No. 17-55036

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JORGE ALEJANDRO ROJAS,
Plaintiff-Appellant,

v.

FEDERAL AVIATION ADMINISTRATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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INTRODUCTION AND SUMMARY

Pursuant to Fed. R. App. P. 35 and 40, the government respectfully petitions for panel rehearing or rehearing en banc. As Judge Christen's dissent persuasively explains, the panel majority's decision seriously errs in its resolution of an important question of federal law and, in so doing, creates a square circuit split. As the dissent further explains, the panel's erroneous ruling is likely to have significant adverse consequences both for the government's ability to protect privileged materials from

disclosure and for its ability to obtain the outside advice and assistance it needs to perform its myriad regulatory functions.

This case involves Exemption 5 of the Freedom of Information Act ("FOIA"), a key provision protecting from disclosure all "inter-agency or intra-agency" documents that "would not be available by law to a party … in litigation with the agency." 5 U.S.C. § 552(b)(5). By protecting materials "normally privileged in the civil discovery context," including attorney work product, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975), Exemption 5 prevents an "anomaly" whereby parties could "supplement civil discovery" against the government by demanding privileged materials under FOIA, *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801 (1984).

Consistent with that essential purpose, federal courts of appeals have long concluded that the "intra-agency" materials protected by Exemption 5 include privileged documents prepared for an agency at the agency's request by the agency's contractor or consultant. The Supreme Court has similarly assumed without deciding that Exemption 5 encompasses documents authored by persons outside the agency who are "acting in a governmentally conferred capacity" for the agency's benefit. *Department of Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 10 (2001); *see id.* at 910 (recounting Justice Scalia's observation that this interpretation is "textually possible" and "in accord with the purpose of the provision").

The panel majority erroneously departed from this established understanding by holding that Exemption 5 "applies only to records that the government creates and retains" without employing "a[ny] third-party consultant." Op. 12. That holding, which relied heavily on a perceived "mandate to interpret [FOIA's] exemptions narrowly," Op. 15, conflicts with the reasoning of multiple Supreme Court decisions.

And, as the panel acknowledged (Op. 15-19), at least six courts of appeals—the First, Second, Fourth, Fifth, Tenth, and D.C. Circuits—agree that Exemption 5 covers privileged documents prepared for an agency by its consultant.

The panel also wrongly discounted the potential harms its interpretation would cause. The majority recognized its ruling would render the government unable to protect advice from experts and consultants if they are not government employees. It dismissed the impact of its holding by stating that "agencies can still avoid disclosure under Exemption 5" by refraining from involving consultants or other outside persons in privileged discussions. Op. 21. That option is illusory—agencies necessarily and properly involve consultants and outside experts in undertaking a number of important functions. The majority opinion would put the government to

the untenable choice of dispensing with this crucial assistance or forgoing all usual litigation privileges.

Rehearing en banc is clearly warranted to permit the Court to fully consider the important question presented by this case and its implications for the functioning of effective government.

STATEMENT

A. Statutory Background

FOIA generally requires federal agencies, "upon any request for records which … reasonably describes such records," to "make the records promptly available to any person," 5 U.S.C. § 552(a)(3)(A), but an agency may withhold records if an exemption applies. Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party … in litigation

with the agency." *Id.* § 552(b)(5). Exemption 5 has long been understood to encompass all "documents which a private party could not discover in litigation with the agency." *Sears, Roebuck*, 421 U.S. at 148. Indeed, this Court has interpreted the exemption to be "coextensive with all civil discovery privileges," including the attorney-work-product privilege. *Sierra Club, Inc. v. U.S. Fish & Wildlife Serv.*, 925 F.3d 1000, 1011 (9th Cir. 2019).

Exemption 5 refers to "inter-agency or intra-agency" communications, but does not define either term. 5 U.S.C. § 552(b)(5). In *Klamath*, the Supreme Court considered whether materials submitted to the government by an Indian Tribe were

"intra-agency" documents under Exemption 5. 532 U.S. at 6. The Court explained that although Exemption 5 does not specifically address how to treat "communications with outsiders," various courts of appeals had identified circumstances in which "a document prepared outside the Government may nevertheless qualify as an 'intra-agency' memorandum." *Id.* at 9. The Court also noted that several justices had endorsed this "more expansive reading" of the "intraagency" provision. *Id.* (citing *Department of Justice v. Julian*, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting)). Specifically, as Justice Scalia explained, "[i]t is textually possible and … in accord with the purpose of [Exemption 5] to regard as an intraagency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity," including "as employee or consultant to the agency." *Id.* at 9-10 (quoting *Julian*, 486 U.S. at 18 n.1).

After recounting that reasoning, the unanimous *Klamath* opinion agreed that "consultants may be enough like the agency's own personnel to justify calling their communications 'intra-agency.'" 532 U.S. at 12. The Court observed that in the "typical cases" in which Exemption 5 applied to consultant documents, "the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done." *Id.* at 10-11. And in such cases, "the consultant d[id] not represent an interest of its own, or the interest of any other client, when it advise[d] the agency that hire[d]

it," but rather "function[ed] just as an [agency] employee would be expected to do." *Id.* at 11.

Klamath stopped short of confirming that this "consultant corollary" exists, however, because the Court held it did not apply to the facts at bar. Unlike the "typical cases" in which the corollary had been applied, the documents at issue in *Klamath* were not authored by agency contractors, but instead by Indian Tribes that "necessarily communicate[d] with the Bureau with their own … interests in mind" and acted as "self-advocates [seeking benefits] at the expense of others." *Id.* at 12. Finding that distinction dispositive, the Court held that the "intra-agency condition" in Exemption 5 "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.

B. Factual Background

1. This dispute arises from the Federal Aviation Administration's ("FAA") process for hiring air traffic controllers. In 2012, FAA retained a human-resources consultant, APTMetrics, to review the agency's hiring processes. FAA incorporated

APTMetrics' recommendations into a "[b]iographical [a]ssessment," a test measuring personality traits relevant to successful job performance as an air traffic controller. E.R. 301. FAA used the assessment during its 2014 hiring cycle. An applicant who was unsuccessful in that cycle filed a complaint and administrative petition for class certification with the Equal Employment Opportunity Commission ("EEOC").

In anticipation of litigation, FAA's Office of Chief Counsel asked APTMetrics to summarize its "validation work" for the biographical assessment.[1] E.R. 301. APTMetrics prepared three summaries, which it provided to FAA in late 2014 and early 2015.

2. In 2015, FAA conducted further hiring using an updated biographical assessment. Plaintiff Jorge Rojas was an unsuccessful applicant in that cycle. FAA notified him he was ineligible based on the results of the assessment, a test which FAA noted had been "independently validated by outside experts." E.R. 339.

Rojas—represented by the same counsel involved in the pending EEOC proceedings—submitted FOIA requests to FAA. As relevant here, Rojas sought "[i]nformation regarding the empirical validation of the biographical assessment," including "any report created by, given to, or regarding APTMetrics' evaluation and creation and scoring of the assessment." E.R. 320.

[1] "Validation" is the empirical process by which a hiring criterion is confirmed to be predictive of, or to correlate with, successful performance of the relevant job.

FAA conducted a search for documents and identified the three summaries prepared by APTMetrics. FAA withheld the documents under Exemption 5, explaining that they would be protected in discovery by the attorney-work-product doctrine. That doctrine, codified at Federal Rule of Civil Procedure 26(b)(3)(A), provides that a party ordinarily "may not discover documents … that are prepared in anticipation of litigation … by or for another party *or its representative* (*including the other party's* attorney, *consultant*, surety, indemnitor, insurer, or agent." *Id.* (emphases added).

C. Procedural History

1. Rojas brought suit under FOIA to challenge (as relevant here) the withholding of the three summaries. The district court granted summary judgment for FAA, concluding it properly withheld the documents under Exemption 5.

2. **a.** A divided panel of this Court reversed. The majority opinion, authored by visiting district judge Donald Molloy (D. Mont.) and joined by Judge Wardlaw, concluded that Exemption 5 did not apply to documents authored by FAA's retained consultant (APTMetrics) rather than by its employees. Op. 11-21. The majority did not dispute that the documents—prepared at FAA's direction "in anticipation of litigation on the FAA's hiring practices," Op. 6—would be protected from disclosure in discovery. It nonetheless concluded that allowing the documents to be withheld would be "contrary" to the exemption's "text" and to "FOIA's purpose to require broad disclosure." Op. 13.

With respect to text, the panel majority stated that "[t]he consultant corollary contravenes Exemption 5's plain language." Op. 13. The majority did not seek to reconcile that statement with Justice Scalia's observation, later recounted in *Klamath*,

that it is "textually possible" to interpret Exemption 5 to protect documents "received by an agency" from outside persons "acting in a governmentally conferred capacity." *Klamath*, 532 U.S. at 9-10 (quoting *Julian*, 486 U.S. at 18 n.1 (Scalia, J., dissenting)).

Second, the panel majority asserted that interpreting Exemption 5 to protect consultant-authored documents would be "contrary to FOIA's policy favoring disclosure and its mandate to interpret exemptions narrowly." Op. 15. The majority dismissed Judge Christen's concern that the panel's reading would "allow[] parties to use FOIA to circumvent civil litigation privileges." Op. 20. The majority declared itself "not convinced that the potential harm to the government warrants adopting the consultant corollary[]," because "agencies [could] still avoid disclosure under Exemption 5" by refraining from involving consultants in privileged discussions. *Id.* In other words, the government could avoid the impact of the majority's ruling only by dispensing with use of contractors and outside experts.

The majority acknowledged that its holding was inconsistent with the decisions of numerous other circuits, Op. 15-19, but asserted that those decisions were unpersuasive because they "d[id] little to confront" a perceived "inconsistency with both the text and purpose of FOIA." Op. 15.[2]

b. Judge Christen dissented from the panel's Exemption 5 holding. Op. 23-39. She explained that Exemption 5 does not "dictate that an 'intra-agency memorandum' includes *only* those materials … prepare[d] in-house." Op. 30. And, in this case,

[2] The panel also held that FAA did not show it undertook an adequate search for documents. Op. 9-11; *accord* Op. 37 n.7 (Christen, J.). The government does not seek further review of that holding.

"[t]he responsive documents" are intra-agency because they were prepared at FAA's instruction and remained "'within' the FAA in both a physical and proprietary sense." Op. 31. Judge Christen also explained that the majority failed to understand Congress's multiple purposes in enacting FOIA. She noted that Congress "was well aware of discovery privileges when it drafted" the statute, and had consciously struck a "careful balanc[e] between the benefits of transparency and the government's need to maintain the confidentiality of some types of records." Op. 28-29.

Judge Christen warned that "[p]arties engaged in litigation with the government will use today's ruling to circumvent the government's claims of work product, attorney-client communication or any other privilege recognized by our discovery rules, even though the federal rules *expressly bar* discovery into those kinds of materials, and despite the long-established rule that the government is entitled to the same litigation privileges as other parties." Op. 33 (citation omitted). She emphasized that "dozens of federal agencies must rely on the expertise of outside consultants to perform specialized tasks," and warned that the panel decision "will likely dissuade agencies from seeking helpful expertise from outside consultants in the first place." Op. 34-35.

ARGUMENT

FOIA EXEMPTION 5 PROTECTS PRIVILEGED DOCUMENTS CREATED FOR AN AGENCY BY ITS CONSULTANT

This Court should grant panel rehearing or rehearing en banc to correct the serious errors in the panel's opinion and avoid the circuit split it creates.

1. Exemption 5 applies to "inter-agency or intra-agency" documents that would be privileged in litigation with the agency. 5 U.S.C. § 552(b)(5). The term "intra-agency" is not defined. The Supreme Court has acknowledged that "intraagency memorandums" would certainly include documents "addressed both to and from employees of a single agency." *Klamath*, 532 U.S. at 9. But FOIA nowhere expressly confines the exemption to that subset. Exemption 5 states that the "memorandum[]" must be "intra-agency" in character, not that its authors must be direct employees on the agency's payroll. And as *Klamath* recounted, it is "textually possible" to interpret "intra-agency memorandums" to include documents that "ha[ve] been received by an agency" from outside persons who are "acting in a governmentally conferred capacity," such as a "consultant to the agency." 532 U.S. at 9-10 (quoting *Julian*, 486 U.S. at 18 n.1 (Scalia, J., dissenting)). Here, the privileged documents at issue—created for FAA's sole use, at FAA's express request, by persons retained by FAA, in contemplation of litigation against FAA—are properly understood to be "intra-agency."

