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,
Respondent.

On Petition For A Writ of Certiorari
To The U.S. Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONER

Bruce D. Brown
Counsel of Record
Mark R. Caramanica
Aaron Mackey
The Reporters Committee
for Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209-2100
bbrown@rcfp.org
(703) 807-2101

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STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press ("the Reporters Committee" or "*amicus*") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Reporters Committee has no parent corporation and issues no stock.

As advocates for the rights of the news media who gather and disseminate information to the public, *amicus* maintain a strong and ongoing interest in ensuring that journalists—as well as members of the public—have a robust right to access federal records under the federal Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, ("FOIA"). Granting review in this case is necessary to repudiate an interpretation of FOIA that conflicts with this Court's precedent and creates the potential for agencies to shield from disclosure records involving third parties that Congress never intended to protect. Such an outcome contradicts a plain reading

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Further, the parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.

of 5 U.S.C. § 552(b)(5), ("Exemption 5"), and could increase secrecy surrounding agencies' increasing practice of outsourcing critical governmental functions to private industry.

SUMMARY OF ARGUMENT

Amicus urges the Court to accept review of this case to clarify for lower courts that the text of FOIA's exemptions drive the threshold analysis when determining whether a record can be withheld, not the facts of any particular case. Exemption 5 allows an agency to withhold internal documents that would not be disclosed to a party in litigation with the agency. 5 U.S.C. § 552(b)(5). This case concerns whether federal courts can sidestep the clear intent of Congress—which sought to protect certain interests by enumerating nine exemptions to FOIA's presumption of disclosure—by ignoring the analysis spelled out in Exemption 5, thus allowing an agency to withhold records sent to or from a private, self-interested third party.

This Court should grant review to reject the Fourth Circuit's erroneous interpretation of Exemption 5, which conflicts with other federal circuits and the plain text of FOIA. For a record to be withheld under Exemption 5, a court must conduct a two-step inquiry, asking first whether the records are inter- or intra-agency records. Only when that threshold requirement is satisfied can the court determine whether the various privileges recognized under Exemption 5 can be properly applied to the documents at issue.

The Fourth Circuit seeks to upend this analysis, allowing an agency's claim of a "common in-

terest" litigation privilege to evade the threshold determination of whether the documents are inter- or intra-agency materials. Not only is this out of step with the plain text of Exemption 5, it also runs counter to the FOIA's legislative intent by dramatically broadening the scope of the exemption. Under the Fourth Circuit's rationale, private third parties that seek a government benefit would be able to claim they are akin to an agency employee and thus shield their documents from disclosure under FOIA.

The Fourth Circuit's decision therefore conflicts on its face with this Court's precedent interpreting Exemption 5, which has held that self-interested third parties cannot claim the exemption's protections, a fact that alone merits granting review. Further, the Fourth Circuit's decision erases the line drawn by this Court to recognize a narrow exception to the inter- or intra-agency requirement of Exemption 5—known as the consultant corollary—so that nearly any company doing business with an agency could very well invoke the "common interest" privilege to shield documents from public disclosure.

Finally, review of the Fourth Circuit's decision is necessary because allowing agencies to invoke the "common interest" privilege to claim that documents can be withheld under Exemption 5 would seriously harm efforts to report on the government's increasing hiring of private firms to carry out government functions. Yet the text and purpose of FOIA counsel that more transparency, not less, is required when federal agencies delegate their duties to private parties. Such transparency

allows the press, and by extension, the public, to learn about transactions between agencies and private contractors and determine whether the government's activities, and those of the chosen private surrogates, are proper.

ARGUMENT

I. Review by the Court is necessary to reject the Fourth Circuit's interpretation of FOIA Exemption 5, as it conflicts with the statute's text and interpretations by other federal courts.

A straight reading of the text of Exemption 5 makes plain the need for this Court to grant review of the decision below because the Fourth Circuit's employment of the "common interest" privilege provides an end-run around the statutory analysis Congress created in Exemption 5. Exemption 5 allows 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).

