[ORAL ARGUMENT NOT YET SCHEDULED]

No. 17-5225

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

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff-Appellant,

v.

INTERNAL REVENUE SERVICE,
Defendant-Appellee.

On Appeal from an Order of the
U.S. District Court for the District of Columbia
Case No. 17-cv-670(JEB)

BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Cir. R. 28(a)(1), undersigned counsel for Appellant hereby provides the following information:

I. PARTIES AND AMICI APPEARING BELOW

The following parties appeared before the District Court:

1. Electronic Privacy Information Center, *Plaintiff-Appellant*.
2. Internal Revenue Service, *Defendant-Appellee.*

No *amici* appeared before the District Court.

II. PARTIES AND AMICI APPEARING IN THIS COURT

To date, the following parties and *amici* have appeared before this Court:

1. Electronic Privacy Information Center, *Plaintiff-Appellant*.
2. Internal Revenue Service, *Defendant-Appellee.*

No *amici* have appeared before this Court.

III. RULINGS UNDER REVIEW

The ruling under review in this case is United States District Court Judge James E. Boasberg's August 18, 2017, Order and Memorandum Opinion granting Defendant's Motion to Dismiss. *EPIC v. IRS*, No. 17-670 (D.D.C. Aug. 18, 2017).

IV. RELATED CASES

Apart from the proceedings in the District Court, this case has not previously been filed with this Court or any other court. Counsel not aware of any cases qualifying as "related" under D.C. Cir. R. 28(a)(1)(C).

V. CORPORATE DISCLOSURE STATEMENT

The Electronic Privacy Information Center ("EPIC") is a 501(c)(3) non-profit corporation. EPIC has no parent, subsidiary, or affiliate. EPIC has never issued shares or debt securities to the public.

Respectfully Submitted,

/s/ Marc Rotenberg
MARC ROTENBERG
EPIC President and Executive Director

Dated: February 21, 2018

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GLOSSARY

ADD	Citation to the Addendum
APA	Administrative Procedure Act
EPIC	Electronic Privacy Information Center
FOIA	Freedom of Information Act
GLDS	Office of Governmental Liaison, Disclosure and Safeguards (IRS)
IRM	Internal Revenue Manual
IRS	Internal Revenue Service
JCT	Joint Committee on Taxation
JA ___	Citation to the Joint Appendix

INTRODUCTION

There has never been a stronger claim for the release of records in the possession of the IRS than the request, now before this Court, brought under the Freedom of Information Act for the disclosure of Donald J. Trump's tax returns. First, the secrecy of the President's tax returns is unprecedented. Presidents Ford, Carter, Reagan, Bush, Clinton, Bush, and Obama all made public their personal tax returns. President Trump has not. Second, wide-ranging concerns about conflicts of interests, unique to this Presidency, could be resolved with the public release of the President's tax returns. Third, President Trump's tweets and statements regarding the contents of his tax returns have been plainly contradicted by his own attorneys, family members, and business partners. Fourth, Congress specifically anticipated that there would be circumstances, similar to those now before this Court, that would permit the release of tax records without taxpayer consent. Finally, the agency's failure to process EPIC's FOIA request disregards relevant facts in this case, is inconsistent with the agency's internal rules and processing of a similar FOIA request from EPIC in the past few weeks, and is contrary to law.

If the IRS is unable to even process a FOIA request in these circumstances, then the agency has placed itself beyond the reach of the Freedom of Information Act. That is a result Congress never intended and this Court should not permit.

JURISDICTIONAL STATEMENT

The lower court had jurisdiction to review the IRS's refusal to disclose records in its possession responsive to EPIC's Freedom of Information Act ("FOIA") Request pursuant to 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(C)(i), and 28 U.S.C. § 1331. The lower court also had jurisdiction to review EPIC's Administrative Procedure Act ("APA") challenges pursuant to 5 U.S.C. §§ 702, 704, and 706. The lower court granted the government's motion to dismiss on August 18, 2017. JA 24.

EPIC filed a timely notice of appeal on September 29, 2017. JA 64; *see* Fed. R. App. P. 4(a)(1)(B); Fed. R. App. P. 26(a)(1)(C). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

PERTINENT STATUTORY PROVISIONS

The full text of pertinent federal statutory provisions is reproduced in the addendum to this brief.

STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court erred in dismissing EPIC's FOIA claims against the IRS based on the agency's assertion that EPIC failed to obtain taxpayer consent.
2. Whether the District Court erred in holding that the IRS may lawfully impose a consent requirement on *all* FOIA requests for tax returns, even

when the controlling statute explicitly permits the disclosure of tax returns in certain circumstances without taxpayer consent.

3. Whether the District Court erred in holding that the IRS may refuse to process a FOIA request unless a congressional committee first gives approval for the release of the requested tax records.
4. Whether the District Court erred in dismissing EPIC's argument that 26 U.S.C. § 6103(k)(3) violates the constitutional separation of powers.
5. Whether the District Court erred in holding that EPIC is barred from challenging the IRS's refusal to process EPIC's FOIA request as a violation of 5 U.S.C. § 706 of the APA.

STATEMENT OF THE CASE

I. Congress's Enactment of § 6103(k)(3)

Two years after the Watergate scandal prompted the resignation of President Richard Nixon, Congress enacted the Tax Reform Act of 1976, Pub. L. 94-455, § 1202, 90 Stat. 1520 (codified as amended at 26 U.S.C. § 6103) ("the Act"). The experience of Watergate had left members of Congress "alarm[ed]" about the "political misuse of the Internal Revenue Service" by the White House. *Confidentiality of Tax Return Information: Hearing Before the H. Comm. on Ways & Means*, 94th Cong. 92 (1975) (statement of Rep. Jerry Litton), ADD 22. Section 6103, which concerns the confidentiality and disclosure of tax records, was a direct

response to these concerns. Like the Freedom of Information Act amendments and intelligence oversight reforms of the mid-1970s, § 6103 served as a "legislative remedy to the flaws of Government exposed by the chain of abuses we call Watergate." 122 Cong. Rec. 24,013 (1976) (statement of Sen. Weicker), ADD 28.

In enacting § 6103, Congress achieved two primary objectives. First, it established a "[g]eneral rule" that tax "[r]eturns and return information shall be confidential." 26 U.S.C. § 6103(a). Second, it enumerated certain narrow exceptions under which the IRS would disclose tax records. See 26 U.S.C. §§ 6103(c)–(o).[2] As Senator Bob Dole explained, the "tax return privacy provisions of this bill balance government's need for tax return information with the citizens' right of privacy and the related impact of disclosures upon continued compliance with our country's successful voluntary assessment system." 122 Cong. Rec. 24,013 (1976) (statement of Sen. Dole), ADD 28. One of these exceptions—and the key provision in this case—is § 6103(k)(3). It states:

> Disclosure of return information to correct misstatements of fact.--The Secretary may, but only following approval by the Joint Committee on Taxation, disclose such return information or any other information with respect to any specific taxpayer to the extent necessary for tax administration purposes to correct a misstatement of fact published or

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[2] The IRS website characterizes several of these provisions as "Disclosure Laws." Internal Revenue Serv., *Disclosure Laws* (Dec. 29, 2017), https://www.irs.gov/government-entities/federal-state-local-governments/disclosure-laws.

> disclosed with respect to such taxpayer's return or any transaction of the taxpayer with the Internal Revenue Service.

Id. Unlike many of the IRS's disclosure powers, (k)(3) allows for the release of taxpayer records "to the public at large" rather than "specified private individuals (*e.g.*, the taxpayer to whom the information relates) or government officials." *Church of Scientology of Cal. v. IRS (Church of Scientology I)*, 792 F.2d 146, 149 (D.C. Cir. 1986) (Scalia, J.) (citing § 6103(k)(3)), *aff'd*, 484 U.S. 9 (1987).

Section 6103(k)(3) was enacted to ensure "integrity and fairness in administering the tax laws" and to "protect [the IRS] and the tax system against unwarranted public attacks." *Confidentiality of Tax Return Information: Hearing Before the H. Comm. on Ways & Means*, 94th Cong. 23 (1976) (statement of Donald C. Alexander, IRS Comm'r), ADD 21. The Senate Finance Committee, which added the draft text of § 6103(k)(3) to the Act, emphasized that the core purpose of subsection (k) was to enable the disclosure of records both (1) as a general matter of policy and (2) in response to specific fact-based determinations:

> The committee decided that it was necessary to allow the disclosure of returns and return information decided in certain miscellaneous situations. In most of these situations, disclosure is permitted under present law. In each situation, the committee decided either that the returns or return information should be public as a matter of policy, or that the reasons for the limited disclosures involved outweighed any possible invasion of the taxpayer's privacy which might result from the disclosure.

