No.

In the Supreme Court of the United States

NATIONAL INSTITUTE OF MILITARY JUSTICE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

DAN M. KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

Whether documents submitted by private citizens in response to a request by a government official for comment on proposed rules qualify as "inter-agency or intra-agency memorandums or letters" exempt from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5).

RULE 29.6 STATEMENT

The National Institute of Military Justice ("NIMJ") states that it has no parent companies, nor does any publicly-held company have a 10% or greater ownership interest in NIMJ.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—continued

Page(s)

MISCELLANEOUS

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PETITION FOR A WRIT OF CERTIORARI

The National Institute of Military Justice, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 512 F.3d 677. The opinion of the district court (App., *infra*, 41a-87a) is reported at 404 F. Supp. 2d 325.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 2008. A timely petition for rehearing and rehearing en banc was filed on February 25, 2008, and was denied on April 30, 2008. App., *infra*, 88a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Freedom of Information Act, 5 U.S.C. § 552 provides, in relevant part:

> (a) Each agency shall make available to the public information as follows:
>
> * * *
>
> (3)(A) * * * [E]ach agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> * * *
>
> (b) This section does not apply to matters that are –

* * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

STATEMENT

Exemption 5 of the Freedom of Information Act is limited to "***inter-agency or intra-agency memorandums or letters*** which 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) (emphasis added). In *Department of the Interior* v. *Klamath Water Users Protective Association*, 532 U.S. 1 (2001), this Court held that the "inter-agency or intra-agency" requirement should not be "drain[ed] * * * of independent vitality," rejecting the argument that "'intra-agency' is a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential." *Id.* at 12.

Notwithstanding this Court's clear statements in *Klamath*, the court of appeals majority held that documents written by private citizens and submitted by them to the government qualified as "inter-agency or intra-agency" as long as there are "some indicia of a consultant relationship between the outsider and the agency"—even if those indicia consist solely of a request by a government official for the private citizen's views. App., *infra*, 19a. As Judge Tatel explained in dissent, the majority's ruling "does exactly what the Supreme Court forbade in * * * [*Klamath*]: it makes 'intra-agency' . . . a purely conclusory term." App., *infra*, 23a.

The decision below does not just flagrantly disregard this Court's analysis in *Klamath*; it also creates confusion among the lower courts regarding the appropriate test for determining whether a document

qualifies for protection under Exemption 5, an issue that arises with some frequency. Review by this Court is plainly warranted.

A. The FOIA Request

1. The Freedom of Information Act, 5 U.S.C. § 552, provides broadly for disclosure of government documents upon request unless the documents fall within specific exceptions to the disclosure obligation. "[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of the Air Force* v. *Rose*, 425 U.S. 352, 361 (1976). Thus, "[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given narrow compass." *Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 151 (1989).

This case involves the scope of Exemption 5, which allows the government to withhold "inter-agency or intra-agency memorandums or letters which 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). Most decisions construing Exemption 5 have focused on the provision's second condition, whether particular agency documents were protected by a civil discovery privilege. This case involves the first condition, whether a document qualifies as "inter-agency or intra-agency."

The Court addressed that issue in *Klamath*, recognizing that "the first condition of Exemption 5 is no less important than the second; the communication must be 'inter-agency or intra-agency.'" 532 U.S. at 9. The question in *Klamath* was whether letters from Indian tribes that had been requested by the Department of the Interior were exempt from disclosure under Exemption 5.

Quoting Justice Scalia's statement in *United States Department of Justice* v. *Julian*, 486 U. S. 1, 18 n.1 (1988) (dissenting opinion), that "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," the *Klamath* Court observed that some lower courts had extended Exemption 5 to encompass "communications between Government agencies and outside consultants hired by them." 532 U.S. at 10.

