[ORAL ARGUMENT NOT YET SCHEDULED]

No. 17-5225

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

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff-Appellant

v.

INTERNAL REVENUE SERVICE,

Defendant-Appellee

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. The plaintiff, appellant in this Court, is the Electronic Privacy Information Center. The defendant, appellee in this Court, is the Internal Revenue Service. No intervenors or amici have appeared either below or in this Court.

B. Rulings Under Review. The ruling under review is the Order of the United States District Court (Judge James E. Boasberg) dated August 18, 2017, granting the Internal Revenue Service's motion to dismiss the Electronic Privacy Information Center's complaint (D.D.C. Case No. 1:17-cv-670) (Doc. 17), entered pursuant to the Memorandum Opinion entered that same day (Doc. 18). The Memorandum Opinion is reported at 216 F. Supp. 3d 1.

C. Related Cases. This case has not previously been before this Court or any court other than the District Court. Counsel is not aware of any related cases currently pending in this Court or in any other court, as provided in Cir. R. 28(a)(1)(C).

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GLOSSARY

ADD	Appellant's addendum
APA	Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*
Br.	Appellant's opening brief on appeal
CIA	Central Intelligence Agency
Doc.	Documents of record as numbered by the Clerk of the District Court
EPIC	Electronic Privacy Information Center
FOIA	Freedom of Information Act, 5 U.S.C. § 552
JA	Joint Appendix
Joint Committee	congressional Joint Committee on Taxation
I.R.C.	Internal Revenue Code of 1986 (26 U.S.C.)
I.R.M.	Internal Revenue Manual
IRS	Internal Revenue Service
the President	President Donald J. Trump
Treas. Reg.	Treasury Regulation (26 C.F.R.)

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STATEMENT OF JURISDICTION

On February 16, 2017, the Electronic Privacy Information Center (EPIC) submitted to the Internal Revenue Service (IRS) a request for records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.[1] (Doc. 1, JA52.) On March 2, 2017, the IRS notified EPIC that it was

[1] "Doc." references are to the documents of record as numbered by the Clerk of the District Court. "JA" references are to the parties' joint appendix. "Br." references are to EPIC's opening brief.

closing the request as imperfect. (*Id.*) On March 29, 2017, EPIC renewed its request for records; on April 6, 2017, the IRS notified EPIC that it was again closing the request as imperfect. (*Id.*, JA52-53.) On April 15, 2017, EPIC filed a timely suit against the IRS in the District Court challenging, pursuant to FOIA and the Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq.*, the IRS's closure of the FOIA request. (Doc. 1, JA43-56.) The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 552(a)(4)(B) and 702.

On August 18, 2017, the District Court, upon the IRS's motion, entered an order dismissing EPIC's case without prejudice. (Docs. 17, 18, JA4-24.) That order was final and resolved all claims of all parties. On September 26, 2017, EPIC filed a timely notice of appeal. (Doc. 19, JA64; 28 U.S.C. § 2107(b); Fed. R. App. P. 4(a)(1)(B).) This Court has jurisdiction under 28 U.S.C. § 1291.[2]

[2] That EPIC's case was dismissed without prejudice does not affect this Court's jurisdiction. An order dismissing a case without prejudice is final and appealable. *Ciralsky v. C.I.A.*, 355 F.3d 661, 666-67 (D.C. Cir. 2004).

STATEMENT OF THE ISSUES

The Electronic Privacy Information Center (EPIC) submitted a FOIA request to the IRS seeking the tax returns and return information of President Donald J. Trump ("the President"). The issues presented are:

1. Whether the District Court correctly held that EPIC had not established its entitlement to the President's returns and return information and, therefore, correctly dismissed its FOIA claims seeking such materials.

2. Whether the District Court correctly dismissed EPIC's APA claims, where EPIC had an adequate remedy under FOIA and sought an injunction compelling the IRS to take discretionary action.

STATUTES AND REGULATIONS

The relevant statutory and regulatory provisions are set forth in the addendum, *infra*.

STATEMENT OF THE CASE

A. The nature of the case and course of proceedings in the District Court

EPIC submitted a FOIA request, as well as an "appeal and renewed request," to the IRS seeking the President's tax returns and

other return information. (Doc. 14-3, JA25-28; Doc. 14-5, JA31-40.) Section 6103 of the Internal Revenue Code (I.R.C.) (26 U.S.C.) prohibits the IRS from disclosing such materials unless certain conditions are met. As relevant here, the IRS may release a taxpayer's return information if the taxpayer has authorized it to do so, I.R.C. § 6103(c), and the IRS has more limited discretion to release return information if the congressional Joint Committee on Taxation (Joint Committee) has authorized it to do so, I.R.C. § 6103(k)(3). EPIC, however, failed to provide authorization from either the President or the Joint Committee. (Doc. 14-3, JA25-28; Doc. 14-5, JA31-40.) The IRS notified EPIC that its FOIA request sought information protected by section 6103; that it had not established its entitlement to such information; and that its request would be closed as imperfect. (Doc. 14-4, JA29-30; Doc. 14-6, JA41-42.)

EPIC filed suit under FOIA and the APA, challenging the closure of its request. (Doc. 1, JA43-56.) The IRS moved to dismiss EPIC's complaint pursuant to Fed. R. Civ. P. 12(b)(6). (Docs. 14, 16.) The District Court held that EPIC's complaint failed to state a claim upon which relief can be granted, granted the IRS's motion to dismiss, and

entered an order dismissing EPIC's case without prejudice. (Docs. 17, 18, JA4-24.)

B. The relevant facts

EPIC is a non-profit organization based in Washington, D.C. (Doc. 1, JA44.) EPIC submitted a FOIA request to the IRS seeking two categories of materials: (i) the President's individual income tax returns for the 2010 to 2017 tax years; and (ii) "any other indications of financial relations [by the President] with the Russian government or Russian businesses." (Doc. 14-3, JA26.) Collectively, EPIC referred to these materials as the President's "tax records." (*Id.*, JA27.) EPIC asserted that there was significant public interest in release of those records and that the President had a "diminished expectation of privacy" with respect to them. (*Id.*, JA26-27.)

EPIC's initial request made no mention of section 6103, which provides that tax returns and return information are confidential, and that the IRS can disclose those materials only to the taxpayer, to someone with a statutorily specified relationship to the taxpayer, or for a statutorily specified purpose. (*Id.*, JA25-28.) Nor did EPIC's request

contain authorization to release the materials from the President, a representative of the President, or anyone else. (*Id.*)

The IRS notified EPIC that its request sought materials that, to the extent they existed, are made confidential by section 6103, and that the relevant Treasury regulations required that EPIC establish its entitlement to the materials before the IRS further processed the request. (Doc. 14-4, JA29-30.) The IRS concluded that, because EPIC had not established its entitlement to the materials requested, its request was being closed as incomplete. (*Id.*)

EPIC then submitted "an appeal and renewed request" for the tax records. (Doc. 14-5, JA31-40.) This time, EPIC acknowledged the applicability of section 6103 to the requested materials. (*Id.*, JA32-33.) But it argued that it was entitled to the materials based on section 6103(k)(3), which provides a narrowly tailored exception to section 6103(a)'s general prohibition against the disclosure of return information. (*Id.*, JA32-40.)

As characterized by EPIC, section 6103(k)(3) "gives the IRS discretion to release certain tax return information with the permission of the Joint Committee on Taxation . . . to correct a misstatement of

fact." (*Id.*, JA32 (citation and internal quotations omitted).) EPIC asserted that disclosure of the requested materials would correct one or more misstatements of fact, as follows:

(1) In 2016 and 2017, the President denied having any present investments, debts, or deals in Russia. Also in 2016 and 2017, the media reported that the President has, in the past, had financial involvement with Russia. EPIC asserted that the President's denials and the media reports "directly contradicted" one another and that release of the requested materials to EPIC was "necessary" to resolve the contradiction.

(2) In 2016, the President suggested that the IRS may have examined his tax returns for motives unconnected with fair tax administration. EPIC asserted that releasing the requested materials to it would "dispel[ ] or confirm[ ]" that suggestion, although it did not explain the nexus between the President's suggestion and the materials sought.

(*Id.*, JA33-39.)

Like the original request, EPIC's appeal and renewed request did not contain an authorization from the President to release the materials. Nor did it include an authorization by the Joint Committee, which is a prerequisite to the disclosure of return information under section 6103(k)(3). (*Id.*, JA31-40.) Instead, EPIC urged the IRS to "move promptly to obtain permission from the Joint Committee" to release the materials. (*Id.*, JA32.)

In April 2017, following a phone conversation between the IRS Disclosure Office and EPIC's counsel, the IRS closed EPIC's renewed request as incomplete. (Doc. 1, JA53; Doc. 14-6, JA 41-42.) The IRS explained that EPIC's renewed request—like its original request—sought returns and return information protected from disclosure by section 6103; that EPIC was required to establish its entitlement to the materials before the IRS further processed the request; and that EPIC had not done so. (Doc. 14-6, JA 41-42.) The IRS acknowledged EPIC's invocation of section 6103(k)(3), but informed EPIC that "IRC § 6103(k)(3) does not afford any rights to requesters under the FOIA to the disclosure of tax returns or return information of third parties." (*Id.*, JA41.)

C. Proceedings in the District Court

1. EPIC's complaint

EPIC filed this suit in the District Court, asserting three FOIA claims (Counts I to III) and two APA claims (Counts IV and V). (Doc. 1, JA43-56.) The gravamen of the complaint was that the IRS should not have closed its FOIA request because disclosure of the President's returns and return information was authorized by section 6103(k)(3) to correct one or more misstatements of fact. (*See id.*, JA43.)

