RECORD NO.

18-2814

*To Be Argued By:
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In The
United States Court of Appeals
For The Second Circuit

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

Plaintiffs – Appellants,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendant – Appellee.

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

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The government's interpretation of the term "agency records" would create a sweeping new exception to the Freedom of Information Act ("FOIA") for records that the White House decides – by the mere stroke of a pen – should be deemed under the "control" of the president even if obtained and relied upon by federal agencies in the conduct of their official duties. The government's construction of FOIA, however, contradicts the statute's text and structure, controlling Supreme Court precedent interpreting "agency records," and the legislative history of that term. These sources of statutory interpretation all reflect a clear congressional intent that "agency records" be defined by reference to the relationship of the record in question to the agency in possession of it, rather than by the nature of the information contained within it. Applying this definition yields the unmistakable conclusion that the requested visitor records are agency records of the Secret Service.

As explained below, the government's arguments to the contrary lack merit. First, the text and structure of FOIA reflect Congress' intent that the term "agency records" apply broadly and that any legitimate interests in secrecy be accommodated by nine, carefully enumerated exemptions to disclosure. The government's interpretation would effectively inject a tenth exemption into the term "agency records" for an amorphous category of "presidential schedule

information." And while the government claims that requiring the Secret Service to disclose its visitor records would invade presidential prerogatives, it has yet to explain why FOIA's existing nine exemptions – including the protection for presidential communications recognized in Exemption 5 – would not sufficiently protect any legitimate interests it has in secrecy.

Second, the Supreme Court already has defined the term "agency records" in a manner that is consistent with the text and structure of FOIA. In *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 141 (1989) ("*Tax Analysts II*"), the Court established a two-part test for "agency records" that considers an agency's possession of and control over the records. The records Plaintiffs seek here readily satisfy both criteria: they were created or obtained by the Secret Service and came into its possession in the legitimate course of one of its official statutory duties – protecting the president. The line of D.C. Circuit cases on which the government instead relies predates *Tax Analysts II* and defines "agency records" based primarily on the intent of each record's author, an approach *Tax Analysts II* rejects.

Third, the Supreme Court's interpretation of "agency records" is consistent with FOIA's legislative history. Through the 1974 amendments to FOIA, Congress knowingly and affirmatively elected to make all the records of agency components of the Executive Office of the President ("EOP") subject to FOIA's disclosure requirements, even if created by those components in their capacities as

presidential advisers. With this expanded agency definition Congress established that "agency record" status depends on the entity that created or obtained the record, not on the content of the information in it. Congress' exclusion of certain EOP components from FOIA's reach reflects an intent to protect the president and his advisors from the day-to-day intrusion that compliance with FOIA's processes would impose. Congress did not, however, seek to protect presidential information that made its way into agency records, except through FOIA's exemptions.

Fourth, accepting the government's interpretation of "agency records" would raise substantial separation-of-powers concerns by permitting the executive branch to contract its way around the broad mandate of disclosure Congress enacted through FOIA. Specifically, accepting Defendant's theory of the case would allow the president to shield information from public disclosure simply by entering into memoranda of understanding that purport to give the president control over records obtained by an agency in the legitimate conduct of its official duties.

Finally, the district court's dismissal of Plaintiffs' Federal Records Act claims also should be reversed. The Amended Complaint plainly states plausible violations of the statute and evidence entered into the record by Defendant reinforces Plaintiffs' allegations.

ARGUMENT

I. The government's atextual interpretation of "agency records" would create a sweeping tenth exemption to FOIA and undermine FOIA's structure and purpose.

The government's interpretation of "agency records" effectively would create an amorphous and sweeping tenth exemption to FOIA that the president could invoke at will to remove whole categories of records from FOIA's reach.

In arguing that the requested visitor records are not agency records of the Secret Service, the government relied in part on two memoranda of understanding as evidence of the president's control over and ongoing interest in the records. They include a 2006 MOU entered into by the White House and Secret Service purportedly to memorialize White House control over the visitor records, Gov't Br. at 10-11, 33, and a 2015 MOU the government cited as evidence that the president maintains "exclusive ownership, control, and custody" of the requested records, *id.* at 35. The district court also relied on this evidence, characterizing the 2015 MOU as "reinforce[ing] the conclusion that WAVES and ACR records are within the control of the White House rather than the Secret Service." Op. & Order, JA 162.