S. Rep. No. 94-938, at 340 (1976), ADD 24. As Senator Chuck Grassley observed several years after the Act was passed, (k)(3) dictates that certain "type[s] of factual misstatements should trigger disclosure of return information" depending on the "consequences of these misstatements" and "their degree of seriousness." 127 Cong. Rec. 22,510 (1981) (statement of Sen. Grassley), ADD 29. Whether a particular release of tax records satisfies (k)(3) "depends on the reason for the disclosure and the type of information to be disclosed," Sen. Grassley explained. *Id.*

In the case below, EPIC contended that its FOIA request for President Trump's tax returns fell squarely within the § 6103(k)(3) disclosure provision. JA 31–39, 45–53.

II. The IRS's Procedures for § 6103(k)(3) Disclosures

Although the IRS represented to the District Court that "there is no procedure . . . to obtain access under section 6103(k)(3)," IRS Reply Supp. Mot. Dismiss 7 n.7, ECF No. 16, the agency has in fact developed extensive standards and procedures to obtain access to tax records under § 6103(k)(3).

According to the Internal Revenue Manual ("IRM"), the IRS should seek disclosure "when a misstatement of fact can potentially instigate taxpayer noncompliance, cause a proliferation of taxpayer noncompliance, or impugns the integrity of the IRS" and the "misstatement will have a significant impact on tax

administration." IRM 11.3.11.3 ¶¶ 1–2, ADD 9. Indeed, the IRM makes this point explicit a second time:

> The IRS should seek authorization to disclose when [a] misstatement of fact has the potential for instigating taxpayer noncompliance or causing a proliferation of taxpayer noncompliance [or a] misstatement of fact discredits the integrity of the IRS.

IRM 9.3.1.14.1 ¶ 2, ADD 18. For example, the IRS has determined that the agency "should be pursing Joint Committee approval to correct misstatements of fact" when "leaders promoting frivolous argument schemes make false claims about their personal tax situations and IRS dealings with them." IRM 4.12.2.5 ¶ 2 (1999), ADD 17. The predicate misstatement may come from either the taxpayer in question or from a third party. IRM 11.3.11.3.1–2, ADD 12–13.

When the IRS receives a "[r]equest[] involving disclosure to correct a misstatement of fact under IRC § 6103(k)(3)," agency rules require that any contemplated release of records "be authorized by the Commissioner, the appropriate Deputy Commissioner, or other delegated official in accordance with Delegation Order No. 11-2[.]" IRM 34.9.1.4.1 ¶ 2, ADD 16–17; *accord* IRM 11.3.35.5 ¶ 2, ADD 15. A "request" includes "any request . . . for the production of IRS records or information, oral or written, by any person, which is not a demand." IRM 34.9.1.2 ¶ 4, ADD 16 (quoting 26 C.F.R. § 301.9000-1(d)); *accord* IRM 11.3.35.3 ¶ 7, ADD 14; *see also* 5 U.S.C. § 552(a)(3)(A) ("[E]ach agency, upon any request for records . . . shall make the records promptly available to any

person."). Notably, § 6103(k)(3) "permits the IRS to disclose tax return information to correct misstatements of fact without a waiver from the taxpayer." *Final Remarks by Margaret Milner Richardson, Commissioner of Internal Revenue*, Fed. B.A. Sec. Tax'n Rep., Spring 1997, at 6, 9 [hereinafter *Richardson Remarks*], ADD 38.

The IRS's rules for processing a § 6103(k)(3) request and obtaining the Commissioner's authorization are set forth primarily in IRM 11.3.11 ("Other Information Available to the Public"). If IRS personnel "become aware of any situation where a misstatement may warrant correction by the IRS through the disclosure of return information," they are instructed to "contact their servicing Disclosure Manager for assistance." IRM 11.3.11.3 ¶ 4, ADD 9. IRS Disclosure Managers—also known as FOIA Public Liaisons—are then charged with "collect[ing] all necessary information" for a request and forwarding it to the agency's Disclosure Policy & Program Operations Manager. Internal Revenue Serv., *IRS Disclosure Offices* (Sep. 6, 2017);[3] IRM 11.3.11.3 ¶ 5, ADD 9. The Operations Manager, in turn, "will forward [the] request to the Director, Office of Governmental Liaison, Disclosure and Safeguards (GLDS) via memo[.]" IRM 11.3.11.3 ¶¶ 6–7, ADD 9–12. Finally, the GLDS Director "will prepare a letter to

[3] https://www.irs.gov/privacy-disclosure/irs-disclosure-offices.

the Chairman of the Joint Committee on Taxation for the Commissioner's signature." IRM 11.3.11.3 ¶ 8, ADD 12.

In cases where the taxpayer has made a misstatement of fact that impugns the agency or provokes noncompliance, the expectation is that the Joint Committee on Taxation will authorize disclosure. *See* IRM 11.3.11.3.1 ¶ 3, 12 ("[W]here the taxpayer makes the misstatement, the Chairman and Vice Chairman of the Joint Committee *will authorize disclosure* for the Committee." (emphasis added)). Where the misstatement is made by a third party, "[t]he Joint Committee will scrutinize these cases more closely." IRM 11.3.11.3.2 ¶ 1, ADD 13. "When the Joint Committee approves the disclosure, the [GLDS Director] will notify the referring office" of the IRS, which in turn will "notify the appropriate subordinate office" to discharge the release of tax information. IRM 11.3.11.3.3 ¶ 3, ADD 14.

III. The IRS's Prior Use of § 6103(k)(3)

Contrary to the District Court's finding that it "is aware of no instance where [(k)(3)] has been successfully invoked," JA 16, the IRS has indeed made disclosures of tax information under § 6103(k)(3) on multiple occasions.

In 1981, the IRS sought to disclose tax information under § 6103(k)(3) to correct misstatements by tax protestors that the agency was "letting them get away with not filing or that [it was] harassing them." I.R.S. News Release IR-81-122 (Oct. 6, 1981), ADD 35. "Protest leaders had publicly made 'sales pitches' that

they had successfully evaded taxes, encouraging others to join in undermining the Service's revenue collection." JA 16 (citing Ray Walden, Comment, *Render unto Uncle Sam That Which Is Uncle Sam's: The IRS and Tax Protest Evangelism*, 61 Neb. L. Rev. 681, 731 & n.265 (1982)). Even though the IRS found "no discernable relationship between the illegal tax protestor 'movement' and [the IRS's] ability to maintain an effective voluntary compliance system," the agency determined that disclosure of records was still justified under § 6103(k)(3). *Response to the Illegal Tax Protester Movement: Hearing Before the Commerce, Consumer and Monetary Affairs Subcomm. of the H. Comm. on Gov't Operations*, 97th Cong. 105–06 (1981) (statement of Roscoe L. Egger, Jr., IRS Comm'r) [hereinafter Egger Statement], ADD 30–31; *id.* app. 1, at 142, 170 ("Study of the Illegal Tax Protestor Activities"), ADD 32–33. As the IRS Commissioner explained at the time, it was "essential, despite the cost and effort, to enforce the laws violated by these individuals, and to demonstrate to the public that these tactics should not be attempted by others." *Id.* at 106.

In 1997, the IRS Commissioner "requested the opportunity to explore with [JCT] Chairman Archer and Chairman Roth the possibility of using Code section 6103(k)(3) to permit the IRS to correct misstatements of fact regarding examinations of tax-exempt organizations." Joint Comm. on Taxation, *Report of Investigation of Allegations Relating to Internal Revenue Service Handling of Tax-*

Exempt Organization Matters, JCS No. 3-00, at 1 (2000), ADD 39. The Commissioner informed the JCT that these "unfounded reports erode[d] public confidence in the integrity of the IRS, thereby undermining the self-assessment compliance system." Letter from Margaret Milner Richardson, IRS Comm'r, to William V. Roth, Jr., Chairman, S. Comm. on Fin. (Feb. 25, 1997), ADD 36. The Commissioner went on to explain in a public speech that "the information the IRS can legally share will demonstrate the IRS' fair, impartial, and nonpartisan enforcement of the internal revenue laws." *Richardson Remarks* 9, ADD 38.

And in 2000, the IRS used its § 6103(k)(3) authority to make ten separate disclosures of tax information. Internal Revenue Serv., *Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 2000* at 3 (2001), ADD 41. The circumstances of these disclosures are not known to EPIC. But the IRS recently admitted—just weeks after the District Court stated that it was "aware of no instance where it [§ 6103(k)(3)] has been successfully invoked," JA 16—that the agency did indeed invoke § 6103(k)(3) in 2000. Letter from David Nimmo, Disclosure Manager, IRS, to John Davisson, EPIC (Sep. 14, 2017) ("[W]e were able to ascertain that the most recent disclosure made pursuant to IRS § 6103(k)(3) occurred during calendar year 2000."), ADD 47.

IV. Misstatements of Fact Concerning President Trump's Tax Returns and IRS Transactions

Many individuals, including President Trump himself, have published conflicting statements of fact about the contents of the President's tax records. These statements of fact concern revenue from Russian sources, the scope (and possible religious and political bias) of audits, and the impact of recent changes in tax law upon the President's finances.

