18-2814

To Be Argued By:
SARAH S. NORMAND

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 18-2814

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

Plaintiffs-Appellants,

—v.—

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendant-Appellee.

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

BRIEF FOR DEFENDANT-APPELLEE

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TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Jurisdictional Statement 4

Issues Presented. 4

Statement of the Case 5

A. Procedural History 5

B. Factual Background 7

1. Records of Visitors to the White House Complex 7

C. The President's Schedule 11

D. The Responsive Records at Issue on Appeal. 12

E. The District Court's Decision. 13

1. Plaintiffs' FOIA Claims 13

a. The D.C. Circuit's Decision in *Judicial Watch* 13

b. The District Court's Adoption of the D.C. Circuit's Approach in *Judicial Watch* 16

c. The District Court's Ruling on the Presidential Schedule Records. . . 19

PAGE

2. Plaintiffs' Claims Under the APA, FRA, and PRA 21

Summary of Argument 23

ARGUMENT 25

Standard of Review 25

POINT I—The District Court Correctly Held That the Responsive Presidential Schedule and Visitor Records Are Not Agency Records Subject to FOIA 25

A. FOIA Does Not Apply to Records Controlled by Congress or the President . 26

B. The White House Has Clearly Manifested Its Intent to Retain Control of the Responsive Records. 32

1. WAVES and ACR Records 32

2. Presidential Schedule Records 36

C. The District Court Properly Considered the White House's Intent to Retain Control of the Responsive Records 38

D. Requiring Disclosure Would Raise Substantial Separation of Powers Concerns 42

E. Plaintiffs Misstate the Effect of the District Court's Ruling 45

PAGE

POINT II—The District Court Correctly Dismissed Plaintiffs' Claims Alleging Violation of the APA, FRA, and PRA 47

A. Plaintiffs' Claims as Alleged in the Amended Complaint Are Premised on the 2015 MOU 49

B. The 2015 MOU Is Not Judicially Reviewable for Compliance with the PRA or FRA. 51

C. The Court Should Reject Plaintiffs' Belated Request for Further Amendment. 54

CONCLUSION 58

PAGE

TABLE OF AUTHORITIES

Cases:

ACLU v. CIA,
823 F.3d 655 (D.C. Cir. 2016). 28, 40

ACLU v. DoD,
901 F.3d 125 (2d Cir. 2018) 25

Amidax Trading Grp. v. S.W.I.F.T. SCRL,
671 F.3d 140 51

Armstrong v. Bush,
924 F.2d 282 (D.C. Cir. 1991). 23, 51, 53, 57

Armstrong v. Exec. Office of the President, Office of Admin.,
1 F.3d 1274 (D.C. Cir. 1993). 23, 52, 53, 54

Bureau of Nat'l Affairs v. DOJ,
742 F.2d 1484 (D.C. Cir. 1984). 29

Carter v. HealthPort Techs., LLC,
822 F.3d 47 (2d Cir. 2016) 51

Clark v. Martinez,
543 U.S. 371 (2005). 44

Consumer Federation of America v. Department of Agriculture,
455 F.3d 283 (D.C. Cir. 2006). 41

DOJ v. Tax Analysts,
492 U.S. 136 (1989). . . . . *passim*

PAGE

Gallop v. Cheney,
642 F.3d 364 (2d Cir. 2011) 54

Goland v. CIA,
607 F.2d 339 (D.C. Cir. 1978). 27

Grand Central Partnership v. Cuomo,
166 F.3d 473 (2d Cir. 1999) 41, 42

Holy Spirit Association for the Unification of World Christianity v. CIA,
636 F.2d 838 (D.C. Cir. 1980). 28

Horoshko v. Citibank, N.A.,
373 F.3d 248 (2d Cir. 2004) 54

Hotel Emps. & Rest. Emps. Union v. City of N.Y.,
311 F.3d 534 (2d Cir. 2002) 55

Judicial Watch v. U.S. Secret Service,
726 F.3d 208 (D.C. Cir. 2013). . . . . *passim*

Kissinger v. Reporters Comm. for Freedom of the Press,
445 U.S. 136 (1980). 25, 41, 43, 57

Kleinman v. Elan Corp.,
706 F.3d 145 (2d Cir. 2013) 50

Main Street Legal Servs., Inc. v. NSC,
811 F.3d 542 (2d Cir. 2016) . . . . . *passim*

McCarthy v. Dun & Bradstreet Corp.,
482 F.3d 184 (2d Cir. 2007) 25, 53, 54

PAGE

Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112 (2d Cir. 2010) 55

Paisley v. CIA, 712 F.2d 686 (D.C. Cir. 1983). 27, 28, 40

Robinson v. Gov't of Malaysia, 269 F.3d 133 (2d Cir. 2001) 25

Ryan v. DOJ, 617 F.2d 781 (D.C. Cir. 1980). 29

Tax Analysts v. DOJ, 845 F.2d 1060 (D.C. Cir. 1988). 38

United We Stand America, Inc. v. IRS, 359 F.3d 595 (D.C. Cir. 2004). . . . . *passim*

Wilson v. Libby, 535 F.3d 697 (D.C. Cir. 2008). 36

Wilson v. Merrill Lynch & Co., 671 F.3d 120 (2d Cir. 2011) 54

Wright v. Ernst & Young LLP, 152 F.3d 169 (2d Cir. 1998) 50

Statutes:

5 U.S.C. § 552(a). 4, 25

18 U.S.C. § 3056(a). 7, 26, 31, 37

18 U.S.C. § 3056A(a) 7

28 U.S.C. § 1291 4

PAGE

28 U.S.C. § 1331 4

44 U.S.C. § 2201 . . . . . 15, 20, 32, 37

Other Authorities:

H.R. Conf. Rep. No. 93-1380 . . . . . 15, 25

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Plaintiffs-Appellants,

—v.—

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

Preliminary Statement

Plaintiffs submitted a Freedom of Information Act ("FOIA") request to the U.S. Secret Service, seeking to obtain records of presidential visitors that they indisputably could not obtain directly from the President. As relevant to this appeal, plaintiffs seek Worker and Visitor Entry System ("WAVES") and Access Control Record ("ACR") records of presidential visitors to the White House Complex for the period January 20 through March 8, 2017, as well as records reflecting

the President's schedule and visitors when he visited Mar-a-Lago during that period. The district court correctly held that these records are not "agency records" subject to disclosure under FOIA.

As the D.C. Circuit has squarely held, WAVES and ACR records reflecting visits to the President, and any presidential component of the Executive Office of the President ("EOP"), are not agency records. Noting that Congress clearly intended that documents like the President's appointment calendar should not be disclosable under FOIA, and that construing FOIA differently could raise serious constitutional questions of separation of powers, the D.C. Circuit held that WAVES and ACR records are not agency records within the meaning of FOIA. After careful consideration, the district court adopted the D.C. Circuit's approach and applied it to presidential schedules and visitor information that the White House provides to the Secret Service.

Those rulings were correct. The President's schedule and information concerning presidential visitors are provided to the Secret Service solely to permit the Secret Service to fulfill its statutory mandate to protect the President and the White House Complex. Indeed, the President is required by statute to accept the Secret Service's protection, and thus he has little choice but to share his schedule and visitor information with the Secret Service. The record establishes —and plaintiffs do not dispute—that the White House has manifested a clear intent to retain control of these documents, and under the prevailing case law that in-

tent means that the records remain presidential records, not agency records. Moreover, Congress intended to exclude presidential appointment calendars from FOIA, in recognition of the significant separation of powers concerns that would be raised if the statute purported to compel the President to release such records; those same concerns would be presented if FOIA were interpreted to compel disclosure of the presidential schedules and visitor records that are shared with the Secret Service to allow the agency to protect the President and the White House Complex.

The district court also correctly dismissed plaintiffs' claims premised on the Administrative Procedure Act ("APA"), the Federal Records Act ("FRA"), and the Presidential Records Act ("PRA"), for lack of jurisdiction. These claims as pleaded in the amended complaint are premised on a 2015 Memorandum of Understanding ("MOU") that does not fall within the narrow set of recordkeeping guidelines that are judicially reviewable. Plaintiffs attempt to recharacterize the claims as a challenge to an earlier 2006 MOU that is nowhere mentioned in the amended complaint, but the district court correctly rejected this effort. Plaintiffs' belated request to further amend the complaint should be rejected, as plaintiffs failed to seek that relief from the district court. In any event, considering the 2006 MOU now would be futile, and the relief plaintiffs seek is effectively available (and has been sought in this case) under FOIA.

The district court's judgment should be affirmed.

Jurisdictional Statement

The district court had jurisdiction over plaintiffs' FOIA claims under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). The district court correctly dismissed plaintiffs' APA, FRA, and PRA claims for lack of jurisdiction. The district court entered final judgment on September 21, 2018 (Joint Appendix ("JA") 198-99), and plaintiffs filed a timely notice of appeal on September 24, 2018 (JA 200-01). This Court thus has jurisdiction under 28 U.S.C. § 1291.

Issues Presented

1. Whether the district court correctly held that WAVES and ACR records reflecting visitors to presidential components of the EOP, and other records reflecting the President's schedule and visitor information that were provided by the White House to allow the Secret Service to fulfill its statutory duty to protect the President, are not agency records subject to FOIA.

2. Whether the district court correctly dismissed plaintiffs' APA, FRA, and PRA claims for lack of jurisdiction, where the claims as pleaded in the amended complaint are limited to the 2015 Memorandum of Understanding, which is not a judicially reviewable recordkeeping guideline; plaintiffs never sought leave to further amend their complaint; and amendment would be futile.

Statement of the Case

A. Procedural History

On March 10, 2017, plaintiffs filed a FOIA request with the Secret Service seeking certain data fields from WAVES and ACR records and records of presidential visitors at Mar-a-Lago from January 20, 2017, to March 8, 2017. (JA 51-53).[1] Plaintiffs filed this action against the Department of Homeland Security ("DHS") one month later, alleging that DHS had violated FOIA by failing to produce the requested records. (JA 4; JA 25 ¶ 33).

