RECORD NO.

18-2814

In The

United States Court of Appeals

For The Second Circuit

KATE DOYLE, NATIONAL SECURITY ARCHIVE, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiffs – Appellants,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANTS

Anne L. Weismann
Conor M. Shaw
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
1101 K Street, NW, Suite 201
Washington, DC 20005
(202) 408-5565

Counsel for Plaintiffs - Appellants

Alexander Abdo
Jameel Jaffer
KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY
475 Riverside Drive, Suite 302
New York, New York 10115
(646) 745-8502

Counsel for Plaintiffs - Appellants

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

CORPORATE DISCLOSURE STATEMENT

Appellants Citizens for Responsibility and Ethics in Washington, the National Security Archive, and the Knight First Amendment Institute at Columbia University have no parent corporation, none have stock, and therefore no publicly held corporation owns 10% or more of any of them. The Knight Institute is a non-profit, non-partisan organization governed by a nine-member board of directors of whom five are associated with Columbia University.

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INTRODUCTION

The Plaintiffs in this case seek access under the Freedom of Information Act ("FOIA") to the Secret Service's documentation of who visited the White House and when – records the Secret Service has created or received while performing its statutory function of protecting the president at the White House complex and at President Donald Trump's so-called "Winter White House" at Mar-a-Lago. The records would give the public crucial insight into who has influence over the most powerful office in the land, at a time of unparalleled public need to know the forces that are shaping the policies of that office and to what end.

The requested visitor logs, as records the Secret Service created or acquired while performing its core protective function, meet the Supreme Court's two-part, bright-line test for "agency records" announced in *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989) ("*Tax Analysts II*"). They were "created or obtained" by the Secret Service, and they "c[a]me into the agency's possession in the legitimate conduct of its official duties." 492 U.S. at 145. Nevertheless, the district court ruled that both records of visitors to the White House complex, except for records involving agency components of the Executive Office of the President ("EOP"), and Secret Service records reflecting the president's schedule that the Secret Service relied on in providing protection for the president at Mar-a-Lago are not agency records subject to disclosure under the FOIA. To reach this

conclusion the district court elevated caselaw from the U.S. Court of Appeals for the D.C. Circuit that places nearly dispositive weight on the intent of the records' creator over Supreme Court precedent that expressly rejects intent as a factor to be considered.

The district court also erroneously credited "special policy considerations" to conclude that requiring disclosure of agency records that reveal information about the president would raise the same concerns as subjecting the president himself to the compelled disclosure regime the FOIA embodies. In so doing, the court essentially fabricated a new exemption to the FOIA's disclosure requirements and carved out a whole category of records that Congress did not intend to protect from FOIA requests.

With this ruling the district court erred. The FOIA, as interpreted by the Supreme Court, applies to the Secret Service's visitor logs and other visitor records and requires reversal of the district court's grant of summary judgment.

The district court compounded its error by dismissing Plaintiffs' challenge to the policy and practice, embodied in memoranda of understanding between the EOP and the Department of Homeland Security ("DHS"), of treating the visitor logs as presidential records subject to the Presidential Records Act ("PRA"), and not as agency records within the scope of the Federal Records Act ("FRA"). First, by purporting to classify the Secret Service's visitor records as presidential

records, the memoranda of understanding constitute the kind of guidance courts have found is subject to judicial review. *Armstrong v. Exec. Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993). Second, the district court's interpretation of that guidance creates the very danger Congress sought to legislate against when it enacted the PRA: it allows that statute to become "a potential presidential *carte blanche* to shield materials from the reach of the FOIA." *Id.* at 1292. These errors require reversal.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 5 U.S.C. § 552(a)(4)(B), based on the two FOIA requests Plaintiffs filed with DHS; 5 U.S.C. § 702 for their allegations that Defendants' policy and practice of treating federal records as presidential records was arbitrary, capricious, and contrary to law; and 28 U.S.C. § 1331. On September 21, 2018, the district court entered judgment against the Plaintiffs. Civil J., JA 198-99. On September 24, 2018, Plaintiffs timely filed their notice of appeal from this final judgment. JA 200-01. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court err in holding that visitor logs maintained by the Secret Service and Secret Service records reflecting the president's schedule used

by the Secret Service to provide protection for the president at Mar-a-Lago are not "agency records" within the meaning of the FOIA?

2. Did the district court err in holding that Plaintiffs' challenge to the policy and practice, embodied in memoranda of understanding between the EOP and DHS, of treating Secret Service visitor logs as within the scope of the PRA was not subject to judicial review?

STATEMENT OF THE CASE AND THE FACTS

I. Nature of the case and proceedings below

This appeal arises from two FOIA requests Plaintiffs sent to the Secret Service, a component of DHS, for records for the period January 20, 2017 through March 8, 2017, from two automated systems the Secret Service uses to track visitors at the White House complex, and for records of presidential visitors at Mar-a-Lago and Trump Tower for that same period. Op. & Order, JA 136-37; Exhibit A to Second Decl. of Kim E. Campbell, JA 51-56. After receiving no response, Plaintiffs filed a complaint against DHS on April 10, 2017, challenging DHS's failure to respond to their FOIA requests. Op. & Order, JA 137. On September 14, 2017, Plaintiffs amended their complaint to add EOP as a defendant and to add claims against DHS and the EOP under the Administrative Procedure Act ("APA") challenging Defendants' failure to manage and preserve these records under the FRA. *Id.*, JA 140-41. *See also* Am. Compl., JA 17-33.

In October 2018, Defendants moved for summary judgment on the FOIA claims arguing the requested records are not agency records subject to the FOIA. Op. & Order, JA 141; ECF Dkt. No. 45. Defendants also moved to dismiss the APA claims as not subject to judicial review based on their characterization of the claims as not challenging written guidelines. *Id.*

On July 26, 2018, District Court Judge Katherine Polk Failla entered an opinion and order granting in part and denying in part Defendants' motion for summary judgment and concluding that both the visitor logs for non-agency EOP components and the Secret Service records reflecting the president's schedule are not agency records subject to the FOIA. Op. & Order, JA 146-80. The district court also granted Defendants' motion to dismiss Plaintiffs' APA claims under the PRA and FRA, finding Plaintiffs had failed to allege a guideline subject to judicial review. *Id*., JA 180-97. The court ordered Defendants to disclose within 60 days materials responsive to Plaintiffs' surviving FOIA claims. *Id*., JA 197. On September 21, 2018, following the court-ordered production, the district court entered final judgment. Civil J., JA 198-99.

II. Statement of the facts

As part of its statutory responsibilities to protect the president, vice president, and their immediate families, 18 U.S.C. §§ 3056, 3056A, the Secret Service monitors visitors to the White House complex and the vice president's

residence. Decl. of James M. Murray ("Murray Decl."), JA 62 ¶ 6. Within the White House complex the Secret Service employs two web-based electronic systems to monitor visitors: the Executive Facilities Access Control System ("EFACS") and the Worker and Visitor Entrance System ("WAVES"). Op. & Order, JA 132. The Secret Service uses the EFACS system to control and monitor access to the White House complex, and the WAVES system to vet visitor information and grant access to the White House complex. Murray Decl., JA 62 ¶ 7.