First, conflicting statements have been made as to whether President Trump's returns reflect Russian sources of income. JA 46. The President has repeatedly stated that he receives no income from Russian sources. JA 46 ("For the record, I have ZERO investments in Russia."); JA 47 ("I HAVE NOTHING TO DO WITH RUSSIA - NO DEALS, NO LOANS, NO NOTHING!"); JA 47–48 ("I can tell you, speaking for myself, I own nothing in Russia. I have no loans in Russia. I don't have any deals in Russia."). But the President's own lawyers have contradicted these assertions. JA 46–49. In a letter published last year, the President's attorneys identified multiple sources of Russian income that would appear in his "personal returns":

> With a few exceptions—as detailed below—your tax returns do not reflect (1) any income of any type from Russian sources . . . . The exceptions are: (1) in 2013, the Miss Universe pageant was held in Moscow, and of the $12.2 million of foreign income that it earned that year, a substantial portion of it was attributable to the Moscow event . . . ; and (3) over the years, it is likely that TTO or third-party entities engaged in ordinary course sales of goods or services to Russians or

> Russian entities . . . that could have produced income attributable to Russian sources . . . .

Letter from Sheri A. Dillon & William F. Nelson, Tax Partners, Morgan Lewis & Bockius LLP, to President Donald J. Trump (Mar. 8, 2017), ADD 45. Family members, public figures, and news organizations have also disputed the President's denials of Russian financial ties, including Donald Trump, Jr., Eric Trump, former Democratic presidential nominee Hillary Clinton, Sen. Chris Murphy, The New York Times, The Washington Post, and CBS News. JA 46–49; *see also* Paul Waldman, *With Trump and Russia, It's All About the Money*, Wash. Post (July 19, 2017) ("There's the reporter who says Eric Trump told him that that they didn't need loans from American banks for golf course projects, because 'We have all the funding we need out of Russia.'").

Second, conflicting statements of fact have been published concerning the frequency of and basis for the IRS's audits of President Trump. JA 49–50. The President has claimed that he "unfairly get[s] audited by the I.R.S. almost every single year" and has accused the agency of targeting him for both religious and political reasons. JA 49. In a February 2016 CNN interview, then-candidate Trump stated: "I'm always audited by the IRS, which I think is very unfair—I don't know, maybe because of religion, maybe because of something else." JA 49–50. Trump added that the IRS may target him "because of the fact that I'm a strong Christian,

and I feel strongly about it and maybe there's a bias." JA 50. IRS Commissioner John Koskinen expressly denied Trump's allegations the following day:

> That's something that would never cause you to be audited. I've tried to make clear, certainly since I've been commissioner, that we don't care who you are, who you voted for, what party you belong to, whether you go to church or don't go to church. If you hear from us in response to an inquiry, it is about something in your tax return. . . . But it would never be the case that you'd be audited because of any religious persuasion you might happen to have.

Newsmakers with John Koskinen, C-SPAN (Feb. 26, 2016).[4] One commentator even asserted that President Trump eludes IRS auditors at a higher rate than non-wealthy taxpayers. JA 50.

Third, there appear to be misstatements of fact concerning the impact of recent changes in tax law upon President Trump's personal finances. President Trump stated that he will not benefit from the tax bill he championed and signed into law last year. *E.g.*, James B. Stewart, *Trump Says G.O.P. Tax Bill Wouldn't Benefit Him. That's Not True*, N.Y. Times (Nov. 30, 2017)[5] ("'This is going to cost me a fortune,' he said on Wednesday in Missouri. 'This is not good for me.'"); Christina Wilkie, *Trump: 'I Don't Benefit' from GOP Tax Reform Plan*, CNBC (Sep. 27, 2017)[6] ("'I don't benefit, no,' Trump replied to a reporter who asked him

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[4] https://www.c-span.org/video/?405379-1/newsmakers-john-koskinen.
[5] https://www.nytimes.com/2017/11/30/business/trump-benefit-tax-cuts.html.
[6] https://www.cnbc.com/2017/09/27/trump-i-dont-benefit-from-gop-tax-reform-plan.html.

whether he would get a tax cut under the current framework."). Tax experts have flatly contradicted these claims. *E.g.*, Drew Harwell & Jonathan O'Connell, *The Many Ways President Trump Would Benefit from the GOP's Tax Plan*, Wash. Post (Nov. 10, 2017).[7]

V. Unique Public Interest in the Release of the President's Tax Records

The secrecy of the President's tax returns has provoked widespread public concern, including concern over the fair administration of the tax system. The public favors the release of President Trump's tax returns by wide margins. According to an ABCNews poll, three-quarters of Americans believe the President should release his returns. JA 45; *accord CNN December 2017* at 7, CNN (Dec. 19, 2017)[8] (finding that 73% of Americans think President Trump should "release his tax returns for public review"). More than 1 million people have signed a petition urging the federal government to "[i]mmediately release Donald Trump's full tax returns, with all information needed to verify emoluments clause compliance." JA 45.

Significant numbers of taxpayers have even "announced their intention to 'withhold[] payment until Trump releases his own tax returns . . . .'" JA 50; *see*

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[7] https://www.washingtonpost.com/business/economy/the-many-ways-president-trump-would-benefit-from-the-gops-tax-plan/2017/11/10/d82c8116-c4ba-11e7-aae0-cb18a8c29c65_story.html.

[8] http://cdn.cnn.com/cnn/2017/images/12/18/rel12a.-.trump.and.taxes.pdf.

also Internal Revenue Serv., *Filing Season Statistics for Week Ending February 10, 2017* (showing a 17.2 percent year-over-year decline in tax returns received by the IRS), ADD 43; Internal Revenue Serv., *Filing Season Statistics for Week Ending February 9, 2018* (showing a further 3.8 percent year-over-year decline in tax returns received by the IRS), ADD 58. This conduct directly impedes the administration of the tax system. *See* Egger Statement 106, ADD 31 ("[I]t is possible for public confidence in the government's ability to fairly and firmly administer the tax laws to be jeopardized if the illegal tax protestor 'movement' continues to grow.").

Meanwhile, the President's campaign and several of the President's closest advisers have come under federal investigation for allegedly coordinating with the Russian government to interfere in the 2016 U.S. presidential election. Rod J. Rosenstein, *Order No. 3915-2017: Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters* (May 17, 2017), ADD 46; *see also* JA 26, 45–46. That investigation has produced indictments and guilty pleas as to four close Trump associates on charges of money laundering, false statements, and other offenses. *Special Counsel's Office*, The United States Department of Justice (Feb. 16, 2018).[9] These unique circumstances,

[9] https://www.justice.gov/sco.

the secrecy of the President's tax returns, and the financial ties they may reflect all underscore the public interest in disclosure.

VI. EPIC's FOIA Requests and Appeal

On February 16, 2017, EPIC submitted a FOIA request to the IRS ("Original FOIA Request"). JA 25–28, 52. EPIC's Original FOIA Request sought "all of Donald J. Trump's individual income tax returns for tax years 2010 forward, and any other indications of financial relations with the Russian government or Russian businesses." JA 26, 52. The request "reasonably described" the records sought from the agency. 5 U.S.C. § 552(a)(3)(A). In a letter to EPIC dated March 2, 2017 ("First Response"), IRS Tax Law Specialist Michael Young acknowledged receipt of EPIC's request. JA 29–30, 52. The IRS's First Response—which was labeled a "final response"—stated that the agency was "closing [EPIC's] request" with "no further action." JA 29, 52.

On March 29, 2017, EPIC submitted a renewed FOIA request and appeal ("Renewed FOIA Request and Appeal") to the IRS. JA 31–40, 52. EPIC reiterated its request for "Donald J. Trump's tax returns for tax years 2010 forward and any other indications of financial relations with the Russian government or Russian businesses." JA 32, 52. EPIC's Renewed FOIA Request and Appeal "reasonably described" the records sought from the agency. § 552(a)(3)(A). EPIC explained its right to access such records under § 6103(k)(3) and urged the IRS Commissioner

to "move promptly to obtain permission from the Joint Commission on Taxation to release the records EPIC has requested." JA 32, 53.

On April 4, 2017, EPIC Fellow John Davisson and IRS Disclosure Manager David Nimmo conducted a phone conference concerning EPIC's Renewed FOIA Request and Appeal. JA 53, 63. During the phone conference, Nimmo stated that the IRS was closing EPIC's request. JA 53, 63. Nimmo stated that "we're not going to do a (k)(3)" and that "we're not exercising (k)(3)." *Id.* Nimmo also stated that EPIC could "file a suit" and seek "judicial review." JA 53, 63. In a letter to EPIC dated April 6, 2017 ("Second Response"), Nimmo acknowledged receipt of EPIC's Renewed FOIA Request and Appeal. JA 41–42, 53. The IRS's Second Response—which was again labeled a "final response"—stated that the agency would not consider EPIC's appeal. JA 41, 53. The IRS also wrote that the agency was "closing EPIC's request" and that "any future request regarding this subject matter w[ould] not be processed." JA 42, 53.

