No. 22-578

In the Supreme Court of the United States

RICHARD BEHAR, PETITIONER

v.

DEPARTMENT OF HOMELAND SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Freedom of Information Act, 5 U.S.C. 552, required the disclosure of schedules and visitor information provided to the Secret Service in confidence between November 2015 and January 2017 by a presidential candidate, and later President-elect, where those records would not shed light on the operations of the Secret Service or any other federal agency during that period.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32a-54a) is reported at 39 F.4th 81. The order of the district court granting petitioner's cross-motion for summary judgment (Pet. App. 30a-31a) is not published in the Federal Supplement. An earlier order of the district court (Pet. App. 1a-29a) is reported at 403 F. Supp. 3d 240.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2022. A petition for rehearing was denied on September 22, 2022 (Pet. App. 55a). The petition for a writ of certiorari was filed on December 20, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Freedom of Information Act (FOIA), 5 U.S.C. 552, requires a federal agency to disclose an "agency record" when a member of the public requests such disclosure, subject to enumerated exemptions. 5 U.S.C. 552(f)(2)(A) and (b)(1)-(9). This dispute arises from FOIA requests for schedules and visitor information from the presidential campaign and transition of Donald J. Trump during the period in which he received Secret Service protection before his inauguration as President of the United States on January 20, 2017.

1. Petitioner, a journalist, submitted two FOIA requests to the Secret Service, a component of the Department of Homeland Security. As relevant here, the requests sought documents identifying individuals whom the Secret Service screened in connection with its protection of Trump, as well as schedules of meetings involving him and others, both when he was a candidate for President and when he was President-elect. See C.A. App. 29-34, 69-74.

The Secret Service withheld the documents for two reasons. First, the Secret Service explained that it did not consider "the responsive documents" to be "'agency records'" under FOIA because "[t]he schedules of candidate Trump and President-elect Trump provided to the Secret Service by the campaign and/or transition team are the property of a private entity which is not subject to FOIA" and "[t]he Secret Service does not exercise the requisite control over these records to satisfy the definition of an 'agency record.'" C.A. App. 87 (citing *Judicial Watch, Inc.* v. *United States Secret Serv.*, 726 F.3d 208, 231 (D.C. Cir. 2013)).

Second, the Secret Service observed that "even if the schedules were agency records," the documents none-

theless "would be withheld in full" under several FOIA exemptions, including Exemption 7(C). C.A. App. 87. Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes" to the extent that production of such information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). That exemption applied, the Secret Service later explained, because many of the documents containing schedules and visitor information were explicitly marked as confidential, and they all had been provided to the agency in confidence with the understanding that they would not be disseminated beyond the Secret Service personnel who needed the information to perform their protective functions. See C.A. App. 112-113, 805, 816-817. The documents also would reveal nothing about how the Secret Service conducts its activities, *id.* at 112-113, and could jeopardize the flow of information from protectees to the Secret Service, making it harder for the Secret Service to protect future presidential candidates and Presidents-elect. *Id.* at 806.

2. Petitioner brought two suits seeking to compel disclosure of the withheld documents. The cases were consolidated, and the district court eventually ordered disclosure. Pet. App. 1a-29a, 30a-31a.

a. In an initial order (Pet. App. 1a-29a), the district court found that Exemption 7(C) potentially applied to the relevant responsive documents, but that it needed additional information from the Secret Service to determine whether the privacy interests implicated here were outweighed by the public interest in disclosure. The court explained that the Secret Service had made Exemption 7(C)'s threshold showing that the documents were compiled "for law enforcement purposes,"

5 U.S.C. 552(b)(7)(C), because "'[t]here can be no doubt . . . that the Secret Service acts with a law enforcement purpose when it protects federal officials [and presidential candidates] from attack, even though no investigation may be ongoing.'" Pet. App. 11a (quoting and adding brackets to *Milner* v. *Department of the Navy*, 562 U.S. 562, 583 (2011) (Alito, J., concurring)). The court therefore found it necessary "to balance the public interest in disclosure against the privacy interest Congress intended the Exemption to protect." *Id.* at 12a (citation omitted).

The district court found that Trump and the other individuals named in the withheld documents had "more than *de minimis*" privacy interests in the documents. Pet. App. 13a. But the court found that those interests "should not [be] give[n] * * * too much weight in the balance." *Id.* at 22a. In the court's view, Trump's privacy interest "is limited substantially by the fact that candidates for federal office are not merely private citizens." *Id.* at 23a. And the other individuals' privacy interests were likewise reduced, in the court's view, because "there has been no showing of potential unwelcome consequences" that they would face if their meetings with Trump were publicly disclosed. *Id.* at 24a.