Plaintiffs amended their complaint on September 15, 2017, adding the EOP as a defendant and adding additional claims under the APA, FRA, and PRA. (JA 10-11; JA 17-33). Specifically, plaintiffs alleged that the EOP and DHS had violated the FRA and PRA by entering into a Memorandum of Understanding in 2015 that, according to plaintiffs, improperly treated records of visits to agency components of the EOP, which are subject to FOIA, as being "under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component," rather than as "agency records of DHS subject to the FOIA."

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[1] Plaintiffs also sought records of presidential visitors at Trump Tower, but President Trump did not visit Trump Tower during the relevant time period. (JA 38-39 ¶ 8).

(JA 30-31 ¶¶ 63; JA 67).[2] On October 23, 2017, defendants moved for summary judgment with regard to plaintiffs' FOIA claims, and moved to dismiss plaintiffs' remaining claims for lack of subject matter jurisdiction or, alternatively, failure to state a claim. (JA 34-35).

On July 26, 2018, the district court issued an opinion and order granting defendants' motion for summary judgment in part and denying it in part with respect to plaintiffs' FOIA claims and dismissing plaintiffs' remaining claims for lack of jurisdiction. (JA 129; JA 197). After the parties notified the court that no further issues remained for the court's resolution (JA 199; *see also Doyle v. DHS*, 17 Civ. 2542 (S.D.N.Y.), ECF No. 62), the district court entered final judgment (JA 198-99).

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[2] According to the amended complaint, the agency components of the EOP subject to FOIA are the Council on Environmental Quality ("CEQ"), the Office of Management and Budget ("OMB"), the Office of National Drug Control Policy ("ONDCP"), the Office of Science and Technology Policy ("OSTP"), and the Office of the United States Trade Representative ("USTR"). (JA 20 ¶ 9).

B. Factual Background

1. Records of Visitors to the White House Complex

As the safety of the President and Vice President implicates national security and other governmental interests of the highest order, Congress has directed that both of these constitutional officers receive protection from the Secret Service. *See* 18 U.S.C. §§ 3056(a), 3056A(a); (JA 61 ¶ 3 ("By statute, the Secret Service's protection of the President and Vice President . . . is mandatory.")). No other official (except the President-elect and Vice President-elect) is required by law to accept such protection. (JA 61 ¶ 3); *Judicial Watch v. U.S. Secret Service*, 726 F.3d 208, 211 n.2 (D.C. Cir. 2013). The Secret Service's protection extends to the physical persons of the President and Vice President, as well as the White House Complex, which contains the offices of the President, the Vice President, and their respective staff. *See* 18 U.S.C. § 3056A(a)(1), (2), (4), (6); (*see also* JA 61 ¶ 3; JA 79-80 ¶ 2).

To fulfill its statutorily mandated function to protect the White House Complex, the Secret Service clears proposed visitors for entry and controls the entry and exit of visitors. (JA 61-62 ¶¶ 3-6). The Secret Service utilizes two interrelated electronic systems: the Executive Facilities Access Control System ("EFACS"), for controlling and monitoring access to the White House Complex, and WAVES, for vetting visitor information and granting access to the White House Complex. (JA 62 ¶ 7).

The Secret Service operates EFACS and WAVES on behalf of the President, in accordance with a framework established by President Obama in a 2015 Memorandum creating the Presidential Information Technology Community. (JA 85; JA 88-91). The purposes of the memorandum were to "ensure that information resources and information systems provided to the President, Vice President, and EOP are efficient, secure, and resilient; establish a model for Government information technology management efforts; reduce operating costs through the elimination of duplication and overlapping services; and accomplish the goal of converging disparate information resources and information systems for the EOP." (JA 88 § 1). The Presidential Information Technology Community later entered into a Memorandum of Understanding ("2015 MOU") regarding its operations. (JA 92-100). Under the 2015 MOU, the President, through the Director of White House Information Technology ("DWHIT"), controls and is the business owner of the EFACS and WAVES systems, and the Secret Service operates those systems as a service provider. (JA 86 ¶ 8). As a service provider, the Secret Service cannot make changes to the systems, or make purchases related to the systems, without consent of the DWHIT or his designee. (JA 67 ¶ 20; JA 86-87 ¶ 8-9).

WAVES records are generated when an authorized White House passholder, including presidential and vice presidential staff, makes an appointment in WAVES. The passholder provides the Secret Service with information on anticipated visitors to the White House Complex. (JA 62-63 ¶ 8 (describing how information is entered and transmitted to Secret Service)).

This information includes, among other things, the proposed visitor's name and other personal information such as date of birth and Social Security number; the date, time and location of the planned visit; the name and email address of the official or employee submitting the request; the name of the person to be visited; and the date of the request. (JA 75-76 ¶ 7). The Secret Service uses that information solely to determine whether there is any protective concern with admitting the proposed visitor to the White House Complex, and to verify the visitor's admissibility at the time of the visit. (JA 63 ¶ 8). The majority of the information contained in WAVES records consists of information that the authorized White House passholder has provided to the Secret Service. (JA 63 ¶ 9).[3]

Once a visitor is cleared into the White House Complex, he or she usually receives a badge, which is swiped over one of the badge readers at entrances to and exits from the Complex. Swiping a badge automatically creates an ACR within EFACS. (JA 64 ¶ 10). An ACR includes information such as the visitor's name and badge number, the time and date of the swipe, and the post at which the swipe was recorded. (JA 64 ¶ 10). After the visit, WAVES records are typically updated electronically with information showing the time and

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[3] Some WAVES records may be annotated by Secret Service personnel, in note and description fields, with limited information resulting from background checks or with instructions, including coded instructions to Secret Service officers. (JA 63-64 ¶ 9).

place of the visitor's entry into and exit from the White House Complex. (JA 64 ¶ 11).

After a visit is complete, the Secret Service has no continuing interest to justify its own preservation or retention of WAVES or ACR records. (JA 65 ¶ 13; JA 81-82 ¶ 9). Accordingly, it has been the practice of the Secret Service, since at least 2001, to transfer newly generated WAVES records to the White House Office of Records Management ("WHORM"), generally every 30 to 60 days. (JA 65 ¶ 13).[4] Currently, the after-visit records that are transferred to the WHORM constitute a combination of WAVES and ACR information. (JA 65 ¶ 13). After the WAVES and ACR records are transferred to the WHORM, the Secret Service deletes them from the computer systems. (JA 65 ¶ 13; JA 66 ¶ 15). If the Secret Service wants to view a WAVES or ACR record once a visit is completed, the White House must grant that permission. (JA 67 ¶ 19).

In May 2006, the Secret Service Records Management Program and the WHORM entered into a Memorandum of Understanding ("2006 MOU"), which both documented past practice and interests as understood at the time regarding WAVES and ACR records, and confirmed the WHORM's management and custody of them. (JA 65 ¶ 14; JA 69-73; JA 81 ¶ 6). The 2006 MOU provides, among other things, that the President has a continuing interest in WAVES and ACR records,

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[4] The Secret Service began transferring ACR records to the WHORM in 2006. (JA 65-66 ¶¶ 13-15; JA 80 ¶¶ 4-5).

and continues to use the information contained in the records for various historical and informational purposes. (JA 72 ¶ 20). The 2006 MOU further provides that "any information provided to the Secret Service for the creation, or in the form, of [WAVES and ACR] records is provided under an express reservation of White House control" (JA 71 ¶ 19), and that the White House "at all times asserts, and the Secret Service disclaims, all legal control over any and all [WAVES and ACR] Records" subject to the MOU (JA 72 ¶ 24). The Secret Service acknowledges that its temporary retention of such records after an individual's visit to the White House Complex is solely for the purpose of facilitating an orderly and efficient transfer of the records to the WHORM. (JA 72 ¶ 22).

C. The President's Schedule

To fulfill its protective mission, the Secret Service also relies on information regarding the President's schedule provided by the White House Office, which includes the Office of Presidential Scheduling and the Office of Advance. (JA 67-68 ¶ 22). Each evening, staff in the White House Office provide the President's schedule to a limited number of Secret Service personnel with an operational need to have it. (JA 67-68 ¶ 22 (describing mechanisms by which schedule is transmitted)). A Secret Service employee who needs access to the President's schedule must first request and receive approval from the White House Office. (JA 68 ¶ 23). Presidential schedules belong to the White House Office and not the Secret Service. (JA 68 ¶ 24). They are provided to and used by the Secret Service solely for the purpose of allowing the Secret Service to

perform its duty to protect the President, other protectees, and the White House Complex. (JA 68 ¶ 24).

D. The Responsive Records at Issue on Appeal

This appeal is limited to two categories of records reflecting presidential visitors. First, plaintiffs seek certain data fields contained in WAVES and ACR records reflecting visits to presidential components of the EOP between January 20 and March 8, 2017. Second, plaintiffs seek presidential schedules and visitor information provided by the White House Office to the Secret Service in connection with the President's visits to Mar-a-Lago during the same period. (JA 51). In the second category, the Secret Service located three types of records: (1) presidential schedules transmitted by the White House Office to the Secret Service for the dates February 10 through 12, 2017; (2) emails from the White House Office to the Secret Service providing specific information about the arrival of a certain individual scheduled to meet with the President at Mar-a-Lago on February 12 or 19, 2017, and the person(s) accompanying that individual; and (3) Secret Service emails containing the President's schedules, or presidential schedule information, that was obtained from the White House Office (collectively, the "presidential schedule records"). (JA 44-45 ¶¶ 28, 30).

