No. 15-5128

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

COMPETITIVE ENTERPRISE INSTITUTE
Plaintiff/Appellant,

v.

OFFICE OF SCIENCE AND TECHNOLOGY POLICY,
Defendant/Appellee.

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 26 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and *Amici*

All parties, intervenors, and *amici* that appeared before the district court are listed in the brief of Appellant Competitive Enterprise Institute. All parties, intervenors, and *amici* appearing before this Court are listed in the brief of Appellant or in the Amended Representation of Consent to Participate as *Amici Curiae* and Rule 26.1 Corporate Disclosure Statements.

B. Rulings Under Review

The rulings under review are listed in the brief of Appellant Competitive Enterprise Institute.

C. Related Cases

Pursuant to Circuit Rule 28(a)(1)(C), counsel for *amici* state that they are not aware of any related cases pending in this Court, or any Court of Appeals, or any other court within the District of Columbia.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are The Reporters Committee for Freedom of the Press, Advance Publications, Inc., American Society of News Editors, The Associated Press, Association of Alternative Newsmedia, Cable News Network, Inc., Courthouse News Service, Cox Media Group, Inc., Dow Jones & Company, Inc., First Amendment Coalition, First Look Media, Inc., Gannett Co., Inc., GateHouse Media, LLC, Investigative Reporting Workshop at American University, MediaNews Group, Inc., MPA – The Association of Magazine Media, The National Press Club, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, News Corp, The News Guild - CWA, North Jersey Media Group Inc., Online News Association, TEGNA Inc., Tully Center for Free Speech, and The Washington Post. *Amici* are described in more detail in Appendix A.

As representatives and members of the news media, *amici* frequently rely on FOIA to gather information about the government and report on matters of vital public concern. *Amici* thus have a strong interest in ensuring that such laws are interpreted by courts in a manner that facilitates public access to government records and assures government accountability.

RULE 29(C)(5) CERTIFICATION

Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

RULE 26.1 CORPORATE DISCLOSURE STATEMENTS

The corporate disclosure statements of *amici* are set forth in the Amended Representation of Consent to Participate as *Amici Curiae* and Rule 26.1 Corporate Disclosure Statements filed concurrently herewith.

CIRCUIT RULE 29(D) CERTIFICATION

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici* certifies that a separate brief is necessary.

SOURCE OF AUTHORITY TO FILE BRIEF

Pursuant to Fed. R. App. P. 29(a) and D.C. Circuit Rule 29(a), all parties to the appeal have given consent for *amici curiae* to file this brief.

STATUTES AND REGULATIONS

Pursuant to D.C. Circuit Rule 28(a)(5), all applicable statutes and regulations are contained in the Addendum to the Brief for Appellant Competitive Enterprise Institute.

GLOSSERY OF ABBREVIATIONS AND ACRONYMS

FOIA	Freedom of Information Act
FRA	Federal Records Act
CEI	Competitive Enterprise Institute
OSTP	Office of Science and Technology Policy
RCFP	Reporters Committee for Freedom of the Press
MAP	Military Audit Project

INTRODUCTION AND SUMMARY OF ARGUMENT

In enacting the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), Congress sought "to open agency action to the light of public scrutiny." *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772 (1989). The Act's purpose "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The case now pending before this Court implicates the capacity of FOIA to continue to effectively serve that vital purpose at a time of ever-increasing use of email and other forms of digital communication by federal government agencies and their employees.

The decision of the District Court, below, which dismissed at the pleading stage the FOIA and Federal Records Act ("FRA") claims of appellant Competitive Enterprise Institute ("CEI") is contrary to law and undermines the ability of the press and public to access government records and hold government officials accountable. *Amici*, as members and representatives of the news media, are frequent users of FOIA, and have a strong interest in ensuring its efficacy as a tool for government oversight. *Amici* write separately to: (1) address the District Court's application of an erroneous legal standard to determine that the email records requested by CEI were not "withheld" by appellee the Office of Science

and Technology Policy ("OSTP") within the meaning of FOIA, and to clarify the standard for determining possession, custody, or control sufficient to "withhold" requested records; and (2) highlight the importance of press and public access where government officials utilize private email accounts to conduct public business.

