No. 12-1233

In the Supreme Court of the United States

AMERICAN MANAGEMENT SERVICES, LLC, D/B/A PINNACLE, PETITIONER

v.

DEPARTMENT OF THE ARMY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), exempted from mandatory disclosure certain communications between the Department of the Army and a private contractor, which related to a lawsuit filed by the contractor against another private party, where the Army had a financial stake in the litigation and had expressly authorized the litigation after determining that the litigation furthered the public interest.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 703 F.3d 724. The order of the district court (Pet. App. 24-80) is reported at 842 F. Supp. 2d 859.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2013. The petition for a writ of certiorari was filed on April 9, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a private corporation that partnered with another private firm, Clark Realty Capital, LLC, to successfully bid for projects developing, owning, operating, managing, and maintaining family

housing on two military bases. Pet. App. 2; see 10 U.S.C. 2871-2885 (Military Housing Privatization Initiative). The housing projects are organized through a set of jointly owned companies. Pet. App. 2-3. The Department of the Army itself is a 49% owner of two of the relevant companies. *Id.* at 3.

In 2010, Clark informed the Army of evidence that petitioner, which had responsibility for managing the family-housing properties, was engaged in fraud. Pet. App. 3-4. The relevant operating agreements required Clark to obtain the Army's approval in order to replace petitioner as property manager. *Ibid.* After reviewing Clark's evidence, the Army "determined that Clark's decision to replace [petitioner] was in the public interest and approved Clark's proposed course of action," which consisted of both removing petitioner as property manager and filing a lawsuit against petitioner. *Id.* at 55-56; see *id.* at 4. Clark filed the suit, which sought termination of the property-management agreements with petitioner because of petitioner's alleged misconduct, in Georgia state court. *Id.* at 4. Although the Army is not a party to the Georgia suit, it has continued to communicate with Clark about the litigation. *Ibid.*

After certain discovery requests in the Georgia litigation were met with privilege objections by Clark, petitioner filed a request with the Army under the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking disclosure by the Army of "'all records of any nature referring directly to pending litigation or matters known to be directly related to' the Georgia litigation and 'all records submitted to or requested by Clark.'" Pet. App. 5 (brackets omitted). The Army released a limited subset of responsive documents and

cited certain FOIA exemptions, see 5 U.S.C. 552(b), as the basis for withholding certain other documents. Pet. App. 5-6.

2. While the Army was processing petitioner's FOIA request, petitioner sued the Army in the United States District Court for the Eastern District of Virginia, seeking an order compelling disclosure of all records responsive to that request. Pet. App. 5. The district court ultimately granted summary judgment in favor of the Army. *Id.* at 6; see *id.* at 24-80. As particularly relevant here, the district court concluded that records of communications between the Army and Clark (and Clark's counsel) that post-dated the Army's approval of the Georgia litigation (which the court referred to as the "Category B documents") fell within FOIA's Exemption 5, 5 U.S.C. 552(b)(5), which exempts from disclosure "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." Pet. App. 54-65.

The court of appeals affirmed. Pet. App. 1-23. The court of appeals recognized, as initial matter, that "[t]o fall within Exemption 5, a document must (1) be inter- or intra-agency and (2) fall within a discovery privilege." *Id.* at 15. With respect to the second requirement, the district court had determined that the Category B documents were covered by the attorney-client privilege. *Id.* at 63-65. The court of appeals observed that petitioner's appeal "d[id] not challenge the Army's ability to establish that the communications are privileged," and it "f[ound] that the government can satisfy the privilege prong." *Id.* at 15-16.

With respect to the first requirement, the court of appeals agreed with the district court that the Cate-

gory B documents were "inter- or intra-agency documents" for purposes of Exemption 5. Pet. App. 16. The court of appeals acknowledged that "Clark, the source of the documents, is not a government agency," but quoted this Court's decision in *Department of the Interio*r v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001), for the proposition that "in some circumstances a document prepared outside the Government may nevertheless qualify as an intra-agency memorandum under Exemption 5." Pet. App. 16 (internal quotation marks omitted).