VII. EPIC's Case in the District Court

On April 15, 2017, EPIC filed suit against the IRS in the U.S. District Court for the District of Columbia to obtain the release of President Trump's tax records. JA 43–56. EPIC alleged that the IRS had violated the FOIA by failing to comply with statutory deadlines, failing to take reasonable steps to release nonexempt information, and unlawfully withholding agency records. JA 54–54. EPIC also

alleged that the IRS had violated the APA by arbitrarily closing EPIC's records request and unlawfully failing to seek disclosure approval from the JCT. JA 55–56. On June 12, 2017, the IRS moved the Court to dismiss all counts of EPIC's Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). IRS Mot. Dismiss (June 12, 2017), ECF No. 14.

On August 18, 2017, District Court Judge James E. Boasberg granted the IRS's motion and dismissed the case without prejudice. JA 24, 7, 23. The Court determined that EPIC's FOIA request was "not perfected" because it lacked proof of President Trump's "consent to release [his] otherwise confidential information," and that EPIC's FOIA claims "must therefore be dismissed for failure to exhaust." JA 15. The Court also held that § 6103(k)(3)—a statute which authorizes disclosure "without a waiver from the taxpayer," *Richardson Remarks* 9, ADD 38—did not overcome the proof-of-consent barrier that the IRS opted to impose on EPIC's request. JA 17–18. In the District Court's view, "this potential exception to the consent requirement could not possibly apply" to EPIC's request unless the JCT had already "approved" the release of the requested records under § 6103(k)(3). JA 18. *But see* IRM 11.3.11.3–11.3.11.3.3, ADD 9–14 (explaining that § 6103(k)(3) disclosure requests are first processed by the IRS and later submitted to the JCT for approval).

Finally, the District Court dismissed EPIC's APA claims, reasoning that the FOIA provided an adequate remedy for EPIC's unlawful agency action claim under § 706(a)(2) and that agency's request for JCT approval of disclosure under § 6103(k)(3) "cannot [be] compel[led] through the APA" under § 706(a)(1). JA 19–22. The Court declined to consider the argument, raised in EPIC's Opposition, that the congressional approval requirement of § 6103(k)(3) violates the constitutional separation of powers and may not be enforced as a bar to the relief EPIC seeks. JA 22–23; EPIC Opp'n 11 n.2, ECF No. 12. The Court concluded: "[U]ntil President Trump or Congress authorizes release of the tax returns, EPIC (and the rest of the American public) will remain in the dark." JA 4–5.

SUMMARY OF THE ARGUMENT

The District Court's decision to dismiss EPIC's complaint against the IRS should be reversed, and the case should be remanded for four reasons. First, EPIC plausibly stated a claim that the agency's failure to process the request violated the FOIA. EPIC's request for disclosure of President Trump's tax returns satisfied all applicable requirements under the Freedom of Information Act, the Internal Revenue Code, the relevant Treasury regulations, and the agency's own procedural regulations. Second, EPIC plausibly stated a claim that the agency's refusal to take steps necessary to authorize disclosure of the requested records violated the Administrative Procedure Act. Third, the District Court's decision rested on an

interpretation of § 6103(k)(3) that violates the separation of powers and delegates to Congress the Executive Branch's statutory authority to process a request for records in the possession of a federal agency. Fourth, there has never been a more compelling FOIA request presented to the IRS than this request for the release of President Donald J. Trump's tax returns.

STANDARD OF REVIEW

This Court reviews a district court's grant of a motion to dismiss *de novo*. *Cierco v. Mnuchin*, 857 F.3d 407, 414 (D.C. Cir. 2017).

ARGUMENT

I. The IRS violated the FOIA by refusing to process EPIC's request for the release of agency records under 26 U.S.C. § 6103(k)(3).

By twice refusing to process EPIC's FOIA request for President Trump's tax records, the IRS violated the Freedom of Information Act, 5 U.S.C. § 552. Accordingly, EPIC has three claims for relief, all of which are ripe for review. First, by refusing to process EPIC's FOIA request, the IRS violated 5 U.S.C. § 552(a)(6)(A)(i). JA 54 (Count I). Second, by refusing to take reasonable steps to release all responsive records, the IRS violated 5 U.S.C. § 552(a)(8)(A)(ii)(II). JA 54 (Count II). Third, by unlawfully withholding President Trump's tax records, the IRS violated 5 U.S.C. § 552(a)(3)(A). JA 54 (Count III).

A. EPIC submitted a perfected FOIA request for the release of tax records under § 6103(k)(3).

EPIC's request for President Trump's tax returns was a perfected FOIA request for the release of tax information under § 6103(k)(3). As such, the IRS was obligated to process it under the FOIA and to take the reasonable steps set forth in the Internal Revenue Manual for "[r]equests involving disclosure to correct a misstatement of fact under IRC 6103(k)(3)." IRM 11.3.35.5, ADD 15; *see* IRM 11.3.11.3–IRM 11.3.11.3.3, ADD 9–14; 5 U.S.C. § 552(a)(8)(A)(ii)(II).

Congress enacted the Freedom of Information Act in order "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *CREW v. DOJ*, 746 F.3d 1082, 1088 (D.C. Cir. 2014) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). The purpose of FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1232 (D.C. Cir. 2008) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). Under the FOIA, a requester is entitled to the "prompt[]" release of all nonexempt records "reasonably describe[d]" in a conforming request. 5 U.S.C. § 552(a)(3)(A). A requester is also entitled to a determination "within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request" and all

"reasonable steps necessary to . . . release nonexempt information[.]" *Id.* §§ 552(a)(6)(A)(i), (a)(8)(A)(ii)(II).

Though the FOIA creates a "presumption of openness requir[ing] that all doubts be resolved against closure," *NRDC v. Nuclear Regulatory Comm'n*, 216 F.3d 1180, 1184 (D.C. Cir. 2000), the statute permits agencies to withhold several categories of documents. 5 U.S.C. § 552(b). Exemption 3 concerns records "specifically exempted from disclosure by [another] statute." *Id.* § 552(b)(3). Section 6103 of the Internal Revenue Code, which addresses the privacy and disclosure of taxpayer records, "is the sort of statute referred to by [Exemption 3]," *Church of Scientology of Cal. v. IRS (Church of Scientology III)*, 484 U.S. 9, 11 (1987). Although § 6103 establishes a "general rule" that tax "[r]eturns and return information shall be confidential," it also requires the release of taxpayer records to FOIA requesters in many circumstances:

> The two statutes seem to us entirely harmonious; indeed, they seem to us quite literally made for each other: Section 6103 prohibits the disclosure of certain IRS information (with exceptions for many recipients); and FOIA, which requires all agencies, including the IRS, to provide nonexempt information to the public, establishes the procedures the IRS must follow in asserting the § 6103 (or any other) exemption. Church of Scientology of Cal., 792 F.2d at 149 (emphasis added).

Church of Scientology I, 792 F.2d at 149.

EPIC's FOIA request explicitly and repeatedly invoked one such exception to the confidentiality of tax returns: 26 U.S.C. § 6103(k)(3). JA 32–33, 40. Under

the plain language of § 6103(k)(3), information about a specific taxpayer may be released, following consultation with the JCT, if two conditions are met. First, "a misstatement of fact [has been] published or disclosed with respect to such taxpayer's return or any transaction of the taxpayer with the Internal Revenue Service." *Id.* § 6103(k)(3). Second, disclosure of the requested records is "necessary for tax administration purposes to correct" that "misstatement of fact[.]" *Id*. Notably, "[t]he term 'tax administration' is defined broadly . . . ." *True the Vote, Inc. v. IRS*, 831 F.3d 551, 557–58 (D.C. Cir. 2016) (citing § 6103(b)(4)), *cert. denied sub nom. True the Vote, Inc. v. Lerner*, 137 S. Ct. 1068 (2017); *see also Hobbs v. U.S. ex rel. Russell*, 209 F.3d 408, 410–11 (5th Cir. 2000) ("The courts that have considered whether certain activities qualify as 'tax administration' uniformly have defined the term broadly."). Where the taxpayer is responsible for the misstatement of fact that impugns the agency or provokes noncompliance, the expectation is that disclosure will be approved. *See* IRM 11.3.11.3.1 ¶ 3, ADD 12.

EPIC explained at length in the Renewed FOIA Request and Appeal (and plausibly reiterated in the Complaint) how the records it sought were subject to release under § 6103(k)(3). EPIC's request called for Donald J. Trump's tax returns for tax years 2010 forward "and any other indications of financial relations with the Russian government or Russian businesses." JA 32, 52. In support, EPIC

detailed numerous conflicting statements of fact that have been published concerning President Trump's tax returns and his "transaction[s] . . . with the Internal Revenue Service," including many statements by the President himself. § 6103(k)(3); JA 33–39, 46–50.