The Court in *Klamath* expressly refused to decide whether consultants' reports may ever be protected as "intra-agency" documents under Exemption 5, because—even if they could—"consultants whose communications have typically been held exempt have not been communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant." 532 U.S. at 12. Because the Indian tribes clearly were communicating in their own interest, any "consultant corollary" to Exemption 5 could not apply to the documents submitted by the tribes. *Id.* at 11.

2. President Bush in November 2001 issued a military order authorizing the creation of commissions to try suspected terrorists. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001). The order directed the Secretary of Defense to promulgate implementing regulations. *Ibid.*

The Department of Defense did not seek public comment with respect to these regulations. It did, however, solicit private comments regarding the draft regulations from a number of private individuals. Thus, in a March 21, 2002, press briefing, the Secretary of Defense expressed his personal appre-

ciation for the comments of "a number of non-Defense Department individuals, most of them former government officials or judicial officers of various types" who "just volunteered to help out and have been enormously helpful." U.S. Department of Defense News Transcript, *DoD News Briefing on Military Commissions* (Mar. 21, 2002), available at www. defenselink. mil/transcripts/transcript.aspx? transcriptid=3367. Secretary Rumsfeld identified nine distinguished attorneys from private practice and academia, "none of [whom] work for this department" who participated "without compensation" in the development of the commissions' procedures. *Ibid.*

On July 1, 2003, the Department published its rules governing the military commissions. See *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism*, 68 Fed. Reg. 39,374 (July 1, 2003).

3. The National Institute of Military Justice ("NIMJ") is a non-profit organization dedicated to improving public understanding of the military justice system and to advancing the fair administration of military justice. Shortly after the military commission rules were published, NIMJ filed a carefully tailored FOIA request seeking records of communications between DoD personnel and members of the public relating to the creation of the commissions and their governing rules. NIMJ requested

> all written or electronic communications that the Department (including the Secretary and General Counsel) has either sent to or received from anyone (other than an officer or an employee of the United States acting in the course of his or her official duties) regarding the President's November 13, 2001 Mili-

> tary Order, the Secretary's Military Commission Orders, and the Military Commission Instructions. This request includes but is not limited to suggestions or comments on potential, proposed, or actual terms of any of those Orders or Instructions and any similar, subsequent, superseding or related Orders or Instructions, whether proposed or adopted.

App., *infra*, 42a-43a. The request thus specifically excluded traditionally exempt documents such as draft correspondence or internal communications within or among government departments, agencies, or personnel.

The Government initially released nine pages of documents in response to NIMJ's request. Gov't Ct. App. Br. 3.

B. The Proceedings In The District Court

After the government failed to respond in a timely fashion to NIMJ's administrative appeal, NIMJ commenced this action in the District Court for the District of Columbia under 5 U.S.C. § 552(a)(4)(B) to force the government to comply with its FOIA obligations. App., *infra*, 5a.

Several months later, the government released additional documents from the Defense Department's Office of General Counsel responsive to NIMJ's request. App., *infra*, 43a n.2.

The district court found that the government failed to "compl[y] with its obligations under the FOIA" by conducting an "inadequate" search for documents. App., *infra*, 85a, 86a. "Troubled by the government's failure to timely and adequately respond to plaintiff's FOIA request," the court ordered the government to conduct an additional search for responsive documents. *Id.* at 86a. Several hundred

additional documents were provided to NIMJ. Govt. Ct. App. Br. 3-4.

The government also produced a revised *Vaughn* index describing 87 responsive documents that it had either withheld or redacted. App., *infra*, 44a. Nineteen of the withheld documents are at issue in this case, consisting of comments on draft regulations "solicited and received * * * from a number of non-governmental lawyers, who were former high ranking government officials or academics or both." *Id.* at 3a.