Turning to the public interest in disclosure, the district court found that "disclosure of the emails and schedules would not advance the public's understanding of the [Secret Service's] performance of its statutory duties" and "would shed no light on the actions or operations of the [Secret Service] itself." Pet. App. 24a. Nevertheless, the court concluded that disclosure might be warranted because "the documents [c]ould shed light on whom Mr. Trump relied upon in selecting his initial cabinet and perhaps other presidential appointees and

determining the priorities of his administration." *Id.* at 25a. As to that possibility, the court found that it "lack[ed] information sufficient to determine whether disclosure of the identities of those with whom he met in that time period could shed light on the operations of the government once Mr. Trump became president and other matters of legitimate public interest." *Id.* at 25a-26a. The court accordingly directed the Secret Service to file additional declarations addressing, among other things, the extent to which the withheld documents might "shed light on Mr. Trump's post-inauguration priorities and conduct." *Id.* at 26a; see *id.* at 26a-28a.

b. Following the district court's initial order, the Secret Service submitted declarations explaining that because the documents in question all pre-dated Trump's inauguration, "the documents do not directly reflect the activities or operations of the Trump administration." Pet. App. 37a (citation omitted). The declarations further explained that "[b]ecause the Secret Service was not involved in the activities of the campaign or transition, it was unable to evaluate 'whether a given meeting was in furtherance of Mr. Trump's candidacy, presidency, business or personal interests.'" *Ibid.* (citation omitted). Moreover, the Secret Service was unable "to make an informed judgment as to whether disclosure of the occurrence of a particular meeting or series of meetings would shed light on 'whom Mr. Trump relied upon in making cabinet and other presidential appointments or in determining his presidential priorities.'" *Ibid.* (brackets and citation omitted). Instead, the declarations explained that "[t]o evaluate who the visitors were and what the significance of their meetings might have been 'would require the Secret Service to engage in speculation.'" *Id.* at 37a-38a (citation omitted).

Nearly a year after its original order, the district court issued a three-paragraph order granting summary judgment to petitioner "largely for the reasons identified in its prior opinion." Pet. App. 30a; see *id.* at 30a-31a. The court accordingly ordered the Secret Service to produce the responsive materials (which the court itself had reviewed in the interim) to petitioner. *Id.* at 30a.

3. The court of appeals granted a stay pending appeal, see C.A. Doc. 77 (Mar. 10, 2021), and ultimately reversed on two independent grounds, Pet. App. 32a-55a.

The court of appeals first determined that the requested records were not "agency records" within the meaning of FOIA. Pet. App. 41a-47a. The court recognized that this "'Court has instructed' that 'the term "agency records" extends only to those documents that an agency both (1) "creates or obtains," and (2) "controls at the time the FOIA request was made."'" *Id.* at 42a-43a (brackets omitted) (quoting *Judicial Watch*, 726 F.3d at 216 (quoting *United States Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 144-145 (1989))). The schedules and visitor information at issue were created by the campaign and transition teams, which were private entities rather than agencies of the federal government subject to FOIA. *Id.* at 43a (citing 5 U.S.C. 551(1)). Accordingly, the dispositive question was whether the Secret Service exercised sufficient "control" over the documents when it obtained them as part of its efforts to protect candidate Trump or President-elect Trump. *Id.* at 44a.

To answer that question, the court of appeals relied on prior Second Circuit and D.C. Circuit decisions that evaluated whether documents reflecting visitor infor-

mation for the White House Complex were "agency records" subject to FOIA. See Pet. App. 41a-45a, 42a n.7 (citing *Doyle* v. *United States Dep't of Homeland Sec.*, 959 F.3d 72 (2d Cir. 2020), and *Judicial Watch*, 726 F.3d 208). Those decisions recognized that the Office of the President is not itself subject to FOIA, meaning that the public cannot obtain documents directly from that Office. See *Judicial Watch*, 726 F.3d at 216 (citing *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980)). They further recognized that "'difficult constitutional question[s]' * * * would arise if the FOIA were interpreted to require the disclosure via the Secret Service of presidential records," given the Executive's constitutional prerogative to safeguard the confidentiality of its communications. Pet. App. 45a n. 9 (quoting *Doyle*, 959 F.3d at 77); see *Judicial Watch*, 726 F.3d at 224. In cases implicating those concerns, the *Doyle* and *Judicial Watch* courts had explained, the inquiry is whether "'the non-covered entity . . . has manifested a clear intent to control the documents,' such that 'the agency is not free to use and dispose of the documents as it sees fit.'" Pet. App. 44a (quoting *Doyle*, 959 F.3d at 77-78); see *Judicial Watch*, 726 F.3d at 223.

