IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case No. 19-cv-1333 (ABJ)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

"Those who cannot remember the past are condemned to repeat it."[1] President Trump's policy and practice of failing to create records of meetings with certain foreign leaders, in violation of his statutory and constitutional obligations, jeopardizes just that. Left unchecked, the President's categorical exclusion of a class of meetings from his recordkeeping responsibilities will leave an incomplete historical record for the Plaintiffs and the American people. Accordingly, Plaintiffs—three non-profit, non-partisan groups—seek an order from this Court requiring the President to comply with his obligations under the Presidential Records Act ("PRA") and the Take Care Clause of the Constitution.

In their motion to dismiss this action, Defendants have raised a variety of procedural objections all of which lack merit. Contrary to Defendants' arguments, the President's violations of his non-discretionary obligations are subject to judicial review following the reasoning of the D.C. Circuit in *Armstrong v. Exec. Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993) ("*Armstrong II*"). *Armstrong II* postdates the case on which Defendants place singular and undue reliance—*Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) ("*Armstrong I*")—and establishes the framework for evaluating Plaintiffs' PRA claims. Defendants' motion to dismiss rests fundamentally on a now familiar theory that the President is above the law. Accepting Defendants' theory here would nullify a statutory command directed specifically at the President, threatening the separation of powers, and depriving Plaintiffs and the public at large of a complete historical record. For these reasons, the Court should reject Defendants' arguments in favor of a statutory construction that gives life to Congress's words and leaves intact our system of checks and balances.

[1] George Santayana, The Life of Reason: Reason in Common Sense (Scribner's 1905).

Plaintiffs' mandamus claim to redress the President's PRA violations provides a basis for this Court's jurisdiction to issue either declaratory or injunctive relief, as do the President's violations of the Take Care Clause of the Constitution. Because the President has ignored his ministerial duties under the PRA, Plaintiffs are entitled to mandamus relief. In addition, the President has actively prevented the State Department from complying with its own obligations under the Federal Records Act ("FRA"). The President's abuse of his core constitutional responsibility to "take care that the laws be faithfully executed . . . ." also provides an independent cause of action to review Plaintiffs' claims as well as an independent basis for declaratory relief.

In their motion, Defendants advance extraordinarily narrow views of the PRA's justiciability, the availability of mandamus relief, and Take Care Clause jurisdiction that run counter to the obligations Congress imposed on the President to create, categorize, and preserve presidential records for their ultimate owner—the American people. To the extent *Armstrong I* supports Defendants' position, it contradicts the separation-of-powers principles established by the Supreme Court in *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *Armstrong I* also fails to acknowledge that Congress considered and rejected Defendants' separation-of-powers arguments when it enacted the PRA. This Court's obligation to apply Supreme Court precedent and uphold Congress's and the judiciary's separate roles is paramount. Accepting the government's argument that this Court lacks jurisdiction to enforce the President's obligations under the PRA—even if it finds support in the D.C. Circuit's *Armstrong I* decision—would create separation-of-powers concerns, not avoid them. Accordingly, to the extent the Court finds that *Armstrong I* does bar these claims,

that case was wrongly decided and this case should promptly proceed to the Circuit to allow Plaintiffs a forum in which that point may be argued.

STATEMENT OF FACTS

The President's refusal to create records of highest-level meetings between the United States and certain foreign governments and his interference with the ability of agencies to create and maintain such records severely impacts the historical record of this presidency. In particular, the President has refused to document his meetings with Russian president Vladimir Putin and North Korean leader Kim Jong-Un.

For example, in July 2017, President Trump had his first reported face-to-face meeting with President Putin in Hamburg, Germany during the G20 Summit. Reportedly, President Trump confiscated his interpreter's notes after the meeting and ordered the interpreter not to disclose what he had heard, including to administration officials. Compl. ¶ 42. That interpreter, and others present at meetings with foreign leaders, was an employee or contractor of the State Department's Office of Language Services. *Id.* State Department translators and interpreters "serve as the ears, voice and words in foreign languages of the President, the First Lady, the Vice President, the Secretary of State, the National Security Advisor, and other Cabinet officials." *Id.* ¶ 43. They are part of "a tradition of language support for the conduct of foreign policy that dates back to 1789[.]" *Id.* In past administrations, interpreters not only provided interpretation services in meetings between presidents and foreign heads of state or foreign ministers, but also prepared written memoranda memorializing what was said. *Id.*[2] Although then-Secretary of State Rex Tillerson also was at the G20 Summit and provided some details publicly about the meeting, his

[2] For example, a Memorandum of Conversation describing what was discussed at a meeting between the President and the German chancellor on June 4, 1965 regarding Vietnam, was drafted by the interpreter. Compl. ¶ 43. That memorandum is *available at* https://history.state.gov/historicaldocuments/frus1964-68v02/d331.

account reportedly "is at odds with the only detail that other administration officials were able to get from the interpreter," specifically that when Putin denied "any Russian involvement in the U.S. Election . . . Trump responded by saying 'I believe you.'" Compl. ¶ 44.[3]

Similarly, during a dinner that followed, President Trump had a conversation with President Putin without accompanying American witnesses. *Id.* ¶ 45. U.S. officials did not learn of these actions until a senior State Department official and a White House advisor "sought information from the interpreter beyond a readout shared by Tillerson." *Id.* The White House did not disclose the private discussion until after word had leaked out from other sources. *Id.*

Following these meetings, President Trump tweeted that he had "strongly pressed President Putin twice about Russian meddling in our election. He vehemently denied it." Compl. ¶ 46. President Trump also denied that sanctions were discussed during the meeting. *Id.* Russian officials, however, provided an "alternative account" claiming the President "had accepted Mr. Putin's denial of the election interference and had even said that some in the United States were 'exaggerating' Moscow's role without proof." *Id.* ¶ 47. Without transcripts or notes from the meeting, it is impossible to verify either the President's claims or those of Russian officials. *Id.*

Presidents Trump and Putin also spoke during the November 2017 Asia-Pacific Economic Cooperation Summit in Da Nang, Vietnam. Compl. ¶ 48. While then-White House Press Secretary Sarah Sanders stated that the two would not have a formal meeting during the summit, President Putin's spokesperson said, "[t]he meeting will take place on the sidelines." *Id.*

[3] More recent reporting confirms that after President Trump confiscated the interpreter's notes "intelligence officials again expressed concern that the President may have improperly discussed classified intelligence with Russia," a concern that could be neither confirmed nor rebutted absent a record of their conversation. Jim Sciutto, Exclusive: US extracted top spy from inside Russia in 2017, *CNN*, Sept. 9, 2019, *available at* https://www.cnn.com/2019/09/09/politics/russia-us-spy-extracted/index.html (last visited Sept. 11, 2019).

Despite the "diplomatic dust-up" from their meeting at the G20 Summit over whether President Trump accepted President Putin's denials of Russian meddling in the 2016 presidential election, *id.*, reportedly no official transcript or notes of their "sidelines" meetings exist. *Id.*

Additionally, on July 16, 2018, President Trump held a summit with President Putin in Helsinki, Finland. During their two-hour private meeting the two were accompanied only by interpreters. Compl. ¶ 49. Following their tête-à-tête, Presidents Trump and Putin held a press conference during which President Trump, ignoring the findings of U.S. intelligence agencies, reported that President Putin had provided him with an "extremely strong and powerful" denial of Russian interference in the 2016 election. *Id.* When subsequently questioned about what the two discussed in Helsinki, Director of National Intelligence Dan Coats stated, "I'm not in a position to either understand fully or talk about what happened in Helsinki." *Id.* ¶ 50. White House National Security Advisor John Bolton claimed President Trump told President Putin at the Helsinki summit that "U.S. troops would stay in Syria until Moscow forced out its Iranian allies[.]" *Id.* ¶ 51. But with no transcript from the summit or observers to the meeting, there is no way to verify Bolton's claims. Reportedly President Trump's interpreter left the meeting "with pages of notes," but there is no indication those notes have been shared with anyone. *Id.* ¶ 51.

