a job in their chosen field. That test should be considered legitimate only if it can survive rigorous public scrutiny and can be "statistically shown to predict workplace success." (Pet. at 7) But the FAA outsourced the creation of the test to private consultants, Pet. App. 8a, and those consultants provided the only "independent" evaluation of the test's validity—a validation that the FAA used to defend the test to Congress, to Rojas, and the public at large. *See* A Review of the FAA's Air Traffic Controller Hiring, Staffing, and Training Plans, Hearing before the H. Subcomm. On Aviation, 114th Cong., 2d Sess.,

21 (2016) (Statement of Rep. LoBiondo), https://tinyurl.com/yyd3cw35; see also Pet. App. 51a.

Without being able to uncover the FAA's communications with the consultants who created and validated the test—including the summaries of the tests and the test validation documents that Rojas sought, Pet. App 75a-76a—there is no way for anyone outside the government to determine whether that validation was ever performed, what the validation process entailed, or indeed, whether the test has any proven statistical validity at all. The "consultant corollary" should not be permitted to prevent the public from investigating these vital questions.

2. Public access to agency communications with private consultants is also critical in uncovering fraud, corruption, and waste. Public sector contractors frequently obtain work through lobbying and influence-peddling as much as through technical expertise. That raises risks of corruption, undue influence, and even fraud. Agency officials may be unable or unwilling to discover these abuses, since they might be the victim—or an accomplice. It is thus vital that the public be permitted to examine the interactions between government officials and contractors, because those interactions are where the corruption, influence-peddling, and fraud occurs.

3. Finally, shielding agencies' communications with private contractors under the "consultant corollary" could provide a perverse incentive for agencies to outsource their dirtiest work to contractors—things that agencies know will not survive legal or public scrutiny. Indeed, such dark outsourcing is already occurring, as the Trump Administration's unsuccessful

attempt to add a citizenship question to the U.S. Census illustrates in vivid detail. The Court invalidated that effort based on something it found to be missing from the administrative record: a line of reasoning that could match up "the decision the Secretary" of Commerce Wilber Ross made to add the citizenship question and "the rationale he provided" for doing so—protecting the Voting Rights Act—which "seem[ed] to have been contrived." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2556 (2019).

But quite apart from the issue of whether the absence in the record of any proper motive for adding the citizenship question should have disqualified that question, the Commerce Department also possessed an *improper* motive that it kept *outside* the administrative record. The Department hired an outside consultant, Thomas Hofeller, to determine if Republicans could gain partisan advantage if the question was added. Using Texas as an example, Hofeller concluded that adding a citizenship question "would be advantageous to Republicans and non-Hispanic whites, and would dilute the political power of the state's Hispanics." Michael Wines, "Deceased G.O.P. Strategists' Hard Drives Add New Details on the Census Citizenship Question," *N.Y. Times*, May 30, 2019, https://perma.cc/9EUP-PAQ8. It was this chance for partisan advantage, not any concern for protecting the VRA, that drove the decision to change the census.

The most alarming aspect of this story is that the only reason Hofeller's studies and communications were ever made public was because his daughter went through his hard drive after he passed away. *Id*. They were never produced in discovery. And the Commerce

Department has shielded at least some of the communications between Hofeller and the Department from FOIA disclosure, asserting that they fall under Exemption 5. *See* Letter from Jennifer Piel, Dep't of Commerce, to Laura Iheanachor, CREW (July 26, 2021), https://bit.ly/2WuELxm. If the a-textual "consultant corollary" remains law, then even more dark outsourcing will be encouraged. And that is a compelling reason why it should not be left standing.

5. Furthermore, none of the policy reasons courts have offered for the "consultant corollary" serve to justify its judicial annexation to the statute.

Courts have noted that one purpose of exemption 5 was to encourage a full and frank exchange of ideas during the agency policymaking process. See Pet. App. 14a. But Congress was very specific that its concern for the deliberative process extended only to the *agency* policymaking process. In the text of Exemption 5, Congress distinguished between the deliberative processes it sought to facilitate and shield from disclosure and those it wanted to be made public. And Congress put discussions between agencies and private consultants squarely in the latter camp, deeming the public interest in exposing those interactions to sunlight to be worth any risk to the deliberative process that might result. This interest in fostering limited deliberation provides no general invitation for courts to decide for themselves which deliberations to facilitate, nor does it provide allowance for judges to bring them into the protections of the statute by fiat. The deliberation-fostering justification for shielding communications under Exemption 5 ends at the agency's edge.