Unless overturned, the government's interpretation of "agency records," effectively adopted by the district court, would give the president vast authority to invalidate FOIA's application to entire categories of records through memoranda of understanding declaring them records of the president and that required

subordinate agencies to surrender all control over such records. Empowering the White House to determine FOIA's reach would subvert FOIA and run directly contrary to its goal of "ensur[ing] an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

This approach also would render the presidential communications privilege entirely superfluous, at least in the FOIA context, violating a canon of statutory construction. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1983) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."); *see also Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon [against surplusage] is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

Exemption 5 of FOIA includes within its scope the constitutionally-based presidential communications privilege, which protects "documents 'solicited and received' by the President or his immediate White House advisors who have 'broad and significant responsibility for investigating and formulating the advice to be given to the President.'" *Judicial Watch, Inc. v. Dep't of Justice, Inc.*, 365 F.3d 1108, 1113-1114 (D.C. Cir. 2004) (quoting *In re Sealed Case*, 121 F.3d 729, 752

(D.C. Cir. 1997)). The government's interpretation of "agency records" would make this privilege entirely gratuitous. Where now the government must satisfy the presidential communications privilege to withhold White House communications, under the government's theory, the White House could recharacterize any agency records it wishes as presidential through the stroke of a pen. This would hand the president a tool that would allow him to bypass any need to make a privilege showing, creating a withholding power that would swallow FOIA's mandatory disclosure requirements and its limited exemptions.

II. The government's interpretation of "agency records" is inconsistent with the Supreme Court's decision in *Tax Analysts II*.

Plaintiffs' opening brief explained that the Supreme Court's interpretation of the term "agency records" controls this case and dictates reversal of the district court's decision. In *Tax Analysts II*, the Supreme Court defined that statutory term in deciding the question – also presented here – of whether records that "had originated in a part of the Government not covered by the FOIA," 492 U.S. at 141, constituted "agency records." The Court reviewed its prior precedent on the question and from that precedent distilled "[t]wo requirements . . . , each of which must be satisfied for requested materials to qualify as 'agency records.'" *Id.* at 144. First, the agency must have "either create[d] or obtain[ed]" the records. *Id.* Interpreting "agency records" to extend to records "obtain[ed]" by an agency would, the Court explained, serve "Congress' desire to put within public reach the

information available to an agency in its decision-making processes." *Id.* Second, "the agency must be in control of the requested materials." *Id.* at 145. The Court immediately defined the term "control": "By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.* The Court explained that this capacious definition of "control" would harmonize the definition of "agency record" under FOIA with the definition of "records" under the Records Disposal Act, as those "made or received by an agency . . . in connection with the transaction of public business." *Id.* (quoting 44 U.S.C. § 3301) (internal quotation marks omitted).

In short, the Supreme Court defined "agency records" broadly to include all records in an agency's possession obtained in the conduct of the agency's official duties. And the Court did so to serve Congress' clear purpose of exposing the government's conduct of its official duties to public scrutiny.

As explained in Plaintiffs' opening brief, the Supreme Court's definition of "agency records" easily resolves this case. Pls' Br. at 19-20. The Secret Service created or obtained the visitor records in the legitimate conduct of its official statutory duties, and those records are therefore "agency records." FOIA's exemptions may justify withholding some of them from Plaintiffs, but the records clearly are "agency records" under the Supreme Court's controlling interpretation of that term.

In response, the government relies on a line of D.C. Circuit cases (predating *Tax Analysts II*) that hold that agency "control" of a record must be determined by looking to the "intent" of the record's author, Gov't Br. at 27-30, but that interpretation of "control" simply cannot be reconciled with *Tax Analysts II*. The Supreme Court's definition of "control" turns not on intent but on an objective inquiry into the relationship between the record and the agency's official duties. And, in fact, the Supreme Court expressly rejected reliance on the author's intent in defining "agency records," because intent has no basis in FOIA's text. *Tax Analysts II*, 492 U.S. at 147-48. The D.C. Circuit itself has recognized this conflict between *Tax Analysts II* and its caselaw requiring consideration of "intent." In *Consumer Fed'n of Am. v. Dep't of Agriculture*, 455 F.3d 283 (D.C. Cir. 2006), both the majority and the concurrence highlighted the tension. *See id.* at 290 n.11 ("We focus on the manner in which the documents were used, rather than on the subjective 'intent of the creator of [the] document,' because the Supreme Court has rejected reliance upon the latter."); *id.* at 294 (Henderson, J., concurring).