The court of appeals determined that the same test should apply here, observing that "similarly difficult constitutional questions regarding executive privilege or other confidentiality interests would arise if the FOIA required the disclosure of records belonging to a presidential transition, which deliberates and conducts business in anticipation of assuming the presidency on inauguration day." Pet. App. 45a-46a n.9. The court then held that the "campaign and transition manifested a clear intent to control the documents"—such that the

Secret Service did not take control of them—because "'[a]ll' of the records . . . were provided to the Secret Service with the expectation of privacy and the expectation that they would not be disseminated beyond the Secret Service personnel who had the need of the information . . . to perform their protective functions.'" *Id.* at 45a (quoting C.A. App. 805).

The court of appeals determined that withholding was also appropriate here for a second, independent reason. Pet. App. 47a-54a. "Even if the records in this case were properly considered 'agency records,'" the court held, "Exemption 7(C) would shield the records from disclosure" because they implicate an important privacy interest that outweighs any public interest in disclosure. *Id.* at 47a. The court explained that the scheduling documents and visitor information implicated important privacy interests both for Trump and for members of his campaign and transition teams, as well as for the individuals visiting him. *Id.* at 48a-49a. And it rejected the district court's suggestion that those privacy interests were diminished because Trump was a candidate for public office. *Id.* at 49a. In fact, the court of appeals explained, the privacy interest here was "heightened"—not tempered—"to the extent any particular record * * * reveal[ed] information that directly or significantly illuminated President Trump's post-inaugural priorities or conduct . . . given the well-established confidentiality of presidential meetings and advisors." *Id.* at 50a (citations omitted).

The court of appeals further determined that those significant privacy interests outweighed any public interest in disclosure. Pet. App. 51a-54a. The court emphasized that the "core purpose of the FOIA . . . is contributing significantly to public understanding of the

operations or activities of the government" by shedding "light on an agency's performance of its statutory duties." *Id.* at 52a (quoting *United States Dep't of Def.* v. *Federal Labor Relations Auth.*, 510 U.S. 487, 495 (1994)); see *United States Dep't of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773, 775 (1989). Disclosure of the visitor information and scheduling documents, however, would "not reveal anything about the manner in which the Secret Service conducts its activities." *Id.* at 51a (quoting C.A. App. 805).

The court of appeals also rejected the district court's conclusion that disclosure of information about Trump and his campaign by the Secret Service was warranted to further the public interest in "reveal[ing] information about the inner workings of the campaign and nascent administration." Pet. App. 52a. The court of appeals observed that "[n]either a campaign nor a transition is an agency the records of which the FOIA aims to disclose," and thus "[t]he FOIA does not establish a public interest in revealing information about such entities." *Id.* at 53a. Instead, the court explained that Congress's adoption of Exemption 7(C) reflects "a public interest in encouraging those officials who receive Secret Service protection to share information necessary for the Secret Service to perform its protective function." *Ibid.*

ARGUMENT

The court of appeals held that the Secret Service is not required to disclose the confidential visitor information and scheduling documents at issue in this case because they are not "agency records" and would be exempt from disclosure under Exemption 7(C) even if they were. Those conclusions were correct and do not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. FOIA empowers a district court "to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U.S.C. 552(a)(4)(B). The statute does not define "agency records," but this Court construed that term in *United States Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136 (1989). There, a non-profit magazine publisher sought disclosure of publicly available district court tax opinions that the Department of Justice's Tax Division had aggregated. See *id.* at 138-140. Although the district court decisions were not created by the Department, the Court concluded that they were agency records because (1) the Department had obtained the documents from the district courts; and (2) the Department was "in control" of the district court decisions at the time the request was made. *Id.* at 145; see *id.* at 144-147. "By control," the Court explained, "we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.* at 145.

Since this Court's decision in *Tax Analysts*, courts of appeals have considered how the "control" prong of that test applies when documents are obtained from a governmental entity not covered by FOIA and that entity, instead of making the documents publicly available like the district courts had done in *Tax Analysts*, indicates that it intends to keep them confidential.

