No. 22-578

In the
Supreme Court of the United States

RICHARD BEHAR,
Petitioner,
v.
UNITED STATES
DEPARTMENT OF HOMELAND SECURITY,
Respondent.

On Petition for Writ of Certiorari to the
Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The government cannot defend the Second Circuit's actual holdings, so it simply misstates them. On the government's telling, the "agency records" holding is limited to cases involving sensitive presidential-type communications, but the decision expressly rejects that very limitation. Worse, the government never advanced this position at any point in the litigation and, to the contrary, expressly disavowed it.

On the privacy exemption, the government suggests the outcome was correct because the records at issue would only shed light on the actions of private actors, but after reviewing the records the district court found to the contrary. The district court concluded that they would shed light on subsequent actions of the Executive Branch, and the Second Circuit did not reject that finding. It instead found this conclusion irrelevant, once again leaving no doubt about the unprecedented rewriting of FOIA its holdings impose.

The Second Circuit's decision commands review by this Court because both of its alternative holdings impose dramatic new limits on government transparency that have no basis in FOIA's text, purpose, or past judicial application. If permitted to stand, the Second Circuit's rejection of fundamental, longstanding precepts of this important federal law will dramatically limit government transparency and impede government accountability.

ARGUMENT

I. The FOIA Limitations Imposed Here Contradict the Statute's Text, This Court's Precedents, and Holdings of Other Courts of Appeals

A. The Second Circuit's Contraction of the "Agency Records" Subject to FOIA Is Too Radical to Ignore

1. The Second Circuit held that the disputed documents are not "agency records" under FOIA solely because they were provided to the agency by a private entity that requested confidentiality. Pet.17; Pet.App.45a. Under its far-reaching holding, no documents that a private party provides to an agency with an expectation of confidentiality are subject to disclosure under FOIA. None. Confidentiality alone removes them from FOIA's disclosure mandate. Pet.33; *see also* Reporters Comm. for Freedom of the Press Amicus Br. (RCFP Amicus Br.) 12-15; Citizens for Responsibility & Ethics in Wash. Amicus Br. (Citizens Amicus Br.) 12-13.

Unable to defend this extraordinary holding, the government depicts the decision as resting "[s]pecifically" on a need to avoid "constitutional questions regarding executive privilege." Opp.14 (citing Pet.App.45a-46a n.9). It does not. The Second Circuit *expressly* rejected this limitation to the reach of its ruling.

The government's misportrayal rests on an out-of-context snippet from a footnote, but that footnote makes the opposite point. *Id.* It explains that the

court's decision "does *not* depend on constitutional avoidance," notwithstanding the potential for such considerations in this case. Pet.App.45a-46a n.9 (emphasis added). As made equally clear by the text to which that footnote relates, the Second Circuit's holding rests only on the fact that the documents provided to the agency by a private entity were marked "confidential." Pet.App.45a. This *alone* was deemed sufficient to preclude the agency "control" needed to make them "agency records" under FOIA. *Id.*; Pet.17. The government does not attempt to defend this breathtaking new limitation on the scope of FOIA because it cannot. The holding directly conflicts with the language and structure of FOIA itself, and with decades of precedent. Pet.15-23.

a. Far from the narrow holding portrayed by the government, the Second Circuit's decision conflicts irreconcilably with FOIA. Its holding that documents provided confidentially are never subject to FOIA renders superfluous multiple statutory exemptions, including Exemption 4 (exempting from disclosure certain confidential commercial information) and Exemption 7(D) (exempting from disclosure certain confidential law enforcement information). Pet.21-23. The government elides this untenable interpretation by again mischaracterizing the decision below as applying only to cases that "raise the special policy considerations related to presidential privilege." Opp.18.

b. The Second Circuit's holding conflicts with *DOJ v. Tax Analysts*, 492 U.S. 136 (1989)—a controlling decision it does not even cite directly—and with

holdings of other courts of appeals. Pet.15-20. As the government acknowledges, *Tax Analysts* holds that documents are within an agency's "control," and thus are "agency records" subject to FOIA, whenever they "have come into the agency's possession in the legitimate conduct of its official duties." Opp.10 (quoting *Tax Analysts*, 492 U.S. at 145). It is undisputed that the Secret Service obtained the documents here while carrying out its official duties and possessed them when Petitioner submitted his FOIA requests. *See* Pet.16-17. Under *Tax Analysts*, that makes these documents "agency records." Pet.17.

