[ORAL ARGUMENT NOT 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 APPELLEES

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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

The appellants are Citizens for Responsibility and Ethics in Washington, National Security Archive, and Society for Historians of American Foreign Relations. The appellees are Donald J. Trump, in his official capacity as President of the United States, and the Executive Office of the President. There are no amici.

B. Rulings Under Review

The ruling under review (issued by Judge Amy Berman Jackson) is an order dated February 10, 2020 (Dkt No. 23). The opinion accompanying that order (Dkt No. 24) is reported at 438 F. Supp. 3d 54 (D.D.C. 2020).

C. Related Cases

Counsel for appellees are not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Thomas Pulham
Thomas Pulham

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GLOSSARY

CREW	Citizens for Responsibility and Ethics in Washington
FOIA	Freedom of Information Act
FRA	Federal Records Act of 1950
JA	Joint Appendix
PRA	Presidential Records Act of 1978

INTRODUCTION

This case is the latest in a series of efforts to undo the "intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns" relating to the management and preservation of presidential records. *Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991) (*Armstrong I*). The Presidential Records Act of 1978 (PRA), 44 U.S.C. §§ 2201-2209, balances these concerns by establishing "presidential control of records creation, management and disposal during the President's terms of office and public ownership and access to the records after the expiration of the President's term." *Armstrong I*, 924 F.2d at 291. This Court has preserved that balance by refusing "to rule on the adequacy of the President's records management practices or overrule his records creation, management, and disposal decisions." *Id.* at 290; *see also Citizens for Responsibility and Ethics in Washington v. Trump*, 924 F.3d 602, 608-10 (D.C. Cir. 2019) (denying mandamus relief).

The plaintiffs in this case—Citizens for Responsibility and Ethics in Washington (CREW), National Security Archive, and Society for Historians of American Foreign Relations—claim that the President violates the PRA when he meets with foreign leaders without a note-taker present to make a contemporaneous transcript of the exchange. They seek mandamus-style relief requiring the President to create such records.

The district court correctly rejected plaintiffs' invitation to interfere with the President's recordkeeping practices and his conduct of foreign affairs. Because "the PRA accords the President virtually complete control over his records during his term of office," *Armstrong I*, 924 F.2d at 290, plaintiffs cannot establish either a clear and indisputable right to the relief they seek, or that the President has a ministerial duty to act in the manner they prefer. Plaintiffs' attempt to restyle these claims as a violation of the Take Care Clause adds nothing to their argument and provides no basis for judicial review.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1361. Dkt No. 1, ¶ 10 (JA__). The district court dismissed plaintiffs' complaint on February 10, 2020. Dkt No. 23 (JA__). Plaintiffs filed a timely notice of appeal on February 18, 2020. Dkt No. 25 (JA__). This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Plaintiffs claim that the President violated the Presidential Records Act and the Take Care Clause by meeting with foreign leaders without a note-taker present to create a transcript of the exchange. The question presented is whether plaintiffs have demonstrated entitlement to mandamus and declaratory relief against the President and the Executive Office of the President to correct such "recordkeeping failures." Dkt No. 1 ¶ 8 (JA__).

PERTINENT STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

A. Statutory Background

The Presidential Records Act of 1978, 44 U.S.C. § 2201 *et seq.*, directs the President to "take all 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). In service of that requirement, records produced or received by the President or his staff "shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately." *Id.* § 2203(b).

Presidential records are those "documentary materials, or any reasonably segregable portion thereof, created or received by the President" or his advisors[1] "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." 44 U.S.C. § 2201(2)(B). The PRA specifically excludes from its definition

[1] The relevant officials are "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." 44 U.S.C. § 2201(2)(B).

of presidential records "any documentary materials that are . . . official records of an agency," as that term is defined in the Freedom of Information Act (FOIA). *Id.* § 2201(2)(B).[2] This latter, far broader, category of material falls under the Federal Records Act of 1950 (FRA), 44 U.S.C. §§ 2101-2120, 2901-2911, 3101-3107, 3301-3314. The two statutory schemes do not overlap, so "no record is subject to both." *Armstrong v. Executive Office of the President*, 90 F.3d 553, 556 (D.C. Cir. 1996). Rather, "[t]he FRA defines a class of materials that are federal records subject to its provisions, and the PRA describes another, mutually exclusive set of materials that are subject to a different and less rigorous regime." *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1293 (D.C. Cir. 1993) (*Armstrong II*).