The Secret Service begins creating these records when a White House passholder – who may or may not be a member of the president's staff – provides the agency with information about the visitor, including, *inter alia*, personally identifying information and the location of the visit. *Id.*, JA 62-63 ¶ 8. The Secret Service uses this information to perform background checks to determine whether the visitor should be admitted. *Id.* Thereafter Secret Service personnel annotate the WAVES records with the results of the background checks and any instructions to Secret Service officers. *Id.*, JA 63-64 ¶ 9. The Secret Service stores the WAVES records electronically on computer servers located at Secret Service headquarters, and Secret Service personnel operate those servers. *Id.*, JA 66 ¶ 16.

The Secret Service clears each scheduled visitor for entry into the White House complex upon their arrival and issues a badge that the visitor swipes over an

electronic badge reader at entrances and exits to the complex. *Id.*, JA 64 ¶ 10. This generates an electronic Access Control Record ("ACR") that records the visitor's name, badge number, date and time of entrance or exit, and the post at which the badge was swiped. Murray Decl., JA 64 ¶ 10. The ACR records do not include either who requested clearance for the visitor or who the visitor was seeing. Upon the completion of a visit, the Secret Service updates the WAVES records with the ACR information. *Id.*, JA 64 ¶ 11.

The Secret Service claims only a temporary interest in the WAVES and ACR records; once a visit is completed, the Secret Service transfers these records to the White House Office of Records Management every 30 to 60 days. *Id.*, JA 65 ¶ 3. The Secret Service purges WAVES records more than 60 days old on a rolling basis. *Id.* Over the years, these practices have varied, but in May 2006, the Secret Service and the White House entered into a Memorandum of Understanding ("2006 MOU") that purports to memorialize their "agreement" that these records are "not the records of any 'agency' subject to the Freedom of Information Act." *Id.*, JA 65-66 ¶¶ 14, 15; 2006 MOU, JA 69-73.

Notwithstanding the 2006 MOU, in 2009 President Barack Obama announced that starting on September 15, 2009, the White House would begin voluntarily disclosing the majority of information in the WAVES and ACR records, subject to certain exceptions. Decl. of Philip C. Droege ("Droege Decl."),

JA 82-83, ¶¶ 12, 13. On April 14, 2017, a spokesperson for President Trump announced the White House was rescinding the voluntary disclosure policy. *Id.*, JA 83 ¶ 14.

In September 2015, following President Obama's creation of a Presidential Information Technology Community ("the Community"), the Community entered into a Memorandum of Understanding ("2015 MOU") that established a framework for implementing policies and procedures governing "the information resources and information systems provided to the President, Vice President, and EOP." Decl. of Charles Christopher Herndon ("Herndon Decl."), JA 85-87, ¶ 6; 2015 MOU, JA 92-100. Under the terms of the 2015 MOU, the Secret Service manages and operates the EFACS and WAVES systems, but the 2015 MOU designates the president as their "business owner" and purports to vest control of these systems and the records created on them in the president. Herndon Decl., JA 86 ¶ 8.

The Secret Service has no system in place for monitoring presidential visitors to Trump Tower or Mar-a-Lago. Second Decl. of Kim E. Campbell, JA 39 ¶ 11. In searching for records responsive to Plaintiffs' FOIA requests, the Secret Service located a handful of documents related to Mar-a-Lago visits, which included White House travel schedules, emails containing presidential schedule information, emails with information about scheduled presidential visitors, and

other presidential event information. *Id.* JA 44-46, ¶¶ 28, 30. The Secret Service described these documents as "contain[ing], reflect[ing], or directly relat[ing] to Presidential schedules" that were transmitted to the Secret Service so that the agency could "perform its statutory duty to protect the President." *Id.*, JA 46-47 ¶ 31. The Secret Service did not perform a search for visits to Trump Tower because President Trump had made no such visits during the period of time covered by Plaintiffs' FOIA requests. *Id.*, JA 38-39 ¶ 8.

III. The district court's opinion

With one exception described below, the district court granted Defendants' summary judgment motion as to the Secret Service's logs of visitors to the White House and its documentation reflecting or pertaining to visitors to Mar-a-Lago. Op. & Order, JA 164-80, 197. The court began its analysis by examining three Supreme Court cases addressing the meaning of the term "agency record" under the FOIA: *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980) ("*Kissinger*"); *Forsham v. Harris*, 445 U.S. 169 (1980) ("*Forsham*"); and *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989). Op. & Order, JA 149-51. The district court then turned to a decision from the D.C. Circuit, *Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d 208 (D.C. Cir. 2013) ("*Judicial Watch*"), involving a FOIA request for Secret Service visitor logs, and that decision's application of the D.C. Circuit's four-factor test for agency control,

which considers: (1) the document creator's intent; (2) the agency's ability to use and dispose of the record as it sees fit; (3) reliance by agency personnel on the document; and (4) the extent to which the agency integrated the document into its system or files. Op. & Order, JA 151-56. The district court noted that the *Judicial Watch* court ultimately found that because the four-factor test failed to yield "decisive answers," *id.*, JA 153, it went on to apply "special policy considerations" to conclude the records did not constitute agency records. *Id*. Here the district court, relying in part on the 2015 MOU executed by the White House and the Secret Service and applying "special policy considerations," followed the D.C. Circuit's approach to conclude the requested EFACS and WAVES records are not agency records because they are not within the control of the Secret Service. *Id*., JA 162-63.

The district court reached a similar conclusion as to the Secret Service documentation reflecting visitors to Mar-a-Lago, reasoning that those records "track the definition of 'presidential records' in the PRA even more closely than WAVES and ACR records[.]" *Id.*, JA 178. The court limited its holding to the specific documents at issue, characterizing the argument that this approach creates an unsustainable rule as "a straw man," without explaining how the scheduling documents could meaningfully be distinguished from other documents that relate to or reflect the president's schedule, or indeed anything about the president. *Id*.

For those records of EOP components that are agencies, the district court concluded their records are subject to disclosure under the FOIA. Op. & Order, JA 165-67. The court also concluded, however, that to the extent any of these records "contain[] information that would not constitute agency records in light of its connection to the President, Defendants may redact such information." *Id.*, JA 166. The court further noted, "if disclosure of records from an EOP Agency Component threatened the President's security, it would likely be exempt from FOIA." *Id.*

The district court also granted Defendants' motion to dismiss Plaintiffs' APA claims challenging Defendants' failure to treat and manage the visitor logs as agency records under the FRA. *Id.*, JA 180-97. In reaching this conclusion the court refused to consider the 2006 MOU, characterizing the complaint as failing to specifically reference that document. *Id.* The court, however, ignored its own reliance on that MOU in describing the relevant factual background on which the court's opinion is based, *id.*, JA 129, 134, and the fact that the government's argument for why the records are presidential, not agency records rests in critical part on the 2006 MOU. Op. & Order, JA 188-89. As to the 2015 MOU, the district court concluded that both the FRA and the PRA preclude judicial review. *Id.*, JA 189-94.

SUMMARY OF ARGUMENT

I. The Supreme Court's two-part definition of "agency records" in *Tax Analysts II* disposes of the legal issue presented here by Plaintiffs' requests for WAVES and ACR records and Secret Service records reflecting the president's schedule. These records were "created or obtained" by the Secret Service, and they "c[a]me into the agency's possession in the legitimate conduct of its official duties." *Tax Analysts II*, 492 U.S. at 145. Notwithstanding this controlling precedent, the district court looked beyond *Tax Analysts II* to apply a four-factor control test the D.C. Circuit employs to accommodate the "special circumstances" the court believed this case presents. The Supreme Court's two-part test flatly contradicts this approach and instead yields the conclusion that the requested records are agency records subject to disclosure under the FOIA.

