IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

INTRODUCTION

President Donald Trump, entrusted by law with safeguarding our nation's history, has instead adopted policies and practices that exclude records of his meetings and conversations with certain foreign leaders from the non-discretionary obligations the Presidential Records Act ("PRA") imposes on him. From their inception these actions have posed an unacceptable risk that valuable historical records will be permanently and irreparably lost. Recent revelations about the White House's handling of records of a conversation between President Donald Trump and the president of Ukraine further showcase the White House's disregard for its recordkeeping obligations. In the face of the palpable risk that presidential records will be irreparably lost to Plaintiffs and the American people, Defendants have refused to provide Plaintiffs with adequate assurances that pending the resolution of this lawsuit all relevant information will be preserved. Accordingly, Plaintiffs seek emergency relief from this Court enjoining Defendants to preserve: (1) all records reflecting Defendants' meetings, phone calls, and other communications with

foreign leaders; (2) all records reflecting policies and practices regarding recordkeeping of Defendants' meetings, phone calls, and other communications with foreign leaders; (3) all records reflecting White House or agency investigations of Defendants' recordkeeping policies and practices regarding meetings, phone calls, and other communications with foreign leaders; (4) all records reflecting Defendants' communication of recordkeeping polices or practices to other components of the executive branch; (5) all records reflecting instructions, guidance, or legal advice about recordkeeping requirements; and (6) all records of efforts by White House or other executive branch officials to return, "claw back," "lock down," or recall White House records reflecting Defendants' meetings, phone calls, and other communications with foreign leaders that were distributed to or otherwise shared with agency officials.

FACTUAL BACKGROUND

Plaintiffs' Complaint

As set forth in Plaintiffs' Opposition to Defendants' Motion to Dismiss (ECF No. 14), the President's refusal to create records of his highest-level meetings with certain foreign leaders and representatives and his interference with the ability of agencies to create and maintain such records already have had severe impacts on the historical record of this presidency. For example, as alleged in the Complaint, the absence of any written record of President Trump's five publicly reported meetings with Russian President Vladimir Putin has effectively shielded those conversations from the public and prevented even top U.S. officials from knowing fully what President Trump said to and/or promised President Putin, who heads a country that is one of the United States' main strategic adversaries. *See* Compl. ¶ 53.[1] Further, in President Trump's first

[1] In June 2019, after the Complaint was filed, President Trump met President Putin for a sixth time at the G20 summit in Osaka, Japan. Rosie Perper, 'Don't meddle in the election': Trump

reported face-to-face meeting with President Putin in Hamburg, Germany during the G20 Summit, President Trump reportedly confiscated his interpreter's notes after the meeting and ordered the interpreter not to disclose to anyone what he had heard, including to administration officials. *Id.* ¶ 42. With respect to phone calls between the two leaders, who talk "regularly" by phone, *id.* ¶ 55, presidential aides reportedly have been allowed to listen in on only some of these conversations, and often Russia has been the "first to disclose those calls when they occur and release statements characterizing them in broad terms favorable to the Kremlin." *Id.*

In light of this conduct, on May 7, 2019, Plaintiffs Citizens for Responsibility and Ethics in Washington, National Security Archive, and Society for Historians of American Foreign Relations filed this lawsuit against President Trump and the Executive Office of the President ("EOP") challenging (1) their failure to comply with the mandatory obligations the PRA imposes to create, classify, and preserve records, 44 U.S.C. §§ 2201-2209, and (2) their implementation of policies and practices that violate the PRA, the Federal Records Act ("FRA"), 44 U.S.C. §§ 3101, *et seq.*, and Article II, Section 3 of the Constitution (the "Take Care Clause"). In particular, the Complaint alleges that President Trump has a policy and practice of affirmatively failing to create and preserve records of the meetings and discussions the President and other senior White House staff have with certain foreign leaders, including Russian President Putin and North Korean leader Kim Jung-Un. Plaintiffs also allege that the President has interfered with the adequate and proper documentation of agency records of bilateral meetings.

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appears to joke with Putin as they meet at G20 summit for the first time since Mueller report, *Business Insider* (Jun. 28, 2019), *available at* https://bit.ly/2o3RqG3.

The Whistleblower Complaint

On September 18, 2019, the *Washington Post* reported that President Trump's communications with a foreign leader—subsequently identified as Ukrainian President Volodymyr Zelenskyy—were the subject of a whistleblower complaint filed with the Inspector General for the Intelligence Community ("IGIC"). Greg Miller, Ellen Nakashima, and Shane Harris, Trump's communications with foreign leader are part of whistleblower complaint that spurred standoff between spy chief and Congress, former officials say, *Washington Post* (Sept. 18, 2019), https://wapo.st/2kos98a. The IGIC deemed the complaint credible and a matter of "urgent concern," thereby triggering a requirement to notify the appropriate congressional oversight committees. *Id.* Most relevant for this case and the relief sought herein, recordkeeping access and procedures lie at the heart of the whistleblower complaint.