That reading is not only consistent with the statutory text, but is "much more in accord with [Exemption 5's] purpose." *Julian*, 486 U.S. at 18 n.1 (Scalia, J., dissenting);

see id. (describing this interpretation as both "permissible" and "desirable"). Congress enacted Exemption 5 to ensure that documents "normally privileged in the civil discovery context" cannot be obtained through the backdoor of FOIA. *Sears, Roebuck*, 421 U.S. at 149. The materials at issue here are privileged because they are "documents … prepared in anticipation of litigation … by or for [FAA] *or its representative*," specifically, its "*consultant*." Fed. R. Civ. P. 26(b)(3)(A) (emphases added). Plaintiff has identified no reason—and there is none—why Congress would have intended to exclude privileged work product from Exemption 5's protections simply because it was prepared for the agency by its lawful "representative." *Id.* Rather, as Judge Christen correctly observed, "[t]h[e] result" under Exemption 5 "[sh]ould be the same whether the materials were prepared by an FAA employee sitting in an FAA cubicle, or by a consultant hired to do the same thing." Op. 29-30.

That interpretation has prevailed since FOIA was first enacted. *See infra* p. 14 (citing cases). The *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, issued in 1967, explains that Exemption 5's protection for intra-agency documents encompasses materials "*prepared by* agency staff personnel or *consultants for the use of the agency*." *Id.* at 35 (emphases added). The Supreme Court has repeatedly cited that memorandum in FOIA-interpretation cases. *See, e.g.*, *NARA v.*

Favish, 541 U.S. 157, 169 (2004); *Department of State v. Washington Post Co.*, 456 U.S. 595, 602 n.3 (1982).

2. The majority's assertion that the plain text compels its reading does not bear scrutiny. The majority did not attempt to reconcile its holding with Justice Scalia's

observation, recounted by the unanimous *Klamath* Court, that it is "textually possible" to read Exemption 5 to protect consultant documents. 532 U.S. at 9. Nor did the majority engage with *Klamath*'s recognition that "consultants may be enough like the agency's own personnel to justify calling their communications 'intra-agency.'" *Id.* at 12. Rather, the panel simply declared that "[b]y its plain terms, Exemption 5 applies only to records that the government creates and retains." Op. 12; *see* Op. 14 (similar). As *Klamath*'s discussion reflects, however, nothing in Exemption 5 speaks directly to the question of a document's authorship. And the other exemptions discussed by the panel majority—Exemptions 4 and 8—do not refer to "intra-agency" documents at all, and thus shed no light on the meaning of that term. In any event, even under the panel's textual gloss, the records here were "create[d]" or "originate[d]" by "the government," Op. 11, 14: they were generated at FAA's direction, for FAA's use, by an entity hired by FAA.

The panel correctly noted what is undisputed—that FOIA was "enacted to facilitate public access to government documents," Op. 8 (brackets omitted). As this Court has previously recognized, however, "[a]t the same time, FOIA contemplates that some information may legitimately be kept from the public." *Lahr v. NTSB*,

569 F.3d 964, 973 (9th Cir. 2009). In particular, Exemption 5 was enacted to protect documents "normally privileged in the civil discovery context," including materials subject to "attorney work-product privilege[]." *Sears, Roebuck*, 421 U.S. at 149. As another court correctly explained, "[t]he government has the same right to undisclosed legal advice in anticipation of litigation as any private party," and "there is nothing in FOIA that prevents the government from drawing confidential counsel

from the private sector." *Hunton & Williams v. Department of Justice*, 590 F.3d 272, 278 (4th Cir. 2010). Yet the panel decision here would allow plaintiff—whose counsel is litigating against FAA in related proceedings—to obtain documents expressly protected from disclosure in discovery, thereby creating the very "anomaly" the Supreme Court has "consistently rejected" when interpreting FOIA. *Weber Aircraft*, 465 U.S. at 801.

The related maxim that FOIA's exemptions are "construed narrowly," Op. 15, also cannot justify the panel's interpretation. FOIA's "exemptions are intended to have meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Indeed, in a recent decision postdating the panel's opinion, the Supreme Court expressly refused to invoke a narrow-construction canon in interpreting FOIA Exemption 4, explaining that courts "normally have no license to give statutory exemptions anything but a fair reading" and affirming that FOIA's exemptions "are as much a part of FOIA's purposes and policies as the statute's disclosure requirement." *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356,

2366 (2019) (brackets and quotation marks omitted). The panel erred in resting its decision on an interpretive canon that the Supreme Court itself refuses to treat as dispositive.

3. The panel's decision readily satisfies the criteria for en banc review. As discussed above, the decision cannot be reconciled with the reasoning of multiple Supreme Court decisions interpreting Exemption 5 and FOIA more generally. *See* Fed. R. App. P. 35(b)(1)(A).

The decision also conflicts with "authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). As the panel acknowledged (Op. 15-19), at least six circuits—the First, Second, Fourth, Fifth, Tenth, and D.C. Circuits—agree that Exemption 5 covers privileged documents prepared for an agency by its consultant. *See, e.g.*, *Government Land Bank v. GSA*, 671 F.2d 663, 666 (1st Cir. 1982); *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 77-78 (2d Cir. 2002); *Hunton & Williams*, 590 F.3d at 279-80; *Hoover v. U.S. Dep't of Interior*, 611 F.2d 1132, 1137-38 (5th Cir. 1980); *Stewart v. U.S. Dep't of Interior*, 554 F.3d 1236, 1244-45 (10th Cir. 2009); *National Inst. of Military Justice (NIMJ) v. U.S. Dep't of Def.*, 512 F.3d 677, 680-87 (D.C. Cir. 2008).[3] Those courts correctly recognize that "[w]hen an agency record is submitted by outside consultants as part of the [agency's] deliberative process, and it was solicited by the agency," it is "entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of" Exemption 5. *McKinley v. Board of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 336 (D.C. Cir. 2011) (quoting *NIMJ*, 512 F.3d at 680).

The panel decision also conflicts with a prior, unpublished decision of this Court. In *Center for Biological Diversity v. Office of U.S. Trade Representative*, 450 Fed. Appx. 605 (9th Cir. 2011), the Court addressed an agency's withholding of "communications between government officials and private third parties." *Id.* at 608. The Court

[3] The majority incorrectly believed that the Sixth Circuit's decision in *Lucaj v. FBI*, 852 F.3d 541 (6th Cir. 2017), "rejected" the consultant corollary. Op. 19. The question in *Lucaj* was whether documents exchanged with a foreign government were properly withheld under the "common-interest doctrine," not whether Exemption 5 protects consultant documents prepared at an agency's request. 852 F.3d at 547-48.

recognized that "[u]nder the so-called 'consultant corollary,'" a federal agency "can invoke Exemption 5 with regard to records of communications with a third party if that private individual was acting 'just as a [] [government] employee would be expected to do.'" *Id.* (quoting *Klamath*, 532 U.S. at 11). This Court "remand[ed] for the supplementation of the record" to determine whether the corollary, as limited by *Klamath*, applied to the records at issue. *Id.* at 609. Contrary to the panel majority's assertion (Op. 13 n.4), that disposition plainly conflicts with its conclusion that the consultant corollary is categorically invalid.

Insofar as *Lucaj* expressed disapproval on the latter question, it did so only in "dictum," Op. 38 (Christen, J., dissenting), which rested on an interpretation of *Klamath* that even the majority here recognized was incorrect, *see* Op. 20 ("disagree[ing]" with *Lucaj*'s reading of precedent).

Finally, the legal issue is one of exceptional importance. Congress enacted Exemption 5 as the key safeguard to ensure that "the weighty policies underlying discovery privileges" cannot be "circumvented" through FOIA. *Weber Aircraft*, 465 U.S. at 802. The government routinely employs Exemption 5 to protect privileged materials from disclosure, including for privileged documents produced in collaboration with contractors, consultants, private experts, or outside counsel. Contrary to the panel majority's suggestion, *cf.* Op. 21, it is neither practicable nor desirable for agencies to refrain from consulting with such entities. Federal agencies regularly "encounter problems outside their ken, and it is clearly preferable that they enlist the help of outside experts skilled at unravelling their knotty complexities." *NIMJ*, 512 F.3d at 683. And "[t]he expectation that [privileged] communications will

remain confidential is crucial to eliciting candid and honest advice from outside consultants." *Id.* at 685.

Exemption 5 is not only critical for ensuring that agency regulators can benefit from outside expertise and assistance; it is also essential for protecting the government's litigation interests. The government necessarily engages outside personnel to assist with the government's representation, including to obtain expert opinions on complex factual issues, receive professional litigation support (*e.g.*, electronic discovery management), and to provide representation in circumstances of

ethical conflict.[4] As Judge Christen observes, the panel's decision would "put[] the government at a stark litigation disadvantage" to the extent it would allow private litigants to obtain privileged materials prepared by such "government-retained" entities. Op. 24, 33. The panel majority's speculation that its reading of Exemption 5 would not threaten any significant harms to the government, *cf.* Op. 20-21, could not be more misconceived.

[4] Moreover, some independent government agencies hire outside counsel to represent them in litigation. And the Justice Department routinely hires private counsel to represent the United States in litigation in foreign courts.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing or rehearing en banc.

Respectfully submitted,

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ADDENDUM

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JORGE ALEJANDRO ROJAS, *Plaintiff-Appellant*, v. FEDERAL AVIATION ADMINISTRATION, *Defendant-Appellee*.	No. 17-55036 D.C. No. 2:15-cv-05811-CBM-SS ORDER AND AMENDED OPINION

Appeal from the United States District Court for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted June 6, 2018

Pasadena, California

Filed April 24, 2019
Amended June 18, 2019

Before: Kim McLane Wardlaw and Morgan Christen,
Circuit Judges, and Donald W. Molloy,[5] District Judge.

Order;
Opinion by Judge Molloy;
Partial Concurrence and Partial Dissent by Judge Christen

SUMMARY[6]

Freedom of Information Act

The panel reversed the district court's order granting summary judgment in favor of the Federal Aviation Administration ("FAA") in a case concerning a Freedom of Information Act ("FOIA") request.

The plaintiff submitted the FOIA request after the FAA notified him that he was ineligible for an Air Traffic Control Specialist position based on his performance on a screening test called the Biographical Assessment.

[5] The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

[6] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the FAA failed to conduct a search reasonably calculated to uncover all relevant documents in response to plaintiff's FOIA request.

The panel held that the records at issue were not "intraagency" documents, and FOIA's Exemption 5 did not apply. Joining the Sixth Circuit, the panel rejected the consultant corollary theory, adopted by the district court and some sister circuits, which uses a functional interpretation of Exemption 5 that treats documents produced by an agency's third-party consultant as "intra-agency" memorandums.

The panel rejected plaintiff's argument that the FAA had an obligation under FOIA to retrieve any responsive documents, such as the underlying data to the summaries.

Judge Christen concurred in part and dissented in part. She concurred with the majority that plaintiff cannot use FOIA to access materials that the FAA does not actually possess, and that the scope of the FAA's in-house search for responsive documents was inadequate. She dissented from the majority's rejection of the consultant corollary doctrine adopted by seven sister circuits. She would adopt the corollary to shield work product generated by the government's outside consultants in anticipation of litigation.

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ORDER

The opinion filed on April 24, 2019, and reported at 922 F.3d 907 (9th Cir. 2019), is amended at footnote 1. The amended opinion is filed simultaneously with this Order, along with the unchanged dissent. The parties may file petitions for rehearing and petitions for rehearing en banc in response to the amended opinion, as allowed by the Federal Rules of Appellate Procedure.

OPINION

MOLLOY, District Judge:

Jorge Alejandro Rojas ("Rojas") appeals the district court's order granting summary judgment in favor of the Federal Aviation Administration ("FAA"). The case concerns a Freedom of Information Act ("FOIA") request Rojas submitted to the FAA after the FAA notified him that he was ineligible for an Air Traffic Control Specialist position based on his performance on a screening test called the Biographical Assessment ("BA"). The district court held that (1) the FAA fulfilled its FOIA obligations by conducting a reasonable search for the requested information and (2) the FAA properly withheld nine pages of summary documents pursuant to Exemption 5 as inter-agency memoranda subject to the attorney work-product doctrine. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse and remand.