The government argues that *Tax Analysts II* did not 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," Gov't Br. at 39, but that is precisely what *Tax Analysts II* considered and resolved. In that case, the Supreme Court noted that the records at issue "had

originated in a part of the Government not covered by the FOIA," 492 U.S. at 141, and considered the government's argument that the definition of "agency records" should account for the intent of a record's author as to the agency's use of the record, *id.* at 147-48. The Court rejected that argument, holding that "[s]uch a *mens rea* requirement is nowhere to be found in [FOIA]." *Id.* at 147. It is of course true that the records at issue here are not the same as the records at issue in *Tax Analysts II*, but the Supreme Court's definition of "control" leaves no room for the extra-textual limitation the government's definition of that term would impose.

The government disputes this last point, claiming that the *mens rea* to which the Supreme Court referred in *Tax Analysts II* is different from the *mens rea* on which the government's interpretation in this case relies. Gov't Br. at 40. But this, too, is incorrect. *Tax Analysts II* rejected consideration of the intent of a record's author as to how the record would be *used*, 492 U.S. at 147-48, and an assertion of control is simply a way of limiting use. That is, considering an author's intent to retain control of a record is no different than considering an author's intent that the record be used in a particular way. In any event, the Supreme Court's rejection of intent as a proper consideration did not turn on the precise nature of the intent; it turned on the lack of a textual foundation in FOIA for the consideration of intent of any kind. *Id.*

Finally, the government relies on the D.C. Circuit's decision in *Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d 208 (D.C. Cir. 2013), to argue that construing "agency records" narrowly is necessary to avoid intruding on the president's constitutional prerogatives, Gov't Br. at 29–32, but this argument fundamentally misunderstands FOIA. Through that statute, Congress commanded that executive agencies disclose all of their records upon request, unless they fall within carefully delineated exemptions. *See* 5 U.S.C. §§ 552(a)(3), (b). As discussed *infra*, though FOIA's disclosure mandate is broad, Congress accommodated the executive branch's interests in – and constitutional claim to – secrecy through the exemptions, which are more than adequate to accommodate any legitimate presidential interests implicated by a request for the Secret Service's visitor records. Indeed, Plaintiffs have pointed that fact out since the beginning of this litigation, and the government has yet to offer any explanation of why FOIA's exemptions are insufficient to protect any legitimate interest it has in secrecy. It would be extremely difficult for the government to make that showing, given that the White House routinely disclosed its visitor records, with limited redactions, for years. And even if the government could make that showing, its remedy would be either to seek another exemption to FOIA from Congress or to raise an as-applied constitutional challenge to the compelled disclosure of specific records in which it

could show a constitutionally valid claim to secrecy that is not addressed by an exemption.[1]

III. Treating the Secret Service's visitor records as presidential records would upend the statutory scheme Congress created, which defines "agency records" by reference to their function.

The district court's decision that the visitor records are presidential records flows from the false premise, also relied on by the D.C. Circuit in *Judicial Watch*, that with the 1974 amendments to FOIA, Congress expressed its intent that "it did not want documents like the appointment calendars of the President and his close advisors to be subject to disclosure under FOIA." 726 F.3d at 211. The district court endorsed this reasoning, opining that "[t]his congressional intent

[1] The government claims that Plaintiffs' interpretation of *Tax Analysts II* is inconsistent with two of this Court's cases. Gov't Br. at 41 & n.11. As explained in Plaintiffs' opening brief, Pls' Br. at 23-24, *Main Street Legal Services v. Nat'l Sec. Council*, 811 F.3d 542 (2d Cir. 2016), concerned the status of the National Security Council as an "agency," not the definition of the term "agency records." Moreover, the factors that this Court considered in *Grand Cent. Partnership v. Cuomo*, 166 F.3d 473 (2d Cir. 1999), focused primarily on whether the allegedly personal files at issue were used in an official manner. *See id.* at 480 ("Thus, the importance of a court's evaluation of the use to which such documents were and might be put by the agency and its staff cannot be overestimated."). That focus is consistent with *Tax Analysts II*. To be sure, the Court noted several times that there was not sufficient evidence in the record to determine how the records were "intended to be used" (or the like), *id.* at 481, but those statements are either dicta, given the lack of evidence, or no longer good law, given their clear conflict with *Tax Analysts II*. In fact, the D.C. Circuit has, since *Grand Central* was decided, disavowed the intent-based factors considered in the D.C. Circuit case that *Grand Central* discussed. *See Consumer Fed'n of Am.*, 455 F.3d at 290 & n.11.

speaks to the inapplicability of FOIA to the President and his immediate staff without regard to any statutory exemptions." Op. & Order, JA 160.

