ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5037

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

Citizens for Responsibility and Ethics in Washington, *et al.*,

Plaintiffs-Appellants,

v.

Donald J. Trump, *et al.*,

Defendants-Appellees.

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

BRIEF FOR PLAINTIFFS-APPELLANTS

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June 1, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellants Citizens for Responsibility and Ethics in Washington, National Security Archive, and Society for Historians of American Foreign Relations submit this certificate as to parties, rulings, and related cases:

I. Parties and Amici

Appellants are Citizens for Responsibility and Ethics in Washington, National Security Archive, and Society for Historians of American Foreign Relations. Appellees are Donald J. Trump, President of the United States of America, and the Executive Office of the President. To date, no amici have sought leave to participate in this Court. There were no amici in the District Court.

II. Rulings Under Review

The ruling under review (issued by Judge Amy Berman Jackson) is the District Court's order and memorandum opinion dated February 10, 2020. The memorandum opinion is unpublished.

III. Related Cases

The case on review has not previously been before this Court or any other court. Counsel are unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Appellants Citizens for Responsibility and Ethics in Washington, National Security Archive, and Society for Historians of American Foreign Relations make the following disclosures:

1. 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 percent or more of CREW.
2. Appellant National Security Archive (the "Archive") is a nonprofit organization that does not have any parent corporation. No publicly held corporation owns 10 percent or more of the Archive.
3. Appellant Society for Historians of American Foreign Relations ("SHAFR") is a nonprofit organization that does not have any parent corporation. No publicly held corporation owns 10 percent or more of SHAFR.

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GLOSSARY

As used herein,

Archive means the National Security Archive;

Compl. means the complaint filed in this case;

CREW means Citizens for Responsibility and Ethics in Washington and the Plaintiffs collectively;

EOP means the Executive Office of the President;

Executive means the president, his staff, and the Executive Office of the President;

FRA means Federal Records Act;

JA means the Joint Appendix in this appeal;

Op. means the District Court opinion in this case, as paginated in the Joint Appendix;

PRA means Presidential Records Act;

SHAFR means Society for Historians of American Foreign Relations.

JURISDICTIONAL STATEMENT

On May 7, 2019, Appellants CREW, the Archive, and SHAFR (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 August 9, 2019, the Executive filed a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim under Fed. R. Civ. P. 12(b)(6). On February 10, 2020, the District Court granted that motion under Rule 12(b)(1) and dismissed all counts of CREW's complaint in an order issued the same day. The order granting the Executive's motion to dismiss constitutes a final decision for purposes of appellate review. *See* 28 U.S.C. § 1291. CREW filed a timely notice of appeal on February 20, 2020. This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

(1) Did the District Court err in dismissing this case on the ground that under *Armstrong v. Bush* ("*Armstrong I*"), 924 F.2d 282 (D.C. Cir. 1991), judicial review of CREW's claims is impliedly precluded?

(2) Did the District Court err in concluding that the exception for judicial review recognized in *Armstrong v. Exec. Office of the President* ("*Armstrong II*"), 1 F.3d 1274 (D.C. Cir. 1993), does not apply to CREW's claims?

(3) Was this Court's decision in *Armstrong I* wrongly decided to the extent it bars review of CREW's claims here?

(4) Did the District Court err in finding that CREW failed to state a valid mandamus claim to support its claims for declaratory relief?

(5) Did the District Court err in holding that implied preclusion of a statutory claim also bars constitutional claims?

STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in the addendum to this brief.

INTRODUCTION

The Presidential Records Act ("PRA"), as well as its complement, the Federal Records Act ("FRA"), represent Congress' decision that a country of the people, by the people, and for the people cannot survive if the people do not have

access to its historical record. Thus, through the PRA, Congress mandated public ownership of a president's papers and required that the president document the activities, deliberations, decisions, and policies of his administration; maintain those records created during the performance of his duties; and preserve those records for posterity. President Donald J. Trump seeks to upend that law, claiming the absolute, unchecked power to ignore the PRA at will by failing to create records in the first instance and preventing executive agencies from doing so as well. At bottom, this lawsuit presents the fundamental question of whether a president may subvert congressional intent embodied in duly enacted legislation. The answer must be no.

Recognizing the importance of the president's compliance in the process of preserving important historical records, this Court has construed the PRA to allow judicial review where a president's actions contravene the plain language of the statute. Thus, while courts will not second-guess a president's day-to-day decisions about individual documents, courts may review, for example, "guidelines outlining what is, and what is not, a 'presidential record' under the terms of the PRA." *Armstrong II*, 1 F.3d at 1290.

Accepting the District Court's decision that the president's wholesale exemption of certain categories of activities from the scope of the PRA is not subject to judicial review would nullify a statutory command directed specifically

at the president, threaten the separation of powers, and deprive CREW and the public at large of a complete historical record. For these reasons, the Court should reverse the District Court's decision in favor of a statutory construction that gives life to Congress' words and leaves intact our system of checks and balances.

STATEMENT OF THE CASE

Statutory Background

Congress enacted the PRA and its predecessor statute, the Presidential Recordings and Materials Preservation Act of 1974 ("PRMPA"), to advance three goals: (1) promoting "the creation of the fullest possible documentary record"; (2) ensuring "the preservation of that record"; and (3) providing eventual public access to that record. *Hearings Before a Subcomm. of the Comm. on Gov't Operations on H.R. 10998 and Related Bills,* 95th Cong., 2nd Sess. (1978) ("*PRA Hearings*") (Statement of Rep. John Brademas, PRA co-sponsor); *see also* H. Rep. 95-1487, at 3 (95th Cong., 2d Sess., Aug. 14, 1978). Congress acted to address the loopholes exposed by President Richard M. Nixon's attempt to assert full ownership and control of his presidential records after leaving office. It did so fully recognizing that "essential to understanding the past is access to the historical record, to the documents, and other materials that were produced in the course of governing and which shed light on the decisions, and the decisionmaking processes of earlier years." *PRA Hearings* at 70; *see also* H. Rep. 94-1487, at 74 (Statement of Rep.

Allen E. Ertel, PRA co-sponsor) ("we must take care that the records to be owned are both historically complete and manageably organized. Accordingly, legislation in this realm must instruct the President to insure that the activities and deliberations of his administration are adequately recorded and maintained.").

Toward that end, the PRA specifies that "[t]he United States shall reserve and retain complete ownership, possession and control of Presidential records." 44 U.S.C. § 2202. To ensure the preservation of a full 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.

