No. 08-125

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

REPLY BRIEF FOR PETITIONER

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The government's principal argument in opposing certiorari is that the court of appeals' decision is correct. It also suggests that the issue is not yet ripe for review by this Court. Both contentions are meritless. As explained in the two amicus briefs—filed by amici with broad experience in FOIA litigation—the decision below addresses an issue of very substantial importance. Review by this Court is plainly warranted.

1. The applicable statutory text is "inter-agency or intra-agency memorandums or letters." 5 U.S.C. § 552(b)(5). Although the Solicitor General refers to this language in passing, he never even attempts to square his construction of the statute with the words Congress actually used.

Nor could he. The Solicitor General contends that the statutory term "intra-agency" should be defined as follows: "any communication solicited by a government official from a private party, provided that the private party does not have 'its own interest in the matter.'" See Br. in Opp. 11. That certainly bears no relation to the plain meaning of the term, which requires that the communication originate within the government. The Solicitor General, like the majority below, is forced to ignore the statutory text to achieve the result that he seeks. Pet. 14-16.

Moreover, concluding that a communication is "inter-agency or intra-agency" only when both parties to the communication have a formal relationship with the government is not "formalistic" (Br. in Opp. 10). As Judge Tatel explained in his comprehensive dissent below (see Pet. 15-16), that requirement is necessitated by the language that Congress employed in Exemption 5. The government's distinction

between private citizens who have their "own interest" and those who are "disinterested" (Br. in Opp. 11) not only ignores the statutory language, it also would be impossible to administer (see Pet. 17). And requiring a formal link to the government means that the individual would be bound by any applicable government conflict of interest regulations. See, *e.g.*, National Security Archive Am. Br. 10.

Finally, the government errs in asserting (Br. in Opp. 9-10) that Justice Scalia's dissenting opinion in *United States Dep't of Justice* v. *Julian*, 486 U.S. 1 (1988), provides support for its position. Justice Scalia's reference to a person acting "in a governmentally-conferred capacity" plainly meant an individual having a formal relationship with the government; *Julian* itself concerned documents prepared by probation officers employed by the courts. The same is true of the Court's reference to "consultants" in *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001); the Court previously had explained that the category of communications it was addressing were those "between Government agencies and outside consultants *hired by them*" (*id.* at 10 (emphasis added)). The *Klamath* reference thus incorporates precisely the type of formal relationship that the Solicitor General claims is irrelevant.

Indeed, the decision below is directly contrary to this Court's injunction in *Klamath* that "intra-agency" is not "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. As Judge Tatel recognized (Pet. App.31a-32a & 36a), the majority below construed the provision in a manner that drains any meaning from the statutory term "intra-agency." See Pet. 18.

2. The Solicitor General does not dispute that the question presented here regarding the applicability of Exemption 5 to communications from private individuals arises frequently. See also Pet. 19-21. And he does not disagree that the question is important.

His contention is that the Court should await a circuit conflict before granting review. But the Court has granted review in FOIA actions in the absence of a conflict—in *Klamath* itself, for example. The comprehensive majority and dissenting opinions below fully explore the relevant legal principles—and the numerous district court decisions (see Pet. 19-21) illustrate the various factual settings in which the issue can arise. No further "percolation" is required.*

Moreover, the majority's decision below rests on its misinterpretation of this Court's decision in *Klamath*. It is up to this Court to correct that error. That course is especially appropriate in view of the D.C. Circuit's uniquely expansive jurisdiction over FOIA claims. See Pet. 17-18. Otherwise, a substantial proportion of FOIA claims will be adjudicated under an erroneous legal standard bearing no relationship whatever to the statutory text. This Court should intervene to prevent that result.

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* The Solicitor General suggests (Br. in Opp. 13-14) that the Court await a decision in the *Stewart* case now pending in the Tenth Circuit. But the district court's decision there rested on its determination that the private party was not disinterested. Pet. 20 (discussing *Board of County Comm'rs of Kane County* v. *Dep't of the Interior*, No. 2:06-CV-209-TC, 2007 WL 2156613 (D. Utah July 26, 2007)). The Tenth Circuit therefore is likely to resolve the case on the basis of this Court's decision in *Klamath*, without reaching the question addressed by the court below.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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