The court of appeals explained that "[o]ne such circumstance, relied upon by the district court, is where the common interest doctrine applies." Pet. App. 16. The court explained that the common-interest doctrine applies when an agency can "show that it had agreed to help another party prevail on its legal claims at the time of the communications at issue because doing so was in the public interest." *Ibid.* (quoting *Hunton & Williams* v. *United States Dep't of Justice*, 590 F.3d 272, 274 (4th Cir. 2010)). The court stressed that it "'carefully scrutinize[s]'" any assertion of the common-interest doctrine, and requires the government to show actual "meeting of the minds or agreement to pursue a joint legal strategy," rather than "'[m]ere indicia of joint strategy as of a particular point in time.'" *Id.* at 16-17 (quoting *Hunton & Williams*, 590 F.3d at 284-285) (internal quotation marks omitted).

The court of appeals determined that the Army's express authorization of the suit, along with two declarations submitted by Army officials, established the applicability of the common-interest doctrine here. Pet. App. 16-20. One declaration "emphasized the

Army's financial interests in the wellbeing of the military housing projects by noting that the Army is a 49% owner of the entities that control the housing projects and that the Army receives most of the net operating income generated by the housing projects." *Id.* at 17. That declaration further explained that "the Army has a clear interest in both the manner in which the litigation with [petitioner] is conducted and how the litigation is resolved," because "every dollar spent on litigation expenses either reduces the amount of project net income * * * or increases the likelihood that the Projects will recover some or all of the monetary damages suffered by the Projects because of fraudulent activities perpetrated against the Projects by [petitioner's] employees." *Ibid.* The second declaration similarly explained that "the Army shares a common interest with Clark in the ongoing Georgia litigation" in light of "the Army and Clark's pre-existing business relationship, through which Clark * * * has an obligation to protect those housing LLCs' interests, through litigation if necessary." *Id.* at 18 (alterations omitted). The second declaration also represented that "[t]he actions Clark has taken benefit Soldiers, and thus they are in the Army's interests," and that "[a]lthough not reduced to writing, the Army and Clark effectively formed a common interest * * * when the Army approved Clark's course of action." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 9-20) that the court of appeals erred in its application of FOIA Exemption 5 to the Category B documents. The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. In any

event, the question presented by the petition arises infrequently and is not squarely presented in this case. No further review is warranted.

1. In *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), this Court explained that a document is covered by Exception 5 if it satisfies "two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Id.* at 8. Petitioner does not dispute that the second condition is satisfied here. The district court determined that the Category B documents fall within the attorney-client privilege, Pet. App. 63-65, and petitioner has not challenged that determination in either the court of appeals, *id.* at 15-16, or this Court.

With respect to the first condition, petitioner acknowledges (Pet. 10) that this Court's decision in *Klamath Water Users Protective Ass'n* allows for the possibility "that in some circumstances a document prepared outside the Government may nevertheless qualify as an 'intra-agency' memorandum." 532 U.S. at 9. As this Court explained, "[i]t 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." *Id.* at 9-10 (quoting *United States Dep't of Justice* v. *Julian*, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting)). The Court noted in particular a set of lower-court decisions holding that "the exemption extends to communications between Government agencies and outside consultants

hired by them." *Id.* at 10. Petitioner does not directly question the existence of such a "consultant corollary to Exemption 5," *id.* at 11.

The court of appeals' application of the common-interest doctrine in the particular circumstances of this case is substantially similar to the application of Exemption 5 to a government consultant. Although the Army did not formally hire Clark to pursue the Army's own interests, the Army and Clark share a common financial interest through their co-ownership of the housing companies. Pet. App. 2-3. The arrangement imposes upon Clark "an obligation to protect those housing LLCs' interests, through litigation if necessary," *id.* at 18, and also requires that the Army expressly authorize Clark's litigation against petitioner, *id.* at 3-4. As a result of the Army's interest in the net profits of the housing projects, the Army will bear much of the financial burden, and reap much of the financial benefit, of the litigation that Clark is pursuing. *Id.* at 17-18. The Army's declarations explain that Clark's termination of petitioner, and therefore the litigation to accomplish that termination, is in the public interest with respect to the housing programs on the two Army bases. *Id.* at 18-19. And, as evidenced by the existence of the communications that petitioner seeks, the Army has been actively engaged in the conduct of that litigation. This particular combination of circumstances demonstrates that Clark is effectively representing the Army's interest in the litigation in functionally the same way that a hired contractor would. See *Hunton & Williams* v. *United States Dep't of Justice*, 590 F.3d 272, 280 (4th Cir. 2010) ("By cooperating with the agency in pursuit of the agency's own litigation aims, the litigation partner

in a limited sense becomes a part of the enterprise that the agency is carrying out.").

