

No. 21-469

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*

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

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred by holding that “intra-agency memorandums or letters” in FOIA’s Exemption 5 encompasses documents prepared by a private, outside consultant.

2. Whether the Fifth Circuit, in a sharply divided decision, erred in holding that any “consultant corollary” in FOIA Exemption 5 encompasses 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.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i
TABLE OF AUTHORITIES.....iii
INTEREST OF *AMICUS CURIAE*..... 1
INTRODUCTION AND SUMMARY OF
ARGUMENT 1
ARGUMENT: THE COURT SHOULD TAKE
THIS CASE TO RESTORE FOIA’S
ESSENTIAL ROLE IN ENSURING THAT
FEDERAL AGENCIES AND THOSE
CONSULTING WITH THEM REMAIN
ACCOUNTABLE TO THE AMERICAN
PEOPLE..... 5
 A. Federal Agencies Have Never Been More
 Powerful, and Less Accountable—
 Especially When They Work with, and
 through, Private Consultants 5
 B. FOIA Plays an Essential Role in
 Providing Oversight and Accountability
 for Federal Agencies and Their Armies of
 Private Consultants 10
 C. The Atextual “Consultant Corollary”
 Cripples Oversight and Accountability
 for Agencies’ Private Consultants 12
CONCLUSION 19

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	8
<i>City of Arlington, Tex. v. FCC</i> , 569 U.S. 290 (2013).....	6
<i>Dep't of Commerce v. New York</i> , 139 S. Ct. 2551 (2019).....	15
<i>Dep't of Interior v. Klamath Water Users Protective Ass'n</i> , 532 U.S. 1 (2001).....	4, 11, 17
<i>Dep't of Justice v. Reporters Comm. for Freedom of Press</i> , 489 U.S. 749 (1989).....	11
<i>Dep't of Justice v. Tax Analysts</i> , 492 U.S. 136 (1989).....	13
<i>Dep't of the Air Force v. Rose</i> , 425 U.S. 352 (1976).....	11
<i>FBI v. Abramson</i> , 456 U.S. 615 (1982)	11
<i>Food Mktg. Inst. v. Argus Leader Media</i> , 139 S. Ct. 2356 (2019).....	5
<i>Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.</i> , 561 U.S. 477 (2010)	2, 6, 9
<i>Gundy v. United States</i> , 139 S. Ct. 2116 (2019).....	7
<i>Milner v. Dep't of the Navy</i> , 562 U.S. 562 (2011).....	5, 11
<i>NLRB v. Robbins Tire & Rubber Co.</i> , 437 U.S. 214 (1978).....	10, 11

<i>Oklahoma v. EPA</i> , 723 F.3d 1201 (10th Cir. 2013).....	9
<i>Soucie v. David</i> , 448 F.2d 1067 (D.C. Cir. 1971).....	5
<i>Wu v. Nat'l Endowment for Humanities</i> , 460 F.2d 1031 (5th Cir. 1972).....	16

Statutes

5 U.S.C. § 551(1).....	12
5 U.S.C. § 552(b)(4).....	12
5 U.S.C. § 552(b)(5).....	3
5 U.S.C. § 552(b)(8).....	12
5 U.S.C. § 552(f)(1)	12
Clean Air Act, 42 U.S.C. § 110	9
Freedom of Information Act, Pub. L. 89-554, 80 Stat. 383 (1966).....	2
Pub. L. 104-231 (1996)	18
Pub. L. 107-306 (2002)	18
Pub. L. 110-175 (2007)	18
Pub. L. 111-83 (2009)	18
Pub. L. 114-185 (2016)	18
Pub. L. 93-502 (1974)	18
Pub. L. 94-409 (1976)	18
Pub. L. 95-454 (1978)	18
Pub. L. 98-620 (1984)	18
Pub. L. 99-570 (1986)	18