The PRA permits the President to dispose of Presidential records "that no longer have administrative, historical, informational or evidentiary value," but it requires that the President first seek the views of the Archivist. 44 U.S.C. § 2203(c). While the Archivist may "inform Congress of the President's desire to dispose of the records, neither the Archivist nor the Congress has the authority to veto the President's disposal decision." *Armstrong I*, 924 F.2d 282, 290 (D.C. Cir. 1991).

Once a President's time in office has concluded, the Archivist takes on a more prominent role, "assum[ing] responsibility for the custody, control, and preservation of, and access to" that President's records. 44 U.S.C. § 2203(g)(1). The Archivist is

[2] The PRA cites 5 U.S.C. § 552(e), but the definition of agency has been recodified at 5 U.S.C. § 552(f).

charged with "an affirmative duty to make such records available to the public as rapidly and completely as possible." *Id.* § 2203(g)(1)-(2). Presidential records generally become subject to public request under FOIA five years following the President's final term in office, although certain records may be subjected to longer restrictions. *See id.* § 2204(a), (b)(2).

The PRA and its legislative history "reflect a congressional intent to balance two competing goals." *Armstrong I*, 924 F.2d at 290. The first was to "establish the public ownership of presidential records and ensure the preservation of presidential records for public access after the terminations of a President's term in office." *Id.* The second, motivated by separation of powers concerns, was the desire to "minimize outside interference with the day-to-day operations of the President" and "to ensure executive branch control over presidential records during the President's term in office." *Id.* The balance Congress struck was to "requir[e] the President to maintain records documenting the policies, activities, and decisions of his administration, but leaving the implementation of such a requirement in the President's hands." *Id.* Consistent with Congress's choice to give "the President virtually complete control over his records during his term of office," this Court has held that "the PRA precludes judicial review of the President's recordkeeping practices and decisions." *Id.* at 290-91.

B. Factual Background and Prior Proceedings

1. The plaintiffs in this case—CREW, National Security Archive, and Society for Historians of American Foreign Relations—claim that the President violated the PRA and the Take Care Clause with respect to his meetings with foreign leaders. Their complaint cites press reports that "President Trump has had at least five separate meetings with Russian President Vladimir Putin without note takers present," which they assert "mean[s] that no official U.S. record of those meetings exists." Dkt No. 1 (Compl.) ¶ 7 (JA__); *see also id.* ¶¶ 42-52 (JA__) (describing each meeting). The complaint also alleges that "President Trump confiscated a State Department interpreter's notes" after one such meeting "and ordered the interpreter not to disclose to anyone what he had heard." *Id.* ¶ 7 (JA__); *see also id.* ¶ 42 (JA__). From these and other alleged "recordkeeping failures," plaintiffs infer that the President has a "policy and practice of failing to create—or affirmatively directing others not to create—records of meetings" with foreign leaders and of improperly classifying agency records as presidential records. *Id.* ¶¶ 8-9 (JA__).

The complaint seeks relief based on five separate claims. The first claim seeks "mandamus relief ordering the President, his staff, and the EOP to comply with their mandatory, non-discretionary duties under the PRA." Compl. ¶ 78 (JA__). Plaintiffs allege that the President "personally as well as by and through his staff" has violated these duties by (1) "engaging in a policy and practice of refusing to create records of his meetings and conversations with foreign leaders"; (2) "asserting unilateral and

exclusive control over the contents" of such meetings, including by "seizing interpreter's notes" and "maintaining recordkeeping policies" that "improperly classify agency records as presidential records"; and (3) "destroying or ordering the disposal of presidential records without obtaining the Archivist's views." *Id.* ¶ 76 (JA__).

The second, third, and fourth claims seek declaratory judgments that the President has violated the PRA (and in Claim Three, the FRA) through each of the three alleged policies or practices identified in Claim One. *See* Compl. ¶¶ 80-82 (JA__) (Claim Two: failure to create records); *id.* ¶¶ 86-92 (JA__) (Claim Three: assertion of control, seizure of notes, and classification of records); *id.* ¶¶ 95-97 (JA__) (Claim Four: failure to seek Archivist's views). Finally, the fifth claim seeks a declaratory judgment that the President's failure to comply with the PRA and FRA also violates the Constitution's Take Care Clause, as well as injunctive relief to require compliance with those statutes.