In *United We Stand America, Inc.* v. *Internal Revenue Service*, 359 F.3d 595 (D.C. Cir. 2004), for example, the court evaluated whether to require disclosure of documents that the IRS had created in response to a request for information from a congressional committee. Congress is not subject to FOIA, 5 U.S.C. 551(1)(A), and the committee had made clear that the

request for information was confidential and could not be disclosed without prior approval. *United We Stand*, 359 F.3d at 597-598. In those circumstances, the D.C. Circuit reasoned, application of the control test was "not so simple" because "the connection between Congress and the requested records implicate[d] considerations not at issue in *Tax Analysts*." *Id.* at 599. The court had long recognized that requiring disclosure of such records "would force Congress 'either to surrender its constitutional prerogative of maintaining secrecy, or to suffer an impairment of its oversight role.'" *Ibid.* (quoting *Goland* v. *CIA*, 607 F.2d 339, 346 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980)); see *id.* at 599-600 (citing line of cases applying *Goland*). Given those special considerations, the court held that if "Congress has manifested its own intent to retain control, then the agency—by definition—cannot lawfully 'control' the documents." *Id.* at 600 (citation omitted). And because the court found that there were "sufficient indicia of congressional intent to control" the portions of the IRS documents that would reveal the committee's confidential requests, the court concluded that those portions of the documents were not agency records. *Ibid.*; see *Goland*, 607 F.2d at 347-348 (concluding that a CIA copy of a congressional hearing transcript marked "Secret" was not an agency record because "Congress' intent to retain control of the document [wa]s clear," and the CIA was "not free to dispose of the Transcript as it will[ed], but h[eld] the document, as it were, as a 'trustee' for Congress").

Later, in *Judicial Watch, Inc.* v. *United States Secret Service*, 726 F.3d 208 (D.C. Cir. 2013), the court applied the same principles to conclude that visitor logs and other records obtained by the Secret Service from

the Office of the President were not "agency records" subject to FOIA. The court recognized that Congress exempted the Office of the President from FOIA "to avoid serious separation-of-powers concerns that would be raised by a statute mandating disclosure of the President's daily activities." *Id.* at 216; see *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980). In assessing whether the public could circumvent that exemption by asking for records from the Secret Service, the court observed that the traditional *Tax Analysts* test did "not fully capture" the relevant "'control' issue." *Judicial Watch*, 726 F.3d at 218. Rather, a "somewhat different control test applie[d]," *id.* at 221, because of the "'special policy considerations' at stake"—namely, "the Executive['s] * * * 'constitutional prerogative' to 'maintain[] the autonomy of its office and safeguard[] the confidentiality of its communications," *id.* at 221, 224 (quoting *Paisley* v. *CIA*, 712 F.2d 686, 693 n.30 (D.C. Cir. 1983) and *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 385 (2004)). The court explained that the question in those circumstances was not solely whether the agency obtained the documents in the legitimate conduct of its official duties, but whether the "non-[FOIA]-covered entity * * * 'manifested a clear intent to control' the documents." *Id.* at 223 (citation omitted); see *id.* at 222-223. Applying that test, the court concluded that the visitor logs in the Secret Service's possession were not "agency records" because they were created with information from the Office of the President, which provided the information "'under an express reservation of White House control.'" *Id.* at 223 (citation omitted).

The Second Circuit addressed a similar question in *Doyle* v. *United States Department of Homeland Secu-*

rity, 959 F.3d 72 (2020), and agreed that documents reflecting visitor information from the White House Complex and the President's private home were not "agency records" subject to FOIA. The requester in *Doyle*, like the requester in *Judicial Watch*, argued that the documents were agency records under *Tax Analysts* because "neither party dispute[d] that the Secret Service obtained the visitor logs in furtherance of its duty to protect the President." *Id.* at 76. The court rejected that argument, agreeing with the D.C. Circuit that *Tax Analysts* did "not resolve th[e] appeal." *Ibid.* It explained that *Tax Analysts* "concerned a non-profit magazine company seeking disclosure of publicly available district court tax opinions that had been aggregated by the Department of Justice's Tax Division." *Ibid.* (citing *Tax Analysts*, 492 U.S. at 138-140). *Doyle*, "by contrast, concern[ed] the disclosure of virtually every visitor that the President received over a seven-week period at home and at work." *Ibid.* That distinction was important, the court reasoned, because "[c]ompelled disclosure" of the types of records Doyle sought "would affect a President's ability to receive unfettered, candid counsel from outside advisors and leaders, both domestic and foreign, who were aware that their visits to the White House would be subject to public disclosure." *Id.* at 77. Reading the statute to avoid the difficult constitutional questions that compelling disclosure would raise in that context, the court concluded that the documents were not "agency records" subject to FOIA. See *id.* at 78.