In *Kissinger v. Reporters Committee for Freedom of the Press*, the U.S. Supreme Court stated that a federal court's jurisdiction over a FOIA case is dependent upon a showing that an agency has (1) "improperly" (2) "withheld" (3) "agency records." 445 U.S. 136, 150 (1980) ("*Kissinger*"). Here, the District Court dismissed Appellant's FOIA claims solely on the basis of *Kissinger*'s "withholding" prong. In doing so, it not only misconstrued the Supreme Court's opinion in *Kissinger*, it erroneously applied a portion of the test for determining whether requested materials are "agency records," instead of the standard for determining whether an agency has "withheld" such records in violation of FOIA.

Both Supreme Court and this Court's case law interpreting FOIA's jurisdictional requirements make clear that these two prongs of the *Kissinger* analysis involve two distinct analyses. Specifically, to determine whether requested records are "agency records" within the meaning of the Act, courts in this Circuit apply a fact-intensive "totality of the circumstances" test that "focus[es] on a variety of factors surrounding the creation, possession, control, and

use of the document by an agency." *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 288 (D.C. Cir. 2006). The "prerequisite" for an agency's "withholding" of an agency record, on the other hand, as *Kissinger* made clear, mirrors the straightforward "possession, custody, or control" analysis applicable in the civil discovery context. *See* Fed. R. Civ. P. 34(a)(1); *Kissinger*, 445 U.S. at 154; *id*. at 155 n.9.

Because the District Court ruling improperly dismisses CEI's FOIA claims on the basis of an incorrect legal standard, and undermines the fundamental purpose of the Act by endorsing an agency's refusal to release records maintained on an employee's personal email account, this Court should reverse.

ARGUMENT

I. The District Court misconstrued Kissinger and applied an erroneous legal standard for determining whether records have been "withheld."

As the Supreme Court stated in *Kissinger*, a federal court's jurisdiction over a FOIA case is dependent upon a showing that an agency has (1) "improperly" (2) "withheld" (3) "agency records." 445 U.S. at 150. "Judicial authority to devise remedies and enjoin agencies" under 5 U.S.C. § 552(a)(4)(B) can only be invoked where all three prongs of this jurisdictional test are satisfied. *Id*.

The District Court, below, dismissed CEI's FOIA claims solely on the basis of its conclusion that CEI's allegations failed to show that OSTP had "withheld"

the email records requested by CEI. *See* J.A. at 194 n.4 ("Because CEI's FOIA claims fail on the 'withholding' prong of the *Kissinger* analysis, the Court need not reach the question of whether the emails sought are agency records."). Put another way, the District Court concluded that even if the emails sought were "agency records" within the meaning of FOIA, OSTP was not "withholding" them. In reaching that conclusion, the District Court misinterpreted *Kissinger*, stretching it well beyond its express holding and unique facts, and improperly applied an incorrect legal standard for determining whether an agency has sufficient "control" to "withhold" agency records within the meaning of the Act.

A. Kissinger.

At issue in *Kissinger* were three FOIA requests submitted to the State Department seeking various transcripts of Henry Kissinger's telephone conversations that were created during his tenures as an Assistant to the President (from January 1969 to September 1973) and Secretary of State (from September 1973 to January 1977). *Kissinger*, 445 U.S. at 139–40. On October 29, 1976, Kissinger moved the transcripts from the State Department to a private estate in New York. *Id.* at 140. On November 12, 1976 and December 24, 1976, Kissinger entered into two agreements with the Library of Congress, deeding various papers, including the transcripts. *Id*. at 141–42. On December 28, 1976, the transcripts were transferred to the Library of Congress. *Id*.

On January 14, 1976, the first of the FOIA requests at issue in *Kissinger* was made to the State Department by journalist William Safire; it sought certain transcripts created between 1969 and 1971, when Kissinger was an Assistant to the President. *Id.* at 143. On December 28 and 29, 1976, the second FOIA request was submitted by the Military Audit Project ("MAP"). *Id*. Thereafter, on January 13, 1977, a third request for the telephone transcripts was made by RCFP and others. *Id*. Unlike the Safire request, the MAP and RCFP requests sought transcripts created while Kissinger was Secretary of State, but were submitted to the agency after the transcripts had been deeded and transferred to the Library of Congress.[1]

With respect to the MAP and RCFP requests, the only issue addressed by the Supreme Court in *Kissinger* was whether the State Department had "withheld" the requested transcripts for purposes of 5 U.S.C. § 552(a)(4)(B); the Court found it "unnecessary to decide" whether they were "agency records." *Id*. at 150.