E. The District Court's Decision

1. Plaintiffs' FOIA Claims

a. The D.C. Circuit's Decision in *Judicial Watch*

Noting that this case presents an issue of first impression in this circuit, the district court looked to *Judicial Watch*, in which "the D.C. Circuit considered a FOIA claim mirroring the case at bar," seeking WAVES and ACR records from 2010. (JA 151 (citing 726 F.3d at 214)). The D.C. Circuit found no dispute that the Secret Service had "obtained" the records, thus satisfying the first prong of the test established by the Supreme Court for determining whether a record constitutes an "agency record" for FOIA purposes. (JA 153); *see DOJ v. Tax Analysts* ("*Tax Analysts II*"), 492 U.S. 136, 144-45 (1989) (to qualify as "agency records," the requested materials must be "creat[ed] or obtain[ed]" by an agency, and be in the agency's "control . . . at the time the FOIA request is made"). *Judicial Watch* thus turned on the second prong of the test, "whether the Secret Service had sufficient control over the documents to render them agency records." (JA 151).

To answer this question, the *Judicial Watch* court "drew parallels" to a line of cases involving "'documents that an agency has either obtained from, or prepared in response to a request from, a governmental entity not covered by FOIA: the United States Congress'" (JA 153 (quoting 726 F.3d at 221)). In those cases, the D.C. Circuit considered "special policy considerations," which "in the context of WAVES and ACR

records suggested that such records would not fall within the scope of FOIA." (JA 153 (quoting 726 F.3d at 220-21)). The White House had affirmatively expressed its intent to control WAVES and ACR records. (JA 153 (citing 726 F.3d at 221)). And "subjecting these records to FOIA would force the President to 'either surrender his constitutional prerogative of maintaining secrecy regarding his choice of visitors (and therefore of outside advisors), or to decline to cooperate with the executive branch agency entrusted with (and necessary for) his protection.'" (JA 153-54 (quoting 726 F.3d at 224; quotation marks and alterations omitted)).

The D.C. Circuit in *Judicial Watch* also "discussed the separation of powers issues that such a state of affairs would precipitate." (JA 154 (citing 726 F.3d at 224)). "[A] FOIA plaintiff could 'not obtain the appointment calendars (or visitor logs)' of individuals within the Office of the President, as such documents 'are simply not "agency records" as FOIA defines the term,'" yet the Secret Service "effectively replicated the schedules of the individuals in the Office of the President through its recordkeeping practices." (JA 154 (quoting 726 F.3d at 225)). The court determined that "Congress intentionally excluded the President's documents from FOIA, and a FOIA request should not act as a tool to obtain indirectly what it may not obtain directly." (JA 154). Moreover, "applying FOIA to the records at issue 'could substantially affect the President's ability to meet confidentially with foreign leaders, agency officials, or members of the public,' and supporting such an application of FOIA would

therefore permit congressional incursion on the President's constitutional prerogatives." (JA 155 (quoting 726 F.3d at 226-27)). Applying the canon of constitutional avoidance, the D.C. Circuit concluded that "interpreting FOIA in this manner could present the issue of whether Congress exceeded its constitutional power over the executive branch, a worrisome outcome of which Congress was aware when excluding Presidential advisors from FOIA." (JA 155 (citing 726 F.3d at 227; H.R. Conf. Rep. No. 93-1380, at 232 (1974))).

"[T]he D.C. Circuit considered the PRA to provide a more natural fit for WAVES and ACR records." (JA 155). The PRA "defines 'Presidential records' to include 'documents created or received by the President,' his 'immediate staff,' or individuals in the EOP 'whose function is to advise or assist the President,' and to exclude 'official records of an agency,' as defined under FOIA." (JA 155 (quoting 44 U.S.C. § 2201(2)). Although "'Congress did not intend the PRA to diminish the scope of FOIA,' the Court reasoned that the records at issue tracked more closely the definition of presidential records in the PRA, which 'gives the President virtually complete control' over such records while in office." (JA 155-56 (quoting 726 F.3d at 228; quotation marks and citation omitted)).

The court in *Judicial Watch* therefore held that "WAVES and ACR records 'that disclose the kind of information' presented in 'documents like the President's appointment calendar' are not agency records subject to FOIA." (JA 151 (quoting 726 F.3d at 233-34)). However, "WAVES and ACR records 'that reveal

visitors to those offices within the White House Complex that are themselves subject to FOIA' would constitute agency records." (JA 151 (quoting 726 F.3d at 233-34)).

b. The District Court's Adoption of the D.C. Circuit's Approach in *Judicial Watch*

The district court found the reasoning in *Judicial Watch* "persuasive." (JA 156). Observing that this Court had "previously 'acknowledged the considerable experience of the Court of Appeals for the District of Columbia Circuit' in analyzing FOIA's application to records generated by units of the Executive Office of the President" (JA 149 n.12 (quoting *Main Street Legal Servs., Inc. v. NSC*, 811 F.3d 542, 566 (2d Cir. 2016)), the district court proceeded from the premise that it would adopt the D.C. Circuit's approach unless plaintiffs provided "compelling countervailing reasons." (JA 156). The court found that plaintiffs failed to do so. (JA 156).

The district court rejected plaintiffs' contention that the D.C. Circuit's approach in *Judicial Watch* was inconsistent with the Supreme Court's decision in *Tax Analysts II*. (JA 156). The court disagreed with the assertion that *Tax Analysts II* precludes courts from considering the White House's intent; rather, considering "the intent of a document's creator to retain or relinquish control over the document accords with both the Supreme Court and the Second Circuit's analysis in FOIA cases." (JA 157-58 (emphasis omitted)). The court declined to adopt plaintiffs' "restrictive reading

of *Tax Analysts II*," and instead "adopted the D.C. Circuit's approach, as provided in *Judicial Watch*, in determining whether the Secret Service exercises sufficient control over [WAVES and ACR records] to require disclosure under FOIA." (JA 162).

The district court also concluded that "developments since *Judicial Watch* have underscored the correctness of that holding." (JA 162). President Obama's 2015 Memorandum, establishing the Presidential Information Technology Community under the direction of the DWHIT, and the 2015 MOU "have reinforced the conclusion that WAVES and ACR records are within the control of the White House rather than the Secret Service." (JA 162). The court found that "the White House's intention to retain control over WAVES and ACR records is manifest in the relevant memoranda." (JA 163 (citing JA 88; JA 96 § 3.01)). The court further noted that "pursuant to the White House's exerted control over the records at issue, the Secret Service 'cannot make changes to the [WAVES or EFACS] systems, or make purchases related to the systems, without the consent of the DWHIT.'" (JA 163 (quoting JA 86 ¶ 8; alteration in district court decision)). "In addition, pursuant to the 2015 MOU, the Secret Service's access to the records is 'limited . . . as necessary to perform its protective functions,' and 'once a visit is concluded,' the Secret Service 'may not access EFACS or WAVES records without White House [a]pproval.'" (*Id.* (quoting JA 86 ¶ 9)). In the district court's view, these considerations "compel a finding that the White House (rather than the Secret Service) controls the WAVES and ACR records." (JA 163-64).

The court also agreed with the *Judicial Watch* court that WAVES and ACR records reflecting visits to any EOP component that is subject to FOIA—that is, an EOP component that "possesses 'substantial independent authority in the exercise of specific functions' rather than the 'sole function to advise and assist the President'" (JA 165 (quoting *Main Street Legal Servs.*, 811 F.3d at 547))—are agency records. (JA 164-67). The court rejected the Secret Service's argument that it was unable to segregate with certainty records reflecting visits to agency components from those reflecting visits to presidential components based solely on the information contained in WAVES and ACR records. (JA 165-67).[5]

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[5] Defendants have not appealed this ruling, and records of visits to agency EOP components are now posted to the respective EOP components' electronic reading rooms monthly via a process established by a settlement in another litigation, *Public Citizen, Inc. v. U.S. Secret Service*, No. 18-cv-01669 (D.D.C.). (*See* JA 115-24); *infra* note 17. The responsive WAVES and ACR records in this case reflecting visits to agency EOP components were publicly released, with redactions, pursuant to the process set forth in the *Public Citizen* settlement. *See Doyle v. DHS*, 17 Civ. 2542 (S.D.N.Y.), ECF No. 62 (joint letter to the district court noting that defendants had "directed plaintiffs to where responsive WAVES and ACR records reflecting visits to agency components of the EOP are publicly available").

c. The District Court's Ruling on the Presidential Schedule Records

The district court concluded that "[t]he considerations that render FOIA inapplicable to WAVES and ACR records apply with equal force" to the presidential schedule records. (JA 176). As the court noted, "[t]he White House's intent to control these documents is apparent from its selective disclosure only to approved Secret Service members," who "had no part in creating the documents, but only passively received them from the White House." (JA 176-77). And "exposing these documents to disclosure under FOIA would produce the same problems as applying FOIA to WAVES and ACR records." (JA 177).

In particular, "the same separation-of-powers concerns that animated *Judicial Watch* apply" to the presidential schedule records. (JA 177). "Just as 'the Secret Service must monitor and control access to the building in which the President lives and works,' which 'requires presidential staff to request access from the Secret Service for visitors'" (JA 177 (quoting *Judicial Watch*, 726 F.3d at 225; alterations omitted)), "the Secret Service uses the Presidential Schedule Documents solely to fulfill its operational needs" (JA 177 (quoting JA 68 ¶ 24; quotation marks and alterations omitted)). "In one sense," the district court noted, "subjecting the Presidential Schedule Documents to FOIA would intrude more deeply into the Office of the President than doing so for WAVES and ACR records: whereas the latter would allow 'a FOIA requestor effectively to receive *copies* of the President's calendars,' the former would

provide *direct* access to these calendars in their original forms." (JA 177-78 (quoting *Judicial Watch*, 726 F.3d at 225; alterations omitted; emphasis in district court decision)).

The district court noted that presidential schedule records "track the definition of 'presidential records' in the PRA even more closely than WAVES and ACR records: They are 'documentary materials . . . created . . . by the President, the President's immediate staff, or a unit or individuals of the [EOP] whose function is to advise or assist the President, in the course of conducting activities which relate to' the President's 'official or ceremonial duties.'" (JA 178 (quoting 44 U.S.C. § 2201(2); alterations in district court decision)). "And by providing them to the Secret Service, like WAVES and ACR records, 'they are essential to ensuring that the President can go about these core activities without risking his security or that of his family and staff.'" (JA 178 (quoting *Judicial Watch*, 726 F.3d at 228)).