Specifically, the D.C. Circuit's test, on which the district court relied, places nearly dispositive weight on the intent of the creator of the records at issue in determining whether they are "control[led]" by an agency subject to the FOIA. The Supreme Court has said, however, that "a *mens rea* requirement . . . is nowhere to be found in the Act," *Tax Analysts II*, 492 U.S. at 147, a clear repudiation of the D.C. Circuit's intent-focused test.

The district court's approach not only contravenes controlling Supreme Court caselaw, but it also sets a precedent that effectively would render any

information about the president or revealing his conduct beyond the public's reach merely because such information could not be obtained directly from the president. The judicially imposed limitations the court applied here contravene the FOIA's text and purpose and ignore the reality that the president must act through and communicate with subordinate agency officials, creating a documentary record to which the public is entitled through the FOIA. To the extent the government has a legitimate basis to withhold responsive records, it may do so if those records fall within the exemptions to the FOIA that Congress has established.

II. In dismissing as nonjusticiable Plaintiffs' APA claims asserting that the recordkeeping policies of the Secret Service and EOP contravene the requirements of the FRA and PRA, the district court erred in two respects.

First, the district court erred in finding that the Amended Complaint fails to articulate justiciable claims that Defendants' recordkeeping policies violate the Federal Records Act and Presidential Records Act. Consistent with D.C. Circuit precedent that was adopted by the district court, Plaintiffs properly alleged that the Secret Service and EOP had an unlawful policy of treating agency records as presidential records, as evidenced by a 2015 Memorandum of Understanding that was cited and quoted in the Amended Complaint. Judicial review of the executive's policies on what constitutes an agency or presidential record is

necessary to uphold the recordkeeping and transparency regime that Congress established for agencies through the FRA and the FOIA

Second, the district court erred in failing to consider evidence extrinsic to the Amended Complaint that provided further support for Plaintiffs' claims. This evidence includes a 2006 Memorandum of Understanding that, in direct conflict with both the FRA and the PRA, states that certain records created by the Secret Service shall at all times be deemed presidential records. Although consideration of such materials is discretionary in ruling on a motion to dismiss under Rule 12(b)(1), the court refused to do so premised on the false assertion that Plaintiffs introduced this evidence into the record, when in fact those materials were exhibits to Defendants' dispositive motion.

In the alternative, Plaintiffs respectfully request that pursuant to 28 U.S.C. § 1653, this Court grant them leave to amend the complaint so that it reflects the extrinsic evidence offered by Defendants and already in the record that clearly establishes the justiciability of Plaintiffs' claims.

STANDARD OF REVIEW

In an appeal of a dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), this Court reviews the district court's factual findings for clear error and its legal conclusions *de novo*. *Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 126 (2d Cir. 1999).

In considering a Rule 12(b)(1) motion to dismiss, this Court must draw all facts from the complaint and "assume [them] to be true unless contradicted by more specific allegations or documentary evidence." *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011). This Court also reviews *de novo* a question of statutory interpretation. *Jaen v. Sessions*, 899 F.3d 182, 185 (2d Cir. 2018).

ARGUMENT

I. The Secret Service's Visitor Records Are "Agency Records" Subject to the FOIA.

A. Under Supreme Court precedent, "agency records" are those "created or obtained" by an agency "in the legitimate conduct of its official duties."

Under the FOIA's bedrock jurisdictional requirement, courts can review only those challenges to the improper withholding of "agency records." 5 U.S.C. § 552(a)(4)(B). Although the phrase "agency record" is an essential term in the statute, neither the language of the FOIA nor its legislative history defines the term. *Tax Analysts II*, 492 U.S. at 142.[1] The Supreme Court filled in this gap by

[1] There is at least one reference to the definition of record in the Senate hearings that led to the FOIA's passage that the Court cited in *Forsham*: "'[s]ince the word 'records' . . . is not defined, we assume that it includes all papers which an agency preserves in the performance of its functions.'" *Forsham*, 445 U.S. at 184 (quoting Administrative Procedure Act: Hearings on S. 1160 *et al.* before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 244 (1965)).

developing a two-part test that considers: (1) whether the requested records were created or obtained by the agency, and (2) whether the agency controls the records. *Id.* at 143-45. The Court in turn construed the word "control" to mean "that the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.* at 145.

The control test the Court announced in *Tax Analysts II* stems in part from the definition of agency records in the Record Disposal Act, 44 U.S.C. § 3301, which forms part of the Federal Records Act and defines agency records as those

> "made or received by an agency of the United States Government *under Federal law or in connection with the transaction of public business* . . . ."

492 U.S. at 145 (emphasis in original) (quoting 44 U.S.C. § 3301). By focusing exclusively on the reason that the agency created or obtained the records in question – for the transaction of public business – the two-part *Tax Analysts II* test presents a straight-forward, easy-to-apply test that reduces the concept of "control" to its very essence. Indeed, the Court anticipated that after applying its test "disputes over control should be infrequent" "[b]ecause requested materials ordinarily will be in the agency's possession at the time the FOIA request is made[.]" 492 U.S. at 146 n.6. In other words, the Court viewed agency possession as typically coextensive with agency control.

The *Tax Analysts II* Court was not writing on a blank slate. Its earlier *Kissinger* decision had addressed the different but related question of whether written summaries of Henry Kissinger's telephone conversations prepared while he was serving in the White House as National Security Adviser were agency records subject to production under the FOIA because Kissinger took the summaries with him when he later worked at the State Department. The Supreme Court concluded their mere physical location did not dictate their status as agency records, reasoning:

> The papers were not in the control of the State Department at any time. They were not generated in the State Department. They never entered the State Department's files, and they were not used by the Department for any purpose.

Kissinger, 445 U.S. at 157. Stated differently, the State Department did not acquire the requested documents "under Federal law or in connection with the transaction of public business[.]" *Tax Analysts II*, 492 U.S. at 145.

In the companion decision *Forsham v. Harris*, the Supreme Court faced the question of whether raw data relied on in a private but federally funded study constituted agency records of the agency funding the study. Again, the Court concluded the records were not agency records, reasoning that the records "ha[d] never passed from private to agency control[.]" *Forsham*, 445 U.S. at 185. That the agency had a right of access to the records did not alter this conclusion because "the FOIA applies to records which have been *in fact* obtained, and not to records

which merely *could have been* obtained." *Id.* at 186 (emphasis in original). As in *Tax Analysts II*, the *Forsham* Court drew guidance from the definition of agency record in the Records Disposal Act as well as the PRA and those statutes' focus on records that have been created or obtained by the relevant agency. *See id.* at 183-184. And as in *Kissinger* and *Tax Analysts II*, the agency in question in *Forsham* did not acquire the requested documents "under Federal law or in connection with the transaction of public business," *Tax Analysts II*, 492 U.S. at 145, placing them outside the scope of agency records subject to the FOIA.

