ORAL ARGUMENT REQUESTED

No. 18-5150

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Citizens For Responsibility and Ethics in Washington and
National Security Archive,

Plaintiffs-Appellants,

v.

Donald J. Trump, The Honorable, President of the United States of America
and Executive Office of the President,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR PLAINTIFFS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiffs are Citizens for Responsibility and Ethics and National Security Archive. Defendants are Donald J. Trump, The Honorable President of the United States of America, and the Executive Office of the President. There have been no intervenors or amici in this case, either in the District Court or in this Court.

B. Rulings Under Review

The rulings under review (issued by Judge Christopher R. Cooper) are the District Court's order and memorandum opinion dated March 20, 2018 and the order dated June 25, 2018. The memorandum opinion has been published and is available at 302 F. Supp. 3d 127 (D.D.C. 2018).

C. Related Cases

This case has not been before this or any other Court other than the District Court. Counsel for appellants is unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ George M. Clarke III
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Attorney for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

Appellant Citizens for Responsibility and Ethics in Washington ("CREW") is a section 501(c)(3) organization that does not have any parent corporation. No publicly held corporation owns 10% or more of CREW.

Appellant National Security Archive (the "Archive") also is a nonprofit organization that does not have any parent corporation. No publicly held corporation owns 10% or more of the Archive.

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GLOSSARY

CREW	Citizens for Responsibility and Ethics in Washington
EOP	Executive Office of the President
PRA	Presidential Records Act
Archive	National Security Archive

REQUEST FOR ORAL ARGUMENT

This case involves the question of whether and to what extent the Presidential Records Act contains ministerial duties subject to mandamus relief and applies to the actions of the Defendants-Appellees. Given the complexities regarding, and paucity of case law addressing, these issues, oral argument will aid the Court by allowing the parties to explore the issues presented in this appeal and respond to any inquiries raised. For this reason, Appellants respectfully request that the Court hear oral argument in this case.

JURISDICTIONAL STATEMENT

On June 22, 2017, Appellants CREW and the Archive (in keeping with the convention adopted by the District Court, collectively, "CREW") filed a Complaint with the District Court for the District of Columbia seeking declaratory, injunctive, and mandamus relief challenging certain actions of the president, his staff, and the Executive Office of the President ("EOP") (collectively, the "Executive"). The District Court had jurisdiction under 28 U.S.C. § 1331; 44 U.S.C. §§ 2201–2209 (the Presidential Records Act); 28 U.S.C. § 1361 (mandamus); and 28 U.S.C. §§ 2201–2202 (the Declaratory Judgment Act).

On October 6, 2017, the Executive filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and for lack of subject-matter jurisdiction under Rule 12(b)(1) ("Defs.' Mot. Dismiss"). On March 20, 2018, the District Court granted that motion under Rule 12(b)(6) and dismissed all counts of CREW's Complaint in an order issued the same day. On April 17, 2018, CREW filed a motion for reconsideration under Rule 59(e). The District Court denied the motion on June 25, 2018. Both the order granting the Executive's motion to dismiss and the order denying CREW's motion for reconsideration constitute final decisions for purposes of appellate review. *See* 28 U.S.C. § 1291. CREW filed a timely notice of appeal on May 18, 2018 and a timely amended notice of appeal under Federal Rule of Appellate Procedure 4(a)

on June 29, 2018. This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

(1) A statutory duty is subject to mandamus relief if it is clear and compelling and non-discretionary. The Presidential Records Act ("PRA" or the "Act") explicitly requires that materials produced or received by the president, his staff, or the EOP must be categorized as presidential or personal records; that presidential records may only be destroyed following statutorily prescribed procedures; and that the president must implement records management controls to ensure the categorization of records. Did the District Court err when it held that the PRA's duties are not specific enough to support a mandamus claim?

(2) In deciding a motion to dismiss for failure to state a claim, a district court must decide the legal sufficiency of the complaint. The Complaint here raised issues that the Executive's knowing use of message-deleting apps violates the president's duty to categorize records under the PRA and that the president has violated the notification requirements under that Act. Did the District Court err when it refused to consider CREW's claims in its Complaint and held such claims were waived?

(3) A valid mandamus claim, as well as a claim under the Constitution, can sustain declaratory relief under the PRA. CREW has brought both mandamus claims and claims under the Take Care Clause of the Constitution. Did the District

Court err when it refused to apply Circuit precedent to find that CREW was entitled to declaratory relief to redress its two PRA claims?

STATUTES AND REGULATIONS

44 U.S.C. § 2201. Definitions.

(1) The term "documentary material" means all books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio and visual records, or other electronic or mechanical recordations, whether in analog, digital, or any other form.

(2) The term "Presidential records" means documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term—

(A) includes any documentary materials relating to the political activities of the President or members of the President's staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; but

(B) does not include any documentary materials that are (i) official records of an agency (as defined in section 552(e) of title 5, United States Code);

(ii) personal records; (iii) stocks of publications and stationery; or (iv) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified

(3) The term "personal records" means all documentary materials, or any reasonably segregable portion therof, of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term includes—

(A) diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business;

(B) materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; and

(C) materials relating exclusively to the President's own election to the office of the Presidency; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

(4) The term "Archivist" means the Archivist of the United States.

(5) The term “former President”, when used with respect to Presidential records, means the former President during whose term or terms of office such Presidential rec-ords were created.

44 U.S.C. § 2202. Ownership of Presidential records.

The United States shall reserve and retain complete ownership, possession, and control of Presidential records; and such records shall be administered in accordance with the provisions of this chapter.

44 U.S.C. § 2203. Management and custody of Presidential records.

(a) Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President’s constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records pursuant to the requirements of this section and other provisions of law.

(b) Documentary materials produced or received by the President, the President’s staff, or units or individuals in the Executive Office of the President the function of which is to advise or assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately.

(c) During the President's term of office, the President may dispose of those Presidential records of such President that no longer have administrative, historical, informational, or evidentiary value if—

(1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and

(2) the Archivist states that the Archivist does not intend to take any action under subsection (e) of this section.