In Count I, EPIC alleged that the IRS had failed to timely "make a determination regarding" whether it would comply with EPIC's FOIA request. (*Id.*, JA54.) In Count II, EPIC alleged that the IRS had failed "to take all reasonable steps necessary to release all nonexempt information requested by Plaintiff." (*Id.*) In Count III, EPIC alleged that the IRS had "wrongfully withheld agency records requested by Plaintiff." (*Id.*, JA54-55.)

In Count IV, EPIC alleged that the IRS's closure of its FOIA request was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(a) and short of statutory right under 5 U.S.C. § 706(2)(c)." (*Id.*, JA55.) In Count V,

EPIC alleged that the IRS's "fail[ure] to seek permission from the Joint Committee on Taxation to release the records EPIC has requested . . . constitutes agency action unlawfully withheld or unreasonably delayed in violation of 5 U.S.C. § 706(1)." (*Id.*, JA55-56.)

In its prayer for relief, EPIC requested that the District Court "[h]old unlawful and set aside the IRS's rejection of EPIC's FOIA Request." (*Id.*, JA56.) EPIC further requested that the court order the IRS to conduct a reasonable search for documents responsive to the request, "take all reasonable steps possible to release nonexempt records," and "disclose to Plaintiff all responsive, non-exempt records." (*Id.*)

2. The District Court's dismissal of the case

The IRS moved to dismiss EPIC's complaint on the ground that it failed to state a claim upon which relief can be granted, and the District Court granted that motion. (Docs. 17, 18, JA4-24.)

Beginning with EPIC's FOIA claims, the court observed that the parties were in agreement regarding the material facts. (*Id.*, JA14-15.) They agreed that EPIC's FOIA request exclusively sought returns and return information; they agreed that those materials are protected by

section 6103; and they agreed that EPIC needed to demonstrate that an exception to section 6103(a)'s prohibition against disclosure applied. (*Id.*) The parties also agreed that EPIC did not come within section 6103(c), which conditions disclosure on authorization from the taxpayer. (*Id.*)

The heart of the dispute was whether EPIC could establish that it was entitled to the requested materials under section 6103(k)(3), which provides the IRS with discretionary authority to disclose return information "to the extent necessary for tax administration purposes to correct a misstatement of fact." (*Id.*, JA15.) Section 6103(k)(3) further conditions disclosure on prior approval by the Joint Committee. (*Id.*) For the purposes of its decision, the District Court assumed (without deciding) that EPIC had plausibly alleged facts showing that disclosure of the requested information would correct a misstatement of fact and was necessary for tax administration. (*Id.*, JA17.) Those assumptions, however, did not save EPIC's FOIA claims because EPIC had neither submitted authorization from the Joint Committee nor identified any authority requiring the IRS to seek such authorization: "The plain terms of [section 6103(k)(3)], which require congressional approval,

foreclose any relief from the exhaustion barrier." (*Id.*, JA18-19 (emphasis in original).)

Having disposed of EPIC's FOIA claims, the court similarly held that EPIC was not entitled to relief under the APA. (*Id.*, JA16-19.) With respect to Count IV, seeking further processing of EPIC's FOIA request, the court explained that a plaintiff can seek review under the APA only if it has "no other adequate remedy in a court." (*Id.*, JA17-18 (citing 5 U.S.C. § 704).) Where, as here, a plaintiff seeks access to an agency's records, this Court's precedent left "little doubt that FOIA offers an adequate remedy" precluding APA review. (*Id.*, JA17-18 (citing *Citizens for Responsibility and Ethics in Washington (CREW) v. United States Dep't of Justice*, 846 F.3d 1235, 1245-46 (D.C. Cir. 2017) (internal quotations omitted).) And with respect to Count V, seeking to compel the IRS to seek Joint Committee approval to release the requested materials, the court held that such relief was inappropriate where nothing in section 6103(k)(3) provided that the IRS "must or shall or even should consult with the Joint Committee." (*Id.*, JA22 (emphasis in original).)

Finally, the court held that EPIC had forfeited all claims that it had omitted from its complaint and advanced only in footnotes of its response brief, including its claim that section 6103(k)(3)'s congressional preapproval clause violates the separation of powers. (*Id.*, JA22-23.)

SUMMARY OF ARGUMENT

At issue in this case is whether the IRS can be forced to release information that is protected from disclosure by statute, without complying with the safeguards against unauthorized disclosure contained in that statute. Specifically, section 6103 prohibits the disclosure of taxpayers' returns and return information absent certain conditions precedent that are not met here.

EPIC submitted a FOIA request to the IRS specifically and exclusively seeking the President's returns and return information. EPIC could have satisfied the condition precedent to disclosure found in section 6103(c) had it submitted the President's authorization to release the materials. It did not. Instead, EPIC sought to invoke section 6103(k)(3), which provides the IRS with limited discretionary authority to disclose return information following authorization by the Joint

Committee. But just as EPIC failed to submit the President's authorization, it failed to submit the Joint Committee's authorization. Rather than attempt to cure the defects that the IRS identified in the FOIA request, EPIC filed suit seeking relief under FOIA (Counts I to III) and the APA (Counts IV and V). The District Court correctly dismissed both sets of claims.

1. EPIC's FOIA claims fail on three grounds, each of which, standing alone, warrants dismissal for failure to state a claim upon which relief can be granted. First, section 6103(k)(3) does not invest private parties with the right to force the disclosure of protected return information. Second, section 6103 is an Exemption 3 statute that grants the IRS limited discretionary authority to release information that would otherwise be kept confidential. This Court has held that an agency's decision not to make a discretionary disclosure of such information is unreviewable. Finally, even if this Court could review the IRS's decision not to make a discretionary disclosure, the IRS's discretion under section 6103(k)(3) is expressly made subject to a condition precedent (*i.e.*, Joint Committee approval) that EPIC has not satisfied and that the IRS need not try to satisfy on EPIC's behalf.

In an attempt to sidestep its failure to obtain Joint Committee approval, EPIC raises two arguments that it either wholly failed to advance below or advanced in such conclusory fashion that they were deemed forfeited: (i) even if nothing in FOIA or section 6103(k)(3) requires the IRS to seek Joint Committee approval, the IRS is required to do so pursuant to the Internal Revenue Manual (I.R.M.); and (ii) requiring Joint Committee approval prior to the discretionary release of protected return information represents an unconstitutional exercise of executive power by the legislative branch. Even if this Court considers the arguments, it should reject them as meritless. Regarding the former, the I.R.M.—both generally and with respect to its guidance about section 6103(k)(3)—lacks the force of law and does not bind the IRS. Regarding the latter, this Court has made clear that the basic nondisclosure decision under Exemption 3 statutes is appropriately a function of the legislative, not executive, branch.

2. EPIC's two APA claims also fail. Controlling precedent makes clear that a plaintiff cannot bring a claim under the APA if it either (a) has another adequate remedy available to it; or (b) seeks to compel an agency to take action that is not legally required. Here,

EPIC's first APA claim seeks further processing of its FOIA request, which is precisely the relief that EPIC can (and does) seek under FOIA. And EPIC's second APA claim seeks an order compelling the IRS to request Joint Committee approval to release the President's return information, even though the IRS has no obligation to make such a request.

The District Court's order dismissing EPIC's case is correct and should be affirmed.

ARGUMENT

The District Court correctly dismissed EPIC's case seeking the President's confidential tax information

Standard of review

This Court reviews *de novo* the District Court's decision to dismiss a plaintiff's case under Fed. R. Civ. P. 12(b)(6). *Jones v. Horne*, 634 F.3d 588, 595 (D.C. Cir. 2011).

A. The District Court correctly dismissed EPIC's FOIA claims

The IRS closed EPIC's initial FOIA request (which did not mention section 6103) because EPIC failed to satisfy the agency's regulation concerning the disclosure of tax returns and return information – *i.e.*, that a third-party requester must provide the

taxpayer's consent to the disclosure. (JA29.) In its appeal and renewed request, EPIC relied upon section 6103(k)(3) as the authority permitting disclosure. The IRS closed that request because section 6103(k)(3) "does not afford any rights to requesters under the FOIA to the disclosure of tax returns or return information of third parties," and because EPIC had still failed to provide the President's consent to the disclosure. (JA41.) The District Court dismissed EPIC's case because EPIC (i) failed to obtain the President's consent, and (ii) failed to show that the Joint Committee had approved of the disclosure, which is a requirement under section 6103(k)(3). The District Court's decision is correct and should be affirmed.

1. Introduction: The statutes and regulations governing disclosure of returns and return information

This case involves the interplay between FOIA and section 6103 of the Internal Revenue Code. FOIA generally provides for "open disclosure of public information." *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982). Section 6103(a), however, provides that, except as authorized by the Internal Revenue Code, "[r]eturns and return information shall be confidential." I.R.C. § 6103(a).

a. FOIA

FOIA is the primary statute authorizing members of the public to request records maintained by federal agencies and to bring suit to compel "the production of agency records improperly withheld." 5 U.S.C. § 552(a)(3), (4)(B). FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003). As part of that balance, Congress exempted nine categories of material from disclosure. *Id.*; 5 U.S.C. § 552(b)(1)-(9).[3] If the material

[3] Section 552(b) provides that "[t]his section does not apply to [certain] matters that are" (1) authorized "to be kept secret in the interest of national defense or foreign policy"; (2) "related solely to the internal personnel rules and practices of an agency"; (3) "specifically exempted from disclosure by [certain types of] statute[s]"; (4) "trade secrets and commercial or financial information obtained from a person and privileged or confidential"; (5) "inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency"; (6) "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"; (7) "records or information compiled for law enforcement purposes"; (8) "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation and supervision of financial institutions"; or (9) "geological and

requested falls within one of the nine exemptions, FOIA's disclosure requirement "does not apply" and the material is not subject to disclosure. 5 U.S.C. § 552(b).