Id. § 2203(a). The legislators explained these requirements as follows:

> To facilitate the compiling of a complete record and the orderly transfer of materials, the President is encouraged to implement sound records management practices and is required as far as practicable to make and separate personal papers from presidential records. The President is required to adequately document the performance of his functions and may not dispose of presidential records without first obtaining the written views of the Archivist.

H. Rep. 95-1487, at 4. Significantly, the drafters sought to *encourage* presidents to implement sound records management practices, but to *require* presidents to adequately document the performance of their functions. *Id*. In particular, the PRA specifies that the president "shall . . . 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 defines "presidential records" broadly to include:

> 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.

Id. § 2201(2). Congress understood that with respect to the president, "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. Rep. 95-1487, at 11-12.

The PRA establishes a multi-step process the president must complete before destroying presidential records during his or her term in office. The president must first make an affirmative determination that the records "no longer have administrative, historical, informational, or evidentiary value." 44 U.S.C. § 2203(c). The president must then obtain the written views of the Archivist of the United States (the "Archivist") on the proposed destruction, *id.* § 2203(c)(1)-(2), and upon receipt of written confirmation that the Archivist intends to take any

action concerning the proposed destruction 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 the president destroys records only after considered deliberation by multiple stakeholders.

In enacting the PRA, Congress was cognizant of the constitutional considerations the Supreme Court applied to the PRMPA in *Nixon v. Administrator*, 433 U.S. 425 (1977). There, the Court adopted a "pragmatic, flexible approach" to separation of powers concerns, *id.* at 442, explaining that "in determining whether the [PRMPA] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* at 443 (citing *United States v. Nixon*, 418 U.S. 683, 711-12 (1974)). In hearings on the proposed legislation that became the PRA, the Department of Justice's Office of Legal Counsel ("OLC") explained to Congress that "[t]he Supreme Court's opinion in *Nixon v. Administrator* makes clear that it is within the appropriate ambit of Congress' power to legislate with respect to the preservation of historically valuable papers of the Chief Executive." *PRA Hearings* at 89 (statement of Lawrence A. Hammond, Deputy Att'y Gen., OLC). According to the OLC, the framework for analyzing separation of powers concerns with respect to legislation

dictating how a president's papers are to be maintained builds on the *Nixon* case and prior decisions of the Supreme Court recognizing Congress' ability to legislate "so long as it does so in a way that does not lead to disruption of the functioning of the executive branch." *Id.* at 90.

Presidential records ultimately are made available to the public through the Freedom of Information Act ("FOIA"). The PRA provides that once a president leaves office, the Archivist assumes custody and control over the former president's records. 44 U.S.C. § 2203(g). Beginning five years after a president leaves office, members of the public can begin filing FOIA requests for presidential records. 44 U.S.C. § 2204(b)(2). Although some materials can be withheld or redacted for an extended period of time, they too eventually become available to the public. 44 U.S.C. § 2204(a).

Agency records are subject to different creation, maintenance, and destruction rules codified in the FRA, 44 U.S.C. §§ 3101, *et seq*. Similar to the PRA, the FRA requires each agency head to

> make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

44 U.S.C. § 3101.

Factual Background[1]

From the outset of his administration, President Trump has systematically ignored many of his PRA obligations, including refusing to create records documenting the exercise of his core constitutional powers. Specifically, the president has developed a pattern and practice of refusing to create records of highest-level meetings between the United States and certain foreign leaders, and has interfered with the ability of agencies to create and maintain their own records of those meetings.

For example, President Trump has had at least five publicly reported meetings with Russian President Vladimir Putin for which no written record was created, preventing even top U.S. officials from knowing what President Trump said to President Putin, who heads a country that is one of the main strategic adversaries of the United States. Compl. ¶ 53, JA __. In the absence of any records of these meetings and conversations, U.S. officials have had to rely on "U.S. intelligence agencies tracking the reaction in the Kremlin." Compl. ¶ 54, JA __.

During President Trump's first reported face-to-face meeting with President Putin in Hamburg, Germany in July 2017 during the G20 Summit, the president reportedly confiscated his interpreter's notes after the meeting and ordered the interpreter not to disclose what he had heard, including to administration officials.

[1] These facts are drawn from the complaint and do not include meetings and conversations the president had with foreign leaders after the complaint was filed.

Compl. ¶ 42, JA __. That interpreter was an employee or contractor of the State Department's Office of Language Services, whose translators and interpreters "serve as the ears, voice and words in foreign languages of the President," as part of "a tradition of language support for the conduct of foreign policy dating back to 1789." Compl. ¶ 43, JA __. In past administrations, interpreters also prepared written memoranda memorializing what was said. *Id.* Although then-Secretary of State Rex Tillerson also attended the G20 Summit and provided some details publicly about the meeting, his account reportedly was "at odds with the only detail that other administration officials were able to get from the interpreter," specifically that when President Putin denied "any Russian involvement in the U.S. Election . . . Trump responded by saying 'I believe you.'" Compl. ¶ 44, JA __.

Similarly, during a dinner that followed, President Trump had a side conversation with President Putin without any accompanying American witness. Compl. ¶ 45, JA __. U.S. officials did not learn of these actions until a senior State Department official and a White House advisor sought additional information, which the White House disclosed only after word had leaked out from other sources. *Id*. The president's private, unrecorded meetings with President Putin apparently touched on a subject of great public interest: Russia's meddling in the 2016 U.S. presidential election, and the veracity of the president's claim that during those meetings he had strongly pressed President Putin on the meddling. An

account from Russian officials disputes the president's claim but, in the absence of a written record of the conversations cannot be verified, Compl. ¶ 47, JA __, leaving government officials and the public in the dark.

Presidents Trump and Putin again spoke privately on several occasions during the November 2017 Asia-Pacific Economic Cooperation Summit in Da Nang, Vietnam, with no documentation prepared of those discussions. Compl. ¶ 48, JA __. While the White House denied the two would have a formal meeting, a spokesperson for President Putin described the meetings as taking "place on the sidelines." *Id*. Reportedly, no official transcript or notes of their "sidelines" meetings in Vietnam exist. *Id*.