The district court rejected as "a straw man" plaintiffs' contention that treating the presidential schedule records as non-agency records would create an "unsustainable rule" that documents that "merely relate to information about the [P]resident's schedule" are "beyond FOIA's reach." (JA 178). The court noted that its holding "is limited to the documents at issue, consisting of correspondence detailing the President's daily schedule that was transmitted from the White House to a select set of Secret Service members. It does not

speak to, or even anticipate, a broader set of documents than those presented here." (JA 178-79).[6]

2. Plaintiffs' Claims Under the APA, FRA, and PRA

The district court next considered defendants' motion to dismiss plaintiffs' APA, FRA, and PRA claims for lack of subject matter jurisdiction. (JA 180-81; JA 194). The court rejected plaintiffs' argument that these claims sought review of both the 2006 and 2015 MOUs, noting that "the operative complaint makes no mention of the 2006 MOU." (JA 188). The court observed that "the only citation to any MOU" in the amended complaint refers to a provision of the 2015 MOU. (JA 188 (citing JA 29 ¶ 50)).[7] "[T]he claims at

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[6] The district court also ruled that the Secret Service had conducted an adequate search for records of presidential visitors at Mar-a-Lago (JA 167-73), that the Secret Service must process under FOIA certain operational records regarding the Japanese Prime Minister's visit to Mar-a-Lago in February 2017 (JA 179-80), and that declaratory relief was unnecessary (JA 194-97). These rulings are not at issue in this appeal.

[7] That provision is section 3.01 of the 2015 MOU, which states, "All records created, stored, used, or transmitted by, on, or through the unclassified systems or information resources provided to the President, Vice President and EOP shall remain under the

issue go on to reference this provision of the 2015 MOU as violating" the EOP's obligation under the FRA and PRA, and DHS's obligation under the FRA, to treat records of visits to agency components of the EOP "as agency records of DHS subject to FOIA." (JA 188-89 (citing JA 30-31 ¶¶ 63, 67)). The court rejected plaintiffs' effort to "inject the 2006 MOU into their pleading by way of their opposition brief." (JA 189).

The district court then held that plaintiffs' FRA and PRA claims as alleged in the amended complaint "do not contain a sufficient factual basis for the Court's review." (JA 192). After surveying the case law (JA 185-88), the court found that the 2015 MOU was "not the sort of guideline or directive that courts have reviewed for compliance with either the FRA or the PRA" (JA 189-91).

With regard to the PRA claims, the court observed that "judicial review for compliance with the PRA extends only to guidelines that categorize materials as presidential records, such that by doing so, an agency may run afoul of the PRA's definition of 'presidential records' and, thus, treat records as presidential when they would otherwise fall within the FRA." (JA 191). Here, the court concluded, the challenged provision of the 2015 MOU "simply states the understanding of the parties to the MOU that certain records 'shall remain under the exclusive ownership, control, and custody of

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exclusive ownership, control, and custody of the President, Vice President, or originating EOP component." (JA 29 (quoting JA 96)).

the President, Vice President, or originating EOP component,'" and "does not command recordkeeping practices that could result in improper disposal under the FRA, encompass the initial classification of presidential records, or constitute the functional equivalent of such impermissible steps." (JA 192 (quoting *Armstrong v. Exec. Office of the President, Office of Admin.* ("*Armstrong II*"), 1 F.3d 1274, 1282, 1294 (D.C. Cir. 1993); quotation marks and alteration omitted)).

With regard to the FRA claims, the district court concluded that the practice challenged by plaintiffs—the Secret Service's practice of transferring WAVES and ACR records to the WHORM rather than retaining them—"is precisely the sort of claim that the FRA, as interpreted by the Supreme Court, has precluded courts from reviewing." (JA 192). The court noted that plaintiffs did not assert a claim seeking review of an agency head's or the Archivist's failure to demand enforcement by the Attorney General—the only remedy available under the FRA for the improper removal of a record from an agency. (JA 192-93 (citing *Armstrong v. Bush* ("*Armstrong I*"), 924 F.2d 282 (D.C. Cir. 1991); quotation marks omitted)).

Summary of Argument

Applying the D.C. Circuit's reasoning in *Judicial Watch*, the district court correctly held that FOIA does not apply to WAVES and ACR records reflecting visits to presidential components of the EOP or other presidential schedule and visitor records transmitted by the White House to the Secret Service solely to permit the agency to carry out its statutory mandate to protect

the President and the White House Complex. The undisputed record demonstrates that the White House has clearly manifested its intent to retain control over these records—the key consideration under the relevant case law. *See infra* Points I.A-I.C. Moreover, substantial separation of powers concerns would be presented if FOIA were interpreted to compel disclosure of presidential schedule and visitor records—the only records addressed by the district court's ruling. *See infra* Points I.D-I.E.

The district court also properly dismissed plaintiffs' APA, FRA, and PRA claims for lack of jurisdiction. As pleaded in the amended complaint, plaintiffs alleged only that the 2015 MOU improperly treated WAVES and ACR records of visits to agency components of the EOP as presidential records rather than agency records. *See infra* Point II.A. But the 2015 MOU does not fall within the narrow set of guidelines that are judicially reviewable for compliance with the PRA or FRA. It neither categorizes WAVES and ACR records as presidential records nor permits the destruction of records that must be preserved under the FRA. *See infra* Point II.B. Plaintiffs ask this Court to permit them to further amend their complaint to assert a claim based on the 2006 MOU, but they never sought that relief in the district court. In any event, amendment would be futile. WAVES and ACR records reflecting visits to presidential components of the EOP are not agency records, and thus they are not subject to FOIA or the FRA. And records reflecting visits to agency EOP components—including the records requested in this case

—are now provided to the respective agency EOP components, processed under FOIA and posted publicly. *See infra* Point II.C.

ARGUMENT

Standard of Review

The district court's determinations on summary judgment with respect to plaintiffs' FOIA claims are reviewed *de novo*, *ACLU v. DoD*, 901 F.3d 125, 132 (2d Cir. 2018), including its determination that records are not agency records subject to FOIA, *see Main Street Legal Servs.*, 811 F.3d at 543 (construction of "agency" provision of FOIA subject to "*de novo* review"). This Court also reviews *de novo* the legal sufficiency of plaintiffs' claims under the APA, FRA, and PRA. *See Robinson v. Gov't of Malaysia*, 269 F.3d 133, 140 (2d Cir. 2001). However, any alleged failure by the district court to grant leave to amend those claims is reviewed only for abuse of discretion. *See McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007).

POINT I

The District Court Correctly Held That the Responsive Presidential Schedule and Visitor Records Are Not Agency Records Subject to FOIA

Congress limited the reach of FOIA to records of an "agency," 5 U.S.C. § 552(a), (f)(1), a term that does not encompass "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President," H.R. Conf. Rep. No. 93-1380, at 15 (1974); *Kissinger v. Reporters Comm. for*

Freedom of the Press, 445 U.S. 136, 156 (1980). Unable to compel information regarding presidential visitors from the President directly, plaintiffs seek the same information from the Secret Service. The records at issue are obtained by the Secret Service only because the agency is statutorily required to protect the President, and the President is statutorily required to accept that protection. 18 U.S.C. § 3056(a); (JA 61 ¶ 3). Plaintiffs seek to exploit this statutory mandate to obtain presidential schedules and other visitor records from the Secret Service that they could not obtain directly from the White House. As the district court concluded, "[i]n removing the Office of the President from FOIA's scope, Congress surely did not 'intend to require the effective disclosure of the President's calendars in this roundabout way.'" (JA 178 (quoting *Judicial Watch*, 726 F.3d at 225)).

A. FOIA Does Not Apply to Records Controlled by Congress or the President

The Supreme Court has instructed that "agency records" (a term not defined by statute) must not only be "created or obtained" by an agency, but must also be under the agency's "control" at the time the FOIA request is made. *Tax Analysts II*, 492 U.S. at 144-45. Ordinarily, the requisite control exists when the records "have come into the agency's possession in the legitimate conduct of its official duties." *Id.* at 145. Where a non-FOIA entity such as the President or Congress asserts control over documents in an agency's possession, however, the inquiry "is not so simple." *United We Stand America, Inc. v. IRS*, 359 F.3d 595, 598-99 (D.C. Cir. 2004).

Although an issue of first impression in this circuit, the D.C. Circuit has considered this question in a series of cases. In *Goland v. CIA*, 607 F.2d 339, 347 (D.C. Cir. 1978), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir. 1979) (per curiam), that court held that the transcript of a congressional hearing was a congressional document even though it was in the possession of the Central Intelligence Agency ("CIA"). The court concluded that Congress retained control of the document based on both "the circumstances attending the document's generation and the conditions attached to its possession by the CIA." *Id.* at 347. The court explained that the document was marked "Secret" and the CIA was not free to dispose of the document "as it wills, but holds the document, as it were, as a 'trustee' for Congress." *Id.* The court also recognized that "Congress exercises oversight authority over the various federal agencies, and thus has an undoubted interest in exchanging documents with those agencies to facilitate their proper functioning in accordance with Congress' originating intent." *Id.* at 346. To hold that the requested transcript was subject to FOIA "would force Congress 'either to surrender its constitutional prerogative of maintaining secrecy, or to suffer an impairment of its oversight role.'" *United We Stand*, 359 F.3d at 599 (quoting *Goland*, 607 F.2d at 346).