(d) In the event the Archivist notifies the President under subsection (c) that the Archivist does intend to take action under subsection (e), the President may dispose of such Presidential records if copies of the disposal schedule are submitted to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. For the purpose of this section, continuity of session is broken only by an adjournment of Congress sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the days in which Congress is in continuous session.

(e) The Archivist shall request the advice of the Committee on Rules and Administration and the Committee on Governmental Affairs of the Senate and the Committee on House Oversight and the Committee on Government Operations of

the House of Representatives with respect to any proposed disposal of Presidential records whenever the Archivist considers that—

(1) these particular records may be of special interest to the Congress; or

(2) consultation with the Congress regarding the disposal of these particular records is in the public interest.

(f) During a President's term of office, the Archivist may maintain and preserve Presidential records on behalf of the President, including records in digital or electronic form. The President shall remain exclusively responsible for custody, control, and access to such Presidential records. The Archivist may not disclose any such records, except under direction of the President, until the conclusion of a President's term of office, if a President serves consecutive terms upon the conclusion of the last term, or such other period provided for under section 2204 of this title.

(g)

(1) Upon the conclusion of a President's term of office, or if a President serves consecutive terms upon the conclusion of the last term, the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President. The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this chapter.

(2) The Archivist shall deposit all such Presidential records in a Presidential archival depository or another archival facility operated by the United States. The Archivist is authorized to designate, after consultation with the former President, a director at each depository or facility, who shall be responsible for the care and preservation of such records.

(3) When the President considers it practicable and in the public interest, the President shall include in the President's budget transmitted to Congress, for each fiscal year in which the term of office of the President will expire, such funds as may be necessary for carrying out the authorities of this subsection.

(4) The Archivist is authorized to dispose of such Presidential records which the Archivist has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation. Notice of such disposal shall be published in the Federal Register at least 60 days in advance of the proposed disposal date. Publication of such notice shall constitute a final agency action for purposes of review under chapter 7 of title 5, United States Code.

44 U.S.C. § 2209. Disclosure requirement for official business conducted using non-official electronic messaging accounts.

(a) In General.—The President, the Vice President, or a covered employee may not create or send a Presidential or Vice Presidential record using a

non-official electronic message account unless the President, Vice President, or covered employee—

(1) copies an official electronic messaging account of the President, Vice President, or covered employee in the original creation or transmission of the Presidential record or Vice Presidential record; or

(2) forwards a complete copy of the Presidential or Vice Presidential record to an official electronic messaging account of the President, Vice President, or covered employee not later than 20 days after the original creation or transmission of the Presidential or Vice Presidential record.

(b) Adverse Actions.— The intentional violation of subsection (a) by a covered employee (including any rules, regulations, or other implementing guidelines), as determined by the appropriate supervisor, shall be a basis for disciplinary action in accordance with subchapter I, II, or V of chapter 75 of title 5, as the case may be.

(c) Definitions.—In this section:

(1) Covered employee.—The term "covered employee" means—

(A) the immediate staff of the President;

(B) the immediate staff of the Vice President;

(C) a unit or individual of the Executive Office of the President whose function is to advise and assist the President; and

(D) a unit or individual of the Office of the Vice President whose function is to advise and assist the Vice President.

(2) Electronic messages.—The term “electronic messages” means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals.

(3) Electronic messaging account.—The term “electronic messaging account” means any account that sends electronic messages.

STATEMENT OF THE CASE

Statutory and Regulatory Background

Congress enacted the PRA in 1978 to ensure both "the preservation of the historical record of the future Presidencies" and "public access to the materials" of a presidency. H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. § 2 (1978). The impetus for the PRA was the protracted legal battle between the United States and President Richard M. Nixon over his ability to control the records of his presidency after leaving office. To preserve the historical record, the PRA directs the president to:

> take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records[.]

44 U.S.C. § 2203(a). The PRA further specifies that "[t]he United States shall reserve and retain complete ownership, possession and control of Presidential records[.]" 44 U.S.C. § 2202.

The PRA defines "presidential records" broadly, recognizing that "a great number of what might ordinarily be construed as one's private activities are, because of the nature of the presidency, considered to be of public nature, *i.e.*, they effect the discharge of his official or ceremonial duties." H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. §§ 11–12. Congress considered "few" of a president's

activities to be "truly private and unrelated to the performance of his duties . . . ." *Id.* § 12. The statutory definition of "presidential records" reflects this breadth:

> documentary materials . . . created or received by the President, his immediate staff, or a unit or individual in the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

44 U.S.C. § 2201(2). The statute further defines "documentary materials" to include "electronic or mechanical recordations." 44 U.S.C. § 2201(1).[1]

The PRA also contains a multi-step process that the president must go through before destroying presidential records. While in office, a president may dispose of his or her presidential records only after making an affirmative determination that the records "no longer have administrative, historical, informational, or evidentiary value[.]" 44 U.S.C. § 2203(c). After making that

[1] In 2014, Congress expanded the scope of the PRA to embrace new means of digital communication, including the use of "non-official electronic message accounts." Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, § 2, 128 Stat. 2003, 2006-07 (codified at 44 U.S.C. § 2209). Those amendments prohibit the president, his staff, and the EOP from using non-official electronic message accounts unless they either: (1) copy one of the president's official electronic messaging accounts or that of his staff or EOP, or (2) forward a complete copy of the presidential record to an official electronic messaging account of the president, his staff, or EOP. 44 U.S.C. §§ 2209(a)(1)–(2). Congress defined "electronic messages" to mean "electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals." *Id.* § 2209(c)(2). Congress explained that the purpose of this amendment was to "ensure that all Presidential records, even those sent from a personal electronic messaging account, are properly preserved and maintained." S. Rep. No. 113-218, at 4 (2014).

determination, the president must then obtain the written views of the Archivist of the United States ("Archivist") on the proposed destruction. *Id.* § 2203(c)(1)–(2). If the president receives written confirmation that the Archivist intends to take any action with respect to the proposed destruction, the president must notify the appropriate congressional committee of the president's intention 60 days before the proposed disposal. *Id.* § 2203(d). This process reflects the care Congress took to ensure that presidential records could be destroyed only after considered deliberation by multiple stakeholders.