On July 16, 2018, President Trump held a summit with President Putin in Helsinki, Finland. During their two-hour private meeting the two were accompanied only by interpreters, Compl. ¶ 49, JA __, leaving the substance of their conversation unrecorded. Even Director of National Intelligence Dan Coats was left in the dark, unable to "either understand fully or talk about what happened in Helsinki." Compl. ¶ 50, JA __. Reportedly, President Trump's interpreter left the meeting "with pages of notes," but there is no indication they were shared with anyone. Compl. ¶ 51, JA __.

President Trump's fifth undocumented meeting with President Putin took place in Buenos Aires, Argentina in November 2018 during another G20 Summit.

President Trump conducted the meeting with no one aside from his wife present—no note taker, no translator, and no official member of his delegation—even though the conversation "appeared longer and more substantive than the White House . . . acknowledged." Compl. ¶ 52, JA __.

President Trump also ignored his recordkeeping responsibilities with respect to at least one meeting with North Korean leader Kim Jong-Un in Hanoi, Vietnam, at a critical nuclear summit. Compl. ¶ 57, JA __. The two met with only interpreters present and note takers were again banned from the meeting. *Id.* Experts on North Korea have expressed concerns that these private conversations provide the North Korean leader with "an opportunity to win concessions from Trump that working-level officials would have advised him not to offer." *Id.*[2]

These recordkeeping failures extend to other top White House officials, including Senior White House Advisor Jared Kushner. For example, the U.S. embassy in Riyadh, Saudi Arabia "was largely left in the dark on the details" of conversations Mr. Kushner had with Saudi Crown Prince Mohammed bin Salman

[2] Even when records have been created, there are serious questions about whether they adequately document the activities, deliberations, decisions, and policies of the president. For example, the official readout of an Oval Office meeting President Trump had just months after taking office with Russian Foreign Minister Sergey Lavrov and then-Russian Ambassador Sergey Kislyak contained "notable discrepancies" with reports that emerged later revealing that the president also disclosed highly classified "code-word" information to the Russian Foreign Minister and Ambassador. Compl. ¶¶ 40-41, JA __-__.

and King Salman during a February 2017 meeting in Saudi Arabia. Compl. ¶ 60, JA __. According to the White House, the three discussed topics of significant international interest including "the peace efforts, as well as American-Saudi cooperation and plans to improve condition in the region through investment." *Id.* Nevertheless, U.S. embassy staff in Riyadh "were not read in on the details of Jared Kushner's trip . . . or the meetings he held with members of the country's Royal Court," *id*., suggesting a desire to keep those details secret.

These practices deviate sharply from the protocols and practices of prior administrations, which "relied on senior aides to witness meetings and take comprehensive notes then shared with other officials and departments." Compl. ¶ 62, JA __. As a career State Department diplomat explained, particularly with Russia a "word-for-word set of notes . . . protect[ed] the integrity of the American side of the conversation against later manipulation by the Soviets or the Russians." *Id.*

Proceedings Below

On May 7, 2019, CREW filed a complaint challenging the failures of the president and his staffers to create, maintain, and properly dispose of records of interactions with certain foreign leaders. The Executive moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter

jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

On February 10, 2020, the court issued a memorandum opinion granting the Executive's motion to dismiss under Rule 12(b)(1) ("Op."). The court noted that its opinion "should not be interpreted to endorse[] the challenged practices[,] nor does it include any finding that the Executive Office is in compliance with its obligations." Op. 2, JA ___. The court held, however, that it was "bound by Circuit precedent to find that it lacks authority to oversee the President's day-to-day compliance with the statutory provisions involved in this case." Op. 1-2, JA ___-___.

CREW has appealed the District Court's February 10, 2020 judgment.

SUMMARY OF ARGUMENT

At issue in this case is whether the president can ignore the foundational obligation the PRA imposes on him to create records of his essential decisions and transactions, free from any judicial review. Withholding that review will grant the president unchecked power to ignore the statute entirely, risking a permanent hole in our nation's history. While this Court has previously indicated a great reluctance to interfere in the president's day-to-day recordkeeping and records management practices, it should not be reluctant to review the claims CREW has brought here. Such review does not involve such day-to-day decisions and will cause no

interference with the president's ability to carry out his assigned functions, whereas withholding review risks rendering an act of Congress a nullity.

Congress enacted the PRA to assure the creation and preservation of "presidential records" for future public access. As a first and necessary step toward that end, the statute, using mandatory language, requires the president to assure the documentation of his "activities, deliberations, decisions, and policies." From early on in his administration, however, President Trump and his staff have categorically refused to create records of high-level meetings with certain foreign leaders and taken affirmative steps to ensure that others, including agency participants, also do not memorialize those meetings. CREW's complaint is based on these failures and seeks declaratory and mandamus relief compelling the president to comply with his obligations under the PRA and the Take Care Clause of the Constitution.

The District Court granted the Executive's motion to dismiss under Fed. R. Civ. P. 12(b)(1), concluding that pursuant to this Court's decision in *Armstrong I* judicial review of CREW's claims is impliedly precluded. The District Court further held that the exception for judicial review this Court recognized in *Armstrong II* does not apply here, characterizing CREW's claims as seeking review of the "day-to-day operations" of the White House as to presidential records. The District Court also dismissed CREW's request for mandamus relief, finding it did not rest on a purely ministerial obligation. As to CREW's claim

under the Take Care Clause, the District Court found it too fell within the preclusion of judicial review recognized in *Armstrong I*. Notably, the District Court made clear it was not addressing and did not endorse the challenged practices, nor did it find those practices were in compliance with the PRA.

The District Court erred in its conclusion that both *Armstrong I* and *Armstrong II* compelled dismissal of CREW's complaint. Any language in those opinions that suggests dismissal is mandated is pure dicta and is inconsistent with the PRA's structure, purpose, and legislative history. To conclude otherwise would completely eviscerate the record creation, maintenance, destruction, and public access components of the statute. Further, the District Court failed to properly assess the impact of judicial review here on the president's control of presidential records while in office—the primary separation of powers concern identified in *Nixon v. Administrator*. Nor did the District Court properly consider the minimal impact that judicial review of record creation obligations would have on the president's ability to carry out his constitutional and statutory functions. The relief CREW seeks would require the president to prospectively refrain from exempting categories of decisions, actions, and meetings from his obligation to create records, but would not interfere with his ability to manage and dispose of his records during his term in office provided these actions are taken in accordance with the remaining obligations and limitations imposed on the president by the PRA.