For an agency to withhold a document under Exemption 5, it "must thus satisfy 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." *Dep't of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 8 (2001). In *Klamath*, this Court went on to emphasize that "the first condition of Exemption 5 is no less important than the second." *Id*. at 9.

This two-step analysis demonstrates that Congress was principally concerned with shielding federal agencies from disclosing documents that would be privileged if the parties were engaged in litigation. In short, Congress did not want FOIA to bypass the traditional litigation privileges that federal agencies enjoy. The inter- or intra-agency threshold requirement of Exemption 5 serves this purpose by limiting protection to agencies themselves, making no mention of extending protection to private third parties.

Interpretation of Exemption 5 by this Court and others acknowledged that the inter- or intra-agency requirement of the exemption would harm agencies in select, narrow situations where the agency itself has sought the advice or expertise of particular third parties. For these situations, this Court recognized the "consultant corollary" test to allow agencies to withhold records from third parties where the government has elected to seek specific external expertise or help for a particular concern. *See Klamath*, 532 U.S. at 9-11.[2] This is not unlike when private parties in litigation retain consultants for advice on a particular matter, as such individuals are specifically sought out by litigants for their advice.

Although the consultant corollary may bring private parties who are acting as agents of the government within the ambit of what is considered an inter- or intra-agency document, courts must still undertake Exemption 5's two-step inquiry. Other

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[2] A greater discussion of the consultant corollary and the impact the Fourth Circuit's decision would have on it can be found in Section IV, *infra*.

federal circuits have similarly recognized that Exemption 5's analysis begins with asking whether the documents at issue are inter- or intra-agency, following the statute's text. *See ITT World Commc'ns, Inc. v. FCC*, 699 F.2d 1219, 1238 (D.C. Cir. 1983), *rev'd on other grounds*, 466 U.S. 463 (1984); *Madison County, N.Y. v. Dep't of Justice*, 641 F.2d 1036, 1039-40 (1st Cir. 1981); *Conoco Inc. v. Dep't of Justice*, 687 F.2d 724, 727 (3d Cir. 1982); *Center for Biological Diversity v. Office of the U.S. Trade Rep.*, 450 F. App'x 605, 609, 2011 WL 4342653 (9th Cir. 2011); *Bloomberg L.P. v. Board of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 280-81 (S.D.N.Y. 2009).

In light of the broad judicial recognition of the proper analysis under Exemption 5, it is only the Fourth Circuit that seeks to rewrite what Congress plainly intended. By importing a "common interest" doctrine into FOIA, the Fourth Circuit evades Exemption 5's threshold requirement that the documents at issue be inter- or intra-agency. This allows an agency to shield documents to and from a third party based solely on the assertion of a litigation privilege.[3] Such analysis puts the cart

[3] It is not even clear whether the "common interest" privilege is one of the litigation privileges protected by Exemption 5, assuming *arguendo* that Respondents could meet the exemption's threshold requirement. The Fourth Circuit appears to be the only court using the privilege in the context of FOIA. This Court has noted that "it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery." *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 354-55 (1979). The Court later expressed skepticism about incorporating "novel" privileges or those that have found "less than universal acceptance" into

before the horse, allowing a court to begin and end its inquiry without confronting Exemption 5's threshold requirement.

Review of this decision is necessary to reject the Fourth Circuit's analysis under Exemption 5 in light of the overwhelming majority of other federal circuit courts and this Court. Such review will allow the Court to clarify that the threshold requirement of Exemption 5 cannot be ignored in light of its prominent placement within the text of the exemption. *See, e.g.*, *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1267 (2011) (rejecting a lower court's interpretation of Exemption 2 because "[i]t is disconnected from FOIA's text"). Grounding Exemption 5's analysis to the statute's text would also prevent agencies from shielding particular records from disclosure by partnering with private third parties and claiming a common interest.