President Trump's fifth meeting with President Putin took place in Buenos Aires, Argentina in November 2018 during another G20 Summit. Like the meeting in Germany, President Trump conducted the conversation without anyone else from the U.S. present beyond his wife—no translator, no note taker, and no official member of his delegation. Compl. ¶ 52. Of course, President Putin had his own translator present. *Id.* As a result, no U.S. transcript or other record of the meeting exists. According to "people familiar with the conversation . . . it appeared longer and more substantive than the White House has acknowledged." *Id.*

The absence of any written record of President Trump's five publicly-reported meetings with President Putin have shielded those conversations from the public and prevented even top U.S. officials from knowing what President Trump said to President Putin, who heads a country that is one of the United States' main foes. Compl. ¶ 53. "Veterans of past administrations" explained that "[w]hen they meet with foreign leaders, presidents typically want at least one aide in the room—not just an interpreter —to avoid misunderstandings later." *Id.* In the absence of records of President Trump's conversations with President Putin U.S. officials reportedly have had to rely on "U.S. intelligence agencies tracking the reaction in the Kremlin." *Id.*

According to President Putin's public statements, in addition to these one-on-one meetings, Presidents Putin and President Trump talk "regularly" by phone. Compl. ¶ 55. Presidential aides reportedly have been allowed to listen in on only some of these conversations, and often Russia has been the "first to disclose those calls when they occur and release statements characterizing them in broad terms favorable to the Kremlin." *Id.*

More recently, in February 2019, President Trump met with North Korean leader Kim Jong-Un in Hanoi, Vietnam. Compl. ¶ 57. In a highly unusual move, the only other individuals present for their meeting were interpreters, who were not there to create a record of the conversation, thereby deviating from the practices of past administrations, with note takers again banned from the meeting. This left U.S. policymakers in the dark and the public with no historical record. *Id.* Experts on North Korea have expressed concerns that these private conversations provide the North Korean leader with "an opportunity to win concessions from Trump that working-level officials would have advised him not to offer." *Id.*

Congress, for its part, has expressed concerns that these practices violate the PRA. A February 21, 2019 letter from the Chairs of the House Committee on Oversight and Reform, the

House Committee on Foreign Affairs, and the House Permanent Select Committee on Intelligence to White House Acting Chief of Staff Mick Mulvaney notes that President Trump apparently has violated the PRA, based on: press reports of President Trump confiscating his interpreter's notes at the Hamburg, Germany summit; reports that President Trump physically tears up his records, leaving to staff the task of taping them back together; the inability of U.S. officials to obtain information about the President's Helsinki meeting with President Putin; and reports that President Trump may not be documenting the calls and meetings that do not appear on his schedule. *Id.* ¶ 58. To date, the White House has not responded to this letter. *Id.*

On March 4, 2019, these same Chairs on behalf of their committees wrote a letter to Secretary of State Michael Pompeo concerning communications between Presidents Trump and Putin. Compl. ¶ 59. The letter noted the press reports of President Trump taking steps to conceal the details of his conversations with President Putin and expressed the concern that, if true, they would "raise profound national security, counterintelligence, and foreign policy concerns, especially in light of Russia's ongoing active measures campaign to improperly influence American elections." *Id.*[4] The letter also notes that such actions would "undermine the proper functioning of government, most notably the [State] Department's access to critical information germane to its diplomatic mission and its ability to develop and execute foreign policy that advances our national interests." *Id.* The Chairs, on behalf of their committees, further expressed their "serious concerns that materials pertaining to specific communications may have been manipulated or withheld from the official record in direct contravention of federal laws, which expressly require that Presidents and other administration officials preserve such materials." *Id.*

[4] The letter is available at https://bit.ly/2k7ISMP (last visited Sept. 11, 2019).

Recent reporting reveals that recordkeeping failures extend to other top White House officials. Senior White House Advisor Jared Kushner recently met in Saudi Arabia with Saudi Crown Prince Mohammed bin Salman and King Salman. Compl. ¶ 60. According to a White House statement, the three discussed "the [Middle East] peace efforts, as well as American-Saudi cooperation and plans to improve conditions in the region through investment." *Id.* Reportedly U.S. embassy staff in Riyadh "were not read in on the details of Jared Kushner's trip . . . or the meetings he held with members of the country's Royal Court[.]" *Id.* The only State Department official who was allowed to attend the meeting is someone who focuses on Iran. *Id.* As a result, the U.S. embassy "was largely left in the dark on the details of Kushner's schedule and his conversations with Saudi officials[.]" *Id.*

House Committee on Foreign Affairs Chairman Eliot L. Engel expressed his concern with the sidelining of Embassy personnel during the planning and conducting of Kushner's Middle East meetings in a March 28, 2019 letter to Secretary Pompeo. Compl. ¶ 61. As Chairman Engel explained, "U.S. government resources are expended to support embassies in countries around the world to aid in the planning and execution of U.S. foreign policy, and an official visit to the Middle East by a senior White House aide would presumably bear meaningfully on the conduct of U.S. foreign policy in that region." *Id.*

This policy and practice by President Trump and other top White House officials of failing to create or preventing others from creating records of meetings with certain foreign leaders, including at least Putin, Kim Jong-Un, and Saudi officials, deviates sharply from the protocols and practices of prior administrations. Compl. ¶ 62. Victoria J. Nuland, a career State Department diplomat, explained: "All five of the presidents whom I worked for, Republicans and Democrats, wanted a word-for-word set of notes, if only to protect the integrity of the American

side of the conversation against later manipulation . . . ." *Id.* Other public reporting also confirms that the President's recordkeeping practices differ radically from those of previous administrations, "who have relied on senior aides to witness meetings and take comprehensive notes then shared with other officials and departments." *Id.*

In previous administrations, when presidents and other top White House officials met with foreign leaders, designated officials had the responsibility of preparing a record of the meeting. Compl. ¶ 63.[5] Depending on the administration's procedures, State Department officials, including at times State Department interpreters, sometimes drafted Memoranda of Conversation or "memcons." *Id.* The record of the meeting would then be shared with officials who had a need to know at the White House, the State Department, and other agencies. The memcon would become part of the official record at the White House and the agencies. *Id.*

In previous administrations when presidents had "one-on-one" conversations with foreign leaders, those interactions were almost without exception three-on-three. Compl. ¶ 64. Each principal would be joined by two others: a translator and a note taker. *Id.* In some cases, the note taker was a State Department employee, while in other cases, the note taker was a National Security Council employee. *Id.* Further, in previous administrations when presidents in fact had an actual one-on-one conversation with a foreign leader, the protocol called for a member or members of the President's delegation to be debriefed on what was said in that conversation, which would then be written up and either included in an official record of the meeting or sent

[5] This and some of the factual statements that follow are drawn from the complaint and were made on "information and belief." *See* Compl. ¶¶ 63–67. Where, as here, the facts are uniquely within the Defendants' control, facts based on information and belief "can be sufficient to survive a motion to dismiss." *Bancroft Glob. Dev. v. United States*, 330 F. Supp. 3d 82, 102 (D.D.C. 2018) (quoting *Evangelou v. District of Columbia*, 901 F. Supp. 2d 159, 170 (D.D.C. 2012)).

out in a new email. Compl. ¶ 65. In both instances, the description of the one-on-one meeting between a President and foreign leader would be part of the official State Department record. *Id.*

In addition to these federal agency records, EOP components, such as the National Security Council, often would generate documents memorializing what was said in meetings between the President and/or his top aides and foreign leaders regardless of where those meetings occurred. Compl. ¶ 66. These records were treated as presidential records that were preserved as part of the record of that presidency. *Id.*

Similarly, in previous administrations when presidents had telephone conversations with foreign leaders, a U.S. transcriber would be tasked with listening in on the calls and preparing a transcript. Compl. ¶ 67. The transcript, which was designated as the Official Call Transcript, was prepared in addition to any readout the White House prepared for public and other dissemination and was preserved as a presidential record. *Id.* These and other presidential records are now available to the public through the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA").[6]

STATUTORY BACKGROUND

Congress enacted the PRA in 1978 to ensure both "the preservation of the historical record of the future Presidencies" and "public access to the materials" of a presidency. H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. § 2 (1978). Through the PRA and its predecessor statute, the Presidential Recordings and Materials Preservation Act of 1974, Congress sought to prevent a repeat of the protracted legal battle that ensued between the United States and President Richard M. Nixon over the ownership and control of his presidential records after leaving office.

To preserve the historical record, the PRA directs the president as follows:

[6] Other modes of access include the State Department's multi-volume series, *The Foreign Relations of the United States*, which is available at https://history.state.gov/historicaldocuments.

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

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

In imposing these requirements through the PRA, Congress recognized that with the president, "a great number of what might ordinarily be construed as one's private activities are, because of the nature of the presidency, considered to be of public nature, *i.e.*, they effect the discharge of his official or ceremonial duties." H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. §§ 11–12. Congress considered "few" of a president's activities to be "truly private and unrelated to the performance of his duties[.]" *Id.* § 12. The PRA's definition of "presidential records" reflects this breadth by defining presidential records as:

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

44 U.S.C. § 2201(2). The PRA also includes within the definition of "documentary material" "electronic or mechanical recordations." 44 U.S.C. § 2201(1).

The PRA also defines what are *not* presidential records, a category that includes "any documentary materials that are . . . official records of an agency[.]" 44 U.S.C. § 2201(2)(B). The PRA cross-references the definition of agency records supplied by the FOIA, which makes clear that agency information made or received by an agency while conducting agency business is an agency record. 5 U.S.C. § 552(f). *See also* 44 U.S.C. § 3301 (defining federal record for

purposes of FRA). In addition, "the PRA provides that the definition of 'agency' records in the FOIA trumps the definition of 'presidential records' in the PRA." *Armstrong II*, 1 F.3d at 1292.