Noting that FOIA does not define the word "withhold," the Court looked to the "usual meaning" of the word, and the "structure and purpose" of the Act, to

[1] While the Court's opinion in *Kissinger* does not specify when on December 28th the transcripts were transferred to the Library of Congress, the transcript of oral argument in that case makes clear that the MAP and RCFP requests were submitted after the physical transfer of those records to the Library. *See* Oral Argument at 7:34, *Kissinger*, 445 U.S. 136 (No. 78-1088), *available at* http://www.oyez.org/cases/1970-1979/1979/1979_78_1088#argument.

conclude that "possession or control is a prerequisite to FOIA disclosure duties." *Id*. at 152. But, as this Court noted in *McGehee v. CIA*:

> That such custody or control is a prerequisite for a "withholding" is the only aspect of the definition of the term settled by *Kissinger*, the majority of the Court declined to "decide the full contours of a prohibited 'withholding.'"

697 F.2d 1095, 1110 n.67 (D.C. Cir. 1983) (quoting *Kissinger*, 445 U.S. at 150–51), *vacated in part and aff'd in part*, 711 F.2d 1076 (D.C. Cir 1983).

As an initial matter, *Kissinger* involved FOIA requests seeking paper documents "which ha[d] been removed from" the physical "possession" of the State Department and its employees "prior to the filing" of the MAP and RCFP requests. *Kissinger*, 445 U.S. at 154. The Court did not consider "possession" in the context of electronic records, like email, that can simultaneously be in the possession—as well as the control—of an employee, a service provider, and a system administrator, among others. Nor, in 1980 when *Kissinger* was decided, did the Supreme Court have any reason to anticipate today's widespread use of email by government officials and agencies.

In any event, the Court's holding in *Kissinger* did not turn on the mere physical possession of the requested transcripts. To the contrary—relying on the fact that the MAP and RCFP requests were submitted "after Kissinger's telephone notes had been deeded to the Library of Congress," *Kissinger*, 445 U.S. at 154—the Supreme Court held that the State Department's "*refusal to resort to legal*

remedies" to recover the transcripts was "simply not conduct subsumed by the verb 'withhold.'" *Id*. at 151 (emphasis added).

> We hold today that even if a document requested under the FOIA is wrongfully in the possession of a party not an 'agency,' the agency which received the request does not 'improperly withhold' those materials *by its refusal to institute a retrieval action*.

Id. at 139 (emphasis added); *see also id*. at 152 ("An agency's *failure to sue a third party* to obtain possession is not a withholding under the Act.") (emphasis added); *id*. at 153 (stating that the language of the Act did "not suggest that Congress expected an agency *to commence lawsuits* in order to obtain possession of documents requested; "it was operating under the assumption that agencies would not be *obligated to file lawsuits* in order to comply with FOIA requests") (emphasis added); *id*. at 154 (finding it "doubtful" that "Congress intended that a 'search' include *legal efforts to retrieve* wrongfully removed documents") (emphasis added).

In reaching its conclusion that an agency is not required to sue a third party to obtain physical possession of documents in order to respond to a FOIA request, the Court analogized the agency's obligations under FOIA to the obligations of a party in the context of civil discovery. *Id*. (noting that "an individual does not improperly withhold a document sought pursuant to a subpoena by his refusal to sue a third party to obtain or recover possession"); *see also id*. at 155 n.9.

With respect to Safire's request for transcripts covering the period when Kissinger was an Advisor to the President, the Court concluded that they were not "agency records" under 5 U.S.C. § 552(a)(4)(B). *Id.* at 156. The Court, therefore, did not address whether the requested transcripts had been "withheld" by the State Department and expressly declined to do so. *Id*. at 157.

B. Whether a requested record is an "agency record," and whether it has been "withheld," are separate, distinct inquiries.

The "withholding" prong of *Kissinger* focuses not on whether requested records are "agency records" subject to the Act, but rather on the scope of an agency's duty to release "agency records" in response to a FOIA request. *See Kissinger*, 445 U.S. at 151–54. Where an agency has possession, custody, or control of records at the time a request is made, yet fails to release them in response to that request, those records have been "withheld" for purposes of 5 U.S.C. § 552(a)(4)(B). *See id*. at 151–52; *id*. at 154 n.9; *see also McGehee*, 697 F.2d 1095.