Further, the District Court misconstrued the ministerial, non-discretionary language of the PRA in its dismissal of CREW's mandamus claim. In reaching its conclusion, the court effectively broadened the discretion the president has under the PRA to decide *how* to satisfy his obligations and permitted him to circumvent non-discretionary obligations, an outcome that contradicts the plain, mandatory language of the PRA.

Finally, the District Court erred in dismissing CREW's claim under the Take Care Clause. The Take Care Clause requires that the president comply with and execute the laws as enacted by Congress. Here, however, the president acted in direct contradiction to the PRA, and there is no clear and convincing evidence that through the PRA Congress intended to bar review of a constitutional claim.

ARGUMENT

I. Standard of review.

This Court reviews motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) *de novo*. *United States ex. rel. Oliver v. Philip Morris USA Inc.*, 826 F.3d 466, 471 (D.C. Cir. 2016). Further, this Court "must accept the factual allegations in the complaint as true." *Sturm, Roger & Co., Inc. v. Chao*, 300 F.3d 867, 871 (D.C. Cir. 2002).

II. The PRA does not preclude judicial review of CREW's claims.

The District Court's rulings that *Armstrong I*, 924 F.2d 282 (D.C. Cir. 1991), bars this case from judicial review and that the exception for judicial review recognized in *Armstrong II*, 1 F.3d 1274 (D.C. Cir. 1993), does not apply are erroneous and should be reversed. The challenge here to the Executive's pattern and practice of excluding categories of meetings and discussions from the PRA's records creation obligation falls outside the scope of these opinions. Any other conclusion would deprive the PRA of any utility by completely undermining a central animating principle of the statute. Further, recognizing judicial review of the Executive's wholesale failure to create certain categories of records would cause no undue interference with the president's day-to-day management of his records.

A. Circuit precedent does not bar this case.

Despite the well-established presumption in favor of judicial review of administrative action, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), this Court has limited the types of claims that are justiciable under the PRA. First, in *Armstrong I*, the Court held that the PRA impliedly precluded review of a suit to prevent the president, the Archivist of the United States, and the National Security Council ("NSC") from erasing material stored on the NSC computer system during the final days of President Ronald Reagan's administration. The Court reasoned

that judicial review for "creation, management, and disposal decisions" would require it to second-guess the president's decisions as to particular documents, and contravene Congress' intent to give the president "virtually complete control over his records during his term in office." 924 F.2d at 290.

Two years later in *Armstrong II* the Court narrowed the reach of *Armstrong I*, cautioning that its opinion in that case "must be read in the context of the issue before the court," 1 F.3d at 1294, and rejected an interpretation of *Armstrong I* that would render "all decisions made pursuant to the PRA . . . [as] immune from judicial review." *Id.* at 1293. As the *Armstrong II* Court explained, that context was a challenge to the proposed destruction of presidential documents, which was not subject to judicial review, to ensure, consistent with the intent behind the PRA, "'executive branch control *over presidential records* during the President's term of office.'" *Id.* (quoting *Armstrong I*, 924 F.2d at 290 (emphasis added by *Armstrong II*)). *Armstrong II*, however, involved a different challenge to "guidelines describing which *existing* materials will be treated as presidential records in the first place." 1 F.3d at 1294 (emphasis in original).

Rejecting the notion that *Armstrong I's* sweeping language applied to the claim before it, the *Armstrong II* Court held that the "district court erred in declining to review the EOP guidelines defining presidential records." *Id.* at 1290. To otherwise extend the judicial review preclusion recognized in *Armstrong I* to

the case before it would "be tantamount to allowing the PRA to functionally render the FOIA a nullity." *Id.* at 1293. Thus, the *Armstrong II* Court struck a different balance than it had in *Armstrong I*, recognizing the need to keep in equipoise the balance between the PRA's protection of presidential records and the FOIA's public access provisions.

The D.C. Circuit has not directly revisited the meaning of these two opinions. In *CREW v. Trump*, 924 F.3d 602 (D.C. Cir. 2019), the Court faced competing interpretations of the *Armstrong* cases, with the Executive arguing that they prohibited the Court "from reviewing any 'claims that the President failed to comply with requirements of the [PRA]'" and the plaintiffs arguing that *Armstrong II* authorized the review of their claim that the president was exempting "'an entire class of records . . . from the PRA's reach.'" *Id.* at 609. But because the Court construed the plaintiffs' claims in the case before it as requiring it to engage in "just the kind of micromanaging proscribed by *Armstrong I*," by determining "whether White House personnel are in fact complying with the directive to conduct all work-related communications on official email," *id.*, the Court declined to resolve the dispute between the parties on the meaning of its prior precedent.

This case squarely presents the question of the extent to which the *Armstrong* cases bar judicial review. Here, CREW is challenging not the failure of the president to comply with existing guidelines, as in *CREW v. Trump*, but the

failure of the president and his senior staff to comply with their most basic obligation under the PRA: to create records documenting the exercise of the president's core constitutional powers.

The president has unilaterally and affirmatively refused to create records of high-level meetings and discussions with certain foreign leaders and has also prevented agencies from memorializing those discussions. By doing so, the Executive has effectively amended the PRA to exclude certain categories of activities from the obligations of the statute. The question for the Court is whether such categorical violations of the PRA's obligation to create records are subject to judicial review.

As a result, this case does not fall within the preclusion of review recognized in *Armstrong I* and *II* on individual creation, management, and disposal decisions. CREW is not asking the Court to second-guess decisions the president has made relating to *specific* documents or dictate that the president document a *particular* meeting or phone call. Rather, CREW seeks prospective relief that would prevent the president from self-exempting an entire category of actions, decisions, and deliberations from the scope of the PRA.

While the Court in *Armstrong II* asserted that "any decisions regarding *whether to create* a documentary presidential record" would not be subject to judicial review, 1 F.3d at 1294 (emphasis in original), to the extent this suggests

that judicial review is impliedly precluded here such a suggestion is dicta. This language was not derived from or relevant to the facts of either *Armstrong* case, and it did not affect the outcome of either decision. The instant case raises an entirely different question than the questions raised in either *Armstrong I* or *Armstrong II.* Neither of those cases involved a claim that the president was not complying with his records creation obligation under the PRA by eliminating entire categories of transactions and decisions from the statute's scope. Nor do principles of *stare decisis* apply, as that doctrine "compels adherence to a prior *factually indistinguishable* decision of a controlling court." *Brewster v. Commissioner*, 607 F.2d 1369, 1373 (D.C. Cir. 1979) (emphasis added).[3] In short, no precedent of this Court dictates dismissal of CREW's claims.