By contrast, in *Paisley v. CIA*, 712 F.2d 686, 695-96 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984) (per curiam), the D.C. Circuit concluded that documents in CIA files were agency records even though some of the records were created by Congress and others were generated in direct response to a congressional investigation. The court

again recognized the need to "safeguard Congress' long recognized prerogative to maintain the confidentiality of its own records as well as its vital function as overseer of the Executive Branch." *Id.* at 693 n.30. "To accomplish this," the court "focused [its] inquiry on 'Congress' intent to control (and not on the agency's),' and concluded that Congress had failed to manifest an intent to control the requested records." *United We Stand*, 359 F.3d at 600 (quoting *Paisley*, 712 F.2d at 693 n.30; citing *id.* at 695-96). Similarly, in *Holy Spirit Association for the Unification of World Christianity v. CIA*, 636 F.2d 838, 842-43 (D.C. Cir. 1980), *vacated in part on other grounds*, 455 U.S. 997 (1982), the D.C. Circuit concluded that documents that had been created by the CIA, sent to Congress, and returned to the CIA were agency records, resting its "decision on the absence of congressional intent to 'retain control' over agency-generated documents." *United We Stand*, 359 F.3d at 600 (quoting *Holy Spirit Ass'n*, 636 F.2d at 843).

In *United We Stand*, the D.C. Circuit considered whether documents prepared by the IRS in response to a congressional inquiry were agency records or congressional records. The court reaffirmed that "the agency to whom the FOIA request is directed must have exclusive control of the disputed documents," and if "'Congress has manifested its own intent to retain control, then the agency—by definition—cannot lawfully "control" the documents.'" *Id.* at 600 (quoting *Paisley*, 712 F.2d at 693), *quoted in ACLU v. CIA*, 823 F.3d 655, 664 (D.C. Cir. 2016). Accordingly, the court barred plaintiff from obtaining under FOIA any portion of the records at issue over which the court found

"sufficient indicia of congressional intent to control." *United We Stand*, 359 F.3d at 660.

In *Judicial Watch*, the D.C. Circuit applied these precedents to records that the President had manifested an intent to control, specifically, WAVES and ACR records of visitors to the White House Complex. 726 F.3d at 221-24.[8] The court first noted that, as in *United We Stand*, the documents were "created in response to requests from, and information provided by, a governmental entity not covered by FOIA." *Id.* at 222. Specifically, WAVES and ACR records "are created in response to requests by the Office of the President to grant visitors access to the White House Complex, and they contain visitor information provided by that Office." *Id.* Second, "the non-covered entity—here, the White House—has 'manifested a clear intent to control' the documents." *Id.* at 223 (quoting *United We Stand*, 359 F.3d at 597). "And that means the agency is not free to use or dispose of the documents as it sees fit." *Id.* "Third, again as in *United We Stand*, disclosing the records would reveal the specific requests made by the non-covered entity—here, the Office of the President's requests for visitor clearance." *Id.* Based on

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[8] As the *Judicial Watch* court noted, the D.C. Circuit had previously suggested, but not squarely held, that the analysis of *Goland* and its progeny extends to presidential communications. 726 F.3d at 223 n.21 (citing *Bureau of Nat'l Affairs v. DOJ*, 742 F.2d 1484, 1491-92 (D.C. Cir. 1984); *Ryan v. DOJ*, 617 F.2d 781, 785, 786 (D.C. Cir. 1980)).

these factors, the court concluded that it was appropriate to apply the test set out in *United We Stand* and its predecessors in the context of presidential records; applying that test, the court held that WAVES and ACR records reflecting visits to presidential components of the EOP bear "sufficient indicia of presidential control" that they are not agency records. *Id.* at 224.

The D.C. Circuit rejected the argument that "*United We Stand* and its predecessors should be limited to documents created by or at the instance of Congress, not the White House." *Id.* at 223. The court concluded that "the Office of the President has comparable constitutional prerogatives" to Congress. *Id.* at 224. "In particular, the Executive has a constitutional prerogative to maintain the autonomy of its office and safeguard the confidentiality of its communications." *Id.* (quoting *Cheney v. U.S. District Court*, 542 U.S. 367, 385 (2004); quotation marks and alterations omitted). "Indeed, Congress crafted FOIA to avoid intruding on the confidentiality of presidential communications." *Id.* The court observed that

> [s]ubjecting [WAVES and ACR] records to FOIA would thus confront the President with a dilemma similar to the one that concerned us in *Goland* and *United We Stand*—forcing him either to surrender his constitutional prerogative of maintaining secrecy regarding his choice of visitors (and therefore of outside advisors), or to decline to cooperate with the executive branch agency entrusted with

> (and necessary for) his personal protection. Given 18 U.S.C. § 3056(a)—which bars the President from declining Secret Service protection—it is not even clear he would have the latter choice.

Id. (citations and quotation marks omitted).

The D.C. Circuit concluded that its judgment "was confirmed by application of the canon of constitutional avoidance." *Id.* at 231. "In order to avoid substantial separation-of-powers questions," the court held that "Congress did not intend to authorize FOIA requesters to obtain indirectly from the Secret Service information that it had expressly barred requesters from obtaining directly from the President." *Id.* The court also observed that WAVES and ACR records are "a better fit for the Presidential Records Act (PRA), which Congress enacted in 1978 to avoid the very 'separation of powers concerns' and 'outside interference with day-to-day operations of the President and his closest advisors' " that would be presented by subjecting the records to FOIA. *Id.* at 227-28. WAVES and ACR records "are 'created or received' by the President and his staff . . . 'in the course of' 'the carrying out of the constitutional, statutory, official and ceremonial duties of the President,' " including "whenever the President consults agency officials, negotiates with foreign heads of state, or speaks with private organizations or individuals at the White House." *Id.* at 228 (quoting 44 U.S.C. § 2201(2); alteration omitted). "And they are essential to ensuring that the President can go about these core activities without risking his security or that of his family and staff." *Id.* The records "thus track quite

nicely the definition of 'Presidential records' found in the PRA." *Id.*

B. The White House Has Clearly Manifested Its Intent to Retain Control of the Responsive Records

The district court correctly adopted the reasoning of *Judicial Watch* and held that both WAVES and ACR records reflecting visits to presidential components of the EOP and the responsive presidential schedule records are not agency records subject to FOIA. (JA 156-64, 176-79). With regard to both sets of records, the record demonstrates—and plaintiffs have not disputed—that the White House has manifested a "clear intent to control" the records, and the Secret Service is not "free to use and dispose of the documents as it sees fit." *Judicial Watch*, 726 F.3d at 223.

1. WAVES and ACR Records

Philip C. Droege, who has served as the Director of the White House Office of Records Management since 2004, affirmed that "[s]ince at least 1990, throughout the last five Presidential administrations, it has been the policy and the practice of the White House Office, in accordance with the Presidential Records Act, 44 U.S.C. § 2201 *et seq.*, to retain and maintain control over records generated by the Worker and Visitor Entrance System." (JA 79 ¶ 1; JA 80 ¶ 3). Droege explained that WAVES and ACR records "reflect the activities and official functions of the Presidency and Vice Presidency, and the White House continues to use the information contained in such records for various historical and informational purposes." (JA 81 ¶ 7).

"Accordingly, WAVES and ACR records, like other records that reflect the activities of the Presidency and Vice Presidency, are maintained as records subject to the Presidential Records Act." (JA 81 ¶ 7).

The White House's intent to maintain control of WAVES and ACR records is reflected in the 2006 MOU, which "documented what was then understood to be past practice and interests regarding WAVES and ACR records." (JA 81 ¶ 6). As the D.C. Circuit observed in *Judicial Watch*, the 2006 MOU is "unequivocal" in asserting that control of WAVES and ACR records is at all times maintained by the White House, not the Secret Service. 726 F.3d at 218; (JA 71 ¶ 19 ("any information provided to the Secret Service for the creation, or in the form, of [WAVES and ACR] records is provided under an express reservation of White House control"); JA 72 ¶ 24 ("the White House at all times asserts, and the Secret Service disclaims, all legal control over any and all [WAVES and ACR] records subject to this [MOU]")).

The White House's intent to retain control of these records is further illustrated by the strict limitations the White House has placed on the Secret Service's ability to access and use them. Information contained in WAVES records is provided to the Secret Service for two limited purposes: to allow the Secret Service to perform background checks to determine whether, and under what conditions, to authorize a visitor's temporary admittance to the White House Complex; and to allow the Secret Service to verify the visitor's admissibility at the time of the visit. (JA 70 ¶ 12). The 2006

MOU recognizes that "[o]nce the visit ends, the information contained in WAVES and ACR records has no continuing usefulness to the Secret Service." (JA 70 ¶ 13; *see* JA 65 ¶ 13; JA 81 ¶ 9). Accordingly, the Secret Service has a longstanding practice, reflected in the 2006 MOU, of transferring WAVES and ACR records to the White House (specifically, to the WHORM) within 30 to 60 days of the visit, and automatically deleting those records from the computer systems every 60 days. (JA 65-66 ¶¶ 13-15; JA 80-81 ¶¶ 4-6). The Secret Service's temporary retention of WAVES and ACR records following a visit "is solely for the purpose of facilitating an orderly and efficient transfer of the records to the WHORM." (JA 81-82 ¶ 9). Indeed, "once a visit is concluded, the [Secret Service] may not access EFACS or WAVES records without White House approval." (JA 86 ¶ 9; *see also* JA 67 ¶ 19).

The White House has also placed limitations on the Secret Service's use of EFACS and WAVES, the electronic systems that generate WAVES and ACR records. The reorganization of EOP information systems and resources pursuant to President Obama's 2015 Memorandum consolidated disparate information systems and resources into a single Presidential Information Technology Community under the auspices of the DWHIT. (JA 85 ¶ 4; *see* JA 88 § 1). Pursuant to that framework, the President controls and is the business owner of the EFACS and WAVES systems, and the Secret Service operates those systems on behalf of the President, acting as a service provider. (JA 66-67 ¶¶ 16, 20; JA 86 ¶¶ 7-8). The Secret Service cannot make any changes to the system, or make purchases related to the systems, without consent of the

DWHIT.[9] (JA 67 ¶ 20; JA 86 ¶ 8). The 2015 MOU entered into by members of the Presidential Information Technology Community confirms that "[a]ll records created, stored, used, or transmitted by, on, or through the unclassified information systems and resources provided to the President, Vice President, and EOP shall remain under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component." (JA 96 § 3.01; *see also* JA 66 ¶ 17; JA 86 ¶ 9).[10]

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[9] It is therefore not the case that WAVES and ACR records are "in the agency's files" simply because they "reside on the Secret Service's servers." *Judicial Watch*, 726 F.3d at 219-20. While the Secret Service operates the machinery, it does so on behalf of the President, and the fact that WAVES and ACR records reside on the Secret Service's servers for a short period does not mean that they are "integrated into the Secret Service's overall record system." *Id.* at 220.