Regulations

48 C.F.R. § 9.406-2	9
48 C.F.R. § 9.407-2	9

Other Authorities

Br. of <i>Amici Curiae</i> Freedom of Information Act and First Amendment Scholars in Support of Respondent, <i>Food Mktg. Inst. v. Argus Leader Media</i> , 139 S. Ct. 2356 (2019) (No. 18-481)	18
Department of Justice, Memorandum from Quin Shea to Bob Saloshin, Exemption 5, “Chilling Effect” and Openness in Government (Nov. 7, 1977).....	17
Elena Kagan, <i>Presidential Administration</i> , 114 Harv. L. Rev. 2245, 2332 (2001).....	6, 10, 11
Federalist No. 51 (James Madison) (Clinton Rossiter ed., 1961).....	2
<i>Government by Contract: Outsourcing and American Democracy</i> (Jody Freeman & Martha Minow eds., 2009).....	8
H.R. Rep. No. 89-813 (1965).....	10
H.R. Rep. No. 114- 391 (2016).....	18
Harold L. Cross, <i>The People’s Right to Know</i> (1977).....	11
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).....	5

House Comm. on Gov't Reform-Minority Staff, <i>Waste, Fraud, and Abuse in Hurricane Katrina Contracts</i> , 109th Cong., 2d Sess. (2006)	14
John J. Dilulio, Jr. et al., <i>Improving Government Performance: An Owner's Manual</i> (1993).....	8
John J. Dilulio, Jr., <i>Response Government by Proxy: A Faithful Overview</i> , 116 Harv. L. Rev. 1271 (2003).....	8
Jon D. Michaels, <i>Privatization's Progeny</i> , 101 Geo. L.J. 1023 (2013)	8
Letter from Jennifer Piel, Dep't of Commerce, to Laura Iheanachor, CREW (July 26, 2021).....	15
Michael Gerson, "Taming Big Government by Proxy," <i>Wash. Post</i> , Feb. 16, 2015	7
Michael Wines, "Deceased G.O.P. Strategists' Hard Drives Add New Details on the Census Citizenship Question," <i>N.Y. Times</i> , May 30, 2019	15
Nicholas Bagley, <i>Bedside Bureaucrats: Why Medicare Reform Hasn't Worked</i> , 101 Geo. L.J. 519 (2013)	8
Paul C. Light, <i>The Government Industrial Complex: The True Size of the Federal Government, 1984-2018</i> (2019).....	7
Paul C. Light, <i>The True Size of Government: Tracking Washington's Blended Workforce</i> , Volcker Alliance Issue Paper (2017)	7
S. Rep. No. 89-813 (1965)	9, 11

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, like its companion petition, *Rojas v. FAA*, No. 21-133, it involves the critical role played by the Freedom of Information Act in providing transparency and accountability in agency decision-making, even when—and especially when—those decisions are being made with the assistance of self-interested private consultants.

INTRODUCTION AND SUMMARY OF ARGUMENT

“In framing a government which is to be administered by men over men, the 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 classic political-

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.

theory dilemma must be resolved in any viable system of self-government. The Framers addressed it by baking multiple mechanisms of accountability into our constitutional structure, from the rules we follow in choosing elected representatives to the system of checks and balances by which individual liberty is protected: “ambition being made to counteract ambition.” *Id.* These systems were designed to force the government to remain accountable to the governed and to enlist every official in holding others in check.

The growth of the administrative state has tested the durability of those constitutional accountability systems in ways that would test the patience not just of petitioner Jobe, but of Job himself. As agencies have grown in size and power, assuming ever-growing control over Americans’ daily lives, the need for accountability has assumed greater importance. But federal agencies have become *less* accountable.

Just as the dangers from the administrative state first began to challenge the Constitution’s ability to handle them, Congress 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 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 control 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 conducting their own oversight: information. That informational access allows everyday Americans,

organizations, and the press to require disclosure of officials' dealings, ensuring transparency in public policy and accountability for policymakers. Protecting FOIA is thus critical to ensuring that the American people can keep their government in check. And FOIA is doubly important in ensuring the private contractors and others who consult with the government actually help keep agencies properly focused on the people's business, rather than distracting them from it.