To sidestep this conclusion, the government advances the incorrect claim that *Tax Analysts* applies only to "publicly available" documents, not those an entity "intends to keep . . . confidential." Opp.10. *Tax Analysts* did not turn on the public availability of the records at issue, and it expressly rejected as irrelevant the intent of the entity providing those documents to make them public because "[s]uch a *mens rea* requirement is nowhere to be found in the Act." 492 U.S. at 147. *Tax Analysts* even recognized that documents in an agency's possession are sometimes "subject to certain disclosure restrictions" like the confidentiality request made here but said that "*does not bear on whether the materials are in the agency's control*." *Id.* at 147 n.8 (emphasis added).

Subsequently, in *Department of Justice v. Landano*, 508 U.S. 165 (1993) (applying Exemption 7(D)), and *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019) (applying Exemption 4),

this Court did not even contemplate that the confidential documents at issue weren't agency records. Consistent with *Tax Analysts,* and contrary to the Second Circuit, the Eighth, Ninth, and D.C. Circuits have found a confidentiality intent irrelevant or, at most, a non-dispositive factor bearing on the question of control. Pet.18.[1]

The government's authorities addressing separation-of-powers issues are irrelevant to the Second Circuit's holding on confidentiality and do not erase the clear conflicts with precedent. Unlike this case, *Judicial Watch, Inc. v. Secret Service* and *Doyle v. Department of Homeland Security* explicitly relied on constitutional avoidance in finding that a sitting president's White House visitor logs were not agency records. *See Jud. Watch*, 726 F.3d 208, 231 (D.C. Cir. 2013); *Doyle*, 959 F.3d 72, 78 (2d Cir. 2020). The government acknowledges as much. Opp.11-13. Likewise, *United We Stand America, Inc. v. IRS* rested on precedent addressing "policy considerations unique to the congressional context." 359 F.3d 595, 599-600 (D.C. Cir. 2004). These cases fail to support the Second Circuit's holding that documents are not agency records subject to FOIA disclosure if they are

[1] *See Rojas v. FAA*, 941 F.3d 392, 408-09 (9th Cir. 2019); *Missouri ex rel. Garstang v. Dep't of Interior*, 297 F.3d 745, 751 (8th Cir. 2002); *Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996). The government dismisses these cases as not involving the "special considerations" of executive privilege disclaimed by the Second Circuit, Opp.17, but does not dispute the clear conflict between these circuits and the *actual* holding below.

provided to an agency with an expectation of confidentiality.

2. The brief in opposition not only misstates the "agency records" holding of the Second Circuit, it deceptively portrays the issue raised *sua sponte* at oral argument on appeal as having been asserted earlier in the litigation by the government. Opp.18-19. It was not.

The opposition does not dispute that it was the government's burden to raise the issue and then to prove that the requested documents are not "agency records" under FOIA. *See* § 552(a)(4)(B) ("burden is on the agency" to justify withholding records); *Tax Analysts*, 492 U.S. at 142 n.3. It thus seeks to leave the impression that this burden was met by pointing to an initial disclaimer by the agency during the administrative processing of Petitioner's FOIA request, Opp.18-19, deceptively describing the *only* issue litigated (the privacy exemption) as "the government's lead argument," Opp.20, and conceding only that the government "did not make the specific 'agency records' argument that was ultimately adopted by the court of appeals," Opp.19. In truth, the government did not make *any* such argument about the records at issue at any point in the litigation, knowingly disclaimed the argument early in the district court proceedings by asserting it only as to documents not at issue, and disavowed it *again* before the court of appeals. Pet.26; Opp.18-19. That is a textbook example of waiver. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver is an "intentional relinquishment or abandonment of a known right");

Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 107 (2015) (argument waived where parties never disputed issue in lower courts).