B. Recognizing judicial review of categorical failures to create records would cause no undue interference with the presidency and raises no constitutional concerns.

The animating principle behind this Court's decisions in *Armstrong I* and *Armstrong II* was a reluctance to interfere with the day-to-day management decisions of the president. This concern flows from the need the Court identified in

[3] Nor is *CREW v. Trump* law of the Circuit, as that doctrine applies to bar one panel from nullifying the decision of another panel only where "the *same issue* [is] presented in a *later case* in the *same court*." *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127 (D.C. Cir. 2017) (emphasis in original) (citation omitted). As discussed *supra*, the issue in *CREW v. Trump*, as characterized by the Court, was whether the Executive had failed to comply with existing guidelines.

Nixon v. Administrator to maintain "the proper balance between the coordinate branches," by focusing on the degree to which judicial review "prevents the Executive Branch from accomplishing its constitutionally assigned functions." 433 U.S. at 443 (citation omitted).

Recognizing judicial review of CREW's claims here poses no risk of interfering in the president's day-to-day management of and control over his records. CREW is not asking this Court to direct the president to make a particular decision about a particular record. Nor is it asking this Court to wrest control from the president over his records. Rather, CREW seeks the Court's review of the president's practice of exempting an entire category of decisions, events, or actions from the PRA's document creation requirement. In doing so, the Court would be making an up-front decision on how the president must comply with the PRA, similar to its review of guidelines dictating what records qualify as presidential records. The relief CREW seeks would be no more intrusive on the president's day-to-day activities than the Court's ruling in *Armstrong II* and would likewise have only a prospective effect.

For these same reasons, review of these claims raises no separation-of-powers concerns. Congress enacted the PRA against the backdrop of the Supreme Court's decision in *Nixon v. Administrator*, where it upheld the constitutionality of the PRMPA. Adopting a "pragmatic, flexible approach" to separation of powers

principles, the Supreme Court rejected an interpretation of the Constitution "that contemplates a complete division of authority between the three branches." 433 U.S. at 442-43 (citation omitted). Instead, "the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* at 443 (citation omitted).[4] Applying that analysis here, judicial review of the president's failure (or outright refusal) to document a category of decisions, events, or actions poses no bar to the president accomplishing his constitutionally assigned functions. The president remains free to carry to carry out foreign policy as he sees fit. Nor does it threaten the president's control over his presidential records while in office because any records the Executive creates only become available to the public years after a president's term ends. *See* 44 U.S.C. § 2204. Accordingly, such review fully accords with Congress' intent, as construed in *Armstrong I*, to "minimize outside interference with the day-to-day operations of the President and his closest advisors and to

[4] The *Nixon* decision built on the Court's recognition in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), that Article I of the Constitution vests the legislative authority of the United States in Congress, not the president, as reflected in "[t]he President's power to see that the laws are faithfully executed," which the Court characterized as "limit[ing] his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." 343 U.S. at 587-88.

ensure executive branch control over presidential records during the President's term in office." *Armstrong I*, 924 F.2d at 290.

Indeed, Congress enacted the PRA with these constitutional principles fully in mind, as reflected in the accompanying House Report, H. Rep. 95-1487, at 6, and the contemporaneous analysis the OLC provided Congress. *See, e.g.*, *PRA Hearings* at 90 (statement of Lawrence A. Hammond, Deputy Att'y Gen., OLC) ("[I]t is clear that Congress can legislate with respect to the way papers are maintained so long as it does so in a way that does not lead to disruption of the functioning of the executive branch.").

The ministerial nature of the PRA's records creation obligation reinforces this conclusion. As discussed *infra* at III.B., the PRA imposes on the president the non-discretionary obligation to document the activities of the president and presidential aides, dictating that "the President *shall* take *all* such steps . . . to *assure* that [the president's] activities, deliberations, decisions, and policies . . . are adequately documented." 44 U.S.C. § 2203(a) (emphasis added). Although the PRA gives the president discretion to determine what steps to take, the president may not disregard the obligation to document his activities, as expressed in Congress' use of the word "shall." *See Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320-21 (2020) ("The first sign that a statute imposed an obligation is its mandatory language: 'shall.'"); *Kingdomware Techs., Inc. v.*

United States, 136 S. Ct. 1969, 1977 (2016) ("When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty."); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (by using "shall" in civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied"). To the extent this Court's *Armstrong* decisions preclude judicial review of CREW's claims by failing to give full effect to Congress' use of mandatory language in the PRA they must be overturned.

1. *The PRA and its legislative history do not support preclusion of judicial review of CREW's claims.*

Alternatively, this Court should overturn the *Armstrong* decisions to the extent the Court interprets them to preclude review in this case, even if doing so requires *en banc* review.

As the Court in *Armstrong I* recognized, to determine whether Congress intended to overcome the presumption of judicial review for claims under the PRA, the Court must consider the express language of the statute, "'the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.'" *Armstrong I*, 924 F.2d at 290 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984)). Applying those factors in *Armstrong I*, the Court concluded that the PRA impliedly precluded judicial review "of the President's recordkeeping practices and decisions," 924 F.2d at 291,

in order to "keep in equipoise important competing political and constitutional concerns." *Id.* at 290.

To reach this conclusion, the Court examined the PRA and its legislative history and drew from them a congressional intent to "minimize outside interference with the day-to-day operations of the President and his closest advisors," in recognition of separation of powers concerns. *Id.* According to *Armstrong I*, this intent was evidenced by the "virtually complete control" the PRA accords the president "over his records during his term in office," *id.*, given that neither Congress nor the Archivist "has the authority to veto the President's disposal decision[,] . . . and the lack of any authority to interfere with [the president's] records management practices." *Id.* Based on all this, the Court rejected a suit to prohibit the defendants from destroying certain records, which the Court concluded would have required it to second-guess the president's decisions as to particular documents. Doing so, the Court concluded would "substantially upset Congress' carefully crafted balance" between the degree of control the PRA affords a president over his or her records while in office and the public's ownership and access to those records once the president's term ends. *Id*. at 291.

