No. 22-578

IN THE

Supreme Court of the United States

RICHARD BEHAR,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

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

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI BY CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, GOVERNMENT ACCOUNTABILITY PROJECT, INC., NATIONAL SECURITY ARCHIVE, OPEN THE GOVERNMENT, AND PROJECT ON GOVERNMENT OVERSIGHT, INC.

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INTEREST OF *AMICI CURIAE*[1]

Citizens for Responsibility and Ethics in Washington ("CREW") is a non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code. CREW seeks to promote accountability, transparency, and integrity in government officials and the government decision-making process. CREW is committed to protecting the right of citizens to be informed about the activities of government officials and empowering citizens to have an influential voice in government decisions through the dissemination of information, including information CREW obtains through the Freedom of Information Act ("FOIA"). Toward that end, CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW's public interest litigation includes lawsuits brought against the Executive and executive branch agencies to prevent abuses of executive power.

Government Accountability Project, Inc. ("GAP") is an independent, nonpartisan, nonprofit organization that promotes corporate and government accountability by protecting whistleblowers and advancing occupational free speech. GAP advocates for effective implementation of whistleblower protections throughout industry, international institutions, and the federal government,

1. Counsel of Record for all parties received notice at least 10 days prior to the due date of the intention of the *amici curiae* to file this brief. No party or counsel for any party to this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* has made a monetary contribution to the preparation or submission of this brief.

focusing on issues involving corporate accountability, radioactive waste disposal, passenger jet mechanical integrity, national security, and food pathogen detection. GAP defines a "whistleblower" as a person who discloses information that he or she reasonably believes is evidence of illegality, gross waste or fraud, mismanagement, abuse of power, general wrongdoing, or a substantial and specific danger to public health and safety. To advance its mission GAP uses information obtained from the FOIA.

The National Security Archive ("Archive") is an independent non-governmental research institute and library. The Archive was established in 1985 to promote research and public education about the U.S. governmental and national security decision-making process. The Archive collects, analyzes, and publishes documents acquired through the FOIA to promote and encourage openness and government accountability for the national security, foreign, intelligence, and economic policies of the United States. The potential harm to the work of the Archive if the Second Circuit's *Behar* decision were to stand is difficult to understate. Many of the Archive's projects, especially those focusing on human rights abuses, climate change, and the U.S. wars in Iraq and Afghanistan, are inherently complex and involve discussions with other federal entities, both domestic and foreign, and private individuals and corporations. There is no way to establish a comprehensive evidentiary record on these multifaceted issues without incorporating the views and inputs of the non-federal agencies. The Archive considers the current exemptions intended to protect corporate and private interests to be robust enough to protect valid secrets, while enabling the public's right to know.

Open the Government ("OTG") is an inclusive, nonpartisan coalition that works to strengthen our democracy and empower the public by advancing policies that create a more open, accountable, and responsive government. As the coordinating hub of a coalition of more than 100 public-interest organizations, OTG has led efforts to pass critically needed reforms to the FOIA and defend against efforts to weaken and violate the law. OTG has worked with coalition members to file FOIA requests for records on government decision-making and believes that ensuring public access to information is essential to hold our public officials accountable at all levels of government.

Founded in 1981, the Project On Government Oversight, Inc. (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and the government's failure to serve the public or its silencing of those who report wrongdoing. POGO champions reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. POGO investigates corruption, misconduct, and conflicts of interest in the federal government, and in doing so it relies on the FOIA. POGO has found that in many cases, agencies refuse to disclose government records to hide corruption, intentional wrongdoing, or gross mismanagement by the government or its contractors. POGO strongly believes that sunshine is the best disinfectant, and that we must empower citizens with information and tools to hold local, state, and federal governments accountable.

SUMMARY OF ARGUMENT

I. The Second Circuit's construction of "agency records" in the context of the Freedom of Information Act conflicts with precedent from this Court establishing a two-part test for determining agency record status. That test, set forth in *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989), eschewed the intent of the document's creator as a governing factor. *Id.* at 147-48. Here, however, in concluding that Secret Service records of visitors to candidate and then president-elect Donald Trump did not qualify as agency records the Second Circuit focused primarily on the intent of the records' creator, which it inferred from the "confidential" markings on many of the documents, and the claim of the Secret Service that it treated the records as confidential.

The Second Circuit justified this departure from *Tax Analysts* by citation to two cases, *Doyle v. Dep't of Homeland Sec.*, 959 F.3d 72 (2d Cir. 2020), and *Judicial Watch Inc. v. U.S. Secret Serv.*, 726 F.3d 208 (D.C. Cir. 2013), holding that Secret Service logs of visitors to the White House Complex (and President Trump's Mar-a-Lago home in *Doyle*) were not agency records. The Second Circuit completely ignored the constitutional underpinnings of those two decisions that dictated the conclusion that *presidential* visitor logs fail to meet the FOIA's agency record prerequisite. Records of visits to candidate and President-elect Trump do not implicate the constitutional concerns guiding the *Doyle* and *Judicial Watch* decisions.