2. On February 10, 2020, the district court granted the government's motion to dismiss, holding that this Court's decision in *Armstrong I* required dismissal of plaintiffs' claims. Dkt No. 24 (Op.) (JA__). In *Armstrong I,* this Court held that "the PRA precludes judicial review of the President's recordkeeping practices and decisions." Op. 7 (JA__) (quoting *Armstrong I*, 924 F.2d at 291). The district court observed that "in each claim" of their complaint, plaintiffs were "questioning the President's 'record management practices' and his 'creation, management, and

disposal decisions.'" Op. 10 (JA__). The court recognized that an exception to the judicial review bar existed for claims that challenge "'the initial classification of existing materials,'" and that courts could review classification guidelines "'for the limited purpose' of ensuring that [they] did not encompass materials that would otherwise be subject to the Freedom of Information Act." Op. 8-9 (JA__) (quoting *Armstrong II*, 1 F.3d at 1290, 1294). But plaintiffs had not alleged "that anyone in the White House has actually 'classified' a record of a meeting with a foreign leader as a presidential record, much less, that there is a general classification guideline or policy" that the court could review. Op. 15 (JA__). Rather, plaintiffs' complaint asked the court "to do precisely what it is precluded from doing: to review the 'day-to-day operations' of the White House concerning presidential records." Op. 17 (JA__).

The court rejected plaintiffs' efforts to "repackag[e]" their claims of statutory violations "as a constitutional claim" under the Take Care Clause "in an apparent effort to avoid the strictures of *Armstrong I*." Op. 16-17 (JA__). Such "artful pleading" could not "circumvent the preclusion of judicial review." Op. 17 (JA__).

The district court further held that, even if plaintiffs' claims were not barred outright by *Armstrong I*, plaintiffs failed to satisfy the requirements for mandamus jurisdiction. The court held that plaintiffs "have not established the clear duty to act necessary to support the request for mandamus" because the PRA does not impose any "purely ministerial obligations." Op. 21. (JA__). Rather, the court explained, the

duty to "assure 'adequate' documentation of Presidential activities . . . necessarily involves the application of judgment and the formulation of policy." Op. 20 (JA__). And because the district court did not have jurisdiction pursuant to the mandamus statue, it also lacked "jurisdiction to issue the declaratory and injunctive relief that plaintiffs have requested" in their other claims. Op. 21 (JA__).

SUMMARY OF ARGUMENT

I. Plaintiffs claim that the President and his staff have violated the PRA by failing to create, maintain, and properly dispose of records of the President's meetings with foreign leaders. Their primary objection is that the President has held such meetings without note takers present. Plaintiffs seek mandamus-style relief to compel the President to correct these alleged "recordkeeping failures." Compl. ¶ 8 (JA__).

Plaintiffs fail to demonstrate the required clear and indisputable right to relief. *CREW v. Trump*, 924 F.3d 602, 606 (D.C. Cir. 2019). This Court has long held that the PRA "precludes judicial review of the President's recordkeeping practices and decisions," *Armstrong I*, 924 F.2d 282, 291 (D.C. Cir. 1991), including "decisions regarding *whether to create* a documentary presidential record," *Armstrong II*, 1 F.3d 1274, 1294 (D.C. Cir. 1993). Plaintiffs' attempt to compel the creation of transcripts for the President's meeting with foreign leaders would not only "require just the kind of micromanaging proscribed by *Armstrong I*," *CREW*, 924 F.3d at 609, but would intrude into the President's personal conduct of foreign affairs. Plaintiffs have also failed to allege any plausible violations of the PRA, much less to the degree required

to invoke mandamus jurisdiction. The President has "virtually complete control," *Armstrong I*, 924 F.2d at 290, over records creation and management. Allegations that the President failed to create certain types of records on specific occasions therefore do not state a violation of the PRA. Any contention that the statute precludes the President from engaging in talks with foreign leaders without a note taker would ascribe to Congress an intent not merely to micromanage presidential affairs but to intrude into the conduct of diplomacy with leaders of foreign states.

The failure of plaintiffs' mandamus claim dooms their claims seeking declaratory relief based on the same factual allegations. *See CREW*, 924 F.3d at 610 (declining to entertain claims for declaratory relief under similar circumstances); *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (explaining that declaratory relief "presupposes the existence of a judicially remediable right").

II. Plaintiffs' repackaging of their arguments under the Take Care Clause is equally unavailing. The Supreme Court has carefully "distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." *Dalton v. Specter*, 511 U.S. 462, 472 (1994). Claims alleging simply that an official has "exceeded his statutory authority are not 'constitutional' claims." *Id.* at 473.