In the complaint, which was submitted to the IGIC on August 12, 2019, the whistleblower asserts that he or she has "received information from multiple U.S. Government officials that the President of the United States is using the power of his office to solicit interference from a foreign country in the 2020 U.S. election. This interference includes, among other things, pressuring a foreign country to investigate one of the President's main domestic political rivals." Whistleblower Compl. (Ex. A) at 1. The whistleblower complaint describes a pattern of conduct that raised ongoing concerns including a phone call between President Trump and President Zelenskyy on July 25, 2019, in which President Trump pressured Zelenskyy to "initiate or continue an investigation into the activities of former Vice President Joseph Biden and his son, Hunter Biden"; "assist in purportedly uncovering that allegations of Russian interference in the 2016 U.S. presidential election originated in Ukraine"; and "meet or speak with two people the President named explicitly as his personal envoys on these matters, Mr.

Giuliani and Attorney General Barr." *Id.* According to the *Wall Street Journal*, Secretary of State Mike Pompeo was among the officials who listened in on the July 25 phone call. Courtney McBride and Sadie Gurman, Pompeo Took Part in Ukraine Call, Official Says, *Wall Street Journal* (Sept. 30, 2019), *available at* https://on.wsj.com/2neJEcw.

The whistleblower complaint also raises the prospect that U.S. security assistance was suspended to place additional pressure on Zelenskyy and other Ukrainian officials. *Id.*, Classified Appendix at 2. A memorandum summarizing the call released by the White House corroborates the whistleblower's claims. Memorandum of Telephone Conversation, Ex. B.

Critical for this case, the whistleblower complaint further alleges that White House officials abused recordkeeping systems to conceal the President's actions. Officials reportedly were "deeply disturbed by what had transpired" on the July 25 phone call and there was "a 'discussion ongoing' with White House lawyers about how to treat the call because of the likelihood . . . that they had witnessed the President abuse his office for personal gain." Whistleblower Compl. at 3. According to the whistleblower complaint, although "approximately a dozen White House officials" and "a State Department official, Mr. T. Ulrich Brechbuhl," listened to the call and multiple State Department and Intelligence Community officials were "briefed on the contents of the call," *id.* at 3, in the days following the call, "*senior White House officials . . . intervened to 'lock down' all records of the phone call, especially the official word-for-word transcript of the call that was produced—as is customary—by the White House Situation Room.*" *Id.* (emphasis added). Specifically, the whistleblower complaint alleges that

> White House officials told me that they were "directed" by White House lawyers to remove the electronic transcript from the computer system in which such transcripts are typically stored for coordination, finalization, and distribution to Cabinet-level officials.

> Instead, the transcript was loaded into a separate electronic system that is otherwise used to store and handle classified information of an especially sensitive nature. One White House official described this act as an abuse of this electronic system because the call did not contain anything remotely sensitive from a national security perspective.

Id. at 3-4.

A classified appendix to the whistleblower complaint that is partially redacted provides further detail about these recordkeeping practices:

> According to multiple White House officials I spoke with, the transcript of the President's call with President Zelenskyy was placed into a computer system managed directly by the National Security Council (NSC) Directorate for Intelligence Programs. This is a standalone computer system reserved for codeword-level intelligence information, such as covert action. According to information I received from White House officials, some officials voiced concerns internally that this would be an abuse of the system and was not consistent with the responsibilities of the Directorate for Intelligence Programs. *According to White House officials I spoke with, this was "not the first time" under this Administration that a Presidential transcript was placed into this codeword-level system solely for the purpose of protecting politically sensitive—rather than national security sensitive—information.*

Id., Classified Appendix at 1 (emphasis added).

Public reporting based on interviews of former national security officials confirms that placing memoranda of routine conversations between the President and other world leaders in a "separate electronic system that is otherwise used to store and handle classified information of an especially sensitive nature," was highly unusual. Greg Sargent, The whistleblower alleged a Trump coverup. A former insider explains how it worked., *Washington Post* (Sept. 26, 2019), https://wapo.st/2mkMcFy; Natasha Bertrand and Daniel Lippman, White House 'lockdown' of transcript would be highly unusual, *Politico*, Sept. 26, 2019, *available at* https://politi.co/2m7euDp. According to Ned Price, a former senior director at the National Security Council, that system permits access to only a small number of individuals in the National Security Directorate for Intelligence Programs and is typically used to store the "most sensitive information within

our government's possession," such as "extraordinarily sensitive intelligence information that emanates from the most precious intelligence sources." Sargent, *Washington Post*, Sept. 26, 2019. Furthermore, Executive Order 13526, which "prescribes a uniform system for classifying, safeguarding, and declassifying national security information," specifically states that "[i]n no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to: (1) conceal violations of law, inefficiency, or administrative error; [or] (2) prevent embarrassment to a person, organization, or agency . . . ."