Factual Background

Following President Donald Trump's inauguration, the news media reported that White House staff were using message-deleting applications ("apps") to communicate with each other about presidential or federal business. For example, on January 24, 2017, the *Wall Street Journal* reported that at least some of President Trump's staff were using Signal, an encrypted peer-to-peer messaging application. Compl. ¶ 50. Signal encrypts communications at both the sender and user ends, meaning no one else can read them. *Id.* Its message-deleting function allows the user to set a timer to delete the message from all devices. *Id.* ¶ 52.

The *Washington Post* also reported that some presidential staffers were using another "secret chat app—Confide—that erases messages as soon as they're read." Compl. ¶ 56. Confide promotes its product as a "confidential messenger"; those

who receive messages through Confide "'wand' over the words with [their] finger or mouse to read them, and watch them disappear without a trace when [they're] done." *Id.* ¶ 58. The messages remain intact only until the reader "wands" over the screen, at which point the messages are destroyed and are no longer capable of being preserved. *Id.* Confide touts the fact that by using its product, messages are "gone for good—no forwarding, no printing *and no archiving*." *Id.* (emphasis added).

Following these revelations, then-Chairman of the House Oversight and Government Reform Committee Jason Chaffetz and Ranking Member Elijah E. Cummings sent a letter to the White House counsel noting that use of these encrypted messaging apps "could result in the creation of presidential or federal records that would be unlikely or impossible to preserve." Compl. ¶ 63. The House Oversight Committee requested, among other things, information on the White House policies relating to the use of non-official electronic messaging accounts, official text message or other messaging or communications applications, and policies and procedures for securing and preserving presidential records. *Id.*

In response to this congressional request, the White House merely stated: "It is the policy of the White House to comply with the preservation requirements of the PRA regardless of where presidential records reside, how they are created, or the manner in which they are transmitted." Ex. A to Declaration of George Clarke

dated Nov. 3, 2017 ("Clarke Decl."). Notably, the White House did not deny that White House officials were using message-deleting apps, nor did it address how it is technologically possible for the White House to comply with its preservation obligations under the PRA for messages sent or received through message-deleting apps like Signal or Confide.

In response to a subsequent report that White House Senior Advisor Jared Kushner was using a private email account for official business, the House Oversight Committee sought additional documents and information. Ex. B Clarke Decl. Among the information the Committee requested were the identities of non-career White House officials who had used "text messages, phone-based message applications, or encryption software," and "evidence of measures to ensure compliance with federal law." *Id.* at 2. The Committee also asked the White House to identify changes in policies or directives relating to non-official email accounts and messaging applications since January 1, 2017. *Id.*

Rather than answer these questions, the White House simply responded that "[a]ll White House employees must comply with 44 U.S.C. § 2209, which governs the use of non-official electronic message accounts," and that "[t]he White House and covered employees endeavor to comply with all relevant laws[.]" *Id.* According to the letter, "[t]here has been no change in White House policy" in these areas "since January 20, 2017 . . . ." *Id.* In other words, the White House has

not implemented guidelines addressing presidential records created on third-party electronic messaging platforms like Confide and Signal.

Proceedings Below

On June 22, 2017, CREW filed a Complaint challenging the White House's use of message-deleting apps because they prevent the preservation of presidential records under the PRA. The Executive moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of standing and Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

The District Court held oral argument on the Executive's motion on January 17, 2018. On March 20, 2018, the court issued a memorandum opinion granting that motion to dismiss under Rule 12(b)(6) ("Mem. Op."). In its opinion, the court acknowledged that "[t]his case raises difficult questions concerning the ability of private citizens to sue the President for violations of his duty to preserve his official records for historical account," and pronounced that "[t]he use of automatically-disappearing text messages to conduct White House business would almost certainly run afoul of the [PRA]." Mem. Op. at 1. The court held, however, that the Complaint failed to state a valid mandamus claim because the duty to issue record classification guidelines is not a ministerial duty subject to mandamus relief.

The court refrained from deciding whether judicial review of the PRA is precluded under this Court's precedent.[2]

On April 17, 2018, CREW filed a motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure because the District Court failed to address two other ministerial duties raised in the Complaint: (1) the ministerial obligation to categorize messages, and (2) the ministerial obligation to provide certain statutorily compelled notifications prior to destroying presidential records.

The District Court denied this motion, ruling that CREW forfeited the arguments that either of those two duties are ministerial. The court further concluded that even if CREW did not forfeit these arguments, the PRA does not "specifically prohibit the use of any particular means of communication." Order of June 25, 2018 denying Plaintiff's motion for reconsideration at 3 ("Order"). CREW has appealed both the District Court's March 20, 2018 judgment and its denial of the motion for reconsideration.

SUMMARY OF THE ARGUMENT

Congress enacted the PRA to preserve "presidential records" for future public access. To do so, the Act imposes several duties on the president. First, he

[2] Because the District Court did not reach this question, CREW has not briefed it here, but is prepared to provide a supplemental brief at the Court's request. The District Court also dismissed CREW's Claim Four on the basis that it did not fall within the scope of the Take Care Clause. We do not challenge that ruling here.

must categorize records created or received by himself, his staff, or certain units of the EOP as either presidential or personal. Second, he must not destroy presidential records unless he follows specified procedures, including notifying the Archivist. Finally, he must implement record management controls to guarantee that his administration complies with the PRA. All records—whether hard copy or electronic—created or received by the president, his staff, and the EOP are subject to the PRA. There are no exceptions.

Shortly after Donald Trump took office, however, the above-referenced media outlets reported that White House staff were communicating using messaging applications that automatically delete messages once they are read. Messages that are automatically deleted cannot be categorized or preserved. Nor can notice be given to the Archivist before they are erased. As a result, White House staff who use such apps cannot be in compliance with the PRA. And if White House staff are not complying with the PRA, then the president is not fulfilling his obligation to take care that the law is faithfully executed.