STANDARD OF REVIEW

This Court reviews an order granting a motion to dismiss de novo. *King v. Jackson*, 487 F.3d 970, 972 (D.C. Cir. 2007). The threshold requirements for

mandamus jurisdiction are likewise reviewed de novo. *CREW v. Trump*, 924 F.3d 602, 606 (D.C. Cir. 2019).

ARGUMENT

I. Plaintiffs Fail To Establish The Requirements For Mandamus Relief Requiring The President To Make Transcripts Or Other Contemporaneous Notes Of His Conversations With Foreign Leaders.

The Mandamus Act confers jurisdiction on the district courts over actions "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. "[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). In order to obtain mandamus-style relief, "a plaintiff must demonstrate (1) a clear and indisputable right to relief, (2) that the government official has a clear duty to act, and (3) that no adequate alternative remedy exists." *CREW v. Trump*, 924 F.3d 602, 606 (D.C. Cir. 2019) (quotation marks omitted). "Even when the legal requirements for mandamus jurisdiction have been satisfied," a court may only grant mandamus-style relief "when it finds compelling equitable grounds." *American Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016); *see also 13th Reg'l Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980).

A. Plaintiffs Do Not Have A Clear and Indisputable Right To Relief Under The Presidential Records Act.

1. The Presidential Records Act Bars Judicial Review Of The Manner In Which A President Chooses To Record Conversations With Foreign Leaders.

a. In *Armstrong I*, 924 F.2d 282, 291 (D.C. Cir. 1991), this Court held that the PRA "precludes judicial review of the President's recordkeeping practices and decisions." That case concerned allegations that President Reagan, Vice President Bush, and components of the Executive Office of the President "intend[ed] to delete material from the White House computer systems." *Id.* at 286. The *Armstrong* plaintiffs wanted to preserve access to these records, which contained emails and other communications of administration officials over the course of several years. *Id.* at 286-87. They sought a "declaration that many of the documents stored in the [computer] system at the close of the Administration are federal and presidential records" and an "injunction prohibiting the destruction of these documents and directing the President and [the National Security Council] to classify and preserve the documents." *Id.* at 287.

This Court held that the PRA is "one of the rare statutes" that "impliedly preclude[s] judicial review." *Armstrong I*, 924 F.2d at 290. The Court explained that "[t]he statutory scheme and legislative history of the PRA . . . reflect a congressional intent to balance two competing goals." *Id.* On the one hand, "Congress sought to establish the public ownership of presidential records and ensure the preservation of

presidential records for public access after the termination of a President's term in office." *Id.* On the other, Congress was cognizant of "separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations," and "therefore sought assiduously to minimize outside interference with the day-to-day operations of the President and his closest advisors." *Id.* Congress balanced these competing concerns by "requiring the President to maintain records documenting the policies, activities, and decisions of his administration, [while] leaving the implementation of such a requirement in the President's hands." *Id.*

The Court recognized that "permitting judicial review of the President's compliance with the PRA would upset the intricate statutory scheme Congress carefully drafted to keep in equipoise [these] important competing political and constitutional concerns." 924 F.2d at 290. The Court therefore concluded that Congress did not "inten[d] to allow courts, at the behest of private citizens, to rule on the adequacy of the President's records management practices or overrule his records creation, management, and disposal decisions." *Id.*

In a subsequent decision in the same litigation, the Court reaffirmed that claims under the PRA are not subject to judicial review, while recognizing a limited role for courts to play in ensuring that agency records are properly subject to the FRA and FOIA. Following remand in *Armstrong I*, the plaintiffs amended their complaint to drop any claim under the PRA. *See Armstrong v. Executive Office of the President*, 810 F. Supp. 335, 337 n.1 (D.D.C. 1993). Instead, the plaintiffs invoked the FRA and FOIA

to argue that White House guidelines improperly classified certain material as Presidential records that were in fact agency records subject to these other statutes. *Armstrong II*, 1 F.3d 1274, 1290 (D.C. Cir. 1993).