II. The Fourth Circuit's analysis conflicts with the purpose of Exemption 5 and undercuts FOIA's goal of increasing disclosure of government activity.

The Court should grant review in this case because the Fourth Circuit's analysis runs counter to Congress' purpose in creating Exemption 5 by extending its protection to third parties who approach the government seeking a particular benefit, rather than shielding federal agencies themselves. At bottom, this dispute is about the level of protection Congress intended to provide private third parties under Exemption 5. A review of the

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Exemption 5. *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 801 (1984).

legislative history and purpose of FOIA demonstrate that Congress' concern was with protecting the government's interests and not private third parties.

FOIA's legislative history makes clear that Congress intended to protect federal agencies from having to disclose privileged documents when it enacted Exemption 5. *See* H.R. Rep. No. 89-1497, at 10 (1966) (noting that Exemption 5 was intended to incorporate the government's common law privileges); S. Rep. No. 89-813, at 29 (1965) (same). The exemption was also placed within FOIA to prevent agencies from being "prematurely forced to 'operate in a fishbowl.'" S. Rep. No. 89-813, at 44.

The legislative history of Exemption 5 thus makes clear that Congress intended to protect government agencies themselves from being forced to disclose privileged documents. In other words, Congress did not want FOIA to become a vehicle for parties in litigation with the government to obtain documents that they could not otherwise obtain in the course of discovery. Allowing FOIA requesters to gain more access to government records than parties in litigation with the government would hardly make sense, given that Congress would not want the fundamental litigation privileges enjoyed by agencies to be swallowed by FOIA. Forcing such disclosure would also be particularly unfair to agencies, which would be at a distinct legal disadvantage by having to hand over privileged documents under FOIA to opposing parties that would not lose the benefit of such privileges.

Given that Congress sought to protect federal agencies from having to disclose internal docu-

ments that were privileged, the Fourth Circuit's analysis in the case cannot be sustained. The history and purpose of Exemption 5 show that Congress intended the privilege to apply to agencies' privileged documents and not those shared with private third parties that unilaterally approach the government seeking a particular benefit. In such cases, it is of no moment under Exemption 5 that the government (or the third party) can thereafter articulate a reason why the parties share a common interest.

Allowing the Fourth Circuit's analysis to stand would provide private third parties and agencies with the perverse incentive of pairing together on certain matters in order to shield their correspondence from disclosure under FOIA. Such a practice could not only invite improper collusion but also adversely affect the public's ability to access records detailing the relationship between agencies and private parties. The Fourth Circuit's interpretation of Exemption 5 thereby also lays waste to a bedrock principle that requires courts to construe FOIA exemptions narrowly. *See Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); *FBI v. Abramson*, 456 U.S. 615, 630 (1982).

Moreover, allowing third parties to exhibit a heavy or manipulative hand in dictating whether its interactions with federal agencies can be disclosed under FOIA through invocation of the "common interest" doctrine would thwart the central purpose of FOIA to open government activity to public scrutiny. This Court has long recognized 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), and that FOIA was enacted to let the public "know what their government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

Under a regime in which the "common interest" doctrine can be claimed without any inquiry into whether the threshold requirement of Exemption 5 has been met, increased secrecy will result. The Fourth Circuit's interpretation of Exemption 5 would therefore make it more difficult for FOIA requesters to access records concerning private third parties doing business with the government. As will be discussed more fully in Section IV, *infra*, such business dealings are becoming more common, meaning it is evermore important to provide public access to records documenting this type of government activity.

III. The Fourth Circuit's decision requires review because it dramatically broadens the consultant corollary exception, allowing third parties to dictate an agency's FOIA disclosure.

The Fourth Circuit's analysis blurs the distinction this Court drew between self-interested third parties and agency consultants, broadening the scope of the consultant corollary exception to the point in which it swallows the threshold requirement of Exemption 5. Despite attempts to distinguish its decision from *Klamath*, the Fourth Circuit rejects the narrow consultant corollary exception created for Exemption 5 by allowing a self-interested third party to shield documents from disclosure whenever the entity claims that it shares a common interest with a federal agency.