II. The implications of the Second Circuit's construction of the term "agency records" sought by Petitioner Behar

underscore the need for this Court's review. Applied more broadly, treating the claimed confidentiality of information or data submitted by non-governmental entities and individuals as dispositive of its non-agency record status with no further analysis under the FOIA would essentially override Exemption 4 and the analysis it requires and conflict irreconcilably with this Court's decision in *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019). The Second Circuit's decision also threatens to override Exemptions 6 and 7(D) by granting to any non-governmental individual or entity providing information within the scope of those two exemptions the power to remove it from the FOIA's reach by designating the information as "confidential," again without considering the requirements of those exemptions.

Allowing non-governmental entities and individuals to avoid the FOIA by the simple act of stamping a document "confidential" would subvert Congress' clear purpose of exposing the conduct of government agencies and officials to public scrutiny through the FOIA and would undermine the role of the Courts.

III. The Second Circuit's approach upsets the statutory burdens of proof the FOIA imposes on agencies. Although the Secret Service did not advance the argument that the records at issue failed to qualify as agency records, the Second Circuit raised and resolved the issue *sua sponte*. The Secret Service was never required to meet its burden of proof through the presentation of evidence and Behar was never afforded an opportunity to test that evidence through summary judgment briefing.

ARGUMENT

I. The Second Circuit's Construction of Agency Records Conflicts With Supreme Court Precedent.

Although the phrase "agency record" is an essential term in the FOIA, neither the language of the statute nor its legislative history defines the term. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989).[2] This Court filled in that gap by developing a two-part test that considers: (1) whether the requested records were created or obtained by the agency, and (2) whether the agency controls the records. *Tax Analysts*, 492 U.S. at 143-45. The Court in turn construed the word "control" to mean "that the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.* at 145.[3]

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2. The Senate hearings that led to the FOIA's passage contain at least one reference to the definition of record that the Court cited in *Forsham v. Harris*, 445 US. 169, 184 (1980): "'[s]ince the word 'records' . . . is not defined, we assume that it includes all papers which an agency preserves in the performance of its functions.'" (quoting Administrative Procedure Act: Hearings on S. 1160 *et al.* before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 244 (1965)).

3. *Tax Analysts* built on this Court's decision in *Kissinger v. Reporters Com. for Freedom of Press*, 445 U.S. 136 (1980), holding that the mere physical location at the State Department of summaries of Henry Kissinger's telephone conversations while serving as National Security Advisor did not dictate their status as agency records. As the Court reasoned, they were not in the State Department's control, were not generated by the State Department, were not in the agency's files, and "were not used by the Department for any purpose." *Id.* at 157.

Two aspects of the control test dictated by *Tax Analysts* bear particularly on the status of the Secret Service records at issue here. First, possession alone is nearly dispositive of the control issue, *id.* at 147, meaning that records in the legitimate possession of the agency as part of conducting agency business are "agency records." Second, the intent of the creator does not govern. *Id.* "Such a *mens rea* requirement" the Court reasoned "is nowhere to be found in the Act" and otherwise "discerning the intent of the drafters" is "an elusive endeavor[.]" *Id.* at 147-48.

The Secret Service records at issue of visitors to candidate and then president-elect Donald Trump easily satisfy the two-part *Tax Analysts* test. First, the Secret Service obtained physical possession of the records, as attested to in the district court by U.S. Department of Homeland Security declarants Kim E. Campbell, Leonza Newsome, III, and Kevin R. Tyrell. Second, the Secret Service obtained the requested records while performing its core statutory function of protecting presidential candidates and presidents-elect, thereby satisfying the control requirement "that the materials have come into the agency's possession in the legitimate conduct of its official duties." *Tax Analysts*, 492 U.S. at 145.

While paying lip service to this Court's two-part agency record test, the Second Circuit reached the opposite conclusion. Its decision focuses primarily on the intent of the records' creator, which it inferred from the "confidential" markings on many of the documents and the Secret Service's bald claim that it treated the records as confidential. From this the court concluded that the agency lacked the necessary control to render the records subject

to disclosure under the FOIA, *Behar v. U.S. Dep't of Homeland Sec.*, 39 F.4th 81, 90 (2d Cir. 2022), despite this Court's command that the intent of the document's creator does not govern. The Second Circuit relied instead on its decision in *Doyle v. Dep't of Homeland Sec.*, 959 F.3d 72 (2d Cir. 2020), and the D.C. Circuit's decision in *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208 (D.C. Cir. 2013), holding that Secret Service logs of visitors to the White House Complex (and President Trump's Mar-a-Lago home in *Doyle*) were not agency records.