As set forth above, while the Supreme Court in *Kissinger* identified the "prerequisite" for a "withholding" within the meaning of 5 U.S.C. § 552(a)(4)(B)—possession, custody, or control—it expressly declined to "decide the full contours of a prohibited 'withholding.'" *Id*. at 150–51. And, after *Kissinger*, few courts have had occasion to elaborate on what constitutes a

"withholding" under FOIA. While "[c]ertainly a categorical refusal to release documents that are in the agency's 'custody' or control' for any reason other than those set forth in the Act's enumerated exemptions would constitute 'withholding,'" a "withholding" can also occur in other ways. *McGehee*, 697 F.2d at 1110. For example:

> a system adopted by an agency for dealing with documents of a particular kind constitutes "withholding" of those documents if its net effect is significantly to impair the requester's ability to obtain the records or significantly to increase the amount of time he must wait to obtain them.

Id.

As discussed in more detail below, in determining whether the "prerequisite" for a "withholding" under the Act—possession, custody, or control—has been satisfied, the applicable analysis is straightforward. As *Kissinger* makes clear, it mirrors the test for "possession, custody, or control" applicable in the civil discovery context. *See* Fed. R. Civ. P. 34(a)(1); *Kissinger*, 445 U.S. at 154; *id*. at 155 n.9.

With respect to the "agency records" prong of *Kissinger*, this Circuit has "adopted a totality of the circumstances test" designed "to distinguish 'agency records' from personal records." *Consumer Fed'n of Am.*, 455 F.3d at 288; *see also United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144–46 (1989). The test "focus[es] on a variety of factors surrounding the creation, possession,

control, and use of the document by an agency." *Consumer Fed'n of Am.*, 455 F.3d at 288 (quoting *Bureau of Nat'l Affairs v. United States Dep't of Justice*, 742 F.2d 1484, 1490 (D.C. Cir. 1984)).

The case law applying this test has generally placed greater weight on the *creation* and *use* of the requested material; not on *possession* or *control*. *See*, *e.g.*, *Bureau of Nat'l Affairs*, 742 F.2d at 1492 ("Where, as here, a document is created by an agency employee, consideration of whether and to what extent that employee used the document to conduct agency business is *highly relevant* for determining whether that document is an 'agency record' within the meaning of FOIA.") (emphasis added).[2] However, such case law "'cannot be compartmentalized rigidly into either a 'control' or a 'use' analysis.'" *Consumer Fed'n of America*, 455 F.3d at 291 n.12 (quoting *Bureau of Nat'l Affairs*, 742 F2d at 1490). To the contrary, the "agency records" analysis is fact specific, and the factors to be considered are intertwined. *See id.* (noting that this Court has "suggested that the extent to which an employee *uses* a document for agency business is an indicator of the extent of agency *control* over the document") (emphasis added).

[2] This Court has made clear that an agency's lack of physical possession of documents, alone, is not determinative of whether or not they constitute "agency records" under FOIA. *Forsham v. Califano*, 587 F.2d 1128, 1136 n.19 (D.C. Cir. 1978) ("Obviously a government agency cannot circumvent FOIA by transferring physical possession of its records to a warehouse or like bailee."); *see also Burka v. United States HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996).

Thus, when analyzing "control" in the "agency records" context, courts apply a distinct multi-factor test as one part of the overarching totality of the circumstances analysis. That test within a test looks to four factors "relevant" to determining "control" for these purposes: "(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files." *Burka*, 87 F.3d at 515 (quoting *Tax Analysts v. United States Dep't of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988), *aff'd* 492 U.S. 136 (1989).

The "control" shown by these factors is then considered as one factor—alongside others—in determining whether requested documents meet the definition of "agency records." *See Bureau of Nat'l Affairs*, 742 F.2d at 1490 (stating that "control" may have "no precise definition and may well change as relevant factors assume varying importance from case to case") (quotation omitted). In sum, the four "control" factors identified by this Court in *Burka*, 87 F.3d at 515, are one part of the multi-faceted "agency records" analysis adopted by this Court.

C. The District Court erroneously applied part of the "agency records" analysis to determine that the records requested by CEI were not "withheld."

The District Court below based its decision entirely on its conclusion that OSTP had not "withheld" the email records requested by CEI; it expressly did not determine whether those records were "agency records." J.A. at 194 n.4. To reach that conclusion, however, the District Court erroneously relied on case law applying the standard for determining whether records are "agency records."

