No. 22-578

IN THE
Supreme Court of the United States

RICHARD BEHAR,
Petitioner,
v.

UNITED STATES DEPARTMENT
OF HOMELAND SECURITY,
Respondent.

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

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 21 MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are the Reporters Committee for Freedom of the Press, The Atlantic Monthly Group LLC, The Daily Beast Company LLC, The E.W. Scripps Company, First Amendment Coalition, Freedom of the Press Foundation, Gannett Co., Inc., The Guardian U.S., Institute for Nonprofit News, The Media Institute, National Freedom of Information Coalition, National Press Photographers Association, The New York Times Company, The News Leaders Association, News/Media Alliance, Online News Association, The Philadelphia Inquirer, Radio Television Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, TEGNA Inc., and Tully Center for Free Speech.

Journalists frequently use the Freedom of Information Act ("FOIA" or the "Act"), 5 U.S.C. § 552, to gather news and inform the public. Accordingly, as members and representatives of the news media, amici have a strong interest in ensuring that FOIA's provisions are interpreted to provide the press and public with the broad access to government information intended by Congress. Amici write to urge this Court to grant *certiorari* and reverse the

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[1] Pursuant to Supreme Court Rule 37, counsel for amici curiae state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the amici curiae, their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief; counsel of record for all parties were given timely notice of the intent to file this brief.

Second Circuit's decision, which created out of whole cloth a new standard that significantly narrows the scope of agency records subject to FOIA. The Second Circuit's decision conflicts with this Court's precedent, the plain text of multiple other statutes concerning government records, and the purpose of the Act.

SUMMARY OF THE ARGUMENT

In enacting the Freedom of Information Act, Congress sought to operationalize a "general philosophy of full agency disclosure" that would help ensure an informed public, central to the functioning of a democratic society. S. Rep. No. 813, 89th Cong., 1st Sess. at 3 (1965), as reprinted in Freedom of Information Act Source Book ("Source Book"), S. Doc. No. 93-82, at 38 (Comm. Print 1974). As this Court recognized more than 30 years ago, that purpose requires the disclosure of not only material generated within executive branch agencies, but also "all nonexempted information received by an agency as it carries out its mandate." *Dep't of Just. v. Tax Analysts*, 492 U.S. 136, 147 (1989) (emphasis added).

The decision below in *Behar v. United States Dep't of Homeland Security*, 39 F.4th 81 (2d Cir. 2022), fundamentally undermines the Act, necessitating correction by this Court. The Second Circuit *sua sponte* generated and applied, without briefing from the parties, a new test for determining whether material qualifies as "agency records" under FOIA, one of the statute's fundamental prerequisites. *See id.* But this new test is irreconcilable with this Court's decision in *Tax Analysts*, 492 U.S. 136. The Second Circuit not only incorporated a criterion that was considered and explicitly disavowed by this Court in *Tax Analysts* — third-party intent — but brazenly treated such intent as dispositive in its "agency records" analysis. *Compare id.*, *with Behar*, 39 F.4th at 90. That double deviation from this Court's longstanding precedent, without so much as an acknowledgment, cannot stand. The Second Circuit's

intent-dispositive test imposes new limits on public access that are found nowhere in FOIA's text, ignoring decisions from this Court eschewing judicially created amendments to the Act. Such a standard is not just unwarranted. It is unworkable. Its application will needlessly complicate and extend FOIA litigation.

In addition to being legally indefensible, the Second Circuit's newly minted test for "agency records" will hamper news reporting, including on matters affecting public safety. The news media has effectively used FOIA to illuminate relationships between the federal government and third parties that have profound implications for the public. Such reporting would be stymied if those non-governmental entities could shield communications with the federal government at will. The new intent-dispositive standard defining what material can qualify as an agency record would facilitate such obfuscation, threatening the public's right to know what its "government is up to." *U.S. Dep't of Just. v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citation omitted).

For these reasons, amici urge the Court to grant the petition for *certiorari* and reverse.

ARGUMENT

I. The Second Circuit's new intent-dispositive test conflicts with this Court's precedent, impermissibly grafts extra-textual requirements onto FOIA, and presents an unworkable standard.