This Court held that, when presented with such a claim, "courts may review guidelines outlining what is, and what is not, a 'presidential record' to ensure that materials that are not subject to the PRA are not treated as presidential records." *Armstrong II*, 1 F.3d at 1294. Such limited review is necessary to preserve the vitality of statutory schemes governing agency records because "non-presidential materials that would otherwise be immediately subject to the FOIA would be shielded from its provisions, whether wittingly or unwittingly, if they were managed as presidential records." *Id.* at 1293. The Court was careful to underscore, however, that "creation, management, and disposal decisions" relating to presidential records remains unavailable. *Id.* at 1294. Thus, for example, "the courts may not review any decisions regarding *whether to create* a documentary presidential record." *Id.*

More recently, this Court addressed the availability of mandamus-style relief under the PRA in *CREW*, where two of the plaintiffs here alleged that White House personnel used certain "message-deleting apps that guarantee confidentiality by encrypting messages and then erasing them forever once read by the recipient." 924 F.3d at 604. The plaintiffs sought mandamus-style relief "compelling the president and the Executive Office . . . to comply with their ostensibly 'non-discretionary duties'" under the PRA: "to categorize records as presidential or personal; to follow

certain procedures, including notifying the Archivist, before disposing of records; and to implement record management guidelines." *Id.* at 605. They also "sought a declaration that the White House's knowing use of message-deleting apps and its failure to issue guidelines concerning such apps violate the PRA." *Id.*

The Court held that the plaintiffs had failed to demonstrate a "clear and indisputable right to relief" for two reasons. First, the White House had issued guidance "instruct[ing] its staff to comply with the PRA, and it has done so by prohibiting the use of message-deleting apps and restricting electronic communications to official email accounts that automatically preserve records." 924 F.3d at 606. The "second and related obstacle to mandamus relief" was that, even if compliance with the PRA were imperfect, the Court "would lack jurisdiction to order the White House to take corrective action." *Id.* at 608. The Court explained that, under *Armstrong I*, courts may not "review the President's 'day-to-day operations'" to monitor "compliance with the PRA." *Id.* at 609. But that is what the *CREW* plaintiffs had asked the Court to do: to "[d]etermin[e] whether White House personnel are in fact complying" with their records preservation duties. Because that "would require just the kind of micromanaging proscribed by *Armstrong I*," the plaintiffs there could not establish a clear and indisputable right to relief, and the Court denied mandamus-style relief. *Id.*

b. These decisions foreclose plaintiffs' claims here. Just like the parties in these other cases, plaintiffs in this case challenge "the adequacy of the President's records management practices" and seek to "overrule his records creation, management, and disposal decisions." *Armstrong I*, 924 F.2d at 290; *see also Armstrong II*, 1 F.3d at 1294. "In their complaint, plaintiffs emphasize the particular importance of the creation and retention of records of the Chief Executive's meetings with foreign leaders," and they allege that "those records are not being generated or are being destroyed." Op. 10 (JA__) (citing Compl. ¶¶ 6-7, 39, 53 (JA__, __, __)); *see also* Compl. ¶ 76 (JA__). But "courts may not review any decisions regarding *whether to create* a documentary presidential record." *Armstrong II*, 1 F.3d at 1294. And judicial review of "'disposal decisions' . . . is also unavailable." *Id.*

Plaintiffs nevertheless contend that this Court's case law "does not bar this case" because no prior decision "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." Br. 18, 22; *see also* Br. 22 (arguing that "principles of *stare decisis*" apply only to "*factually indistinguishable*" cases). Plaintiffs cannot sidestep precedent simply by alleging a "policy and practice" of noncompliance with the PRA. *See* Compl. ¶ 76 (JA__). Nothing in either *Armstrong I* or *II* exempts actions taken pursuant to a policy or practice from the bar on judicial review. *See* Op. 13 (JA__). *Armstrong* I involved a category of documents, *see* 924 F.2d at 284 ("any material stored on the NSC computer system during the last

two weeks of the Reagan Administration"), and *CREW* involved a challenge to an allegedly widespread practice of using message-deleting apps. Those cases applied a clear rule that *any* challenge to the President's "recordkeeping practices and decisions," including those regarding the creation or disposal of records, is barred. *Armstrong II*, 1 F.3d at 1290.

Regardless, plaintiffs' complaint does not identify any actual policy and practice that could be reviewed without "interfer[ing] with the day-to-day operations of the President." *Armstrong I*, 924 F.2d at 290. They assert that the President violated the PRA by holding some meetings with foreign leaders "without note takers present." Compl. ¶ 7 (JA__); *see also id.* ¶ 45 (JA__) (no "accompanying American witnesses"); *id.* ¶ 49 (JA__) ("accompanied only by interpreters"); *id.* ¶ 52 (JA__) ("no translator, no note-taker, and no official member of his delegation"). They contrast this alleged practice with the preferences of some prior presidents, who "wanted a word-for-word set of notes" created by witnesses to the meetings. *Id.* ¶ 62 (JA__). And they suggest that the absence of such a transcript "mean[s] that no official U.S. record of those meetings exists." *Id.* ¶¶ 7 (JA__); *but see id.* ¶ 45 (JA__) (acknowledging that a readout was created of one such meeting). Even if the PRA could somehow be read to require the type of record plaintiffs prefer, *but see infra pp.* 19-22, any attempt to compel the President to have witnesses transcribe his meetings with foreign leaders would "require just the kind of micromanaging proscribed by *Armstrong I*," *CREW*,