As relevant here, Exemption 3 provides that FOIA's disclosure requirement does not apply to material that another statute specifically exempts from disclosure, as long as the other statute satisfies one of three conditions. *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Retirement Bd.*, 830 F.2d 331, 333-34 (D.C. Cir. 1987) (citing 5 U.S.C. § 552(b)(3)).[4] A statute qualifies for Exemption 3 status if it "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552(b)(3)(A)(i). A statute also qualifies for Exemption 3 status if it either "establishes particular criteria for withholding" or "refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A)(ii).

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geophysical information and data, including maps, concerning wells." 5 U.S.C. § 552(b)(1)-(9).

[4] In 2009, the relevant paragraphs of subsection (b)(3) were renumbered, but that renumbering did not alter the text or substance thereof.

Unlike other exemptions that require an examination of "'the detailed factual contents of specific documents,'" the sole criterion for determining whether Exemption 3 applies "'is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage.'" *Morley v. C.I.A.*, 508 F.3d 1108, 1126 (D.C. Cir. 2007) (quoting *Retired R.R. Workers*, 830 F.2d at 336); *Goland v. C.I.A.*, 607 F.2d 339, 350 (D.C. Cir. 1978).

Courts have uniformly held that I.R.C. § 6103 qualifies for Exemption 3 status either under paragraph (i) of subsection (b)(3)(A), because it "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue," *Aronson v. I.R.S.*, 973 F.2d 962, 964 (1st Cir. 1992); *Fruehauf Corp. v. I.R.S.*, 566 F.2d 574, 578 n.6 (6th Cir. 1977), or under the latter portion of paragraph (ii) of subsection (b)(3)(A), because it "refers to particular types of matters to be withheld," *Aronson*, 973 F.2d at 964-65; *DeSalvo v. I.R.S.*, 861 F.2d 1217, 1221 n.4 (10th Cir. 1988); *Chamberlain v. Kurtz*, 589 F.2d 827, 838-39 (5th Cir. 1979). Indeed, this Court has held that it is "beyond dispute" that "§ 6103 is the sort of nondisclosure statute contemplated by FOIA exemption 3." *Tax Analysts v. I.R.S.*

(Tax Analysts I), 117 F.3d 607, 611 (D.C. Cir. 1997). Thus, "if § 6103 forbids the disclosure of material, it may not be produced in response to a request under the FOIA." *Church of Scientology of Calif. v. I.R.S. (Church of Scientology II)*, 792 F.2d 153 (D.C. Cir. 1986) (*en banc*), *aff'd*, 484 U.S. 9, 11 (1987).[5]

b. I.R.C. § 6103

The federal tax system largely depends on taxpayers providing their personal information to the IRS. *United States v. Bisceglia*, 420 U.S. 141, 145 (1975). To encourage compliance with the Internal Revenue Code's self-reporting requirements, Congress enacted section 6103 to assure taxpayers that the information the IRS collects about them will remain confidential. *Church of Scientology II*, 792 F.2d at 158-59; *In re United States (Panasonic)*, 669 F.3d 1333, 1336-37 (Fed. Cir. 2012). In so doing, Congress "decided that, with respect to tax returns, confidentiality, not sunlight, is the proper aim." *Aronson*, 973 F.2d at 966. In particular, section 6103(a) provides that two distinct categories of material—"returns" and "return information"—

[5] The pertinent portion of the text of section 6103 is set forth at pp. 21-22, *infra*.

shall be confidential and not inspected or disclosed "except as authorized by this title." I.R.C. § 6103(a).[6]

The term "return" is defined to include "any tax or information return, declaration of estimated tax, or claim for refund . . . which is filed with the Secretary [of the Treasury] . . ." I.R.C. § 6103(b)(1). The term "return information" is expansively defined to include:

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessment, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition or offense.

I.R.C. § 6103(b)(2)(A). This broad definition of return information covers "virtually any information collected by the Internal Revenue Service regarding a person's tax liability." *Landmark Legal Found. v.*

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[6] "Returns and return information shall be confidential, and except as authorized by this title . . . no officer or employee of the United States . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. . . ." 26 U.S.C. § 6103(a).

IRS, 267 F.3d 1132, 1135 (D.C. Cir. 2001) (citation and internal quotations omitted).

Section 6103 prohibits the IRS from disclosing a taxpayer's returns or return information absent explicit statutory authorization to do so. I.R.C. § 6103(a); *Church of Scientology II*, 484 U.S. at 10. Thus, the IRS can disclose a taxpayer's returns or return information only to the taxpayer, to someone with a statutorily specified relationship to the taxpayer, or for a statutorily specified purpose. *See* I.R.C. § 6103(c)-(o). Congress felt so strongly about maintaining confidentiality that it made it a felony to willfully disclose a taxpayer's returns or return information without statutory authorization. *See* I.R.C. § 7213. In the case of knowing or negligent disclosures, the government is liable for civil damages. I.R.C. § 7431(a).

c. Treasury regulations governing FOIA requests that seek information protected by I.R.C. § 6103

An agency's duty to process a FOIA request does not commence until it has received a proper (or "perfected") request. 5 U.S.C. § 552(a)(3)(A), (a)(6)(A); Treas. Reg. § 601.702(c)(1)(i). As relevant here, a FOIA request is not considered perfected unless it is made "in accordance with [the agency's] published rules stating the time, place,

fees (if any), and procedures to be followed." 5 U.S.C. § 552(a)(3)(A); Treas. Reg. § 601.702(c)(4); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 754-55 n.5 (1989).

As a condition for seeking judicial review, FOIA requires a requester to exhaust its administrative remedies, which includes submission of a request that complies with the agency's rules. 5 U.S.C. § 552(a)(6)(A); Treas. Reg. § 601.702(c)(13). As long as the agency's rules are reasonable, a requester's failure to comply with them subjects its FOIA request to administrative closure, and any subsequent FOIA suit may be dismissed for failure to state a claim upon which relief can be granted. *Clemente v. F.B.I.*, 867 F.3d 111, 119 (D.C. Cir. 2017) (agency rules judged by standard of reasonableness); *see* Treas. Reg. § 601.702(c)(1)(i) (request that does not "conform[ ] in every respect with the rules and procedures set forth in this section" "shall be closed" as noncompliant), (4)(i) ("only requests for records which fully comply with the requirements of this section can be processed").

When a statute like section 6103 restricts disclosure of the material sought, Treas. Reg. § 601.702(c)(4)(i)(E) requires that a FOIA request "establish the identity and the right of the person making the

request to the disclosure of the records . . ." If such a request seeks material "pertaining to other persons, the requester shall furnish a properly executed power of attorney, Privacy Act consent, or tax information authorization as appropriate." Treas. Reg. § 601.702(c)(5)(iii)(C). This regulatory requirement is consistent with, and implements, section 6103(c), which authorizes the Secretary to disclose the return information of any taxpayer "to such person or persons as the taxpayer may designate in a request for or consent to such disclosure."

In light of the IRS's regulatory requirement, if a FOIA request seeks third-party material that falls within the scope of section 6103, but fails to establish the requester's entitlement to that material, the IRS need not conduct the academic exercise of collecting the material and informing the requester that none of the material can be released. Treas. Reg. § 601.702(c)(4)(i)(E), (c)(5)(iii)(C). Rather, the IRS may close the FOIA request administratively without further processing. *Goldstein v. I.R.S.*, 279 F. Supp. 3d 170, 178-80 (D.D.C. 2017) (dismissing FOIA suit where requester sought third-party return information but did not establish entitlement thereto); *Kalu v. I.R.S.*,

Civil Action No. 14-998(JEB), 2015 WL 4077756, at *5-*6 (D.D.C. July 1, 2015) (same). *Accord*, *Strunk v. U.S. Dep't of State*, 693 F. Supp. 2d 112, 114-15 (D.D.C. 2010) (dismissing FOIA suit where requester sought travel records regarding president-elect and his mother, but failed to comply with regulation requiring proof of entitlement thereto).

2. EPIC's FOIA claims fail as a matter of law because it failed to submit a perfected request

As discussed below, EPIC's FOIA request exclusively sought materials protected from disclosure by section 6103. The IRS, therefore, could not release the materials absent authorization from the taxpayer to whom it belonged, *i.e.*, the President. *See* I.R.C. § 6103(c). And because EPIC did not establish that the President had authorized it to receive such materials, the District Court correctly held that EPIC had failed to exhaust its administrative remedies and dismissed its FOIA claims.

EPIC's FOIA request sought two categories of the President's tax records: his income tax returns for several years and materials indicating any financial relations between the President and the Russian government or businesses. (Doc. 14-3, JA26-27; Doc. 14-5,

JA32-33.) Both categories consisted entirely of information protected by section 6103, and EPIC does not argue otherwise. Indeed, by arguing that it is entitled to these materials only under the exception provided by section 6103(k)(3), EPIC acknowledges that the material it seeks falls within the proscription of section 6103(a). (Br. 22-34.)

It is similarly undisputed that EPIC has not – either before filing suit or at any time thereafter – obtained the President's authorization to receive his returns or return information, much less submitted proof thereof as required by the relevant Treasury regulations. (Doc. 18, JA15.) Accordingly, EPIC has not exhausted its administrative remedies, and its case was correctly dismissed for failure to state a claim upon which relief could be granted. *See Hidalgo v. F.B.I.*, 344 F.3d 1256, 1258-60 (D.C. Cir. 2003).