The PRA specifies a multi-step process before any presidential records can be destroyed. While in office, a president may dispose of his or her presidential records only after determining that the records "no longer have administrative, historical, informational, or evidentiary value[.]" 44 U.S.C. § 2203(c). After making that determination, the president must obtain the written views of the Archivist of the United States on the proposed destruction. 44 U.S.C. § 2203(c)(1)–(2). If the president receives written confirmation that the Archivist intends to take any action with respect to the proposed destruction, the president must notify the appropriate congressional committee of the president's intention 60 days before the proposed disposal. 44 U.S.C. § 2203(d). This process reflects the care Congress took to ensure that presidential records could be destroyed only after considered deliberation by multiple stakeholders.

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

Agency records are subject to different creation, maintenance, and destruction rules codified in the FRA, 44 U.S.C. §§ 3101, *et seq*. The FRA requires that the

> head of each Federal agency . . . make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the

> information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

44 U.S.C. § 3101. The FRA further requires that the head of each agency establish a records management program, 44 U.S.C. § 3102; safeguard against the removal or loss of records, 44 U.S.C. § 3105; and "notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency," and with the assistance of the Archivist "initiate action through the Attorney General for the recovery of records" unlawfully removed, 44 U.S.C. § 3106.

ARGUMENT

I. Standard of review.

When resolving a Rule 12(b)(1) motion, a court must accept all factual allegations in a complaint as true and must draw all reasonable inferences in the plaintiff's favor. *Jerome Stevens Pharm., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). Likewise, in ruling on a motion to dismiss under Rule 12(b)(6), a court must construe the complaint liberally, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor. *Hurd v. Dist. of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017).

When deciding a Rule 12(b)(1) motion, a court may consider material outside of the pleadings. *Nat'l Harbor GP, LLC v. Gov't of D.C.*, 121 F. Supp. 3d 11, 17 (D.D.C. 2015); *Boritz v. United States*, 685 F. Supp. 2d 113, 117 (D.D.C. 2010). However, "[i]n determining whether a complaint fails to state a claim, the court may consider only the facts alleged in the complaint, any documents either attached or incorporated in the complaint and matters of which the court may take judicial notice." *Hurd*, 864 F.3d at 678.

II. The PRA does not preclude review of Plaintiffs' claims.

Congress enacted the PRA in 1978, after a protracted legal battle between the United States and President Nixon over his control of presidential records after leaving office. The PRA transfers ownership of a president's records to the public, thereby "terminat[ing] the tradition of private ownership of Presidential papers and the reliance on volunteerism to determine the fate of their disposition." H.R. No. 95-1487, 95th Cong., 2d Sess. § 2 (1978). It also "promote[s] the creation of the fullest possible documentary record" of a presidency and insures its preservation for "scholars, journalists, researchers and citizens of our own and future generations." 124 Cong. Rec. 34, 894 (Daily ed. Oct. 10, 1978) (statement of Rep. John A. Brademas). Significantly, the PRA does this by imposing "standards fixed in law," "to assure creation and maintenance of the fullest possible documentation of White House activities[.]" H.R. No. 95-1487, 95th Cong., 2d Sess. § 2 (1978).[7] Those legal impositions include, among others, the mandate that the President "take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties are adequately documented." 44 U.S.C. § 2203(a).

Defendants now claim the President can freely ignore these obligations safe from any judicial review of his actions. The authority on which they rely—*Armstrong I*—does not sweep that broadly, and is only the starting point for the Court's analysis, not the end as Defendants argue. In *Armstrong I*, the Court concluded that the PRA impliedly precludes judicial review "of the president's general compliance with the PRA" because such review "would substantially

[7] *See also* Sara Worth, Trump and the Toothless Presidential Records Act, *Yale Law School Media Freedom & Information Access Clinic*, Mar. 11, 2019, *available at* https://law.yale.edu/mfia/case-disclosed/trump-and-toothless-presidential-records-act (last visited Sept. 11, 2019).

upset Congress's carefully crafted balance" between a president's "control of records creation, management, and disposal" while in office and "public ownership and access to the records" after leaving office. 924 F.2d at 291. Relying on this holding, Defendants argue here that "the courts have *no* role in policing the President's compliance with the PRA[.]" Ds' Mem. at 13 (emphasis added). This both mischaracterizes *Armstrong I* and ignores the D.C. Circuit's subsequent decision in the same litigation, *Armstrong II*, which reflects an expansion of judicial review over PRA claims like those Plaintiffs bring here.

The plaintiffs in *Armstrong I* filed suit at the end of the Reagan administration to prohibit the National Security Council from destroying a specific subset of records on its computer systems, arguing that both the PRA and the FRA required the records' continued preservation. In resolving this question, the D.C. Circuit examined the interplay between the PRA and the FRA and the degree to which courts could review a president's decisions and actions under each statute. The Court rejected the plaintiffs' suit because it would have required the Court to second-guess the president's decisions as to particular documents. 924 F.2d at 290. But this conclusion was not without limits; as the Court explained in *Armstrong II*, its earlier opinion "must be read in the context of the issue before the court in *Armstrong I*": "creation, management, and disposal decisions" for individual documents. 1 F.3d at 1294.

In *Armstrong II*, the D.C. Circuit was asked to determine whether guidelines issued by the White House improperly instructed White House staff to treat agency records as presidential records. *Id.* at 1290. Relying on *Armstrong I*, the district court had concluded it lacked jurisdiction to review the guidelines. *Id.* at 1291. The D.C. Circuit reversed, explaining that its earlier decision in *Armstrong I* does not "stand for the unequivocal proposition that all decisions made pursuant to the PRA are immune from judicial review." *Id.* at 1293. The court expressly

eschewed an interpretation of the PRA that would deprive the courts of the ability to review "the initial classification of materials as presidential records." *Id.*

More recently in *CREW v. Trump*, 924 F.3d 602 (D.C. Cir. 2019), the D.C. Circuit was presented with another opportunity to narrow the construction of judicial review set forth of the two *Armstrong* decisions, but declined to do so. The court instead decided the case on the independent ground that CREW was actually asking the court to determine "whether White House personnel are in fact complying with the directive to conduct all work-related communications on official email," *id.* at 609, which would interfere "'with the day-to-day operations of the President.'" *Id.* (quoting *Armstrong I*, 924 F.2d at 290).[8]

Here, as alleged in the complaint, Plaintiffs challenge the "policy and practice" of President Trump and other top White House officials "of failing and/or refusing to create or preventing others from creating records of their meetings with foreign leaders[.]" Compl. ¶ 62. Defendants dispute the legal sufficiency of this claim because Plaintiffs have failed to identify a "written policy that, in their view, violates the PRA." Ds' Mem. at 14. Defendants also argue that permitting judicial review of this policy and practice would cause the exact harm to the President that the *Armstrong I* court sought to prevent. Their objections, however, seek to elevate form over substance and mischaracterize the conduct that lies at the heart of this case.

At its core, Plaintiffs' complaint challenges the President's treatment of certain activities as being beyond the reach of the PRA notwithstanding the statutory command to the contrary. *See, e.g.*, Compl. at ¶ 59 (charging the President with "taking steps to conceal the details of his

[8] Defendants claim that the *CREW* plaintiffs made a concession in that case that is fatal to their claim here, specifically that courts lack jurisdiction to review the day-to-day operations of the President. Ds' Mem. at 14. But this merely restates the *Armstrong I* holding that, as explained herein, does not extend to plaintiffs' challenge here to a policy and practice of the President.

conversations with President Putin"). That conduct includes five separate meetings President Trump had with President Putin and a meeting with Kim Jong-Un where the President ensured there would be no written records of what was discussed in the possession of either the White House or affected agencies. *Id.* ¶¶ 42–57. Similarly, Jared Kushner, taking a page from the President's book, took steps to ensure there were no records created of his meeting with Saudi leaders. *Id.* ¶ 60. And in at least one instance, President Trump confiscated his interpreter's notes after a meeting with President Putin and directed the interpreter not to disclose to anyone, including administration officials, what he had heard. *Id.* ¶ 42. Taken as a whole, this policy and practice reflect far more than "isolated instances[.]" Ds' Mem. at 15.

This conduct deviates sharply from previous administrations, during which note takers either took part in a president's meetings with foreign leaders or were subsequently provided details of the conversations, which were then included in an official agency record of the meeting. Complaint ¶¶ 64–65. Other White House components, such as the National Security Council, also "would generate documents memorializing what was said in meetings between the President and/or his top aides and foreign leaders[.]" *Id.* ¶ 66. Further, the conduct of this White House forms part of a larger pattern of ignoring or flouting the PRA's recordkeeping obligations, which the complaint summarizes as involving:

> a policy and practice of refusing to create records of his [the President's] meetings and conversations with foreign leaders; by seizing interpreter's notes, which are agency records, and effectively classifying them as presidential records; by asserting unilateral and exclusive control over the contents of meetings by the President and his staff with foreign leaders; by maintaining recordkeeping polic[i]es, guidelines, and practices that improperly classify agency records as presidential records; and by destroying or ordering the disposal of presidential records without obtaining the Archivist's views in writing or producing a disposal schedule to Congress as the PRA requires.

Id. ¶ 76.