b. Building on that line of precedent, the court of appeals here determined that visitor information and scheduling documents from the Trump campaign and transition team did not qualify as "agency records" sub-

ject to compelled disclosure under FOIA. See Pet. App. 41a-47a. The court explained that the principles applied by the Second Circuit and D.C. Circuit in *United We Stand*, *Judicial Watch*, and *Doyle* likewise apply in the context of presidential transition records. Specifically, the court observed that "similarly difficult constitutional questions regarding executive privilege or other confidentiality interests would arise if the FOIA required the disclosure of records belonging to a presidential transition, which deliberates and conducts business in anticipation of assuming the presidency on inauguration day." *Id.* at 45a-46a n.9. Moreover, a presidential campaign or transition—like the Office of the President or Congress—is not an "agency" within the meaning of FOIA. *Id.* at 43a. And contrary to petitioner's suggestion (Pet. 19-20), the court concluded that the transition and campaign teams had "'manifested a clear intent to control the documents,'" such that the Secret Service was not "'free to use and dispose of the documents as it s[aw] fit.'" Pet. App. 44a (quoting *Doyle*, 959 F.3d at 77-78 (quoting *Judicial Watch*, 726 F.3d at 223)). Indeed, the Deputy Director of the Secret Service attested that "'[a]ll' of the records 'at issue in this case . . . were provided to the Secret Service with the expectation of privacy and the expectation that they would not be disseminated beyond the Secret Service personnel who had the need of the information . . . to perform their protective functions.'" *Id.* at 45a (quoting C.A. App. 805).

c. Petitioner's efforts to characterize the court of appeals' narrow holding on the "agency records" question as a dramatic departure from FOIA precedent are unsuccessful.

Petitioner first contends (Pet. 15-17) that the court of appeals' decision is inconsistent with *Tax Analysts*. In his view, *Tax Analysts* establishes that an agency has "control" over a document—such that the document becomes an "agency record"—whenever the document comes "into the agency's possession in the legitimate conduct of its official duties." Pet. 16 (quoting *Tax Analysts*, 492 U.S. at 145). Petitioner does not dispute, however, that this case is different from *Tax Analysts* in that it involves presidential transition and campaign records that the candidate and then President-elect intended to remain confidential, not publicly available judicial decisions. Disclosure of those kinds of records would implicate "special considerations" regarding the ability of the future President to obtain unfettered advice and counsel in preparation for assuming office. *Judicial Watch*, 726 F.3d at 221. And when such "special considerations are at stake," courts have long recognized that *Tax Analysts* does not resolve the "control" question. *Ibid.*; see *Doyle*, 959 F.3d at 76; *United We Stand*, 359 F.3d at 602-603. It is not enough in those circumstances for the agency to possess the document and use the document to carry out its official duties. See *Doyle*, 959 F.3d at 76 (rejecting argument that documents reflecting visitor information were agency records because the Secret Service obtained them "in furtherance of its duty to protect the President"). Instead, the focus, as the court of appeals recognized, is on whether the non-FOIA-covered entity manifestly intended to retain control over the documents. See Pet. App. 44a (quoting *Doyle*, 959 F.3d at 77-78); see *Judicial Watch*, 726 F.3d at 223.

Petitioner is also incorrect to suggest (Pet. 18-20) that the decision below conflicts with the D.C. Circuit's

decision in *Judicial Watch* and with precedent from other circuits. As explained, the court of appeals' decision is fully consistent with *Judicial Watch*, which held that visitor logs from the Office of the President, though possessed by the Secret Service, were not "agency records" under FOIA. See pp. 11-14, *supra*. Petitioner skips over that central holding, focusing instead (Pet. 19) on the D.C. Circuit's conclusion that its analysis "d[id] not apply" to a limited subcategory of logs that originated from offices, like the Office of Management and Budget, that are located on the grounds of the White House Complex but are "not part of the President's immediate staff," *Judicial Watch*, 726 F.3d at 232. The D.C. Circuit concluded that such records were subject to disclosure because those offices, unlike the Office of the President, are themselves "agencies" under FOIA, meaning the requester could have obtained the records directly from those offices. *Ibid.* That reasoning does not apply here because it is undisputed that the presidential campaign and transition teams were not agencies subject to FOIA. See Pet. App. 53a.