The purposes of Exemption 5 strongly support its application in these circumstances. The "clear thrust" of the exemption is "to ensure that FOIA does not deprive the government of the work-product and attorney-client protections otherwise available to it in litigation." *Hunton & Williams*, 590 F.3d at 278; see *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) ("[I]t is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context."); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Petitioner does not dispute that the documents it seeks would be privileged from discovery in litigation against the Army. Yet the logic of petitioner's position would dictate that a party denied discovery of those documents in litigation could turn around and obtain them through a FOIA request.

As the court of appeals has observed, the impact of such a "sweeping view * * * on the government's ability to conduct complex and multi-faceted litigation would be staggering." *Hunton & Williams*, 590 F.3d at 278. For example, "attorneys on one side of litigation could freely communicate, safe in the knowledge that their work product and deliberative processes would be privileged, while the other side would be obliged to turn over communications of the very same nature to its adversary." *Id.* at 278-279. "Further, in the absence of coordination, the government—or any party whose interests align with the government's—might find its position strafed inadvertently by 'friendly fire.'" *Id.* at 279.

Congress enacted Exemption 5 precisely to avoid requiring "the government to litigate on such distinctly disadvantageous terms." *Hunton & Williams*, 590 F.3d at 279; see *id.* at 278 ("What the Supreme Court has termed the 'Delphic' wording of Exemption 5, *Department of Justice* v. *Julian,* 486 U.S. 1, 11 (1988), is thus clear in this respect—one side in litigation cannot play by one set of rules and another side play by a more privileged set of rules."). Even petitioner's amicus acknowledges that "Congress would not want the fundamental litigation privileges enjoyed by agencies to be swallowed by FOIA." Reporter's Comm. Amicus Br. 8. Petitioner's proposed interpretation of Exemption 5 cannot be squared with that congressional design.

2. Petitioner's principal objection to the decision below is that, in its view, the court of appeals "collapsed the privilege prong of Exemption 5 with the inter- or intra-agency prong," and thus "bypassed altogether the inter- or intra-agency threshold requirement." Pet. 11-12. That objection is mistaken. The court of appeals expressly recognized that "[t]o fall within Exemption 5, a document must (1) be inter- or intra-agency and (2) fall within a discovery privilege." Pet. App. 15. It found no dispute that the Category B documents fell within a discovery privilege, *id.* at 15-16, and it thus devoted the majority of its analysis to the question whether they were intra-agency documents, *id.* at 16-22. But the court of appeals neither "ignore[d]" nor "cast[] aside" (Pet. 13) either requirement.

The decision below also provides no basis for an argument that the two requirements have been functionally collapsed such that only a single inquiry is

sufficient to satisfy both. As a threshold matter, because petitioner declined to challenge the Army's privilege claim on appeal, the court of appeals had no occasion to illustrate the differences between the two requirements. In any event, the court of appeals has elsewhere made clear that the two separate requirements require two separate legal inquiries. "Merely satisfying the requirements of the common interest doctrine without also satisfying the requirements of a discovery privilege," the court has explained, "does not protect documents from disclosure." *Hunton & Williams*, 590 F.3d at 280. The district court in this case accordingly recognized that "in addition to meeting the requirements of the common interest doctrine, the Army must also demonstrate that Category B documents are subject to the attorney-client or deliberative process privilege." Pet. App. 63.