The Second Circuit completely ignored, however, the constitutional underpinnings of those two decisions that dictated the conclusion that *presidential* visitor logs failed to meet the FOIA's agency record prerequisite. *Doyle* rests on two principles not applicable here: (1) that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated," 959 F.3d at 76-77 (citation and quotation omitted), and (2) where compelled disclosure threatens "a President's ability to receive unfettered, candid counsel from outside advisors and leaders" the canon of constitutional avoidance requires an interpretation of the term agency record that avoids that result. *Id.* at 77. The *Doyle* court emphasized the narrowness of its ruling, explaining that its "application of the avoidance canon is limited to the very narrow circumstances involving the availability under FOIA of the *President's* schedules and visitor logs[.]" *Id.* at 78 (emphasis added).

The D.C. Circuit's opinion in *Judicial Watch* also flowed from the "constitutional prerogative" of the Office of the President in the "autonomy of its office"

and its ability to "safeguard[] the confidentiality of its communications." *Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d at 224 (citation and quotation omitted). Separation of powers concerns compelled that court to conclude that White House visitor logs fall outside the reach of the FOIA. *Id.* at 224-229.

This case implicates neither of those concerns. As both a candidate and president-elect Donald Trump fell outside the Executive Branch and the constitutional protections afforded a sitting president. To be sure, as a former president he retained "for some period of time a right to assert executive privilege over documents *generated during [his] administration*[]." *Trump v. Thompson*, 20 F.4th 10, 26 (2021) (citing *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449, 451 (1977)) (emphasis added). But that limited right, which "protects only "'the confidentiality required for the President's conduct of office,'" *id.*, quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. at 448, and says nothing about the agency record status of his visitor records, cannot be extended to documents generated before he even took office.

The Second Circuit acknowledged the non-agency status of both the presidential campaign and the transition team, *Behar*, 39 F. 4th at 89, which should also have led it to recognize that neither presented "special considerations" or constitutional concerns. *Doyle*, 959 F.3d at 76-77. It failed to make that recognition, however, and instead *sua sponte* applied a far more sweeping principle that because Behar could not compel "the disclosure of the records directly from a campaign or transition," under the FOIA, *id.* at 89 (citation omitted), he could not compel their disclosure from the Secret Service. This

conclusion contravenes *Tax Analysts*, departs radically from *Doyle* and *Judicial Watch*, and otherwise lacks any foundation in either the language of the FOIA or its judicial interpretations.

II. The Implications of the Second Circuit's Construction of the Term "Agency Records" in the FOIA Underscore the Need for Review

In concluding that the Secret Service records sought by Behar fail to meet the agency record requirement of the FOIA based on their "confidential" label the Second Circuit adopted an approach that essentially overrides Exemption 4, provides non-governmental submitters of information or data to the government a powerful tool to block transparency, and upsets the statutory burdens of proof Congress imposed on the agency. Each standing alone presents grounds to reverse the Second Circuit's decision and together they underscore the need for review by this Court.

The Second Circuit in *Behar* treated the claimed confidentiality of the requested records as dispositive of their non-agency record status before even considering the application of any exemption. This approach threatens to override exemptions in the FOIA carefully tailored to protect governmental interests while recognizing the right of the public to access government information.

First, the Second Circuit's approach essentially overrides Exemption 4, which protects from compelled disclosure "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Pivotal in determining whether the exemption

applies is the confidentiality of the commercial or financial information, a term this Court explored in *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019). Applying rules of statutory interpretation, the Court rejected a definition that included a "substantial competitive harm" requirement. 139 S. Ct. at 2364. Critically the Court concluded that because the grocery store data at issue met the confidentiality requirement of Exemption 4 the exemption applied to shield the data from disclosure. *Id.* at 2366. The Court did not, however, deem the requested records as non-agency and therefore falling outside the scope of the FOIA because of their claimed confidentiality, as the Second Circuit did here. The Second Circuit's unprecedented approach conflicts irreconcilably with *Argus Leader* and the entire body of Exemption 4 caselaw characterizing the term "confidential" as part of the analysis used to determine whether documents submitted by outside entities are exempt, not whether they fail to satisfy the "agency record" requirement of the FOIA and therefore fall outside the FOIA on that basis alone.

The Second Circuit's decision also threatens to override Exemption 6, which protects information about individuals in "personnel and medical files and similar files" if disclosure "would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6). Under the Second Circuit's approach any individual who provides information to the government could remove it from the FOIA's reach simply by designating the information "confidential" regardless of whether its disclosure would invade their privacy and regardless of any countervailing public interest, considerations that Exemption 6 requires. Similarly, the Second Circuit's approach threatens to override Exemption 7(D), which protects from disclosure

law enforcement information provided by an outside source on a "confidential basis." 5 U.S.C. § 552(b)(7)(D). Applying the Second Circuit's approach such sources could place the information beyond the reach of the FOIA simply by labelling it "confidential" and without even considering the circumstances under which it was provided.

