No. 02-1206

In the Supreme Court of the United States

JOHN J. TIGUE, JR. AND MORVILLO, ABRAMOWITZ, GRAND, IASON & SILBERBERG, P.C., PETITIONERS

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

LEONARD SCHAITMAN
MATTHEW M. COLLETTE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a memorandum prepared by an Assistant United States Attorney, to assist a commission established by the Internal Revenue Service (IRS) to investigate the policies and practices of the agency's Criminal Investigation Division and to recommend possible changes in the IRS, is an "inter-agency or intra-agency" memorandum within the meaning of Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 02-1206

JOHN J. TIGUE, JR. AND MORVILLO, ABRAMOWITZ, GRAND, IASON & SILBERBERG, P.C., PETITIONERS

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 312 F.3d 70. The orders of the district court (Pet. App. 23a-24a, 25a-26a) are unreported.

JURISDICTION

The court of appeals entered its judgment on November 15, 2002. The petition for a writ of certiorari was filed on February 13, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, generally mandates disclosure upon

request of records held by an agency of the federal government. Section 552(b), however, identifies several categories of records that are exempt from compelled disclosure. In particular, FOIA Exemption 5 authorizes an agency 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).

Exemption 5 protects from compelled disclosure "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The privileges incorporated by Exemption 5 include the "deliberative process" privilege, which "covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Department of the Interior* v. *Klamath Water Users Protective Ass'n (Klamath Water Users)*, 532 U.S. 1, 8 (2001) (internal quotation marks omitted). "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." *Id.* at 8-9 (citation and internal quotation marks omitted).

For purposes of the FOIA, the term "agency" is defined to mean (with exceptions not relevant here) "each authority of the Government of the United States," 5 U.S.C. 551(1), "includ[ing] 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)(1). The courts of appeals that have addressed the question have uniformly concluded that, at least under some circumstances, a document prepared outside the government may qualify as an "inter-agency or intra-agency memorandum[]" within the meaning of Exemption 5. See, *e.g.*, *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168, 170 (D.C. Cir. 1997); *Formaldehyde Inst.* v. *Department of Health & Human Servs.*, 889 F.2d 1118, 1122-1125 (D.C. Cir. 1989); *Ryan* v. *Department of Justice*, 617 F.2d 781, 789-791 (D.C. Cir. 1980); *Hoover* v. *United States Dep't of the Interior*, 611 F.2d 1132, 1137-1138 (5th Cir. 1980); *Lead Indus. Ass'n* v. *OSHA*, 610 F.2d 70, 83 (2d Cir. 1979); *Wu* v. *National Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973); *Soucie* v. *David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); cf. *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1159-1162 (D.C. Cir. 1987) (applying same principle to discovery request in administrative adjudication), cert. denied, 485 U.S. 977 (1988).

In *Klamath Water Users*, this Court considered the application of Exemption 5 to communications between an Indian Tribe and the Department of the Interior. See 532 U.S. at 5-6. The Court assumed without deciding that, in appropriate circumstances, documents prepared by outside "consultants" "may qualify as intra-agency under Exemption 5." *Id.* at 12. The Court held, however, that the documents at issue in that case fell outside the scope of Exemption 5 because "the apparent object of the Tribe's communications is a decision by an agency of the Government to support a claim by the Tribe that is necessarily adverse to the interests of competitors." *Id.* at 14; see *id.* at 12 (de-

scribing the Tribes in that case as "self-advocates at the expense of others seeking benefits inadequate to satisfy everyone").

2. In July 1998, Internal Revenue Service (IRS) Commissioner Charles Rossotti appointed William H. Webster to form a task force (the Webster Commission) to review the policies and procedures of the IRS's Criminal Investigation Division (CID). Pet. App. 4a; see C.A. App. 18, 85. The Commissioner directed that the task force "compile data and information from which [it] could evaluate" the CID, "determine its effectiveness in accomplishing its mission, and make recommendations for improvement" to the Commissioner. *Id.* at 85; see Pet. App. 4a. Mr. Webster, with the assistance of a former head of the Justice Department's Office of Professional Responsibility, recruited a trial attorney in the Department's Criminal Division "to supervise a staff with extensive criminal investigative, law enforcement, and federal prosecutive experience, including two experienced prosecutors from the Department of Justice and nine federal law enforcement Special Agents." C.A. App. 85.

During its nine-month review of the CID, the Webster Commission consulted a number of law enforcement officials, including lawyers in the United States Attorney's Office for the Southern District of New York. Pet. App. 4a. "The Webster Commission specifically requested the opinions of the Southern District because it handled more tax investigations than any other" United States Attorney's office. *Ibid.* Responding to a request by the Commission, then-Deputy United States Attorney Shirah Neiman prepared a 16-page memorandum (the Neiman Memorandum) expressing opinions and recommendations of the Southern District regarding possible modifications to the IRS's

criminal enforcement policies and procedures. *Ibid.*; C.A. App. 199.