There is no dispute here that Plaintiffs filed their FOIA request with an agency as defined by the statute. The dispute centers instead on whether the visitor records Plaintiffs request are records of an agency – the Secret Service – or whether they instead are presidential records. The only reason this question is in dispute is that the White House and Secret Service have signed memoranda of understanding ("MOUs") that purport to cede control of the Secret Service's visitor records to the White House. The government concedes, as it must, that the records at issue were created or obtained by the Secret Service in fulfillment of its statutorily mandated duties. *See*, *e.g.*, Gov't Br. at 2, 7, 11. The government tries to diminish that fact, however, by suggesting the Secret Service is a mere "service provider," *id.* at 8, that has "only passively received [the records] from the White House," *id.* at 19. The government's own evidence contradicts these characterizations, including the fact that the Secret Service actively uses these records to fulfill its statutory duties, including annotating the records with additional information the Secret Service needs to meet those duties. *See* Gov't Br. at 9 n.3.

The district court discounted these facts to adopt the approach used by the D.C. Circuit in *Judicial Watch*, but both courts fundamentally misconstrued the

purpose and effect of the 1974 amendments to FOIA, which expanded the definition of "agency" at 5 U.S.C. § 552(f)(1) to include, among other entities, the EOP. With this expansion Congress was building upon a disclosure regime for agency records that starts with a presumption of disclosure subject to narrowly drawn exemptions where essential to protect countervailing interests. The definition of "agency" is a building block upon which FOIA defines records to include "any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format[.]" 5 U.S.C. § 552(f)(2)(A).

Prior to the 1974 amendments, FOIA defined "agency" as "each authority . . . whether or not within or subject to review by another agency." 5 U.S.C. § 551(1) (Supp. V, 1970), cited in *Soucie v. David*, 448 F.2d 1067, 1032 & n.13 (D.C. Cir. 1971). The *Soucie* court deemed this language "not entirely clear," *id.* at 1072, but concluded that the Office of Science and Technology ("OST"), a component of the EOP, was an agency under this definition based on a functional analysis. The court reasoned that in addition to advising and assisting the president, OST also exercised the independent function of evaluating federal scientific programs, an authority conferred on it by Congress, 448 F.2d at 1075, and which transformed it into an agency.

Significantly, the *Soucie* court understood that OST also advised and assisted the president and prepared documents in direct response to presidential requests. Indeed, the request at issue in *Soucie* sought OST's assessment of a scientific program prepared "because the President had requested an assessment of it." 448 F.2d at 1076. Nevertheless, the court concluded that "despite any confidential relation between the Director of the OST and the President – *a relation that might result in the use of such information as a basis for advice to the President*," *id.* (emphasis added), OST's records "made in the performance of the ordinary functions of the agency" – which included its assessment for the president – were subject to FOIA. *Id.* at 1075-76.

When Congress amended FOIA in 1974 to expand the FOIA's definition of agency to include, *inter alia*, the EOP, it intended the same result as *Soucie*, and it said so expressly:

> [w]ith respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in *Soucie* v. *David*, 448 F.2d 1067 (CA.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974). *See also Main Street Legal Servs.*, 811 F.3d at 547. In a February 1975 memorandum on the 1974 amendments, the attorney general further explained that the expanded definition of agency "is intended chiefly to clarify and expand the class of organizational

entities to be deemed 'agencies' *so that their records will be subject to the Act*." Attorney General's 1974 FOI Amendments Memorandum (emphasis added).

Neither the language of the amended agency definition nor its legislative history suggests an intent to protect specific documents or document categories from compelled disclosure in the interest of protecting presidential interests. Instead, Congress endorsed the *Soucie* court's focus on the nature of the entity as determinative of whether its records qualify as "agency records," regardless of the content of any particular record or its relationship to the president.[2] Far from protecting particular documents and so-called "presidential information" from disclosure under FOIA, Congress was focused on facilitating the broadest possible disclosure of government records while still protecting the president and his close advisors as non-agencies from the day-to-day intrusion that would result from imposing the FOIA process on them.