For example, the District Court cited *CEI v. NASA*, 989 F.Supp.2d 74 (D.D.C. 2013) ("*NASA*") for the proposition that "agencies do not—merely by way of the employer/employee relationship—gain 'control' over their employees' personal email accounts." J.A. at 195–96. In *NASA*, however, the district court *only* analyzed whether the materials requested under FOIA were "agency records," by applying this Circuit's totality of the circumstance test—and the four factors "relevant" to the "control" factor of that test that were identified in *Burka*, 87 F.3d at 515—to conclude that "the term 'agency records' [was] not so broad as to include" the "personal materials" sought in that case. *See* 989 F. Supp. 2d at 86 (internal citations and quotations omitted). It did not address the question of what constitutes a "withholding" under the second prong of the *Kissinger* test.

Similarly, the District Court cited *Bureau of National Affairs,* 742 F.2d at 1496, as well as *Kissinger*, 445 U.S. at 157, to conclude that "high ranking officials

have personal interests distinct from those of agencies they lead." J.A. at 197. While that observation may be true, it does not speak to whether an agency has improperly "withheld" records under FOIA. Again, the District Court relied on portions of case law addressing whether requested records were "agency records," not whether they were "withheld." *See Kissinger*, 445 U.S. at 157 ("We simply decline to hold that the physical location of the notes of telephone conversations renders them 'agency records.'"); *Bureau of Nat'l Affairs*, 742 F.2d at 1496 ("We conclude, however, that these particular appointment calendars are not 'agency records.'").

By relying on case law applying one aspect of the totality of the circumstances test applicable to *Kissinger*'s "agency records" prong to dismiss CEI's FOIA claims under the "withholding" prong the District Court erred in two separate ways. First, it applied the wrong legal standard. "Control" for purposes of *Kissinger*'s "withholding" prong is analogous to "control" in the civil discovery context; case law analyzing the "agency records" prong of *Kissinger* is inapposite. Second, even assuming, *arguendo*, that it is not inapposite, and the same "control" test is properly applied under both the "agency records" and the "withholding" prongs of *Kissinger*, the District Court failed to correctly apply that test.

i. The District Court failed to apply the correct Rule 34-based standard for determining whether an agency has "control" of records sufficient to "withhold" them.

While the full scope of what constitutes a "withholding" under FOIA has yet to be delineated, it is clear that an agency "withholds" a record, at a minimum, when it has possession, custody, or control of that record, and refuses to release it. *See Kissinger*, 445 U.S. at 152; *McGehee,* 697 F.2d at 1110.

What constitutes possession, custody, or control for these purposes is, as the Supreme Court indicated in *Kissinger*, determined by reference to the analogous obligations of a party to produce documents in its "possession, custody, or control" in the civil discovery context. Fed. R. Civ. P. 34(a)(1); *see Kissinger*, 445 U.S. at 154; *id*. at 155, n.9 (citing Fed. R. Civ. P. 34 and 45).

Indeed, in his separate opinion in *Kissinger*, Justice Stevens expressly endorsed this analogy as "instructive." *Id.* at 164 n.6 (Stevens, J., concurring in part and dissenting in part) ("Under Rule 34 of the Federal Rules of Civil Procedure, a party is required to produce requested documents if they are within his "possession, custody or control.").[3] And this approach is supported by other aspects of FOIA, which similarly incorporate or mirror civil discovery obligations. *See, e.g., EPA v. Mink*, 410 U.S. 73, 86 (1973) (stating that the exemption set forth in 5 U.S.C. § 552(b)(5) "clearly contemplates that the public is entitled to all such

[3] This Court has cited Justice Stevens' opinion with approval when interpreting the "improper" prong of the *Kissinger* test. *See, e.g., McGehee*, 697 F.2d at 1110.

memoranda or letters that a private party could discover in litigation with the agency").

Under Rule 34 of the Federal Rules of Civil Procedure, the distinction between "possession" and "control" can be significant. *See Alexander v. FBI*, 194 F.R.D. 299, 302 (D.D.C. 2000) (stating that Hillary Clinton's discovery responses did not address "whether documents not within Mrs. Clinton's possession, but still within her control were searched in response to the plaintiffs' requests."). For example, "documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action," even if it does not have possession of those documents. *Gordon Partners v. Blumenthal* (*In re NTL, Inc. Sec. Litig.*), 244 F.R.D. 179, 195 (S.D.N.Y. 2007). And, within the context of an employer-employee relationship, "a corporation may be required to produce documents in the possession or control of one of its officers." 7-34 *Moore's Federal Practice*, § 34.14 (Matthew Bender 3d Ed.) (citing *Riddell Sports v. Brooks*, 158 F.R.D. 555, 559 (S.D.N.Y. 1994)). Generally, for civil discovery purposes, the government is deemed to have control over employee email. *See AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 439–40 (2007).