3. Petitioner errs in asserting that the decision below conflicts with *Klamath Water Users Protective Ass'n*. In that case, this Court concluded that certain documents "passing between Indian Tribes and the Department of the Interior, address[ing] tribal interests subject to state and federal proceedings to determine water allocations" fell outside the scope of Exemption 5. 532 U.S. at 4-5. The Court distinguished those communications from agency communications with consultants (to which it presumed Exemption 5 would apply, see *id.* at 9-11) on two grounds. First, rather than furthering the interests of the agency, the tribes "necessarily communicate[d] with the [agency] with their own, albeit entirely legitimate, interests, in mind." *Id.* at 12. Second, the tribes were acting as "self-advocates at the expense of others seeking benefits inadequate to satisfy every-

one." *Ibid.* Neither ground is present in this case. The communications here are in furtherance of a lawsuit that the Army approved on behalf of its joint undertaking with Clark, and the matter does not concern the allocation of scarce resources among nongovernmental parties with competing claims.

As the court of appeals observed, *Klamath Water Users Protective Ass'n* did not discuss the common-interest doctrine and did "not impact the situation where the two parties to a communication share a unitary interest in achieving a litigative outcome and result," as the Army and Clark do in this case. Pet. App. 20 (quoting *Hunton & Williams*, 590 F.3d at 279) (alterations omitted). Although some of the documents in *Klamath Water Users Protective Ass'n* related to litigation by the government on behalf of an Indian tribe, that litigation was the opposite of the Georgia litigation here: the government was advancing the *tribe's* interests, because it had a fiduciary obligation to do so. *Hunton & Williams*, 590 F.3d at 279; see *Klamath Water Users Protective Ass'n*, 532 U.S. at 13-14 (observing that the government "merely represents the interests of the Tribe before a state court" and that the government had a fiduciary duty "to adopt the stance it believed to be in the [tribe's] best interest"). Petitioner errs in suggesting (Pet. 16-17) that *Klamath Water Users Protective Ass'n* should nevertheless be read as silently rejecting the application of a common-interest doctrine in a case like this one. The government's brief in the case did not advance any sustained argument for such a doctrine, see Gov't Br. at 43-45, *Klamath Water Users Protective Ass'n*, *supra* (No. 99-1871) (context for quotations cited at Pet. 17); the Court's decision said nothing

about it; and the court of appeals has made clear that the doctrine it applies in cases like this would not have changed the result in *Klamath Water Users Protective Ass'n*, see Pet. App. 20-22; *Hunton & Williams*, 590 F.3d at 279.

Petitioner briefly asserts (Pet. 10) that, although *Klamath Water Users Protective Ass'n* discusses the application of Exemption 5 to documents created by government consultants, it imposes a requirement that any such consultant exhibit an "undivided loyalty to the public interest" that is "no less than the undivided loyalty of an agency employee." Even if that is a correct reading of *Klamath Water Users Protective Ass'n*, it is functionally satisfied in this case. Clark, at all the relevant times, was committed to pursuing litigation that the Army had expressly determined to be in the public interest in light of the Army's interest in the base-housing ventures. Pet. App. 4, 55-56. Clark was acting pursuant to its obligations under the housing-project contracts, see *id.* at 18, and the court of appeals observed that petitioner had failed to explain how Clark's actions furthered its own self-interest independent of the Army's, *id.* at 20 n.8 (observing that petitioner "does not explain what Clark stood to gain by terminating [petitioner's] property management contracts"). In any event, even assuming that Clark's reasons for prosecuting that suit also had a component of self-interest, that self-interest overlaps entirely with the public interest represented by the Army, the co-owner of the LLCs, and is thus no obstacle to the application of Exemption 5. See *Hunton & Williams*, 590 F.3d at 280 ("The point is that there is no conflict of interest when it comes to advancing the public's interest because the outsider

stands to gain personally only if the public's interest is vindicated.").

4. Petitioner is wrong in asserting (Pet. 10-11) that the decision below conflicts with the decisions of other circuits. Proceeding from the mistaken premise that the court of appeals in this case improperly collapsed the two prerequisites for application of Exemption 5, see pp. 9-10, *supra*, petitioner erroneously posits that the decision below conflicts with other circuit decisions that distinguish between those two prerequisites. See Pet. 10-11; see also Reporter's Comm. Amicus Br. 5-6 (taking a similar approach). In the absence of that mistaken premise, the asserted conflict disappears. None of the decisions cited by petitioner indicates that another circuit would have reached a different result on the facts of this case.