Two aspects of the control test dictated by *Tax Analysts II* bear particularly on the status of the Secret Service's visitor records at issue here. First, as the Court made clear, possession alone is nearly dispositive on the issue of "control." In *Tax Analysts II*, the Court rejected the government's argument that because the requested opinions the Department of Justice had received while litigating tax cases remained in the ultimate control of the issuing court they were not agency records of DOJ. The Court emphasized: "The control inquiry focuses on an agency's *possession* of the requested materials, not on its power to alter the content of the materials it receive[d]." *Tax Analysts II*, 492 U.S. at 147 (emphasis added). As a result, records in the legitimate possession of the agency as part of conducting agency business are "agency records."

Second, the Court directly rejected a definition of "agency records" that turns on "the intent of the creator of a document." *Id.* at 147. "Such a *mens rea* requirement," the Court reasoned "is nowhere to be found in the Act." *Id.* The Court characterized "discerning the intent of the drafters of a document" as "an elusive endeavor" that the Court ultimately declined to require. *Id.* at 147-48.

B. The Secret Service's visitor records are "agency records" under the Supreme Court's definition of that term.

The visitor logs requested here readily meet the two-part *Tax Analysts II* test for "agency records." First, the Secret Service actually "created or obtained" the electronic records: they reside on computer servers located at Secret Service headquarters, and Secret Service personnel operate those servers. Murray Decl., JA 66 ¶ 16. This possession alone satisfies a key component of the test for agency records.

Second, the Secret Service obtained the WAVES and EFACS records in performing its core statutory function to protect the president and the White House complex by performing background checks on White House visitors and verifying a visitor's admissibility at the time of the visit. *Id*., JA 62 ¶ 6; 2006 MOU, JA 70 ¶ 12. This satisfies the control requirement "that the materials have come into the agency's possession in the legitimate conduct of its official duties," *Tax Analysts II*, 492 U.S. at 145, even if through memoranda of understanding the White House

claims some level of continuing or eventual control, *id.* at 146.[2] This is all that *Tax Analysts II* requires, regardless of the documents' ultimate disposition as provided by the 2006 and 2015 Memoranda of Understanding. *Tax Analysts II*, 492 U.S. at 147-48.[3]

Similarly, the Secret Service's records reflecting the president's schedule, including those the agency uses to clear visitors to Mar-a-Lago, meet the Supreme Court's two-part test for agency records. The Secret Service receives these documents by email from the White House on a nightly basis. Murray Decl., JA 67-68 ¶ 22, thereby satisfying the possession requirement. The agency, in turn, uses these records "to fulfill its operational needs," *id.*, JA 68 ¶ 24, specifically "to perform its statutory duty to protect the President, Vice President and other protectees, as well as the White House Complex," *id*., JA 68 ¶ 24, thereby satisfying the control requirement.

[2] Notably, guidance from the National Archives and Records Administration recognizes that agency records can be temporary, a status that may not require the possessing agency to maintain the records permanently, but still mandates that they be maintained and disposed of pursuant to the requirements of the FRA. *See, e.g.*, 36 C.F.R. § 1225.16.

[3] Moreover, as discussed *infra*, Defendants' efforts to transform agency records into presidential records through memoranda of understanding to avoid disclosure under the FOIA contravene both the PRA and the FRA.

C. The definition of "agency records" the district court adopted contradicts the Supreme Court's definition.

The district court ignored these facts and the controlling Supreme Court precedent to rely instead on a four-factor control test the D.C. Circuit initially applied when the *Tax Analysts II* case was before it, *Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060 (D.C. Cir. 1988) ("*Tax Analysts I*"), and that the Supreme Court declined to adopt. The repudiated test looks well beyond the fundamental feature of control *Tax Analysts II* established to instead rely most heavily on the intent of the records' creator to retain control. *Tax Analysts I*, 845 F.2d at 1068 ("[W]e look for evidence surrounding the creation and transmittal of a document indicating that its creator intended to retain control."); *id.* at 1069 (the D.C. Circuit's four-factor test begins with "the intent of the document's creator to retain or relinquish control over the records."). As even one member of the D.C. Circuit has acknowledged, however, the Supreme Court's decision in *Tax Analyst II* directly contradicts that approach by deeming 'the author's intent [a]s irrelevant to whether a document is an 'agency record,'" thereby undermining the precedential value of D.C. Circuit precedent that "relie[s] heavily on the authors' purpose in creating the documents." *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 294 (D.C. Cir. 2006) (Henderson, J., concurring).

The district court refused to recognize this conflict between the D.C. Circuit's four-factor test and the two-part *Tax Analysts II* test, and instead

construed the Supreme Court's reasoning as limited to the situation where documents originated outside the agency. Op. & Order, JA 157. This limitation draws no support from the Court's broad language in *Tax Analysts II* that a "determination of 'agency records'" should not "turn on the intent of the creator" because "a *mens rea* requirement is nowhere to be found in the Act." 492 U.S. at 147. Quite simply, the FOIA makes no mention of an intent requirement, a conclusion in harmony with the Supreme Court's reliance on the Records Disposal Act – which also lacks a *mens rea* requirement – to determine the meaning of "agency record" under the FOIA.

Moreover, the D.C. Circuit's four factors and their focus on intent are indeterminate and difficult to apply. Courts can readily assess whether an agency has acquired records in the legitimate conduct of its activities, an ease the *Tax Analysts II* Court recognized in its prediction that "disputes over control should be infrequent[.]" 492 U.S. at 146 n.6. By contrast, as the D.C. Circuit's tangled decisions concerning congressional and presidential records show, application of the four-factor test requires a fundamentally subjective analysis that is particularly ill-suited for the FOIA context where issues typically are resolved on summary judgment motions with no preceding discovery. *See, e.g.*, *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 599-601 (D.C. Cir. 2004); *Judicial Watch*, 726 F.3d at 220 ("Our past application of the test reveals its considerable indeterminacy.").

The district court also attempted to draw support from the decision of this Court in *Main Street Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542 (2d Cir. 2016), which it characterized as also resting on intent in its conclusion that an entity created in part by the president and subcomponents of that entity were not agencies subject to the FOIA. *See* Op. & Order, JA 158. That case, however, presented a very different issue not present here, namely whether the National Security Council ("NSC") and the NSC System, parts of which were created by statute and parts of which were created by presidential directive, constituted an agency under the FOIA. Because the entities' organic statute and the presidential directive creating them did not grant either the NSC or the NSC System any independent authority, the Court concluded they were not an agency subject to the FOIA. *Main Street Legal Servs., Inc.*, 811 F.3d at 569. In reaching this conclusion, the Court necessarily had to consider the president's intent because "the President alone decides the extent and conditions of any delegation" to an entity he controls, *id.* at 558, requiring the Court to determine whether the directive establishing the NSC System "indicates any intent to transfer presidential authority so that it can be exercised independent of the President." *Id.*

The *Main Street Legal Services* decision considered intent in the context of determining whether an entity that solely advised and assisted the president was *an agency* because of the authority the president had conferred on that entity. *Id.* at

551-2. That analysis required the Court to determine the president's intent in establishing the NSC and the NSC System in the first place. The district court erred here in relying on this authority to consider intent in the entirely different context of determining whether a document in an agency's possession is an *agency record*, an analysis that under Supreme Court precedent is objective, not intent-based.