Neiman prepared the memorandum with the expectation that it would remain confidential. C.A. App. 199; see Pet. App. 4a-5a. The Neiman Memorandum contains detailed evaluations of various aspects of federal criminal tax enforcement, including differences between the Southern District's positions on particular issues and those of other federal components. C.A. App. 199. Neiman's declaration in this case explained that "[t]he analyses contained in the memorandum are not of the sort usually shared with the public by a prosecutorial office," and Neiman stated that she "would have drafted [the memorandum] differently" if she had known that it "might become a public document." *Ibid.*

The Webster Commission ultimately released a 113-page report that outlined the Commission's findings and recommendations for improving the effectiveness of the CID. Pet. App. 5a. The final report was provided to the IRS and was made public. See *ibid.*; C.A. App. 18, 67-68. The Neiman Memorandum is cited once in a footnote and quoted once in the text of the Webster Commission's report. Pet. App. 5a-6a. The IRS Commissioner expressed thanks for the Webster Commission's recommendations and stated his agreement with many of those proposals, see C.A. App. 67-68, while noting that some of the recommendations "need further analysis and design work in coordination with our other organizational changes," *id.* at 68; Pet. App. 5a.

3. Petitioners are an attorney and a law firm that frequently represent clients in connection with federal tax investigations, enforcement actions, and prosecutions. Pet. App. 6a. "Believing that review of the Neiman Memorandum would improve [their] under-

standing of Southern District policy and thus allow [them] to represent [their] clients better," petitioners filed a FOIA request for the memorandum. *Ibid.* The Department of Justice refused to release the document, invoking the deliberative process privilege as incorporated by Exemption 5. *Ibid.*

Petitioners then filed suit under the FOIA against the Justice Department and the IRS. The district court granted the government's motion for summary judgment, holding that the Neiman Memorandum is protected by FOIA Exemption 5. See Pet. App. 23a-26a. The court further concluded, after reviewing the document in camera, that any factual material contained in the Neiman Memorandum is "inextricably intertwined with evaluations and recommendations of policy" and therefore is not subject to compelled disclosure. *Id.* at 24a.

4. The court of appeals affirmed. Pet. App. 1a-22a.

a. The court of appeals held that the Neiman Memorandum is an "inter-agency" document within the meaning of Exemption 5. Pet. App. 10a-16a. The court explained that "the Webster Commission was acting as a consultant to the IRS when it solicited the Neiman Memorandum, and the Neiman Memorandum was prepared by the Southern District, an agency, to assist the IRS with determining how best to reform the CID." *Id.* at 12a. The court noted that petitioners "recognize, as they must, that the privilege would have been maintained had Neiman given her memorandum directly to the IRS." *Id.* at 14a. The court found that "[t]he fact that Neiman transmitted [the memorandum] to the Webster Commission for use in the Commission's recommendations on IRS policy does not alter our view of the matter." *Ibid.* The court of appeals concluded that the Neiman Memorandum is an "inter-agency"

document within the meaning of Exemption 5 because it was "prepared by one governmental agency for use by another agency," and that "[t]he interposition of the Webster Commission between the two agencies does not alter this result." *Id.* at 16a.

b. The court of appeals further held that the Neiman memorandum is covered by the deliberative process privilege. Pet. App. 17a-18a. The court explained that the memorandum was "predecisional" because it "was prepared for the Commission in order to assist the IRS in its decisionmaking regarding the future of the CID." *Id.* at 17a; see *id.* at 18a ("[T]he fact that the government does not point to a specific decision made by the IRS in reliance on the Neiman Memorandum does not alter the fact that the Memorandum was prepared to assist IRS decisionmaking on a specific issue.").[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. While noting that the various FOIA exemptions must be "narrowly construed," *Department of the Air Force* v. *Rose*, 425 U.S. 352, 361 (1976), this Court "has

---

[1] The court of appeals rejected petitioners' contention that the Webster Commission's references to the Neiman Memorandum in its public report effected a waiver of the deliberative process privilege. Pet. App. 19a-21a. Based on its in camera review of the Neiman Memorandum, the court also concluded that any factual information contained in the document was not "reasonably segregable" (5 U.S.C. 552(b)) from its deliberative material, and that the document was therefore properly withheld in its entirety. Pet. App. 21a-22a. Petitioners do not challenge those holdings in this Court.

recognized that the statutory exemptions are intended to have meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). Because "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information," it provided "specific exemptions under which disclosure could be refused." *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982). Congress thereby sought "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966) (*1966 House Report*); see *John Doe Agency*, 493 U.S. at 152.