FOIA's judicial review provision empowers courts to enjoin agencies from "improperly" withholding "agency records." 5 U.S.C. § 552(a)(4)(B); *see also Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) (explaining that satisfaction of that requirement is a prerequisite to jurisdiction). The Act, however, provides no definition for "agency records." *See* 5 U.S.C. § 552.

In 1989, this Court — looking to other federal statutes, the text and structure of FOIA, and its own precedent — provided a straightforward, two-part test for determining whether materials are "agency records" within the meaning of FOIA:

> First, an agency must either create or obtain the requested materials . . . .
>
> Second, the agency must be in control of the requested materials at the time the FOIA request is made. By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties.

Tax Analysts, 492 U.S. at 144–45 (internal quotation and citations omitted).

Notwithstanding this Court's clear precedent, the text of FOIA and related government records statutes, and the purpose of the Act, the Second Circuit crafted and applied a new definition of "agency records" that upsets the "control" prong of the *Tax Analyst*s test. *See Behar*, 39 F.4th at 90. That new standard is wholly incompatible with this Court's rulings and grafts a new judicially created standard onto FOIA that is found nowhere in its text. Moreover, the Second Circuit's standard is impractical, and it will tax party and court resources in future cases.

A. The Second Circuit's intent-dispositive test is incompatible with *Tax Analysts*.

In analyzing whether the material at issue were "agency records," the Second Circuit treated as dispositive that the third party who originated the documents purportedly "manifested a clear intent to control the[m]." *Behar*, 39 F.4th at 90. That intent, the court said, was evident because the third party provided the material with "the expectation they would not be disseminated" and because they were "regularly marked" with words such as "confidential." *Id.* The court concluded that "under these circumstances," the material did not come under the "control" of the Secret Service. *Id.*

This new "intent"-based standard for records generated by a third party is incompatible with this Court's flat rejection of intent as a factor relevant to "control." In *Tax Analysts*, this Court considered and repudiated the argument that the intent of a third

party that generates material in the possession of an agency is relevant to determining whether they are "agency records." *See* 492 U.S. at 147. The Justice Department in that case maintained that only material "prepared substantially to be relied upon in agency decisionmaking" should be considered an "agency record"—in other words, that the third party had to intend their material to be used by the agency. *Id.* But this Court rejected the notion that the "intent of the creator of a document" could be dispositive in determining whether the document is subject to FOIA. *Id.* As a practical matter, "discerning the intent of the drafters of a document" can prove an impossible task. *Id.* at 147–48. However, more fundamentally, a "*mens rea*"-type condition "is nowhere to be found in the Act." *Id.* at 147. There was, accordingly, no textual support for the consideration of third-party intent in the analysis.

The Second Circuit's newfound "control" test, which it made clear applies to all FOIA cases, *see Behar*, 39 F.4th at 90 n.9, is foreclosed by *Tax Analysts*. The Second Circuit's bold pronouncement that third-party intent is not just a factor to be considered, but is dispositive in the "control" analysis, gave no consideration, analysis, or even recognition of this Court's precedent. *See id.* at 90. The "control" analysis calls for a straightforward, objective response to a simple question: whether "the materials have come into the agency's possession in the legitimate conduct of its official duties." *Tax Analysts*, 492 U.S. at 145. The decision below, which effectively overturns that standard, must be reversed.

B. The Second Circuit's intent-dispositive test is unmoored from the plain text of government record statutes.

Not only is the Second Circuit's new test irreconcilable with this Court's prior FOIA caselaw interpreting "agency records," but also it exemplifies the type of extra-textual, judicial policymaking that this Court has repeatedly rejected in the FOIA context. As noted in *Tax Analysts*, consideration of third-party intent in determining whether material qualifies as an "agency record" is simply "nowhere to be found in the Act." *Id.* at 147. Subsequent cases from this Court also have rejected extra-textual FOIA requirements, including in the contexts of Exemptions 2, 4, and 7. *See Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (Exemption 2); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364–65 (2019) (Exemption 4); *Dep't of Just. v. Landano*, 508 U.S. 165, 178 (1993) (Exemption 7(D)). The Second Circuit's addition of a non-textual "intent" requirement for "agency records" is clearly contrary to the approach taken by this Court in those cases, as it is wholly "disconnected from [FOIA's] text." *Milner*, 562 U.S. at 573.