Despite this policy and practice, the government argues that *Armstrong I* and not *Armstrong II* controls here, requiring dismissal of the complaint. According to the government, *Armstrong II* only allowed judicial review where a plaintiff is challenging the actions of a White House component subject to the FRA or a guideline defining presidential records in a way that captures agency records. Ds' Mem. at 16. The government's attempt to confine *Armstrong II* to its facts misapprehends its underlying rationale, specifically the need to maintain the careful balance Congress struck between a president's right to control decisions about the creation, management, and disposal of specific records while in office, and the public's right to a complete historical record of a president's actions and decisions upon leaving office.

The government's position on the scope of *Armstrong II* also ignores case law rejecting this very argument. In *CREW v. Cheney*, a challenge to the alleged exclusion by the vice president of certain categories of records from the PRA, the government also urged the court to limit *Armstrong II* to its specific facts. 593 F. Supp. 2d 194, 214-15 (D.D.C. 2009). Judge Kollar-Kotelly rejected the government's construction as "untenable" after engaging in an extensive analysis of the D.C. Circuit precedent, reasoning that to so restrict *Armstrong II* would "eviscerate[] its precedential value." *Id.* at 214. Judge Kollar-Kotelly stressed that the important distinction between *Armstrong I* and *Armstrong II* was "the type of conduct the plaintiffs were seeking to challenge" rather than "the vehicle by which plaintiffs were challenging it." *Id.* "Whether a plaintiff proceeds under the FOIA, the FRA, the APA, or any other statute" she noted is "irrelevant to that distinction." *Id.* at 215. In urging an unduly narrow construction of the *Armstrong II* exception to the no-judicial-review rule, the government completely ignores Judge Kollar-Kotelly's decision and instead cites a case that was decided on redressability grounds, *Judicial Watch, Inc. v. Nat'l Archives & Records Admin.*, 845 F. Supp. 2d 288, 297 (D.D.C.

2012) (cited in Ds' Mem. at 15), with an observation on the narrowness of the *Armstrong II* holding that is pure dicta.

The type of conduct Plaintiffs challenge resembles the conduct at issue in *Armstrong II*, and far exceeds quotidian decisions about specific records that *Armstrong I* declared off-limits. Critically, judicial review of the policy and practice at issue here poses no risk of interfering in the "day-to-day operations of the President and his closest advisors," *Armstrong I*, 924 F.2d at 290, which was the animating concern behind that court's decision.[9] Specifically, Plaintiffs have alleged that President Trump has a policy and practice of excluding from the PRA an entire class of activities: top-level meetings between the President and certain foreign leaders. That this policy has not been reduced to a formal, written recordkeeping directive is of no legal significance, given that it is being directed by the President. In fact, the D.C. Circuit has recognized that records preservation guidance subject to judicial review may be written or oral. *Armstrong II*, 1 F.3d at 1280. Stated differently, the presidential recordkeeping policies of the White House are what the President—who is at the top of the decision-making chain and expressly charged by statute to implement the PRA—says they are. Here he has established policies that directly contradict the PRA's dictate that he "assure that the activities, deliberations, decisions, and policies that reflect the performance of [his] constitutional, statutory, or other official or ceremonial duties are adequately documented." 44 U.S.C. § 2203(a). The legislative history of the PRA makes clear that "[d]efining the types of documentary materials falling within the ambit of" presidential records "is of primary importance to the act." H.R. No. 95-1487, 95th Cong., 2d Sess. § 11 (1978). Plaintiffs' claims seek to give full effect to this legislative intent.

[9] As discussed *infra*, the *Armstrong I* court actually misconstrued the PRA's legislative history, ignoring the Supreme Court's most important articulation of separation-of-powers considerations in the specific context of presidential recordkeeping obligations.

In the face of the factual allegations in the Complaint, which remain unrebutted, Defendants' attempt to reduce this case to "a single occurrence" where President Trump seized the notes of an interpreter, Ds' Mem. at 17, must fail. Defendants ignore the wealth of detail the complaint provides about an entire category of conduct that President Trump has effectively declared to be outside the reach of the PRA. *See* Compl. ¶ 76. Also excluded from Defendants' arguments are the efforts by the President and top White House staff to prevent agencies from creating and preserving records of their interactions with certain foreign leaders in violation of the FRA, of which the President's seizure of an interpreter's notes is just one example. More broadly, the President has seized control of the entire recordkeeping processes of both the White House and affected agencies such as the State Department as they pertain to the President's high-level meetings with certain foreign leaders like Putin and Kim Jong-Un. The President's actions have created a permanent hole in the historical record and have prevented other officials and agencies from receiving "comprehensive notes" of these conversations that otherwise would be part of the agencies' official records. *Id.* ¶¶ 62–63.

Defendants' other efforts to avoid the impact of *Armstrong II* are red herrings. The reviewability of Plaintiffs' claims does not hinge on the purpose for which the interpreter prepared his or her notes, *see* Ds' Mem. at 18, a suggestion in any event that requires the Court to speculate and consider facts not in evidence. Moreover, the facts alleged in the Complaint belie Defendants' speculation, as they demonstrate that this case also challenges the President's attempts to capture and control agency recordkeeping practices as they pertain to the President's meetings with these foreign leaders. Nor, as Defendants argue, would accepting Plaintiffs' claims encroach on the President's core Article II powers, Ds' Mem. at 23, or force him "to forego control over the content of such meetings[.]" *Id.* at 19 n.10. The PRA simply requires the

President to document his activities, deliberations, decisions, and policies, but neither places any limit on the President's ability to negotiate with foreign leaders nor deprives the President of control over the substance of his meetings with foreign leaders.

At bottom, accepting Defendants' arguments would contravene the animating principle behind the PRA—ensuring the creation and preservation of "the fullest possible documentary record" of this President, 124 Cong. Rec. 34, 894—an interest the Supreme Court recognized in *Nixon v. Administrator*, in which it upheld the constitutionality of the PRA's predecessor. 433 U.S. at 452. Further, accepting Defendants' unduly narrow construction of *Armstrong II* would allow the President to decline to create any records whatsoever, subject to no judicial check, based on a characterization of such a decision as strictly a "record creation" decision. Nothing in the language of either *Armstrong I* or *Armstrong II* suggests an intent to eviscerate the PRA in this manner. To the extent this Court otherwise construes the two *Armstrong* decisions as compelling dismissal here on the grounds advanced by Defendants, Plaintiffs respectfully submit that such a construction is erroneous and reserve the right to ask the full D.C. Circuit to overturn that precedent to recognize judicial review over claims like those Plaintiffs bring here.

III. Plaintiffs state a valid claim for mandamus relief because Defendants have failed to comply with their ministerial duties under the PRA.

Plaintiffs seek mandamus relief under 28 U.S.C. § 1361, which gives district courts "original jurisdiction of any action in the nature of a mandamus."[10] Pursuant to this statute, a court may grant mandamus relief if "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff."

[10] In the portion of their memorandum addressing the relief available to Plaintiffs, Defendants rely again on their assertion that Plaintiffs' PRA claims are not justiciable. Ds' Mem. at 20. For the reasons explained in Section II, *supra*, the claims advanced in this case are consistent with those that the D.C. Circuit ruled were justiciable in *Armstrong II*. 1 F.3d at 1294.

Council of & for the Blind of Del. Cnty. Valley, Inc. v. Regan, 709 F.2d 1521, 1533 (D.C. Cir. 1983); *accord CREW v. Cheney*, 593 F. Supp. 2d at 219. The D.C. Circuit has explained that, for purposes of analyzing the propriety of mandamus "the central issue in every mandamus case must be the 'proper interpretation of the particular statute and the congressional purpose.'" *Ganem v. Heckler*, 746 F.2d 844, 853 (D.C. Cir. 1984) (quoting *Work v. United States ex rel. Rives*, 267 U.S. 175, 178 (1925)).

Congress enacted the PRA to ensure the creation and preservation of a historical record of each presidency, H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. § 2 (1978); *see also* 44 U.S.C. § 2203(a), which depends entirely on the President's compliance with the Act. The PRA furthers this purpose by mandating that the President document the performance of his official and ceremonial duties and preserve these presidential records for the American people. Because Defendants have violated the PRA's clear duty to comply with the statute's documentation and preservation requirements, Plaintiffs have a clear right to relief and are entitled to a writ of mandamus compelling the Defendants to comply with their statutory duties.[11]

A. The PRA imposes ministerial obligations on the President.

To be a "clear duty" for purposes of mandamus relief, the defendant's duty must be "ministerial and the obligation to act peremptory, and clearly defined . . . ; the duty must be clear and indisputable." *13th Reg'l Corp. v. U.S. Dep't of the Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980) (quoting *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931)). A ministerial duty is one that must be complied with, *i.e.*, "the official in question has no authority to determine *whether to perform* the duty." *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996) (emphasis added). This does not mean that no component of the duty may be discretionary.

[11] Defendants do not challenge that the third requirement for mandamus relief has been met—the inadequacy of alternative remedies.

Instead, it may be discretionary "within limits," *Ganem*, 746 F.2d at 853 (quoting *Work*, 267 U.S. at 177), such as "in the method by which [the official] chooses to determine [compliance with the statute] . . . ." *Id.* at 854. Thus, "[t]he fact that the statute does not dictate precisely how compliance must be accomplished in no way lightens [the] legal duty to comply." *CREW v. Exec. Office of the President*, 587 F. Supp. 2d 48, 63 (D.D.C. 2008).