Alarmingly, public reporting in the wake of the release of the whistleblower complaint suggests that the White House has taken additional, unusual action with respect to records of President Trump's phone calls with foreign leaders. For instance, the *Washington Post* reported that "[a]t one point in 2018, Defense Department officials were asked to send back transcripts of calls to the White House after Trump aides grew worried they could be disclosed, according to former senior administration officials." Josh Dawsey and Carol D. Leonnig, Effort to shield Trump's call with Ukrainian leader was part of broader secrecy effort, *Washington Post* (Sept. 26, 2019), https://wapo.st/2mjte1V. Such efforts reportedly are the result of the President pressing aides to ensure that records do not become public. *Id.* Transferring records to the National Security Council's code-word-protected system reportedly requires a written request from a senior White House official such as the chief of staff or the national security adviser. *Id.* The *New York Times* reported that records of calls between President Trump and President Putin and between President Trump and Saudi Crown Prince Mohammed bin Salman are among the records that have been placed in a highly classified computer system. Julian E. Barnes, Michael Crowley, Matthew Rosenberg and Mark Mazzetti, White House Classified Computer System Is Used to Hold Transcripts of Sensitive Calls, *New York Times* (Sept. 27, 2019), https://nyti.ms/2mn

vo0K. *See also* Pamela Brown, Jim Sciutto and Kevin Liptak, White House restricted access to Trump's calls with Putin and Saudi crown prince, *CNN*, (Sept. 28, 2019), https://cnn.it/2lK3cVo.

After the whistleblower complaint was filed, the Acting Director of National Intelligence, the White House, and the Department of Justice ("DOJ") took steps to prevent Congress from accessing the complaint. On August 26, 2019, Inspector General Michael K. Atkinson disclosed the whistleblower complaint to Acting Director of National Intelligence Joseph Maguire. IGIC August 26, 2019 Letter to Acting Director Maguire, Ex. C at 1. Even though federal law requires the Director of National Intelligence ("DNI") to transmit to Congress a whistleblower complaint deemed by the inspector general to be a matter of urgent concern and credible, *see* 50 U.S.C. § 3033(k)(5), Acting Director Maguire failed to do so within the prescribed statutory deadline. Instead, Acting Director Maguire consulted the White House and DOJ's Office of Legal Counsel. Zachary Cohen, Acting spy chief tells Congress the 'whistleblower did the right thing', *CNN* (Sept. 26, 2019), https://cnn.it/2nbAAVB. As a result, the White House Counsel's office, which according to the whistleblower directed officials to move records from one computer system where it was normally stored to a classified information system, was consulted about whether to disclose to Congress a complaint concerning the President's actions. *See* Acting DNI Maguire Testifies on Whistleblower Complaint, *C-SPAN* (Sept. 26, 2019), https://cs.pn/2mRL8ZO.

In a September 9, 2019 letter to Chairman Adam Schiff and Ranking Member Devin Nunes of the Permanent Select Committee on Intelligence of the U.S. House of Representatives, Inspector General Atkinson advised the Committee of the Director's failure to transmit the whistleblower complaint and IGIC determination to Congress. IGIC Sept. 9, 2019 Letter to Schiff, Nunes, Ex. D. Inspector General Atkinson informed the Committee of his understanding

"that the Acting DNI has determined that he is not required to transmit my determination of a credible urgent concern or any of the Complainant's information to the congressional intelligence committees because the allegations do not meet the definition of an 'urgent concern' under the statute" and that "the Acting DNI's treatment of the Complainant's alleged 'urgent concern' does not appear to be consistent with past practice." *Id.* at 2. In a second letter, Inspector General Atkinson informed the Committee that he had received a letter from Jason Klitenic, the General Counsel for the Office of the Director of National Intelligence ("ODNI"), advising "that the Acting DNI had determined, after consulting with . . . DOJ, 'that no statute requires disclosure of the complaint to the intelligence committees' because 'the disclosure in this case did not concern allegations of conduct by a member of the Intelligence Community or involve an intelligence activity under the DNI's supervision.'" IGIC Sept. 17, 2019 Letter to Schiff, Nunes, Ex. E at 2. Inspector General Atkinson noted that he disagreed "with that determination, particularly DOJ's conclusion, and the Acting DNI's apparent agreement with the conclusion, that the disclosure in this case does not concern an intelligence activity within the DNI's authority, and that the disclosure therefore need not be transmitted to the congressional intelligence committees." *Id.* The DOJ Memorandum reaching that conclusion sidestepped the question of whether the attempt by White House officials to restrict access to records of the July 25 call was an intelligence activity within DNI's authority. *See* U.S. Dep't of Justice, Office of Legal Counsel, *Memorandum for Jason Klitenic, General Counsel, Office of the Director of National Intelligence*, Sept. 3, 2019, at 3 n.4, https://www.justice.gov/olc/page/file/1205151/download.

President Trump's Past Conduct to Create False Records to Conceal His Unlawful Conduct

This latest conduct by President Trump and the White House is part of a larger pattern of conduct to prevent the public from learning about the President's unlawful conduct. Volume II of Special Counsel Robert S. Mueller's Report on the Investigation into Russian Interference in the 2016 Presidential Election ("Mueller Report") describes in detail several episodes in January and February 2018 in which the President personally and through subordinates pressured former White House Counsel Don McGahn to create a false record of events.