Nevertheless, the D.C. Circuit in *Judicial Watch* posited that "where Congress has intentionally excluded a governmental entity from the Act" it intended to close off all avenues of access to "documents or information of that entity . . . by filing a FOIA request with an entity that *is* covered under the statute." 726 F.3d at 225 (emphasis in original). There simply is no support for this

[2] The framework the Supreme Court established in *Tax Analysts II* is consistent with *Soucie* because it allows for agency records to originate outside of an agency. *See supra*, Section II.

proposition. Through the expanded definition of "agency" in the 1974 amendments Congress adopted a functional approach that contemplated that even information that might be "a basis for advice to the President" is to be treated as an agency record subject to FOIA when in the possession of an agency exercising an "independent function[.]" *Soucie*, 448 F.2d at 1075. In other words, function – not content – controls.

The day-to-day functioning of the executive branch reinforces this conclusion. The president must act through subordinate agency officials who implement the president's agenda, a process that necessarily requires frequent contact and communication with the president and his staff and leaves a trail of agency records subject to FOIA. Indeed, under *Soucie* such records would be agency records even when in the possession of an EOP component that also exercises independent statutory authority. Their status as agency records of the Secret Service is even more compelling here, given that the Secret Service is a separate agency and not part of the EOP.

The visitor records Plaintiffs seek, which were created or obtained by the Secret Service "in the performance of the ordinary functions of the agency," *Soucie*, 448 F.2d at 1076, fit squarely within the framework *Soucie* established and Congress adopted through the 1974 Amendments to FOIA. Any other conclusion would upend the statutory scheme Congress created through FOIA to protect and

advance the essential principle of democracy through greater government transparency.

IV. Permitting the White House to contract around the disclosure requirements of FOIA would usurp Congress' legislative power and raise more significant separation-of-powers concerns than it resolves.

When President Lyndon Johnson signed FOIA into law on July 4, 1966, he emphasized that the statute is necessary to protect our democracy by ensuring that "people have all the information that the security of the Nation permits," and preventing the government from "pull[ing] curtains of secrecy around decisions which can be revealed without injury to the public interest." Statement by President Lyndon Johnson Upon Signing Public Law 89-487 on July 4, 1966. Yet here, with the district court's concurrence, the government seeks to pull a curtain of secrecy around the White House and the agency charged with protecting its occupants under the false claim that secrecy is essential to prevent an unconstitutional intrusion into presidential powers and prerogatives.

To the contrary, construing FOIA to protect the secrecy of the Secret Service's visitor records perverts FOIA's language and purpose to achieve an end directly at odds with congressional intent. To the extent this case raises separation-of-powers concerns, they flow from attempts by the executive branch to enter into memoranda of understanding that subvert laws duly enacted by the legislature. Permitting the White House and other components of the executive branch to

contract around laws vesting the Secret Service with responsibility for protecting the president and making the agency's records subject to disclosure through FOIA does not avoid separation-of-powers concerns – it creates them. This Court should not give the executive branch license to fundamentally alter the legislative decisions that Congress made in enacting FOIA and H.R. 2395 (82nd Cong. 1951) (permanently authorizing the Secret Service to protect the president and codified at 18 U.S.C. § 3056).

As the Supreme Court explained in *Youngstown Sheet & Tube Co. v. Sawyer*, Article I of the Constitution vests the legislative authority of the United States in Congress, not the president:

> The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States.'

343 U.S. 579, 587-8 (1952).

Congress exercised that authority when it enacted FOIA "to open agency action to the light of public scrutiny." *Tax Analysts II*, 492 U.S. at 142 (internal quotations omitted). With that statute Congress imposed on agencies – including the Secret Service – the obligation to fulfill requests for records. 5 U.S.C. § 552. Separately, Congress specified that the "United States Secret Service is authorized

to protect . . . The President . . . .” Pub. L. No. 82–79, § 4, 65 Stat. 121, 122 (1951) (codified at 18 U.S.C. § 3056(a)). Congress later explicitly declined to make this protection optional. *See* Pub. L. No. 98–587, 98 Stat. 3110 (1984) (codified at 18 U.S.C. § 3056(a)). This legislation reflects a conscious decision to establish a protective force that is not under the direct control of the White House.