3. EPIC's attempt to invoke I.R.C. § 6103(k)(3) is misplaced

EPIC contends that it was not required to obtain the President's authorization because it is entitled to disclosure of the material it seeks under the exception provided by section 6103(k)(3). That contention lacks merit for several reasons. First, the language of subsection (k)(3) does not allow room for a private right of action. Second, EPIC has

failed to show that the Joint Committee has approved the release of the materials that have been requested. And third, this Court would not, in any event, review the Secretary's discretion not to release the requested materials.

Section 6103(k)(3) permits the Secretary to disclose a taxpayer's return information – but it says nothing about a taxpayer's returns – to the extent necessary to correct a misstatement of fact, so long as the disclosure is necessary for tax administration and is preceded by approval from the Joint Committee.[7] That subsection reads as follows:

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

I.R.C. § 6103(k)(3). The purpose of this provision is to provide the IRS with "discretionary authority to make limited disclosures necessary to

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[7] The Joint Committee, which is comprised of members from the Senate Finance Committee and House Ways and Means Committee, is authorized to, *inter alia*, conduct investigations concerning the federal tax system, obtain tax returns necessary for its investigations, and issue reports detailing the results of its investigations. I.R.C. §§ 8001-8005, 8021-8023.

protect itself and the tax system against unwarranted public attacks on its integrity and fairness in administering the tax laws." (*Confidentiality of Tax Return Information: Hearing Before the H. Comm. on Ways and Means*, 94th Congr. 23 (1976); *see also Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005) ("the word 'may' clearly connotes discretion") (citation, internal quotations, and alterations omitted); Doc. 14-5, JA32.)

As originally proposed, the provision would have permitted the IRS to unilaterally exercise this discretion. *S. 4116,* 93rd Congr. (1974). A concern was raised, however, about whether it was appropriate to vest the IRS with such broad authority. *Proposals for Administrative Changes in Internal Revenue Service Procedures: Hearings Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 94th Cong. 107 (1975). One commenter proposed addressing this concern by limiting the types of misstatements to which section 6103(k)(3) would apply, *id.*, but Congress instead chose to condition the IRS's exercise of discretion on prior approval by the Joint Committee, I.R.C. § 6103(k)(3).

EPIC argues that, because the IRS has limited discretion to disclose the President's return information pursuant to section 6103(k)(3), it should be forced to exercise that discretion and release the return information that is responsive to its FOIA request. (Br. 21-37.) EPIC's argument, however, is tantamount to a request that section 6103(k)(3) be rewritten as follows:

> If a private citizen believes that it is in the interest of sound tax administration to disclose return information in order to correct a publicized misstatement of fact, then the Secretary is required to (i) ask the Joint Committee for approval to disclose the information, and (ii) release the information to that citizen or justify its decision not to do so.

This is emphatically not what Congress had in mind when it enacted section 6103(k)(3). Indeed, one can imagine all sorts of public figures who might be subject to having their return information made public under such an expansive exception to the confidentiality requirement. The District Court did not err when it sustained the IRS's decision not to process EPIC's request.

1. As indicated, the IRS declined to process EPIC's appeal and renewed request because subsection (k)(3) "does not afford any rights to requesters under the FOIA to the disclosure of tax returns or return

information of third parties." (JA41.) That is a correct interpretation of the statute.

Section 6103(c) is the provision that was designed for third parties to obtain tax returns and return information. Under that provision, the Secretary is permitted to disclose a taxpayer's returns and return information to a third party, but only if the taxpayer consents to the disclosure.

Nothing in the language or history of section 6103(k)(3) suggests that a private party can use FOIA to make an end-run around the protections conferred upon the taxpayer by subsection (c). And, indeed, forced disclosure of return information to a single private party seems detached from, if not altogether incompatible with, section 6103(k)(3)'s purpose of protecting the IRS and the tax system against unwarranted public attacks. Section 6103(k)(3) was designed to empower the IRS to make discretionary disclosures of exempt information, not to confer on FOIA requesters the right to force such disclosures. As with other statutes that authorize limited discretionary disclosures of third parties' otherwise-protected information, "[t]he only parties with a direct interest in" section 6103(k)(3) "are those who may be injured by an

improper disclosure." *See Retired R.R. Workers*, 830 F.2d at 335-37. Because this excludes EPIC, its reliance on subsection (k)(3) was properly rejected.

2. Even if section 6103(k)(3) could be construed as conferring upon private citizens the right to seek the disclosure of return information, the District Court correctly applied the plain text of the provision when it rejected EPIC's claim, because disclosure is permitted only after the Joint Committee has given its approval. I.R.C. § 6103(k)(3). Here, EPIC did not submit approval from the Joint Committee with its FOIA request, and EPIC has not alleged that the Joint Committee provided approval. (Doc. 18, JA18.) Without that approval, the IRS has no authority to disclose the requested materials pursuant to section 6103(k)(3), and the IRS properly declined to process EPIC's request. Until EPIC submits appropriate authorization, it has failed to exhaust its administrative remedies and cannot seek judicial review on the merits.[8] *See Hidalgo*, 344 F.3d at 1258-60.

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[8] EPIC devotes significant discussion to trying to define what is, and is not, an "appropriate" manner to "establish . . . the right of the person making the request to the disclosure of the records." (Br. 30-34; Treas. Reg. § 601.702(c)(4)(i)(E).) This discussion, however, is beside

Undeterred, EPIC contends that the IRS must seek approval from the Joint Committee and, if the IRS declines, be compelled to do so. (Br. 22-30.) But EPIC cites no authority to support its fanciful claim that an agency must, in discharging its obligations under FOIA, seek authorization from a third party to release otherwise exempt information. Indeed, we are unaware of any case in which a court has held that an agency "improperly withheld" records because the agency failed to seek such authorization. *See Reporters Comm.*, 489 U.S. at 755 n. 6 (citing 5 U.S.C. § 552(a)(4)(B)). To the contrary, this Court has routinely held that an agency can demonstrate that material is covered by an exemption, rendering FOIA's disclosure requirement inapplicable, without requiring the agency to seek third-party authorization. *See, e.g.*, *Lehrfeld v. Richardson*, 132 F.3d 1463, 1466-67 (D.C. Cir. 1998) (holding that taxpayers' return information was exempt from disclosure pursuant to Exemption 3 without requiring that the IRS seek their consent to release it); *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197,

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the point. The IRS did not close EPIC's FOIA request because EPIC submitted noncompliant proof of its entitlement to the President's return information; the IRS closed the request because EPIC submitted no proof of entitlement whatsoever.

1205-06 (D.C. Cir. 1991) (holding that individuals' names and addresses were exempt from disclosure pursuant to Exemption 7(C) without requiring that agency seek their consent to release such information); *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874-80 (D.C. Cir. 1989) (same with Exemption 6). And in an analogous context, this Court has held that the IRS satisfied its burden of establishing that a document in its possession was nonetheless under the control of a congressional committee, and thus constituted a congressional record to which FOIA's disclosure requirement did not apply, without requiring that the IRS request congressional authorization to release the document. *United We Stand, Inc. v. I.R.S.*, 359 F.3d 595, 598-603 (D.C. Cir. 2004).

EPIC contends that the IRS's ability to seek approval from the Joint Committee is transformed into a duty to do so by FOIA's directive that "[a]n agency shall . . . take reasonable steps necessary to segregate and release nonexempt information." (Br. 26, 37-38 (quoting 5 U.S.C. § 552(a)(8)(A)(ii)(II). But that language does not bear the heavy weight that EPIC places upon it. The immediately preceding paragraph makes

clear that this language merely imposes a requirement to segregate and release nonexempt information from a partially exempt record:

> (A) An agency shall . . .
>
> (ii)
>
> (I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and
>
> (II) take reasonable steps necessary to segregate and release nonexempt information.

5 U.S.C. § 552(a)(8)(A)(ii)(I)-(II). Moreover, the immediately following paragraph makes clear that the language does not require an agency to release (or attempt to release) information protected from disclosure by law, either generally or under Exemption 3 specifically:

> Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

5 U.S.C. § 552(a)(8)(B). The tax records sought by EPIC are covered by section 6103 and, therefore, are protected from disclosure on both grounds. *Panasonic*, 669 F.3d at 1336-37; *Tax Analysts I*, 117 F.3d at 611.

In short, EPIC's failure to show that the Joint Committee has approved the disclosure of the return information at issue is an additional reason to affirm the District Court's decision that EPIC has not filed a perfected FOIA request.

3. As discussed, the sole criterion for determining whether Exemption 3 applies is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage. Here, that criterion is inarguably met, and that would have ended the inquiry even if the IRS had processed EPIC's request. EPIC's arguments that disclosure would be popular, equitable, or in the public interest are insufficient to escape the protection afforded by section 6103(a) and Exemption 3. *See Morley*, 508 F.3d at 1126; *Goland v. CIA*, 607 F.2d at 350.

This Court has previously held that when a statute grants an agency limited discretion to disclose documents that it would otherwise be required to withhold, it will not review the agency's decision not to disclose. In *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Retirement Bd.*, this Court addressed an Exemption 3 statute that permitted limited discretionary disclosures. 830 F.2d 331, 331-32, 334 (D.C. Cir.