This Court has previously held that "the PRA certainly creates ministerial obligations for the President," *CREW v. Cheney*, 593 F. Supp. 2d at 218, specifically the "ministerial obligation to preserve [presidential] records," *id.* at 220, and that this "ministerial obligation . . . may form the basis for [a] mandamus claim," *id.* at 221. Here, Plaintiffs' mandamus claim rests on four ministerial duties in the PRA: (1) the duty to document the performance of the President's duties; (2) the duty to categorize records as presidential or personal; (3) the duty to comply with the PRA's notification procedures prior to destroying presidential records; and (4) the duty to implement record management controls. Compl. ¶¶ 27, 32, 74. Each of these duties is sufficiently specific and non-discretionary to support a claim for mandamus relief.

First, the PRA imposes an obligation on the President to document his activities, stating that "the President *shall* take *all* such steps . . . to *assure* that the activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties are adequately documented . . . ." 44 U.S.C. § 2203(a) (emphasis added). Although the PRA gives the President discretion to determine *what* steps to take, the President may not disregard the obligation to document his activities. The statute's use of the word "shall" leaves the President no discretion to ignore these duties. *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (finding that by using "shall" in civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be

mandatory in cases where the statute applied . . ."); *United Gov't Sec. Officers v. Chertoff*, 587 F. Supp. 2d 209, 219 (D.D.C. 2008) ("These regulations use the words 'must' and 'shall,' respectively, leaving no discretion on the part of the agency.").

Next, under the PRA, the President must categorize records as either "presidential" or "personal." In particular, the PRA requires that all "[d]ocumentary materials produced or received by the President, the President's staff, or units or individuals in the Executive Office of the President . . . *shall* . . . be categorized as Presidential records or personal records upon their creation or receipt and be filed separately." 44 U.S.C. § 2203(b) (emphasis added). By its terms, this provision imposes a ministerial duty to make a categorization decision as to each record it creates or receives. 44 U.S.C. § 2201(2)–(3); *see also CREW v. Cheney*, 593 F. Supp. 2d at 220. To the extent this section accords the President any discretion, it is the discretion to determine *when* to categorize records, not *whether* to categorize (although the PRA urges that they should be categorized "upon their creation or receipt" "to the extent practicable"). 44 U.S.C. § 2203(b).

Third, the PRA instructs the President to "implement[] . . . records management controls . . . to assure that . . . [presidential] records are preserved and maintained . . . pursuant to the requirements of this section[,]" including the requirement to categorize records. 44 U.S.C. § 2203(a). As a practical matter, the President must provide guidance (*i.e.*, management controls) to assure that presidential records are appropriately categorized.

Finally, the PRA imposes additional non-discretionary obligations before the President may destroy presidential records. He must first determine that the records "no longer have administrative, historical, informational, or evidentiary value . . . ." 44 U.S.C. § 2203(c). Next, he must "obtain[] the views, in writing, of the Archivist concerning the proposed disposal of . . . Presidential records." 44 U.S.C. § 2203(c)(1). Not only must the Archivist's view be "in

writing," but this document must explicitly state that "the Archivist does not intend to take any action under subsection (e) of [44 U.S.C. § 2203]." 44 U.S.C. § 2203(c)(1)–(2). The PRA does not afford the President discretion to determine whether to comply with these requirements. If the President wishes to destroy presidential records, he must follow this procedure. Because the President has a clear duty to act prior to destroying presidential records, it is a ministerial duty.

The Defendants argue that a lack of judicial review over the President's day-to-day management decisions renders the PRA's duties discretionary. Ds' Mem. at 24. Specifically, Defendants state that "the President's 'virtually complete control' over records creation, management and disposal during his term of office is entirely incompatible with the notion that he is subject to such ministerial obligations." *Id.* (citation omitted) (quoting *Armstrong I*, 924 F.2d at 290). Defendants quote the D.C. Circuit out of context, however. The Court of Appeals was discussing the availability of judicial review, not evaluating whether the President's obligations were ministerial. The "complete control" referred to by the D.C. Circuit is the President's control over the disposition of particular documents while in office. *Armstrong I*, 924 F.2d at 290. In any case, the fact that the President has control of presidential records during his time in office is not "entirely incompatible" with his ministerial obligations under the PRA. To the contrary, once the President has fulfilled his ministerial obligation to create and classify records, he has control over how to maintain the records while in office, may determine that they no longer have "administrative, historical, information, or evidentiary value," and may restrict access to such records after his term ends. 44 U.S.C. §§ 2203–04. These rights do not negate and are in fact premised on a duty to create and classify records as "presidential." Any other reading would render the PRA truly meaningless. The President could, in fact, do whatever he wanted

with the records he created while in office including the destruction of those records prior to the end of his term for no reason other than whim.

B. The complaint pleads facts plausibly demonstrating that the White House is violating the PRA and the FRA.

The complaint details numerous instances in which the President and top White House officials are violating their ministerial duties by (1) exempting certain presidential activities from the scope of the PRA; (2) improperly classifying federal records as presidential records; and (3) destroying or ordering the disposal of presidential records without obtaining the Archivist's views in writing or producing a disposal schedule to Congress as the PRA requires. Compl. ¶ 76.

The PRA imposes a mandatory duty on the President to create a documentary record of his presidency, and to preserve and maintain those "presidential records" for the United States. 44 U.S.C. § 2202. The PRA is exceedingly broad; it does not exempt any of the President's "official or ceremonial" activities from its scope. Congress through the PRA recognized that with the President, "a great number of what might ordinarily be construed as one's private activities are, because of the nature of the presidency, considered to be of public nature, *i.e.*, they effect the discharge of his official or ceremonial duties." H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. §§ 11–12. Congress considered "few" of a President's activities to be "truly private and unrelated to the performance of his duties[.]" *Id.* § 12. The PRA's definition of "presidential records" reflects this breadth by defining presidential records as:

> documentary materials . . . created or received . . . in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

44 U.S.C. § 2201(2). The PRA's scope is limited only by its exemption of certain documents from the definition of "presidential record," namely, those that "do *not* relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the

President" (so-called "personal records"); official agency records; stocks of publications and stationery; and extra copies of documents (but only those produced for convenience of reference, if clearly identified as such). 44 U.S.C. § 2201(2)(B), (3) (emphasis added).

Yet, notwithstanding the PRA's breadth, Defendants have adopted a policy of excluding certain categories of activities from the PRA's scope and improperly classifying federal records as presidential records. First, Plaintiffs' complaint details a pattern or practice within the White House of categorically exempting certain of the President's "constitutional, statutory, or other official or ceremonial duties" from the PRA's requirements. 44 U.S.C. § 2201(2) (defining "presidential records" as those that relate to the President's duties), 2203 (requiring that a President document his duties). Specifically, the President has refused to document his meetings with certain foreign officials. The Complaint describes five separate meetings between President Trump and President Putin for which no presidential or agency records were created. Compl. ¶¶ 42, 44–45, 48–50, 52. In addition, President Trump reportedly "regularly" speaks with Putin by telephone and excludes others from some of these calls, such that no documentary record of the calls is created. Compl. ¶ 55. The Complaint also describes a meeting between President Trump and North Korean leader Kim Jong-Un in Vietnam during which no other individuals were present except interpreters. Compl. ¶ 57. These actions amount to a de facto policy determination that such activities are exempt from the PRA and violate the President's obligation to "*assure* that the activities . . . of the President's . . . duties are adequately documented and that such records are preserved and maintained as Presidential records . . . ." 44 U.S.C. § 2203(a) (emphasis added).

In addition, the President's actions have prevented the creation of presidential records by other Executive Branch officials. Specifically, President Trump has (1) ordered interpreters not

to disclose details of a meeting with President Putin to administration officials; (2) withheld information from other Executive Branch officials; and (3) excluded Executive Branch officials from meetings with President Putin and Kim Jong-Un. Compl. ¶¶ 42, 44–45, 48–50, 52, 55, 57. These actions differ markedly from the actions of past administrations. Compl. ¶¶ 63–67.

Second, the President has improperly destroyed federal records, effectively treating them as presidential records. Compl. ¶ 42. On at least one occasion, the President has confiscated an interpreter's notes (*i.e.*, an agency record) after a meeting with President Putin and ordered the interpreter not to disclose to anyone what he had heard, including administration officials. Compl. ¶ 42. This conduct is functionally similar to that at issue in *Armstrong II*, in which the D.C. Circuit stated that a "narrow, clearly defined limitation on the scope of the PRA is absolutely essential to preventing the PRA from becoming a potential presidential *carte blanche* to shield materials from the reach of FOIA." *Armstrong II* 1 F.3d at 1292. Defendants argue that there is no proof that interpreters' notes are federal records governed by the FRA. Ds' Mem. at 22. However, Defendants ignore the fact that interpreters are State Department employees, not White House advisors. 6 Foreign Affairs Manual 1530, Assignment of Interpreters to Official Visits and High-Level Meetings. And to the extent that there is a "definitional overlap" between the FRA and the PRA with respect to a particular record or class of records, "the PRA provides that the definition of 'agency' records in the FOIA trumps the definition of 'presidential records' in the PRA." *Armstrong II*, 1 F.3d at 1292. Further, the President's destruction of the interpreter's notes is a violation of the mandatory record destruction procedures the PRA imposes. 44 U.S.C. § 2203(c)–(d). The President also routinely destroys other presidential records. Compl. ¶ 68.