[10] As discussed *infra* in Point II.C, where the "originating EOP component" is an agency component subject to FOIA, the WHORM now transfers WAVES and ACR records to that component for processing under FOIA and posting to the component's electronic reading room, pursuant to the process established in the *Public Citizen* settlement. (*See* JA 118 ¶ 7; *Doyle v. DHS*, 17 Civ. 2542 (S.D.N.Y.), ECF No. 62).

2. Presidential Schedule Records

The White House has also manifested a clear intent to control the presidential schedule records, as the district court determined. (JA 176-77). The records bear the indicia of non-agency-records under the D.C. Circuit's precedents, as applied in *Judicial Watch*, 726 F.3d at 222-23.

First, the records were created by, and obtained from, "a governmental entity not covered by FOIA." *Id.* at 222; (JA 177). The responsive presidential schedule records consist of presidential schedules transmitted directly by the White House Office to the Secret Service; other information regarding presidential visitors transmitted directly by the White House Office to the Secret Service; and information regarding the President's schedule that was obtained directly from the White House Office and incorporated into Secret Service emails. (JA 44-46 ¶ 28(i)-(vi), (xi), ¶ 30; JA 67-68 ¶ 22). The White House Office is a presidential component of the EOP that is not subject to FOIA. (JA 84-85 ¶ 2 (the White House Office, also referred to as the Office of the President, serves the President in the performance of the many detailed activities incident to his immediate office)); *Wilson v. Libby*, 535 F.3d 697, 708 (D.C. Cir. 2008). As the district court determined, the presidential schedule records "track the definition of 'presidential records' in the PRA even more closely than WAVES and ACR records: They are 'documentary materials . . . created . . . by the President, the President's immediate staff, or a unit or individual of the [EOP] whose function is to advise or assist the President, in the course of conducting activities which

relate to' the President's 'official or ceremonial duties[.]'" (JA 178 (quoting 44 U.S.C. § 2201; alterations in district court decision); *see also* JA 46 ¶ 31); *Judicial Watch*, 726 F.3d at 227-28.

Second, as the district court recognized, the White House Office disseminates the President's schedule only to limited personnel within the Secret Service who have an operational need to know the scheduling information in order to perform their protective duties. (JA 176-77; *see* JA 67-68 ¶ 22). Only Secret Service personnel who are approved by the White House may access the President's schedule. (JA 68 ¶ 23). The responsive presidential schedule records were transmitted by the White House Office for the narrow purpose of providing the information necessary for the Secret Service to perform its mandatory statutory duty to protect the President. (JA 46-47 ¶ 31; JA 68 ¶ 24); 18 U.S.C. § 3056(a). The Secret Service, in turn, uses the records for the limited purpose of fulfilling its operational needs in relation to the performance of its protective functions. (JA 68 ¶ 24). In short, the presidential schedule documents "belong to the White House Office and not the Secret Service" (JA 68 ¶ 24), and thus "the agency is not free to use and dispose of the documents as it sees fit," *Judicial Watch*, 726 F.3d at 223.

Third, as in *Judicial Watch*, "disclosing the records would reveal the specific requests made by the non-covered entity." *Id.* In fact, disclosure would reveal not only "the Office of the President's requests for visitor clearance," *id.*, but the President's entire schedule for the relevant dates. In that sense, as the district court

observed, "subjecting the Presidential Schedule Documents to FOIA would intrude more deeply into the Office of the President than doing so for WAVES and ACR records," because it would provide "*direct* access to [the President's] calendars in their original forms." (JA 177-78 (emphasis in district court decision)).

C. The District Court Properly Considered the White House's Intent to Retain Control of the Responsive Records

Plaintiffs do not dispute that the record evidences the White House's clear intent to retain control of WAVES and ACR records as well as the presidential schedule records. Nor do they dispute that they are attempting to obtain presidential schedules and visitor records that they could not obtain from the President himself. Instead, relying on the Supreme Court's decision in *Tax Analysts II*, 492 U.S. at 145, plaintiffs insist that any document that comes into an agency's possession in the legitimate conduct of its official duties is under agency control, regardless of whether the President or Congress asserts control of the record. Plaintiffs' argument is based upon a misreading of the law and should be rejected.

Contrary to plaintiffs' claim (Brief of Appellants ("Br.") 21), the district court did not rely on the D.C. Circuit's four-factor test in *Tax Analysts v. DOJ* ("*Tax Analysts I*"), 845 F.2d 1060, 1069 (D.C. Cir. 1988), *aff'd on other grounds in Tax Analysts II*, 492 U.S. 136.. Rather, the district court adopted the reasoning in *Judicial Watch*, which itself found application of the four-

factor test indeterminate and instead applied the principles set forth in *United We Stand* and its predecessors involving records over which an entity not covered by FOIA asserts control. (JA 156-62); *Judicial Watch*, 726 F.3d at 218-24. As the district court noted, "the outcome in *Judicial Watch* was driven more by 'special policy considerations' related to the prospect of applying FOIA to Presidential documents than by the four-factor test for control with which Plaintiffs take issue." (JA 156).

Plaintiffs maintain that the reasoning in *Judicial Watch* is inconsistent with the test for control applied in *Tax Analysts II* (Br. 21-22), but the Supreme Court in that case was addressing a different question. At issue in *Tax Analysts II* was whether the Department of Justice controlled copies of district court decisions that it received in the course of litigating tax cases on behalf of the federal government. 492 U.S. at 138. The Court's statement that "[b]y control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties," 492 U.S. at 145, must be read in that context. The Court had no occasion to consider, let alone resolve, whether an agency's receipt of a record in the conduct of its official duties would be sufficient to demonstrate control when another entity not subject to FOIA asserts control of the record. In that circumstance, settled precedent in the D.C. Circuit—which has "considerable experience" in analyzing FOIA's application to records generated by the EOP, *Main Street Legal Servs.*, 811 F.3d at 547; (JA 149 n.12)—instructs that a record cannot be under the control of an agency if Congress or the President manifests a clear intent to control the record. *See*

United We Stand, 359 F.3d at 600; *Paisley*, 712 F.2d at 693; *see also ACLU*, 823 F.3d at 659 (congressional report transmitted to various agencies "for their consideration and use within the Executive Branch" was not an agency record where evidence "manifest[ed] a clear intent by the Senate Committee to maintain continuous control over its work product," including the final report).

Plaintiffs' contention that the Supreme Court's decision in *Tax Analysts II* precludes any consideration of the White House's intent to control (Br. 19, 22) is also mistaken. Plaintiffs seize on the Court's statement that "[s]uch a *mens rea* requirement is nowhere to be found in the Act," 492 U.S. at 147, but the Court was referring to a different *mens rea*. The Department of Justice had argued that the "agency records" subject to disclosure under FOIA should be limited to "documents prepared substantially to be relied upon in agency decisionmaking." *Id*. The tax court decisions at issue in *Tax Analysts* were not agency records, the government urged, because "judges do not write their decisions primarily with an eye toward agency decisionmaking." *Id*. The Supreme Court rejected that argument, explaining that the agency records determination does not turn on the intent of the creator as to the purpose of the document. But the Court nowhere suggested that courts should not consider the intent of the creator to retain or relinquish control over the record—a factor that is plainly relevant to the question of control. (*See* JA 157 (*Tax Analysts II* was "considering an issue separate and apart from whether a document's creator intended 'to retain or relinquish control' of the document")).

Judge Henderson's concurrence in *Consumer Federation of America v. Department of Agriculture*, 455 F.3d 283, 293-96 (D.C. Cir. 2006), on which plaintiffs also rely (Br. 21), underscores this distinction. Judge Henderson explained that *Tax Analysts II* rejected reliance "on the authors' purpose *in creating the documents*," *id.* at 294 (emphasis added), but she endorsed the continued vitality of the *Tax Analyst I* test, including consideration of the intent of the documents' creator to retain or relinquish control over the records, *id.* at 295-96. Moreover, as the district court noted (JA 157-59), Supreme Court and Second Circuit case law "support[] consideration of the drafter's intent" to retain or relinquish control "in determining whether a document is an agency record subject to FOIA." (JA 157-58 (observing that *Kissinger*, 445 U.S. at 140-41, 157, considered Henry Kissinger's "demonstrated intent to retain control over notes of his phone calls" as National Security Advisor, and *Main Street Legal Servs.*, 811 F.3d at 544-45, 553, held that the National Security Council "was not an agency subject to FOIA based in part on the President's intentions as expressed in a presidential directive")).[11] The district

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[11] Plaintiffs' reading of *Tax Analysts II* is also inconsistent with *Grand Central Partnership v. Cuomo*, 166 F.3d 473, 478-81 (2d Cir. 1999), in which this Court considered whether employee notes in the agency's possession were agency records under FOIA. Rather than holding that the notes were agency records based solely on the agency's possession of them in

court thus properly rejected plaintiffs' overly "restrictive reading" of *Tax Analysts II*. (JA 158).