Relatedly, the Second Circuit's approach would relieve the government from independently analyzing national security information provided by outside sources that bears a "confidential" marking under Exemption 1 of the FOIA and the classification standards of Executive Order 13526. For example, before *Behar* a letter from a foreign minister or diplomat to a State Department official that was stamped by the foreigner as "confidential" would be dealt with under Exemption 1 as to whether its release would damage United States foreign relations. Even if the exemption barred its disclosure the document could eventually be released after the passage of time and upon request for a Mandatory Declassification Review by the Information Security Oversight Office of the National Archives and Records Administration pursuant to Section 3.5(e) of E.O. 13526. Under the Second Circuit's approach in *Behar*, however, any request for that document would escape FOIA review altogether—and ultimate public disclosure—as not satisfying the agency record requirement. This approach in turn could have unforeseen results under the Federal Records Act, which imposes on federal agencies the duty to preserve certain agency records, 44 U.S.C. §§ 2902, 3101, as it calls into question whether an agency receiving such a document has a duty to preserve it as part of the records of the agency.

Beyond these exemptions the Second Circuit's decision has far-reaching consequences for transparency

in government. Under its approach, any time a non-governmental entity submits documents to a government agency it could avoid the application of the FOIA merely by stamping those documents "confidential." This would place a wealth of information beyond the public's reach, including information that would shed light on the extensive partnerships the federal government has with contractors and other outside entities and information concerning government compliance with health and safety standards. Just as troubling, the Second Circuit's decision would remove the role of the courts in determine the meaning of "confidential" in a variety of contexts under the FOIA, instead granting outside submitters of information unilateral control over whether and when the FOIA applies. That power would subvert Congress' clear purpose of exposing the conduct of government agencies and government officials to public scrutiny through the FOIA, *see*, *e.g.*, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978), and assigning to courts the job of determining whether an agency has met its burden of proving the applicability of the FOIA and its nine exemptions. 5 U.S.C. § 552(a)(4)(B).

III. The Second Circuit's Approach Upsets the Burdens of Proof the FOIA Imposes on Agencies.

Finally, the Second Circuit's approach upsets the statutory burdens of proof the FOIA imposes on agencies. FOIA cases differ from typical administrative review cases not only because the court exercises *de novo* review under the express language of the statute, 5 U.S.C. § 552(a)(4)(B), but also because the government bears the burden of proving that an asserted exemption applies, *id.*, *Reporters Comm. for Freedom of the Press v. FBI*,

3 F.4th 350, 361 (D.C. Cir. 2021), and "that the materials sought are not 'agency records[.]'" *Tax Analysts*, 492 U.S. at 142 n.3 (citing S. Rep. No. 813, 89th Cong., 2nd Sess., 8 (1965). In imposing these evidentiary burdens Congress recognized that an agency is "the only party able to explain" the basis for a withholding. *Id.* (citing H.R. Rep. No. 1497, 89th Cong., 2d Sess., 9 (1966)). Because the FOIA "reflects a general philosophy of full agency disclosure," *Dep't of Defense v. FLRA*, 510 U.S. 487, 494 (1994) (internal citation and quotation omitted), an agency's failure to meet its burden of proof properly results in a disclosure order. *Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d at 214-15.

Although the district court below followed these principles in ruling on the parties' summary judgment motions the Second Circuit on review ignored the statutorily imposed evidentiary burdens and the deficiencies in the government's evidence to reach and resolve the agency record issue. The Secret Service, however, failed to even raise much less meet its burden of proving the requested records are not agency records. Indeed, while the Secret Service suggested at the administrative stage that the requested records were not agency records, *Behar*, 39 F.4th at 85, it abandoned that argument once in litigation. The Second Circuit therefore erred in raising the issue *sua sponte* and resolving it based on its evaluation of an evidentiary record that the agency never presented in support of a non-agency record argument. Had the Second Circuit adhered to the burden of proof the FOIA imposes on agencies, it would have remanded the case for the Secret Service to present its evidence and Behar to test that evidence through summary judgment briefing. None of that happened here, however, compounding the Second Circuit's errors.

CONCLUSION

The decision of the Second Circuit contravenes Supreme Court precedent and threatens to override exemptions in the FOIA that Congress carefully tailored to protect government interests while recognizing the right of the public to access government information. Accordingly, amici respectfully request that the Court grant Plaintiff-Petitioner's petition for a writ of certiorari.

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Respectfully submitted,

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