In the face of these unlawful actions, Defendants claim that they cannot be violating the PRA because they have issued a memorandum (the "2017 Memo") that quotes verbatim from 44 U.S.C. § 2203(a). Ds' Mem. at 21. The suggestion that such a memorandum could immunize the Defendants from any judicial review in all cases would amount to that "presidential *carte blanche*" rejected by the D.C. Circuit in *Armstrong II*. 1 F.3d at 1292. The PRA should not be interpreted to allow such an end run around its strictures. In addition, Defendants' citation to the D.C. Circuit's recent decision in *CREW v. Trump*, 924 F.3d 602, is misplaced. In that case, the Court of Appeals held that the plaintiffs did not have a clear right to relief in part because the 2017 Memo specifically prohibited the use of messaging-deleting applications, the use of which plaintiffs were challenging as contrary to the PRA. Here, by contrast, the 2017 Memo does not purport to specifically address the conduct at issue. Nor could it, unless a White House counsel memorandum instructing the President himself not to engage in illegal conduct could somehow be internally enforced.

C. Defendants attack a straw man by arguing that the President has exclusive power in the area of international relations.

Defendants misrepresent Plaintiffs' claims when they argue that "[t]he Constitution vests 'plenary and exclusive power' in the President to act 'as the sole organ of the federal government' in many areas of international relations." Ds' Mem. at 23. Plaintiffs are not asking this Court "to impose restrictions on the President's ability to negotiate effectively with foreign nations." *Id.* Rather, Plaintiffs are asking the Court to find that the Defendants must comply with their obligations under the PRA, which does not exempt foreign relations from its requirement to *document* "the activities . . . that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties . . . ." 44 U.S.C. § 2203(a). The PRA explicitly includes all of the President's constitutional duties within its scope. The Constitution does indeed

authorize the President to represent the United States in international affairs, "but the authority of the President to represent the United States . . . speaks to the President's *international* responsibilities, not any unilateral authority to create domestic law." *Medellin v. Texas*, 552 U.S. 491, 529 (2008). To the extent Defendants are suggesting that the President is not required to document activities involving foreign leaders because the Constitution "vests" him with "plenary and exclusive power," their argument sweeps too broadly, for it would mean that Congress could not establish recordkeeping requirements regarding any powers the Constitution grants exclusively to the President. Mandamus relief requiring Defendants to comply with their ministerial duties under the PRA would not raise any separation of power concerns.

It is a fundamental constitutional principal that the legality of the Executive Branch's actions are subject to judicial review. *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974) (explaining that "the judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch"). Indeed, failing to do so "not only might indicate a disrespect for congressional legislative authority under Article I, Section 1 of the Constitution, but itself might be constitutionally improper." *Id.* at 605. This principal also extends to the President. *See, e.g.*, *N.L.R.B. v Canning*, 573 U.S. 513 (2014) (determining constitutionality of presidential appointments); *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (determining constitutionality of executive order); *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 776 (W.D. Pa. 2014) (same). This is because "judicial resolution of the issue better enables the President to perform his constitutional duty to take care that the laws be faithfully executed." *Nat'l Treasury Emps. Union*, 492 F.2d at 605. As the Supreme Court has explained, "it is the 'duty of the judicial department'—in a separation-of-powers case as in any other—'to say what

the law is.'" *Canning*, 573 U.S. at 525 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). As a result, there is a "general presumption of reviewability" of the legality of executive action. *Chamber of Commerce*, 74 F.3d at 1327.

By failing to issue guidelines that comply with the ministerial duties the PRA requires of them and then alleging that failure may not be challenged in court, Defendants are claiming extraordinary authority to decide which laws, if any, apply to them. But if it is "emphatically the province and duty of the judicial department to say what the law is," *Marbury*, 5 U.S. at 177, courts must be able to distinguish between actual interference with the executive functions of a president and hollow invocations of "separation of powers" that are deployed by the President to excuse his conduct.

Enforcing Defendants' obligations under the PRA does not require the Court to enjoin the President's discharge of executive or political functions—the legitimate interest that underlies true "separation of powers" concerns. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982); *Clinton v. Jones*, 520 U.S. 681, 703 (1997). Instead, the duties imposed on Defendants by the PRA are straightforward, non-discretionary, and do not infringe on the President's constitutional responsibilities. Indeed, in determining to issue a writ of mandamus against an executive branch agency, the D.C. Circuit explained the grave constitutional implications of the executive branch flouting federal law and stated that its "decision . . . rests on the constitutional authority of Congress, and the respect that the Executive and the Judiciary properly owe to Congress in the circumstances here." *In re Aiken Cnty.*, 725 F. 3d 255, 266–67 (D.C. Cir. 2013).

Contrary to the Defendants' assertions, such relief is available, even if it is used sparingly. In *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866), the Supreme Court left open the question of whether injunctive relief against the president in his official capacity was available,

but has since upheld such relief on several occasions, including *United States v. Nixon*, 418 U.S. 683 (1974), and *Boumediene v. Bush*, 553 U.S. 723 (2008). In accordance with those decisions, the D.C. Circuit held in *Nat'l Treasury Employees Union* that it had jurisdiction "to support the issuance of a writ of mandamus directing the President to effectuate the pay raise sought by plaintiff," even though it ultimately opted to impose declaratory relief instead. 492 F.2d at 616; *cf. Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) ("For purposes of establishing standing, however, we need not decide whether injunctive relief against the President was appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone.").[12] Even if the Court were reluctant to issue mandamus relief (especially if it considered declaratory relief likely to prove effective), that is not a basis for dismissing Plaintiffs' claim at this stage. *See Franklin*, 505 U.S. at 803; *Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 31 (D.D.C. 2011).

D. Defendants' additional arguments about the unavailability of mandamus relief are also specious.

Defendants raise a series of other erroneous challenges to mandamus relief. First, Defendants' assertion that Plaintiffs have no clear right to mandamus relief because they do not have a private right of action under the PRA, Ds' Mem. at 20, is wrong as a matter of law. The existence of a private right of action under the PRA is not necessary to support mandamus relief and Plaintiffs "may seek to obtain relief for PRA violations [under the Declaratory Judgement Act and the Mandamus Act]." *CREW v. Cheney*, 593 F. Supp. 2d at 218.

[12] These cases, all of which involved claims for injunctive relief against a president, stand in stark contrast to *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010), and its dicta (on which Defendants rely) that "'courts do not have jurisdiction to enjoin' the President." Ds' Mem. at 27.

Next, Defendants suggest that Plaintiffs may not reference newspaper articles with unnamed sources. Defendants cite only one district court opinion from the Western District of New York to support this claim, *Arroyo v. City of Buffalo*, No. 15-cv-753A, 2017 WL 3085835, at *1 (W.D.N.Y, July 20, 2017), *report and recommendation adopted*, No. 15-CV-753, 2018 WL 488943 (W.D.N.Y. Jan. 20, 2018). Defendants misstate the holding of this opinion, however, and ignore the specific context in which it arose. *Arroyo* involved an action against the City of Buffalo, its police department, its police chief, and several police officers under 42 U.S.C. § 1983 for the alleged deprivation of the plaintiff's federal constitutional rights. To maintain such a claim against a municipality, a plaintiff must establish that the deprivation resulted from a "governmental custom, policy or usage of the municipality." *Arroyo*, 2017 WL at *4 (citation omitted). To support his contention that the Buffalo police had a policy of unnecessarily shooting dogs during drug raids, the plaintiff cited an "article in a free local newspaper describing examples of police unnecessarily shooting dogs." *Id.* at *5. Given that the plaintiff did not cite the article in its complaint and failed to identify its source the court found the plaintiff could not rely on the article alone to plausibly show that the police had such a policy. *Id.* at *5-7.

In that same opinion, the court recognized that "information in newspaper articles may provide support for meeting the plausibility standard." *Id.* at *5. As another Circuit has explained, "Reliance on an article in *The Wall Street Journal* is not reliance on an insubstantial or meaningless investigation. Plaintiffs and their attorneys need not make further expenditures to prove independently that which may be read with some confidence of truthfulness and accuracy in a respected financial journal." *Lewis v. Curtis*, 671 F.2d 779, 788 (3d Cir. 1982).

Finally, the Defendants claim that mandamus relief is unavailable because "[a]ny duties created by the PRA are owed not to Plaintiffs, but to the public at large." Ds' Mem. at 25 n.11.