1987). There, a non-profit organization representing retired railroad workers submitted a FOIA request to the Railroad Retirement Board seeking the names and addresses of retirees. *Id.*, 331. The organization represented that it would use the requested information only to solicit retirees for membership. *Id.*, 332. Section 12 of the Railroad Unemployment Insurance Act mandated that such information "shall not be revealed or open to inspection nor be published in any manner revealing an employee's identity," but gave the Board discretion to disclose the information "in cases in which the Board finds that such disclosure is clearly in furtherance of the interest of the employee or his estate." *Id.*, 332. This Court held that Section 12 was an Exemption 3 statute because it referred to particular matters to be withheld, and it further held that the materials sought fell within the statute. *Id.*, 334-35.

The requester argued that these holdings did not end the inquiry and that this Court should also review whether, in declining to exercise its discretion to disclose the information, the Board had appropriately balanced the competing interests of privacy and disclosure. *Id.*, 335. This Court acknowledged that it had a statutory duty to conduct a *de*

novo review of an agency's assertion of an exemption. *Id.* (citing 5 U.S.C. § 552(a)(4)(B)). But it categorically rejected the requester's argument that it should review the Board's decision not to make a discretionary release. *Id.,* 335-337. Relying on Supreme Court and its own precedent, this Court held that its "[d]e novo review ends with the finding that the particular matter sought . . . is covered by the [Exemption 3] statute." *Id.*, 335 (citations omitted).

In doing so, this Court distinguished between (i) statutory provisions that afford an agency discretion to withhold information that would otherwise be available to the public; and (ii) provisions that afford an agency discretion to disclose information that would otherwise be withheld. *Id.*, 336-37. While it might be appropriate for a court to review an agency's exercise of discretion under the former, it was *in*appropriate for a court to review an agency's exercise of discretion under the latter. *Id.* Because Section 12 was the latter type of statute, the Board's decision against making a discretionary release was not subject to judicial review. *Id.*, 336.

Here, as in *Retired R.R. Workers*, section 6103 is an Exemption 3 statute that affords an agency limited discretion to disclose information

that would otherwise be kept confidential. It follows from *Retired R.R. Workers* that this Court will not compel the IRS to make a discretionary disclosure of material that is protected by section 6103. *See Retired R.R. Workers*, 830 F.2d at 335-37. *Accord*, *Central Platte Nat'l Res. Dist. v. U.S. Dep't of Agric.*, 643 F.3d 1142, 1146-48 (8th Cir. 2011) (following *Retired R.R. Workers*, *supra*); *Irons and Sears v. Dann*, 606 F.2d 1215, 1219-22 (D.C. Cir. 1979).

To be sure, *Retired R.R. Workers* limited its holding to statutes that qualify for Exemption 3 status under the latter portion of paragraph (ii) of subsection (b)(3)(A) (referring to particular types of matters to be withheld), 830 F.2d at 334, and this Court has not had occasion to decide whether section 6103 qualifies for Exemption 3 status under that particular provision. That said, the plain text of section 6103 refers to particular matters to be withheld (*i.e.*, returns and return information) and certainly qualifies. *See Aronson*, 973 F.2d at 964-65; *DeSalvo*, 861 F.2d at 1221 n.4; *Chamberlain*, 589 F.2d at 838-39. Moreover, even if section 6103 only qualified for Exemption 3 status under a different provision of subsection (b)(3)(A), the same rationale would also warrant making such withholding unreviewable. It would

make little sense to afford an agency greater discretion to protect retired railroad workers' names and addresses than to protect taxpayers' identities, income, expenses, etc.

4. The primary authority that EPIC relies upon in support of its claim that the IRS must disclose the President's return information is the Internal Revenue Manual (I.R.M.). Indeed, the table of authorities in EPIC's brief shows 54 citations to the Manual. Notably, EPIC did not argue below that the Manual required the IRS to disclose the return information. Because EPIC never raised this argument below, this Court should not consider it. *See Williams v. Shalala*, 997 F.2d 1494, 1500 (D.C. Cir. 1993). In any event, the argument badly misses the mark.

By way of background, the I.R.M. is a compilation of "[p]rocedures . . . intended to aid in the internal administration of the IRS." *Matter of Carlson*, 126 F.3d 915, 922 (7th Cir. 1997). Consistent with section 6103(k)(3), I.R.M. 11.3.11.3 advises IRS employees that "[t]here may be instances where limited disclosures to correct a misstatement of fact may be warranted." I.R.M. 11.3.11.3(1). Those situations, however, are rare and require approval by both the Commissioner of Internal

Revenue and the Joint Committee. I.R.M. 11.3.11.3(2)-(3). IRS personnel are directed that, if they become aware of a misstatement that may warrant correction, they "should" contact their Disclosure Manager, who "will collect all necessary information" and forward it to appropriate personnel for consideration. I.R.M. 11.3.11.3(4)-(6).

As a threshold matter, it is "'well settled'" that the provisions of the I.R.M. "'are directory rather than mandatory, are not codified regulations, and clearly do not have the force and effect of law.'" *O'Donnell v. Commissioner*, No. 12-1160, 2012 WL 6599720, at *1 (D.C. Cir. Dec. 5, 2012) (quoting *Marks v. Commissioner*, 947 F.2d 983, 986 n.1 (D.C. Cir. 1991)); *cf. Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981) (Social Security Administration's claims manual, which is created for internal use by agency employees, "is not a regulation," "has no legal force," and "does not bind the SSA"). Accordingly, nothing in the I.R.M. creates rights upon which EPIC can rely in this litigation. *See United States v. Will*, 671 F.2d 963, 967 (6th Cir. 1982) (guidance in I.R.M., which is "adopted solely for the internal administration of the IRS, rather than for the protection of the taxpayer, does not confer any

rights upon the taxpayer"); *see also Boulez v. Commissioner*, 810 F.2d 209, 215 n.48 (D.C. Cir. 1987) (citing *Will*, *supra*).

EPIC claims, nevertheless, that the language of I.R.M. 11.3.11.3 manifests a unique intent to create a binding regulation, rather than internal policy. (Br. 44-47.) To support this claim, EPIC cites *Tax Analysts v. I.R.S. (Tax Analysts II)*, 97 F. Supp. 2d 13, 15 n.3 (D.D.C. 2000), *reconsideration denied*, 152 F. Supp. 2d 1, 7-8 (D.D.C. 2001), *aff'd in part and rev'd in part*, 294 F.3d 71, 76 (D.C. Cir. 2002). (Br. 44-45.) In fact, however, that case demonstrates the fallacy of EPIC's argument.

In *Tax Analysts II*, a non-profit organization submitted a FOIA request to the IRS seeking, *inter alia*, certain legal memoranda. 97 F. Supp. 2d at 14. The IRS withheld the memoranda pursuant to the deliberative-process privilege. *Id.*, 15. The district court held that the memoranda were predecisional and deliberative and, therefore, within the scope of Exemption 5. *Id.*, 16-18. The requester nonetheless argued that these holdings did not end the inquiry because of an I.R.M. provision setting forth the so-called harm rule – *i.e.*, that the IRS "will grant" a FOIA request unless the materials sought are exempt from

disclosure *and* their release would cause specified harm to the IRS or third parties. *Id.*, 15 n.3. The requester argued that the IRS should be required to establish not merely that the memoranda fell within Exemption 5, but also that their release would cause one of the harms contemplated by the I.R.M. *Id.*

The district court rejected this argument because the requester had "not demonstrated that the IRS intended to be bound." *Id.* The court explained that, in this Circuit, agency pronouncements of internal policy are treated as binding regulations only if the agency has manifested an intent to be bound. *Id.* (citing *Chiron Corp. and PerSeptive Biosystems, Inc. v. Nat'l Transp. Safety Bd.*, 198 F.3d 935, 943-44 (D.C. Cir. 1999)). An agency's intent is determined based on the language used, the context of that language, and any available extrinsic evidence. *Tax Analysts II*, 152 F. Supp. 2d at 8 (citing *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987)). Considering those factors, the court held that the provisions in question were merely precatory internal procedures. *Id.*, 8. In particular, the court noted that the operative language contained in the relevant I.R.M. provisions was directory (*i.e.*, "will" and "should") rather than mandatory (*i.e.*, "shall"

and "must"). *Id.* On appeal, this Court affirmed, holding that the district court had "correctly determined that the harm rule articulated in the [Internal Revenue] Manual does not bind [the] IRS or create rights in" the requester. *Tax Analysts II*, 294 F.3d at 76.

The language and context of I.R.M. 11.3.11.3 lead to the same result here. Like the provisions at issue in *Tax Analysts II*, I.R.M. 11.3.11.3 uses directory language like "will" and "should."[9] *E.g.*, I.R.M. 11.3.11.3(4)-(6). The context of I.R.M. 11.3.11.3 likewise manifests a lack of intent to be bound. As discussed, the IRS's authority to take action under section 6103(k)(3) is clearly

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[9] I.R.M. 11.3.11.3.1 provides that if IRS management prepares a letter to the Chairman of the Joint Committee regarding a misstatement by a taxpayer, "the Chairman and Vice Chairman . . . will authorize disclosure for the Committee." Although EPIC contends that this language manifests an IRS "expectation" that the Joint Committee will, in fact, authorize a requested disclosure under these circumstances (Br. 9, 24, 29, 47), the far more natural reading is that the Chairman and Vice Chairman will authorize, or not authorize, a requested disclosure rather than requiring a full Committee vote. In any event, even an expectation that the Joint Committee will act in a particular way is a far cry from imposing a binding commitment on the IRS. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 72 (2004) ("plan's statements to the effect that [the Bureau of Land Management] will conduct 'Use Supervision and Monitoring' in designated areas—like other 'will-do' projections of agency actions set forth in land use plans—are not a legally binding commitment enforceable under § 706(1)").

discretionary. If the IRS wanted to convert its discretionary authority into a mandatory obligation, it could have done so explicitly by issuing a binding regulation pursuant to notice-and-comment rulemaking. *See New Jersey v. U.S. Nuclear Regulatory Comm'n*, 526 F.3d 98, 103 (3d Cir. 2008) (considering rulemaking procedures utilized in determining whether agency intended to be bound). It did not.