First, President Trump has issued multiple emphatic denials that he has any financial ties to Russia which might be reflected in his tax returns. *Supra* p. 12; JA 35, 46 ("For the record, I have ZERO investments in Russia."); JA 36, 47 ("I HAVE NOTHING TO DO WITH RUSSIA - NO DEALS, NO LOANS, NO NOTHING!"); JA 37, 47–48 ("I can tell you, speaking for myself, I own nothing in Russia. I have no loans in Russia. I don't have any deals in Russia."). These claims were contradicted by family members, news reports, and even the President's own lawyers. *Supra* pp. 12–13; JA 35–38, 46–49. Second, President Trump has alleged that the IRS unfairly targets him for audits on religious and political grounds. *Supra* pp. 13–14; JA 38–39, 49. Again, these claims were contradicted by news reports and even by the former IRS Commissioner ("That's something that would never cause you to be audited."). *Supra* p. 14; JA 39, 50. As EPIC noted, "At least some of these statements of fact must necessarily be false because they are contradictory." JA 46; *accord* JA 38.

EPIC also detailed how disclosure of the requested records was "necessary for tax administration purposes to correct" these "misstatement[s] of fact[.]" §

6103(k)(3). The misstatements of fact identified in Renewed the FOIA Request and Appeal (and again in the Complaint) pertain to transactions with the IRS that can only be resolved by disclosure of President Trump's tax information. *See* JA 38, 45. And as EPIC explained, it is necessary for tax administration purposes that the IRS make such a disclosure because the integrity and fairness of the IRS is under attack. *See* JA 38–39, 49. Without support, the President has condemned the agency's administration of tax collection as politically and religiously biased. JA 39–39, 49–50. Not surprisingly, significant numbers of taxpayers "have announced their intention to 'withhold[] payment until Trump releases his own tax returns. . . .'" JA 50.

Given this extensive recitation of facts and arguments in support of § 6103(k)(3) disclosure, the IRS was obligated to process EPIC's pursuant to FOIA, § 552(a), and to take the reasonable steps set forth in the Internal Revenue Manual for handling "[r]equests involving disclosure to correct a misstatement of fact under IRC 6103(k)(3)." IRM 11.3.35.5, ADD 15; 5 U.S.C. § 552(a)(8)(A)(ii)(II). And according to the IRS's procedures for § 6103(k)(3), the burden fell upon the agency to review the record, prepare a memo to the relevant agency authorities recommending disclosure, and then initiate communications with the Joint Committee on Taxation so that the FOIA request could be processed. *See* IRM 11.3.11.3, ADD 9–12.

Yet the District Court reached the opposite, and erroneous, conclusion. Despite EPIC's clear invocations of § 6103(k)(3), the Court held that EPIC's FOIA request falls outside of § 6103(k)(3) because "the Joint Committee on Taxation has not [yet] approved the disclosure of President Trump's tax returns." JA 15, 18. This is a topsy-turvy reading of the provision. First, it contradicts the Internal Revenue Manual, which identifies the IRS—not the JCT—as the initiator on any § 6103(k)(3) request. *See, e.g.*, IRM 9.3.1.14.1 ¶ 2, ADD 18 ("The IRS should seek authorization to disclose . . . ."); IRM 11.3.11.3 ¶ 8, ADD 12 ("After receipt of the request for disclosure . . . [GLDS] will prepare a letter to the Chairman of the Joint Committee on Taxation for the Commissioner's signature."); IRM 11.3.11.3.3 ¶ 2, ADD 14 ("Once the Commissioner signs the request, it will be delivered expeditiously to the Joint Committee."). In nearly 1,500 words spent interpreting § 6103(k)(3), the Manual does not once suggest that a disclosure approval might originate with the JCT.

Indeed, if § 6103(k)(3) "could not possibly apply" to a records request without advance JCT approval, JA 15, the IRM would suddenly be full of contradictions and feedback loops. For example, IRS personnel are required to seek the Commissioner's authorization for "[r]equests involving disclosure to correct a misstatement of fact under IRC 6103(k)(3)." IRM 11.3.35.5, ADD 15; *accord* IRM 34.9.1.4.1 ¶ 2, ADD 16–17. On the District Court's view, no request

can fall "under" § 6103(k)(3) unless the JCT has pre-approved disclosure of the requested records. JA 18. But wait: the Commissioner was required to authorize that very same § 6103(k)(3) disclosure *before* it was "delivered expeditiously to the Joint Committee" for approval (itself an impossible act, since under this line of argument no § 6103(k)(3) disclosure request can even exist unless the JCT first says so). IRM 11.3.11.3.3 ¶ 2, ADD 14. Remarkably, the District Court's interpretation of § 6103(k)(3) would make it logically impossible for IRS personnel to obtain the Commissioner's authorization for any disclosure.

Second, the District Court misconstrues the text of § 6103(k)(3), reading "approval by the Joint Committee on Taxation" as *carte blanche* for IRS to ignore § 6103(k)(3) requests. JA 18. Although the IRS may not make a final release of tax information without consulting the JCT, the IRM is clear that the IRS must identify and process § 6103(k)(3) requests long before they reach the JCT. IRM 11.3.11.3, ADD 9–12; IRM 11.3.35.5, ADD 15; *see also supra* pp. 9–11 (enumerating attempted and successful § 6103(k)(3) disclosures initiated by the IRS).

Moreover, this order of operations is apparent from the text of § 6103(k)(3), which gives the Secretary of the Treasury the power to "disclose" information and to make the initial determination of what is "necessary for tax administration purposes." 5 U.S.C. § 6103(k)(3). It would be a strange (and indeed, unconstitutional) statute that invested primary executive authority to initiate

disclosures of agency records in a legislative committee. *See Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirement of Art. I, § 7."). That is not the natural reading of § 6103(k)(3), which—like the rest of § 6103—is directed at the conduct of the IRS. *See Church of Scientology I*, 792 F.2d at 149 ("Section 6103 prohibits the disclosure of certain IRS information (with exceptions for many recipients); and FOIA . . . establishes the procedures the IRS must follow in asserting the § 6103 (or any other) exemption.").

Third, the misstatements of fact in this case arise not only from contradictory statements between third parties, but also from the taxpayer himself. President Trump has directly contradicted statements by the former IRS Commissioner regarding political and religious bias in the administration of the tax system, and he has explicitly disaffirmed statements by family members and his own attorneys regarding personal income from Russian sources. In these circumstances, the expectation is that disclosure will be approved under (k)(3). IRM 11.3.11.3.1 ¶ 3, ADD 12. But rather than recognize this presumption in favor of disclosure where the statutory and regulatory requirements have been met, the District Court held

that the IRS must defer responsibility to Congress before processing a FOIA request that the law requires the agency to comply with.

EPIC's FOIA request therefore properly falls under § 6103(k)(3). The IRS was required to process EPIC's request in accordance with the FOIA and the reasonable steps enumerated in the IRM for § 6103(k)(3) disclosures.

B. Taxpayer consent was not required for the IRS to process EPIC's FOIA request.

Because EPIC submitted a FOIA request for the release of records under § 6103(k)(3)—a provision that "pertain[s] to disclosure" of taxpayer records "to the public at large," *Church of Scientology I*, 792 F.2d at 149—EPIC was under no obligation to provide a written authorization from President Trump. Section 6103(k)(3) neither imposes nor tolerates such a hurdle to FOIA processing. EPIC's request was thus perfected upon submission, and EPIC's administrative remedies were properly exhausted when the IRS improperly closed EPIC's request. Nonetheless, the District Court implied (without actually holding) that the IRS could lawfully require EPIC to furnish proof of consent under Treasury regulations 26 C.F.R. §§ 601.702(c)(4)(i)(E) and 601.702(c)(5)(iii)(C) *even if* EPIC's request fell under § 6103(k)(3). JA 12–13, 18. This reading fails for at least four reasons.

First, the IRS has repeatedly conceded that proof of consent is not required when a FOIA requester seeks tax return information that the IRS is specifically authorized by statute to publish. In 1997, IRS Commissioner Margaret Milner

Richardson stated that § 6103(k)(3) "permits the IRS to disclose tax return information to correct misstatements of fact *without a waiver from the taxpayer*." *Richardson Remarks* 9, ADD 38 (emphasis added). This interpretation is consistent with the Internal Revenue Manual, which sets out extensive procedures for processing § 6103(k)(3) disclosure requests but which make no reference whatsoever to obtaining taxpayer consent for such disclosures. *See, e.g.*, IRM 11.3.11.3–11.3.11.3.3, ADD 9–14.

Indeed, the IRS recently confirmed that it does not require proof of consent in order to process a FOIA request for tax return information subject to public disclosure under 26 U.S.C. § 6103(k)(1), an adjacent provision which states that "[r]eturn information shall be disclosed to members of the general public to the extent necessary to permit inspection of any accepted offer-in-compromise . . . ." This admission arose from a related FOIA request EPIC submitted to the agency concerning President Trump. On February 5, 2018, EPIC filed a request with the IRS seeking "[a]ll accepted offers-in-compromise relating to" President Trump and his businesses, plus all "return information . . . necessary to permit inspection of [the] accepted offer[s]-in-compromise." Letter from John Davisson, EPIC Counsel, to IRS Disclosure Office (Feb. 5, 2018), ADD 49–50. Though EPIC's request for third-party tax return information was not accompanied by proof of taxpayer consent, the IRS conceded on February 8, 2018, that it must nevertheless process

EPIC's request. Letter from David Nimmo, IRS Disclosure Manager, to John Davisson, EPIC Counsel (Feb. 8, 2018), ADD 57 ("We are granting your request for expedited processing. We will search for documents responsive to the request."). Thus the IRS does not interpret its regulations to require proof of consent where, as here, a statute authorizes release of requested return information to the general public.