I. Background A. The Biographical Assessment

In November 2012, the FAA hired Applied Psychological Techniques, Inc. ("APTMetrics"), a human resources consulting firm, to review and recommend improvements to the FAA's hiring process for Air Traffic Control Specialists.

In 2013, APTMetrics developed the BA test to replace the FAA's existing Air Traffic Selection and Training Test. The BA is an initial screening test that determines whether an applicant possesses certain characteristics empirically shown to predict success in an Air Traffic Control Specialist position. These characteristics include flexibility, risktolerance, self-confidence, dependability, resilience, stress tolerance, cooperation, teamwork, and rules application. The FAA implemented the BA for the first time during the 2014 hiring cycle for Air Traffic Control Specialist applicants. In Summer and Fall 2014, the FAA revised the BA, and APTMetrics performed validation work related to the revised BA (the "2015 BA"). The 2015 BA was subsequently incorporated in the 2015 Air Traffic Control Specialist hiring process.[7]

[7] Rojas requests judicial notice of a transcript of a congressional hearing from June 15, 2016. In general, we may take judicial notice of publicly available congressional records, including transcripts of congressional hearings. *See* Fed. R. Evid. 201(b)(2); *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001) (providing that judicial notice may be taken of public records). But judicial notice is not appropriate here because the testimony at issue is "not relevant to the resolution of this appeal." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006).

In November 2014, the FAA Office of the Chief Counsel asked John Scott ("Scott"), then Chief Operating Officer of APTMetrics, to create "summaries and explanations" of its validation work on the 2015 BA in anticipation of litigation on the FAA's hiring practices. Scott provided the Office of the Chief Counsel with an initial summary in December 2014 and a supplement in January 2015.

B. Rojas's Application and FOIA Request

In early 2015, Rojas applied for an Air Traffic Control Specialist position with the FAA. During the application process, he completed the 2015 BA. On May 21, 2015, the FAA notified Rojas that he was ineligible for a position based on his responses to the BA. Rojas's rejection notification briefly described the BA and stated that the test was "independently validated by outside experts."

On May 24, 2015, Rojas emailed the FAA a FOIA request seeking "information regarding the empirical validation of the biographical assessment noted in [his] rejection notification [from the FAA]. This includes any report created by, given to, or regarding APTMetrics' evaluation and creation and scoring of the assessment." On June 18, 2015, the FAA, through the Office of the Chief Counsel, denied Rojas's FOIA request for documents on the empirical validation of the 2015 BA. The FAA reasoned that these records were, in part, protected as attorney workproduct and therefore subject to Exemption 5 of FOIA. *See* 5 U.S.C. § 552(b)(5). On June 24, 2015, Rojas filed an administrative appeal contesting the FAA's denial of his FOIA request. On October 7, 2015, the FAA remanded Rojas's case to the Office of the Chief Counsel because the agency incorrectly searched for documents on the empirical validation of the 2014 BA, instead of the 2015 BA.

Pursuant to the remand, attorneys at the Office of the Chief Counsel reviewed records on the empirical validation of the 2015 BA. They located the following three documents: (1) a summary of the Air Traffic Control Specialist hiring process, dated December 2, 2014; (2) a summary of the 2015 BA, dated January 29, 2015; and (3) a summary of the validation process and results of the 2015 BA, dated September 2, 2015. All of these records were created by APTMetrics and are identified in the FAA's Vaughn Index.[8] The FAA denied Rojas's FOIA request for the second time on December 10, 2015, once again invoking Exemption 5 and the attorney work-product doctrine.

On July 31, 2015, Rojas filed a complaint in district court, alleging that the FAA withheld information on the empirical validation of the 2015 BA in violation of FOIA. On September 21, 2016, the district court ordered the FAA to disclose the three documents identified in its Vaughn Index for *in camera* review. The district court granted summary judgment in favor of the FAA on November 10, 2016, holding that the three responsive records were properly withheld under Exemption 5 as attorney workproduct. The court also concluded that there was no genuine dispute of material fact that the FAA adequately searched for

[8] Agencies are typically required to submit a Vaughn Index in FOIA litigation. *See Vaughn v. Rosen*, 484 F.2d 820, 823–25 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). A Vaughn Index identifies the documents withheld, the FOIA exemptions claimed by the agency, and "why each document falls within the claimed exemption." *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 688 (9th Cir. 2012), *overruled on other grounds by Animal Legal Def. Fund v. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016) (en banc) (per curiam) (citation and internal quotation marks omitted).

relevant documents. Rojas timely appeals. *See* Fed. R. App. P. 4(a).

II. Standard of Review

In FOIA cases, we review de novo a district court's order granting summary judgment. *Animal Legal Def. Fund*, 836 F.3d at 990. Summary judgment is warranted when, viewing the evidence in the light most favorable to the nonmoving party, there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Olsen v. Idaho St. Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

III. Discussion

FOIA requires government agencies to "make . . . promptly available to any person," upon request, whatever "records" are possessed by the agency. 5 U.S.C. § 552(a)(3)(A). FOIA "was enacted to facilitate public access to [g]overnment documents" and "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (citations and internal quotation marks omitted). An agency may avoid disclosure only if it proves that the requested documents fall within one of nine enumerated exemptions. *See* 5 U.S.C. § 552(b)(1)–(9); *see also Lane v. Dep't of Interior*, 523 F.3d 1128, 1137 (9th Cir. 2008). At issue on appeal is whether: (1) the FAA adequately searched for records in response to Rojas's FOIA request; (2) the FAA properly withheld three documents under Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5); and (3) the FAA properly construed the scope of Rojas's FOIA request.

A. Search for Responsive Documents[9]

Under FOIA, an agency responding to a request must "demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents." *Hamdan v. Dep't of Justice*, 797 F.3d 759, 770 (9th Cir. 2015) (citation and internal quotation marks omitted). "[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (emphasis in original) (citation and internal quotation marks omitted). "The adequacy of the agency's search is judged by a standard of reasonableness, construing the facts in the light most favorable to the requestor." *Citizens Comm'n on Human Rights v. Food & Drug Admin.*, 45 F.3d 1325, 1328 (9th Cir. 1995) (citation omitted). We conclude that the FAA failed to conduct a search reasonably calculated to uncover all relevant documents.

Rojas's FOIA request sought "information regarding the empirical validation" of the BA that was described in his rejection notice, including "any report created by, given to, or regarding APTMetrics' evaluation and creation and Case: 17-55036, 06/18/2019, ID: 11334955, DktEntry: 44-1, Page 10 of 39Case: 17-55036, 08/01/2019, ID: 11384929, DktEntry: 46, Page 33 of 64

scoring" of the BA. In response, the Office of the Chief Counsel located summaries of: (1) the Air Traffic Control Specialist hiring process; (2) the 2015 BA; and (3) the

[9] The FAA argues that the parties stipulated before the district court that "the only issue in the case concerned the legal basis for the FAA's decision to withhold the responsive records." While the parties "indicated their agreement that the only issue in the case concerned the legal basis for the FAA's decision to withhold the responsive records," Rojas argued before the district court that the FAA conducted an inadequate search, the district court held that Rojas failed to "show a genuine issue of material fact regarding whether the search conducted by the FAA was adequate under FOIA," and both parties briefed the issue on appeal and argued reasonableness at oral argument. Therefore, the reasonableness of the FAA's search is properly before the Court.

validation process and results of the 2015 BA. All of these records were created by APTMetrics.

"[T]he government may demonstrate that it undertook an adequate search by producing reasonably detailed, nonconclusory affidavits submitted in good faith." *Lane*, 523 F.3d at 1139 (citation and internal quotation marks omitted). Affidavits must be "relatively detailed in their description of the files searched and the search procedures." *Zemansky*, 767 F.2d at 573 (internal quotation marks omitted). The agency must show that it searched for the requested records "using methods which can be reasonably expected to produce the information requested." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

The FAA's declarations did not sufficiently describe the agency's search procedures. The declaration of Yvette Armstead, the FAA's Assistant Chief Counsel, states that the agency "conducted a search for documents responsive to [Rojas]'s FOIA request" on two occasions—both initially and on remand from Rojas's administrative appeal. Armstead further explains that the search was "reasonably calculated to obtain responsive records" because attorneys at the Office of the Chief Counsel who provided legal advice on revisions to the Air Traffic Control Specialist hiring process "were asked to review their records." Attorneys located "[t]hree responsive documents" comprised of nine pages in total that "discuss[] the validation of the 2015 BA."

Armstead's declaration is conclusory. It omits relevant details, such as names of the attorneys who searched the relevant documents and the amount of time the Office of the Chief Counsel devoted to the search. *See Citizens Comm'n* Case: 17-55036, 06/18/2019, ID: 11334955, DktEntry: 44-1, Page 11 of 39Case: 17-55036, 08/01/2019, ID: 11384929, DktEntry: 46, Page 34 of 64

on Human Rights, 45 F.3d at 1328 (concluding that agency's search was adequate where its declaration stated that the agency spent over 140 hours reviewing documents in response to the plaintiff's FOIA request). The documents the FAA located included summaries of the Air Traffic Control Specialist hiring process, the 2015 BA, and the validation process and results of the 2015 BA. But summaries by

necessity summarize something else; there is no indication that there was any search conducted for underlying documents. Thus, though Armstead's declaration establishes that appropriate employees were contacted and briefly describes the files that were discovered, it does not demonstrate that the FAA's search could reasonably be expected to produce the information requested—here, "information regarding the empirical validation of the biographical assessment noted in Rojas's rejection notification." Construing the facts in the light most favorable to Rojas, the FAA has not shown "that it undertook an adequate search," *Lane*, 523 F.3d at 1139.

B. FOIA Exemption 5

Per Exemption 5, FOIA's disclosure requirements do not apply to "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). The exemption allows the government to withhold records that are "normally privileged in the civil discovery context[,]" such as documents covered by the attorney work-product privilege. *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *see Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997). It prevents FOIA from being used to circumvent litigation privileges. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801–02 (1984).

The threshold question under Exemption 5 is whether the records qualify as "inter-agency or intra-agency memorandums or letters." 5 U.S.C. § 552(b)(5); *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001). By its plain terms, Exemption 5 applies only to records that the government creates and retains. However, a number of our sister circuits have adopted a functional interpretation of Exemption 5 that treats documents produced by an agency's third-party consultant as "intra-

agency" memorandums. This functional interpretation, called the consultant corollary, recognizes that a third-party consultant may perform certain functions on behalf of a government agency. The consultant corollary treats communications from third-party consultants as "intra-agency" memorandums under Exemption 5, as if those communications came from the agency itself.

The district court seems to have relied on the consultant corollary in determining that the FAA properly invoked Exemption 5 in this case. It reasoned that "courts have upheld the application of FOIA Exemption 5 to materials composed and supplied by outside contractors." At the same time, the court concluded that the records "constitute *inter*agency memoranda created by a government agency." The description of the documents as "*inter*-agency memoranda" is incorrect. APTMetrics is not a government agency. *See* 5 U.S.C. §§ 551(1) (defining agency), 552(f) (same). Therefore, the exchange of records between it and the FAA cannot be an inter-agency exchange. *See Black's Law Dictionary* (10th Ed. 2014) (defining the preposition "inter" as "among"). Under the consultant corollary, to which the district court's reasoning alludes, the documents would be
classified as "*intra*-agency."

We have yet to adopt the consultant corollary in this Circuit, though we have previously acknowledged it.[10] Here,

[10] In an unpublished memorandum disposition, *Center for Biological Diversity v. Office of U.S. Trade Representative*, 450 F. App'x 605, 607 (9th Cir. 2011) (mem. disp.), agency communications with private third parties had been withheld under Exemption 5. After expressing that "[t]his fact alone suggests [the communications] do not meet Exemption 5's threshold requirement[,]" we nonetheless described that certain thirdparty communications may fall within Exemption 5 under the consultant corollary. *Id.* at 608. The case was then remanded to develop the record on the relationships between the agency and the third parties. *Id.* at 609. Because the record was unclear as to whether the

the role of APTMetrics as a consultant to the FAA is undisputed. Therefore, we must now decide whether to adopt the consultant corollary to Exemption 5. Because the consultant corollary is contrary to Exemption 5's text and FOIA's purpose to require broad disclosure, we decline to do so.