In *Klamath*, this Court reviewed lower courts' decisions and recognized that there are narrow circumstances when the threshold requirement of Exemption 5 could be met even when the communication is with an outside party. *See Klamath*, 532 U.S. at 9-10. Synthesizing the cases, this Court developed a functional framework for determining the situations in which outside communications can nonetheless meet the inter- or intra-agency threshold requirement of Exemption 5. Specifically, this Court recognized that "[i]n such cases, 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 then held that to qualify for the exception to Exemption 5's inter- or intra-agency requirement, the third party could not represent an interest of its own or of its client in advising the agency. *Id.* at 11. "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." *Id.*

Lower courts have faithfully employed *Klamath*'s narrow exception to Exemption 5's threshold requirement that records must be inter- or intra-agency. *See, e.g.*, *Institute of Military Justice v. Dep't of Defense*, 512 F.3d 677, 681 (D.C. Cir. 2008) ("taken together, the foregoing cases compel us to conclude that documents [. . .] submitted by non-agency parties in response to an agency's request for advice [. . .] are covered by Exemption 5"); *Stewart v. Dep't of Justice*, 554 F.3d 1236, 1245 (10th Cir. 2009) (holding that a third party functioned

"akin to an agency employee" and therefore could claim the consultant corollary exception); *Natural Resources Defense Council v. Dep't of Defense*, 442 F. Supp. 2d 857, 869 (C.D. Cal. 2006) ("the Court *is* convinced that contractors must act as agents of the government with respect to the documents that are claimed to be withheld") (emphasis in original).

From the preceding cases a common principle emerges: for the consultant corollary exception to apply, the government must seek out the third-party's assistance and ask it to function similar to an employee. This means that it is the action of the government in trying to enlist outside specialists to help it with particular tasks that defines the scope of the exception, and not the independent conduct of the third party.

In contrast, the Fourth Circuit allows the conduct of the outside third party—by enlisting the government in a "common interest"—to determine whether records can be withheld. The Fourth Circuit held that the "common interest" doctrine does not conflict with *Klamath* because this Court did not discuss the common interest doctrine or deal with similar facts. *See Hunton & Williams v. Dep't of Justice*, 590 F.3d 272, 279 (4th Cir. 2010).

In essence, the Fourth Circuit in *Hunton & Williams* and in the present case developed a *sui generis* exception to Exemption 5's textual requirements that has no basis in the law and has the practical effect of blowing the narrow consultant corollary exception wide open. Rather than applying the analysis this Court has enunciated and looking to see whether the consultant corollary could apply, the Fourth Circuit allows an agency to

withhold any records concerning a private party where "the two parties share a unitary interest in achieving a litigative outcome and result." *Hunton & Williams*, 590 F.3d at 279.

The Fourth Circuit's rationale for adopting the "common interest" doctrine cannot be squared with the cases developing the consultant corollary exception. In *Klamath* and similar cases construing the exception, a self-interested company doing business with an agency cannot claim the protection of Exemption 5 merely by asserting that the two parties share some mutual interest. This makes intuitive sense, as any outside party can claim a unitary interest with the government as both want to see whatever business they have between them completed.

The application of the consultant corollary exception to Exemption 5's threshold requirement, however, turns on whether the agency has *itself* reached out to a private party to seek help or expertise and whether the private party acts without any self-interest or at the expense of other private parties. *See Klamath*, 531 U.S. at 12. None of these conditions were met in *Hunton & Williams* or the present case, meaning that the consultant corollary would be inapplicable. But rather than recognize such an outcome, the Fourth Circuit develops a new categorical restriction on access to certain records that is unmoored from the statute's text or precedents.