Second, the plain terms of 26 C.F.R. §§ 601.702(c)(4)(i)(E) and 601.702(c)(5)(iii)(C) do not require proof of consent for § 6103(k)(3) FOIA requests. Section 601.702(c)(4)(i)(E) states that an "initial request for records must"

> In the case of a request for records the disclosure of which is limited by statute or regulations (as, for example, the Privacy Act of 1974 (5 U.S.C. 552a) or section 6103 and the regulations thereunder), establish the identity and the right of the person making the request to the disclosure of the records in accordance with paragraph (c)(5)(iii) of this section.

Section 601.702(c)(5)(iii)(C), in turn, states:

> In the case of an attorney-in-fact, or other person requesting records on behalf of or pertaining to other persons, the requester shall furnish a properly executed power of attorney, Privacy Act consent, or tax information authorization, as appropriate.

EPIC does not dispute that the disclosure of return information is ordinarily limited by 26 U.S.C. § 6103(a). But it is certainly not "appropriate" to demand a waiver from the taxpayer where, as here, § 6103(k)(3) subjects the requested records to disclosure "without a waiver from the taxpayer." *Richardson Remarks* 9, ADD 38.

As this Court has explained, a requirement that a party "shall" do something "as appropriate" means "only to the extent appropriate." *Consumer Fed'n of Am. & Pub. Citizen v. HHS*, 83 F.3d 1497, 1503 (D.C. Cir. 1996) (emphasis added). To conclude otherwise "would violate a basic canon of . . . construction by treating the two words ['as appropriate'] as surplusage." *Id.*; *see also Gardebring v. Jenkins*, 485 U.S. 415, 426–27 (1988) (holding that regulation which required information to be delivered in "written form, and orally as appropriate" meant only "that such information *may* be transmitted orally" (emphasis added)). And it is plainly *inappropriate* to require "a properly executed power of attorney, Privacy Act consent, or tax information authorization" with respect to a statute that authorizes nonconsensual disclosure of information to the public at large. 26 C.F.R. § 601.702(c)(5)(iii)(C); *see* 26 U.S.C. § 6103(k)(3).

Third, even if IRS FOIA regulations did require a requester to provide taxpayer authorization for a § 6101(k)(3) FOIA request, such a rule would directly conflict with the statute and thus be unlawful as applied to EPIC's request. The text, legislative history, agency interpretations, and past agency applications of § 6103(k)(3) all reveal that the statute does not require—or even anticipate—taxpayer consent to the release of records under (k)(3). *See supra* pp. 3–11. Notably, one of the contemplated uses of § 6103(k)(3) is to "protect . . . the tax system against unwarranted public attacks" by the taxpayer himself. For the IRS to

demand a taxpayer authorization with a § 6103(k)(3) FOIA request is thus an "[im]permissible construction of the statute." *Tax Analysts v. IRS*, 350 F.3d 100, 103 (D.C. Cir. 2003) (quoting *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984)).

Nor can the IRS demand proof of consent from EPIC on the basis of the agency's power to "promulgate [FOIA] regulations," as such a processing requirement is plainly unreasonable. "An agency's procedures for conducting a search for responsive records must be reasonable. An agency thus of course cannot impose requirements on requesters that take on the character of a shell game, imposing unwarranted burdens on requesters without apparent justification." *Clemente v. FBI*, 867 F.3d 111, 119 (D.C. Cir. 2017) (internal citation omitted). That is precisely what the IRS has done here: impose an unwarranted proof-of-consent burden on EPIC's § 6103(k)(3) request, even though the IRS has admitted that the provision authorizes disclosure of tax information "without a waiver from the taxpayer." *Richardson Remarks* 9, ADD 38. Just like the defendant in *Public Citizen v. Department of State*, the agency has made "no showing that warrants" a "reflexive application of [its FOIA] policy to every request regardless of circumstances"—least of all EPIC's § 6103(k)(3) request for the President's tax returns. 276 F.3d 634, 643 (D.C. Cir. 2002).

Finally, even if EPIC had failed to exhaust administrative remedies, such failure does not preclude judicial review where, as here, the "action presents no risk of undermining the purposes and policies underlying the exhaustion requirement, namely, to prevent premature interference with agency processes, to give the parties and the courts benefit of the agency's experience and expertise and to compile an adequate record for review." *Wilbur v. CIA*, 355 F.3d 675, 677 (D.C. Cir. 2004). Like the plaintiff in *Wilbur*, EPIC "did not bypass the administrative review process but pursued it to its end[.]" *Wilbur*, 355 F.3d at 677 (D.C. Cir. 2004). EPIC filed both (1) an Original FOIA Request and (2) a Renewed FOIA Request and Appeal explaining the legal basis for the release of the requested records. JA 25–28, 31–40, 52. After refusing to issue a determination on both submissions, the IRS stated to EPIC that "any future requests regarding this subject matter w[ould] not be processed." JA 42, 53. Like the agency in *Wilbur*, the IRS also represented that records were unavailable to EPIC under the applicable provision. JA 41 ("IRC § 6103(k)(3) does not afford any rights to requesters under the FOIA to the disclosure of tax returns or return information of third parties."); JA 63 ("Mr. Nimmo stated that 'we're not going to do a (k)(3) and that 'we're not exercising (k)(3)."). And like the agency in *Wilbur*, the IRS represented to EPIC that it had the "right to seek judicial review." *Wilbur*, 355 F.3d at 677 (D.C. Cir. 2004); JA 52.

This case is thus ripe for judicial review, and the District Court erred in dismissing EPIC's FOIA claims for supposed failure to exhaust administrative remedies.

C. EPIC plausibly stated its FOIA claims, each of which entitles EPIC to relief.

EPIC's request for records under § 6103(k)(3) was entitled to processing. By refusing to process EPIC's request, the IRS violated the FOIA in three respects. EPIC has plausibly alleged facts necessary to prove each violation and—*contra* the District Court—is entitled to relief in each instance. Notably, "the agency bears the ultimate burden of proof" in FOIA cases, which the IRS has failed to carry here. *DOJ v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989). "At all times, courts must bear in mind that FOIA mandates a strong presumption in favor of disclosure, and that the statutory exemptions, which are exclusive, are to be narrowly construed." *CREW v. DOJ*, 854 F.3d 675, 681 (D.C. Cir. 2017) (quoting *ACLU v. DOJ*, 655 F.3d 1, 5 (D.C. Cir. 2011)).

First, the IRS failed to comply with statutory deadlines (Count I). EPIC filed a perfected FOIA request for President Trump's tax records. *Supra* Part I.B; JA 52–53. The IRS failed to issue a determination on that request within the prescribed period. *See* § 552(a)(6)(A)(i); JA 52–54. As relief, EPIC is entitled to a determination on its request. *See* § 552(a)(6)(A)(i); JA 54, 56.

Second, the IRS failed to take reasonable steps to release all responsive information (Count II). EPIC filed a perfected FOIA request for President Trump's tax records. *Supra* Part I.B; JA 52–53. The IRS failed to take any "reasonable steps necessary to . . . release [the] nonexempt information" that EPIC requested. § 552(a)(8)(A)(ii)(II); JA 52–54. As relief, EPIC is entitled to full processing of its request, to the identification of nonexempt responsive documents, to a reasoned determination as to whether the IRS will seek § 6103(k)(3) disclosure (and to a request for JCT approval if so), and to any other "reasonable steps" necessary for release. 5 U.S.C. § 552(a)(8)(A)(ii)(II); JA 54, 56. "This circuit's case law reflects the wide latitude courts possess to fashion remedies under FOIA, including the power to issue prospective injunctive relief." *CREW v. DOJ*, 846 F.3d 1235, 1242 (D.C. Cir. 2017); *see also Church of Scientology I*, 792 F.2d at 149– 50 (holding that an agency's refusal to disclose records responsive to a FOIA request must be sustained "in de novo judicial review").

Finally, the IRS is unlawfully withholding agency records (Count III). EPIC filed a perfected FOIA request for President Trump's tax records. *See supra* Part I.B; JA 52–53. The IRS has failed to disclose nonexempt agency records responsive to that request. *See* 5 U.S.C. § 552(a)(3)(A); JA 52–54. The IRS's failure to comply with statutory deadlines and failure to take reasonable steps towards disclosure renders that withholding unlawful. *See* 5 U.S.C. §

552(a)(6)(A)(i); § 552(a)(8)(A)(ii)(II). As relief, EPIC is entitled to release of nonexempt responsive documents and any other relief necessary to cure the IRS's unlawful withholding of records. *See id.* § 552(a)(3)(A); 26 U.S.C. § 6103(k)(3); JA 55–56.