On January 26, 2018, after the *New York Times* accurately reported that President Trump had ordered Special Counsel Mueller fired in June 2017, President Trump's "personal counsel called McGahn's attorney and said that the President wanted McGahn to put out a statement denying that he had been asked to fire the Special Counsel and that he had threatened to quit in protest. McGahn's attorney spoke with McGahn about that request and then called the President's personal counsel to relay that McGahn would not make a statement." Mueller Report, Vol. II, at 114. Less than two weeks later, on February 5, the President tried again. The Mueller report states that the President "directed [White House Secretary Rob] Porter to tell McGahn to create a record to make clear that the President never directed McGahn to fire the Special Counsel." Mueller Report, Vol. II, at 115. According to the Mueller Report, President Trump told Porter that "he wanted McGahn to write a letter to the file 'for our records' and wanted something beyond a press statement to demonstrate that the reporting was inaccurate." *Id.* According to the Mueller Report, Porter also "recalled the President saying something to the effect of, 'If he doesn't write a letter, then maybe I'll have to get rid of him.'" *Id.* at 115-116. Porter delivered the message and the threat, but McGahn resisted. *Id.* at 116.

On February 6, 2018, White House Chief of Staff John Kelley scheduled time for McGahn to meet with the President about the *Times* article. According to the Mueller Report:

> The President began the Oval Office meeting by telling McGahn that the New York Times story did not "look good" and McGahn needed to correct it. McGahn recalled the President said, "I never said to fire Mueller. I never said 'fire.' This story doesn't look good. You need to correct this. You're the White House counsel."
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> In response, McGahn acknowledged that he had not told the President directly that he planned to resign, but said that the story was otherwise accurate. The President asked McGahn, "Did I say the word 'fire'?" McGahn responded, "What you said is, 'Call Rod [Rosenstein], tell Rod that Mueller has conflicts and can't be the Special Counsel.'" The President responded, "I never said that." The President said he merely wanted McGahn to raise the conflicts issue with Rosenstein and leave it to him to decide what to do. McGahn told the President he did not understand the conversation that way and instead had heard, "Call Rod. There are conflicts. Mueller has to go." The President asked McGahn whether he would "do a correction," and McGahn said no. McGahn thought the President was testing his mettle to see how committed McGahn was to what happened. Kelly described the meeting as "a little tense."
>
> The President also asked McGahn in the meeting why he had told Special Counsel's Office investigators that the President had told him to have the Special Counsel removed. McGahn responded that he had to and that his conversations with the President were not protected by attorney-client privilege. The President then asked, "What about these notes? Why do you take notes? Lawyers don't take notes. I never had a lawyer who took notes." McGahn responded that he keeps notes because he is a "real lawyer" and explained that notes create a record and are not a bad thing. The President said, "I've had a lot of great lawyers, like Roy Cohn. He did not take notes."

Mueller Report, Vol. II at 116-17. According to McGahn, when the President stated that he "never had a lawyer who took notes," he was referring to the notes of Annie Donaldson, Don McGahn's chief of staff from January 2017 to December 2018. *Id.* at 117 n.824.

Communications Between the Parties Concerning Document Preservation

In light of these events, Plaintiffs' counsel sent a letter by email to Defendants' counsel on September 20, 2019, seeking confirmation that Defendants are preserving four general categories of records pertaining to Plaintiffs' claims as well as "any materials relating to the

ODNI whistleblower complaint and the underlying incident." Letter from Anne Weismann to Kathryn L. Wyer, Sept. 20, 2019, Ex. F. By a response letter dated and sent by email on September 23, 2019, Defendants' counsel described Plaintiffs' preservation request as seeking "privileged legal advice" not subject to discovery, suggested Plaintiffs had no "freestanding right to demand that defense counsel disclose preservation guidance outside of the discovery process," and described Plaintiffs' request as "particularly inappropriate" given the limitations Defendants claim courts have placed on judicial review of the claims brought here. Letter from Kathryn Wyer to Anne L. Weismann, Sept. 23, 2019, Ex. G. Defendants' letter went on to state that "we have appropriately advised our clients concerning their preservation obligations, as is our standard practice." *Id.*

Plaintiffs sent a second letter by email on September 25, 2019, pointing out that Defendants' letter mischaracterizes Plaintiffs' request which, far from seeking privileged legal advice, "simply ask[s] for confirmation that certain categories of records we have outlined will be preserved." Letter from Anne Weismann to Kathryn L. Wyer, Sept. 25, 2019, Ex. H. Plaintiffs also explained that the obligation to preserve relevant evidence "runs from the time that a party has notice or should have known that evidence is relevant to either pending or future litigation." *Id.* Further, Plaintiffs' letter explained the relevance of the documents for which Plaintiffs seek preservation assurances, given that they "likely contain evidence of the President's recordkeeping practices that lie at the heart of Plaintiffs' complaint." *Id.* Outlining the caselaw that spells out Plaintiffs' legal entitlement to "know the kinds and categories of records Defendants have been instructed to preserve and 'what specific actions [Defendants] were instructed to take to that end,'" Plaintiffs repeated their request for preservation assurances. *Id.* (citation omitted).