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 those outside consultants. The threat to individual liberty presented by the administrative state has only accelerated as self-interested outsiders, lobbyists, and others have been invited into agencies' internal deliberations. And those threats have only been compounded as many aspects of agency administration have been outsourced to private contractors. Those shifts have added bureaucratic layers between regulators and those charged with regulating them. That dynamic puts essential government functions in the hands of those whose personal interests might be at odds with missions of the agencies they supplement.

Before this case, the court below had already held that FOIA Exemption 5, which prevents disclosure of "inter-agency and intra-agency" communications that would be exempt from litigation discovery, can be extended to cover private consultants *outside* the agency. 5 U.S.C. § 552(b)(5). Now it has stretched this atextual "consultant corollary" further by holding that Exemption 5 applies to documents created by those

who were being “consulted” only because the agency was investigating them.

This Court cast doubt on the core of 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 as it stopped short of overruling the “consultant corollary” entirely.

Now the Court needs to step in and finish the job, to prevent the “consultant corollary” from completely overriding the statutory text Congress enacted. The lower courts may have justified this rule based on the potential costs of disclosure, including potential chilling of open dialogue during agency deliberations and issues surrounding attorney-client privilege. But Congress has already weighed those costs and decided that disclosure was still the better option. The lower court’s decision to substitute its 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 that mission creep by granting the petition, resolving the split among the courts of appeals, and ending 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 THOSE CONSULTING WITH THEM 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” readings of FOIA exemptions were common. *Milner v. Dep’t of the Navy*, 562 U.S. 562, 573 (2011). And the “corollary” has passed unexamined from circuit to circuit ever since. But this “relic from a bygone era of statutory construction” cannot be squared with FOIA’s plain text. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). And if this atextual expansion of Exemption 5 is left standing, it will deprive the public of a sorely needed mechanism to provide essential oversight over federal agencies’ interactions with private consultants.

A. Federal Agencies Have Never Been More Powerful, and Less Accountable—Especially When They Work with, and through, Private Consultants

1. The modern administrative state has gradually outgrown the Constitution’s mechanisms for controlling it. It has of course grown in size. *See* 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”). But even more importantly, it has grown in influence, accreting power from all branches of 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, 313–314 (2013) (Roberts, C.J., dissenting). 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 checking its overreach have withered. As the result of both congressional inattention 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’s collaborations with outsiders have increased. Federal agencies are inundated with input from an array of interested parties—from industry lobbyists, powerful businesspeople, academic experts, nonprofits, and even foreign governments. And the federal government itself outsources 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 consultants. 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 11 operating divisions, a nearly \$500 billion budget, and more than 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, 1272–1273 (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. These consultants’ determinations are often granted the same deference as that 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,” or rather, the EPA’s consultants, as it involved a “technical or scientific matter[] within the agency’s area of expertise.” *Id.* at 1206, 1216–1217. Accordingly, many private contractors take part in vital governmental functions, and often enjoy the same authority as agency personnel.

4. Yet these private consultants and contractors are usually far less accountable to the executive than their counterparts inside the agency. Their relationships with agencies are usually attenuated and circumstantial. And the chief means 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. Many consultants do not work for the government at all, and thus cannot be fired. And as for those that do work for the government, absent debarment for some serious infraction under the Federal Acquisition Regulations, 48 C.F.R. §§ 9.406-2(a)(5) & (c), 9.407-2(c), the worst agency officials can do is threaten cancellation of a single contract—often one of many the consultant has.

Private consultants, lobbyists, businesspeople and other outsiders 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 splitting their time between consulting for regulators and regulated industries.