924 F.3d at 609, and intrude into the President's conduct of foreign affairs in a manner never sanctioned by any court.

Plaintiffs appear to recognize the fatal difficulties with their argument when they invite the Court to "overturn the *Armstrong* decisions to the extent the Court interprets them to preclude review." Br. 26. Even if such an argument were appropriate in the context of mandamus, plaintiffs cannot show any defect in this Court's prior decisions. They assert that the Court in *Armstrong I* "critically misconstrued the congressional intent behind the PRA." Br. 27. The House Report they cite observes that legislation addressing presidential papers would "not breach the separation of powers" if "the executive branch remained in full control" of the papers during a president's term in office, but might be unconstitutional "[w]ere Congress to give control of the papers to some entity outside the executive branch." H.R. Rep. No. 95-1487, at 6 (1978). Contrary to plaintiffs' characterization of the legislative record, this supports the assessment in *Armstrong I* that Congress was "keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations" and "sought assiduously to minimize outside interference with th[ose] day-to-day operations." *Armstrong I*, 924 F.2d at 290.

Plaintiffs also urge that the result in *Armstrong I* "cannot be reconciled with the statutory scheme." Br. 30. But they do not attempt to engage with this Court's statutory analysis, which noted that Congress had deliberately "le[ft] the

implementation of [the PRA] in the President's hands" and had not authorized "any authority to interfere with his records management practices." 924 F.2d at 290. Permitting review of plaintiffs' claim would result in precisely the type of intrusion that Congress was careful to avoid.

2. Plaintiffs' Allegations Do Not, In Any Event, Establish Any Violations Of The Presidential Records Act.

As this Court noted in *CREW*, "[t]he PRA sets out three basic requirements for the handling of presidential records during a president's tenure." 924 F.3d at 604. The factual allegations in plaintiffs' complaint focus on just one of these requirements. Section 2203(a) provides that, "[t]hrough the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that [his] activities . . . are adequately documented and that such records are preserved and maintained as Presidential records." 44 U.S.C. § 2203(a).[3]

[3] The other two statutory requirements, regarding the categorization and disposal of records, are not implicated here. Section 2203(b) requires that records "shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately." 44 U.S.C. § 2203(b). Plaintiffs' complaint contains no allegation that the White House has failed to separate presidential from personal records. Section 2203(c) authorizes the President to "dispose of" certain presidential records "if . . . the President obtains the views, in writing of the Archivist concerning the proposed disposal." *Id.* § 2203(c). Plaintiffs' complaint does not contain any allegations regarding the disposal (or intended disposal) of documents either.

Plaintiffs broadly assert that that the President ("personally as well as by and through his staff") violated the PRA by "engaging in a policy and practice of refusing to create records of his meetings and conversations with foreign leaders." Compl. ¶¶ 76, 81 (JA__). "[T]hey point to a number of news accounts" suggesting that "those records are not being generated." Op. 10 (JA__). Allegations concerning a handful of incidents plucked from "news accounts" do not plausibly establish a "policy or practice" of refusing to create or maintain records. Indeed, on plaintiffs' own account, records are created on other occasions. The complaint refers to two different times when a "readout" was created of the President's conversation with a foreign leader, *see* Compl. ¶¶ 40, 45 (JA__, __), and in their motion for a temporary restraining order, plaintiffs sought to rely on a White House record memorializing a telephone call between the President and a foreign leader. *See* Dkt No. 16, at 5 & Ex. B.

More fundamentally, such factual allegations do not establish a violation of the PRA. The thrust of plaintiffs' complaint is that the President has deemed it appropriate to meet one-on-one with foreign leaders, without an official note-taker present in the room. "As a result," they assert, "no U.S. transcript or other record of the meeting exists." Compl. ¶ 52 (JA__); *see also id.* ¶ 7 (JA__) ("President Trump has had at least five separate meetings with Russian President Vladimir Putin without note takers present, meaning that no official U.S. record of those meetings exists."). What plaintiffs seek is a judicial ruling that the President must create a specific type of

record to document his conversations with foreign leaders in great detail, if not verbatim.