The *Armstrong I* Court, however, critically misconstrued the congressional intent behind the PRA, which the Court characterized as based on a "keen[] aware[ness] of the separation of powers concerns that were implicated by

legislation regulating the conduct of the President's daily operations." *Armstrong I*, 924 F.2d at 290 (citing H. Rep. 95-1487, at 6-7). In fact, the portion of the House Report that *Armstrong I* cites contains a lengthy discussion of how the Supreme Court's decision in *Nixon* supports, not limits, the constitutionality of congressionally imposed presidential recordkeeping requirements. The legislators cited specifically to the *Nixon* Court's conclusion that "Congress did not breach the separation of powers in ceding control of the Papers to the General Service Administration." H. Rep. 95-1487, at 6. They also relied on the Supreme Court's recognition in *Nixon* that "Congress can legitimately act to rectify the hit-or-miss approach that has characterized past attempts to protect these substantial (government and public) interests (in the records)." *Id.* As the House Report makes clear, far from evincing a congressional desire to "minimize outside interference with the day-to-day operations of the President and his closest advisors," *Armstrong I*, 924 F.2d at 290, the legislative history shows that Congress understood and relied on the Supreme Court's conclusion that imposing recordkeeping mandates on a president presents no constitutional impediments.

Thus, contrary to the reasoning in *Armstrong I*, the legislative history reflects a congressional intent to permit judicial review of the claim brought here. Congress enacted the PRA for the express purpose of ensuring the creation and preservation of "the fullest possible documentary record" of the presidency, 124

Cong. Rec. 34,894—an interest the Supreme Court recognized in *Nixon v. Administrator*, when it upheld the constitutionality of the PRA's predecessor. *See* 433 U.S. at 452. A construction of the PRA that immunizes the president from any lawsuit seeking to hold him accountable to his records creation obligations runs contrary to the core purpose of the statute, and would allow a president to essentially eviscerate the PRA and deprive the public of the historical record of that president. Accordingly, this Court must construe the statute in a manner that accords with its language and purpose. *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 (1883)).

Indeed, as explained by the D.C. Circuit, "the judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch." *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974). Failure to do so "not only might indicate a disrespect for congressional legislative history under Article I, Section 1 of the Constitution, but itself might be constitutionally improper." *Id*. at 605; *accord*. *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (court "must take jurisdiction if it should"). This is because "judicial resolution of the issue better enables the

President to perform his constitutional duty to take care that the laws be faithfully executed." *Nat'l Treasury Employees Union*, 492 F.2d at 605.

The *Armstrong I* Court's sweeping pronouncement about the extent to which judicial review is precluded also cannot be reconciled with the statutory scheme. First, the PRA's creation requirement differs in kind from the other obligations the PRA imposes on a president. Congress enacted a statute that in their words "*require[s]*" a president to adequately document the performance of his functions," but merely "*encourage[s]*" a president to implement sound recordkeeping practices." H. Rep. 95-1487, at 4 (emphasis added). Not only is the record creation requirement mandatory, but it also forms the building block upon which the entire statute rests. The PRA and all of its provisions flow from the threshold obligation to create records. The preservation and recordkeeping requirements of the PRA would be meaningless without it.

The legislative history underlines the importance of the record creation requirement. The drafters understood that "[d]efining the types of documentary materials falling within the ambit of [presidential records] is of primary importance to the act." H. Rep. 95-1487, at 11. They also understood the critical need for the president to create records in the first instance. *See, e.g.*, *PRA Hearings* at 43 (statement of rep. Preyer, Chairman, Gov't Info. and Individual Rights Subcomm.) ("All the bill is trying to do is . . . make sure we have a complete record."); *id.* at

70 (statement of Rep. Brademas, PRA co-sponsor) (explaining one of principal concerns was "to promote the creation of the fullest possible documentary record"); *id.* at 80 (statement of Rep. Ertel, PRA co-sponsor) ("This is a historical preservation bill . . . It is to make a complete history of the Presidency available in the future.").

Other obligations that the PRA imposes—"to make and separate personal papers from Presidential records . . . to adequately document the performance of [the president's] functions," and not to "dispose of presidential records without first obtaining the written views of the Archivist," H. Rep. 95-1487, at 4—would be meaningless if a president could refuse to create entire categories of records without consequence. Perhaps most significantly, the American people, the ultimate owners of presidential records, would be denied access to those records as envisioned in § 2204 if the president systematically fails to create certain categories of records.

In sum, proper application the factors the Supreme Court identified in *Block v. Community Nutrition Institute*, 467 U.S. at 345, compels the conclusion judicial review of CREW's claims is not impliedly precluded.

2. *Withholding judicial review would allow the president to completely subvert the PRA and disrupt the ability of the United States to carry out foreign policy, a result Congress sought to avoid.*

While allowing judicial review of a claim that the president has improperly exempted from the PRA an entire category of records would not unduly disrupt the presidency, allowing the president to contravene the records creation requirement of the PRA risks completely subverting the PRA and thwarting its goals entirely. The PRA's mandate that a president create records of his or her "activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties," 44 U.S.C. § 2203(a), forms the lynchpin for the entire statutory scheme, and without it the statute is deprived of all utility. Quite simply, if the president fails to create records, the preservation and access provisions of the PRA are meaningless.

Further, a conclusion from this Court that it lacks the ability to judicially review the president's carve-out of an entire category of documents from his record creation obligation also would impact the ability of our country to effectively carry out foreign policy. Congress enacted the PRA to guard against this very problem. During its consideration of the legislation, Congress was provided a particularly vivid example of this risk by Rep. Paul N. McCloskey, Jr., when he described a trip that members of the House had taken to Hanoi in December 1975. During a briefing in advance of the trip, then-Secretary of State

Henry Kissinger was asked whether he had entered into any agreements with North Vietnam of which the members were not aware, to which he answered no. But while in Hanoi the North Vietnamese premier presented the congressional delegation "with documents indicating that Mr. Kissinger had executed an agreement to pay reparations to the North Vietnamese." *PRA Hearings* at 41. Congress had no knowledge of this agreement and had never seen the documentation even though it "played a material part in negotiations." *Id.* at 42. Once its existence was revealed another congressional committee requested access but was denied, *id.*, and there was no indication the document even existed in government files. Rep. McCloskey raised this problem because "it goes to the very heart of this legislation [the PRA]. If a later administration cannot obtain documentation of a commitment made by a former President, then we have to legislate in some way that succeeding administrations can be advised of these commitments by other administrations." *Id.*

The recordkeeping lapses of the present administration raise these very concerns. By meeting in secret with foreign leaders such as President Putin and Kim Jong-Un, with no note takers present, President Trump has left both the current administration and his successors in the dark about any commitments he has made on behalf of the United States. Congress enacted the PRA and included a

mandatory obligation to create records to prevent this very danger, further reinforcing the need for judicial review of the claims brought here.