The consultant corollary contravenes Exemption 5's plain language. Statutory interpretation "begins with the plain language of the statute." *Eleri v. Sessions*, 852 F.3d 879, 882 (9th Cir. 2017) (citation and internal quotation marks omitted). "When an examination of the plain language of the statute, its structure, and purpose clearly reveals congressional intent, our judicial inquiry is complete." *Id.* (citation and internal quotation marks omitted). Exemption 5 protects only "inter-*agency* or intra-*agency* memorandums or letters." 5 U.S.C. § 552(b)(5) (emphasis added). An "agency," with some exceptions not relevant here, is defined as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 551(1). More specifically, an agency

"includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f). A third-party consultant, then, is not an agency as that word is used in FOIA, generally, or Exemption 5, particularly. Indeed, "neither the terms of the exemption nor the statutory definitions say anything about communications with outsiders." *Klamath*, 532 U.S. at 9.

In contrast, two other FOIA exemptions explicitly protect communications with outsiders. 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). Exemption 8 applies

third parties were "consultants," the case did not require us to decide the validity of the consultant corollary in this Circuit.

to 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). That these exemptions contemplate information from third parties, while Exemption 5 is limited to "inter-agency or intra-agency" communications, makes clear that Exemption 5 applies only to records that originate and remain inside the government. *See Weber*, 465 U.S. at 804 ("We therefore simply interpret Exemption 5 to mean what it says."). Thus, the consultant corollary expands Exemption 5's protections beyond the plain text of FOIA.

The dissent attempts to resolve the consultant corollary's tension with the statutory text by conflating the term "intraagency memorandums," as used in Exemption 5, with "agency records," as used elsewhere in FOIA. The dissent also construes "intra-agency" to mean records held within an agency, even though they may have originated with a third

party consultant. But that renders superfluous the term "*inter*-agency" as used alongside "intra-agency" in Exemption 5. And, if Congress intended Exemption 5 to extend to all "agency records," it would have used that term, *see* 5 U.S.C. § 552(f)(1), (2), rather than the narrower "inter-agency or intra-agency memorandums or letters," § 552(b)(5).

In addition to contravening the statutory text, the consultant corollary also undermines the purpose of FOIA. The dissent insists that civil discovery rules dictate the scope of Exemption 5. But FOIA "sets forth a policy of broad disclosure of Government documents in order 'to ensure an informed citizenry, vital to the functioning of a democratic society.'" *FBI v. Abramson*, 456 U.S. 615, 621 (1982) (quoting *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). "[D]isclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Accordingly, the exemptions are construed narrowly. *See id.* at 361; *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989);

Abramson, 456 U.S. at 630. Congress has instructed as much with the statutory language that the exemptions do "not authorize withholding of information or limit the availability of records to the public, *except as specifically stated* in this section." 5 U.S.C. § 552(d) (emphasis added). The consultant corollary allows the government to withhold more documents than contemplated by Exemption 5, contrary to FOIA's policy favoring disclosure and its mandate to interpret exemptions narrowly.

The cases adopting the consultant corollary do little to confront its inconsistency with both the text and purpose of FOIA. The opinion in which it originates, the 1971 D.C. Circuit case *Soucie v. David*, 448 F.2d 1067 (D.C. Cir.

1971), does not even address the statutory text. *Soucie* concerned a FOIA request for the Garwin Report, an "independent assessment" on supersonic transport aircraft produced by a panel of outside experts for the Office of Science and Technology. *Id.* at 1070. The issue on appeal was whether the Office of Science and Technology was an "agency" subject to FOIA's disclosure requirements. *Id.* at 1075. The D.C. Circuit held that the Office of Science and Technology was an agency and remanded the case for the district court to consider whether the Garwin Report fell within any of FOIA's exemptions. *Id.* at 1075–76. First, though, the court posited that Exemption 5 may apply. *Id.* at 1076–77. In a footnote, the court summarily reasoned that Exemption 5's purpose supported applying it to records prepared by third-party consultants:

> The rationale of the exemption for internal communications indicates that the exemption should be available in connection with the Garwin Report even if it was prepared for an agency by outside experts. The Government may have a special need for the opinions and recommendations of temporary consultants,

> and those individuals should be able to give their judgments freely without fear of publicity. A document like the Garwin Report should therefore be treated as an intraagency memorandum of the agency which solicited it.

Id. at 1078 n.44. The court cited no authority for these propositions. Nor did it acknowledge, never mind reconcile, FOIA's text and purpose.

In *Wu v. National Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972), the Fifth Circuit cited *Soucie*'s unsourced footnote to hold that Exemption 5 protected evaluations prepared by outside experts for the National Endowment for the Humanities. *Wu* reasoned that protecting third-party communications furthered Exemption 5's policy of "encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers." *Id.* at 1034 (quoting *Int'l Paper Co. v. Fed. Power Comm'n*, 438 F.2d 1349 (2d Cir. 1971)). But, like *Soucie*, the opinion did not reconcile its holding with FOIA's broader policy favoring disclosure or Exemption 5's textual limits.

Together, *Soucie* and *Wu* form the basis for the consultant corollary. Later opinions adopting the consultant corollary cite to the two cases. *See Hoover v. Dep't of the Interior*, 611 F.2d 1132, 1138 (5th Cir. 1980); *Lead Indus. Ass'n, Inc. v. OSHA*, 610 F.2d 70, 83 (2d Cir. 1979); *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1970); *Martin Marietta Aluminum, Inc. v. Gen. Servs. Admin.*, 444 F. Supp. 945, 949 (C.D. Cal. 1977). Or, they cite to cases that in turn cite *Soucie* and *Wu*. *See Gov't Land Bank v. Gen. Servs. Admin.*, 671 F.2d 663, 665 (1st Cir. 1982) (citing *Hoover*, 611 F.2d at 1137–38). That other courts readily signed onto the consultant corollary does not compensate for its shaky foundation. And relying on the doctrine's proliferation to

adopt it now would be the result of judicial inertia, rather than reasoned consideration.

The Supreme Court acknowledged, but did not adopt, the consultant corollary in the 2001 case *Department of Interior v. Klamath Water Users Protective Association*. In *Klamath*, the Court commented that "[a]lthough neither the terms of the exemption nor the statutory definitions say anything

about communications with outsiders, some Courts of Appeals have held that in some circumstances a document prepared outside the Government may nevertheless qualify as an 'intra-agency' memorandum under Exemption 5." *Id.* at 9 (citations omitted). The Court also quoted the dissent in *Department of Justice v. Julian*, 486 U.S. 1 (1988), in which Justice Scalia accepted the consultant corollary's purposive reading of Exemption 5:

> It is textually possible and . . . in accord with the purpose of the provision, to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency—*e.g.*, in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency.

Klamath, 532 U.S. at 9–10 (quoting *Julian*, 486 U.S. at 18 n.1 (Scalia, J., dissenting)). Curiously, the *Klamath* Court did not discuss the propriety of the consultant corollary and neither adopted nor rejected it.

Instead, the Court explained that the term "intra-agency" in Exemption 5 is not "purely conclusory" and warned that there is "no textual justification for draining the first condition of independent vitality." *Id.* at 12 (majority opinion). The Court then narrowly held that, "at the least[,]"

the consultant corollary does not apply to communications from interested parties who consult with the government for their own benefit. *Id.* at 12, 12 n.4. In a footnote, the Court

admonished two D.C. Circuit opinions, *Public Citizen, Inc. v. Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997) and *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), as "instances of intra-agency consultants that arguably extend beyond what we have characterized as the typical examples." *Id.* at 12 n.4. However, the Court provided no further guidance as to the proper scope of Exemption 5. *Klamath*, then, appears to instruct that courts should be more rigorous in analyzing whether an outside party's records satisfy Exemption 5's threshold "intraagency" requirement before analyzing whether the records are privileged. *See Hunton & Williams v. Dep't of Justice*, 590 F.3d 272, 283–84 (4th Cir. 2010) (describing that *Klamath* requires the first step of Exemption 5 to be "more carefully scrutinized").

Since the Supreme Court's decision in *Klamath*, the Fourth and Tenth Circuits have adopted the consultant corollary. *See Hanson v. USAID*, 372 F.3d 286 (4th Cir. 2004); *Stewart v. Dep't of Interior*, 554 F.3d 1236, 1245 (10th Cir. 2009). Most recently, though, the Sixth Circuit rejected it in *Lucaj v. Federal Bureau of Investigation*, 852 F.3d 541 (6th Cir. 2017).

Lucaj concerned a FOIA request for documents that the FBI had sent to foreign governments to secure their assistance in investigating Lucaj's role in political attacks in Montenegro. *Id.* at 543–44. The FBI argued that the documents were protected from disclosure under Exemption 5 pursuant to the "common interest doctrine," which "permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims." *Id.* at 545 (quoting *Hunton & Williams*, 590 F.3d at 277–78). The Sixth Circuit, relying on *Klamath*'s instruction that "the first

condition of Exemption 5 is no less important than the second," applied a strict statutory interpretation to conclude that documents sent by a government agency to a foreign government are neither "intra-" nor "inter-agency" memoranda within the meaning of the Exemption. *Id.* at 547 (quoting *Klamath*, 532 U.S. at 9). The court then explicitly rejected the consultant corollary as contrary to Exemption 5's plain text and the mandate to construe FOIA's exemptions narrowly. *Id.* at 549. In doing so, the court relied on *Klamath*'s instruction not to ignore Exemption 5's threshold inquiry.

Lucaj reads *Klamath*'s focus on the threshold question under Exemption 5 as essentially foreclosing the consultant corollary. We disagree that *Klamath* can be interpreted so conclusively. Rather, we understand *Klamath* as leaving open whether the consultant corollary is a proper application of Exemption 5. We conclude that it is not. As described above, the consultant corollary is contrary to Exemption 5's text and FOIA's policy of broad disclosure, and its legal foundation—the unsourced footnote in *Soucie*—is tenuous at best. While the dissent is critical of the Sixth Circuit decision, *Lucaj* provides a reasoned discussion of the interplay between the consultant corollary, the language of Exemption 5, and the purpose of FOIA. That is more than can be said of *Soucie* and its progeny.

Proponents of the consultant corollary may argue that rejecting it allows parties to use FOIA to circumvent civil litigation privileges. Indeed, Congress enacted the exemptions because it "realized that legitimate governmental and private interests could be harmed by release of certain types of information." *Abramson*, 456 U.S. at 621. Even so, full disclosure is the guiding principal in interpreting FOIA. *See Rose*, 425 U.S. at 361. We are not

convinced that the potential harm to the government warrants adopting the consultant corollary's broad reading of Exemption 5. While today's holding means some privileged documents from third-party consultants will be subject to disclosure under FOIA, the dissent's suggestion that it will open the floodgates is speculative. And, absent the consultant corollary, agencies can still avoid disclosure under Exemption 5 by keeping potentially privileged material within the government. If this proves unworkable, as the dissent argues, the proper remedy lies with Congress, not the courts.

Because we reject the consultant corollary, the records at issue can no longer be considered "intra-agency" documents, and Exemption 5 does not apply. Thus, we need not address whether the records would be privileged under Exemption 5's second step.

C. Scope of the FOIA Request

Rojas challenges the district court and the FAA's interpretation of the scope of his FOIA request. Specifically, Rojas argues that the FAA has an obligation under FOIA to retrieve any responsive documents, such as the underlying data to the summaries, held by APTMetrics. However, FOIA places no such obligation on an agency.

FOIA empowers federal courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). As discussed above, an agency is "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent Case: 17-55036, 06/18/2019, ID: 11334955, DktEntry: 44-1, Page 22 of 39Case: 17-55036, 08/01/2019, ID: 11384929, DktEntry: 46, Page 45 of 64

regulatory agency." 5 U.S.C. § 552(f)(1). A "record" is "any information that would be an agency record subject to the

requirements of this section when maintained by an agency in any format, including an electronic format" along with "any information . . . that is maintained for an agency by an entity under Government contract, for the purposes of records management." 5 U.S.C. § 552(f)(2). FOIA does not define "agency record." *See Forsham v. Harris*, 445 U.S. 169, 178 (1980).

The Supreme Court has held that for a document to be an "agency record" under FOIA, the agency must (1) "'either create or obtain' the requested materials," and (2) "the agency must be in control of the requested materials at the time the FOIA request is made." *Tax Analysts*, 492 U.S. at 144–45 (quoting *Forsham*, 445 U.S. at 182). That an agency has a right to obtain a document does not render the document an agency record. *Id.* at 144. "FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained." *Id.* (emphasis in original) (quoting *Forsham*, 445 U.S. at 186).