Even if the district court properly could have considered intent – a factor the Supreme Court unambiguously has rejected – it erred by relying on the 2015 MOU as evidence of the White House's intent to retain control. The 2015 MOU supplements and enhances the 2006 MOU, and the district court construed both as evidence that the visitor records were not subject to the Secret Service's control. As discussed, *infra*, however, those memoranda represent unlawful attempts by the Defendants to transform agency records into presidential records so as to place them beyond the FOIA's reach, in violation of both the FRA and the PRA.[4]

[4] Moreover, the district court should have followed the better-reasoned decision of the district court in *Judicial Watch*, which concluded that even applying the D.C. Circuit's four-factor test, the visitor logs are agency records. *Judicial Watch, Inc. v. U.S. Secret Service*, 803 F. Supp. 2d 51 (D.D.C. 2011). In reaching this conclusion, the court relied on the ability of the Secret Service to use and dispose of the records, the fact that Secret Service personnel had read and relied on the documents in performing their statutory responsibilities, and the fact that the records were integrated into the Secret Service's record system, even if they were eventually transferred to the White House. *Id.* at 58-60. Those same factors compel the identical conclusion here. The court also rejected the idea that constitutional avoidance required construing the FOIA to not cover the Secret Service records, reasoning that because the court was not facing the task of interpreting an ambiguous statute, "[t]he Constitutional avoidance doctrine is not applicable[.]" *Id.*

The district court employed a similarly flawed approach to reach an equally erroneous conclusion in evaluating the agency record status of Secret Service records reflecting the president's schedule. Because the Secret Service did not create these records in the first instance, "but only passively received them from the White House," the district court concluded they were not agency records. Op. & Order, JA 177. But this conclusion conflicts directly with *Tax Analysts II*, which established as a prerequisite for agency record status that an agency "either create *or obtain* the requested materials[.]" 492 U.S. at 144 (emphasis added) (quotations omitted). Without question, the Secret Service *obtained* the Secret Service records reflecting the president's schedule, and it did so "in the legitimate conduct of its official duties." *Id* at 145. Again, this is all that *Tax Analysts II* requires.

Finally, the district court appeared to create an entirely new exception to the definition of "agency record" out of whole cloth: information that has a "connection to the President." Op. & Order, JA 166. For those visitor logs involving EOP components that are agencies, the court recognized they are subject to compelled disclosure under the FOIA. Yet the court also deemed as non-agency records – and therefore not available under the FOIA – information in EOP agency records "that would not constitute agency records in light of its connection to the

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at 60. Here, too, there is no ambiguity and as in *Judicial Watch*, "the Secret Service has a ready recourse in Exemption 5" to protect its interests. *Id.* at 61.

President." *Id*. The court cited no precedent, and Plaintiffs know of none, for this novel approach of excluding from the FOIA information that merely has some connection to the president.

Moreover, as discussed *infra*, exempting from the FOIA any information that merely has a "connection" to the president essentially would create a tenth exception to the FOIA with a potentially vast reach that Congress has declined to adopt. For example, the president flies Air Force One; are all Defense Department records related to that aircraft and all those flights no longer agency records because they have a connection to the president? The district court's approach – which would answer this question in the affirmative – applies an entirely unworkable test with potentially unlimited results that conflicts directly with the Supreme Court's straightforward, two-part test for agency records.

D. The district court erred by relying on other grounds as a reason to ignore the Supreme Court's two-part test for "agency records."

The district court compounded its error in its determination of "agency records" by embracing the D.C. Circuit's reliance on "special policy considerations." *See, e.g.*, *United We Stand Am., Inc.*, 359 F.3d 595, 599 (D.C. Cir. 2004) ("[W]e relied on policy considerations unique to the congressional context"); *Judicial Watch*, 726 F.3d at 221 ("[A] somewhat different control test applies when there are 'special policy considerations' at stake." (quoting *Paisley v. CIA*, 712 F.2d 686, 693 n.30 (D.C. Cir. 1983)). In *Judicial Watch*, which also

involved a FOIA request for the Secret Service's White House visitor records, the D.C. Circuit believed that because the Secret Service in creating its visitor records had obtained information from the White House, an entity not covered by the FOIA, and because through the 2006 MOU the White House had "'manifested a clear intent to control' the documents." 726 F.3d at 223 (quoting *United We Stand Am., Inc.*, 359 F.3d at 597), special policy considerations dictated that the visitor records be treated as non-agency records outside the scope of the FOIA. The D.C. Circuit considered those special policy considerations as necessary to protect the "constitutional prerogatives" of the president. *Judicial Watch*, 726 F.3d at 223-4.

By following this course charted by the D.C. Circuit and ignoring Supreme Court precedent, the district court here employed a process fundamentally at odds with the FOIA's language and purpose. The FOIA's default is disclosure; Congress enacted the statute "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Toward that end, Congress intended that records held by agencies in the discharge of their official duties be publicly available. *Tax Analysts II*, 492 U.S. at 144. At the same time, Congress recognized the need to protect certain executive prerogatives and interests and did so through carefully calibrated and narrowly construed exemptions. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

Those exemptions include, *inter alia*, protection for properly classified information (Exemption 1), for statutorily protected information (Exemption 3), and for deliberative and other privileged materials (Exemption 5).

The D.C. Circuit's four-factor control test inverts the operation of the statute by infusing the definition of "agency records" with "special" policy considerations and limitations of the sort Congress accommodated through the FOIA's exemptions. The district court applied these considerations without examining whether the existing exemptions sufficiently protect any presidential interests found in the visitor records, thereby deepening the conflict between the D.C. Circuit's four-factor test and the approach the *Tax Analysts II* decision dictates. *See* Op. & Order, JA 160-62. In essence, the district court engrafted onto the FOIA an amorphous tenth exemption that improperly narrows the FOIA's definition of "agency records."[5]

Nor do separation of powers concerns dictate otherwise, as the district court concluded based on the flawed reasoning in *Judicial Watch* that subjecting presidential information in the possession of agencies to the FOIA is the equivalent of subjecting the president himself to the FOIA. *See Judicial Watch*, 726 F.3d at 231-32. This reasoning in turn flows from the flawed assumption that by

[5] Notably while Congress has amended the FOIA and enacted other legislation containing Exemption 3 statutes since the status of Secret Service visitor records was first raised, it has not chosen to exempt those records.

exempting the president from the FOIA, Congress was attempting to insulate presidential *information* from the FOIA.

Amendments to the FOIA in 1974 expanded the definition of agencies subject to the statute's requirements to include, *inter alia*, the EOP. The drafters explained that the purpose of the expanded agency definition, at least as to the EOP, was to reach "the result reached in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971)." H.R. Conf. Rep. No. 93-1380 (1974), 14-15; S. Conf. Rep. No. 93-1200 (1974), 7. That decision resolved the question of whether the Office of Science and Technology ("OST"), a component of the EOP, was an agency for purposes of the FOIA. Applying a functional analysis that considered whether the "sole function" of the OST was "to advise and assist the President," the *Soucie* court concluded that because the OST had a separate, independent function to evaluate federal programs it "must be regarded as an agency subject to the APA and the Freedom of Information Act." 448 F.2d at 1075. Significantly, the court reached this conclusion notwithstanding "any confidential relation between the Director of the OST and the President – *a relation that might result in the use of such information as a basis for advice to the President*." *Id.* (emphasis added). As this conclusion makes clear, the determination of whether the FOIA should apply depends not on the character of any particular information contained in the documents – even if that information is provided directly to or from the president – but on the degree to

which the entity creating or possessing the documents is functionally independent from the president.