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

Claim One of the complaint requests mandamus relief compelling the Executive to comply with its non-discretionary duties under the PRA. Compl. ¶¶ 72-78, JA ___-___. The complaint identified four ministerial duties: (1) the duty to document the performance of the president's activities and decisions; (2) the duty to categorize records as presidential records or personal records; (3) the duty to comply with the PRA's notification procedures prior to destroying presidential records; and (4) the duty to implement record management controls. Compl. ¶¶ 27, 32, 74, 76, 80, 95, 105, JA ___, ___, ___, ___, ___, ___.

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 Del. Cnty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1533 (D.C. Cir. 1983); *accord CREW v. 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). Each of the duties identified in the complaint is sufficiently specific and non-discretionary to support a claim for mandamus relief because the president may not choose to disregard those obligations under the PRA.

A. A duty may contain discretionary components while still being ministerial.

The District Court held that CREW failed to state a valid mandamus claim because the PRA is "not purely ministerial." Op. 21, JA ___. In particular, the court held that while "the word 'shall' often denotes a mandatory obligation," the language of the PRA "calls for the exercise of considerable judgment." Op. 20, JA ___. In doing so, the court improperly determined that a duty must be entirely without "the application of judgment and the formation of policy" to support mandamus relief. Op. 20, JA ___. This Court's precedent does not support such a restrictive construction.

This Court has not required that a statute be devoid of discretion to support a mandamus claim. To the contrary, while the official in question "of course has discretion in the method by which she chooses to determine [compliance with the statute] . . . that discretion must be exercised in some manner and consistent with the statutory purposes." *Ganem v. Heckler*, 746 F.2d 844, 854 (D.C. Cir. 1984). And "[w]hen the [official] refuses to perform her statutory duties, mandamus is an

appropriate remedy to force her to do so." *Id.* This is because "[t]he fact that the statute does not dictate precisely how compliance must be accomplished in no way lightens [the] legal duty to comply." *CREW v. Exec. Office of the President*, 587 F. Supp. 2d 48, 63 (D.D.C. 2008). Instead, the pertinent standard is whether the statute imposes a ministerial duty, such that "the official in question has no authority to determine *whether* to perform the duty." *Swan,* 100 F.3d at 977 (emphasis added).

Accordingly, this Court has found statutes specific enough to support mandamus relief if they provide that the official in question "shall" do something, while leaving the details of how it should be done to the official's discretion. *See, e.g.*, *N. States Power Co. v. U.S. DOE*, 128 F.3d 754, 758 (D.C. Cir. 1997); *13th Reg'l Corp.*, 654 F.2d at 762. For example, in *Nat'l Treasury Emps. Union v. Nixon*, the Court found that "[t]he fact in and of itself that the President was required to interpret both [statutes at issue] before determining what his legal obligations were . . . did not render his duty to [execute those obligations] other than ministerial." 492 F.2d at 602. Thus, an obligation may be ministerial while nevertheless leaving the president some discretion, as long as he has no discretion as to whether to perform that obligation. Likewise, the PRA dictates that the president "shall" document his activities and decisions, categorize records, implement management controls, and follow notification procedures, eliminating

the president's discretion as to *whether* to perform those duties. This meets the standard for mandamus relief.

B. The president's obligations under the PRA are mandatory.

In other cases, the District Court has 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 Executive has ministerial obligations to: (1) create records documenting meetings and conversations; (2) categorize records as presidential or personal; and (3) notify the Archivist prior to disposal or destruction of presidential records. With respect to each of these duties, while the president has discretion, for example, in how to document his meetings and the process for categorizing records, he or she may not wholesale disregard those duties with respect to particular categories of activities that are not exempt under the statute. As a result, the failure of the Executive to abide by these duties forms a proper basis for the mandamus relief requested.

The PRA uses clear, mandatory terms and contains both ministerial and non-ministerial duties. The statute's use of the words "shall," "assure," and "if" leaves the President no discretion to ignore these duties. *Monsanto*, 491 U.S. at 607 (finding that by using "shall" in civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases

where the statute applied"); *United Gov't Sec. Officers v. Chertoff*, 587 F. Supp. 2d 209, 219 (D.D.C. 2008) ("These regulations use the words 'must' and 'shall,' respectively, leaving no discretion on the part of the agency"). First, the statute provides that the President "*shall* . . . *assure* that the activities, deliberations, decisions, and policies that reflect the performance of [his] 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) (emphasis added). Thus, the PRA mandates that the president document his activities. Choosing whether to document those activities at all does not fall within the discretion accorded to the president under the statute. The PRA also requires that documents "*shall* . . . be categorized as Presidential records or personal records upon their creation or receipt." 44 U.S.C. § 2203(b) (emphasis added). Thus, the president likewise has no discretion to refuse to categorize records. Finally, "the President may dispose of those Presidential records . . . that no longer have administrative, historical, information, or evidentiary value *if*—the President obtains the views, in writing, of the Archivist . . . and the Archivist states that the Archivist does not intend to take any action [under the PRA]." 44 U.S.C. § 2203(c) (emphasis added). Thus, although the president has discretion to decide whether to dispose of certain records, once he has done so, the president is required to obtain the Archivist's views in writing before disposing of presidential records.

That the president is permitted to exercise discretion in determining the adequacy of documentation and implementing processes to comply with the PRA does not mean that he has discretion to ignore those duties, or any other obligation arising under the statute, 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 office 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).

The District Court erroneously held that the discretion granted to the president under the statute necessarily meant that it contained no ministerial duties. As such, the discretion and judgment the president is permitted to exercise in fulfilling certain obligations under the PRA led the court to disregard the specific aspects of the PRA in which the president is afforded no discretion by the very language of the statute. For example, the court read the phrase "'adequately' documented" in 44 U.S.C. § 2203(a) to imply such a level of discretion that it renders the word "shall" meaningless. Op. 20, JA ___. In doing so, the court

overstated the role of discretion in the PRA and effectively broadened the discretion the president has under the PRA to decide *how* to satisfy his obligations and permits him to circumvent non-discretionary obligations altogether. This expansion is in direct contrast with the language of the PRA, which denotes certain mandatory obligations.