The notion that the "consultant corollary" is needed to protect attorney-client privilege or outside attorney's work product fares no better. Br. 27-28, Pet. App. 14a, 31a-32a. This concern is not only speculative, because few agencies hire outside lawyers, Pet. 29 (citing Pet. App. 68a n.10), it also leads to an overbroad remedy, because Exemption 5 covers far more than just privileged documents. It covers anything unobtainable in discovery, *Klamath*, 532 U.S. at 8.

Changing Exemption 5 to address concerns about privilege is also largely unnecessary, since Exemption 4 already prevents disclosure of confidential information protected by privilege. But worst of all, judicial concerns over privilege fail to justify the "consultant corollary" because such concerns belong to Congress. It is Congress's job to weigh the concerns over privilege against the public's interest in disclosure. And Congress gave every indication that it believed "an attorney for the Government, paid from public funds, should be just as accountable to the public which pays his or her salary as should any other category of well-paid public servant." Dept. of Justice, Memo. from Quin Shea to Bob Saloshin, Exemption 5, "Chilling Effect" and Openness in Government 2 (Nov. 7, 1977). If Congress deems the benefits of disclosure to outweigh the risks, the courts are obliged to respect Congress's judgment rather than rewrite Congress's statute. The Court should intervene to ensure that they do so.

If invalidating the "consultant corollary" forces agencies to be more circumspect about whether to hire outside counsel, and agencies will they communicate with them, then so be it. Those functions can be brought back inside the agency. And if Congress wants

to reinstitute the corollary or wishes to provide an exception that specifically addresses privilege and work-product issues concerning outside attorneys, it can certainly do that too.

Congress has shown great willingness to revisit FOIA "to better balance the public's right to know," H.R. Rep. No. 114-391, 8 (2016), having amended statute 10 different times since its enactment,[2] and having held scores more hearings and compiled countless more reports. *See* Br. of *Amici Curiae* Freedom of Information Act and First Amendment Scholars in Support of Respondent, at Parts I.B.–C, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019) (No. 18-481).

The statute that Congress could—and likely would—draft in response to this case would enjoy greater constitutional legitimacy than the lower courts' decisions expanding Exemption 5. And a statutory remedy to privilege concerns will also prove better capable of achieving the proper balance for an exemption than judges wielding blunt weapon of appellate review to hammer an atextual and overbroad "consultant corollary" into the statute. Accordingly, if

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[2] *See* Pub. L. 93-502 §§ 1-3, 88 Stat. 1561-64 (1974); Pub. L. 94-409, § 5(b), 90 Stat. 1247 (1976); Pub. L. 95-454, tit. IX, § 906(a)(10), 92 Stat. 1225 (1978); Pub. L. 98-620, tit. IV, Subtitle A, § 402(2), 98 Stat. 3357 (1984); Pub. L. 99-570, tit. I, subtit. N, §§ 1802, 1803, 100 Stat. 3207, 3207 (1986); Pub. L. 104-231, §§ 3-11, 110 Stat. 3049 (1996); Pub. L. 107-306, tit. III, subtit. B, § 312, 116 Stat. 2390 (2002); Pub. L. 110-175, §§ 3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 840(a), 12, 121 Stat. 2525, 2526, 2527, 2530 (2007); Pub. L. 111-83, tit. V, § 564(b), 123 Stat. 2184 (2009); Pub. L. 114-185, § 2, 130 Stat. 538 (2016).

the "consultant corollary" is to become law, it should be through a law properly passed by Congress, not through judicial usurpation of the lawmaking function. And the Court should take this case to excise the "consultant corollary" and give Congress that chance.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Ilya Shapiro
William M. Yeatman*
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

J. Carl Cecere
Counsel of Record
CECERE PC
6035 McCommas Blvd.
Dallas, TX 75206
(469) 600-9455
ccecere@cecerepc.com

*Admitted to the D.C. Bar under D.C. App. R. 46-A. Supervised by D.C. Bar member.

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