None of the related government records statutes this Court has examined in its "agency records" jurisprudence consider the intent of a third party in determining whether particular material qualifies. *See Forsham v. Harris*, 445 U.S. 169 (1980); *Kissinger*, 445 U.S. 136; *Tax Analysts*, 492 U.S. 136. The Records Disposal Act, for example, which was in effect at the time of the enactment of FOIA, defines "record" as

> all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them . . . .

44 U.S.C. § 3301(a)(1)(A).

Similarly, according to the Presidential Records Act ("PRA"), the term "Presidential records" means:

> documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

44 U.S.C. § 2201(2).

And a 1975 amendment to the Security Exchange Act of 1934, 94 P.L. 29, 89 Stat. 97 (S. 249), June 4, 1975, which expressly relates to FOIA, states:

> For purposes of section 552 of Title 5 [FOIA] the term "records" includes all applications, statements, reports, contracts, correspondence, notices, and other documents filed with or otherwise obtained by the Commission pursuant to this chapter or otherwise.

15 U.S.C. § 78x(a).

What all of these statutes have in common is an objective, functional approach to defining government records. None of them incorporate, address, rely on, or place any weight on the intent or desire of the author of a document obtained or received by the government. The Second Circuit's intent-dipositive test runs contrary to those provisions. *See* 44 U.S.C. § 3301(a)(1)(A); 44 U.S.C. § 2201(2); 15 U.S.C. § 78x(a); *Cf.* Antonin Scalia & Bryan A. Garner, Reading Law 252 (2012) ("[L]aws dealing with the same subject — being *in pari materia* . . . should if possible be interpreted harmoniously."). The decision below is thus incongruous with Congressional intent to ensure that all material received by the government is subjected to proper retention and disposition. *See id.* If allowed to stand, this new test would fundamentally undercut "FOIA's goal of giving the public access to all nonexempted information received by an agency as it carries out its mandate." *Tax Analysts*, 492 U.S. at 147.

C. The Second Circuit's intent-dispositive test is an unworkable standard.

In addition to deviating from precedent and statutory text, the Second Circuit's intent-dispositive test is unworkable. As noted above, whether material qualifies as "agency records" is a fundamental part of the statute that must be considered before evaluating exemptions, 5 U.S.C. § 552(b), the foreseeable harm standard, *id.* § 552(a)(8), or segregability, *id.* Requiring a detailed and fact-intensive "intent" analysis to be conducted in every FOIA case involving documents that originate outside the government will needlessly tax party and judicial resources. Indeed, the decision below makes clear that the added burden the Second Circuit's intent-driven analysis will impose on courts and FOIA litigants is significant. *See Behar*, 39 F.4th at 90. As this Court recognized in *Tax Analysts*, divining intent is hardly an easy task, especially with the passage of time or when there are multiple authors of a document. 492 U.S. at 147–48. Requiring courts and FOIA litigants to routinely engage in that "elusive endeavor," *id.*, is as unwise as it is unwarranted. This Court has established a straightforward, workable test that aligns with FOIA's text and purpose. Lower courts should continue to apply that test.

II. The Second Circuit's decision will have broad ramifications for the public's right to know how non-governmental entities influence government conduct.

Because the decision below created a new "agency records" test that is generally applicable to all FOIA actions filed in courts within the Second Circuit, *see Behar*, 39 F.4th at 90 n.9, it threatens the public's ability to learn how third parties interact with government agencies. Unless it is reversed, the Second Circuit's decision could stymie important reporting on a range of topics — including about public safety — simply because non-governmental entities wish to conceal their interactions with agencies.