To be sure, the bright line definition of agency records as those "which have been *in fact* obtained" allows the government to avoid disclosure by parking documents with third parties. We share the concerns Justice Brennan articulated when he dissented from the adoption of a bright line definition. Specifically, Justice Brennan expressed that

> the understandable tendency of agencies to rely on nongovernmental grantees to perform myriad projects distances the electorate from important information by one more step. If the records of such organizations, when drawn directly into the regulatory process, Case: 17-55036, 06/18/2019, ID: 11334955, DktEntry: 44-1, Page 23 of 39Case: 17-55036, 08/01/2019, ID: 11384929, DktEntry: 46, Page 46 of 64

> are immune from public inspection, then government by secrecy must surely return.

Forsham, 445 U.S. at 191 (Brennan, J., dissenting). These concerns are particularly pertinent in this case, which involves a federal agency delegating its duty to establish

hiring criteria to an outside consultant. But we are bound by the Supreme Court's precedent. And under that precedent, the records held by APTMetrics that have not been transmitted to the FAA are beyond the reach of FOIA. That the FAA is not obligated to search APTMetrics for responsive documents does not relieve its duty to conduct a reasonable search of its own records, as discussed above.

CONCLUSION

The district court erred by entering summary judgment in favor of the FAA. The FAA has not shown it conducted a search reasonably calculated to uncover all relevant documents in response to Rojas's FOIA request, and we join the Sixth Circuit in rejecting the consultant corollary to Exemption 5. We **REVERSE** the judgment of the district court and **REMAND** for further proceedings consistent with this opinion. Rojas's motion for judicial notice is **DENIED**.

CHRISTEN, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that Rojas cannot use the Freedom of Information Act (FOIA) to access materials that the FAA does not actually possess, and I agree that the scope of the FAA's in-house search for responsive documents was inadequate.

I disagree with the majority's rejection of the "consultant corollary"—a doctrine adopted by seven of our sister circuits. The "consultant corollary" acknowledges that Exemption 5's protection of privileged documents extends to materials prepared by an agency's retained consultants. This allows agencies to shield privileged materials from disclosure to the same extent they would in discovery. By

rejecting the consultant corollary, the majority gives the FOIA a truly capacious scope. After today, the fact that a document was prepared in anticipation of litigation by a government-retained consultant will present no barrier to anyone who wants to access it by filing a FOIA request.

Our court has not had an occasion to squarely address the consultant corollary in a published opinion. Now that the question is presented, we should follow the First, Second, Fourth, Fifth, Eighth, Tenth, and D.C. Circuits, all of which adopted the consultant corollary to shield work product generated by the government's outside consultants in anticipation of litigation.[11] Because the majority's decision rejects the corollary, upends basic discovery rules, and disregards the careful balance Congress struck when it enacted the FOIA, I respectfully dissent.

* * *

The circumstances in which the present dispute arose provide critical context for its resolution. In 2012, the FAA

[11] *See Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); *Gov't Land Bank v. Gen. Serv. Admin.*, 671 F.2d 663, 666 (1st Cir. 1982); *Lead Indus. Ass'n Inc. v. OSHA*, 610 F.2d 70, 83 (2nd Cir. 1979); *Hanson v. U.S. Agency for Int'l. Dev.*, 372 F.3d 286, 292–93 (4th Cir. 2004); *Hoover v. U.S. Dept. of the Interior*, 611 F.2d 1132, 1137 (5th Cir. 1980); *Brockway v. Dept. of Air Force*, 518 F.2d 1184, 1194 (8th Cir. 1982); *Stewart v. U.S. Dep't of Interior*, 554 F.3d 1236, 1245 (10th Cir. 2009).

undertook a comprehensive review of the Air Traffic Control Specialist selection and hiring process and hired APTMetrics, a human resource consulting firm, to assist in that effort. APTMetrics modified a biographical assessment tool the FAA used to test job-related characteristics. In 2014, the FAA implemented a refined process for selecting air traffic controllers, incorporating APTMetrics's recommendations. Following the implementation of the FAA's new process, an unsuccessful applicant filed an Equal Employment Opportunity Commission (EEOC) complaint, seeking to represent a class of unsuccessful air traffic controller applicants. That putative class is represented by Mr. Rojas's counsel. The FAA then revised the biographical assessment for use in 2015, and APTMetrics worked on those revisions.

Meanwhile, in anticipation of the pending EEOC litigation, the FAA asked the Chief Operating Officer of APTMetrics to prepare a summary of its validation work. APTMetrics delivered an initial summary in December of 2014 and supplemented it the following month. By August of 2015, a second group of unsuccessful applicants filed a complaint and petition for class certification, this time challenging the 2015 biographical assessment. The second putative class is also represented by Mr. Rojas's lawyer.

Mr. Rojas applied, but was not hired, to be an air traffic control specialist in 2015. He later filed a FOIA request seeking information about the biological assessment's empirical validation and its "evaluation and creation and scoring."[12] The FAA conducted a search and found three

documents that APTMetrics created at the FAA's request and in anticipation of litigating the EEOC complaints. The FAA withheld the three documents pursuant to FOIA's Exemption 5, which exempts from disclosure "inter-agency

[12] Mr. Rojas's request sought three categories of information, but the parties stipulated that the only category at issue in this appeal is the request for information regarding: "[T]he empirical validation of the

or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The FAA claimed the withheld documents were protected attorney-client communications and work product, and that they were pre-decisional and deliberative.

Mr. Rojas filed an administrative appeal and, eventually, a complaint in district court challenging the denial of his FOIA request. The district court conducted an *in camera* review, ruled that the FAA's search for records was reasonable, and granted summary judgment in favor of the government. The court described the withheld documents as "summaries of [1] the [air traffic control] hiring process, [2] the 2015 biographic assessment, and [3] the validation process and results."

Our review of the district court's order granting summary judgment is governed by several well-established principles that the majority does not dispute. First, we know that materials prepared in anticipation of litigation and at the request of an attorney are protected work product and need not be produced in litigation. *See, e.g.*, *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947). Second, in the context of civil discovery, we have long recognized that work-product protection extends to materials created by consultants or third-party experts. *See, e.g.*, *United States v. Nobles*,

biographic assessment noted in the rejection notification," including "any report, created by, given to, or regarding APTMetrics's evaluation and creation and scoring of the assessment."

422 U.S. 225, 238 (1975); *see also* Fed. R. Civ. P. 26(b)(4) (exempting draft expert reports, communications with expert witnesses, and consulting experts materials from discovery). Third, the Supreme Court has explained that FOIA's Exemption 5 precludes the disclosure of information that would be privileged in litigation. *See United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799–802 (1984) (explaining

that certain air crash safety investigation materials could be withheld pursuant to FOIA's Exemption 5 because courts had previously recognized that those materials were privileged in discovery). These principles alone dictate the appropriate resolution in this case: because the validation summaries would not be available to Mr. Rojas in discovery, he cannot acquire them through a FOIA request.[13]

The majority concludes that Exemption 5 only shields materials generated by federal agencies in-house, not those created by the government's retained consultants. Seven other circuits have considered this argument and rejected it. These circuits all adopted the "consultant corollary," agreeing that Exemption 5 reflects Congress's determination that the government is entitled to the same litigation privileges afforded to other parties. Indeed, the propriety of the consultant corollary was foreshadowed by wellrecognized precedent defining the scope and proper application of litigation privileges and protections. The Supreme Court has "consistently rejected" the suggestion that parties in litigation with the government "can obtain through the FOIA material that is normally privileged" or

use FOIA requests "to supplement civil discovery." *Id.* at 801–02 ("We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented."). All of these authorities lead to the conclusion that the FOIA does not require federal agencies to produce retained experts' work product created in anticipation of litigation.

I.

Congress enacted the Freedom of Information Act in 1966 as a means of increasing transparency and broadening access to government materials. "FOIA 'sets forth a policy

[13] The district court said the validation summaries were "*inter*agency memorandums," but its reasoning (and supporting authority) clearly related to "*intra*-agency" memoranda. For reasons explained here, the withheld documents plainly qualify for Exemption 5 protection as "intra-agency" memoranda.

of broad disclosure of Government documents in order to ensure an informed citizenry[.]'" *Ante* at 15 (quoting *FBI v. Abramson*, 456 U.S. 615, 621 (1982)). But long before Congress passed the FOIA, courts and legislatures recognized that parties to litigation are entitled to shield certain materials from discovery and disclosure. For example, there is no question that litigants need not produce materials covered by the attorney-client privilege or documents that constitute attorney work-product, including those prepared by the party's agents and consultants. *See, e.g.*, *Hickman*, 329 U.S. at 510–11 (work product materials are protected); *Cont'l Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964) (attorney-client privilege is protected); *Nobles*, 422 U.S. at 238 (work product encompasses material prepared by attorney's investigators and other agents in anticipation of litigation); *see also* Fed. R. Civ. P. 26(b)(4) advisory committee's note to the 1970 amendment.

Congress was well aware of discovery privileges when it drafted the Freedom of Information Act, and it recognized that certain exceptions to FOIA's disclosure regime were necessary in order for the government's many agencies to operate effectively. *See* S. Rep. No. 89-813, at 9 (1965)

(acknowledging that government efficiency "would be greatly hampered" if agencies were "forced to 'operate in a fishbowl.'"). FOIA's exemptions reflect careful balancing between the benefits of transparency and the government's need to maintain the confidentiality of some types of records. For example, FOIA exemptions allow federal agencies to withhold classified materials (Exemption 1), trade secrets (Exemption 4), and internal personnel and medical files (Exemption 6). *See generally* 5 U.S.C. § 552(b)(1)–(9).

Exemption 5 has been described as the most important of FOIA's exemptions. [14] It specifically precludes the

[14] *See* 33 Fed. Prac. & Proc. Judicial Review § 8441 (1st ed.) ("The Freedom of Information Act provides nine exemptions from the disclosure requirements. . . . These are, in order of importance, 5, 7, 1, 3, and 2.").

disclosure of inter- or intra-agency materials "that would not be available by law" to adverse parties in litigation. 5 U.S.C. § 552(b)(5); *see Weber*, 465 U.S. at 801. Rojas does not dispute that Exemption 5 shields attorney work-product created by government agency staff, and this concession is not surprising. There was nothing novel about Exemption 5's carve out; without it, the FOIA would have obliterated a common law rule dating back decades. *F.T.C. v. Grolier Inc.*, 462 U.S. 19, 20 (1983) ("It is well established that this exemption was intended to encompass the attorney workproduct rule.").

Given this backdrop, the resolution of Rojas's appeal should be straightforward: he is not entitled to the APTMetrics documents because the FAA's consultant prepared them at the FAA's request, and in anticipation of litigation. This result would be the same whether the materials were prepared by an FAA employee sitting in an

FAA cubicle, or by a consultant hired to do the same thing. We need look no further than Exemption 5 to know that the FAA was not required to disclose the three withheld documents. *See* 5 U.S.C. § 552(b)(5).

II.

The majority reviews the text of Exemption 5, decides that consultants do not qualify as "agencies," and concludes that FAA's consultant-prepared materials are not "intraagency memorandums" within the scope of Exemption 5. *See Ante* at 13–14.

I read the statute differently. Exemption 5 states that FOIA's disclosure requirement "does not apply" to "interagency 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). The Supreme Court has explained that the phrases "an agency" and "the agency" in Exemption 5 refer to the same entity. *See Weber*, 465 U.S. at 798 (explaining that a plaintiff could not access privileged documents through a FOIA request

because "they would not be available by law to a party other than [the Air Force] in litigation with [the Air Force]."") (alternation in original) (internal quotation marks omitted).

Nothing in Exemption 5's text requires that the materials be created by the agency itself, nor do the statute's definitions dictate that an "intra-agency memorandum" includes *only* those materials that agency employees (as opposed to retained consultants) prepare in-house. Here, the FAA specifically engaged APTMetrics to use its expertise to create biometric summaries on behalf of the FAA. The FAA took possession, reviewed and relied on the summaries, then stored and maintained them. For all intents and purposes, the three withheld documents are the FAA's memoranda and

we should treat them just as we would treat a memorandum created by an internal FAA employee.