NIMJ challenged DoD's withholding of this correspondence from volunteer private citizens. Relying on what it believed to be binding District of Columbia Circuit precedent, the district court granted summary judgment for the government, holding that Exemption 5 protects the documents against disclosure under the FOIA. App., *infra*, 80a.[1]

Citing *Klamath*, the district court stated that "[t]he Supreme Court has made clear that Exemption 5 protects not only inter-agency and intra-agency communications among employees, but also communications from outside consultants or other individuals hired or solicited by an agency for their views." App., *infra*, 72a. The district court concluded that pre-*Klamath* decisions by the D.C. Circuit applying Exemption 5 to documents produced by non-government employees accordingly "remain good law." *Id.* at 73a.

The court then went on to reject several limitations on the scope of Exemption 5. First, it held that

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[1] Although the documents at issue were submitted by lawyers, the government did not rely on the attorney-client privilege in opposing release of the documents in the courts below.

Exemption 5 is not limited to "outside consultants * * * who are paid or provide extensive service to an agency." App., *infra*, 74a n.12. Second, the court declined to require that outside authors "possess expertise not possessed by the agency." *Id.* at 75a. Third, the court rejected a requirement that "the defendant must establish that the views of the non-agency attorneys were furnished in confidence [in order] to be considered intra-agency documents." *Id.* at 75a n.13. Because there was no evidence that the individuals here "were representing their personal interests or the interests of any clients in making their comments," the court held that the documents were exempt from disclosure. *Id.* at 74a.

C. The Court of Appeals Decision

The court of appeals affirmed by a divided vote. App. *infra*, 1a-40a. The majority determined that the D.C. Circuit's pre-*Klamath* decisions addressing the applicability of Exemption 5 to non-agency documents—*Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997); *Ryan* v. *Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980); and *Formaldehyde Institute* v. *Department of Health & Human Services*, 889 F.2d 1118 (D.C. Cir. 1989)—adopted the principle that documents "submitted by non-agency parties in response to an agency's request for advice" are "covered by Exemption 5." App., *infra*, 7a. Because this Court in *Klamath* reserved the question whether documents prepared by non-agency employees could be covered by Exemption 5, the majority below "perceive[d] no basis to jettison [its] binding Circuit precedent." *Id.* at 12a.

The majority distinguished *Klamath* on the ground that the commenters here were not advancing a particular interest: "[u]nlike the Indian tribes in *Klamath*, the individuals DoD consulted had no

individual interests to promote in their submissions." App., *infra*, 13a. The majority acknowledged that these individuals were "private citizens rather than government employees or paid contract consultants," but saw "no reason why the absence of a contract or compensation should differentiate them from the 'typical' outside agency consultants. These were not random citizens volunteering their opinions. DoD sought these individuals out and solicited their counsel based on their undisputed experience and qualifications." *Id.* at 13a-14a.

The majority stated that its determination did not violate *Klamath*'s injunction to respect the language of the statute because "DoD itself solicited the advice contained in the documents" from the particular individuals "for the agency's own use in promulgating terrorist trial commission regulations. Under such circumstances," the majority concluded, interpreting Exemption 5 to apply was consistent with the "common sense" observation in *Ryan* that "'[i]n the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees.'" App., *infra*, 16a (quoting *Ryan*, 617 F.2d at 789).

The majority observed that the *Ryan* test requires "indicia of a consultant relationship between the outsider and the agency" and held that such a relationship may be established "by the fact that the agency seeks out the individual consultants and affirmatively solicits their advice in aid of agency business." App., *infra*, 19a. Because the Defense Department asked the individuals to comment on the commission procedure, Exemption 5 applied to their communications.

Judge Tatel dissented. App., *infra*, 23a-40a. He stated that "the court's holding does exactly what the Supreme Court forbade in [*Klamath*]: it makes 'intra-agency' * * * a purely conclusory term." *Id.* at 23a. Beginning his analysis with the text of the statute, Judge Tatel stated that "'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.'" *Id.* at 24a (quoting *Klamath*, 532 U.S. at 9).