In this case, for example, the National Transportation Safety Board’s consultants possessed an obvious conflict of interest. They were, after all, the subjects of the agency’s investigation. Their participation in the investigation may have aided the information-gathering process by adding technical expertise. But it also subtracted from the process by involving those with a vested interest in making their case as to why their companies and products should not be blamed for the crash. More broadly, these divided loyalties often complicate the relationships between federal agencies and their contractors. In these circumstances, 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 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 consultants 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 consultants 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. 9 (quoting 5 U.S.C. §§ 551(1), 552(f)(1)). A private consultant is thus not a government agency under the statute’s definition, so documents exchanged with it cannot be “inter-agency” or “intra-agency” records. It really is that simple.

C. The Atextual “Consultant Corollary” Cripples Oversight and Accountability for Agencies’ Private Consultants

Shielding agency communications with contractors and other outside consultants 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, 144–145 (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 assisting agency business or undermining it.

Denying the public access to these records would thus prevent citizens from obtaining answers to vital questions about how outsourcing is transforming government, whether consultants are providing accurate information, whether essential functions are being performed by competent consultants, whether those consultants are capable of delivering work as promised, and whether that work 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 information access will also deny the public notice about whether agencies are providing proper oversight to those consultants.

The answers to these questions can be life-altering, as FEMA demonstrated during Hurricane Katrina, when private contractors systematically failed to deliver as promised and the costs were measured in incalculable pain and suffering. *See generally* House Comm. on Gov't Reform-Minority Staff, *Waste, Fraud,*

and Abuse in Hurricane Katrina Contracts, 109th Cong., 2d Sess. (2006).

2. Public access to agency communications with private consultants is also critical in uncovering fraud, corruption, and waste. Public sector consultants are often pursuing their own agendas as much as helping the agencies they are consulting with. And 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 of the crime—or an accomplice to it. It is thus vital that the public be permitted to examine the interactions between government officials and consultants, because those interactions are where the corruption, influence-peddling, and fraud occurs.

3. Finally, shielding agencies' communications with private consultants under the "consultant corollary" could provide a perverse incentive for agencies to outsource their dirtiest work to outsiders—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 what 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 absence in the record of any proper motive for adding the citizenship 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 were 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.

Yet the most alarming aspect of that 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 shielded at least some of its communications with Hofeller from FOIA disclosure, asserting Exemption 5. See Letter from Jennifer Piel, Dep’t of Commerce, to Laura Iheanachor, CREW (July 26, 2021), <https://bit.ly/2WuELxm>. If the atextual “consultant corollary” remains law, then even more dark outsourcing will be encouraged. And that is compelling reason enough 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 “without fear of publicity.” Pet. App. 20a (quoting *Wu v. Nat’l Endowment for Humanities*, 460 F.2d 1031, 1032 (5th Cir. 1972)). 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. Congress put discussions between agencies and 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. This interest in fostering unfettered deliberation therefore 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 other justification that some courts have offered for the “consultant corollary”—that it is needed to protect attorney-client privilege or outside attorney’s work product—fares no better. *Rojas v. FAA*, 989 F.3d 666, 673 (9th Cir. 2021). This concern is not only speculative, because few agencies hire outside lawyers, *id.* at 698, it also leads to an overbroad remedy, because Exemption 5 covers far more than privileged

documents. It covers *anything* unobtainable in discovery, *Klamath*, 532 U.S. at 8.

Broadening Exemption 5 based on concerns about privilege is also largely unnecessary, since Exemption 4 already prevents disclosure of privileged information. But worst of all, judicial concerns over privilege fail to justify the “consultant corollary” because such cost-benefit analysis belongs 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, courts are obliged to respect that judgment rather than rewrite the statute to suit their own preferences to the contrary. 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 how agencies should 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.

Indeed, 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 and institutional legitimacy than lower courts decisions expanding Exemption 5. And a statutory remedy to privilege concerns would 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 the “consultant corollary” is to become law, it should be through a law passed by Congress, not through judicial usurpation of the lawmaking function. The Court should take this case to excise the “consultant corollary” from FOIA and give Congress that chance.

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).

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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