The memoranda of understanding between the Secret Service and the White House usurp Congress’ legislative authority because they purport to establish White House control over agency records that should be subject to FOIA. Nor are they necessary to protect the president’s interests in those records. Through FOIA Congress created specific exemptions that were intended to recognize executive branch equities. 5 U.S.C. § 552(b). Exemption 1 protects information properly designated by the executive branch as classified; Exemption 3 protects information exempted by other statutes, including intelligence sources and methods; Exemption 5 protects privileged information, including deliberative material, attorney-client confidences, attorney work product, and presidential communications; and Exemption 7 protects records compiled for law-enforcement purposes. In other words, FOIA has a wide aperture at the front end that would likely raise many difficult constitutional questions if not for the exemptions. And that is how Congress intended the statute to operate, with broad application to “agency records” tempered by a number of narrowly construed exemptions. Significantly,

Congress created no exemption for "presidential schedule information" – the category of records that the government claims to be beyond FOIA's reach. Instead, Congress specified that "[a]n agency shall . . . withhold information . . . only if (I) the agency reasonably foresees that disclosure would harm an interest *protected by an exemption described in subsection (b); or (II) disclosure is prohibited by law*." 5 U.S.C. § 552(a)(8)(A) (emphasis added).

The core separation-of-powers issue raised here is whether the Secret Service and White House should be allowed to determine, contrary to Congress' intent as expressed in FOIA, that records obtained in fulfilment of the agency's statutory duties are presidential, rather than agency records. The government urges this Court to grant it that power, contending that the Secret Service only has presidential schedule and visitor information "because it is required *by law* to protect the President and the President is required *by law* to accept that protection," Gov't Br. at 43 (emphasis added). But the "law" the government references is the very legislative enactments it seeks license from this Court to ignore.

Granting the executive that license would run counter to Supreme Court precedent. When the Supreme Court articulated criteria for determining whether requested materials constitute "agency records" for the purposes of FOIA, it chose a definition that includes material generated externally and received by the agency. To otherwise "restrict the term 'agency records' to materials generated internally

would frustrate Congress' desire to put within public reach the information available to an agency in its decision-making processes." *Tax Analysts II*, 492 U.S. at 144.

Similarly, while the Supreme Court recognized in *Kissinger v. Reporters Comm. for Freedom of the Press*, that Congress intended to exclude from the reach of FOIA "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President," 445 U.S. 136, 156 (1980) (quoting H.R. Conf. Rep. No. 93-1380, at 15 (1974)), agency records that contain presidential schedule information or White House communications – the very information the government resists producing here – can be and frequently are obtained through FOIA requests. For example, in response to a FOIA request submitted by Plaintiff CREW in an unrelated matter, the Department of Justice produced records that revealed that Attorney General Sessions visited the White House complex on February 27, February 28, and March 3, 2017. JA 105-113. Even though these agency records contained presidential schedule information, they were subject to public disclosure through FOIA, just as Congress intended.

Nevertheless, the government insists that the president has free rein to assert "a claim of *control*" over agency records of the Secret Service that "may contain information *about* the President." Gov't Br. at 46 (emphasis in the original). But here lies the problem: the control the president has exercised over Secret Service

records results from self-generated executive branch memoranda drafted for the explicit purpose of subverting legislative authority. If this Court sanctions this power grab by the president that forces an agency to relinquish control of agency records containing presidential information to the White House, then it is giving the executive a license to effectively amend FOIA to suit its needs rather than the transparency and accountability needs Congress sought to address through the statute's enactment. For these reasons, the separation-of-powers concerns that the government would have this Court "avoid" by following the D.C. Circuit's decision in *Judicial Watch* are minimal relative to permitting the executive to functionally re-write FOIA and ignore Congress' choice to place under agency control, not the White House, the responsibility to protect the president.

Moreover, implementing Congress' intent does not leave presidential interests unprotected. As detailed above, the scheme that Congress enacted contains numerous protections for the executive through FOIA's nine exemptions. This is why the principle of constitutional avoidance that the government advances here actually counsels against deciding any constitutional question unless and until the government has shown that those exemptions do not sufficiently protect its constitutionally-based interests. As the *Soucie* court reasoned, while

> [s]erious constitutional questions would be presented by a claim of executive privilege as a defense to a suit under the Freedom of Information Act, and the court should avoid the unnecessary decision of those questions . . . *the court should first consider whether the*

> *[document] falls within any statutory exemption*. Only if the Act seems to require disclosure, and if the Government makes an express claim of executive privilege, will it be necessary for the court to consider whether the disclosure provisions of the Act exceed the constitutional power of Congress to control the actions of the executive branch.