Exemption 5 of the FOIA, and the deliberative process privilege in particular, help to preserve that important balance. Exemption 5 reflects Congress's recognition that "a full and frank exchange of opinions would be impossible" if all internal government communications were made public, and that "advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to operate in a fishbowl." *1966 House Report* 10; see *Wolfe* v. *Department of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc). Although Exemption 5 applies by its terms to "inter-agency or intra-agency memorandums or letters," the courts of appeals that have addressed the question have uniformly held that records submitted by outside consultants that play essentially the same role in the agency's decisionmaking process as documents prepared by an agency employee may be protected from compelled disclosure by that Exemption. See p. 3, *supra*; *Klamath Water Users*, 532 U.S. at 9-11

(discussing prior court of appeals decisions). As the District of Columbia Circuit explained:

> 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 intra-agency memorandum of the agency which solicited it.

Soucie, 448 F.2d at 1078 n.44; see *Ryan* v. *Department of Justice*, 617 F.2d 781, 789-790 (D.C. Cir. 1980) ("[A]n agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.").

2. In *Klamath Water Users*, this Court assumed without deciding that documents prepared by outside "consultants" may qualify as "inter-agency or intra-agency" documents within the meaning of Exemption 5. 532 U.S. at 12.[2] The Court held, however, that the

---

[2] As the Court in *Klamath Water Users* recognized (532 U.S. at 9-10), three members of this Court had previously endorsed that reading of Exemption 5's threshold requirement. In a dissenting opinion in *Department of Justice* v. *Julian*, 486 U.S. 1 (1988), Justice Scalia, joined by Justices O'Connor and White, recognized that while "the most natural meaning" of the phrase "intra-agency memorandum" is a memorandum passing between employees at a single agency, the courts of appeals had held that the term could be

tribal communications at issue did not satisfy that threshold requirement because the outside party that prepared them had sought to vindicate its own interests "at the expense of others seeking benefits inadequate to satisfy everyone." *Ibid.*; see *id.* at 14 (emphasizing that the purpose of the Tribe's communications was "to support a claim by the Tribe that is necessarily adverse to the interests of competitors"). The Court explained that in the "typical cases" where courts have applied Exemption 5 to documents created by outside consultants, "the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Id.* at 11.

The considerations that led this Court in *Klamath Water Users* to find Exemption 5 inapplicable to the

---

interpreted to include memoranda from outside consultants. *Id.* at 18 n.1 (Scalia, J., dissenting). Justice Scalia stated:

> [T]hese decisions are supported by a permissible and desirable reading of the statute. It is textually possible and much more 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.

Ibid. The Court in *Julian* did not address the question whether the documents at issue there were "inter-agency or intra-agency" records within the meaning of Exemption 5, see *id.* at 11 n.9, because it concluded that the relevant documents would be routinely discoverable in civil litigation and therefore would not be covered by the Exemption in any event, see *id.* at 11-14.

Tribe's communications are wholly absent here. The Webster Commission was established by the IRS Commissioner to investigate the policies and procedures of an important agency component and to make recommendations for improvement. The Commission's staff was supervised by a Justice Department attorney and included federal prosecutors and law enforcement agents. C.A. App. 85. Like the consultants in the "typical cases" that have held Exemption 5 applicable to consultant communications, see *Klamath Water Users*, 532 U.S. at 10-11, the Webster Commission "played essentially the same part in an agency's process of deliberation as * * * agency personnel might have done," *id.* at 10. The members of the Webster Commission had no private interest in the outcome of the proceedings, and the Commission's "only obligations [we]re to truth and its sense of what good judgment calls for." *Id.* at 11.

Indeed, the rationale for applying Exemption 5 to consultants' reports is even more compelling here than in the "typical" cases identified by this Court in *Klamath Water Users*. Whereas those cases have generally involved documents created by non-governmental entities, the specific memorandum requested by petitioners was written by a Deputy United States Attorney. As the court of appeals explained, it is undisputed "that the privilege would have been maintained had Neiman given her memorandum directly to the IRS." Pet. App. 14a. And as the court correctly held, "[t]he fact that Neiman transmitted it to the Webster Commission for use in the Commission's recommendations on IRS policy does not alter" the governing legal analysis. *Ibid.*

3. Petitioners contend (Pet. 16) that review by this Court is warranted because there is no "unanimity of

opinion regarding how the consultant corollary should be applied." In support of that assertion, however, petitioners note only that the Ninth Circuit has not yet had occasion to decide whether documents submitted by outside consultants may be covered by Exemption 5. See *ibid.* Though petitioners contend that such records are categorically excluded from Exemption 5's coverage, they identify *no* judicial decision that has endorsed that view. Absent a conflict in authority, the question presented does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

LEONARD SCHAITMAN
MATTHEW M. COLLETTE
Attorneys

APRIL 2003