The government alternatively seeks to excuse this as inconsequential, claiming the Second Circuit's holding "bore a fair resemblance" to arguments it did make because the Secret Service "consistently invoked the special confidentiality interests on which the court of appeals relied in concluding that the withheld documents were not agency records." Opp.19 (brackets omitted). But, again, in raising and deciding the issue *sua sponte* the Second Circuit expressly disavowed any reliance on any special presidential interests. Because the court's holding is not limited to FOIA requests implicating executive privilege, Pet.13-14, it is not a "case-specific error" and will have "substantial effects" beyond this case, Opp.19; *see* Pet.32-24; *infra* at 11-13.

B. The Second Circuit's Redefinition of FOIA's Relevant Public Interest Is Indefensible

In requiring documents to shed light on the actions of the specific agency from whom they are requested to overcome privacy concerns within Exemption 7(C), the Second Circuit's decision again cannot be squared with FOIA's text, purpose, or prior application. Pet.28-30. Its further conclusion that a court applying FOIA's privacy exemptions should consider the potential impact of disclosure on the agency's operations effectively creates a new exemption never

accepted by Congress and rejected by other courts. Pet.31-32.

1. The government is equally unable to defend the Second Circuit's alternate holding that the *only* relevant public interest under FOIA's privacy exemptions is whether disclosure will shed light on actions of the specific agency possessing the records. So, it suggests this erroneous ruling be overlooked as dicta because Petitioner supposedly failed to identify any public interest in disclosure "that could outweigh the significant privacy interests identified by the court of appeals." Opp.22. The record repudiates this claim.

The district court concluded—after *in camera* review—that the records would reveal information about the actions and priorities of the Trump administration that outweighed the privacy concerns presented. Pet.App.25a-26a, 30a-31a. Indeed, the court considered the public interest so significant that it refused the government's request to stay disclosure until after the 2020 presidential election. *See* Dist. Ct. Order, No. 18-cv-07516 (Aug. 07, 2020), Dkt. 51. Contrary to the government's depiction, the Second Circuit did not reject the district court's factual conclusion that the documents would reveal useful information about the "nascent administration;" it instead declared this finding irrelevant because the documents would "shed no light on the operations or decision-making of the Secret Service" itself. Pet.App.52a.

This, too, imposes a substantial new limitation on FOIA's reach that contradicts this Court's instruction that the relevant inquiry in FOIA privacy balancing is the extent to which disclosure generally will "let citizens know 'what *their government* is up to.'" *U.S. Dep't of Def. v. Fed. Lab. Rels. Auth.*, 510 U.S. 487, 497 (1994) (emphasis added) (quoting *DOJ v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). Tellingly, the government does not dispute that this holding also contradicts multiple rulings by the courts of appeals. Pet.29-30.[2]

2. The government advances an atextual theory of congressional intent to defend the Second Circuit's equally anomalous conclusion that a court should consider the impact of disclosure on the agency itself in weighing whether information can be withheld as an unwarranted invasion of personal privacy. With no supporting authority whatsoever, the government speculates that differing language imposing a higher threshold to withhold information under Exemption 6 than required under Exemption 7(C) may have been to induce cooperation with law enforcement. Opp.24-25. But Congress specifically addressed the protection of confidential law enforcement sources separately in

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[2] *See Elec. Frontier Found. v. Off. of the Dir. for Nat'l Intel.*, 639 F.3d 876, 888 (9th Cir. 2010) (finding public interest in understanding how lobbyists engage in "political activity and contributions to either the President or key members of Congress"), *abrogated on other grounds by Animal Legal Def. Fund v. FDA*, 836 F.3d 987, 989 (9th Cir. 2016) (en banc) (per curiam); *Bast v. DOJ*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (finding public interest in understanding "the integrity of the judicial system").