The *Soucie* decision exposes the fundamental flaw in the district court's reasoning that the Secret Service's visitor records cannot be subject to the FOIA because Plaintiffs could not obtain them directly from the president. By exempting certain EOP components from the FOIA, Congress was not seeking to protect presidential *information*, but rather to protect components that advise and assist the president from the FOIA *process*. Any other conclusion would be unworkable and fail to reflect the reality that presidents carry out their agendas through executive agencies. Whenever a president issues a directive to federal agencies to implement policy, authorizes an agency to carry out a course of action, or communicates or visits with agency officials, the president leaves a trail of agency records subject to the FOIA. While some of those records may be exempt from compelled production because they fall within one or more of the FOIA's exemptions, they nevertheless are "agency records" even if they reveal information relating to or emanating from the president.

For example, the Office of Legal Counsel renders legal advice directly to the president in response to specific requests. While that advice may fall within FOIA Exemption 5, it nevertheless constitutes an agency record of the DOJ. Similarly, the Office of Government Ethics renders ethics advice regarding prospective White

House employees based on information the White House supplies, yet its advice is subject to the FOIA.

Moreover, the district court's treatment of the requested Secret Service records has no limiting principle. If "correspondence detailing the President's daily schedule" is not an agency record because it reflects or references information about the president that could not be obtained directly from the president, *see* Op. & Order, JA 178, then under the district court's logic any information an agency creates or obtains that mentions, references, or reflects something about the president and exempt EOP components also would be beyond the FOIA's reach.

Yet experience and caselaw demonstrate otherwise. For example, pardon documents from DOJ that included documents solicited and received by the president and top aides regarding individual pardon petitions were held to be subject to the FOIA but exempt as presidential communications under FOIA Exemption 5. *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1123 (D.C. Cir. 2004). Those same documents could not have been requested directly from the president, yet that fact did not alter their characterization as agency records. Similarly, CREW filed a FOIA request with the Department of Justice for calendars of the attorney general for specified dates. *See* Decl. of Anne Weismann ("Weismann Decl"), JA 101. The disclosed records included entries for White House visits (Exhibit A to Weismann Decl., JA 102-113) – information CREW

could not have requested directly from the White House, but which in the possession of DOJ was considered to be an agency record.

The district court rejected this argument as "a straw man," Op. & Order, JA 178, but failed to offer an explanation for why the logic of its conclusion is "limited to the documents at issue[.]" *Id.* The short answer is that it is not.

II. The District Court Erred in Dismissing Plaintiffs' APA Claims Challenging the Secret Service's and EOP's Recordkeeping Policies and Directives as Contrary to Law.

The district court also erred in granting Defendants' motion to dismiss Plaintiffs' APA claims as nonjusticiable. Those claims challenge the policy and practice, embodied in memoranda of understanding between the EOP and DHS, of treating Secret Service visitor logs as within the scope of the PRA and outside the reach of the FOIA. The district court erred in two critical respects.

First, the district court erred in finding that Plaintiffs failed to adequately plead their APA claims, *see* Op. & Order, JA 189-94, ignoring the express challenges in the Amended Complaint to Defendants' unlawful policies of treating agency records as presidential records and the 2015 Memorandum of Understanding implementing and reflecting these unlawful policies.

Second, the district court committed clear error in failing to consider evidence that Defendants introduced with their dispositive motion that further supports Plaintiffs' APA claims, *see* Op. & Order, JA 188-89, specifically a 2006

Memorandum of Understanding between the EOP and the Secret Service that purports to define agency records as presidential records, in direct contravention of the FRA and PRA, *see* 2006 MOU, JA 69-73 ¶ 17, as well as declarations providing further evidence of Defendants' unlawful policies.

A. Plaintiffs adequately pleaded justiciable APA claims alleging that Defendants' recordkeeping policies were contrary to law.

This Court has not yet had an opportunity to consider which kinds of FRA and PRA challenges are justiciable under the APA. The D.C. Circuit has, however, and the framework established by that court clearly encompasses the claims Plaintiffs raise here. This Court should follow that framework on this issue.

Plaintiffs properly alleged that the Secret Service and EOP had an unlawful policy and practice of treating agency records as presidential records. Not only does this policy undermine any reliance on it as evidence that the requested Service records were not within the agency's control, but Plaintiffs' APA claims challenging that policy fall squarely within the scope of justiciable claims under the D.C. Circuit's framework for FRA and PRA violations that the district court adopted.

In reasoning set forth in a series of opinions and adopted by the district court, the D.C. Circuit established a framework for the kinds of FRA and PRA challenges that are justiciable under the APA. *See Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) ("*Armstrong I*") and *Armstrong v. EOP,* 1 F.3d 1274 (D.C.

Cir. 1993) ("*Armstrong II*"). The plaintiffs in these cases were seeking to prevent the president, the Archivist of the United States, and the National Security Council from erasing material stored on the NSC computer system during the final days of President Ronald Reagan's administration. In *Armstrong I*, the D.C. Circuit held that the APA created a justiciable cause of action for challenging agency recordkeeping guidelines and policy as failing to comply with the FRA. 924 F.2d 291-94.[6] Two years later in *Armstrong II*, the D.C. Circuit affirmed the district court's findings that electronic records were "records" for the purposes of the FRA and that both the agency's practices for preserving electronic records and the agency's supervision of electronic recordkeeping practices fell short of what the FRA required. *Armstrong II*, 1 F.3d 1282-88.

In addition, the D.C. Circuit *reversed* the district court's refusal to adjudicate the *Armstrong* plaintiffs' PRA "claim that NSC guidelines did not adequately distinguish between federal records and presidential records." *Id.* at 1281. The D.C. Circuit held that the district "may review the EOP guidelines for the limited purpose of ensuring that they do not encompass within their operational definition of presidential records materials property subject to the FOIA." *Id*. at 1290.

[6] The D.C. Circuit separately held that although specific instances of noncompliance with agency recordkeeping guidelines were not reviewable, a litigant could challenge an agency's failure to take enforcement action to remedy noncompliance. *Armstrong I*, 924 F.2d 295-296. This portion of the *Armstrong* decision is not at issue here.

Although the *Armstrong II* court held that APA claims alleging that "creation, management, and disposal" decisions violate the PRA were not justiciable, the D.C. Circuit explained that courts have a critical role in policing executive branch guidelines and policies purporting to specify what is or is not a presidential record to ensure that those definitions harmonize with the PRA, FRA, and the FOIA. *Id*. at 1292-93.

Plaintiffs' claims challenging the recordkeeping policies of the Secret Service and the EOP fall well within the scope of justiciable APA claims recognized in the *Armstrong* opinions. These claims plainly challenge a recordkeeping policy that Plaintiffs allege is unlawful under the FRA and PRA. The first paragraph of the Amended Complaint describes as arbitrary, capricious, and contrary to law "the treatment by the Executive Office of the President ('EOP') and DHS of records of visits to agency components of the EOP as presidential records under the PRA that are not publicly accessible through the FOIA, and the failure of DHS to manage and preserve these records under the FRA." Am. Compl., JA 17-18 ¶ 1. In support of this assertion, the Amended Complaint references a passage from the 2015 MOU to which the EOP and Secret Service are both signatories. That document states, in relevant part,

> [a]ll records created, stored, used, or transmitted by, on, or through the unclassified information systems and information resources provided to the President, Vice President, and EOP shall remain under the

> exclusive ownership, control, and custody of the President, Vice President, or originating EOP component.