But the Fourth Circuit's "common interest" privilege does more than simply ignore the text of FOIA or the consultant corollary exception to Exemption 5. By sanctioning a "common interest"

doctrine, the Fourth Circuit allows virtually any private entity to further act in its own self-interest and shield documents from disclosure under FOIA by approaching a federal agency and convincing it that they share a common interest.

The doctrine appears to have no limits on the context in which it can be applied. Nor, as *Hunton & Williams* and the current case demonstrate, does it even require that the agency actually join active litigation before invoking the common interest doctrine as a means of avoiding disclosure under FOIA. *See Hunton & Williams*, 590 F.3d 287 ("The common interest doctrine requires a meeting of the minds, but it does not require that the agreement be reduced to writing or that litigation actually have commenced.").

Allowing a private party to reach out an engage a government agency in a "common interest" extends a benefit to private parties that FOIA does not permit. Congress did not intend such a broad shield to protect private parties interacting with the government. Rather, Congress chose to protect narrow, specific interests of private third parties, including, for example, confidential business information of companies (Exemption 4), personal privacy of individuals (Exemption 6), and records of financial institutions (Exemption 8). 5 U.S.C. § 552(b)(4), (6), (8).

Review of the Fourth Circuit's decision in this case is therefore necessary to prevent application of the "common interest" doctrine to Exemption 5, as it would allow self-interested private parties to shield their communications with agencies from disclosure. Worse, recognizing a "common in-

terest" doctrine under Exemption 5 would move courts further away from the text of the exemption—which should serve as the touchstone of any analysis—and allow particular circumstances to dictate whether documents can be withheld.

IV. Allowing self-interested third parties to claim the "common interest" doctrine to prohibit disclosure under FOIA would harm efforts to report on government outsourcing of essential functions.

Review of the Fourth Circuit's decision is also necessary because allowing the "common interest" doctrine to prevent disclosure of records under Exemption 5 would harm efforts to report on the government's increasing reliance on private contractors to carry out essential government functions. FOIA serves as a critical tool for reporters, who use documents obtained from the government to understand its activities and open them up to public scrutiny. As the government becomes increasingly reliant on private contractors to manage its intelligence, defense, corrections, and even FOIA processing operations, access to records detailing such arrangements is crucial.

A prime example of the difficulties of understanding how private contracting with government agencies has become a huge business can be found in *The Washington Post* series describing the unwieldy state of private intelligence contractors. William M. Arkin & Dana Priest*, National Security, Inc.: The Growing Role of Contractors in Counterterrorism and Intelligence is Raising Concerns About Conflicts of Interest and the Government's*

Ability to Control its Most Sensitive Work, THE WASHINGTON POST (July 20, 2010), *available at* 2010 WLNR 26705018.[4]

Using public records and extensive reporting, the *Post*'s two-year investigation revealed that private contracting in national security and counterterrorism had grown so large that not even top U.S. officials, including the then-directors of the CIA and Department of Defense, knew the full extent to which contractors were performing essential government functions. *Id*.

In particular, the *Post* could only estimate the cost of such contracting—upwards of tens of billions of dollars—and that roughly 265,000 people were employed as contractors in that industry alone. *Id*. But the sheer expanse of the private companies' operations and the fact that much of the contracting was hidden from public view meant that the activities were "lacking in thorough oversight and so unwieldy that [their] effectiveness is impossible to determine." *Id*.

The *Post*'s reporting showed that even in the best of circumstances, where reporters devote serious time to uncover public records and interview government officials, it is incredibly difficult to gain a complete understanding of the extent to which the government has contracted away its national security operations. As it stands now, FOIA provides one avenue by which reporters can gain a bet-

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[4] To facilitate access to secondary sources, "WLNR," or Westlaw NewsRoom, citations are provided whenever possible.

ter understanding of how agencies enter into contracts with private parties to take on essential government functions.

But allowing an agency to withhold documents concerning private parties under a "common interest" doctrine would by its nature inhibit such reporting, as private parties could claim the benefit of the doctrine to shield its dealings with the government from disclosure.