This assertion has no basis in case law, legislative history, or logic, and ignores the fact that Plaintiffs are as much members of "the public" as others (perhaps just more interested ones). As a result, particular members of the public are not foreclosed from seeking mandamus relief for a ministerial duty owed to "the public" at large. Defendants cite no case law to support their remarkable claim. Their citation to *Armstrong I* for this premise merely captures the court's acknowledgement of Congress's intent that there be public ownership and access to presidential records; that opinion does not discuss or even mention the standards for mandamus relief. *See* 924 F.2d at 290. The Court should therefore reject out-of-hand Defendants' suggestion to foreclose mandamus relief for ministerial duties owed to the public.

IV. Plaintiffs have raised valid claims for declaratory relief.

Declaratory judgments are available in federal court "(1) in disputes involving an actual case or controversy; (2) where the issue is actual and adversarial; and (3) when the action is not merely a medium for securing an advisory opinion." *Comm. On Judiciary. v. Miers*, 558 F. Supp. 2d 53, 80 (D.D.C. 2008) (citing *Coffman v. Breeze Corp.*, 323 U.S. 316 (1945)). The Declaratory Judgment Act ("DJA") is "liberally construed to achieve the objectives of the declaratory remedy." *Id.* at 82. "A valid mandamus claim can sustain declaratory relief," even where the PRA does not provide a cause of action. *See CREW v. Trump*¸ 302 F. Supp. 3d 127, 135 n.3 (D.D.C. 2018), *aff'd*, 924 F.3d 602 (D.C. Cir. 2019) (citing *Nat'l Treasury Emps. Union*, 492 F.2d at 616).

The mandamus relief that Plaintiffs seek in conjunction with Claims Two, Three, and Four is sufficient to support claims for declaratory relief under the DJA.[13] As discussed above in

[13] Defendants do not argue that Claim Five, which is based on the Defendants' violation of the Take Care Clause of the Constitution, should be dismissed on the grounds that the Declaratory Judgment Act does not create a cause of action. Ds' Mem. at 26–27.

Section III, the mandamus statute provides a claim sufficient to support declaratory relief. *See CREW v. Cheney*, 593 F. Supp. 2d at 222 ("Where a plaintiff advances a legally cognizable claim for mandamus, the plaintiff necessarily also advances a cause of action on which declaratory relief may lie."). In addition, Plaintiffs have satisfied the conditions set out in the text of the DJA itself. This is a "case of actual controversy within [this Court's] jurisdiction," and Plaintiffs have filed the "appropriate pleading" seeking a declaration relating to their "rights and other legal relations[.]" 28 U.S.C. § 2201(a). Thus, while the DJA does not create an independent source of subject matter jurisdiction, as long as subject matter jurisdiction exists under the Mandamus Act, the Court can "utilize the tool of declaratory relief." *Id.* (quoting *Nat'l Treasury Employees Union*, 492 F.2d at 616).

V. Plaintiffs have raised a valid claim under the Take Care Clause of the Constitution.

Even if the Court finds that the Defendants' actions are not reviewable under the PRA, Plaintiffs have also validly raised an independent claim under Article II, Section 3 of the Constitution (the "Take Care Clause")—Claim Five. As the D.C. Circuit has explained, "an independent claim of a President's violation of the Constitution would certainly be reviewable[,]" notwithstanding the lack of a statutory claim. *Chamber of Commerce*, 74 F.3d at 1326. The court made clear there that "[i]f a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action." *Id.* at 1327. This is true because "courts will ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Id.* at 1328. It would be a different matter "if Congress precluded non-statutory judicial review . . .[b]ut we have never held that a lack of statutory cause of action is *per se* a bar to judicial review." *Id.* In *Mittleman v. Postal Regulatory Commission*, the D.C. Circuit likewise explained that non-

statutory review is available in cases in which the executive branch is accused of exceeding its statutory authority, even in the absence of a statutory cause of action. 757 F.3d 300, 307 (D.C. Cir. 2014). In that case, the court acknowledged that the plaintiffs could have a non-statutory cause of action even though judicial review was expressly precluded under the Administrative Procedure Act. *Id.*

Under the Take Care Clause, the President must "take Care that the Laws be faithfully executed." U.S. Const. Art II, § 3. The Take Care Clause requires that the President comply with and execute the laws as enacted by Congress, but does not give the President independent power to enact laws. *Youngstown Sheet & Tube Co.*, 343 U.S. at 633 (explaining that "the power to execute the laws starts and ends with the laws Congress has enacted"). As a result, the President "'cannot of himself make a law[,]'" *Medellin*, 552 U.S. at 528 (quoting The Federalist No. 47), nor may he violate the law. *See, e.g.*, *Train v. City of New York*, 420 U.S. 35, 47 (1975) (President could not direct EPA Administrator to withhold congressionally appropriated funds).

Although "the decisions of th[e] [Supreme] Court in this area [judicial review of presidential actions] have been rare, episodic, and afford little precedential value for subsequent cases[,]" *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981), that Court has reviewed the validity of the President's actions, as have the lower courts. *See, e.g.*, *Canning*, 573 U.S. 513 (2014) (determining constitutionality of presidential appointments); *Chamber of Commerce*, 74 F.3d 1322 (determining constitutionality of executive order).

In *Juarez-Escobar*, for example, the district court reviewed the constitutionality of an Executive Action issued by President Obama that expanded the granting of deferred action status and updated the removal/deportation priorities for certain categories of undocumented immigrants. 25 F. Supp. 3d 774. The court found that the Executive Action was a "unilateral

legislative action" because it "substantively change[d] the statutory removal system." *Id.* at 787, 788. Because "[t]he President may only 'take Care that the Laws be faithfully executed. . .'; [and] may not take any Executive Action that creates laws," *id.* at 786, the court held that the Executive Action "violate[d] the separation of powers provided for in the United States Constitution as well as the Take Care Clause, and therefore, is unconstitutional." *Id.* at 788.

Defendants' actions here likewise amount to "unilateral legislative action[s]" because they substantively change the relevant statutes. First, Defendants' alleged policy or pattern and practice of failing to create records of certain kinds of presidential activities (*i.e.*, meetings with certain foreign leaders) effectively amends the PRA by carving out an entire set of meetings and communications from its requirements.

In addition, the Complaint alleges that Defendants have functionally amended the definition of a presidential record to include documents that qualify as federal records under the FRA (*e.g.*, interpreter notes) and have prevented the State Department from complying with its own obligations to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency . . . ." 44 U.S.C. § 3101; Compl. ¶ 36.

Contrary to Defendants' protests, Ds' Mem. at 27–28, judicial review is available under the Take Care Clause. In making arguments to the contrary, Defendants both misstate prior case law and ignore the Western District of Pennsylvania's more recent decision in *Juarez-Escobar*. First, Defendant's reliance on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), is misplaced. The Court decided *Lujan* on the basis of standing, finding that a plaintiff that suffered no distinctive concrete harm could not have standing to sue, even if expressly permitted by statute, because doing so "would permit Congress to transfer from the President to the courts the Chief

Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Id.* at 577. That case *does not* stand for the proposition that judicial review is not available under the Take Care Clause.

Dalton v. Specter, 511 U.S. 462 (1994), is also inapposite because it involved a discretionary decision. In *Dalton*, the Court was asked to review President Bush's compliance with a statute that committed the decision of whether to close particular military bases to his discretion. The Court appropriately determined that it would not second-guess his discretionary decision to close the Philadelphia Naval Shipyard. As the D.C. Circuit has explained, "*Dalton*'s holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available."[14] *Chamber of Commerce*, 74 F.3d at 1331.

Here, Plaintiffs are not, as Defendants disingenuously claim, seeking review of the President's discretionary decisions in his negotiations with foreign leaders." Ds' Mem. at 28. Plaintiffs instead are asking this Court to review the President's refusal to comply with the PRA, which mandates that he create a record of his presidency and which affords him no discretion to ignore that obligation. Congress did not exempt the "President's negotiations with foreign leaders" from its requirements. This Court should not lightly append such an exception to a clearly worded statute.

[14] Defendants' additional claim that *Dalton* stands for the proposition that the President's actions cannot support both a statutory claim and a constitutional claim, Ds' Mem. at 28, also misreads that case. The Court in *Dalton* merely noted that a claim based on a statutory violation is a separate and distinct claim from one premised on a constitutional violation and that the later does not *automatically* flow from the former. *Dalton*, 511 U.S. at 472 ("Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution.").

VI. Holding that challenges of a president's recordkeeping failures are non-justiciable and non-enforceable would defy Supreme Court precedent and Congressional intent.

When considered in their totality, Defendant's arguments—that Plaintiffs' allegations are nonjusticiable, that mandamus relief against the President is unavailable, and that the Take Care Clause cannot support a cause of action—amount to an untenable assertion that the President may, without consequence, disregard the PRA. That result runs contrary to the Supreme Court's decisions in *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, which rejected separation-of-powers objections to the precursor to the PRA, and in *Youngstown Sheet & Tube Co.*, 343 U.S. 579, which rejected the idea of complete division between the legislative and executive powers. To the extent that the D.C. Circuit's decision in *Armstrong I* supports Defendants' position, it was wrongly decided. Even though *Armstrong I* conflicts with the Supreme Court's decisions in *Nixon* and *Youngstown Sheet & Tube Co.*, it contains no mention of them. Instead, that decision relies on a flawed analysis of Congress's intent in enacting the PRA: *Armstrong I* invokes a House report and claims that it reflects a congressional desire not to interfere with the President's day-to-day management of presidential records when in fact that report invokes *Nixon* to support the contention that the PRA presents *no* separation-of-powers concerns. For these reasons, the court should reject Defendants' arguments to the extent that they rely on *Armstrong I*.