448 F.2d at 1071-2 (emphasis added).

The logic of *Soucie* applies equally here, where the government has neither made any effort to invoke any of FOIA's exemptions nor explained how those exemptions do not adequately protect any claim of executive privilege. Without this foundation there is no basis for this Court to conclude that the requested visitor records must be treated as presidential records to avoid any intrusion on the Article II powers of the presidency. In fact, the opposition conclusion is more likely; the president's exercise of the executive powers of the United States, including commanding the nation's armed forces, granting reprieves and pardons, making treaties, and nominating inferior officers and judges, does not require blanket non-disclosure of the identities of individuals who enter the people's house to conduct official business. Requiring the Secret Service to fulfill FOIA requests seeking after-the-fact disclosure of records of presidential visitors to the White House, subject to exemptions for personal privacy, classified information, law enforcement information, and other congressionally-authorized exceptions, would not upend our constitutional structure. Prematurely concluding that FOIA's exemptions are inadequate to protect the president's legitimate constitutional

interests, however, would threaten the separation of powers between Congress and the executive.

Without question, the parties' positions present this Court with radically different visions of where the constitutional doubts lie. As the district court below acknowledged, the cannon of constitutional avoidance "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." *Clark v. Martinez*, 543 U.S. 371, 381 (2005); *see* JA 154-55 (citing *Clark*). Justice Frankfurter wrote in his famous concurrence in *Youngstown Sheet & Tube Co.* that "[t]o find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress." 343 U.S. at 609 (Frankfurter, J., concurring). Following this guidance, this Court should uphold Congress' intent to vest in the Secret Service the responsibility of protecting the president and to make its records subject to disclosure under FOIA, and should decline to grant the White House license to subvert these legislative judgments through MOUs that wrest control of agency records from the agencies that created or obtained the records while fulfilling their statutory duties.

V. Plaintiffs' Administrative Procedure Act claims should be reinstated.

Plaintiffs' Administrative Procedure Act ("APA") claims should be reinstated because they raise justiciable challenges to policies and practices expressed in Department of Homeland Security ("DHS") and EOP memoranda that violate the Federal Records Act ("FRA") by unlawfully treating agency records as presidential records.[3] As the D.C. Circuit held in *Armstrong II*, an agency record cannot also be a presidential record for "the definition of 'agency' records in the FOIA trumps the definition of 'presidential records' in the PRA." *Armstrong v. EOP*, 1 F.3d 1274, 1292 (D.C. Cir. 1993).

As Plaintiffs explained in the opening brief, the district court committed multiple errors in dismissing Plaintiffs' APA claims. *See* Pls' Br. at 33-44. None of the arguments advanced by the government save the district court's flawed analysis.

First, as Defendants acknowledge, the D.C. Circuit has held that "'courts may review guidelines outlining what is, and what is not a presidential record.'"

[3] As Plaintiffs explained in the opening brief, the FRA requires that agencies establish: "(1) a program to make and preserve agency records; (2) effective controls over the creation, maintenance, and use of records; and (3) safeguards against the removal or loss of records." 44 U.S.C. §§ 3101, 3102, and 3105; *see also* JA 21. The FRA further specifies exclusive procedures by which agency records may be disposed of or destroyed, including a requirement that an agency first obtain authorization of the Archivist of the United States. JA 22 (citing 44 U.S.C. § 3314).

Gov't. Br. at 52 (quoting *Armstrong II*, 1 F.3d at 1294). Availability of this review is necessary to ensure the executive branch implements the careful judgments Congress established when it subjected some records to the FRA and FOIA and others to the PRA. As the D.C. Circuit explained,

> If guidelines that purport to define presidential records were not reviewable, the cross-appellees could effectively shield all federal records not only from the FOIA, but also from the provisions of the FRA – thus evading this court's holding in *Armstrong* [*v. Bush*, 924 F.2d 282, 293 (D.C. Cir. 1991) (*Armstrong I*)], that the courts have jurisdiction to decide whether the NSC's recordkeeping guidelines adequately describe the material subject to the FRA.