5. Perhaps realizing that the Joint Committee's failure to provide approval is fatal to its argument under section 6103(k)(3), EPIC argues that—to the extent that the congressional preapproval clause forecloses further processing of its FOIA request—that clause is unconstitutional. (Br. 3, 28-29, 47-51.) But EPIC failed to identify any such constitutional challenge in its complaint and raised it only in a three-sentence footnote in its response to the IRS's motion to dismiss. (Doc. 15 p. 11.) The District Court, therefore, correctly held that EPIC had forfeited the argument. *See CTS Corp. v. E.P.A.*, 759 F.3d 52, 64 (D.C. Cir. 2014) ("A footnote is no place to make a substantive legal argument on appeal; hiding an argument there and then articulating it in only a conclusory fashion results in forfeiture."); *Bazarian Int'l Fin. Assocs., L.L.C. v. Desarrollos Aerohotelco, C.A.*, 793 F. Supp. 2d 124, 130

n.3 (D.D.C. 2011). This Court should not consider EPIC's constitutional argument.

If this Court nonetheless considers the argument, it should be rejected on the merits. The premise of EPIC's argument is that, by making approval of the Joint Committee a condition precedent to the release of otherwise exempt return information, members of Congress have been improperly invested with executive power.[10] (Br. 47-51.) This argument reflects a fundamental misunderstanding of Exemption 3.

As originally enacted, Exemption 3 applied to any matters "specifically exempted from disclosure by statute," not merely those matters exempted from disclosure by statutes meeting certain criteria. *Retired R.R. Workers*, 830 F.2d at 333. In 1976, after the Supreme

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[10] EPIC's brief also includes two sentences articulating the requirement, under Article I, § 7 of the Constitution, that laws be passed by both houses of Congress and presented to the President for signature. (Br. 29, 48.) Because EPIC does not argue that section 6103(k)(3)'s congressional preapproval clause violates this requirement, we do not address it other than to note that congressional committees can, and often do, take actions short of enacting legislation without violating the Constitution. *See*, *e.g.*, *Lear Siegler, Inc., Energy Products Div. v. Lehman*, 842 F.2d 1102, 1108 (9th Cir. 1988), *modified as to attorney fees*, 893 F.2d 205 (9th Cir. 1989) (*en banc*).

Court held that Exemption 3 must be broadly construed, Congress expressed concern that a broad construction gave agencies "'carte blanche to withhold any information [they] please[ ].'" *Id.* (quoting *Am. Jewish Congress v. Kreps*, 574 F.2d 624, 628 (D.C. Cir. 1978)). Congress, therefore, amended Exemption 3 to describe the specific types of statutes to which it applies. *Am. Jewish Congress*, 574 F.2d at 628. This Court has held that the purpose of the 1976 amendment was "to assure that Congress, not the agency, makes the basic nondisclosure decision" for materials covered by Exemption 3 statutes. *Id.*, 336. In other words, the withholding of material covered by an Exemption 3 statute is now "a legislative determination and not an administrative one." *Irons and Sears*, 606 F.2d at 1220.

Because section 6103 is an Exemption 3 statute, conditioning the release of material covered by section 6103 on prior approval by the Joint Committee does not invest committee members with executive power. Rather, it sets forth circumstances under which committee members, acting incident to their legislative authority, can cede to the IRS the basic nondisclosure decision under Exemption 3—just as

Congress has ceded that decision to agencies with respect to the other eight exemptions.

Viewed in this light, EPIC's cited authority is readily distinguishable. In three cases, the Supreme Court held that Congress could not delegate decision-making authority to an executive agency, while simultaneously reserving to a congressional committee (or an individual under congressional control) the right to set aside actions that the agency rendered pursuant to the delegated authority. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991); *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983); *Bowsher v. Synar*, 478 U.S. 714, 736 (1986). And in the fourth case, the Supreme Court held that that a territorial legislature could not provide its members and the governor with coextensive, equal roles in carrying out executive functions. *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 209 (1928). Here, by contrast, Congress has broadly prohibited the IRS from making discretionary disclosures of return information, but has granted it limited discretion to make, or not make, such disclosures following Joint Committee approval. I.R.C. § 6103(k)(3). Because the congressional preapproval clause neither

impermissibly allows members of Congress to finally determine that an individual's return information must be disclosed nor direct the IRS to make such a disclosure, it is not constitutionally infirm. *See Lear Siegler*, 842 F.2d at 1108 (citing *Bowsher*, 478 U.S. at 734).

6. In the alternative, if this Court were to find that the congressional preapproval clause of section 6103(k)(3) is unconstitutional, the remedy would be to strike section 6103(k)(3) in its entirety. Thus, the end result would remain the same: EPIC could not rely on section 6103(k)(3) to obtain the President's returns and return information.

I.R.C. § 7852(a) provides that, if any provision of Title 26 is held invalid, "the remainder of the title . . . shall not be affected thereby." While such a clause creates a presumption in favor of severability, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968). Rather, severability turns on whether the statute, minus any invalid provision, "will function in a *manner* consistent with the intent of Congress" and is legislation that Congress would have enacted. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

Here, the language, structure, and legislative history of section 6103(k)(3) manifest an intent to have the provision stand or fall as a whole. First, in drafting the congressional preapproval clause, Congress chose unusually forceful language to demonstrate that the IRS's exercise of discretion pursuant to section 6103(k)(3) was contingent on Joint Committee approval. *See* I.R.C. § 6103(k)(3) (IRS "may, but only following approval by the Joint Committee on Taxation, disclose" return information under that provision). Second, Congress chose to combine the entire substance of section 6103(k)(3), including the preapproval clause, into a single provision and, indeed, a single sentence. *Id.* Finally, the legislative history of section 6103(k)(3) shows that the preapproval clause was added after a concern was raised about the breadth of the IRS's authority to make discretionary disclosures. *Proposals for Administrative Changes in Internal Revenue Service Procedures: Hearings Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 94th Cong. 107 (1975). Had Congress not addressed this concern with the preapproval clause, it likely would have done so another way, such as limiting the types of misstatements to which section 6103(k)(3) applies. *Id.* This Court should not rewrite

section 6103(k)(3) in a way that gives to the IRS the broad authority that Congress deliberately withheld.

4. Administrative exhaustion was the proper ground on which to dismiss EPIC's FOIA claims

EPIC argues that any failure to exhaust its administrative remedies should not preclude judicial review on the merits because the purposes underlying exhaustion have been served. (Br. 35.) As discussed below, EPIC is wrong. And even if EPIC were correct, the IRS would still be entitled to judgment as a matter of law because EPIC exclusively seeks information that is exempt from disclosure.

1. This Court has made clear that "exhaustion of [administrative] remedies is required in FOIA cases." *Dettmann v. U.S. Dep't of Justice*, 802 F.2d 1472, 1476 (D.C. Cir. 1986). Thus, a party must exhaust its administrative remedies "'before [it] can seek judicial review.'" *Id.*, 1477 (quoting *Stebbins v. Nationwide Mutual Ins. Co.*, 757 F.2d 364 (D.C. Cir. 1984)).

Predicating judicial review on a requester's exhaustion of administrative remedies fosters "orderly procedure and good administration," *Dettmann*, 802 F.2d at 1476 n.8, affords an agency "an opportunity to exercise its discretion and expertise on the matter,"

Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 61 (D.C. Cir. 1990), and allows the agency to "make a factual record to support its decision," *id.* Where a requester fails to comply with an agency's published rules regarding submission of a FOIA request or pursuit of an administrative appeal, a subsequent suit is subject to dismissal for failure to state a claim upon which relief can be granted. *E.g.*, *DeBrew v. Atwood*, 792 F.3d 118, 123-24 (D.C. Cir. 2015) (dismissal appropriate where requester failed to reasonably describe records sought); *Ivey v. Snow*, Civil Action No. 05cv1095 (EGS), 2006 WL 2051339, at *3-*4 (D.D.C. July 20, 2006), *aff'd sub nom.*, *Ivey v. Paulson*, No. 06-5292, 2007 WL 1982076, at *1 (D.C. Cir. June 20, 2007) (same where requester failed to submit proof of identity or agreement to pay fees); *Hidalgo*, 344 F.3d at 1258-60 (same where requester submitted premature administrative appeal); *Oglesby*, 920 F.2d at 61 (same where requester failed to pursue administrative appeal).

To be sure, exhaustion under FOIA is a prudential, rather than jurisdictional, doctrine. *Hidalgo*, 344 F.3d at 1259-60. Notwithstanding a requester's failure to exhaust its administrative remedies, a court may still decide the suit on the merits if the

"particular administrative scheme" and "purposes of exhaustion" support doing so. *Id.* Here, neither factor supports reaching the merits.

First, this Court has made clear that "FOIA's administrative scheme favors treating failure to exhaust as a bar to judicial review." *Id.*, 1259. The wisdom of requiring compliance with this scheme is apparent here, where the relevant Treasury regulations serve the dual purposes of ensuring that (a) confidential return information is released only to requesters who are entitled to it; and (b) the IRS does not spend its finite resources conducting the futile exercise of collecting and logging information that has no possibility of being released. Treas. Reg. § 601.702(c)(1)(i), (4)(i), (4)(i)(E), (5)(iii)(C), (13).