Nor does any conflict exist between the court of appeals' decision here and the *Judicial Watch* court's recognition that it was not "bound by the * * * legal assertions" in a memorandum of understanding between the White House and the Secret Service. *Judicial Watch*, 726 F.3d at 215; see Pet. 18-19. The *Judicial Watch* court was not bound by the memorandum's legal conclusions that the visitor logs were "Presidential Records," were "not the records of an 'agency' subject to FOIA," and were "under the exclusive legal custody and control of the White House." *Judicial Watch*, 726 F.3d at 215 (brackets and citation omitted). But the court still viewed the memorandum as important evi-

dence of how the parties "historically regarded and treated the documents," *id.* at 231, and in particular, of the White House's "manifested * * * intent to control" the visitor records, *id.* at 223. The court of appeals here appropriately found that the annotations on the scheduling documents and the Secret Service's historical treatment of those documents as confidential were relevant for the same reasons. See Pet. App. 45a.

The remaining court of appeals decisions on which petitioner relies (Pet. 18) also do not conflict with the decision below. Like *Tax Analysts*, those decisions did not implicate any of the special considerations at stake here. See *Rojas* v. *Federal Aviation Admin.*, 941 F.3d 392, 408-410 (9th Cir. 2019) (remanding to district court to consider whether emails sent to or received by an FAA employee were possessed by the agency in the conduct of its official duties or public business); *Burka* v. *United Sstates Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (concluding that the Department of Health and Human Services had sufficient control over data generated by private firms where the agency extensively supervised and controlled the collection and analysis of the data and planned to disclose it after its publication schedule was complete); *Missouri ex rel. Garstang* v. *U.S. Dep't of Interior*, 297 F.3d 745, 750 & n.3 (8th Cir. 2002) (holding that a publicly available recommendation from a non-profit corporation was an "agency record" under FOIA because it was used as part of the U.S. Fish and Wildlife Service's proposed policy).

For similar reasons, no conflict exists between the court of appeals' narrow holding and the general exemptions under FOIA that protect from disclosure records containing privileged or confidential commercial

and financial information, 5 U.S.C. 552(b)(4), or law enforcement information supplied by a source on a confidential basis, 5 U.S.C. 552(b)(7)(D). See Pet. 20-23. Those exemptions, and the additional exemptions that some amici cite (Citizens for Responsibility & Ethics in Washington Amicus Br. 11-12 (Citizens Amicus Br.)), do important work in the mine run of cases, which do not raise the special policy considerations related to presidential privilege and confidentiality at issue here. Moreover, because the court of appeals' decision turned on the presence of those special (and unusual) considerations, it will not impose unworkable burdens on courts and litigants, Reporters Comm. for Freedom of the Press Amicus Br. 11 (Reporters Comm. Amicus Br.); will not permit agencies to "effectively opt out of FOIA's disclosure mandate by promising confidential treatment when receiving a document," Pet. 33; and will not allow "any private entity" to "shield its communications with a government agency * * * by labeling them 'confidential,'" *ibid.*; see Citizens Amici Br. 12-13; Reporters Comm. Amicus Br. 12-15.

d. Having failed to establish a conflict with existing precedent or FOIA itself, petitioner urges this Court (Pet. 23) to grant review because the court of appeals purportedly violated the "party presentation principle" in deciding the agency records issue. See Pet. 23-27.

Under the party-presentation principle, "a court is not hidebound by the precise arguments of counsel," but it still cannot unilaterally impose a "radical transformation of * * * the case shaped by the parties." *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1581-1582 (2020). Here, the Secret Service explained from the outset of the administrative proceedings that it did not believe "the responsive documents" were "'agency

records,'" C.A. App. 87 (citing *Judicial Watch*, 726 F.3d at 231), and it consistently invoked the special confidentiality interests on which the court of appeals relied in concluding that the withheld documents were not agency records, see, *e.g.*, Gov't C.A. Br. 30-35. Although government counsel did not make the specific "agency records" argument that was ultimately adopted by the court of appeals, the court could reasonably conclude that a decision resting on that ground "b[ore] a fair resemblance to the case shaped by the parties." *Sineneng-Smith*, 140 S. Ct. at 1582.