Armstrong II, 1 F.3d at 1293.

Defendants mischaracterize Plaintiffs' APA claims as relying solely on the 2015 MOU, Gov't. Br. at 49, when in fact, the Amended Complaint challenges "as arbitrary, capricious, and contrary to law the treatment by the EOP and DHS of records of visits to EOP agency components of the EOP as presidential records under the PRA that are not publicly accessible through the FOIA, and the failure of DHS to manage and preserve these records under the FRA." JA 18. This policy is reflected in the 2015 MOU, which states that "[a]ll records created, stored, used, or transmitted by, on, or through the unclassified information systems and information resources provided to the President, Vice President, and EOP shall remain under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component." JA 29. Defendants advance a pleading

standard that finds no support in the *Armstrong* decisions. Nowhere do those cases require that a plaintiff identify at the outset of a case precisely how a defendant has memorialized and effectuated the records policy or guidance that is being challenged.

Indeed, that is why the district court erred in refusing to consider evidence of the challenged policy that was fully consistent with the allegations in Plaintiffs' complaint. This error was particularly grave with respect to the 2006 MOU, a document that is precisely the kind of guideline or directive that the D.C. Circuit determined to be justiciable in *Armstrong*. The 2006 MOU states that the Secret Service operates the White House Access Control System ("WHACS"), JA 69-70; it explains that the Secret Service uses WHACS records to perform one of its core statutory responsibilities – protecting the president, JA 70; and it states and implements the very policy Plaintiffs allege is unlawful under the FOIA by deeming WHACS records to be "at all times Presidential Records," JA 71. Second Circuit precedent clearly permits a district court judge to consider evidence beyond the pleadings when resolving a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). The district court's failure to consider evidence substantiating Plaintiffs' allegations was an abuse of discretion because it did so on the false premise that Plaintiffs introduced the evidence "into their pleading by

way of their opposition brief," JA 189, when in fact *Defendants* introduced this evidence in support of their dispositive motion, *see* JA 69-73.

VI. To the extent that Plaintiffs' allegations are technically deficient, Plaintiffs should be permitted to amend the complaint to include extrinsic evidence establishing the justiciability of Plaintiffs' claims.

In the alternative, this Court should permit Plaintiffs to amend their pleadings on appeal. The government wrongly states such relief is waived if not requested below. Gov't. Br. at 54. To the contrary, Congress explicitly provided appellate courts with independent authority to permit amendment of pleadings to remedy defective allegations of jurisdiction. *See* 28 U.S.C. § 1653. The interests of judicial economy and expediency would be best served by consideration of evidence in the record that is directly relevant to the legal questions this Court must resolve.

Although there is substantial overlap between Plaintiffs' FOIA and FRA claims, the government incorrectly suggests that the fates of these claims are intertwined. Under the FOIA, Plaintiffs have a right to request and obtain non-exempt agency records that are within the agency's control at the time they are requested. As relief for their FOIA claims plaintiffs seek the production of documents unlawfully withheld by the Secret Service. *See* JA 29-30. Under the APA, Plaintiffs may challenge agency policies or guidelines that conflict with the agency's responsibility under the FRA to create and preserve agency records and

to undergo certain procedures before disposing of agency records. *See Armstrong I*, 924 F.2d at 291-94; *Armstrong II*, 1 F.3d at 1282-88. With respect to the APA claims, Plaintiffs seek declaratory and injunctive relief clarifying that agency records of visits to the White House are agency records and requiring that they be maintained consistent with the FRA. JA 31-32.

There is no merit, therefore, to the government's argument that publication of certain records requested by other plaintiffs in another FOIA suit pursuant to a settlement there renders moot Plaintiffs' APA claims here. *See* Gov't Br. at 55-57. The settlement in that other lawsuit did not address or modify the guidelines and policies that Plaintiffs challenge here as contrary to the FRA. *See* JA 115-27. Indeed, the fact that the White House continues to exert control over Secret Service records – including by making them public at its discretion – is precisely what Plaintiffs' APA and FRA claims challenge.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiffs' opening brief the judgment of the district court should be reversed.

Dated: May 15, 2019

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 15th day of May, 2019, I caused this Reply Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users:

I further certify that on this 15th day of May, 2019, I caused the required number of bound copies of the Reply Brief of Appellants to be filed with the Clerk of the Court via UPS Next Day Air.

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

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Dated: May 15, 2019

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