Judge Tatel concluded that cases extending Exemption 5 to documents prepared by paid consultants "certainly stretch the meaning of 'intra-agency,'" but still plausibly interpret that term: "when an agency hires consultants to perform a task, it's not unreasonable to say they have become part of the agency for purposes of that project, making any documents they produce for the project 'intra-agency.'" App., *infra*, 25a.

"In this case, however," Judge Tatel continued, "the government asks us to stretch Exemption 5 beyond its breaking point, to cover *everyone* an agency asks for advice. The government's argument flatly ignores the statute's text, as well as our obligation to construe FOIA exemptions narrowly." App., *infra*, 25a-26a (emphasis in original).

Judge Tatel explained that the D.C. Circuit's pre-*Klamath* decisions "say it makes no difference whether the documents at issue were generated by someone within the agency. All that matters, they hold, is that the documents played a role in the agency's deliberative process, a standard indisputably met here." App., *infra*, 29a. "The problem with these cases," he stated, "is that in *Klamath* the Supreme Court rejected exactly this type of reasoning." *Ibid.*

"[O]ur earlier cases protecting communications from outside consultants under Exemption 5 remain good law only to the extent they give 'independent vitality' to the meaning of 'intra-agency.'" App., *infra*, 30a-31a (quoting *Klamath*, 532 U.S. at 12). Judge Tatel stated that he could agree "that Exemption 5 protects documents agencies solicit from people who could plausibly be called 'intra-agency,' such as paid consultants or members of official agency committees created under [the Federal Advisory Committee Act]. The problem, however, is that the court holds that a document qualifies as 'intra-agency' if an agency solicits it from *anyone*." App., *infra*, 32a (emphasis in original). "Rather than giving 'independent vitality' to 'intra-agency,' this test redefines that term." *Ibid.*

"Indeed," Judge Tatel observed,

> under the court's rule, if an agency held a press conference and asked citizens to send in advice, letters from everyone who responded would qualify as 'intra-agency.' Seeking to escape this untenable result, the court adds a new requirement: the solicitation must be 'formal.' Requiring formality, however, does nothing to prevent absurd results. For example, an agency request for advice published in the Federal Register would be 'formal,' but hardly enough to make letters sent by members of the public who responded 'intra-agency.' * * * The court next suggests that a solicitation suffices if addressed to a 'discrete group of experts.' But a DoD request for advice to every law professor in the country would qualify as a request to a 'discrete group of experts,' yet the professors' responses plainly would not be 'intra-agency.'

App., *infra*, 33a (citations omitted).

Because "Exemption 5's words 'simply will not stretch to cover this situation,' and because the result the court reaches contravenes *Klamath*," Judge Tatel concluded that Exemption 5 does not apply to the private citizens' submissions. App., *infra*, 40a (citation omitted).

REASONS FOR GRANTING THE PETITION

The majority below adopted an extraordinarily expansive construction of "intra-agency memorandums or letters"—encompassing any submission from any private citizen as long as it is in some way solicited by a government employee and the author is not self-interested. That interpretation of the statute bears no relation to the common meaning of "intra-agency," is wholly inconsistent with this Court's reasoning in *Klamath*, and will transform individual FOIA actions into litigation quagmires investigating whether a particular private citizen's submission was sufficiently tied to his or her self-interest to lose its putative status as an "intra-agency" communication.

The dispute between the majority and the dissenting judge below turns entirely on their diametrically opposed readings of this Court's decision in *Klamath*. Only this Court can resolve that disagreement. In addition, because the D.C. Circuit is designated by Congress as the principal forum for FOIA litigation—and because this issue regarding the meaning of "intra-agency" in Exemption 5 arises with considerable frequency—the decision below will have a very substantial continuing impact on FOIA claims. Review by this Court is therefore plainly warranted.

A. The Court Of Appeals' Broad Construction Of Exemption 5 Is Inconsistent With The Statute's Plain Language And This Court's Ruling In *Klamath*.