Defendants responded to this letter on September 27, 2019, reiterating their view that the assurances Plaintiffs seek "clearly implicate[] privileged legal advice." Letter from Kathryn Wyer to Anne L. Weismann, Sept. 27, 2019, Ex. I. Defendants further expressed the view, not supported by any caselaw or other authority, that the information Plaintiffs seek cannot be obtained outside of the discovery process. *See id.* Finally, notwithstanding the growing evidence of the President's malfeasance Defendants asserted that "nothing in your letter, or in the allegations of Plaintiffs' complaint, suggests that spoliation of relevant evidence is likely to occur." *Id.* Defendants closed with the assertion they would not respond to any further inquiries. *Id.*

ARGUMENT

I. CREW IS ENTITLED TO A TEMPORARY RESTRAINING ORDER.

A. Standards for Entry of a Temporary Restraining Order.

The standards for a temporary restraining order mirror those for a preliminary injunction, with the exception of the notice requirement for a preliminary injunction. *See* Fed. R. Civ. P. 65(a)(1); *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 41 (D.D.C. 2018); *Sterling Comm. Credit—MI, LLC v. Phoenix Industries I, LLC*, 762 F. Supp. 2d 8, 13 (D.D.C. 2011); *Hall v. Johnson*, 599 F. Supp. 2d 1, 3 (D.D.C. 2009). For both, the movant "must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (quoting *Winter v. Nat. Resources Def. Council, Inc.*, 555 U.S. 7, 20 2008)).

While the movant must demonstrate that all four factors weigh in favor of granting the relief, courts historically have used a "sliding scale" approach, which recognizes that courts may

award relief when one factor is particularly strong, "even if the showings in the other areas are rather weak." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The D.C. Circuit has noted that the Supreme Court's decision in *Winter* "could be read to create a more demanding burden [on irreparable injury], although the decision does not squarely discuss whether the four factors are to be balanced on a sliding scale" and the Court in that case declined to "decide whether a stricter standard applies." *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). A recent decision from this court noted that also unresolved "is the related question of 'whether, in cases where the other three factors strongly favor issuing an injunction a plaintiff need only raise a serious legal question on the merits.'" *Mons v. McAleenan*, No. 19-1593, 2019 WL 4225322, at *3 (D.D.C. Sept. 5, 2019) (quoting *Aamer*, 742 F.3d at 1043).

Here, whether evaluated on the basis of all four factors equally or on a sliding-scale, Plaintiffs are entitled to the requested emergency relief.

B. Plaintiffs Are Likely to Prevail on the Merits.

Plaintiffs' lawsuit challenges the policy and practice of the President and other top White House officials of failing and/or refusing to create or preventing others from creating records of their meetings with foreign leaders in violation of the PRA. *See* Compl. ¶ 62. As such, it fits squarely within the types of challenges the D.C. Circuit recognized are subject to judicial review in *Armstrong v. Exec. Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993) ("*Armstrong II*"), to preserve the careful balance Congress struck between a president's right to control decisions about the creation, management, and disposal of specific records while in office, and the public's right to a complete historical record of a president's actions and decisions upon leaving office. Far from challenging quotidian decisions about specific records that a previous decision declared

off-limits, *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) ("*Armstrong I*"), the challenged conduct here concerns a broader policy and practice of excluding from the PRA an entire class of activities: top-level meetings and conversations between the President and certain foreign leaders.[2]

The challenged conduct also supports mandamus relief, because the PRA imposes on the President clear, ministerial duties. Those duties include the PRA's requirement that

> the President *shall* take *all* such steps . . . to *assure* that the activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties are adequately documented.

44 U.S.C. § 2203(a) (emphasis added). Although the PRA gives the President discretion to determine what steps to take, the statute's use of the word "shall" leaves the President no discretion to ignore the obligation to document his activities.

Further, the PRA dictates that the President "*shall*" categorize records as either "presidential" or "personal." 44 U.S.C. § 2203(b) (emphasis added). While the statute leaves to the President when to categorize records, it leaves the President no discretion on whether to categorize records. The PRA also instructs the President to "implement[] . . . records management controls . . . to assure that . . . [presidential] records are preserved and maintained, 44 U.S.C. § 2203(a), thereby imposing another non-discretionary duty on the President. Finally, the PRA imposes a litany of non-discretionary obligations on the President before presidential records may be destroyed. *See* 44 U.S.C. § 2203(c) (requirement to determine records no longer have value); *id.* at § 2203(c)(1) (requirement to obtain written views of the Archivist); *id.* at §

[2] For a fuller exposition of the legal merits of Plaintiffs' claims the Court is respectfully referred to Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Ps' Opp.").