Am. Compl., JA 29 ¶ 50 (quoting 2015 MOU). During briefing on Plaintiffs' motion to dismiss, Defendants did not contest the veracity of these allegations. Instead, the government confirmed that the 2015 MOU reflects the current policy of the White House and Secret Service, Def.'s Opening Br. at 4 (ECF Dkt. No. 45), and even attached declarations to its motion supporting that claim. *See, e.g.,* Murray Decl., JA 66 ¶ 17.

The Amended Complaint articulates two claims premised on these allegations. Claim Three alleges that "[b]y entering into an MOU that declares that the records of visits to agency components of the EOP are under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component, the EOP violated its mandatory, non-discretionary obligation under the FRA and the PRA to treat these records as agency records of DHS subject to the FOIA." Am. Compl., JA 30 ¶ 63. Similarly, Claim Four alleges that "[b]y entering into an MOU that declares that the records of visits to agency components of the EOP are under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component, DHS violated its mandatory, non-discretionary obligation under the FRA to treat and manage these records as agency records of DHS subject to the FOIA." *Id.*, JA 31 ¶ 67.

As relief for these claims, Plaintiffs seek injunctive and declaratory relief, including: (1) an order requiring the EOP to treat the visitor records as agency records of DHS; (2) a declaration that "all records the Secret Service creates and maintains of visits to agency components of the EOP are agency records of DHS and *any MOU to the contrary* is unlawful and unenforceable;" and (3) an order requiring DHS to treat and manage the visitor records "as agency records of DHS subject to the FOIA." *Id.,* JA 31-32 (emphasis added). In short, the Amended Complaint expressly and unambiguously challenges a policy, namely the treatment of agency records as presidential records; cites a document that reflects and implements that policy; articulates why the policy is contrary to law; and requests declaratory and injunctive relief to remedy the violations Plaintiffs allege.

The district court's efforts to distinguish the 2015 MOU from policies and guidance that have been subject to justiciable challenges elsewhere are unpersuasive. First, the district court failed to appreciate the significance of a policy that functionally classifies agency records as presidential records. For instance, the district court reasoned that the 2015 MOU does not constitute a policy or guidance properly subject to challenge because it "does not command recordkeeping practices that could result in improper disposal under the FRA . . . or constitute the functional equivalent of such impermissible steps." Op. & Order, JA 192. But this assertion fails to account for the significant differences outlined in

the Amended Complaint between recordkeeping under the FRA and that under the PRA. *See* Am. Compl., JA 21-23 ¶¶ 14-22. Under the FRA, records can be removed or destroyed only with the permission of the archivist, and enforcement action by the archivist and the agency head to remedy improper removal is mandatory (and subject to justiciable APA claims under *Armstrong I*).[7] By contrast, courts have held that the PRA contains essentially no enforcement mechanism, *see, e.g.*, *Judicial Watch, Inc. v. Nat'l Archives & Records Admin.*, 845 F. Supp. 2d 288, 301 (D.D.C. 2012), leaving the president with largely unfettered discretion to determine what is and what is not a permanent record. Those records the president deems permanent are transferred to the archivist for preservation at the end of an administration and are released to the public only after a lengthy delay. *See* 44 U.S.C. §§ 2203, 2204. For that reason, the policy – reflected in the 2015 MOU – of treating agency records as presidential records could be expected to have precisely the effect the district court claimed it would not: recordkeeping practices based on the discretion the PRA affords the president that could result in improper disposal, in violation of the FRA.

Indeed, the concern that the executive branch might undermine Congress's efforts to establish different regimes for agency records and presidential records

[7] In addition, as explained above, agency records of an administration are subject to contemporaneous FOIA requests and therefore can be obtained by members of the public long before presidential records become publicly available.

was one of the principal rationales cited by the D.C. Circuit when it held in *Armstrong II* that recordkeeping policies and guidance could be challenged. The D.C. Circuit explained,

> Our holding today is also consonant with the relationship between the FRA and the PRA. The FRA defines a class of material that are federal records subject to its provisions, and the PRA describes another, mutually exclusive set of material that are subject to a different and less rigorous regime. In other words, no individual record can be subject to both statutes because their provisions are inconsistent. If guidelines that purport to define presidential records were not reviewable, the cross-appellees could effectively shield all federal records not only from the FOIA, but also from the provisions of the FRA—thus evading [the] court holding in *Armstrong* [*I*] that the courts have jurisdiction to decide whether the NSC's record-keeping guidelines adequately describe the material subject to the FRA.

Armstrong II, 1 F.3d at 1293. Despite purporting to adopt the *Armstrong* framework, the district court ignored its fundamental lesson: the entire recordkeeping regime that Congress established for agency and presidential records requires judicial scrutiny of executive branch policies that determine how different records are treated.

The district court's contention that "Plaintiffs' claims under the FRA and PRA do not contain a sufficient factual basis for the Court's review," Op. & Order, JA 192, also rings hollow. As explained above, the Amended Complaint identifies the policy Plaintiffs are challenging as well as a specific document (the 2015 MOU) reflecting and implementing that policy and seeks declaratory and

injunctive relief under the APA because the policy contravenes both the FRA and the PRA. *See* Am. Compl., JA 17-18, 29-31 ¶¶ 1, 50, 63, 67. To the extent that the district court's reasoning rests on the fact that Plaintiffs challenge the "treatment by the Executive Office of the President (''EOP'") and DHS of records of visits to agency components of the EOP as presidential records" without explicitly referring to it as a "policy" or "guideline," the court exalted form over substance. More to the point, neither the requirements of Rule 12(b)(1) nor the D.C. Circuit's *Armstrong* opinions require incantation of those magic words to render an FRA and PRA claim justiciable. What matters is that Plaintiffs allege facts stating a plausible claim that Defendants have a policy or guidelines that violate the FRA and/or PRA. That bar is one that the Amended Complaint easily passes.

Nor is there any reason for this Court to depart from the balanced outcome that the D.C. Circuit reached in *Armstrong II*. By permitting judicial review of policies or guidelines establishing what records are presidential records, the court sought to preserve Congress's "clear limitation on just which materials the President could legitimately assert control over" and to safeguard "the pre-existing body of FOIA law governing the disclosure of government agency records." *Armstrong II*, 1 F.3d at 1292. As the D.C. Circuit explained,

> This narrow, clearly defined limitation on the scope of the PRA is absolutely essential to preventing the PRA from becoming a potential presidential *carte blanche* to shield materials from the reach of the FOIA. Of course, we presume that executive officials will act in good

> faith. But if guidelines that purport to implement the PRA were not reviewable for compliance with the statute's definition of presidential records, non-presidential materials that would otherwise be immediately subject to the FOIA would be shielded from its provisions, whether wittingly or unwittingly, if they were managed as presidential records. Moreover, in light of the fact that *disposal* decisions under the PRA *are* unreviewable, a non-presidential document subject to the FOIA could be forever removed from that statute's provisions if it were improperly classified as a presidential record and destroyed.