An agent acts "on the principal's behalf," meaning the agent's acts *are the principal's acts*. *See Agency*, Black's Law Dictionary (10th ed. 2014). The nature of an agentprincipal relationship requires that the "agent's actions have legal consequences for the principal[,]" *id*., and we have recognized that consultants are agents whose statements can bind their paying clients. *See Reid Bros. Logging Co. v. Ketchikan Pulp Co*., 699 F.2d 1292, 1306 (9th Cir. 1983) (finding that a consultant's report, distributed to a party in litigation, was properly introduced as a party admission under Fed. R. Evid. 801(d)(2)(C)). Because the FAA retained APTMetrics as a consultant and paid it to prepare the sought-after biometric assessment summaries in anticipation of class action litigation, those summaries should be treated as if FAA employees prepared them. Unless we ignore the entirety of the statute, its legislative history, analogous case law, and controlling case law addressing the limits of permissible discovery, the documents must be afforded Exemption 5 protection.

The actual text of Exemption 5 easily encompasses the requested materials because Exemption 5 protects "*intra*agency memorandums[.]" Of course, "intra" simply

means "within," *see intra*, The American Heritage Dictionary of the English Language (1978), and we know that the FAA paid APTMetrics to prepare the summaries on its behalf. The agency received the summaries, and as far as we can tell it has been maintaining and storing them ever since. The responsive documents are therefore "within" the FAA in both a physical and proprietary sense, so the FAA's consultant-created memoranda are "intra-agency memorandums," strictly and textually speaking.

FOIA's broader statutory framework also indicates that the FAA's consultant-prepared materials are entitled to Exemption 5's protection. The FOIA defines "record" and explains that the materials that would qualify as "an agency record" include information "maintained by an agency in any format[.]" 5 U.S.C. § 552(f)(2). This is consistent with the Supreme Court's opinion in *Forsham v. Harris*, where the Court defined FOIA's "agency records" (through reference to similar statutes) as materials "*made or received* by an agency[,]" and "*created or received*" by the government. 445 U.S. 169, 182–86 (1980) (emphasis in original). *Forsham* further explained that "[t]he legislative history of the FOIA abounds with other references to records *acquired by* an agency." *Id*. at 184 (emphasis added). There is no dispute that the FAA received APTMetrics's summaries and that it remains in possession of them. As such, those summaries necessarily constitute "agency records" pursuant to FOIA's definitions.

Today's opinion divorces "agency records" from "intraagency memorandums," and reaches the paradoxical conclusion that the three withheld documents are not "intraagency memorandums" even though they certainly fall within the definition of "agency records." It is difficult to conjure an adequate rationale or a holistic reading of the statutory text by which all "agency records" fall within FOIA's scope but only an arbitrary subset of privileged "agency records" are protected by Exemption 5.

In the majority's view, the consultant corollary ignores FOIA's distinction between intra- and inter-agency materials. *Ante* at 14. But distinguishing between those two categories is simple if the consultant corollary is properly applied: Exemption 5 encompasses materials prepared inhouse *or* by an agency's consultant, and the materials are

either "intra-" or "inter-agency" depending on whether they are shared outside the agency.

Parties engaged in litigation with the government will use today's ruling to circumvent the government's claims of work product, attorney-client communication or any other privilege recognized by our discovery rules, even though the federal rules *expressly bar* discovery into those kinds of materials, *see* Fed. R. Civ. P. 26(b)(4)(D), and despite the long-established rule that the government is entitled to the same litigation privileges as other parties. *In re Lindsey*, 158 F.3d 1263, 1269 (D.C. Cir. 1998) ("Congress intended that agencies should not lose the protection traditionally afforded through the evidentiary privileges simply because of the passage of the FOIA.")[15]; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975) ("It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5 and that such a privilege had been recognized in the civil discovery context by the prior case law.").

Today's decision only disadvantages the government; the privileges afforded to non-government parties will remain intact because only the government responds to FOIA requests. Thus, the decision simultaneously puts the government at a stark litigation disadvantage, departs from the Supreme Court's observation that "Exemption 5 simply incorporates civil discovery privileges[,]" including those "well recognized in the case law[,]" *Weber*, 465 U.S. at 799, and disregards a clear congressional directive that the

[15] Quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

government should receive the same discovery privileges as other parties.

Notwithstanding these concerns, the majority rejects the corollary because it is "not convinced that the potential harm to the government warrants adopting the consultant corollary's broad reading of Exemption 5." *Ante* at 20–21. Respectfully, this is insufficient in light of the decades-long track record of courts uniformly upholding the government's discovery privileges, which Congress expressly preserved by adopting Exemption 5. *See Weber*, 465 U.S. at 801 ("We do not think that Congress could have so easily intended that the weighty policies underlying discovery privileges could be [] easily circumvented [through a FOIA request]").[16]

The majority suggests that "absent the consultant corollary, agencies can still avoid disclosure under Exemption 5 by keeping potentially privileged material within the government." *Ante* at 21. But that suggestion has it backwards. The government *is* keeping APTMetrics's work product, which is why the materials fall within the scope of the search for responsive documents. If the documents were only possessed by APTMetrics, they would not be subject to the FOIA at all. *Forsham*, 445 U.S. at 186. If the majority means that agencies can avoid disclosure by creating materials in-house, that theory fails to acknowledge that dozens of federal agencies must rely on the expertise of outside consultants to perform specialized tasks. Regrettably, today's opinion will likely dissuade agencies

[16] Curiously, the majority quotes *Weber* to justify its approach. *Ante* at 14. But *Weber* is hardly supportive of the majority's analysis. Indeed, contrary to the majority's holding here, *Weber* explained that the plain language of Exemption 5 incorporated discovery privileges and allowed agencies to shield privileged materials. 465 U.S. at 799–801.

from seeking helpful expertise from outside consultants in the first place.

III.

There is nothing new or novel about the consultant corollary, as evidenced by the dearth of case law supporting today's decision. Circuit courts have been applying the consultant corollary since at least 1971. Just five years after Congress enacted the FOIA, the D.C. Circuit adopted the consultant corollary in *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971) (explaining that an outside expert's report should "be treated as an intra-agency memorandum of the agency which solicited it" for purposes of Exemption 5). Since that decision, the First, Second, Fourth, Fifth, Eighth, and Tenth Circuits have adopted the consultant corollary. *See Gov't Land Bank v. Gen. Serv. Admin.*, 671 F.2d 663, 666 (1st Cir. 1982) (exempting from FOIA disclosure a property appraisal performed by independent contractor); *Lead Indus. Ass'n Inc. v. OSHA*, 610 F.2d 70, 83 (2nd Cir. 1979) (exempting from FOIA disclosure private consultant's analysis of lead levels provided to agency); *Hanson v. U.S. Agency for Int'l. Dev.*, 372 F.3d 286, 292–93 (4th Cir. 2004) (exempting from FOIA disclosure a document prepared by outside attorney as attorney work product); *Hoover v. U.S. Dept. of the Interior*, 611 F.2d 1132, 1137 (5th Cir. 1980) (holding that an appraisal report by an outside expert constituted an intra-agency document for purposes of Exemption 5); *Brockway v. Dept. of Air Force*, 518 F.2d 1184, 1194 (8th Cir. 1982) (exempting from FOIA disclosure statements provided to agency by outside witnesses due to pre-trial privilege); *Stewart v. U.S. Dep't of Interior*, 554 F.3d 1236, 1245 (10th Cir. 2009) (holding that consultant's materials were properly withheld pursuant to

Exemption 5 because "[f]or purposes of [a FOIA] analysis" the consultant "functioned akin to an agency employee").

The majority criticizes the first consultant corollary case, *Soucie v. David*, for failing to cite supportive authority for the consultant corollary, *ante* at 16, but *Soucie* was a case of first impression. *See Fong v. Immigration & Naturalization Serv.*, 308 F.2d 191, 194 (9th Cir. 1962) ("The case is one of first impression and neither party has been able to cite cases or decisions in point."). More importantly, the majority never rebuts the reasoning seven of our sister circuits have proffered to justify this corollary to Exemption 5—i.e., that "[t]he Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity." *Soucie*, 448 F.2d at 1078 n.44. Nor could it. In the context of civil discovery, courts have long accepted that agencies benefit from the assistance of outside experts and that the unnecessary risk of disclosure may put a damper on the government's ability to acquire the knowledge and expertise it requires. *See, e.g.*, *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1162 (D.C. Cir. 1987) ("[F]ederal agencies occasionally will encounter problems outside their ken, and it clearly is preferable that they enlist the help of outside experts skilled at unravelling their knotty complexities. . . . To force an exposure is to stifle honest and frank communication between agency and expert by inhibiting their free exchange of thought") (internal quotation marks omitted); 37A Am. Jur. 2d *Freedom of Information Act* § 182 (2019) ("Agencies have a special need for the opinions and advice of temporary consultants, and the quality of consultants' advice, like that of agency employees, may suffer if the advice is made public."). This case is a good example. It is doubtful that decision makers at the FAA would have engaged in a full and candid Case: 17-55036, 06/18/2019, ID: 11334955, DktEntry: 44-1, Page 37 of 39Case: 17-55036, 08/01/2019, ID: 11384929, DktEntry: 46, Page 60 of 64

conversation about the efficacy of the biometric assessment or ways it might be improved if they were aware that their communications would be subject to disclosure in the

prospective class action litigation. And there is no question the public is best served if the most refined selection criteria are used to choose applicants best qualified to perform the exquisitely sensitive positions held by air traffic controllers.[17]

The only circuit to express doubt about the consultant corollary is the Sixth Circuit. In *Lucaj v. Federal Bureau of Investigation*, 852 F.3d 541, 546–47 (6th Cir. 2017), the Sixth Circuit seemed to reject the rule, except there were no consultants at issue in *Lucaj*. The plaintiff in *Lucaj* was arrested in Montenegro, and the FBI believed that he was connected to terrorist attacks. *Id*. at 543. Because Lucaj believed the United States played a role in his arrest, he sent a FOIA request to the FBI. *Id*. at 543–44. The FBI produced some responsive documents, but it withheld two that the Department of Justice had *sent to foreign law enforcement agencies*. *Id*. at 544–45. The Sixth Circuit rejected the FBI's

claim that the documents were exempted from the FOIA and ordered them produced. In the process of issuing this ruling, the Sixth Circuit purported to reject the consultant corollary, *id*. at 546–47, but because no consultants or consultantcreated materials were at issue in *Lucaj*, its brief rejection of the consultant corollary can only be regarded as dictum. Notably, the majority is conspicuously wary of

[17] The fact that consultant-prepared materials may constitute "intraagency memorandums" for purposes of Exemption 5 does not mean that agencies are obligated to search for responsive FOIA materials held only by consultants. As the majority explains, the Supreme Court's decision in *Forsham v. Harris* forecloses Rojas's challenge to the FAA's failure to search APTMetrics's files in response to his FOIA request. I share the majority's concern about the possibility that the FOIA could be circumvented by storing materials offsite with agency contractors. But I agree with the majority that we are bound by *Forsham*, and it dictates that Rojas cannot access APTMetrics's offsite documents through a FOIA request.

I also agree with the majority's conclusion that the FAA has failed to show that it undertook an adequate in-house search. *See Ante* at 9–11. However, the proper scope of a FOIA search is distinct from whether materials falling within that scope may be exempted from disclosure.

Lucaj, *see ante* at 20 (disagreeing with *Lucaj*'s review of applicable Supreme Court precedent), but it subscribes to the same "plain text" interpretation of "intra-agency" that the Sixth Circuit endorsed. By relying on a conclusion that was merely dictum in *Lucaj*, today's opinion creates a circuit split.

The majority also cites *Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), but that case lends no support to its position. In *Klamath*, the dispute involved competing claims by the Klamath Tribe and others to certain water rights. *Id*. at 5–6. The federal government solicited the Klamath Tribe's input on a potential global resolution. *Id*. Other litigants sought access to the Klamath Tribe's memorandum via the FOIA, and on appeal the Court considered whether the Department of Interior could rely on Exemption 5 and the consultant corollary to withhold it. *Id*. at 6–7. The Court rejected the Department's claim that it could withhold the Tribe's settlement proposal under Exemption 5—but not because it rejected the consultant corollary. On the contrary, the Court acknowledged that in the cases where courts have applied the consultant corollary, "the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done." *Id*. at 10. The Court went on to recognize that in those circumstances "consultants may be enough like the agency's own personnel to justify calling

their communications 'intra-agency.'" *Id*. at 12. Ultimately, the Court rejected the Department of Interior's claimed exemption because the Tribe was decidedly *not* acting on the government's behalf. Far from it, the Tribe was an interested party advocating for its own interests. *Id*. at 11–15. *Klamath* is more a benediction of the consultant corollary than an indictment—after all, the question whether the corollary is correct is antecedent to whether it applies in a particular situation. Indeed, at least one circuit reads *Klamath* as the Court's tacit affirmance of the consultant corollary. *See Stewart*, 554 F.3d at 1244 ("In *Klamath*, after recognizing that Exemption 5 extends to government agency

communications with paid consultants, the Court declined to analogize tribal communications to consultant communications.").