CREW's Complaint is premised on these failures. First, it seeks declaratory relief that using message-deleting apps violates the PRA. Second, it asks for a declaration that the president's failure to implement records management controls for categorizing records violates the PRA. Third, it seeks a writ to compel the president to comply with his clear and straightforward duties under the PRA: to

categorize records, notify the Archivist prior to destruction, and implement controls to comply with the foregoing. The president may not choose whether to comply with these duties. As a result, each of these duties may independently support a claim for mandamus relief.

The District Court's holding that the PRA's duties are "too discretionary in nature" to support mandamus relief, Mem. Op. at 2, ignores the clear and compelling commands contained in that act. Although the president has discretion to delegate his duties, and may determine how to comply with the PRA, this discretion does not permit him to determine whether to comply. The PRA leaves no room to decide whether to categorize records, or whether to notify the Archivist. The President must do those things and the failure to do them is sufficient to support mandamus relief. If construction of how to comply with a mandatory statute could render the underlying duty discretionary, the value of a writ of mandamus would be "greatly impair[ed]." *Roberts v. United States*, 176 U.S. 221, 231 (1900).

Further, the District Court's holding that CREW waived arguments that categorizing records and notifying the Archivist are ministerial duties ignores the plain language of the Complaint. Instead, the court improperly focused on CREW's opposition memorandum to the Executive's motion to dismiss, which addressed only the arguments made in its motion. The Complaint is clear, however,

that CREW seeks mandamus relief to "order[] the President, his staff, and the EOP to comply with their mandatory, non-discretionary duties under the PRA, and the president's obligations under the Take Care Clause." Compl. ¶ 108. In its mandamus claim, CREW explained that the "PRA imposes on the President, his staff, and the EOP a non-discretionary duty to segregate, preserve, and maintain presidential records [,]" Compl. ¶ 105, and that using message-deleting apps prevents compliance with the Act. Compl. ¶ 107. Because CREW has valid mandamus claims, these claims may support its other requests for declaratory relief. In addition, because the president has failed to take care that the PRA is faithfully executed, CREW's request for a declaration that the use of message-deleting apps violates the PRA is also available under the Constitution.

ARGUMENT

I. Standard of review.

This Court reviews motions to dismiss for failure to state a claim under Rule 12(b)(6) *de novo*. *See Cutler v. U.S. Dep't of Health & Human Svcs.*, 797 F.3d 1173, 1179 (D.C. Cir. 2015) (citing *Brown v. Whole Foods Market Group, Inc.*, 789 F.3d 146, 150 (D.C. Cir. 2015)). A Rule 12(b)(6) motion may be granted only if the Court finds that the complaint failed to provide fair notice of the claim and the grounds upon which it rests. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs are not required to set

forth "detailed factual allegations," but rather "only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 555, 570; *accord Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015). Further, when ruling on a Rule 12(b)(6) motion, a district court is required to construe a plaintiff's complaint liberally, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor. *Hurd v. Dist. of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017). Likewise, this Court must accept all factual allegations in the Complaint as true and grant CREW the benefit of all reasonable inferences that can be drawn in its favor. *Id.*

This Court also reviews *de novo* a district court's decision that an argument was raised for the first time in a motion for reconsideration. *Patton Boggs LLP v. Chevron Corp.*, 683 F.3d 397, 402 (D.C. Cir. 2012).[3]

II. The District Court erred in finding that CREW failed to state a valid mandamus claim to support its claims for declaratory relief.

A court may issue a writ of mandamus where "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." *Council of & for the Blind of Del. Cnty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1533 (D.C. Cir. 1983); *accord CREW v.*

[3] If this Court agrees with the District Court that the arguments made in CREW's motion for reconsideration were not properly raised before, then the Court must review whether the District Court abused its discretion by refusing to permit CREW to renew its claims.

Cheney, 593 F. Supp. 2d 194, 219 (D.D.C. 2009). The defendant's duty must be "ministerial and the obligation to act peremptory, and clearly defined . . . ; the duty must be clear and indisputable." *13th Reg'l Corp. v. U.S. Dep't of the Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980) (quoting *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931)). A ministerial duty "is one that admits of no discretion, so that the official in question has no authority to determine *whether* to perform the duty." *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996) (emphasis added).

Here, the Complaint identified three ministerial duties within the PRA: (1) the duty to categorize records as presidential or personal; (2) the duty to comply with the PRA's notification procedures prior to destroying presidential records; and (3) the duty to implement classification guidelines. Compl. at ¶¶ 21, 22, 90–95, 97, 101–103. As discussed below, each of these duties is sufficiently specific and non-discretionary to support a claim for mandamus relief.

The District Court, however, determined that CREW failed to state a valid mandamus claim because the PRA does not "obligate[] the President to perform any duty with the requisite level of specificity that mandamus requires." Mem. Op. at 14. In particular, the court held that the PRA does not specifically mandate the creation of classification guidelines. *Id.* The court did not address whether the PRA's duties to categorize records or to comply with notification procedures prior

to the destruction of presidential records are ministerial. This was error because these duties were properly raised in the Complaint.

A. The Complaint pleads facts demonstrating that the Executive has failed to fulfill ministerial duties imposed by the PRA.

Despite its rulings in this case, the District Court has previously agreed that "the PRA certainly creates ministerial obligations for the President." *Cheney*, 593 F. Supp. 2d at 218. In *Cheney*, the District Court specifically held that the PRA creates a "ministerial obligation to preserve [presidential] records . . . ." *Id.* at 220. In addition, the president and the EOP have ministerial obligations to (1) categorize records as presidential or personal; (2) notify the Archivist prior to disposal or destruction of presidential records; and (3) issue and implement guidelines for categorization. Their failure to abide by these duties forms a proper basis for the mandamus relief requested. In its opinion, the District Court addressed only the last of these—the duty to issue classification guidelines.

1. The Executive failed to perform its ministerial duty to categorize records as presidential or personal when it used, authorized the use of, or did not effectively prohibit the use of, message-deleting applications.