Exemption 7(D). *See* 5 U.S.C. § 552(b)(7)(D). Exemption 7(C) addresses congressional concerns that personal information is regularly collected by law enforcement agencies without people's consent or knowledge, and disclosure of a law enforcement interest can be highly damaging to an individual.[3]

More to the point, the government's novel theory of Exemption 7(C) finds no support in the statutory text or structure. As this Court has repeatedly instructed, FOIA's exemptions are "explicitly made exclusive" and must be "narrowly construed." *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011); *see also Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 (2001). This Court has also instructed that both Exemptions 6 and 7(C), by their plain text, protect only an "individual's right of privacy." *FCC v. AT & T Inc.*, 562 U.S. 397, 408 (2011) (quoting *Dep't of State v. Ray*, 502 U.S. 164, 175 (1991)). To "take account of effects on important agency operations" under Exemption 7(C), Opp.25, would be to "arbitrarily constrict it" by "adding limitations found nowhere in its terms," *Food Mktg. Inst.*, 139 S. Ct. at 2366 (emphasis deleted).

Simply put, Exemption 7 does not "invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis." *FBI v. Abramson*, 456 U.S. 615, 631 (1982). The Second Circuit wrongly considered

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[3] *See* 120 Cong. Rec. 17033-34 (1974) (statement of Sen. Philip Hart that the protection of personal privacy was being added to Exemption 7 "to protect the privacy of any person mentioned in the requested files").

"the interest in promoting cooperation with the Secret Service," Opp.24, and only this Court can restore Exemption 7's plain text.

* * * * *

The Second Circuit significantly limited FOIA in a manner irreconcilable with statutory text, contrary to precedent, and inconsistent with congressional intent. Its holding removes many records from any FOIA disclosure obligation and substantially expands the records that may be withheld under Exemptions 6 and 7(C). Its contraction of this important federal statute is too drastic to escape this Court's review.

II. If Permitted to Stand, the Second Circuit's FOIA Revisions Will Have Far-Reaching, Adverse Consequences

The Second Circuit's substantial narrowing of FOIA will have significant consequences for government accountability in matters ranging from foreign policy to public health and safety, election security, and more. In permitting private actors to limit FOIA's scope by claiming confidentiality over their documents, the decision below will deprive the public and the press of the foremost tool for compelling government transparency and leave courts with no role to play.

Amici illustrate how the Second Circuit's ruling places "a wealth of information beyond the public's reach"—describing the fruits of past FOIA requests that would have been off-limits had the Second Circuit's decision been law. Citizens Amicus Br. 13. For example, if PG&E had "simply stamped

'confidential'" on its "memos and communications with the Forest Service," the public might never have discovered the company's deadly negligence in connection with catastrophic wildfires. RCFP Amicus Br. 12-13. And it might never have come to light that consultants working for opioid makers were simultaneously advising the FDA as to the supposedly "safe" use of those drugs—disclosures that motivated Congress to pass legislation "combatting conflicts of interest in government contracting." *Id.* 13-14.

Under the Second Circuit's test, even Secretary of State Hillary Clinton's emails stored on a private server may never have been disclosed. In 2014, a journalist filed a FOIA request that compelled the release of 3,000 of those emails.[4] Yet if the Second Circuit's rule applied, an automatic confidentiality disclaimer on each email could have prevented disclosure.

It's not just journalists and the people they inform who stand to lose if the Second Circuit's decision stands. Civil society organizations, too, rely heavily on FOIA, and the potential harm to their work "is difficult to understate." Citizens Amicus Br. 2. For nongovernmental organizations that educate and advocate on a host of issues, from food safety to military contracting to internet privacy, the ability to examine the government's dealings with private

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[4] Josh Gerstein, *State Dept. to process 3,000 pages of Clinton emails before election*, Politico (Sept. 28, 2016, 9:27 PM), https://www.politico.com/story/2016/09/hillary-clinton-emails-state-department-228877.

individuals and entities is critical. Allowing a vital tool of government accountability to be stripped of its power will have dire effects.

The Second Circuit's opinion also throws into confusion other federal records laws. For example, the Federal Records Act, 44 U.S.C. §§ 2902, 3101, requires federal agencies to preserve certain agency records. The Second Circuit's opinion now "calls into question whether an agency receiving" a document that a private party marks confidential "has a duty to preserve it as part of the records of the agency." Citizens Amicus Br. 12.

Simply put, the Second Circuit's decision warrants review because it gravely threatens FOIA's "basic purpose . . . to ensure an informed citizenry," a purpose "vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] This Petition does not purport to represent the institutional views of Yale Law School, if any.