In *National Institute of Military Justice* v. *United States Department of Defense*, 512 F.3d 677, cert. denied, 555 U.S. 1084 (2008), the D.C. Circuit held that documents containing views of outside attorneys solicited by the Department of Defense did, in fact, fall within the scope of Exemption 5. *Id.* at 678. Not only is the result in that case consistent with the result in this case, but the Fourth Circuit has expressly cited the D.C. Circuit's decision as affirmatively supporting the approach it applied in this case. See *Hunton & Williams*, 590 F.3d at 280.

In *County of Madison* v. *United States Department of Justice*, 641 F.2d 1036 (1981), the First Circuit declined to apply Exemption 5 either to an Indian tribe's communications with the government about settling litigation between the government and the tribe, *id.* at 1039-1041, or to a separate set of letters that "resemble[d] [those] settlement communica-

tions," *id.* at 1042. The court did not have occasion to address, and did not address, the application of Exemption 5 in a circumstance where a government agency is not adverse to the communicating party in litigation, but instead expressly authorized the communicating party to prosecute a lawsuit to protect the public interest under an agency program. Finally, in *Center for Biological Diversity* v. *Office of the United States Trade Representative,* 450 Fed. Appx. 605 (2011), the Ninth Circuit noted the "consultant corollary" discussed in *Klamath Water Users Protective Ass'n*, deemed the record insufficient to determine whether that doctrine applied, and remanded for the district court to address the issue in the first instance. *Id.* at 608-609. Nothing in that decision demonstrates that the Ninth Circuit would disagree with the decision below, and such an unpublished decision ordinarily would not in any event give rise to the sort of circuit conflict that would warrant this Court's review.

5. Petitioner's failure to identify an out-of-circuit decision addressing a common-interest litigation scenario like the one at issue here refutes any claim that such scenarios arise frequently enough to warrant this Court's review. The suggestion of petitioner's amicus (Reporter's Comm. Amicus Br. 10-14) that the court of appeals' approach "allows virtually any private entity to * * * shield documents from disclosure under FOIA by approaching a federal agency and convincing it that they share a common interest" overlooks several limiting features of that approach. First, the common-interest doctrine does not apply every time a private party cooperates with an agency, but instead only when it does so in certain litigation-related contexts. Pet. App. 16. Second, the doctrine does not

cover requests for government cooperation, but instead only communications that occur after the government has already "agreed to help [a] party prevail on its legal claims at the time of the communications at issue." *Ibid.* (quoting *Hunton & Williams*, 590 F.3d at 274). Third, the agency's decision to support the private party must be premised on a determination that "doing so [i]s in the public interest." *Ibid.* (quoting *Hunton & Williams*, 590 F.3d at 274). Fourth, a claim of common interest is "'carefully scrutinize[d]'" by the court and requires the agency to show an actual "meeting of the minds or agreement to pursue a joint legal strategy," as opposed to "'mere indicia of joint strategy as of a particular point in time.'" *Id.* at 16-17 (quoting *Hunton & Williams*, 590 F.3d at 274, 285) (internal quotation marks omitted).

In any event, this case would be an unsuitable vehicle for addressing the question framed by the petition. That question seeks review of the application of Exemption 5 "when the source of the [requested] communications is a self-interested business lobbying the agency for governmental approval and support in a private business dispute." Pet. i. The documents at issue here, however, were not lobbying communications, but instead communications that occurred *after* the Army had already approved Clark's course of action and determined to support its suit. See, *e.g.*, Pet. App. 15; see *id.* at 8-15 (concluding, in a portion of the opinion unchallenged by petitioner, that documents relating to Clark's request for the Army's support were exempt under Exemption 4, 5 U.S.C. 552(b)(4), not Exemption 5). In addition, the lawsuit in this case cannot be characterized as merely a "private business dispute," because the Army had a direct

financial stake in the outcome of the litigation and by virtue of the operating agreements its approval was required in order for the suit to go forward. Pet. App. 17-18. The court of appeals expressly relied on that unusual circumstance to conclude that Exemption 5 applied, see *ibid.*, and its fact-specific conclusion does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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