Under the PRA, the Executive must categorize records as either "presidential" or "personal." In particular, the PRA requires that all "[d]ocumentary materials produced or received by the President, the President's staff, or units or individuals in the Executive Office of the President . . . *shall* . . . be categorized as Presidential

records or personal records upon their creation or receipt and be filed separately." 44 U.S.C. § 2203(b) (emphasis added). By its terms, this provision imposes on the Executive a ministerial duty to *make* a categorization decision as to each record it creates or receives. 44 U.S.C. § 2201(2)–(3); *see also Cheney*, 593 F. Supp. 2d at 220. Although the person categorizing records has discretion in how to categorize records (*e.g.*, whether a particular record is presidential), "the official in question has no authority to determine *whether* to perform the duty." *Swan*, 100 F.3d at 977 (emphasis added).

The entire PRA is predicated on this initial classification decision. The PRA's rules for the preservation of, and access to, presidential records would be meaningless if such records could go uncategorized. 44 U.S.C. §§ 2203(c)–(g), 2204–2205. In fact, the entire Act would be rendered a nullity if the Executive could simply refrain from categorizing records. In that case, it could decide not to categorize records that would otherwise be considered "presidential" under the PRA and thus avoid all the restrictions on such records. The PRA should not be interpreted to allow an end run around its strictures. *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute' ... rather than to emasculate an entire section." (quoting *Montclair v. Ramsdell*, 107 U.S. 147 (1882)).

Because message-deleting apps automatically and instantaneously delete messages after a recipient reads them, they preclude *any* categorization of records. As a result, message-deleting apps prevent the Executive from complying with its ministerial duty to categorize materials produced or received. Compl. ¶¶ 93–94. The use by the president and EOP of message-deleting apps is therefore a *per se* failure to fulfill a ministerial duty created by the PRA and mandamus relief is warranted.

2. The Executive has a ministerial duty to comply with the PRA's record destruction requirements and message-deleting apps preclude such compliance.

Before the president or EOP may destroy presidential records, they must follow the procedures prescribed in the PRA. First, the president must make a determination that the records "no longer have administrative, historical, informational, or evidentiary value . . . ." 44 U.S.C. § 2203(c). Next, he must obtain "the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records." 44 U.S.C. § 2203(c)(1); *see also* Compl. ¶ 95. The records may then be destroyed only if the Archivist "states that the Archivist does not intend to take any action . . . ." with respect to such records. 44 U.S.C. § 2203(c)(2). If, on the other hand, the Archivist indicates that he or she intends to take action, then the president may destroy the records only if he first provides copies of the disposal schedule to the appropriate congressional committees. *See*

44 U.S.C. § 2203(d). The PRA does not afford the president discretion in determining whether to comply with these requirements. If the president wishes to destroy presidential records, he must follow this procedure. Because the president has a clear duty to act prior to destroying presidential records, these are ministerial duties.

The White House and EOP staff who use message-deleting apps prevent the president from complying with this process. The apps' use "results in the wholesale destruction of presidential records without following the statutorily prescribed steps a president must take before deleting presidential records." Compl. ¶ 96. There is no way to notify the Archivist or Congress before the messages are automatically deleted. Not only do message-deleting apps prevent the president from complying with his duties under the PRA, they prevent the Archivist from complying as well. As a result, the failure to execute this ministerial duty also constitutes a proper basis upon which mandamus relief is warranted.

3. Under the PRA, the Executive has a ministerial duty to issue and implement classification guidelines.

The PRA also imposes an affirmative obligation on the president to "implement[] . . . records management controls . . . ." 44 U.S.C. § 2203(a). The purpose of these controls is to assure that presidential records are created and preserved "pursuant to the requirements of [44 U.S.C. § 2203][,]" including the duty to categorize records as presidential or personal. *Id.* Thus, the president is

required to issue records management controls that assure the appropriate categorization of presidential records, *i.e.*, classification guidelines.

This requirement recognizes the fact that the president cannot personally fulfill his obligations under the PRA; he needs the help of his staff. The statutory directive to create guidelines is, therefore, implicit in the prescription that all records "produced or received by the President, the President's staff, or units or individuals in the [EOP] . . . shall . . . be categorized as Presidential records or personal records upon their creation or receipt . . . ." 44 U.S.C. § 2203(b). Because the president is not a one-man show, persons creating or receiving records must be instructed on how to categorize records under the PRA, and the Act recognizes as much.

Although the PRA does not obligate a particular type or manner of guidelines, and the president certainly has discretion as to how to implement those guidelines, the PRA does not give the president authority to ignore his duty to implement records management controls. Thus, in fulfilling his affirmative duty to "take all steps" to preserve presidential records, the president: (1) cannot circumvent that duty by simply erasing all communications irrespective of content; and (2) must, as a practical matter, issue guidelines to ensure records are preserved.

4. The District Court erred when it found that the PRA does not contain ministerial duties.

The District Court erroneously held that the PRA does not contain ministerial duties because the Act's requirements do not have "the requisite level of specificity that mandamus requires." Mem. Op. at 14; Order at 3. The court based its conclusion on two points. First, the court determined that the PRA does not require the creation of classification guidelines because it does not explicitly state that the "records management controls" mandated by the statute must be called "classification guidelines." Mem. Op. at 14. Second, the court found that the PRA does not contain ministerial duties because it gives the president discretion as to how to fulfill its requirements. Mem. Op. at 14; Order at 3.

Although the PRA does not explicitly use the phrase "classification guidelines," it uses analogous terms when it refers to "records management controls" that assure that presidential records are adequately categorized. 44 U.S.C. § 2203(a)–(b). In other words, the president must implement policies that instruct his staff and the EOP on how to categorize records. This requirement is specific and it is non-discretionary.

Further, while the PRA gives the president discretion to determine "*who* must classify these records [and] *how*[,]" Mem. Op. at 14, it does not give the president discretion to decide *whether* to comply with the things the PRA does require—categorization, preservation of presidential records, and the record

destruction procedures.[4] Thus, the PRA contains both ministerial and non-ministerial duties. That the president is permitted to exercise discretion in how to fulfil his categorization and preservation duties under the PRA does not mean that he has the discretion to ignore those duties or to prevent their fulfillment altogether. *In Re Aiken Cnty.*, 725 F.3d 255, 259 (D.C. Cir. 2013) (noting that "absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions"). As the Supreme Court has explained, it would "greatly impair" the "value of this writ" if "[e]very executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of the statute by him . . . ." *Roberts v. United States*, 176 U.S. 221, 231 (1900) (quoted in *13th Reg'l Corp. v. U.S. Dep't of the Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980)).