Exemption 5 applies to "inter-agency or intra-agency memorandums or letters which 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). "Agency," in turn, is defined by the statute as "each authority of the Government of the United States" (*id.* § 551(1)) and "includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch * * *, or any independent regulatory agency." *Id.* § 552(f); see also *id.* § 551(1) (excluding Congress, the courts, and other entities and authorities). Thus, as this Court observed in *Klamath*, "'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.'" 532 U.S. at 9 (quoting *Julian*, 486 at 18 n.1 (Scalia, J., joined by White & O'Connor, JJ., dissenting)).

Justice Scalia's opinion in *Julian* recognized that the statutory definition could in some circumstances reach more broadly:

> 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.

486 U.S. at 18 n.1 (dissenting opinion).

The Court in *Klamath* explicitly reserved the question whether Exemption 5 applies to *any* documents prepared by individuals not acting in an official governmentally-conferred capacity. The Court held that—even if Exemption 5 does encompass some documents prepared by non-government employees—the exemption could not extend to documents prepared by individuals "communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant." 532 U.S. at 12.

The majority below interpreted *Klamath*'s holding that communications by self-interested outsiders *never* qualify as "intra-agency" to mean that communications by outsiders who are not self-interested *always* qualify as "intra-agency." But *Klamath* expressly did not decide that question. As Judge Tatel explained in detail, moreover, the majority's extraordinarily broad construction of "intra-agency" is inconsistent with the language of the statute and with the Court's reasoning in *Klamath*.

First, there is no way to reconcile the majority's expansive construction of Exemption 5 with the statute's plain language. Justice Scalia in *Julian* explained how the text could be read to encompass individuals with some official governmentally-conferred status. Under the majority's view, however, a government official's solicitation of information from a private individual creates a sufficient relationship between the private individual and the government to transform a communication from that individual into an "intra-agency" document. That

stretches the ordinary meaning of "intra-agency" far beyond the breaking point. "Rather than giving 'independent vitality' to 'intra-agency,' this test redefines that term." App., *infra*, 32 (Tatel, J., dissenting) (citation omitted).

Second, the *Klamath* Court emphasized that there is "no textual justification for draining the first condition of independent vitality," refusing to accept the government's argument "that 'intra-agency' is a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential." 532 U.S. at 12. But the majority's construction of the statute here rests squarely on precisely the result-oriented approach rejected in *Klamath*: that an "intra-agency" communication occurs whenever the agency solicits information from anyone, because "federal 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." App., *infra*, 12a. (internal quotation marks omitted). The content of the majority's standard is not in any way based on the ordinary meaning of the term Congress selected.

Third, Judge Tatel's interpretation of the statute, by contrast, is based on the statutory language. As Judge Tatel explained, "one can plausibly say that some paid consultants and members of official agency committees have come 'within' the agency. * * * An agency's mere request for advice * * * has nothing to do with whether a person's response comes from within or outside the agency. Without some indicia that the person responding is 'within' the agency, such as a paid consulting contract, 'intra-agency' has no meaning." *Id.* at 34a (dissenting opinion); see also *id.* at 37a ("contracting with and paying

a consultant establishes a formal relationship between that person and the agency, making it at least plausible to consider the person 'intra-agency'").

Fourth, this Court has held repeatedly that FOIA exemptions should "be narrowly construed." *Rose*, 425 U.S. at *361*; see also *Klamath*, 532 U.S. at 16 (exemptions should "be read strictly in order to serve FOIA's mandate of broad disclosure"); *FBI* v. *Abramson*, 456 U.S. 615, 630 (1982) (same). The majority's interpretation of Exemption 5 plainly fails this test.