Because EPIC has plausibly alleged violations of the FOIA entitling EPIC to relief, the District Court erred in granting the IRS's motion to dismiss Counts I-III of EPIC's Complaint.

II. The agency's arbitrary, capricious, and unlawful closure of EPIC's request and the failure to take actions required under the Internal Revenue Manual violate the APA.

At the outset, EPIC argues that all of the IRS actions at issue in this case are reviewable under the FOIA. But even if the Court finds that certain actions—such as the agency's initial closure of EPIC's request and failure to take steps required in processing any § 6103(k)(3) inquiry—are not reviewable under the FOIA, those actions would necessarily be reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*. A contrary holding would enable the agency to evade judicial review under *both* the FOIA *and* the APA by "forc[ing] resort to an arid ritual of meaningless form." *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958).

EPIC has sufficiently stated claims under the APA, 5 U.S.C. §§ 706(2), 706(1), based on the IRS's improper closure of EPIC's request and the agency's failure to take steps necessary to process and ultimately refer the records at issue

for disclosure. JA 55. First, the IRS's closure of EPIC's request was arbitrary, capricious, and contrary to law. Specifically, the agency's refusal to process EPIC's request violated the statutory and regulatory requirements laid out in 26 U.S.C. § 6103 and 26 C.F.R. § 601.702(c) and was contrary to numerous provisions in the Internal Revenue Manual. Second, the IRS has unlawfully withheld discrete agency actions required under the IRM for the processing of § 6103(k)(3) disclosure requests. EPIC has been aggrieved by the IRS's violations of the APA, and EPIC has "no other adequate remedy" to address these violations, 5 U.S.C. § 704, unless the Court finds they are reviewable under the FOIA, *see CREW*, 846 F.3d 1235.

The lower court found that "the remedies that EPIC seeks here in response to the IRS's closing of its FOIA request qualify as relief under the FOIA." JA 20. As a result, the lower court found that de novo review of the agency's closure decision was available under the FOIA and that APA review of the decision was precluded. EPIC does not take issue with the lower court's conclusion that review is available under the FOIA. However, the question of whether an agency's *refusal to process* a request is reviewable under the FOIA (as opposed to under the APA) appears to be an issue of first impression. And regardless, if this Court held that an agency's determination that a request had not been "perfected" was non-reviewable under FOIA, APA review would still be available.

Under the standard outlined by the court in *CREW*, APA review is necessarily available where FOIA provides *no* remedy. *CREW*, 846 F.3d at 1244 ("Courts must, however, avoid lightly 'construe[ing] [section 704] to defeat the [APA's] central purpose of providing a broad spectrum of judicial review of agency action."). There is no scenario under which EPIC's request to a federal agency can be left in a twilight zone of judicial review, subject to neither the FOIA nor the APA. *See Maxwell v. O'Neill*, No. 00-1953, 2002 WL 31367754, *6–*7 (D.D.C. Sept. 12, 2002), *aff'd sub nom*. *Maxwell v. Snow*, 409 F.3d 354 (D.C. Cir. 2005) ("[W]e find it appropriate to review defendant's determination that plaintiff's requests were deficient.").

This Court has held on numerous occasions that the IRS's actions can be subject to review, and that injunctive relief can be awarded, under the APA. *See, e.g.*, *Cohen v. United States*, 650 F.3d 717, 723–24 (D.C. Cir. 2011) (en banc); *We The People Found., Inc. v. United States*, 485 F.3d 140, 143 (D.C. Cir. 2007); *Foodservice and Lodging Institute, Inc. v. Regan*, 809 F.2d 842 (D.C. Cir. 1987). The IRS closure of EPIC's request was a final agency action; thus, the agency's closure decision is subject to judicial review under § 704 of the APA (unless it is instead subject to review under the FOIA). As explained in Part I, *supra*, the agency's closure of EPIC's request was arbitrary, capricious, and contrary to law.

"It is a basic tenet that regulations, in order to be valid, must be consistent with the statute under which they are promulgated." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013) (internal quotation marks omitted). An agency's interpretation of a valid regulation can be entitled to deference, but not if it is "is plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997). However, if an agency's interpretation "does not disclose [its] reasoning with the requisite clarity to enable" a court to "sustain its conclusion," then the decision must be vacated as arbitrary and capricious. *AT&T Corp v. FCC*, 841 F.3d 1047, 1049 (2016).

The IRS's decision to close EPIC's request in this case fails under all three tests. The agency's stated reason for closing EPIC's request—because EPIC did not "furnish a properly executed power of attorney, Privacy Act consent, or tax information authorization"—is directly contrary to § 6103, contrary to the applicable agency regulations, and contrary to relevant provisions in the IRM. Section 6103(k)(3) authorizes the IRS Commissioner to disclose certain tax return information without taxpayer consent. 26 U.S.C. § 6103(k)(3). The IRS's implementing regulation concerning records requests states that a requester seeking disclosure of tax return information must furnish "authorization, as appropriate." 26 C.F.R. § 601.702(c)(5)(iii)(C). But the agency failed to address or even consider the term "as appropriate" in its decision to close EPIC's request. The purpose of

the regulations is to *implement* the records access requirements in the FOIA and in § 6103. The IRS cannot apply those regulations in a way that conflicts with the statute. *See Fogo De Chao (Holdings) Inc. v. DHS*, 769 F.3d 1127, 1139 (D.C. Cir. 2014) (rejecting a categorical interpretation of a "specialized knowledge" visa rule because it was "ungrounded in statutory text or purpose"). Unlike other tax disclosure provisions, § 6103(k)(3) does not require taxpayer authorization prior to disclosure, so it would not be "appropriate" to require such authorization for a (k)(3) request.

The agency's treatment of EPIC's (k)(3) request was also inconsistent with the agency's own published procedures for reviewing potential (k)(3) disclosures. The IRM lays out a detailed set of procedures that IRS personnel must follow when handling a potential (k)(3) disclosure request. *See* IRM 11.3.11.3, ADD 9–12. None of the procedures established in the IRM contemplate or envision that taxpayer authorization would be required to process a (k)(3) request.

Indeed, if a requester had taxpayer authorization, they would have no need to invoke (k)(3). And the IRM clearly indicates the agency's expectation that (k)(3) would be implicated any time IRS "field personnel become aware of any situation where a misstatement may warrant correction by the IRS through the disclosure of return information." IRM 11.3.11.3 ¶ 4, ADD 9. Yet the IRS refused in this case to follow its own procedures for processing a (k)(3) disclosure. *See* IRM 11.3.11.3,

ADD 9–12. The agency rules even provide for heightened disclosure obligations (and a diminished role for the JCT) when a misstatement under review was "made by the taxpayer." IRM 11.3.11.3.1, ADD 12–13 . In these circumstances, it would be contrary to the purpose of the provision as well as illogical to require a requester to obtain taxpayer consent. The IRS's purported reason for closing EPIC's FOIA request makes no sense, and is contradicted by the text of § 6103(k)(3) and the agency's own implementing guidelines. Such a decision must be set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a).

EPIC has not only stated a claim that the IRS unlawfully closed EPIC's request, but also a claim that the agency unlawfully withheld the discrete actions required to process a request under § 6103(k)(3). A claim under the APA for agency action unlawfully withheld can proceed "where a plaintiff asserts that an agency failed to take a *discrete agency* action that it is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). In particular, this Court has found that plaintiffs can bring an action under the APA for failure to take discrete actions to facilitate disclosure of records as required under the FOIA and related statutes. *Judicial Watch v. Kerry*, 844 F.3d 952, 954 (D.C. Cir. 2016) (quoting *Armstrong v. Bush*, 924 F.2d 282, 286 n.12 (D.C. Cir. 1991)).

The plain language of the FOIA, 5 U.S.C. § 552(a)(8)(A)(ii)(II), requires the IRS to take "reasonable steps necessary to . . . release nonexempt information." Judicial review of the IRS's processing of a § 6103(k)(3) disclosure request is appropriate because both the statute itself and the agency's implementing guidance provide "law to apply." *Armstrong*, 924 F.2d at 49 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). The statute provides the substantive criteria that the agency must apply in evaluating a potential (k)(3) disclosure, which is permitted "to the extent necessary for tax administration purposes to correct a misstatement of fact published or disclosed with respect to such taxpayer's return or any transaction of the taxpayer with the Internal Revenue Service." 26 U.S.C. § 6103(k)(3). Yet the agency failed to even review the numerous misstatements of fact that EPIC highlighted in its request, or to consider the impact that those misstatements will have on the fair administration of taxes in the United States.