Reporting has also shown that the government sometimes fails to perform its due diligence before selecting a private entity to perform governmental functions. *See* Jim McElhatton, *Contractors Elude Scrutiny: Federal Rules Don't Require Background Checks*, THE WASHINGTON TIMES (Dec. 17, 2007), *available at* 2007 WLNR 24895755. Using public records, the reporter reveals that one contractor who helped broker $150 million in security and defense contracts lied about his education and was a convicted felon. *Id.*

It also showed how lax government regulations regarding background checks of private contractors prevented agencies from learning about the individual's past. *Id.* The story also highlighted how different agencies imposed varying amounts of scrutiny on potential private contractors. *Id.*

The story underscores the important role that reporters can play in shedding light on the large economic juggernaut created by private contractors doing business with the government. It is easy to see how a private contractor with a similarly checkered past could have used the "common in-

terest" doctrine to prevent such information from coming to light, meaning that the public would not learn of the contractor's history or how government agencies imposed such lax oversight into their contracting process.

Reporting on federal contractors can also highlight how businesses can sometimes fail to uphold their end of the bargain, resulting in potentially hazardous situations. In Tacoma, Washington, a reporter used FOIA and the state's public records law to show that a private federal prison contractor was violating its contract with the federal government by failing to obtain agreements with local emergency services regarding assistance in case of an emergency. *See* Lewis Kamb, *The Complicated World of Immigration Law*, THE (Tacoma, Wash.) NEWS TRIBUNE (Sept. 9, 2012), *available at* 2012 WLNR 19161861.

Despite the federal government requiring that the private prison operator obtain such agreements with local agencies, the contractor had not done so, creating a possibility that a bad situation could be made worse in the event that there was an emergency at the prison. *Id.* The story notes that such emergencies were more than theoretical, as a prison uprising in 2007 resulted in guards using pepper spray on prisoners to restore order. *Id.* And on another occasion, a leak of poisonous chlorine from a nearby bleach plant almost forced the prison's evacuation. *Id.*

The reporting exposed a contractor's failure to honor its commitment to the federal government. More importantly, the story revealed how the con-

tractor's failure could contribute to a dangerous situation should the prison suffer an emergency, leaving guards, personnel, and prisoners without any local backup should they be needed.

Finally, as public scrutiny of agencies' responses to FOIA requests has increased, so too has the government's reliance on private contractors to fulfill its statutory obligations. *See* Clara Hogan, *The Outsourcing of Federal FOIA Services*, NEWS MEDIA & THE LAW 21 (Summer 2011).[5] The story details how pressure on agencies to decrease their backlogs of FOIA requests and process requests more quickly has led several to hire contractors for help. *Id*. But agencies' use of contractors also raised questions regarding whether it was proper for agencies to outsource certain aspects of FOIA processing, such as making determinations on whether particular documents should be withheld. *Id*.

Allowing agencies to further shield their involvement with private contractors by utilizing a "common interest" privilege would exacerbate the problems of public accountability and transparency that are inherent whenever a government agency delegates responsibilities to a private party. When the government turns over certain functions to a private party, transparency should follow. Having access under FOIA to records detailing such arrangements becomes all the more important, as the communications between the private party and the

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[5] *Available at* http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-law-summer-2011/outsourcing-federal-foia-servic.

agency may provide the only meaningful glimpse into the contractor's operations on behalf of the government.

This Court should therefore grant review and reverse the Fourth Circuit's decision in the case below, as it imperils the public's ability to understand government operations that have been contracted out to private parties.

CONCLUSION

For the foregoing reasons, this Court should accept review and reverse the decision of the Fourth Circuit.

Respectfully submitted,

Bruce D. Brown
Counsel of Record
Mark R. Caramanica
Aaron Mackey
The Reporters Committee for
Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209-2100
bbrown@rcfp.org
(703) 807-2100

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