In addition, the District Court's opinion examines only section 2203(a), and failed to examine the president's duties under subsections (b) and (c). Under those subsections, the president must categorize records as presidential or personal and obtain the Archivist's views in writing before disposing of presidential records, respectively. In failing to review all of the president's obligations under the PRA, the court overemphasized the discretion allotted to the president and allows the president to wholly avoid his statutory obligations. The court rested its holding on *Armstrong I* and *Armstrong II*, "observ[ing] that the PRA 'accords the President virtually complete control over his records during his term of office.'" *Armstrong I*, 924 F.2d at 290; *Armstrong II*, 1 F.3d at 1291; Op. 20, JA ___. Neither of those cases, however, grants the president absolute control over all aspects of his records for all time. If Congress had intended for the president to have absolute control over his records, it would never have enacted the PRA.

Indeed, the PRA is predicated on the president's initial obligation to create records of "the activities, deliberations, decisions, and policies that reflect the

performance of the President's constitutional, statutory, or other official or ceremonial duties." 44 U.S.C. § 2203(a). Thus, the entire statute would be rendered a nullity if the Executive was permitted to refrain from creating records in the first instance. Instead, laws must be interpreted "'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section." *Menasche*, 348 U.S. at 538-39 (*quoting Ramsdell*, 107 U.S. at 152).

IV. The District Court erred in holding that implied preclusion of a statutory claim likewise bars constitutional claims.

The District Court concluded, contrary to judicial precedent, that the implied preclusion of CREW's statutory claims necessarily precluded its constitutional claim as well. Op. 16-17, JA ___-___. Specifically, the court held that CREW merely "repackage[d]" its statutory claims under the PRA "as a constitutional claim in an apparent effort to avoid the strictures of *Armstrong I*." *Id.* In doing so, however, the court erred as a matter of law. A "heightened showing" is required to find that Congress intended to preclude review of constitutional claims, as compared to a preclusion of statutory claims. *Webster v. Doe*, 486 U.S. 592, 603 (1988). As a result, constitutional claim preclusion does not flow as a necessary result of statutory preclusion. Instead, the District Court was required to separately determine whether the Executive's failure to follow federal law, and its actions preventing agency compliance with the FRA, give rise to a reviewable

constitutional claim. *Id.* at 603-604 (separately evaluating preclusion of constitutional claim).

In Claim Five of the complaint, CREW challenges the Executive's failure to comply with federal law "to create and maintain records documenting 'the activities, deliberations, decisions, and policies that reflect the President's constitutional, statutory, or other official or ceremonial duties." Compl. ¶ 100, JA ___ (quoting 44 U.S.C. § 2203(a)). CREW likewise challenges the Executive's "interference by the President with the duty of the Department of State to 'make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency.'" Compl. ¶ 101, JA ___ (quoting 44 U.S.C. § 3101). These actions violate Article II, Section 3 of the U.S. Constitution, which provides that the president "shall take Care that the Laws be faithfully executed" (the "Take Care Clause").

The Take Care Clause requires that the president comply with and execute the laws as enacted by Congress. Accordingly, the president may not act contrary to a validly enacted statute. The president also may not disregard or suspend laws enacted by Congress. *See Train v. City of New York*, 420 U.S. 35, 47 (1975); *Nat'l Treasury Employees Union*, 492 F.2d at 601. He or she may not make law nor amend a validly enacted law. *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (the

Take Care Clause "allows the President to execute the laws, not make them"). The Take Care Clause also prevents the president from ordering executive branch officials to violate the law. *See, e.g.*, *Train,* 420 U.S. at 47 (president could not direct EPA Administrator to withhold validly appropriated funds). For example, the Supreme Court held in *Clinton v. City of New York*, 524 U.S. 417, 448 (1998), that the Line Item Veto Act was unconstitutional because it effectively allowed the president to amend legislation that had been validly enacted by Congress. *Id*. at 448. This was so even though both political branches were aligned in approving of the legislation; as the Court explained, "[i]f there is to be a new procedure in which the President will play a different role in determining the final text of what may 'become a law,' such change must come not by legislation, but through the amendment procedures set forth in Article V of the Constitution." *Id.* at 449.

Unconstitutional conduct by the president is subject to judicial review. *See*, *e.g.*, *Medellin*, 552 U.S. at 1372 (determining validity of presidential memorandum); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) ("[A]n independent claim of a President's violation of the Constitution would certainly be reviewable."). This is unsurprising since, in general, "'judicial review is available to one who has been injured by an act of a government official which is in excess of his express or implied powers.'" *Id.* at 1327 (quoting *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958).

Further, even if the Executive's actions are unreviewable under the PRA, it does not follow that Congress intended to preclude review of constitutional claims arising from the same conduct. *Webster*, 486 U.S. at 603. As the Supreme Court has explained, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Id.* Thus, "[w]hen the Constitution is invoked, a claim of preclusion faces an especially high hurdle." *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of U.S.*, 264 F.3d 52, 59 (D.C. Cir. 2001). This "heightened showing" is necessary "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). As a result, "in the absence of explicit statutory language barring review of constitutional challenges," the evidence of congressional intent to preclude must be "clear and convincing." *McBryde*, 264 F.3d at 59. This Court has not even "regarded broad and seemingly comprehensive statutory language as supplying the necessary clarity" to bar constitutional claims. *Id*.

The PRA contains no language expressly barring constitutional claims, and the District Court identified no "clear and convincing" evidence that Congress intended to do so. Indeed, the District Court made no reference to either the

heightened standard for constitutional claim preclusion or the clear and convincing standard that applies. Instead, the court rested its holding entirely on this Court's decision in *Armstrong I* barring *statutory* claims. Op. 17, JA ___ (review barred by the "strictures of *Armstrong I*"). This was legal error and must be reversed. Consistent with this Court's precedent, the District Court must separately analyze whether Congress intended to preclude judicial review of constitutional claims, and whether the complaint is sufficient to allow the court to draw the reasonable inference that the Executive's actions have violated the Take Care Clause of the Constitution.

CONCLUSION

For all the reasons above, the decision of the District Court should be reversed and remanded for further analysis and findings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,528 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

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ADDENDUM

STATUTORY AND REGULATORY PROVISIONS

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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 thereof, 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 records 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.

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on June 1, 2020, I electronically filed the foregoing *Brief for Plaintiffs-Appellants*, and the addendum thereto, with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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