2203(c)(2) (requirement that Archivist state explicitly he or she does not intend to take any action).

Here, the President's failure to comply with these clear, non-discretionary duties or take these clear, non-discretionary, prescribed steps, as set forth in the Complaint, supports mandamus relief. Those failures include numerous instances where the President and top White House officials acted to exempt certain presidential activities from the scope of the PRA, improperly classified federal records as presidential records, and destroyed or ordered the destruction of presidential records without following the PRA's prescribed steps for such document disposal. *See* Ps' Opp. at 26-29.

Finally, Plaintiffs have raised a valid independent claim under the Constitution's Take Care Clause based on the President's failure to create records of certain presidential activities, which effectively amends the PRA by carving out an entire set of meetings and communications from its requirements. Likewise, Defendants have functionally amended the definition of a presidential record to impermissibly sweep in documents that qualify as federal records under the FRA, such as interpreter notes, and have prevented the State Department from complying with its own recordkeeping obligations under 44 U.S.C. § 3101. *See* Compl. ¶ 36; Ps' Opp. at 35-40.

Through a motion to dismiss, Defendants have raised a panoply of objections to these claims, including arguments that the PRA precludes judicial review, and that Plaintiffs have failed to establish the necessary elements for mandamus relief or Take Care Clause jurisdiction. Their arguments sound a now familiar refrain that the President enjoys unchecked power, free to disregard the PRA with impunity. To hold the President immune from any lawsuit seeking to make him accountable for his recordkeeping violations would, however, fly in the face of the text and purpose of the PRA, its historical context, and the congressional record. Quite simply

"[t]he Constitution does not confer upon [the president] any power to enact laws or to suspend or repeal such as the Congress enacts." *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915). Ignoring the will of Congress here as the Defendants request, would place this Court "in conflict with the legislative branch" and raise, not avoid, separation-of-powers concerns. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1337 (D.C. Cir. 1986).

The revelation that there is, in fact, a record of President Trump's July 25 phone call with President Zelynskyy does not impact Plaintiff's likelihood of success on the merits. In fact, the gravest allegations in the Complaint—that President Trump failed to create records of bilateral in-person meetings with certain foreign leaders—would be bolstered by evidence that records were created of other forms of communication with foreign leaders, that there was a policy and practice of limiting the content of the documentation of those communications, and that there was a policy and practice of blocking federal agencies' access to such content where that content would normally result in an agency record being created or maintained.

C. Plaintiffs Will Suffer Irreparable Injury Absent the Requested Relief.

Plaintiffs brought this suit to challenge policies and practices that deprive the American people and Plaintiffs of a historical record that Congress requires the President to create, maintain, and—eventually—make available to the public via the Freedom of Information Act. As the Complaint explains, "The absence of records . . . when the President and his top advisers are exercising core constitutional and statutory powers causes real, incalculable harm to our national security and the ability of our government to effectively conduct foreign policy because the documentary record of this administration's foreign policy . . . will be unavailable to policy makers and forever lost to history." Compl. ¶ 8.

The credible whistleblower allegations that senior White House officials sought to "lock down" records of the July 25 telephone conversation between President Trump and President Zelenskyy and that this was "not the first time" that politically sensitive information was suppressed by White House officials are evidence of the Defendants' disregard for their recordkeeping responsibilities and the threat of irreparable injury that Plaintiffs and the public face absent this Court's intervention. As discussed below, evidence that is critical to substantiating the claims brought by Plaintiffs in this litigation is in danger of being lost; so too are the records of this administration's foreign policy that the Complaint alleges must be created, classified, and preserved for future generations. That interest is only heightened now that bilateral conversations between the President and the leader of a foreign country will undoubtedly be a matter of enormous historical concern and value.

Courts have recognized that in circumstances similar to those present here, injunctive relief requiring a government defendant to preserve documents is appropriate "where the parties dispute the adequacy of the government's record keeping procedures." *Armstrong v. Bush*, 807 F. Supp. 816, 823 (D.D.C. 1992); *see also Am. Friends Serv. Comm. v. Webster*, 485 F. Supp. 222 (D.D.C. 1980). For instance, in *Citizens for Responsibility and Ethics in Washington v. Executive Office of the President* ("*CREW v. EOP*"), which challenged the deletion of millions of email on White House servers, the district court entered a temporary restraining order requiring the Executive Office of the President to maintain back-up tapes pending resolution of the litigation. Order, *CREW v. EOP*, No. 07-cv-1707 (D.D.C. Nov. 12, 2007) (adopting Report and Recommendation, *CREW v. EOP*, No. 07-cv-1707 (D.D.C. Oct. 19, 2007)). In *CREW v. EOP*, the court issued injunctive relief despite the government's objection that "CREW should instead accept a declaration from an authorized official expressing the defendants' intention to preserve

all the backup media it has in its possession." Report and Recommendation, *CREW*, No. 07-cv-1707, at 2. Similarly, in *American Friends Service Committee*, the Court issued a preliminary injunction requiring the Archivist and the FBI to cease destruction of records until a retention plan and records control schedules were in place. *Am. Friends Serv. Comm.*, 485 F. Supp. at 236.