Even if petitioner were correct that the court of appeals' resolution of the "agency records" issue violated the party-presentation principle, moreover, that sort of case-specific error would provide no sound basis for this Court's review. See Sup. Ct. R. 10. The decision in *Sineneng-Smith* does not suggest otherwise. There, the Court did not grant a writ of certiorari to correct the Ninth Circuit's error in addressing an issue that the parties did not raise. See 140 S. Ct. at 1578. Rather, the Court granted review because the Ninth Circuit had held that a federal criminal statute was facially unconstitutional—a decision that, if left unreviewed, would have had substantial effects beyond that immediate case. See *ibid.* For the reasons discussed above, see pp. 17-18, *supra*, the court of appeals' narrow resolution of the "agency records" issue here will have no such broad effects. Any violation of the party-presentation rule here accordingly would not warrant further review by this Court.

2. In any event, this case would be an unsuitable vehicle in which to address the "agency records" and party-presentation questions for the independent reason that those questions have no practical significance

to the correct disposition of the case. The court of appeals specifically held in the alternative that even if it had determined the documents at issue were "agency records," the court "still would reverse the judgment of the district court because Exemption 7(C) would shield the records from disclosure." Pet. App. 47a. That independent holding—which tracked the government's lead argument on appeal—reflected a straightforward and correct application of longstanding FOIA precedent.

a. Although FOIA generally calls for "'broad disclosure of Government records,'" Congress "'realized that legitimate governmental and private interests could be harmed by release of certain types of information.'" *United States Dep't of Justice* v. *Julian*, 486 U.S. 1, 8 (1988) (citations omitted). Because "public disclosure is not always in the public interest," Congress "provided that agency records may be withheld" if they fall within one of the statute's nine exemptions. *CIA* v. *Sims*, 471 U.S. 159, 167 (1985). Those exemptions serve "important interests" and "are as much a part of FOIA's purposes and policies as the statute's disclosure requirement." *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (brackets and citations omitted).

One such exemption—Exemption 7(C)—provides that "records or information compiled for law enforcement purposes" are exempt from disclosure "to the extent that the production of such * * * records or information * * * could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). Petitioner does not dispute that the visitor information and scheduling documents at issue in this case were gathered by the Secret Service for law enforcement purposes. See Pet. App. 47a. Thus, the only

question is whether disclosure of the records might reasonably be expected to invade personal privacy in an unwarranted manner.

The court of appeals correctly determined that the answer to that question is yes. Pet. App. 47a-54a. First, the court recognized that disclosure of the records would implicate important privacy interests for candidate Trump, President-elect Trump, and the individuals with whom he was meeting in those capacities. *Id.* at 48a-51a. This Court has explained that where, as here, the subjects of records are "private citizen[s]," "the privacy interest * * * is * * * at its apex." *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989). That privacy interest encompasses information that individuals would not otherwise wish to be made public, such as their addresses, daily schedules, and associations. See *id.* at 763 (explaining that privacy interests under FOIA "encompass the individual's control of information concerning his or her person"). And here the campaign and transition teams had provided the records to the Secret Service with a clear understanding and expectation of privacy. Pet. App. 49a; see *United States Dep't of State* v. *Ray*, 502 U.S. 164, 177 (1991) (holding that appellate court gave "insufficient weight to the fact that" witness interviews taken as part of an investigation "had been conducted pursuant to an assurance of confidentiality").

Trump's status as a candidate for public office and later President-elect did not substantially detract from that privacy interest. See *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 171 (2004) (former Deputy White House Counsel's status as both a public figure and a high-level government official did not "detract[]" from his surviving family members' "weighty

privacy interests"); see also *The Nation Mag.* v. *United States Customs Serv.*, 71 F.3d 885, 894 & n.9 (D.C. Cir. 1995) (stating that "[a]lthough candidacy for federal office may diminish an individual's right to privacy * * * it does not eliminate it"). If anything, Trump's privacy interest was heightened when he began preparing to assume office, given the well-established interests in maintaining confidentiality of the Executive's meetings and advisors. Pet. App. 50a; see *Cheney*, 542 U.S. at 385 ("[S]pecial considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.").

Petitioner identifies no public interest in disclosure of the disputed records that could outweigh the significant privacy interests identified by the court of appeals. Pet. App. 51a-54a. "[T]he only relevant 'public interest in disclosure'" under FOIA "is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding *of the operations or activities of the government*.'" *United States Dep't of Def.* v. *Federal Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (quoting *Reporters Comm.*, 489 U.S. at 775) (brackets in original). The schedules and visitor information requested here, however, would not allow petitioner "to discover anything about the conduct of the [Secret Service]"—the government agency in "possession of the requested records." *Reporters Comm.*, 489 U.S. at 773; see C.A. App. 805. Instead, they would reveal only information about the campaign, the transition team, and the private individuals with whom candidate or President-elect Trump met. Disclosure of that kind of "information about private citizens that is accumulated in various governmen-

tal files but that reveals little or nothing about an agency's own conduct" does not "foster[]" FOIA's "statutory purpose." *Reporters Comm.*, 489 U.S. at 773.