The IRS itself has issued internal rules incorporating these substantive criteria and dictating how a potential (k)(3) disclosure should be processed. *See* IRM 11.3.11.3, ADD 9–12.; IRM 9.3.1.14.1, ADD 18. These provisions in the Manual clearly indicate an intent by the IRS to establish "binding regulation" rather than internal policy. *See Tax Analysts v. IRS*, 152 F. Supp. 2d 1, 8 (D.D.C. 2001), *aff'd in part*, 294 F.3d 71 (D.C. Cir. 2002) (articulating the standard for

determining the IRM should be treated as a binding regulation). Agency intent is typically "ascertained by an examination of the provision's language, its context, and any available extrinsic evidence." *Chiron Corp. and PerSeptive Biosystems, Inc. v. NTSB*, 198 F.3d 935, 944 (D.C. Cir. 1999).

Both the language and the context of the relevant IRM provisions indicate the agency's intent to be bound by the rules. For example, the IRM provides that "Whenever field personnel become aware of any situation where a misstatement may warrant correction by the IRS through the disclosure of return information, they *should* contact their servicing Disclosure Manager for assistance." IRM 11.3.11.3 ¶ 4, ADD 9 (emphasis added). The Manual provides a clear chain of command for the processing and consideration of (k)(3) disclosures, including making the "Office of Government Liaison, Disclosure and Safeguards (GLDS)" responsible for "coordinating efforts to secure Joint Committee authorization." IRM 11.3.11.3 ¶ 5, ADD 9 . The Manual provides that the request will be forwarded to the GLDS by the "Disclosure Policy & Program Operations Manager or his/her delegate . . . via memo." IRM 11.3.11.3 ¶ 6, ADD 9–10. The procedures go so far as to specify that the memo to GLDS "*should* contain" certain information described in the Manual. IRM 11.3.11.3 ¶ 7, ADD 10–12. The Manual also specifies that it is the GLDS who is ultimately responsible for preparing a letter to the Chairman of the Joint Committee on Taxation, which would be signed

by the Commissioner. IRM 11.3.11.3 ¶ 8, ADD 12. The Manual even provides additional rules that govern misstatements by the taxpayer, IRM 11.3.11.3.1, ADD 12, and misstatements by third parties, IRM 11.3.11.3.2, ADD 13.

Additional rules govern the process of disclosing tax information under (k)(3) based on misstatements made relating to a criminal tax investigation. The Manual provides that the "IRS *should* seek authorization to disclose" when "[a] misstatement of fact has the potential for instigating taxpayer noncompliance or causing a proliferation of taxpayer noncompliance" or when "a misstatement of fact discredits the integrity of the IRS." IRM 9.3.1.14.1 ¶ 2, ADD 18. The Manual also details the necessary delegations of authority that the agency has already made to enable these pre-disclosure steps to take place. IRM 1.2.49, ADD 8 ("Delegation Order 11-2 (Rev. 2) Reference Chart").

As the Complaint established, EPIC filed a request for disclosure of President Trump's tax returns under § 6103(k)(3) to correct multiple misstatements of fact in the interests of tax administration. JA 46–53. The IRS closed EPIC's request, claiming that it was "incomplete." JA 52–53. The IRS "failed to seek permission from the Joint Commission on Taxation to release the records EPIC has requested" and stated that it would take "no further action" on EPIC's request. JA 52–53, 55. At no point did the IRS take any of the steps required by the statute or by the IRM. The agency's refusal to process a facially valid (k)(3) request is a

violation of its mandatory, non-discretionary duties and is redressable under 5 U.S.C. § 706(1).

III. The congressional approval clause of section 6103(k)(3) violates the constitutional separation of powers and must be severed.

In the circumstances of this case, where the taxpayer himself has made a misstatement of fact that impugns the agency and provokes noncompliance, there is a clear expectation is that disclosure will be authorized under § 6103(k)(3) and that congressional approval will not be an impediment. IRM 11.3.11.3.1 ¶ 3, ADD 12. However, if this Court were to find that the text of § 6103(k)(3) does not permit the IRS to release tax information unless and until it obtains approval from the Joint Committee on Taxation, then the Court must find that approval requirement unconstitutional and strike it from the statute. Such a clause cannot be enforced because "[t]he structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1224 (2015) (quoting *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)). Specifically, the approval clause unconstitutionally grants executive power to the JCT by requiring the Treasury Secretary to seek committee authorization before disclosing tax returns or tax return information under § 6103(k)(3). The congressional approval clause must be severed from (k)(3) and cannot be a bar to EPIC's request for disclosure of tax records under the FOIA.

It is well established that Congress may not "disturb the constitutional balance by arrogating to itself a role" that is reserved for the Executive. *PHH Corp. v. CFPB*, ___ F.3d ___, No. 15-1177, 2018 WL 627055, at *9 (D.C. Cir. Jan 31, 2018) (en banc). Legislative power "is of an encroaching nature" and "can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." The Federalist No. 48, at 334. At bottom, the constitutional separation of powers rule is quite simple. "If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirement of Art. I, § 7." *Metro. Wash. Airports Auth.*, 501 U.S. at 276. The Constitution does not "permit Congress or a part of Congress to take some actions with effects outside the Legislative Branch by means other than the provisions of Art. I, § 7," which provide special procedures for impeachments, appointments, and treaties. *Id*. at 276 n.21. Congress simply has no authority to engage in executive functions like disclosure of records under the FOIA.

Under the separation of powers principle, the Supreme Court has struck down a congressional veto power over the Metropolitan Washington Airports Authority, *id*. at 276; a congressional veto power over Executive Branch removal decisions, *INS v. Chadha*, 462 U.S. 919, 959 (1983); a grant of authority over

budget reductions to the congressionally-controlled Comptroller General, *Bowsher v. Synar*, 478 U.S. 714, 736 (1986); and a grant of authority over the Philipines National Coal Company and National Bank to the President of the Senate and Speaker of the House of Representatives, *Springer v. Gov't of Phillippine Islands*, 277 U.S. 189, 209 (1928). The Congressional approval clause in 26 U.S.C. § 6103(k)(3) is indistinguishable from these earlier unconstitutional attempts to vest executive power in the legislative branch, and must be invalidated.

Requiring JCT approval to release taxpayer information would clearly violate the legislative aggrandizement principle and usurp an executive function. The management, disposition, and disclosure of agency records is carried out by Executive Branch officials under their authority established by the Freedom of Information Act, 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, the Internal Revenue Code, 26 U.S.C. § 6103, the Federal Records Act, 44 U.S.C. §§ 3101 *et seq*., and other related statutes. The disclosure and confidentiality provisions in the FOIA and the Internal Revenue Code are "entirely harmonious" and were "quite literally made for each other." *Church of Scientology I*, 792 F.3d at 149 (Scalia, J.). The authorities established in § 6103, working in tandem with the authorities in the FOIA, are exclusively Executive Branch authorities. Yet the statutory provision at issue reads:

> The Secretary may, *but only following approval by the Joint Committee on Taxation*, disclose such return information or any other information

> with respect to any specific taxpayer to the extent necessary for tax administration purposes to correct a misstatement of fact published or disclosed with respect to such taxpayer's return or any transaction of the taxpayer with the Internal Revenue Service.

26 U.S.C. § 6103(k)(3) (emphasis added). The interjected clause limiting the Secretary's authority to disclose records without the "approval" of a congressional committee is exactly the type of legislative usurpation of Executive Branch authority that the Constitution prohibits.

The approval clause, which reserves to Congress authority over disclosure or non-disclosure of agency records, is nearly identical to prior attempts by Congress to usurp executive functions that the Supreme Court rejected as unconstitutional. In *Bowsher v. Synar*, the Court found that Congress could not grant the Comptroller General executive power to determine which programs must face budget cuts that would ultimately bind the President. 478 U.S. at 717–18 (1986). The Comptroller General's function "plainly entail[ed] execution of the law in constitutional terms"; however, only Congress could remove him from the position. *Id*. at 727–28. Even moreso than the deficit control mechanism at issue in *Bowsher*, the decision to approve disclosure of agency records under the FOIA is the "very essence of 'execution' of the law." *Id.* at 733.

Because it is unconstitutional, the congressional approval clause must also be severed from the rest of § 6103(k)(3). The Internal Revenue Code severability clause states: "If any provision of this title, or the application thereof to any person

or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." 26 U.S.C. § 7852(a). The "inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685–86 (1987); *see also Marchetti v. United States*, 390 U.S. 62, 81–82 (1968) (Warren, J., dissenting in No. 2) (noting the "clear statutory command to this Court to wield its constitutional knife surgically"). Indeed, the Supreme Court has previously severed unconstitutional clauses that violated the separation of powers. *See, e.g.*, *Chadha*, 462 U.S. at 959.

Thus, to the extent that the congressional approval clause presents a bar to any relief that EPIC seeks, the clause violates the separation of powers and must be severed from the remainder of § 6103(k)(3).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the lower court and remand for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(e), because it contains 12,120 words, excluding parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Marc Rotenberg
MARC ROTENBERG

CERTIFICATE OF SERVICE

I, Marc Rotenberg, hereby certify that on February 21, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

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