At bottom, though seven circuit courts have expressly adopted the consultant corollary and the Supreme Court's *Klamath* decision has responded favorably (albeit implicitly) to the rule, only one other circuit has rejected the corollary, in dictum. Against that ledger, the majority marshals a crimped view of the term "intra-agency" and reaches a conclusion that casts aside the need to read the FOIA as an integrated whole, as well as decades of persuasive authority. IV.

Today's opinion creates a lopsided loophole that prejudices only the federal government. *Weber*, 465 U.S. at 801. The consultant corollary fits logically with the text and purpose of the FOIA and ensures that government agencies can appropriately shield privileged and sensitive materials from FOIA responses, just as they would in discovery. I would adopt the consultant corollary, and respectfully dissent from the majority's decision.

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Jeffrey E. Sandberg

No. 17-55036

IN THE

United States Court of Appeals for the Ninth Circuit

JORGE ALEJANDRO ROJAS,
Plaintiff-Appellant,

v.

FEDERAL AVIATION ADMINISTRATION, *Defendant-Appellee*.

On Appeal from the United States District Court for the Central District of California

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RESPONSE TO THE PETITION FOR REHEARING AND/OR REHEARING EN BANC

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INTRODUCTION

The government's rehearing petition rests on an erroneous premise: that the critical statutory terms—"inter-agency or intraagency" records—are "not define[d]" by the Freedom of Information Act. Pet. 3. The term "agency" is, however, specifically defined. Where, as here, the "statute includes an explicit definition, [courts] must follow" it. *Digital Realty Tr., Inc. v. Somers*, 138 S.Ct. 767 (2018) (quotation marks omitted). This Court correctly and straightforwardly held that express definition of "agency" applies to the question whether the requested records were subject to a FOIA exemption for "inter-agency or intraagency" documents. *Rojas v. FAA*, 927 F.3d 1046, 1055-56 (9th Cir. 2019). As this Court explained, FOIA defines "agency" to encompass only an "'authority of the Government of the United States.'" *Id.* at 1055 (quoting 5 U.S.C. §551(1)). Thus, the Court concluded records exchanged between the FAA and a private, "third-party consultant," which is "not an agency as that word is used in FOIA," are in no respect "inter-" or "intra-agency" records. *Id.*

The government has no answer to the Court's rationale. Indeed, the government's petition nowhere mentions, or even cites, FOIA's

definition of "agency." It instead relies on something called the "consultant corollary" to FOIA's text. Pet. 5. There are, however, no "corollaries" to the statutory text. A "legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, … this first canon is also the last: 'judicial inquiry is complete.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 46162 (2002).

The Supreme Court has repeatedly reaffirmed that principle in FOIA cases. Earlier this year, the Court rejected a 1970s-era interpretation of FOIA Exemption 4, where the D.C. Circuit "declared" that the exemption has requirements "in addition to [those] actually set forth in" the statute. *Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 2364 (2019) (overturning *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)). Likewise, in *Milner v. Dep't of Navy*, 562 U.S. 562, 573 (2011), the Court rejected *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981), faulting the D.C. Circuit for "taking a red pen to" Exemption 2. 562 U.S. at 573.

This Court's decision here follows those recent Supreme Court precedents to a tee. Just as the Supreme Court rejected the D.C.

Circuit's aging, atextual FOIA analysis in *National Parks* (1974) and *Crooker* (1981), the Court here examined at length, and properly refused to follow, the D.C. Circuit's equally outmoded analysis in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). *See Rojas*, 927 F.3d at 105658. That is the primary authority for the government's "consultant corollary," positing that "intra-agency" records can include documents prepared for agencies "by outside experts" because the government "may have a special need" to keep those records secret. *Soucie*, 448 F.2d at 1078 n.44. But, as the Court here emphasized, *Soucie* "does not even address the statutory text." *Rojas*, 927 F.3d at 1056.

Because this Court's opinion adhered to recent instructions of the Supreme Court to follow the statutory text, including the key statutory definition, the government's petition should be denied.

BACKGROUND

1. In 2015, Jorge Rojas applied to be an FAA air traffic controller. Though he was enrolled in an FAA-approved air traffic control training program, his application was rejected. *Rojas*, 927 F.3d at 1051. The FAA informed Rojas he was "NOT eligible" because of his responses to a "Biographical Assessment." E.R. 339.

The Biographical Assessment was a controversial new "screening test" added for the first time in 2014 to the FAA's hiring process. *Rojas*, 927 F.3d at 1050-51; E.R. 108-115, 284-88, 301, 304; *see also, e.g.*, Candice Rudd, *FAA's Bid to Expand Air Traffic Hiring Pool Hits Turbulence,* Newsday, April 24, 2016, https://tinyurl.com/y5gj4ls8. The new assessment, a "personality test" designed for the FAA by an outside consultant called Applied Psychological Techniques, Inc. ("APTMetrics"), E.R. 102, 327, asked applicants various questions ostensibly designed to detect whether they possessed personality traits predictive of success in the field. *Rojas*, 927 F.3d at 1050-51. Only after earning a high enough score on the personality screening test were applicants evaluated on actual credentials and tested on the key relevant skills like math, logic, and memory. E.R. 102-103, 108, 148.

The new test's introduction had unfortunate consequences. Thousands of highly qualified graduates of, and enrollees in, FAAapproved certification programs were screened out and blocked from employment. *Hearing Before the House Subcomm. on Aviation: Review of the FAA's Air Traffic Controller Hiring, Staffing, and Training Plans* 2-3 (2016), https://tinyurl.com/yyd3cw35 (Rep. LoBiondo). Worse, this

came at a time when the FAA was "struggl[ing] to replace" numerous retiring controllers, leaving the total number at "a 27-year low" and posing "safety implications" for American air travel. *Id.* Thus, the APTMetrics personality-testing measure came under serious public scrutiny and criticism. One congressman, for example, called it "an unnecessary social science experiment," a "new and confusing psychological test" about which the "FAA has repeatedly been opaque and non-responsive." *Id.* at 7 (Rep. Hultgren).

2. Rojas filed a FOIA request for records about the test's design. Because the FAA notice stated that the new test was "independently validated by outside experts," E.R. 339, Rojas sought "any report created by, given to, or regarding" the outside consultant's "evaluation and creation" of the assessment, E.R. 332.

The FAA located three records summarizing claimed efforts by APTMetrics to "validate" the test's efficacy. *Rojas*, 927 F.3d at 1051-52. The FAA withheld all three under FOIA Exemption 5. That limited exemption to FOIA's general rule mandating disclosure allows agencies not to disclose "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). According to the agency, the summaries would be privileged in civil discovery. E.R. 63.

Rojas then sued to compel disclosure under FOIA. 5 U.S.C. §552(a)(4)(B). The district court granted summary judgment to the FAA. The court agreed with the FAA that the records would be privileged in discovery. And as relevant here, the court concluded the records were "inter-agency or intra-agency" documents because "courts have upheld the application of FOIA Exemption 5 to materials composed and supplied by outside contractors." E.R. 10. The court did not address the statute's text.

This Court reversed, holding that, "[b]y its plain terms, Exemption 5 applies only to records that the government creates and retains." 927 F.3d at 1054. FOIA expressly defines the word "agency," limiting it to an "authority of the Government of the United States." *Id.* at 1055 (quoting 5 U.S.C. §§551(1), 552(f)(1)). Because APTMetrics, a private contractor, is therefore "not a government agency," records exchanged between it and the FAA are neither "inter-" nor "intra-" agency records. *Id.* at 1054-55.

This Court acknowledged other courts have adopted a "functional interpretation" of Exemption 5 called the "consultant corollary." *Id.* at 1056-58. This "corollary," invented by the D.C. Circuit in 1971, *Soucie*, 448 F.2d at 1078 n.44, "treats documents produced by an agency's thirdparty consultant as 'intra-agency'" records, *Rojas*, 927 F.3d at 1054. Emphasizing that "*Soucie* and its progeny" provide no "reasoned discussion" of "the language of Exemption 5," this Court concluded the corollary "contravenes Exemption 5's plain language." *Id.* at 1055-58. Because the records were not "inter" or "intra-agency" documents, the Court had no need to address the FAA's contention that they would be privileged in discovery. *Id.* at 1058.

Judge Christen dissented in relevant part. Beyond emphasizing the exemption's "purpose" and supposed consequences of the panel's ruling, *id.* at 1063, 1066, the dissent proposed that the records should be considered "intra-agency" because the FAA "ha[d] been maintaining and storing them," *id.* at 1064. The dissent also cited common-law agency principles, contending that a private contractor hired by the FAA "should be treated" as if it were the FAA itself. *Id.* 1063-64.

The government petitioned for panel and en banc rehearing. This Court called for a response.

ARGUMENT

I. This Court Properly Followed The Supreme Court's Emphatic Directive To Apply The Text Of FOIA As Written.

A. The government's rehearing petition invokes principles from "a bygone era of statutory interpretation." *Argus*, 139 S.Ct. at 2364 (quotation marks omitted). Devoting scant attention to the statutory text, the government argues that this Court's decision deviates from FOIA Exemption 5's "essential purpose," Pet. 1, 12-13, 16, and erroneously "discounted the potential harms" of its interpretation, Pet. 2-3, 16-17. Interpretation of a statute, however, "starts with its text" and ends there where the text is unambiguous. *Milner*, 562 U.S. at 569. Closely adhering to FOIA's text, this Court correctly held that documents created by a private contractor are not "inter-" or "intraagency" records.

"Inter" and "intra" mean "among" and "within" respectively. *Rojas*, 927 F.3d at 1054; *see* Black's Law Dictionary (10th ed. 2014). And as this Court explained: "[A]n 'agency,' … is defined as 'each authority of the Government of the United States,'" "[m]ore specifically,

… '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.'" 927 F.3d at 1055 (quoting 5 U.S.C. §§551(1), 552(f)(1)).

Applying those specific definitions, this Court correctly held that the documents at issue here were not exchanged "among" agencies or generated "within" an agency. Rather, they were created outside the agency by a private company, APTMetrics, and later sent to the FAA. If anything, the records would properly be described as "*extra*-agency."

The Supreme Court's decision in *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001), supports this Court's plain-text reading of Exemption 5. *Klamath* held that "intraagency" cannot be made into a "purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential." *Id.* With that principle in mind, the Court concluded documents submitted to a federal agency by "outsiders" do not qualify as "intra-agency" records. *Id.* at 9. Relying on FOIA's "statutory definitions" of "agency" in 5 U.S.C. §§551(1), 552(f)(1), the

Court explained that, to constitute an "intra-agency" document under Exemption 5, the "source must be a Government agency." *Id.* at 8-9. Under that rationale, documents submitted by a private company, APTMetrics, do not fall within the scope of Exemption 5.

In *Klamath*, the government cited the "consultant corollary" recognized by some lower courts, *supra* at 7, arguing that the Klamath Tribe should be considered part of a federal agency because it was analogous to a "consultant." *Id.* at 11-14. The Court, however, did not pass upon the corollary because it disagreed with the premise that the Tribe was acting at the agency's behest, as opposed to in its own interests. The Court concluded that Exemption 5's "intra-agency condition excludes, at the least, communications to or from [a nongovernmental] interested party" that does not work at the government's behest. *Id.* at 12 n.4.

Here, this Court proceeded to address the issue that the Supreme Court did not reach in *Klamath*. The majority correctly determined the statutory definition of "agency" clearly did not cover documents submitted by APTMetrics, a private company, whether or not it was working with the government as a consultant. Indeed, broadening the

definition of "agency" to include a private party would violate fundamental tenets of statutory construction. Where a statute has an "explicit definition," courts "must follow" that definition. *Digital Realty*, 138 S.Ct. at 767; *see also, e.g.*, *I.N.S. v. Hector*, 479 U.S. 85, 90 (1986) ("plain language" of a statutory definition "preclude[s] [a] functional approach to defining the term").