Nothing in the statutory text identifies a particular method for documenting meetings with foreign leaders, much less suggests a congressional intention to require the presence of note takers every time the President meets with foreign leaders. On the contrary, the statute gives the President "virtually complete control" over records management, *Armstrong I*, 924 F.2d at 290, including "any decisions regarding *whether to create* a documentary presidential record," *Armstrong II*, 1 F.3d at 1294. The President's discretion must be especially broad when it comes to meetings with foreign leaders, given his constitutional authority in the field of foreign affairs. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 14-15 (2015); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414-15 (2003). Such discussions are often sensitive and require special diplomacy, which the President might conclude is best accomplished through one-on-one conversations. Allegations that the President failed to create certain types of records with respect to specific conversations with foreign leaders—whether pursuant to a policy or ad hoc decisionmaking—cannot plausibly assert a violation of the PRA.

Insofar as plaintiffs claim that the President has interfered with records already in existence, their assertions rest on the allegation that on one occasion the President "confiscated" an interpreter's notes, and thereby "effectively classif[ied] them as presidential records." Compl. ¶¶ 7, 76 (JA__, __). Even if factually correct, one

isolated incident does not suggest the existence of a policy or practice with respect to such notes. *See* Op. 15 (JA__) (noting the lack of any allegation that "there is a general classification guideline or policy concerning records of meetings with heads of state in place for the Court to review"). Nor would it suffice to establish a violation of the PRA, as there is no allegation that the "effectively classified" notes were destroyed.

B. The Presidential Records Act Does Not Impose A Clear Duty To Act That Would Support Mandamus Relief, Especially Against The President.

In addition to a clear and indisputable right to relief, plaintiffs also fail to identify a duty to act that would support mandamus relief. Nor do they explain how such relief would be consistent with the repeated admonitions of the Supreme Court and this Court that injunctive relief against the President is unavailable.

A party seeking mandamus relief must demonstrate that a government official "is violating a clear duty to act." *American Hosp.*, 812 F.3d at 189. The duty to be performed must be "ministerial and the obligation to act peremptory, and clearly defined." *13th Reg'l Corp.*, 654 F.2d at 760 (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).

Section 2203(a)—the only section of the PRA implicated by plaintiffs' complaint, *see supra p.* 19 n.3—requires the President to "take all such steps as may be

necessary" to assure that his actions are "adequately documented." 44 U.S.C. § 2203(a). Rather than setting out any clearly defined or ministerial duty, this provision of the PRA "leav[es] . . . in the President's hands" wide discretion to determine what steps are necessary and what type of documentation is adequate in any given circumstance. *See Armstrong I*, 924 F.2d at 290; *see also id.* (noting "the lack of any authority" for an outside entity "to interfere with his records management practices"). Nothing in the statutory text identifies a particular method for documenting meetings with foreign leaders, nor does it require that documentation must be created contemporaneously with the meeting itself by someone who was personally present for the conversation. Indeed, such specific direction would intrude on the President's Article II authority in matters of foreign affairs. Plaintiffs argue (Br. 36) that the PRA is "specific enough to support mandamus relief" because it provides that the President "'shall' do something." While the PRA may obligate the President to take some steps to create and preserve records, it nowhere dictates which steps to take. Nothing in the PRA clearly commands the actions plaintiffs seek to compel.

Further, insofar as plaintiffs seek mandamus relief against the President, they disregard the clear teachings of the Supreme Court and this Court. Surveying the relevant precedent, this Court has explained that "[w]ith regard to the President, courts do not have jurisdiction to enjoin him." *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866), and

Franklin v. Massachusetts, 505 U.S. 788, 827-28 (1992) (Scalia, J., concurring in part and concurring in the judgment)); *see also id.* at 1012 ("A court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions."). The courts have not ordered such relief even when, in contrast to the claim here, the obligations are arguably ministerial. *See Swan*, 100 F.3d at 978 (this Court has "never attempted to exercise power to order the President to perform a ministerial duty."). The reasons for denying such relief "are painfully obvious": the President "is a coequal branch of government, and for the President to 'be ordered to perform particular executive . . . acts at the behest of the Judiciary' at best creates an unseemly appearance of constitutional tension and at worst risks a violation of the constitutional separation of powers." *Id.* (citation omitted; ellipsis in original) (quoting *Franklin*, 505 U.S. at 827 (Scalia, J., concurring in part and concurring in the judgment)). These concerns are present here in full force and would independently militate against exercise of the Court's mandamus authority even if plaintiffs' claims were not clearly barred.