Especially in light of the unfolding evidence that White House lawyers have aided and abetted the President by attempting to cover up evidence of his unlawful conduct, Plaintiffs should not have to rely solely on ill-defined assurances that records Defendants in their sole discretion deem relevant will be preserved, the position set forth in two letters from their counsel. *See* Exs. G and I. In *Armstrong v. Bush*, the Court issued a temporary restraining order precluding the President, Executive Office of the President, the Archivist, and the National Security Council from erasing material stored on an electronic communications system in part because the defendants were unwilling to guarantee that a wholesale purge of electronic records would not occur. *Armstrong*, 807 F. Supp. at 820. "Under these circumstances and mindful that the most compelling reason to grant injunctive relief is to prevent the judicial process from being rendered futile by a party's act or refusal to act," the court found "that the Plaintiffs [had] made a showing of immediate and irreparable harm." *Id.* at 821. *See also* Wright and Miller, Federal Practice and Procedure § 2947 (3d ed.) ("[T]he most compelling reason in favor of entering a Rule 65(a) order is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act.").

The irreparable harm Plaintiffs face in this matter is nearly identical: Plaintiffs can be afforded full and effective relief only if records that must be created, classified, and maintained are in fact maintained. Records documenting bilateral conversations or meetings between the President and other foreign leaders or the absence of records documenting the same are highly

probative evidence of Plaintiffs' claims, and likely to constitute discoverable evidence, *see* Fed. R. Civ P. 26 (b)(1), proving Plaintiffs' allegations that Defendants are engaging in a pattern and practice of failing to create, classify, and/or maintain presidential records as the law requires.

The allegations set forth in the whistleblower complaint as well as other evidence of recordkeeping irregularities in this administration also establish that irreparable harm is likely. First, the whistleblower complaint and the memorandum of President Trump's telephone conversation with Zelenskyy are powerful evidence that the President engaged in extraordinarily serious misconduct that appears to include the solicitation of a foreign power's interference in the 2020 presidential election and the withholding of military aid to ensure that country followed through. Whistleblower Compl.; Memorandum of Telephone Conversation. Second, in the face of similarly grave reports that he asked former White House Counsel McGahn to fire Special Counsel Mueller, President Trump responded by asking McGahn to falsely deny the report and to create a false record denying the report. Mueller Report at 115-17. Third, there are specific allegations -- allegations that have been deemed credible by the IGIC -- that records of bilateral conversations involving the President have already been mishandled. The whistleblower complaint alleges that "White House officials told [the whistleblower] that they were 'directed' by White House lawyers to remove the electronic transcript from the computer system in which such transcripts are typically stored." Whistleblower Compl. at 3. In addition, the whistleblower complaint alleges that "[a]ccording to White House officials [the whistleblower] spoke with, this was 'not the first time' under this Administration that a Presidential transcript was placed into this codeword-level system solely for the purpose of protecting politically sensitive—rather than national security sensitive—information." *Id.*, Appendix, at 1. The whistleblower's assertion that a codeword-level system was used to conceal records of calls between President Trump and

foreign leaders has been confirmed by at least three separate public reports. Dawsey and Leonnig, *Washington Post* (Sept. 26, 2019); Brown, Sciutto and Liptak, *CNN* (Sept. 28, 2019); Barnes, Crowley, Rosenberg and Mazzetti, *New York Times* (Sept. 27, 2019). Furthermore, public reporting indicates that at least once in 2018, "Defense Department officials were asked to *send back* transcripts of calls to the White House *after Trump aides grew worried they could be disclosed*." Dawsey and Leonnig, *Washington Post* (Sept. 26, 2019) (emphasis added). Fourth, other components of the Executive Branch, including the Director of National Intelligence, the Attorney General, and the Office of Legal Counsel already have taken concrete steps to try to conceal the existence and substance of the whistleblower complaint, *see* Exs. C, D, and E, which calls into question whether there are any effective checks on White House misconduct within the executive branch. In the face of this mounting evidence, the assertion of Defendants' counsel that Plaintiffs have not offered even a suggestion "that spoliation of relevant evidence is likely to occur," Ex. I, defies credibility.

In sum, the President: has engaged in extraordinary misconduct; has a history of hostility to accurate recordkeeping; has previously instructed his attorneys to lie and create false records; faces credible allegations of recordkeeping irregularities; and is now served by senior aides, attorneys, and executive branch components who are willing to take unlawful action on his behalf. In such circumstances, irreparable harm to the evidence that Plaintiffs and—eventually, the American people—are entitled to is at least likely.