D. Requiring Disclosure Would Raise Substantial Separation of Powers Concerns

As both the D.C. Circuit and the district court recognized, compelling disclosure under FOIA of presidential schedules and visitor information provided to the Secret Service to allow the agency to carry out its mandatory duty to protect the President and the White House Complex would raise substantial separation of powers concerns. *Judicial Watch*, 726 F.3d at 231; *see id.* at 224-29; (JA 154-55, 156, 177-78). Indeed, it was in part to avoid the "serious separation-of-powers concerns that would be raised by a statute mandating disclosure of the President's daily activities" that "Congress exempted such records from FOIA—and later subjected them to the Presidential Records Act instead." *Judicial Watch*, 726 F.3d at 216.[12] Applying

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the legitimate conduct of its official duties—as plaintiffs urge the Court to do here—the Court considered "a variety of factors surrounding the creation, possession, control, and use of the document[s] by the agency." *Id.* at 479 (quoting *Bureau of Nat'l Affairs*, 742 F.2d at 1490; quotation marks omitted).

[12] In arguing that "neither the language of FOIA nor its legislative history defines the term ['agency records']" (Br. 15), plaintiffs disregard the legislative history "indicat[ing] that 'the President's immediate personal staff or units in the Executive Office whose sole

the canon of constitutional avoidance, the D.C. Circuit concluded that "Congress did not intend to authorize FOIA requesters to obtain indirectly from the Secret Service information that it had expressly barred requesters from obtaining directly from the President." *Id.* at 231; (JA 177 (holding that "the same separation of powers concerns that animated *Judicial Watch* apply" to the presidential schedule records)). Plaintiffs offer no response to this fundamental point.

Instead, plaintiffs posit a false distinction between "subjecting presidential information in the hands of agencies to the FOIA" and "subjecting the president himself to the FOIA." (Br. 28). But this misses the point. Subjecting the President's schedules and visitor logs to disclosure under FOIA, simply because they were provided to the Secret Service to enable the agency to carry out its protection mandate, would effectively subject the President himself to FOIA. The records sought by plaintiff are the President's records. The Secret Service only has them because it is required by law to protect the President, and the President is required by law to accept that protection. *See Judicial Watch*, 726 F.3d at 225 (President has "little choice" but to share schedule and visitor information

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function is to advise and assist the President' are not included within the term 'agency' under the FOIA." *Kissinger*, 445 U.S. at 156 (quoting H.R. Conf. Rep. No. 93-1380, at 232), *quoted in Judicial Watch*, 726 F.3d at 224, 227.

with the Secret Service). The district court rightly rejected plaintiffs' proposed distinction as "a rhetorical sleight-of-hand." (JA 161).

Plaintiffs also ignore the significant concern that construing "agency records" to extend to presidential schedules and White House visitor logs—"regardless of whether they are in the possession of the White House or the Secret Service—could substantially affect the President's ability to meet confidentially with foreign leaders, agency officials, or members of the public." *Judicial Watch*, 726 F.3d at 226; (JA 155, 177-78). "[T]hat could render FOIA a potentially serious congressional intrusion into the conduct of the President's daily operations," *Judicial Watch*, 726 F.3d at 226, the very concern that prompted Congress to exclude the President and his advisors from FOIA in the first place. The D.C. Circuit and the district court rightly applied the canon of constitutional avoidance to conclude that Congress did not intend such a result. (JA 154-55 (citing *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"))).[13]

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[13] Relying on the reversed district court decision in *Judicial Watch*, plaintiffs suggest, in a footnote, that the constitutional avoidance doctrine is inapplicable because the Court is not interpreting an ambiguous

E. Plaintiffs Misstate the Effect of the District Court's Ruling

Contrary to plaintiffs' assertions, the district court's ruling does not extend to any information with a "connection to the President" (Br. 25-26) or information that merely "mentions, references, or reflects something about the [P]resident and exempt EOP components" (Br. 31). The district court ruled that two particularized sets of responsive documents are not agency records: (1) WAVES and ACR records reflecting visits to presidential components of the EOP, and (2) the presidential schedule records, which were provided by the White House Office to the Secret Service. In both cases, the district court found, the White House has manifested sufficiently clear intent to control to render them non-agency records. That does not mean any information in the hands of the Secret Service "about the President" is excluded from FOIA.

To the contrary, the district court ordered the Secret Service to process under FOIA certain operational records regarding the Japanese Prime Minister's visit with the President at Mar-a-Lago in February 2017. The Secret Service did not contend—and the district court did not rule—that such records are not agency records simply because they relate to the President. Only discrete portions of some of those records, consisting of presidential schedules obtained from the

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statute. (Br. 24 n.4). The D.C. Circuit correctly rejected this argument, finding that "the statute is not only ambiguous, it is opaque." 726 F.3d at 229.

White House Office, are excluded from FOIA under the district court's ruling. (JA 46 ¶ 30, *see* JA 176-79). Likewise, to the extent any WAVES or ACR record from an agency component of the EOP "contains information that would not constitute agency records in light of its connection to the President," the court noted that "Defendants may redact such information." (JA 166). In making this observation, the district court left open the possibility that some WAVES or ACR records could contain elements of both agency and non-agency records, in which case non-agency records could be redacted. The court was not suggesting that any record with a "connection to the President" is excluded from FOIA.

Despite plaintiffs' assertion (Br. 31), the district court's ruling is subject to the same "limiting principle" that the D.C. Circuit has applied in a long line of cases from *Goland* to *United We Stand* to *Judicial Watch*: the principle that a record is not subject to FOIA where it belongs to Congress or the President, entities not covered by FOIA, and Congress or the President has manifested a clear intent to control the record. That cannot be said of the Office of Legal Counsel opinions, Office of Government Ethics advice, pardon documents, or Attorney General calendars identified by plaintiffs (Br. 30-32)—which, although they may contain information *about* the President, are not subject to a claim of *control* by the President.

The district court's ruling is subject to the additional limitation that it implicates a particular category of presidential records that Congress specifically

intended to exclude from FOIA—presidential appointment calendars—that are in the hands of the Secret Service only because the President is required by law to accept Secret Service protection. *See Judicial Watch*, 726 F.3d at 233. By contrast, although the Attorney General's calendars may contain individual entries that disclose White House visits, they would not permit FOIA requestors to obtain "*direct* access" (in the case of the presidential schedule records) (JA 178) or "replicate in key particulars" (in the case of WAVES and ACR records) "the content of *the President's* appointment calendars," *Judicial Watch*, 726 F.3d at 225 (emphasis added). As the D.C. Circuit put it in rejecting a similar argument in *Judicial Watch*, "the kind of *information* at issue here is in many ways sui generis" because the case involves a category of documents "that effectively reproduces a set of records that Congress expressly excluded from [FOIA]." 726 F.3d at 232. Plaintiffs have not pointed to any evidence that the *Judicial Watch* decision "open[ed] the floodgates to White House efforts to circumvent FOIA," *id.* at 231, and there is no reason to expect that applying *Judicial Watch* to the similar records in this case would have any such effect.

POINT II

The District Court Correctly Dismissed Plaintiffs' Claims Alleging Violation of the APA, FRA, and PRA

Plaintiffs ask the Court to reinstate their "APA claims" challenging the Secret Service's and EOP's recordkeeping policies and practices with respect to

WAVES and ACR records, as contrary to the requirements of the FRA and PRA. (Br. 32). But the claims described in plaintiffs' brief are materially different from the claims pleaded in the amended complaint. As the district court determined (JA 188-89), plaintiffs' claims as alleged in the amended complaint were premised only on the 2015 MOU, which plaintiffs alleged violated defendants' obligation to treat records of visits to agency components of the EOP as agency records subject to FOIA. The district court properly found that the 2015 MOU "does no such thing" (JA 193), and thus correctly held that plaintiffs failed to allege a sufficient factual basis for the Court to review the 2015 MOU for compliance with the FRA or PRA (JA 192).

The Court should reject plaintiffs' belated attempt to amend the complaint to encompass the broader APA, FRA, and PRA claims they press on appeal. (Br. 45). Having never sought that relief in the district court, plaintiffs cannot show that the district court abused its discretion in failing to allow them to amend their complaint a second time. In any event, the district court's disposition of plaintiffs' FOIA claims demonstrates that amendment would be futile. WAVES and ACR records reflecting visits with presidential components of the EOP are not subject to FOIA, and those reflecting visits with agency components are now processed under FOIA and publicly posted. Plaintiffs therefore cannot plausibly allege that any current recordkeeping guideline or directive violates the PRA or APA by improperly treating agency records as presidential records.

A. Plaintiffs' Claims as Alleged in the Amended Complaint Are Premised on the 2015 MOU

Plaintiffs ask this Court to reinstate claims on appeal that they never pleaded in their amended complaint. They purport to "challenge the policy and practice, embodied in memoranda of understanding between the EOP and DHS [the 2006 and 2015 MOUs], of treating Secret Service visitor logs as within the scope of the PRA and outside the reach of the FOIA." (Br. 32). Yet, as the district court recognized, the amended complaint "makes no mention of the 2006 MOU" (JA 188), nor does it challenge under the APA, FRA, or PRA the treatment of WAVES and ACR records of visits to Presidential components of the EOP.

Instead, plaintiffs' claims as pleaded in the amended complaint address a subset of WAVES and ACR records that reflect "visits to agency components of the EOP." (JA 30-31, ¶¶ 62-63, 66-67).[14] And the

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[14] Plaintiffs added their APA, FRA, and PRA claims in response to events in a separate FOIA litigation filed by Public Citizen, Inc., in August 2017. As alleged in the amended complaint, the *Public Citizen* lawsuit challenged the alleged failure of the Secret Service to produce "records of visits to four EOP agencies subject to the FOIA: OMB, OSTP, ONDCP, and CEQ." (JA 28 ¶ 48). According to the amended complaint, the Secret Service relied in part on the 2015 MOU, which "ha[d] never before been made public,"

only action challenged in those claims is the EOP and DHS's entry into the 2015 MOU. In their claims for relief under the APA, FRA, and PRA (claims three and four), plaintiffs alleged that "[b]y entering into an MOU that declares [in § 3.01] that the records of visits to agency components of the EOP are under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component," EOP and DHS violated their "mandatory, non-discretionary obligation" under the FRA (and in EOP's case, also the PRA) "to treat these records as agency records of DHS subject to the FOIA." (JA 30-31 ¶¶ 63, 67; *see* JA 96 § 3.01).