Take, for example, 2019 reporting from *The Wall Street Journal*, based on documents from the U.S. Forest Service that show that Pacific Gas & Electric ("PG&E") failed to mitigate a risk that its high-voltage power lines posed to the public, even though its leadership had been aware for years that the lines could spark fires. *See* Katherine Blunt and Russell Gold, *PG&E Delayed Safety Work on Power Line That Is Prime Suspect in California Wildfire,* N.Y. Times (Feb. 27, 2019), https://perma.cc/WAN9-ETPA. The failed Caribou-Palermo power line that sparked the devastating Camp Fire in Paradise, California that killed 85 people in 2018 was, as these documents revealed, predictable and preventable. *See id*. The records show that prior to the fire, PG&E had delayed required maintenance on the century-old power line and acknowledged that it was past time to replace several towers on the line, which had

surpassed their life expectancy. *Id.* Specifically, according to memos PG&E sent to the Forest Service, obtained by *The Journal* though FOIA, the company said it needed to replace 49 steel towers "due to age," and hardware and aluminum line on 57 towers "due to age and integrity." *Id.* PG&E, a third party, produced the records for the Forest Service, which possessed them in the aftermath of the fire, when *The Journal* requested them. But under the new test established by the Second Circuit, PG&E could have simply stamped "confidential" on those memos and communications with the Forest Service and thereby removed them from the scope of FOIA. Had that occurred, the press and public could not have become aware of PG&E's prior knowledge of the danger posed by the antiquated power line and PG&E's neglected plans to secure its infrastructure.

Third-party entities may seek to shield their communications with federal agencies from public view for a variety of reasons. Records of the Food and Drug Administration ("FDA") that were obtained by the news organization *ProPublica* through FOIA requests show, for example, that McKinsey & Company ("McKinsey") routinely advised the agency's drug regulation division while also working on behalf of pharmaceutical companies such as Purdue Pharma and Johnson & Johnson. *See* Ian MacDougall, *McKinsey Never Told the FDA It Was Working for Opioid Makers While Also Working for the Agency,* ProPublica (Oct. 4, 2021), https://perma.cc/Z3BP-G49E. *ProPublica*'s investigation revealed that McKinsey failed to disclose to the FDA that it worked on behalf of firms selling drugs the agency sought to regulate, including Oxycontin, Purdue Pharma's drug

that is widely regarded as an impetus for the opioid epidemic. *See id.* Indeed, working on behalf of a pharmaceutical company, McKinsey consultants once sought to diminish an FDA initiative encouraging the safe use of opioids. *Id.* But under the Second Circuit's new test, companies like McKinsey would have every incentive to mark all their communications to federal agencies as secret, preventing this type of reporting. It is only because these documents were considered "agency records" that *ProPublica* was able to obtain them and publish its reporting, which led to widespread criticism of McKinsey's actions and the passage of a new law focused on combatting conflicts of interest in government contracting. *See* Ian MacDougall, *Congress Passes Bill to Rein in Conflicts of Interest for Consultants Such as McKinsey,* ProPublica (Dec. 16, 2022), https://perma.cc/262K-KTB6.

Another public health example stems from the publication of World Health Organization ("WHO") reports finding that soft drinks were a key contributor to rising rates of child obesity around the world, the soft drink beverage industry sought to combat the WHO reports. *See* Carey Gillam, *Beverage Industry Finds Friend Inside U.S. Health Agency*, HuffPost (June 28, 2016), https://perma.cc/5BC7-3X6H. Through FOIA, journalists obtained emails from a beverage industry leader representing the interests of Coca-Cola to the director of the Centers for Disease Control and Prevention ("CDC")'s Division for Heart Disease and Stroke Prevention. *Id.* The emails revealed the beverage industry's complaints about the WHO's call for regulations on sugary soft drinks, and the CDC director's willingness to help the beverage

industry organize in opposition to the regulations. *Id.* The emails helped spur additional public scrutiny of the CDC's actions and inactions, including that it had not yet taken a position on limiting sugar consumption. *Id.* But if these email communications had been marked "confidential" and assertedly sent with an "expectation of privacy," under the Second Circuit's new test the CDC could have kept them from the public.

As these examples illustrate, the decision below threatens the news media's ability to obtain information about, and thus report on, interactions between third-parties and government agencies. That work is vital to ensuring an informed public capable of holding government accountable. *Certiorari* should be granted and the Second Circuit's new standard below reversed to ensure that this type of reporting remains possible.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to grant Petitioner's writ of certiorari.

Respectfully submitted,

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