Second, precluding judicial review serves the purposes of exhaustion here. At the administrative level, the IRS closed EPIC's FOIA request after making a threshold determination that EPIC had not established its entitlement to the information requested. (Doc. 14-4, JA29-30; Doc. 14-6, JA41-42.) The IRS did not reach a conclusion regarding the merits of invoking section 6103(k)(3) to release that information, *i.e.*, whether one or more "misstatement[s] of fact" had occurred, whether disclosure of the President's return information

would correct any such misstatements, whether correcting any such misstatements would further "tax administration purposes," or the items of return information that would need to be disclosed to accomplish a correction. (*See* Br. 44.) Thus, the IRS neither "exercise[d] its discretion and expertise" on, nor "ma[de] a factual record" regarding, the merits of EPIC's FOIA claims. *See Oglesby*, 920 F.2d at 61.

EPIC relies heavily on *Wilbur v. C.I.A.*, 355 F.3d 675 (D.C. Cir. 2004), but that case is inapposite. There, Robert Wilbur submitted a perfected FOIA request to the Central Intelligence Agency (CIA) seeking records about himself. *Id.*, 676. The CIA searched its files, notified Wilbur that it had not located any responsive information, and informed him that he could pursue an administrative appeal. *Id.* Wilbur did submit an administrative appeal, although not within the time required by the CIA's regulations. *Id.* The CIA nonetheless accepted the appeal, reviewed its prior searches, and conducted a new search before informing Wilbur that it still could not locate any responsive information. *Id.* The CIA further informed Wilbur that he could seek judicial review of its determination. *Id.* Only after Wilbur

filed suit did the CIA take the position that, because Wilbur's administrative appeal was untimely, it was "as if [the appeal] were never filed at all" and judicial review should be precluded on exhaustion grounds. *Id.* Under these circumstances, this Court held that Wilbur's failure to submit a timely administrative appeal did not preclude judicial review. *Id.*, 677.

This case is readily distinguishable. First, the IRS has consistently represented—both to EPIC and the court—that EPIC's FOIA request was imperfect and could not be processed unless EPIC established its entitlement to the information sought. Second, because the IRS has not processed the request, it has had no occasion to determine whether disclosure of some portion of the President's return information is "necessary for tax administration to correct a misstatement of fact." *See* I.R.C. § 6103(k)(3). Finally, because the IRS did not reach the merits of EPIC's request, it likewise had no occasion to create "an adequate record for review" thereof. *Wilbur*, 355 F.3d at 677. Hence, unlike in *Wilbur*, ignoring EPIC's failure to exhaust would frustrate, rather than serve, the policies underlying exhaustion.

2. Although the IRS continues to maintain that exhaustion should bar judicial review here, the question is largely academic. Even if this Court were to reach the merits of EPIC's FOIA request, it should still affirm the District Court's decision dismissing the suit because EPIC seeks information that is categorically exempt from disclosure.

As discussed, it is undisputed that EPIC's FOIA request exclusively sought the returns and return information of a third party. And as discussed, section 6103 prohibits the disclosure of those materials absent conditions precedent that are not satisfied here. Where a "FOIA request on its face solely seeks [a third party's] return information" to which the requester has not established its entitlement, the return information is "properly withheld" pursuant to Exemption 3. *Hull v. I.R.S., U.S. Dep't of Treasury*, 656 F.3d 1174, 1175, 1183-96 (10th Cir. 2011). Thus, the IRS remains entitled to judgment as a matter of law, even if the District Court erred in dismissing the suit for failure to state a claim upon which relief could be granted. *See id.* (affirming on the merits even though district court dismissed suit pursuant to Fed. R. Civ. P. 12(b)(6)); *Lehrfeld*, 132 F.3d at 1466-67 (declining to decide whether requester submitted a proper FOIA

request, as return information sought was exempt from disclosure regardless). *Accord*, *Church of Scientology of Calif. v. I.R.S. (Church of Scientology I)*, 792 F.2d 146, 152 (D.C. Cir. 1986) (where "a claimed FOIA exemption consists of a generic exclusion, dependent upon the category of records rather than the subject matter which each individual record contains, resort to a *Vaughn* index is futile").

5. FOIA's directive to segregate nonexempt material does not affect the outcome of this suit

In passing, EPIC asserts that it is entitled to "the release of *nonexempt* responsive documents." (Br. 37-38, 44 (emphasis added).) It is undisputed, however, that EPIC exclusively sought information that was exempt from disclosure under section 6103. Moreover, assuming *arguendo* that EPIC's request captured documents containing a combination of exempt and nonexempt information, EPIC has framed its FOIA request in such a way that acknowledging the existence of any responsive documents would itself violate section 6103 by disclosing: whether the President has filed income tax returns for the years in question; whether the President has Russian income, assets, expenses, etc.; and/or whether the IRS was, is, or may be investigating the foregoing. *See Housley v. U.S. Dep't of Treasury, I.R.S.*, 697 F. Supp. 3,

4 (D.D.C. 1988) (fact of filing tax returns is protected under section 6103); I.R.C. § 6103(b)(2)(A) (section 6103 protects taxpayer's identity; nature, source, and amount of income; assets, liabilities, and payments; and whether return was, is, or will be subject to examination or other investigation). FOIA does not require this unlawful result. 5 U.S.C. § 552(a)(8)(B); *Hull*, 656 F.3d at 1187-88.

Accordingly, the District Court correctly dismissed EPIC's FOIA claims.

B. The District Court correctly dismissed EPIC's APA claims

In addition to claims under FOIA, EPIC brought two claims under the APA seeking further processing of its FOIA request (Count IV) and an order compelling the IRS to request Joint Committee approval to release the materials sought in EPIC's FOIA request (Count V). (Doc. 1, JA55-56.) Neither claim entitles EPIC to relief.

1. Because EPIC can seek further processing of its FOIA request under FOIA, it cannot seek such relief under the APA

The APA provides for judicial review only when "there is no other adequate remedy in a court." 5 U.S.C. § 704; *CREW*, 846 F.3d at 1238. So framed, the APA is intended neither to "duplicate existing

procedures for review of agency action" nor "provide additional judicial remedies in situations where Congress has provided special and adequate review procedures." *Bowen v. Mass.*, 487 U.S. 879, 903 (1988). Where either an independent cause of action or an alternative review procedure affords relief for the agency action complained of, clear and convincing evidence exists that Congress intended to preclude review under the APA. *CREW*, 846 F.3d at 1244-45. And where such a cause of action or alternative review procedure provides *de novo* review in district court, the evidence of intent to preclude is even stronger. *Id.*, 1245.

In determining whether a plaintiff has an adequate remedy that precludes review under the APA, the question is not whether the plaintiff has access to an alternative claim allowing perfect relief, relief identical to what is available under the APA, or relief as effective as what is available under the APA. *Garcia v. Vilsack*, 563 F.3d 519, 522, 525 (D.C. Cir. 2009) (alternative relief need not be "identical" and may be "imperfect"); *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990) (alternative relief may be "less effective"). Rather, the plaintiff need only have access to an alternative

claim allowing it to seek relief "of the same genre." *Garcia*, 563 F.3d at 522 (citation and internal quotations omitted). *Accord*, *CREW*, 846 F.3d at 1246 (APA claims precluded where there was "no yawning gap" between the relief provided by an alternative claim and the APA).

Applying this standard, this Court has held that the "carefully balanced" scheme of judicial review under FOIA "exhibits all of the indicators" evincing congressional intent to preclude review under the APA. *Id.*, 846 F.3d at 1245-46. Thus, an agency's compliance with FOIA is subject to the "special and adequate review procedures" set forth in 5 U.S.C. § 552 and is "immunized from duplicative APA review." *Id.* (citation, internal quotations, and alterations omitted). That holding is manifestly applicable here, where the relief EPIC seeks in Count IV under the APA—a determination that it submitted a perfected FOIA request and further processing of that request—is exactly the relief sought under FOIA in Counts I to III.[11]

EPIC agrees that FOIA affords it an adequate remedy *vis-à-vis*

[11] Of course, there is a difference between the availability of an alternative remedy and a plaintiff's entitlement to that remedy. *CREW*, 846 F.3d at 1246. As discussed, EPIC is not entitled to relief under FOIA.

the relief sought in Count IV under the APA. (Br. 38-39.) Rather than simply concede Count IV, however, EPIC submits that it should be allowed to proceed with the APA claim if this Court were to hold, as "an issue of first impression," that "an agency's determination that a request had not been 'perfected' was non-reviewable under FOIA." (*Id.*, 39.) This issue, though, is one not of first impression; it is settled law that an agency's closure of a request as imperfect is reviewable under FOIA. *E.g.*, *Summers v. U.S. Dep't of Justice*, 999 F.2d 570, 571-73 (D.C. Cir. 1993) And even if there were some distinction between the relief afforded to the requester in *Summers* and the relief sought by EPIC, it is certainly not the type of "yawning gap" that would justify APA review. *See CREW*, 846 F.3d at 1246.

2. Because the IRS is not legally required to request Joint Committee approval, EPIC cannot compel the IRS to do so

The Supreme Court has made clear that "the only agency action that can be compelled under the APA is action legally *required*." *S. Utah Wilderness*, 542 U.S. at 63. So construed, the APA does not permit "judicial direction of even discrete agency action that is not demanded by law." *Id.*, 65.