Congress enacted the precursor to the PRA, the Presidential Recordings and Materials Preservation Act ("PRMPA"), Pub. L. 93-526, 88 Stat. 1695, in the face of President Nixon's claim that his presidential records were his private property. That statute established that the President's records were the property of the American people, not the individual elected to serve as their president. President Nixon challenged the constitutionality of that statute on multiple grounds, all of which the Supreme Court rejected in *Nixon*. Of greatest relevance here, the Court

held that the PRMPA's requirement that records be kept and made available for later use was not "unduly disruptive of the Executive Branch . . . ." 433 U.S. at 441. To the contrary, the Court pointed to several other recordkeeping regimes—including the FOIA and the FRA—as evidence that Congress's "regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy." *Id.* at 445. The Court explained that this conclusion was consistent with the Court's articulation of the separation of powers in *Youngstown*: far from demanding a "complete division of authority between the three branches," the Constitution permits a balancing of interests so long as a branch is not prevented from "accomplishing its constitutionally assigned functions." *Id.* at 443. According to the Court, the PRMPA did not cross that line.

The Court's decision in *Nixon* built on its recognition in *Youngstown* that 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. at 587–88. As Justice Jackson explained in his famous concurrence in *Youngstown*, "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 637 (Jackson, J., *concurring*). Because courts can only sustain presidential challenges in such cases by "disabling Congress from acting upon the subject," "Presidential claim to a power at once so conclusive and

preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 637–38.

Those decisions have clear relevance here, and compel this Court to give full effect to the presidential recordkeeping responsibilities the PRA mandates. Defendants ignore these decisions, relying exclusively on *Armstrong I*. That opinion, however, does not analyze or even cite the *Nixon* and *Youngstown* decisions, even though *Youngstown* is the Supreme Court's most important articulation of separation-of-powers considerations and *Nixon* is its most direct application of those principles in the context of presidential recordkeeping. If *Armstrong I* had acknowledged *Nixon*, the Court would have had to reckon with the fact that the Supreme Court considered and rejected the notion that congressional regulation of presidential records violated the separation of powers. *See Nixon v. Adm'r of Gen. Servs*, 433 U.S. at 441. If *Armstrong I* had considered *Youngstown*, it might have acknowledged the need to defer to Congress's express will to establish standards for presidential recordkeeping and to uphold the "equilibrium established by our constitutional system." *Youngstown*, at 637–38 (Jackson, J., *concurring*).

The omission of any reference to *Nixon* or *Youngstown* in *Armstrong I* is all the more striking when one factors in *Armstrong I*'s second flaw: its mischaracterization of Congress's intent in enacting the PRA. The flaw is most evident in this crucial passage of *Armstrong I*:

> The statutory scheme and legislative history of the PRA reflect a congressional intent to balance two competing goals. First, Congress sought to establish the public ownership of presidential records and ensure the preservation of presidential records for public access after the termination of a President's term in office. H.R. Rep. No. 95–1487, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5732, 5733. But Congress was also keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations. *See id.* at 6–7, 1978 U.S. CODE CONG. & ADMIN. NEWS at 5737–38. Congress therefore sought assiduously to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President's term in office.

Armstrong I, 924 F.2d at 290.[15]

To the contrary, pages six and seven of the House Report to which *Armstrong I* cites as evidence of congressional "awareness of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations," in fact contain a lengthy discussion of how the Supreme Court's decision in *Nixon* supports the constitutionality of congressionally-imposed presidential recordkeeping requirements. The key portions of those two pages of the House Report read:

> The Supreme Court in 1977 upheld the Constitutionality of the Act in Nixon v. Administration of General Services. Writing for a 7-2 majority, Justice Brennan declared: Congress can legitimately act to rectify the hit-or-miss approach that has characterized past attempts to protect these substantial (government and public) interests (in the records).
>
> Although the 1974 Act concerned itself only with materials of the Nixon Administration, the Court's decision upholding the Act nonetheless established principles that would govern legislation dealing more broadly with control of and access to presidential papers. The following areas of the court's opinion in Nixon are relevant to the bill considered in this report:
>
> 1. Separation of Powers
>
> The Court found that Congress did not breach the separation of powers in ceding control of the Papers to the General Services Administration, inasmuch as the executive branch remained in full control of the Nixon materials with their release

[15] This passage has repeatedly been cited by the D.C. Circuit without critical evaluation. *See, e.g.*, *CREW v. Trump*, 924 F.3d at 608–09 (stating that the *Armstrong I* holding was premised on "'the intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns'") (quoting *Armstrong I*); *Armstrong II*, 1 F.3d at 1292 ("Congress was 'keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations,' and thus sought 'to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President's term of office.'") (quoting *Armstrong I*); *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 216 (D.C. Cir. 2013) ("In part, Congress exempted such records from FOIA—and later subjected them to the Presidential Records Act instead—in order to avoid serious separation-of-powers concerns that would be raised by a statute mandating disclosure of the President's daily activities.").

> permitted only when not barred by some applicable privilege inherent in the executive branch. Were Congress to give control of the papers to some entity outside the executive branch, the court might well find such legislation unconstitutional.
>
> . . .
>
> 5. Standards of Control and Access
>
> The Court repeatedly referred to the specific statutory access guidelines in the 1974 Act and the GSA regulations promulgated pursuant to that Act as being determinative in the protection of Constitutional and legal rights. This supports the view that legislation should include detailed standards of control and access.

H.R. Rep. 95-1487, 1978 U.S.C.C.A.N. 5732 at *6–7 (Aug. 14, 1978). Other passages in the House Report are also inconsistent with *Armstrong I*. For instance, the portion of the House Report that summarizes the components of the bill that relate to the creation, categorization, management, and disposal of records states:

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

Id. at *4 (emphasis added). Notably, the House Report uses the phrase "is encouraged" with respect to sound records management practices, but employs the phrase "is required" with respect to the duties to "make and separate personal papers from presidential records" and to "adequately document the performance of his functions." *Id.*

These components of the congressional record cannot be squared with the claim in *Armstrong I* that Congress sought to minimize the impact of the PRA on the day-to-day operations of the White House. The House Report plainly states that Congress was relying on the Supreme Court's decision in *Nixon* to make two claims: first, that separation-of-powers concerns

were addressed by the fact that control of recordkeeping was maintained within the executive branch; and second, that Congress has a legitimate role to protect against a "hit or miss" approach to presidential records by enacting legislation with "detailed standards of control and access." *Id.* And far from evincing congressional desire to "minimize outside interference with the day-to-day operations of the President and his closest advisors," *Armstrong I*, 924 F.2d at 291, the House Report states that the President "is required to make and separate personal papers from presidential records" and "is required to adequately document the performance of his functions . . . ." House Report at *4.

The text of the PRA also reflects Congress's intent to preserve executive branch custody of presidential records and to impose recordkeeping requirements on the President that *would* impact aspects of the President's recordkeeping. The PRA states that custody of presidential records will remain in the executive branch during and after a president's term of office. 44 U.S.C. § 2203. The PRA also states that the President "*shall take all steps as may be necessary* to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties *are adequately documented and that such records are maintained as Presidential records*[.]" 44 U.S.C. § 2203(a) (emphasis added). Neither the statutory text nor the House Report invites the President to comply with the requirements of the PRA at his discretion.

Thus, while Congress was cognizant of separation-of-powers concerns when it crafted the PRA, Congress resolved those concerns by keeping presidential records in the custody of the executive branch before and after a president's term in office and by making those records available through the FOIA only after a president has left the White House. There is no evidence

that Congress intended to make the president immune from any lawsuit seeking to hold him accountable to recordkeeping requirements that Congress intended to be mandatory.

To the contrary, the historical context, congressional record, and statutory text all indicate that Congress intended to take less of a "hit-or-miss approach," House Report at *4, by requiring the President to create, categorize, and preserve presidential records. Ignoring Congress's clear intent in enacting the PRA is a far greater affront to the separation of powers than ensuring that the President meet recordkeeping requirements established by Congress. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915) ("The Constitution does not confer upon [the president] any power to enact laws or to suspend or repeal such as the Congress enacts."). As the D.C. Circuit has explained, "far from *preserving* the separation of powers, when Congress has spoken, the courts place themselves in conflict with the legislative branch if they *ignore* the statutory message." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1337 (D.C. Cir. 1986). For these reasons, Defendants' claim that the PRA reflects a congressional intent to steer clear of interference with the President's day-to-day recordkeeping to avoid separation-of-powers concerns must fail.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss should be denied.

Respectfully submitted,

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