Fifth, the majority's construction of the statute will lead to absurd results. As Judge Tatel pointed out, "under the court's rule, if an agency held a press conference and asked citizens to send in advice, letters from everyone who responded would qualify as 'intra-agency.' * * * The court [also] suggests that a solicitation suffices if addressed to a 'discrete group of experts.' But a DoD request for advice to every law professor in the country would qualify as a request to a 'discrete group of experts,' yet the professors' responses plainly would not be 'intra-agency.'" App., *infra*, 33a (citation omitted).[2]

The majority's construction of Exemption 5 thus will transform a statute intended to promote government transparency into a device to allow government officials to conceal information from selected individuals simply by soliciting those individuals' views. The opportunities for abuse of the system—concealing the views of favored individuals while leaving the views of others available to the public—are immense.

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[2] The majority disputed (App., *infra*, 20a-21a) Judge Tatel's explanation of the implications of its broad interpretation of exemption five, but was unable to explain why its rationale would not lead to the results he predicted. See *id.* at 33a-34a (dissenting opinion).

Moreover, the majority's standard will lead to a litigation quagmire. Members of the public seeking access to the information provided by these private individuals would be forced to demonstrate that the individuals had an "individual interest[] to promote" (App., *infra*, 13a)—requiring intrusive discovery as well as continued judicial elaboration regarding the type of personal "interest" sufficient to remove a private citizen's communications from the protection of Exemption 5: is financial interest necessary, or would political or personal interest suffice? What about a deeply-held scholarly, religious, or moral perspective or a settled view about the role and responsibility of government—are those sufficient "interests"?

This Court should grant review to correct the plainly erroneous interpretation of the statute adopted by the majority below.

B. Review Is Appropriate Because Only This Court Can Correct The Flawed Interpretation Of *Klamath* Adopted By The Principal Circuit For FOIA Litigation.

The majority and dissenting opinions below reflect a fundamental disagreement regarding the proper interpretation of this Court's decision in *Klamath*. Only this Court can correct the majority's flawed conclusion, an error that will have a very substantial impact on FOIA litigation given the D.C. Circuit's principal role in adjudicating FOIA disputes.

The majority rested its decision squarely on its conclusion that neither *Klamath*'s holding nor its reasoning warranted overruling prior D.C. Circuit caselaw interpreting the "intra-agency" requirement of Exemption 5. App., *infra*, 12a. Indeed, the major-

ity refused to "construe afresh the statutory language" in light of this Court's reasoning in *Klamath*, concluding that "[t]o the extent [the prior decisions] are not 'effectively overrule[d]' by *Klamath* * * * we are bound by their holdings." *Id.* at 12a n.7.

Judge Tatel reached the opposite conclusion, determining that the reasoning of the prior D.C. Circuit decisions "is precisely what *Klamath* rejects: the 'argument skips a necessary step, for it ignores the first condition of Exemption 5' and makes 'intra-agency' . . . a purely conclusory term." App., *infra*, 31a (quoting *Klamath*, 532 U.S. at 12); see also App., *infra*, 36a (dissenting opinion) (*Klamath* decided "that courts may not 'ignore the first condition of Exemption 5' * * *, precisely what [the D.C. Circuit] did in *Ryan*, *Formaldehyde*, and *Public Citizen*"; "*Klamath* eviscerates the reasoning in the *Ryan* line of cases").

This Court's intervention is urgently needed to provide guidance regarding the proper interpretation of its decision in *Klamath*. Indeed, the majority makes clear the D.C. Circuit's resolve to continue to adhere to its pre-*Klamath* precedent regarding Exemption 5 in the absence of further guidance from this Court.

The D.C. Circuit's erroneous conclusion with respect to this issue will have a particularly significant impact because of that court's principal role in adjudicating FOIA disputes. Every FOIA action may be brought in the District of Columbia. 5 U.S.C. § 552(a)(4)(B). Moreover, "[b]ecause there are a number of federal government agencies located in Washington, D.C., it is not surprising that the majority of the caselaw interpreting FOIA has been decided by the D.C. Circuit." *Miccosukee Tribe of the Indians of Florida* v. *United States*, 516 F.3d 1235, 1257 n.23

(11th Cir. 2008). Absent a grant of review by this Court, therefore, the erroneous decision below will affect a very substantial percentage of the FOIA actions litigated in the federal courts.