This is consistent with the examples cited by the District Court in its opinion. For example, the court points to *Northern States Power Co. v. U.S. Dep't of Energy*, in which this Court found that the Department of Energy had a non-

[4] The District Court noted that the PRA does not dictate *who* must classify records, Mem. Op. at 14, but the obligation to classify is subsidiary to the broader requirement put on the president to "take all such steps as may be necessary" to preserve and maintain presidential documents. This obligation must therefore include the proper classification of records, as required by the PRA.

discretionary duty to act because the language at issue provided that DOE "'shall begin disposing of the [spent nuclear fuel] by January 31, 1998." 128 F.3d 754, 758 (D.C. Cir. 1997). The Court's conclusion did not depend on language detailing *how* the fuel should be disposed of; it depended on the statutory mandate that the fuel be disposed of in a discretionary manner but at a specified—and thus non-discretionary—time. Similarly, in *13th Reg'l Corp.*, this Court held that the Alaska Native Claims Settlement Act created a non-discretionary obligation on the Secretary of the Interior "to make a study of all Federal programs primarily designed to benefit Native people," even though that statute also gave the Secretary the discretion to decide which programs are primarily designed to benefit Natives. 654 F.2d at 760–61. Said another way, the obligation to perform a study was ministerial, despite the fact that the Secretary had discretion in performing it.

The District Court alternatively noted that the PRA does not "specifically prohibit the use of any particular means of communication." Order at 3. CREW agrees that the PRA does not purport to restrict specific means of communication. However, neither does it exempt certain kinds communications from its terms. In fact, Congress specifically updated the PRA in 2014 to embrace new means of digital communication, such as message-deleting apps. Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, § 2, 128 Stat. 2003, 2006-07 (codified at 44 U.S.C. § 2209). As a result, all records created or received

by the Executive must be categorized as presidential or personal records, regardless of whether they were created or received on paper, by email, or on message-deleting apps. Thus, the president may not arbitrarily destroy communications—irrespective of type or kind—in a manner that wholly precludes their categorization. Message-deleting apps do precisely that.

B. The District Court erred in finding that CREW waived arguments concerning the use of message-deleting apps and the failure to adhere to the PRA's record destruction policies.

The District Court improperly determined that CREW waived arguments that the Executive violated ministerial duties by (1) using message-deleting apps and (2) failing to follow the PRA's notification requirements prior to destroying presidential records.[5] It found that CREW did not adequately discuss its claims in the Complaint or in its opposition to the Executive's motion to dismiss. Order at 2–3. In doing so, the court ignored the express language of the Complaint and improperly drew inferences in the Executive's favor to conclude that CREW waived claims that would support the requested mandamus relief. As this Court has recently held, however, a plaintiff is entitled to "rest on its complaint in the face of a motion to dismiss" if the complaint adequately states a claim for relief.

[5] As described above, the Complaint also alleged the failure of a third ministerial duty— the duty to implement classification guidelines—but the court addressed that allegation in its ruling and did not find it to be waived. Mem. Op. at 14.

Washington Alliance of Tech. Workers v. U.S. Dep't of Homeland Security, 892 F.3d 332, 345 (D.C. Cir. 2018).

1. The Complaint adequately pleaded claims for relief based on the Executive's use of message-deleting apps and its failure to fulfill the PRA's notification requirements.

While CREW was entitled to a liberal construction of its Complaint by the District Court, even a strict construction demonstrates that CREW adequately pleaded its claims. First, the Complaint expressly sets forth the preservation duties imposed on the president and the EOP, Compl. ¶ 90, and explains that use of message-deleting apps like Confide and Signal "prevent[s] any reasoned consideration of whether a particular electronic message is a presidential record that must be preserved." *Id.* ¶ 92. The Complaint further explains that by summarily deleting messages once read, these apps "completely usurp all the critical record-keeping functions the PRA imposes," *id.* ¶ 93, and essentially "treat all electronic messages produced or received by the [defendants] similarly, no matter their content." *Id.* ¶ 94. These factual assertions undergird CREW's claim that the use of message-deleting apps prevents the Executive from performing the ministerial duties imposed on it by the PRA. *See* Compl. ¶¶ 94, 97.

These factual assertions also form the basis for the requested mandamus relief. Compl. ¶ 103 (incorporating all preceding paragraphs). The Complaint makes clear that the basis for mandamus relief includes the fact that while the PRA

"leaves the President no discretion to remove entire classes of communications from the statute's reach simply because of their method of communication," "the Defendants have done just that by using messaging platforms like Confide and Signal that destroy records before any determination can be made as to whether they should be preserved as presidential records under the PRA." Compl. ¶ 107.

Similarly, the Complaint avers that the PRA "limits the ability of a President to dispose of or destroy presidential records during his term in office," and that before any destruction takes place "the President must solicit the views of the Archivist in writing concerning the President's proposed disposal or destruction of presidential records." Compl. ¶ 95. The Complaint further alleges that the Executive's use of messaging apps like Signal and Confide "results in the wholesale destruction of presidential records without following the statutorily prescribed steps a President must take before deleting presidential records." Compl. ¶ 96.

In denying CREW's Rule 59(e) motion, the District Court purported to find the Complaint deficient because "the mandamus count . . . never once mentions a failure to adhere to the statutory requirements for notification." Order at 2 (citing Compl. ¶¶ 103–108). But in that examination the court ignored the Complaint's caption for Claim Three "For a Writ of Mandamus and Injunctive Relief Compelling President Trump, His Staff, and the EO[P] to Comply with Their Non-

Discretionary *Duties* Under the PRA." Compl. Claim Three (emphasis added). Not only did the caption for Claim Three reference "non-discretionary duties" in the plural, but the claim itself also expressly incorporated all preceding paragraphs. *Id.* ¶ 103. The incorporated paragraphs include a description of the categorization and notification requirements, *id.* ¶¶ 93, 95, as "non-discretionary duties under the PRA," *id.* ¶ 97. The District Court's truncated analysis ignored the full scope and language of both Claim Three and the broader context of that claim as spelled out in the Complaint.