Petitioner contends (Pet. 28-31) that the court of appeals improperly overlooked the fact that disclosure of the records could serve the public interest by revealing information about the future policies and priorities of President Trump's administration. But when, as here, there is a cognizable privacy interest, the burden is on the requester to "show the information [requested] is *likely* to advance" the public interest identified. *Favish*, 541 U.S. at 172 (emphasis added). "Mere speculation" about the potential connections between Trump's pre-inauguration schedules and post-inauguration nominations and priorities "cannot outweigh a demonstrably significant invasion of privacy." *Ray*, 502 U.S. at 179. And here, the withheld materials generally did not reveal the affiliation of visitors or describe the purpose of meetings, meaning that it would be necessary "to engage in speculation" to draw connections between those materials and any post-inauguration activities. Pet. App. 38a (citation omitted). The court of appeals was accordingly correct to hold that "the district court's 'public interest' analysis should have ended when it concluded that disclosure of the records in this case 'would not advance the public's understanding of the [Secret Service]'s performance of its statutory duties.'" *Id.* at 53a (citation omitted).

b. Petitioner contends that the court of appeals "expand[ed] Exemption 7(C) beyond what its plain terms permit" by "relying on an interest in withholding [that has] nothing to do with protecting personal privacy"—namely, "encouraging those who receive Secret Service protection to share information useful for the Agency."

Pet. 31 (citing Pet. App. 53a). That contention is wrong in two respects.

First, and as just discussed, the court of appeals resolved the public-interest balancing here by recognizing that the public had no non-speculative interest in disclosure of the records at issue. Pet. App. 53a. It explained that "the district court's 'public interest' analysis should have ended" once it became clear that petitioner had failed to identify any public interest weighing in favor of making the records public. *Ibid.* The court of appeals' subsequent statement about the way in which withholding under Exemption 7(C) itself serves the public purpose of encouraging cooperation with law enforcement, *ibid.*, was thus superfluous: With no public interest weighing in favor of disclosure, the "right of privacy" held by Trump and each of the other individuals identified in the records at issue is sufficient by itself to support withholding those records. *FCC* v. *AT&T Inc.*, 562 U.S. 397, 408 (2011) (citation omitted).

Second, and in any event, petitioner is incorrect in asserting (Pet. 31) that the interest in promoting cooperation with the Secret Service (or other law enforcement agencies) has "nothing to do with protecting personal privacy" under Exemption 7(C). Indeed, the importance of such cooperation helps explain why Congress was especially solicitous of privacy interests in the context of law enforcement operations. Whereas ordinary "personnel and medical files" can be withheld under Exemption 6 only where disclosure "would constitute a *clearly* unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6) (emphasis added), withholding of "records or information compiled for law enforcement purposes" is permitted upon the lesser showing that disclosure "could reasonably be expected to consti-

tute an unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(7)(C). See Pet. App. 9a & n.35. The court of appeals' statement that "Exemption 7(C) recognizes a public interest in encouraging those officials who receive Secret Service protection to share information necessary for the Secret Service to perform its protective function," *id.* at 53a, thus accurately reflects the statutory text and structure.

The D.C. Circuit's decision in *Washington Post Co.* v. *United States Department of Health & Human Services*, 690 F.2d 252 (1982), is not to the contrary. There, the court stated that the fact that "disclosure might impair the government's ability to acquire similar information in the future * * * carries no weight under [FOIA] Exemption 6, which focuses on individual privacy interests." *Id.* at 259. But the court had no occasion to address the different text, context, and purpose of Exemption 7(C), the law enforcement-focused provision at issue here. And even with respect to Exemption 6, the D.C. Circuit's statement about protecting the government's ability to acquire similar information in the future came only in passing, when it explained the potential differences between FOIA exemptions and discovery standards. See *id.* at 258-259. Even within that circuit, therefore, it may remain appropriate for courts to take account of effects on important agency operations while performing the required public-interest balancing. See *Brannum* v. *Dominguez*, 377 F. Supp. 2d 75, 84 (D.D.C. 2005) (considering, as part of Exemption 6 analysis, potential adverse effect of public disclosure on participation in military personnel board process).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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