C. Questions Regarding The Application Of Exemption 5 To Documents Submitted By Persons Outside The Government Arise With Considerable Frequency.

The question presented here—the standard for determining whether a document prepared by a private individual qualifies as an "intra-agency" communication—arises with considerable frequency in FOIA litigation. After all, there are "literally millions of documents and memoranda of various kinds on a myriad of subjects which repose in the files of executive departments and independent agencies * * * which were created by someone outside the executive branch but in response to an initiative from the executive branch." *Ryan*, 617 F.2d at 790.

In the last two years alone, there have been a significant number of decisions addressing the issue. See *Information Network for Responsible Mining ("INFORM")* v. *Dep't of Energy*, No. 06-CV-02271-REB, 2008 WL 762248, at *7 (D. Colo. Mar. 18, 2008) (exempting documents submitted by government-hired consultant "when 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 and when the outsider does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it"); *Citizens for Responsibility & Ethics in Washington* v. *Dep't of Homeland Security*, 514 F.Supp.2d 36, 44 (D.D.C. 2007) (exempting documents "when an agency solicits opinions from and recommendations by tempo-

rary, outside consultants" hired by the government); *People For The American Way Foundation* v. *Dep't of Educ.*, 516 F.Supp.2d 28, 36-39 (D.D.C. 2007) (rejecting an Exemption 5 claim for documents exchanged between the U.S. Department of Education and the D.C. Mayor's Office); *Board of County Comm'rs* v. *Dep't of the Interior*, No. 2:06-CV-209-TC, 2007 WL 2156613, at *11 (D. Utah July 26, 2007) (holding Exemption 5 inapplicable because "[e]ven though he may not have been competing with others for grazing permits * * *, [the private citizen's] deep-seated views regarding the retirement of grazing permits through market-based principles shows that he is communicating with the DOI in the interest of his deep-seated views, not as a disinterested expert"); *Nulankeyutmonen Nkihtaqmikon* v. *Bureau of Indian Affairs*, 493 F. Supp. 2d 91, 106 (D.Me. 2007) (finding "hybrid" group to be an agency where some members were appointed by the President); *Missouri Coalition for Environment Foundation* v. *Army Corps of Eng'rs*, No. 4:05CV02039 FRB, 2007 WL 869487, at *5 (E.D.Mo. Mar. 20, 2007) (exemption applicable because outside group was a hired government consultant); *Sakamoto* v. *Environmental Protection Agency*, 443 F.Supp.2d 1182, 1199-1200 (N.D. Cal. 2006) (same); *Votehemp, Inc.* v. *Drug Enforcement Admin.*, No. 02-985 (RBW), 2006 WL 1826007, at *7 (D.D.C. June 30, 2006) (holding that "the document qualifies as an intra-agency memoranda even though it was drafted by an outside consultant" hired by the government); *Natural Resources Defense Council* v. *U.S. Dept. of Defense*, 442 F.Supp.2d 857, 867 (C.D. Cal. 2006) (finding insufficient evidence to support exemption and noting "[a]lthough courts have upheld the application of Exemption 5 to documents generated by or disclosed to non-government parties such as contractors and consultants, they have done so

generally when those parties were serving as agents of the government agency and were directly involved in the internal agency decision-making that FOIA protects").

Significantly, the decisions outside the District of Columbia Circuit reflect the distinction identified by Justice Scalia in *Julian* and adopted by Judge Tatel: documents prepared by paid consultants or others with an officially-conferred government status are found to be "intra-agency" while documents prepared by purely private citizens are not. The rule adopted by the majority below is thus out of step with the principles applied by other courts in these cases that arise with substantial frequency. Review by this Court is appropriate to correct the majority's stark misinterpretation of *Klamath* with respect to this important issue of federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN M. KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

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