In this way, the District Court strayed radically from the path prescribed by Rule 12(b)(6) in granting the Executive's motion to dismiss based on what CREW purportedly excluded in its opposition brief ("Pls.' Opp'n Br."). By ignoring what CREW explicitly included in its Complaint, the court committed clear error.

2. CREW properly limited its opposition to the arguments the Executive raised in its motion to dismiss.

CREW was not required to readdress each assertion in its Complaint in responding to the Executive's motion to dismiss. While, in certain circumstances, courts have concluded that a failure to address assertions raised in a defendant's motion to dismiss constitutes a concession as to those assertions, *see e.g.*, *Hopkins v. Women's Div., General Bd. of Global Ministries*, 238 F. Supp. 2d 174 (D.D.C. 2002), Crew made no such omission. Instead, it appropriately addressed all the arguments the Executive raised in its motion.

The Executive's motion to dismiss raised three broad-brush arguments as to Claims One, Two, and Three. First, the Executive argued that the PRA, as construed by this Court in *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991), precludes all three claims. Second, the Executive argued that because the Declaratory Judgment Act does not create a cause of action, all three claims must be dismissed. Finally, the Executive argued that CREW failed to satisfy the standard for mandamus relief.

Specifically, as to the availability of mandamus relief, the Executive made a generalized argument, divorced from any specific reference to the Complaint, that the PRA "does not provide a 'clear and compelling duty' owed by the President to plaintiffs." Defs.' Mot. Dismiss at 23. For support, the Executive pointed to a provision of the PRA that directs the president to "take all such steps as may be necessary," *id.* (citing 44 U.S.C. § 2203(a)), which it construed as in and of itself foreclosing mandamus relief. The Executive also argued that even if the acts alleged constitute a violation of its ministerial duties, they are not redressable because "they do not represent a violation of such duties owed *to the Plaintiffs*." Defs.' Mot. Dismiss at 25 (emphasis in original). In the Executive's view, all aspects of "the President's management and preservation of records [are] left to his discretion," thereby foreclosing mandamus relief. *Id.* at 24.

These arguments ignored that the specific provisions of the PRA pleaded in the Complaint impose ministerial, non-discretionary duties on the Executive. The Executive's brief contained no reference to the ministerial obligations arising from the record-keeping functions set forth in the PRA, including the obligation to determine whether a particular electronic message contains a presidential record. *See* Compl. ¶ 93. Nor did that brief contain any reference to the ministerial notification requirements the PRA imposes before a presidential record can be destroyed. Yet the Executive's violation of these ministerial obligations forms the basis for the requested relief. *See* Compl. ¶ 55, (Defendants' use of Signal violates the PRA); ¶ 58 (same as to Confide); ¶ 92 (use of Confide and Signal prevent categorization); ¶ 94 (same); ¶¶ 95–96 (President must follow notification procedures); ¶ 107 (President may not remove entire classes of communications from PRA's reach).

Under analogous circumstances this Court recently held that a district court abused its discretion when it dismissed a "plausible claim for relief based on [plaintiff's] inadequate opposition" to a motion to dismiss brought under Rule 12(b)(6). *Washington Alliance of Tech. Workers*, 892 F.3d at 339. In *Washington*, the plaintiff-union challenged Department of Homeland Security ("DHS") regulations concerning nonimmigrant alien visas. The DHS filed a motion to dismiss, which the district court granted. There, as here, the district court treated

the claim as conceded even though the complaint "in fact stated a plausible claim for relief," the plaintiff had filed a timely response to the motion to dismiss, and included in its response "a section . . . specifically addressing the sufficiency of its claims for relief." *Id.* at 344, 345. On appeal, this Court acknowledged that the plaintiff's opposition brief may have been "underwhelming" and less than fully developed, but also found that the brief showed that the plaintiffs did not intend to concede their claims. Based on the dictionary definition of "concede," it found that the plaintiff did not "yield or grant," "acknowledge" or "accept" that it had failed to state a claim. This is because the plaintiff "was not silent when confronted with the argument that its allegations fell short." *Id.* at 345. With this ruling, the Court reaffirmed the principle that "a party may rest on its complaint in the face of a motion to dismiss if the complaint itself adequately states a plausible claim for relief." *Id.*

Moreover, a plaintiff cannot be faulted for limiting its response to the arguments raised in a motion to dismiss. A plaintiff has no obligation to infer and respond to additional, *unwritten* arguments. Here, CREW's opposition brief responded to the specific points in the motion to dismiss. CREW explained it was properly seeking mandamus relief to vindicate a duty owed to the general public at large, and that no case, statute, or logic itself bars it, as a member of the public, from so doing. Pls.' Opp'n Br. at 38. The District Court, however, ignored these

responses and instead faulted CREW for addressing the arguments actually made in the motion to dismiss, while ignoring arguments that could have been made, but were not. And while the District Court may have been dissatisfied with the level of detail in CREW's arguments, it committed error when it "turned what should have been an attack on the legal sufficiency of the complaint into an attack on the legal sufficiency of the response in opposition to the motion to dismiss." *Washington Alliance of Tech. Worke*rs, 892 F.3d at 345.

Ignoring the express allegations in the Complaint, the District Court improperly recast CREW's claims as challenging only the failure to "require that any particular classification guidance be created" and "that the President must create it." Mem. Op. at 14. When challenged on these characterizations by the Rule 59(e) motion, the District Court pointed to a single assertion repeated in CREW's opposition to the motion to dismiss that the requested mandamus relief "would simply require Defendants to perform their ministerial duty to issue classification guidelines[.]" Order at 3. From this sentence, the Court concluded that "CREW has forfeited its argument that the use of auto-deletion applications also violates a ministerial duty." *Id.* Both conclusions fly in the face of the Complaint and the opposition brief as written.