This Court has likewise held that courts can compel agency action—as opposed to setting aside agency action—under the APA only if an agency is "under an unequivocal statutory duty to act." *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987), *superseded by statute on other grounds as recognized in Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 553 n.6 (D.C. Cir. 2015); *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) ("§ 706(1) grants judicial review only if a federal agency has a ministerial or non-discretionary duty amounting to a specific, unequivocal command") (citation and internal quotations omitted); *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 751 F.3d 629, 634 (D.C. Cir. 2014) (affirming vacatur of invalidly promulgated rule but declining to order new rulemaking: "[a]bsent a statutory duty to promulgate a new rule, a court cannot order it"); *cf. Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 953-54 (D.C. Cir. 2016) (State Department could be compelled to take additional action to recover records because the Federal Records Act imposed a ministerial, non-discretionary "duty to ask the Attorney General to initiate legal action").

Here, no law requires that the IRS seek Joint Committee approval to release return information. Of section 6103(k)(3), the most that can be said is that it permits the IRS to seek such approval; it certainly does not impose "an unequivocal statutory duty," *Sierra Club*, 828 F.2d at 793, or a "ministerial or non-discretionary duty amounting to a specific, unequivocal command," *Anglers*, 809 F.3d at 670. Consequently, the APA cannot be used to compel this result.[12] *See S. Utah Wilderness*, 542 U.S. at 63-65.

In resisting that conclusion, EPIC recycles its argument that 5 U.S.C. § 552(a)(8)(A)(ii)(II)—which directs that "[a]n agency shall . . . take reasonable steps necessary to segregate and release nonexempt information"—triggers an IRS duty to seek Joint Committee approval.

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[12] EPIC also claims that this Court should order the IRS to request Joint Committee authorization because section 6103(k)(3) and I.R.M. 11.3.11.3 together provide sufficient "law to apply." (Br. 44.) It is true that agency action is unreviewable if it is authorized in such broad terms that a court has an insufficient basis to evaluate whether the action was appropriate, *i.e.*, "there is no law to apply." *Armstrong v. Bush*, 924 F.2d 282, 293 (D.C. Cir. 1991) (citation and internal quotations omitted). However, to compel an agency to act (rather than merely set aside agency action), a court must find both that the agency is under a non-discretionary duty to act, *Anglers*, 809 F.3d at 670, and that there is sufficient law to apply in ordering the agency to act, *Armstrong*, 924 F.2d at 293-94. Because the former condition is not satisfied here, it is irrelevant whether the latter is satisfied.

(Br. 44.) Assuming *arguendo* that EPIC were correct, its remedy would be under the FOIA, not the APA. In any event, the provision does no such thing.

EPIC likewise recycles its argument that I.R.M. 11.3.11.3, which provides guidance about section 6103(k)(3), triggers an IRS duty to seek Joint Committee approval. (Br. 44-47.) But as discussed above, EPIC waived this argument by not raising it below, and the argument lacks merit anyway.

Accordingly, the District Court correctly dismissed EPIC's APA claims.

C. This Court should strike EPIC's extra-record materials

The addendum to a party's brief is typically reserved for the reproduction of legal materials such as statutes, rules, and regulations. Fed. R. App. P. 28(f). Here, EPIC also included the following materials that it apparently submits for their evidentiary value: a news release, correspondence, remarks at a conference, government reports, a Department of Justice order, other FOIA requests, and statistical information. (ADD34-59.) These materials were not before the District Court, and EPIC has not requested that this Court take judicial notice

of them. This Court should, therefore, strike them and all references thereto. *See Bush v. District of Columbia*, 595 F.3d 384, 388 (D.C. Cir. 2010) (citing Fed. R. App. P. 10(a)).

CONCLUSION

The order of the District Court dismissing EPIC's case is correct and should be affirmed.

Respectfully submitted,

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APRIL 2018

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Dated: April 20, 2018

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/s/ Geoffrey J. Klimas
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ADDENDUM

5 U.S.C. § 552 - Public information; agency rules, opinions, orders, records, and proceedings

(a) . . .

(3)

(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

. . .

(4) . . .

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

. . .

(8)

(A) An agency shall—

(i) withhold information under this section only if—

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)

(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

. . .

(b) This section does not apply to matters that are--

. . .

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)

(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

. . .

5 U.S.C. § 704 – Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706 – Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

> **(1)** compel agency action unlawfully withheld or unreasonably delayed; and
>
> **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > **(B)** contrary to constitutional right, power, privilege, or immunity;
> >
> > **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> >
> > **(D)** without observance of procedure required by law;
> >
> > **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> >
> > **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

26 U.S.C. § 6103 – Confidentiality and disclosure of returns and return information

(a) General rule.--Returns and return information shall be confidential, and except as authorized by this title—

> **(1)** no officer or employee of the United States,
>
> **(2)** no officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(1)(C) or (7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section or section 6104(c), and
>
> **(3)** no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), subsection (k)(10), paragraph (6), (10), (12), (16), (19), (20), or (21) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) Definitions.--For purposes of this section--

> **(1) Return.**--The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) Return information.--The term "return information" means--

> **(A)** a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessment, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition or offense

. . .

(c) Disclosure of returns and return information to designee of taxpayer.--The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.

. . .

(k) Disclosure of certain returns and return information for tax administration purposes.—

. . .

(3) Disclosure of return information to correct misstatements of fact.--The Secretary may, but only following approval by the Joint Committee on Taxation, disclose such return information or any other information with respect to any specific taxpayer to the extent necessary for tax administration purposes to correct a misstatement of fact published or disclosed with respect to such taxpayer's return or any transaction of the taxpayer with the Internal Revenue Service.

. . .

26 C.F.R. § 601.702 – Publication, public inspection, and specific requests for records

. . .

(c) Specific requests for other records—

(1) In general.

(i) Subject to the application of the exemptions described in 5 U.S.C. 552(b) and the exclusions described in 5 U.S.C. 552(c), the IRS shall, in conformance with 5 U.S.C. 552(a)(3), make reasonably described records available to a person making a request for such records which conforms in every respect with the rules and procedures set forth in this section. Any request or any appeal from the initial denial of a request that does not comply with the requirements set forth in this section shall not be considered subject to the time constraints of paragraphs (c)(9), (10), and (11) of this section, unless and until the request or appeal is amended to comply. The IRS shall promptly advise the requester in what respect the request or appeal is deficient so that it may be resubmitted or amended for consideration in accordance with this section. If a requester does not resubmit a perfected request or appeal within 35 days from the date of a communication from the IRS, the request or appeal file shall be closed. When the resubmitted request or appeal conforms with the requirements of this section, the time constraints of paragraphs (c)(9), (10), and (11) of this section shall begin.

. . .

(4) Form of request.

(i) Requesters are advised that only requests for records which fully comply with the requirements of this section can be processed in accordance with this section. Requesters shall be notified promptly in writing of any requirements which have not been met or any additional requirements to be met. Every effort shall be made to comply with the requests as written. The initial request for records must—

. . .

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

. . .

(5) Reasonable description of records; identity and right of the requester.

. . .

(iii) Statutory or regulatory restrictions.

. . .

(C) In the case of an attorney-in-fact, or other person requesting records on behalf of or pertaining to other persons, the requester shall furnish a properly executed power of attorney, Privacy Act consent, or tax information authorization, as appropriate. In the case of a corporation, if the requester has the authority to legally bind the corporation under applicable state law,

such as its corporate president or chief executive officer, then a written statement or tax information authorization certifying as to that person's authority to make a request on behalf of the corporation shall be sufficient. If the requester is any other officer or employee of the corporation, then such requester shall furnish a written statement certifying as to that person's authority to make a request on behalf of the corporation by any principal officer and attested to by the secretary or other officer (other than the requester) that the person making the request on behalf of the corporation is properly authorized to make such a request. If the requester is other than one of the above, then such person may furnish a resolution by the corporation's board of directors or other governing body which provides that the person making the request on behalf of the corporation is properly authorized to make such a request, or shall otherwise satisfy the requirements set forth in section 6103(e). A person requesting access to records of a partnership or a subchapter S Corporation shall provide a notarized statement, or a statement made under penalty of perjury in accordance with 28 U.S.C. 1746, that the requester was a member of the partnership or subchapter S corporation for a part of each of the years included in the request.

. . .

(13) Judicial review. If an administrative appeal pursuant to paragraph (c)(10) of this section for records or fee waiver or reduction is denied, or if a request for expedited processing is denied and there has been no determination as to the release of records, or if a request for a favorable fee category under paragraph (f)(3) of this section is denied, or a determination is made that there are no responsive records, or if no determination is made within the twenty day periods specified in paragraphs (c)(9) and (10) of this section, or the period of any extension pursuant to paragraph (c)(11)(i) of this section, or by grant of the requester, respectively, the person making the request may commence an action in a United States district court in the district in which the requester resides, in which the requester's principal place of business is located, in which the records are situated, or in the District of Columbia, pursuant to 5 U.S.C. 552(a)(4)(B). The statute authorizes an action only against the agency. With respect to records of the IRS, the agency is the IRS, not an officer or an employee thereof. Service of process in such an action shall be in accordance with the Federal Rules of Civil Procedure (28 U.S.C. App.) applicable to actions against an agency of the United States. Delivery of process upon the IRS shall be directed to the Commissioner of Internal Revenue, Attention: CC:PA, 1111 Constitution Avenue, NW., Washington, DC 20224. The IRS shall serve an answer or otherwise plead to any complaint made under this paragraph within 30 days after service upon it, unless the court otherwise directs for good cause shown. The district court shall determine the matter de novo, and may examine the contents of the IRS records in question in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions described in 5 U.S.C. 552(b) and the exclusions described in 5 U.S.C. 552(c). The burden shall be upon the IRS to sustain its action in not making the requested records available. The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred by the person making the request in any case in which the complainant has substantially prevailed.

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