II. Plaintiffs' Claims For Declaratory Relief Cannot Proceed Absent Mandamus Jurisdiction.

Claims Two, Three, and Four of plaintiffs' Complaint seek declaratory relief based on the same factual allegations advanced to support their mandamus request in Claim One. *Compare* Compl. ¶ 76 (JA__) (Claim One), with *id.* ¶¶ 81–82 (JA__) (Claim Two), *id.* ¶ 87 (JA__) (Claim Three), *id.* ¶¶ 96–97 (JA__) (Claim Four). The

Declaratory Judgment Act, 28 U.S.C. § 2201, simply "enlarged the range of remedies available in the federal courts"; it did not "extend their jurisdiction." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). "Nor does the Declaratory Judgment Act . . . provide a cause of action." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011). Thus, "the availability of [declaratory] relief presupposes the existence of a judicially remediable right." *Id.* (alteration in original; quotation marks omitted).

The district court held that plaintiffs' failure to establish the threshold requirements for mandamus meant that the court also lacked jurisdiction to provide the relief requested in Claims Two, Three, and Four. Op. 21 (JA__). Plaintiffs do not contend otherwise on appeal. Indeed, they appear to concede that they must "state a valid mandamus claim to support [their] claims for declaratory relief." Br. 34; *see also* Dkt No. 14, at 34-35 (conceding as much below). As in *CREW*, the same reasons that make mandamus inappropriate—the PRA's bar on judicial review and plaintiffs' failure to establish a violation of law—compel dismissal of the claims seeking declaratory relief. *See CREW*, 924 F.3d at 605 ("For the same reasons that we decline to 'resort to mandamus' to micromanage the President's day-to-day compliance with the PRA, we shall 'not entertain [a claim] for declaratory relief.'" (quoting *Cartier v. Secretary of State*, 506 F.2d 191, 200 (D.C. Cir. 1974)).

III. The Take Care Clause Does Not Provide A Basis For Relief For Claims of Statutory Violations.

In the fifth claim of their complaint, plaintiffs attempt to recharacterize their allegations of statutory violations under the rubric of the Constitution's Take Care Clause. *See* Compl. ¶ 102 (JA__) ("President Trump has violated an obligation that the Constitution places solely on the President—to take care that the laws be faithfully executed—by directing or causing violations of the PRA and FRA.").

The Supreme Court has made clear that not "every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution." *Dalton v. Specter*, 511 U.S. 462, 472 (1994). Instead, the Court has carefully "distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." *Id.* (collecting cases). The Constitution is implicated if executive officers rely on it as an independent source of authority to act, or if the officers rely on a statute that itself violates the Constitution. *See id.* 511 U.S. at 473 & n.5. But claims alleging simply that an official has "exceeded his statutory authority are not 'constitutional' claims." *Id.* at 473.

Specifically invoking the Take Care Clause does not change this. That Clause provides that "[t]he President . . . shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. "[T]he duty of the President in the exercise of the power to see that the laws are faithfully executed" "is purely executive and political" and is, therefore, not an appropriate subject for judicial intervention. *Mississippi v. Johnson*, 71

U.S. at 499; *see also Franklin v. Massachusetts*, 505 U.S. at 827-28 (Scalia, J., concurring in part and concurring in the judgment) ("The President's immunity from [declaratory and injunctive] relief is a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." (quotation marks omitted)). For a court to assume superintendence over the exercise of Executive power that the Clause commits to the President would express a "lack of the respect due" to the Nation's highest elected official, *Baker v. Carr*, 369 U.S. 186, 217 (1962). The Take Care clause therefore furnishes no independent basis for affirmative relief in an Article III court.

Plaintiffs object (Br. 41-42) that the district court erred by extending the PRA's implied bar on judicial review to constitutional claims. But their "constitutional" claim is essentially that the President failed to "take care" by failing to take the specific actions they believe are required by the PRA. Plaintiffs do not point to any precedent from the Supreme Court or this Court approving such a claim, much less in the context of a statute that bars judicial review. Regardless, as discussed above, plaintiffs have not established a violation of the PRA. And to the extent that they complain about the President's supervision of subordinate officers, they improperly invite the judiciary to exercise authority that the Take Care Clause commits to the President himself.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,722 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Thomas Pulham
Thomas Pulham

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Thomas Pulham
Thomas Pulham

ADDENDUM

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44 U.S.C. § 2203

§ 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.