The fact that the White House has already released a memorandum of telephone conversation of Trump's July 25 call with Zelenskyy does not undercut the potential harm to Plaintiffs for three reasons. First, additional records created of President Trump's communications with the Ukrainian president might help define the contours of President

Trump's policy and practice of not creating records of bilateral meetings with other foreign leaders. And even if adequate records of the President's communications with Zelenskyy were created as the PRA requires, they are evidence that Plaintiffs could use to demonstrate that equivalent records were not created of President Trump's bilateral conversations and meetings with other foreign leaders, including Russian President Putin and North Korean leader Kim Jung-Un. *See* Compl. ¶¶ 6, 39, 62-67, 75-76, 79-84.

Second, Plaintiffs also allege that the President has violated the PRA, the FRA, and his responsibilities under the Take Care Clause by preventing agencies from creating and maintaining records, by asserting unilateral and exclusive control over records of meetings with foreign leaders, by disposing of records without the prior written permission of the Archivist, and by interfering with the duty of federal agencies to make and preserve records. *See* Compl. ¶¶ 85-106. Public reporting suggests that White House officials have improperly asserted control over agency records maintained by the Department of Defense. Dawsey and Leonnig, *Washington Post*, Sept. 26, 2019. To the extent that White House attorneys sought to claw back records that were obtained by an agency and came into its possession in the legitimate conduct of its official duties, those actions would violate recordkeeping laws. *See U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989).

Finally, there are credible allegations that the President's recordkeeping failures and irregularities may be more widespread than Plaintiffs have already alleged or that is otherwise publicly known. The whistleblower complaint contains a credible allegation that presidential records were misclassified on other occasions. Whistleblower Compl., Appendix at 1. The existence of one record from one meeting provides no assurance that the records Plaintiffs might

be entitled to discover in this litigation and that the American people ultimately are entitled to under the PRA and the Freedom of Information Act are being preserved.

D. Defendants Will Not Be Harmed by the Requested Relief.

The immediate relief that plaintiffs seek will require nothing more of the Defendants than what the law already mandates: the preservation of agency records under agency custody pursuant to the FRA, 44 U.S.C. §§ 3101, *et seq.*, and the preservation of presidential records under the president's custody pursuant to the PRA, 44 U.S.C. §§ 2201, *et seq*. Thus, requiring Defendants to comply with the law cannot properly be characterized as a burden. Indeed, courts have recognized in circumstances substantially similar to those present here that preliminary relief requiring document preservation is appropriate "where the parties dispute the adequacy of the government's record keeping procedures." *Armstrong*, 807 F. Supp. at 823; *see also Am. Friends Serv. Comm.*, 485 F. Supp. at 236. Defendants "cannot suffer harm from an injunction that merely ends an unlawful practice." *Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 179 (D.D.C. 2017) (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013)); *accord R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015).

Moreover, Plaintiffs simply seek to enforce preservation obligations to which Defendants already are subject. A party to litigation has an obligation "to preserve potentially relevant evidence . . . once that party anticipates litigation." *Zhi Chen v. District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011) (citation omitted); *see also Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). Consistent with that obligation, Plaintiffs sought assurances that Defendants were complying with their preservation obligations—assurances made all the more necessary by the nature of the challenged conduct here (failure to follow the PRA's mandatory record requirements) and the recent conduct of the President and White House officials. Nor can

Defendants credibly dispute the relevance of the evidence Plaintiffs seek to have preserved, as it lies at the heart of Plaintiffs' Complaint and fits into the larger pattern of conduct Plaintiffs are challenging. Requiring Defendants to comply with their preservation obligations during the pendency of this litigation simply reinforces an obligation they already bear.

E. The Balance of Equities and Public Interest Favor the Requested Relief.

The balance of equities and the public interest—which "merge" when "the [g]overnment is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009)—weigh heavily in favor of a temporary restraining order.

Beyond the harm to Plaintiffs, the public interest also strongly favors a temporary restraining order. Congress enacted the PRA to "promote the creation of the fullest possible documentary record" of a president and ensure its preservation for "scholars, journalists, researchers and citizens of our own and future generations." 124 Cong. Rec. H34894 (daily ed. Oct. 10, 1978) (Statement of Rep. Brademas). Toward that end, the PRA vests the public with ownership rights in the records of a presidency and provides a process of public access to those papers once a president leaves office. *See* 44 U.S.C. § 2202. Recognizing the "immense historical value" of a president's papers, 124 Cong. Rec. S36843 (daily ed. Oct. 13, 1978) (Statement of Rep. Percy), Congress wanted to provide the people with a key to our past, in the hope it will shed light on the course we should chart for the future. It is self-evident that Defendants' non-compliance with the PRA's directives frustrates its purpose and intent and risks irreparable harm to Plaintiffs' efforts to enforce the FRA, PRA, and Take Care Clause. The public interest in upholding and protecting the rights the PRA confers is best served here by issuing the requested temporary restraining order.

CONCLUSION

Regrettably, Defendants were unwilling to provide Plaintiffs with adequate and appropriate assurances that all potentially relevant evidence in this case is being preserved. As a result, Plaintiffs have no other choice but to seek this Court's emergency intervention to ensure their rights, and the rights of the American people, can be vindicated. Accordingly, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for a temporary restraining order.

Respectfully submitted,

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