3. CREW's opposition to the motion to dismiss does not concede any claims.

Even assuming the Court properly ignored the Complaint, CREW's opposition brief clearly explains the basis of its claims as stemming from the use of "message-deleting apps that make categorization and preservation impossible." Pls.' Opp'n Br. at 2. In the brief's section addressing its mandamus claims, CREW incorporated the discussion earlier in the brief regarding the Executive's violation of its duties under the PRA. It also cited to portions of the Complaint discussing how message-deleting apps violate the Executive's obligations under the PRA to categorize and preserve presidential records. Pls.' Opp'n Br. at 36–37 ("As laid out in [] Section II.A, CREW has pleaded facts demonstrating violations of these duties."). In addition, in the mandamus section itself, CREW states specifically that the PRA "requires that the president categorize records as either presidential or personal, 44 U.S.C. § 2203(b), based on a statutorily-imposed definitions [sic] of what are presidential and personal records. 44 U.S.C. § 2201(2)–(3)." *Id.* at 36. CREW further explained in its opposition that "[t]he PRA does not afford the president discretion to destroy records as he sees fit" and cited to the specific provisions of the PRA that describe the processes by which records may be destroyed (44 U.S.C. § 2203(c)–(f)). *Id.* Significantly, CREW referred the court to the "pleaded facts demonstrating violations of these duties" in both its brief and Complaint. *See id.* at 36–37. And the opposition brief identifies the PRA's

"classification obligations" as ministerial, applying the reasoning of the court in *CREW v. Cheney*, 593 F. Supp. 2d 194, 219 (D.D.C. 2009). Pls.' Opp'n Br. at 38. Thus, like the plaintiff in *Washington Alliance*, CREW did not concede issues raised in its Complaint because it "cited its complaint—the pleading on which an FRCP 12(b)(6) motion to dismiss focuses—in its response." 892 F.3d at 343.

III. The Court erred in dismissing CREW's declaratory relief claims.

The Complaint sought declaratory relief based on the knowing use by the Executive of message-deleting apps that prevent the preservation of presidential records (Claim One), and the failure of the Executive to issue guidelines that the use of these apps violates the PRA (Claim Two). Although the Declaratory Judgment Act "is not an independent source of federal jurisdiction" and the availability of declaratory relief "presupposes the existence of a judicially remediable right," *Schilling v. Rogers*, 363 U.S. 666, 677 (1960) (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950)), a valid mandamus claim provides an independent source of jurisdiction that can sustain declaratory relief. Mem. Op at 12 n.3 (citing *Nat'l Treasury Emps. Union v. Nixon,* 492 F.2d 587, 616 (D.C. Cir. 1974)). This result is unsurprising. Courts are understandably reluctant to issue injunctive or mandamus relief against the president in the first instance and have opted instead to assume that the executive branch will comply with declaratory relief. *See Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992)

(explaining that while the court has "left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty," declaratory relief might nonetheless be available).[6] As explained above, CREW has valid mandamus claims and these claims can sustain its claims for declaratory relief. Since the District Court erred in dismissing CREW's mandamus claims, it also erred in dismissing CREW's declaratory judgment claims.

The District Court also erred in dismissing Claim One for the independent reason that the request for declaratory relief was premised in part on a separate source of jurisdiction: the Take Care Clause of the Constitution. *See* Compl. ¶98 ("Plaintiffs are therefore entitled to relief in the form of a declaratory judgment that President Trump, his staff, and the EOP have violated their non-discretionary statutory duties under the PRA, 44 U.S.C. §§ 2201–2209, and that the President has violated his constitutional obligation to take care that laws like the PRA be faithfully executed."). Although the District Court discussed the availability of declaratory relief under the Take Care Clause in its analysis of Claim IV (the dismissal of which CREW is not challenging), the court erred in failing to consider

[6] This issue also can be avoided by issuing injunctive relief against subordinate officials. *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) ("In most cases, any conflict between the desire to avoid confronting the elected head of a coequal branch of government and to ensure the rule of law can be successfully bypassed, because the injury at issue can be rectified by injunctive relief against subordinate officials.").

whether CREW's request for declaratory relief in Claim I could survive as a challenge under the Take Care Clause.[7] It can.

Indeed, this Court has previously issued declaratory judgments under the Constitution. For example, in *Nat'l Treasury Emps. Union v. Nixon*, this court issued a declaratory judgment stating that the president had a constitutional duty to effectuate a pay raise passed by Congress. 492 F.2d 587, 616 (D.C. Cir. 1974). Further, in *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), this Court explained, albeit in dicta, that the government had acknowledged that "an independent claim of a President's violation of the Constitution would certainly be reviewable." *Id.* at 1326. As the District Court noted here, the Supreme Court has on at least two occasions suggested that declaratory relief (as opposed to injunctive or mandamus relief) is available under the Take Care Clause. *See* Mem. Op. at 18, n.5 (citing *Clinton v. City of New York*, 524 U.S. 417 (1998)), 19 (discussing *United States v. Texas*, 136 S. Ct. 906 (2016)). Similarly, CREW is entitled to seek declaratory relief in conjunction with a claim that the president is failing to take care that the laws are faithfully executed by violating his responsibilities under the PRA.

[7] *See* Subsection II.B, *supra*.

CONCLUSION

By design, message-deleting apps destroy all communications created in them, regardless of content. This feature makes them anathema to the purpose of the PRA: preserving the documentary record of a presidency. Their use by White House staff removes an entire class of records—those created and received in the apps—from the purview of the PRA. While the president does have discretion under the Act, he does not have the power to rewrite its terms. Instead, he must perform his duties with respect to all records. Because the president has non-discretionary obligations under the PRA, the District Court erred in holding that the Act could not support mandamus and declaratory relief. As a result, CREW has a valid cause of action and the District Court's decision should be reversed with the case remanded for consideration of the merits.

Respectfully submitted,

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Dated: October 22, 2018

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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October 22, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system, which serves the filed document electronically on all attorneys of record on the day the document is filed.

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October 22, 2018