Id. at 1292-93 (internal citations omitted) (emphasis in original).

Judicial review of policies that establish which records are agency records and which are presidential records is critical to upholding the entire recordkeeping regime that Congress established. Because the Amended Complaint properly alleges that Defendants' recordkeeping policies violate the FRA and the PRA and therefore fall squarely within the framework for justiciable claims that *Armstrong II* established, this Court should reverse the district court's decision to dismiss Plaintiffs' APA claims.

B. The district court committed clear error in failing to consider additional evidence Defendants introduced that supports the justiciability of Plaintiffs' recordkeeping claims.

The district court also committed clear error in failing to consider additional evidence that Defendants introduced into the record and that clearly demonstrates the justiciability of Plaintiffs' claims. Although consideration of evidence extrinsic to a complaint is discretionary, *see Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) ("In resolving a motion to dismiss for lack of subject matter

jurisdiction under Rule 12(b)(1), a district court . . . may refer to evidence outside the pleadings."), in this case, the district court declined to do so on the demonstrably false premise that Plaintiffs introduced this evidence "into their pleading by way of their opposition brief." Op. & Order, JA 189. To the contrary, *Defendants* introduced this evidence in support of their dispositive motion. *See, e.g.*, 2006 MOU, JA 69-73; Murray Decl., JA 65, 67 ¶¶ 14, 19; Droege Decl., JA 88-81 ¶¶ 5-6; Herndon Decl., JA 85-86 ¶ 6. In addition, the district court ignored this evidence when ruling on the APA claims, but relied on the very same materials as the factual basis for its decision to grant summary judgment on Claims One and Two. *See* Op. & Order, JA 131-36, 152, 163-64. In so doing, the district court selectively and erroneously ignored additional evidence substantiating the justiciability of Plaintiffs' recordkeeping claims.

The most important piece of extrinsic evidence that the district court declined to consider is a 2006 Memorandum of Understanding that reflects the precise policy Plaintiffs challenge: the treatment by the White House and DHS of agency records as presidential records. The 2006 MOU plainly states that the Secret Service, an agency whose records are subject to the FRA and the FOIA, operates the White House Access Control System ("WHACS"). 2006 MOU, JA 69-70 ¶¶ 2, 10). That system contains information submitted by White House pass holders as well as records generated when permanent or temporary White House

passes are swiped over electronic pass readers, *id*., JA 69-70 ¶¶ 4-5), the WAVES and EFACS records sought here. The 2006 MOU also explains that the Secret Service uses WHACS records to perform duties that are central to its mission: performing background checks on White House visitors and verifying a visitor's admissibility at the time of the visit. *Id*., JA 70 ¶ 12.

The FRA defines records as "all recorded information, regardless of form or characteristics made *or received by* a Federal agency . . . ." 44 U.S.C. § 3301 (emphasis added).[8] The 2006 MOU, however, states and implements a policy that conflicts directly with this definition by deeming WHACS records to be "at all times Presidential Records" that are neither federal records nor "the records of an 'agency' subject to the Freedom of Information Act (5 U.S.C. § 552)." 2006 MOU, JA 71 ¶ 17. In other words, the 2006 MOU embodies the precise policy that Plaintiffs allege violates the FRA and PRA – the treatment of agency records as presidential records. *See* Am. Compl., JA 17-18, 29-31, ¶¶ 1, 62, 66; JA 31-32 Requested Relief (5)-(7). Nor is there any doubt, based on the record, that either the 2006 MOU or the policy is still in place. *See* Droege Decl., JA 81 ¶ 8 ("The 2006 MOU continues to reflect current practices and interests with respect to WAVES and ACR records.").

[8] The FOIA defines "record" to mean, in relevant part, "any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format[.]" 5 U.S.C. § 552(f)(2).

Defendants also submitted several declarations that contain additional facts substantiating the justiciability of Plaintiffs' claims, and indeed, the district court relied on those very declarations in granting Defendants summary judgment on Claims One and Two. For instance, the district court cited the Murray and Willson Declarations for the proposition that the Secret Service normally "auto-deletes" records over 60-days old from its servers. *See* Op. & Order, JA 133-34 (citing Murray Decl., JA 65 ¶ 13); Declaration of William Willson, JA 75 ¶ 6. Another of Defendants' declarants attested that "[s]ince at least 1990, throughout the last five Presidential administrations, *it has been the policy* and practice of the White House Office, in accordance with the Presidential Records Act, 44 U.S.C. § 2201 *et seq., to retain and maintain control over records generated by the Worker and Visitor Entrance System* ('WAVES')." Droege Decl., JA 80 ¶ 3 (emphasis added).

In sum, this is not a case where evidence extrinsic to the complaint conflicts with Plaintiffs' allegations. To the contrary, the evidence proffered by Defendants and selectively ignored by the district court unambiguously supports the justiciability of Plaintiffs' APA claims. The district court's failure to consider this evidence is further grounds for reversal.

C. To the extent Plaintiffs' jurisdictional allegations are deficient, Plaintiffs should be afforded an opportunity to amend the complaint to reflect the evidence in the record.

Alternatively, Plaintiffs respectfully request that this Court grant Plaintiffs leave to amend the complaint so that it reflects the extrinsic evidence that clearly establishes the justiciability of Plaintiffs' claims. Section 1653 of Title 28 permits amendment of pleadings in federal trial or appellate courts to remedy defective allegations of jurisdiction. Such relief is "construed liberally to permit the action to be maintained if it is at all possible to determine from the record that jurisdiction does in fact exist." *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 639 (2d Cir. 2005); *see also Troupe v. Chicago, D. & G. Bay Transit Co.*, 234 F.2d 253, 258 n.6 (2d Cir. 1956) ("The whole record may be looked to for the purpose of curing a defective averment of jurisdiction."). As detailed above, Defendants introduced additional evidence in their briefing on their dispositive motion that substantiates Plaintiffs' allegations that Defendants' recordkeeping policies violate both the PRA and the FRA. To the extent that this Court declines to consider this additional evidence supporting Plaintiffs' claims without its formal addition to the operative complaint, Plaintiffs respectfully request leave to amend.

CONCLUSION

For the foregoing reasons this Court should reverse the judgment of the district court.

Dated: January 7, 2019

Respectfully submitted,

/s/ Anne L. Weismann

Anne L. Weismann
Conor M. Shaw
Citizens for Responsibility and Ethics in Washington
1101 K Street, N.W., Suite 201
Washington, D.C. 20005
(202) 408-5565
aweismann@citizensforethics.org

Alex Abdo
Jameel Jaffer
Knight First Amendment Institute at Columbia University
475 Riverside Drive, Suite 30
New York, New York 10115
(646) 745-8500
Alex.abdo@knightcolumbia.org

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 7th day of January, 2019, I caused this Brief of Appellants and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users:

I further certify that on this 7th day of January, 2019, I caused the required number of bound copies of the Brief of Appellants with Joint Appendix to be filed with the Clerk of the Court via UPS Next Day Air.

/s/ Anne L. Weismann
Counsel for Plaintiffs - Appellants

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Dated: January 7, 2019

/s/ Anne L. Weismann
Counsel for Plaintiffs - Appellants