Moreover, Congress knew how to "explicitly protect [agency] communications with outsiders" when it wanted to. *Rojas*, 927 F.3d at 1055. As the Court observed, *id.*, FOIA Exemptions 4 and 8 cover information obtained from an outside private party, but Exemption 5 does not. 5 U.S.C. §552(b)(4) (documents "obtained from a [nongovernmental] person"); *id.* §552(b)(8) (records "prepared … on behalf of … an agency"). A court must presume that "Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994) (quotation marks omitted).

The same principle shows why the dissent was incorrect that the terms "inter-agency or intra-agency" documents and "agency records" mean the same thing as used in FOIA. 927 F.3d at 1064. FOIA's

definition of "agency records" broadly describes the universe of records subject to FOIA requests: all records "maintained by an agency in any format," whether generated in-house or submitted to agencies by outsiders. 5 U.S.C. §552(f)(2). As the majority explained, "if Congress intended Exemption 5 to extend to all 'agency records,' it would have used that term, … rather than the narrower 'inter-agency or intraagency memorandums or letters.'" 927 F.3d at 1055. Further, the dissent's conflation of "intra-agency" records and "agency records" is irreconcilable with *Klamath*. The records there were "held by a federal agency," and thus clearly "agency records" subject to FOIA. 532 U.S. at 7. Yet the Court held in no uncertain terms they did not qualify as "intra-agency" under Exemption 5.

B. Despite FOIA's clear statutory definition of "agency," relied upon by the Supreme Court in *Klamath* and the majority here, the government argues that records submitted by private companies should be encompassed within Exemption 5 if the company serves as a consultant to an agency. In so arguing, the government disregards the statutory definition and instead asks this Court to focus on Exemption 5's "essential purpose." Pet. 1. But arguments about "legislative

purpose" cannot overcome clear text. *Argus*, 139 S.Ct. at 2364 (quotation marks omitted).

Without reference to Exemption 5's text and the "usual source[s]," like dictionaries, "that might shed light on the statute's ordinary meaning," *id.* at 2363, the government asserts that documents from private parties "are properly understood" as "'intra-agency' in character" when they satisfy the following multi-part test: (1) "created for [an agency's] sole use"; (2) "at [an agency's] express request"; (3) "by persons retained by [an agency]"; and (4) "in contemplation of litigation against" the agency. Pet. 10. The government derives this atextual test from *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), which extended Exemption 5 to private parties serving as consultants to an agency.

Soucie, however, represents precisely the sort of "text-light" precedent the Supreme Court has recently and emphatically instructed courts *not* to follow. *Milner*, 562 U.S. at 573; *see Argus*, 139 S.Ct. at 2364. And as the majority rightly concluded here, the circuits that have adopted the *Soucie* "consultant corollary" (collected at Pet. 14-15) did so with virtually no analysis of the statutory text. 927 F.3d at 1057 ("That other courts readily signed onto the consultant corollary does not

compensate for its shaky foundation."). In *Argus*, other circuits likewise followed the D.C. Circuit's atextual approach to a FOIA exemption. But the Supreme Court did not hesitate to reject those precedents: "We cannot approve such a casual disregard of the rules of statutory interpretation." 139 S.Ct. at 2364. With that scolding issued only months ago, this Court should reject the government's ill-advised invitation to embrace just the type of text-ignoring, purpose-driven approach disparaged by the Supreme Court.

The government's invitation to flout the Supreme Court's instructions is made no more palatable by repeatedly invoking a 30year old statement made by Justice Scalia in a dissenting-opinion footnote. Pet. 2, 4, 7, 10-12 (citing *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 18 n.1 (1988)). As an initial matter, Justice Scalia agreed "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." 486 U.S. at 18 n.1. That is what the majority recognized here.

Justice Scalia went on to observe that it "seem[ed] to [him]" that it was "textually possible" to extend the term "agency" to documents prepared by "outside consultants." *Id.* The Court in *Julian*, however

did not address that issue because it concluded that the documents would be discoverable in civil litigation and therefore would not be covered by Exemption 5 in any event. *Id.* at 11-14 & n.9. And the equivocal, "seems-to-me" statement in the dissent's footnote did not grapple with the text (or any text-based sources such as dictionaries). Instead, as the government does here, it focused on the perceived "purpose of the provision." *Id.* at 18 n.1.

Even if it were possible to read the definition of "agency" to include private-party contractors, longstanding precedent would require resolving such ambiguities by construing FOIA "narrowly" in favor of disclosure. *Milner*, 562 U.S. at 571 (collecting cases).[1] As the majority

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[1] The government incorrectly suggests *Argus* departed from this wellestablished rule. Pet. 13-14. *Argus* simply held that the narrowconstruction rule was inapplicable because the statutory text was unambiguous. The rule may not be invoked to "add[] limitations found nowhere in [the statute's] terms." 139 S.Ct. at 2366.

emphasized here, "[d]isclosure, not secrecy, is the dominant objective of the Act." 927 F.3d at 1056 (quotation marks omitted).[2] That strong

presumption in favor of disclosure, paired with the majority's faithful adherence to FOIA's plain text, including its clear-cut definition of "agency," makes rehearing unwarranted here.

C. Not only does the government ignore the plain text, it also cherry picks the purposes animating enactment of Exemption 5. The government repeatedly cites Congress's desire to protect materials "normally privileged in the civil discovery context." Pet. 1, 11, 13. But

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[2] While no FOIA requester is required to show a particular public interest for his request, the public is served by disclosure here. As discussed above (at 4-5), the FAA's new personality testing, which unduly screened out qualified candidates for air traffic control positions, is a matter of congressional concern.

that concern represents the purpose of just one of Exemption 5's "two conditions." *Klamath*, 532 U.S. at 8. While one of the conditions is that the document must "fall within the ambit of a privilege against discovery," the other necessary condition set out in the statute is that the document qualify as "inter-agency or intra-agency." *Id.*; *see* 5 U.S.C. §552(b)(5) (exempting (1) "inter-agency or intra-agency" documents that (2) "would not be available … in litigation with the agency"). Thus, whether the records here would be privileged for discovery purposes—a question the majority here did "not address," 927 F.3d at 1058—is not

relevant to determining whether they are "inter-agency or intra-agency" documents.[3]

II. This Court's Ruling Did Not Create A Circuit Conflict.

[3] It is thus immaterial, as the government mentions (Pet. 6-7, 11), that Fed. R. Civ. P. 26 provides a discovery privilege for certain work prepared by a "consultant."

The government contends rehearing is warranted because this Court's opinion "creates" a circuit split. Pet. 10. While there is a circuit split on whether documents from private consultants can qualify under Exemption 5, this Court did not create it. Thus, granting rehearing would do nothing to eliminate the split.

Where, as here, "a panel decision simply joins one side of an already existing conflict, rehearing en banc may not be as important because it cannot avoid the conflict." Fed. R. App. P. 35 committee notes. As the majority opinion here explained, 927 F.3d at 1056-58, it took sides in a preexisting split. It joined the Sixth Circuit in holding that "Congress chose to limit the exemption's reach to 'inter-agency or intra-agency memorandums or letters,' not to 'memorandums or letters among agencies, independent contractors, and [other] entities that share a common interest with agencies.'" *Lucaj v. FBI*, 852 F.3d 541,

549 (6th Cir. 2017). Thus, like the majority opinion here, the Sixth Circuit expressly rejected the "'consultant corollary'" recognized by the D.C. Circuit in 1971 and later endorsed by other circuits. *Id.* at 547-48.

The government contends the Sixth Circuit did so only in "dictum" because *Lucaj* concerned "documents exchanged with a foreign government," not "consultant[s]." Pet. 14-15 n.3. But the legal rule *Lucaj* announced was broader than the narrow facts at issue: Like the Court here, the Sixth Circuit held that the term "agency" in Exemption 5's reference to "intra-agency" documents may not be broadened beyond FOIA's express, "limited definition [of] … 'agency.'" 852 F.3d at 547; *see also Rojas*, 927 F.3d at 1067 (Christen, J., dissenting) (acknowledging the majority adopted "the same 'plain text' interpretation of 'intraagency' that the Sixth Circuit endorsed"). Such legal rules are what matter when discerning a case's holding. *See Barapind v. Enomoto*, 400 F.3d 744, 750-51 (9th Cir. 2005) (en banc) (articulation of a legal rule "constitutes circuit law," "regardless of whether it was … 'necessary' to [the] disposition of the case").

The government also suggests rehearing is necessary to avoid an intra-circuit conflict. It points to *Ctr. for Biological Diversity v. Office of*

U.S. Trade Representative, 450 F. App'x 605, 609 (9th Cir. 2011). But "[u]npublished dispositions … are not precedent." Ninth Circuit Rule 36-3(a). And even if they were, *Ctr. for Biological Diversity* would not

conflict with the panel's decision here. Faulting a district court for "fail[ing] to consider Exemption 5's threshold ['intra-agency'] inquiry," this Court simply remanded for the court "to apply *Klamath*." 450 F. App'x at 609. While this Court acknowledged the cases embracing the "consultant corollary," in much the same way the Supreme Court did in *Klamath*, it did not adopt the corollary. *Id.* at 608-609. En banc review is thus not warranted to eliminate any conflict, intra-circuit or otherwise.

III. The Government's Speculation About Adverse Consequences Does Not Support Further Review.

Finally, the government argues rehearing is warranted because "adverse consequences" may flow from this Court's ruling. Pet. 1, 16. But arguments about "upset[ting] … agency practice" cannot justify disregarding the statutory text, even where "considerable adjustments" will be required. *Milner*, 562 U.S. at 580. Policy arguments, including those concerning "undue burdens" faced by an agency in addressing "FOIA requests," are "properly addressed," "not to this Court," but "to

Congress," which frequently revisits and amends FOIA. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 123-24 (1980).

In any event, this case does not present a proper vehicle to examine any adverse consequences because the government fails to address the potential application of common-law agency principles under Exemption 5. As Judge Christen briefly suggested in her dissent, it is possible that Exemption 5 incorporates common-law rules regarding "agent-principal relationship[s]." 927 F.3d at 1063. While appellant Rojas takes no position on the question here, and the majority did not address it, nothing in its opinion forecloses this Court from accepting that principle in a future case.

If the Court did so, the government's claims of adverse consequences may well prove substantially overstated. That is because, if the government establishes agency relationships with some of its consultants and third-party contractors, records created by those private parties might, in some circumstances, be treated as government-created records. *See id.* (Christen, J., dissenting) (when an "agent acts 'on the principal's behalf,'" "the agent's acts are [treated as]

the principal's acts" (emphasis omitted)). Such records would presumably then qualify as "intra-agency" under Exemption 5.

Yet, despite Judge Christen's discussion of common-law agency principles, the government's rehearing petition does *not* discuss the issue. It thus deprives this Court of critical information necessary to evaluate its claims of adverse consequences—including whether it agrees that FOIA incorporates common-law agency principles and, if so, how frequently it forms agency relationships with third-party contractors.

While several of the limited examples emphasized in the government's petition would qualify as agents,[4] APTMetrics would not. The government has never argued or furnished evidence that APTMetrics is properly deemed the government's common-law agent. Nor could it have: An agent must be hired to perform specific tasks "on

[4] The government, for example, points to several scenarios in which agencies hire "outside counsel." Pet. 16-17 & n.4. But attorneys are traditionally treated as their clients' agents. *In re Perle*, 725 F.3d 1023, 1027 (9th Cir. 2013).

behalf of" the principal—tasks like selling or buying real estate for someone else, where the principal retains a right to control the manner

and means of the agent's performance and the agent acts as the principal's personal legal "representative." Restatement (Third) of Agency §1.01 cmt. c, f (2006).

By contrast (with special exceptions such as an attorney-client relationship), "if a service provider is retained to give an independent assessment, the expectation of independence is in tension with" the notion that the hired party is the other's personal representative. Restatement §1.01 cmt. f; *see Jones v. Royal Admin. Servs.*, 887 F.3d 443, 448 (9th Cir. 2018) (looking to Restatement for guidance on scope of common-law agency rules). Here, the FAA retained APTMetrics for its independent judgment in devising and validating a new personality screening test. *Rojas*, 927 F.3d at 1050-51. That is not the function characteristic of an agent.

In a future case, the government can try to argue that FOIA incorporates common-law agency principles, such that some contractorprepared records could be attributable to a government agency. That argument is not presented here, however. This case is thus an exceptionally poor vehicle to predict and evaluate consequences that may flow from the Court's text-based reading of Exemption 5.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be denied.

Respectfully submitted,

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~~/s/Robert M. Loeb~~
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