The district court correctly held that plaintiffs could not "inject the 2006 MOU into their pleading by way of their opposition brief, as this would constitute an improper amendment of their complaint." (JA 189 (citing *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998))); *see also Kleinman v. Elan Corp.*, 706 F.3d 145, 153 (2d Cir. 2013). On appeal, plaintiffs contend that the district court was obligated to consider the 2006 MOU in relation to their APA, FRA, and PRA claims because "*Defendants* introduced this evidence in support of their dispositive motion." (Br. 42 (emphasis in Br.)). But the 2006 MOU was submitted in connection with defendants' motion for summary judgment on plaintiffs' FOIA claims (JA 60-73); defendants' motion to dismiss the APA, FRA, and PRA

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and interpreted section 3.01 of the 2015 MOU "as applying to all the records at issue in the *Public Citizen* lawsuit." (JA 29 ¶ 50).

claims was directed at the legal sufficiency of plaintiffs' pleading, and did not invoke the 2006 MOU. (JA 189; *see Doyle v. DHS*, 17 Civ. 2542 (S.D.N.Y.), ECF No. 51, at 30-35; ECF No. 55, at 15). As the district court recognized, "where, as here, a defendant mounts a facial challenge to jurisdiction—*i.e.*, a Rule 12(b)(1) motion 'based solely on the allegations of the complaint'—the district court's task is to determine whether the pleading 'alleges facts that affirmatively and plausibly suggest' that it has jurisdiction." (JA 189 (quoting *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016); *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011; alterations omitted)). The district court properly held that plaintiffs' amended complaint fails to satisfy this standard.

B. The 2015 MOU Is Not Judicially Reviewable for Compliance with the PRA or FRA

The judicial review available to a private plaintiff under the FRA and PRA is extremely limited. In *Armstrong I*, the D.C. Circuit held that a private plaintiff may seek review under the APA of an agency's "record-keeping guidelines and directives" to determine whether they "are inadequate because they permit the destruction of 'records' that must be preserved under the FRA." 924 F.2d at 291. Even so, the FRA precludes judicial review of an action "to prevent an agency official from improperly destroying or removing records." *Id.* at 294. For that, private plaintiffs are limited to an action seeking review of an agency head's or the Archivist's failure to demand administrative enforcement by the Attorney General. *Id.* at 294-95.

"The APA does not authorize judicial review of the President's compliance with the PRA because the President is not an 'agency' within the meaning of the APA and because the PRA precludes judicial review of the President's record creation and management decisions." *Id.* at 297; *see Armstrong II*, 1 F.3d at 1294.[15] However, "courts may review guidelines outlining what is, and what is not, a presidential record." *Armstrong II*, 1 F.3d at 1294 (quotation marks omitted). The PRA allows only "limited review to assure that guidelines defining presidential records do not improperly sweep in nonpresidential records." *Id.* at 1278.

The 2015 MOU does not fall within the narrow categories of "guidelines" reviewable under either the PRA or the FRA. Nothing in the 2015 MOU defines or outlines presidential records. While section 3.01, the provision cited in the amended complaint, states that certain records "shall remain under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component," that does not mean that they are presidential records. The "originating component of the EOP" could be a presidential component or it could be an agency component whose records would be subject to the FRA and FOIA. (JA 20 ¶ 9 (alleging that the EOP includes "agency components . . . subject to the FOIA and the FRA")). Thus, the 2015 MOU does not define which records are presidential records and which are agency records, let

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[15] Plaintiffs are therefore incorrect to the extent they assert that the D.C. Circuit has held that a "PRA challenge[ ]" is "justiciable under the APA." (Br. 33).

alone do so in a way that would "improperly sweep in nonpresidential records." *Armstrong II*, 1 F.3d at 1278. As the district court noted, the 2015 MOU "says nothing of whether the parties understand these records to constitute presidential records," but rather "describes which governmental entities will be responsible for such documents on a day-to-day basis." (JA 193; *see also* JA 192).

Nor does the 2015 MOU "permit the destruction of 'records' that must be preserved under the FRA," such that it would be subject to judicial review in an action under the APA. *Armstrong I*, 924 F.2d at 290. As the district court determined, section 3.01 "simply states the understanding of the parties that certain records 'shall remain under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component.' [I]t does not command record-keeping practices that could result in improper disposal under the FRA[.]" (JA 192).

The 2015 MOU "is not the sort of guideline or directive that courts have reviewed for compliance with either the FRA or the PRA." (JA 198; *see id.* at 198-91 (collecting cases)). The district court thus properly held that plaintiffs' APA, FRA, PRA claims, as pleaded in the amended complaint, do not allege a sufficient factual basis for judicial review (JA 192) and dismissed those claims for lack of subject matter jurisdiction (JA 181, 194).

C. The Court Should Reject Plaintiffs' Belated Request for Further Amendment

Plaintiffs alternatively argue that they should be permitted to further amend their complaint to include the 2006 MOU (Br. 45), but they never asked the district court for leave to amend their complaint a second time. Plaintiffs cannot show that the district court abused its discretion in failing to grant relief they never sought. *See Gallop v. Cheney*, 642 F.3d 364, 369 (2d Cir. 2011); *Horoshko v. Citibank, N.A.*, 373 F.3d 248, 249-50 (2d Cir. 2004). Plaintiffs' belated request for amendment should be rejected for that reason alone. *Wilson v. Merrill Lynch & Co.*, 671 F.3d 120, 140 (2d Cir. 2011).

Plaintiffs' request should also be denied because amendment would be futile. *See McCarthy*, 482 F.3d at 200. As characterized in their brief, plaintiffs' APA, FRA, and PRA claims boil down to the assertion that WAVES and ACR records are improperly treated as presidential rather than agency records. That is precisely the issue that the district court decided under FOIA. For the reasons discussed above, the district court properly held that WAVES and ACR records reflecting visits to presidential components of the EOP are not agency records. *See supra* Point I. Defendants therefore properly treat those records as presidential records subject to the PRA (JA 81 ¶ 8; *see also* JA 70-71 ¶¶ 7, 17), and could not have violated the PRA or the FRA in treating them as such. *See Armstrong II*, 1 F.3d at 1293 (Congress "explicitly provided that the PRA would apply only to records that 'fall outside the scope of FOIA because they are not agency records' ").

To the extent plaintiffs seek to allege a violation of the APA and FRA based upon defendants' treatment of WAVES and ACR records reflecting visits to agency components of the EOP, any amendment would have to account for the settlement agreement entered in the *Public Citizen* case, which changed the way such records are treated. (JA 115-22).[16] The *Public Citizen* settlement created a process by which the WHORM identifies WAVES and ACR records potentially reflecting visits to agency components of the EOP, and refers those records to the respective agency EOP components for processing under FOIA and posting (with appropriate redactions) to the components' respective

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[16] Although the district court declined plaintiffs' request to take judicial notice of the *Public Citizen* settlement in connection with defendants' motion (JA 142-44), "[j]udicial notice may be taken at any stage of the proceeding," even on appeals for the first time. *Hotel Emps. & Rest. Emps. Union v. City of N.Y.*, 311 F.3d 534, 540 n.1 (2d Cir. 2002) (quoting Fed. R. Evid. 201(f)); *see Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 124 n.12 (2d Cir. 2010) (even where document not admitted by district court, this Court was "empowered to take judicial notice" of it as "a public record," and the document was properly "part of the appellate record" and considered on appeal).

electronic reading rooms each month. (JA 116-19 ¶¶ 1-5, 7, 9-10). These records are now available online.[17]

While the *Public Citizen* settlement expires on January 20, 2021, or earlier if the EOP email or WAVES systems are altered in certain ways (JA 143, *see* JA 119 ¶ 10), there can be no reasonable dispute that the process established by the settlement is currently in place. In fact, in accordance with the process created by the *Public Citizen* settlement, plaintiffs have obtained the records of visits to agency components of the EOP that they sought under FOIA. (JA 199; *Doyle v. DHS*, 17 Civ. 2542 (S.D.N.Y.), ECF No. 62). Thus, the harm that plaintiffs allegedly seek to address with their APA, FRA, and PRA claims—that the Secret Service and EOP had a "policy and practice of treating agency records as presidential records" (Br. 33)—no longer exists with regard to WAVES and ACR records

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[17] *See https://www.whitehouse.gov/omb/freedom-information-act-foia/* ("OMB Visitor Records"); *https://www.whitehouse.gov/ceq/foia/* (CEQ "Waves Logs"); *https://www.whitehouse.gov/ondcp/additional-links-resources/foia/* (ONDCP "Visitor Records"); *https://www.whitehouse.gov/ostp/legal/* ("OSTP Visitor Logs"). Although USTR was not a party to the *Public Citizen* settlement (JA 144; *see* JA 115), that agency is also posting its visitor logs in its electronic reading room. *See https://ustr.gov/about-us/reading-room/freedom-information-act-foia/foia-library/frequently-requested-records/visitor*.

reflecting visits to agency EOP components. Instead, the records are referred to the agency components of the EOP, which as plaintiffs allege are subject to FOIA and the FRA (JA 20 ¶ 9).

Moreover, as the district court held, to the extent plaintiffs challenge the Secret Service's practice of transferring WAVES and ACR records to the WHORM rather than retaining them, the district court correctly noted that "this practice, rather than constituting a reviewable guideline, is precisely the sort of claim that the FRA . . . has precluded courts from reviewing." (JA 192 (quoting *Kissinger*, 445 U.S. at 148 ("the [FRA] establishes only one remedy for the improper removal of a 'record from the agency': the agency head, in conjunction with the Archivist, is required to request the Attorney General to initiate an action to recover records unlawfully removed from the agency"), and *Armstrong I*, 924 F.2d at 294)).

For all these reasons, plaintiffs cannot plausibly allege that any current guideline or directive improperly treats agency records as presidential records in violation of the FRA or PRA.

CONCLUSION

The judgment of the district court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 13,784 words in this brief.

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