The definition of "control" in the civil discovery context, while broad, is not without limits; for example, under Rule 34 a federal agency does not have

"control" over documents held by another agency. *See FTC v. Lights of Am. Inc.*, 2012 U.S. Dist. LEXIS 17212, *20 (C.D. Cal. Jan. 20, 2012). Moreover, when this definition is applied in the FOIA context, there are additional requirements that further limit the scope of an agency's obligation not to "withhold" materials within its "control." For example, under FOIA a requester must "reasonably describe[]" the records she or he seeks. 5 U.S.C. § 552(a)(3)(A). And, as discussed above, only materials that meet the definition of "agency records" are subject to disclosure under the Act.

Here, the District Court failed to apply the proper Rule 34-based standard for determining whether an agency has possession, custody, or control of requested records sufficient to "withhold" them under FOIA. Among other things, it failed to consider whether OSTP has the practical ability to obtain the records requested by CEI—which are maintained by the agency's head in a private email account that he has direct access to, and possession and control of.[4] Instead, the District Court applied an erroneous legal standard to conclude that OSTP is not "withholding" the requested email records solely because they are maintained on a personal email account. To *amici*'s knowledge, no court in this Circuit has previously reached such a conclusion. *Cf. Landmark Legal Found. v. EPA*, 959 F. Supp. 2d 175, 181

[4] Unlike in *Kissinger*, there is no indication here that OSTP would have to commence a lawsuit against a third party in order to release the requested email records to CEI. *Cf. Kissinger*, 445 U.S. at 151–54.

(D.D.C. 2013) (denying agency's motion for summary judgment as to the adequacy of its search for records because it did not search "*personal* email accounts" of certain employees, and the record contained "one concrete example of a personal email being used for official purposes") (italics original). This Court should remand this matter to the District Court to evaluate the sufficiency of CEI's allegations under the correct legal standard.

ii. Assuming, *arguendo*, that "control" sufficient to "withhold" records is determined by reference to the *Burka* factors, the District Court failed to apply that test.

In *Burka*, this Court identified four factors "relevant" to "control" under the "totality of the circumstances" test for distinguishing between "agency records" and personal materials. 87 F.3d at 515. Those factors are: "(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files." *Id*. (internal quotation omitted). As set forth above, whether an agency has "control" sufficient to "withhold" records under FOIA is a determination that is correctly made by applying the standard for "control" applicable in the civil discovery context, not under the same analysis applicable to the "agency records" prong. Yet

assuming, *arguendo*, that the same test for "control" applies under both prongs, the District Court erred by failing to apply the *Burka* test. *See* J.A. at 195–96.

The "control" test set out in *Burka* is fact-specific, and proper consideration of its factors does not lend itself to a resolution at the pleading stage. For example, the test turns, in part, on an "intent" to "retain or relinquish control" of the records at issue, as well as the "extent" to which agency personnel have "read or relied" on them. Such factors are appropriately considered by a district court, with the benefit of affidavits and other evidentiary support, on a motion for summary judgment. Indeed, neither the cases relied upon by the District Court, nor other cases that have addressed the "agency records" prong of *Kissinger* as dispositive, have been decided on a motion to dismiss. *See, e.g., Consumer Fed'n of Am.*, 455 F.3d at 288; *Bureau of Nat'l Affairs*, 742 F.2d at 1490; *NASA*, 989 F. Supp. 2d at 86; *see also Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009) (noting that FOIA claims are "typically and appropriately decided on motions for summary judgment").

II. The District Court's decision undermines FOIA.

An interpretation of "withhold" that would allow agency officials to circumvent FOIA by conducting public business on personal email accounts is not—as the District Court suggested—merely an "anticipated" or theoretical problem. J.A. at 198. As explained in more detail below, nearly two-thirds of federal employees use personal email accounts to conduct official government

business. Press and public access to those email records at both the federal and state level is essential to the public's ability to remain informed about the conduct of public servants that work on their behalf.

A. Government employees increasingly use personal email accounts to conduct the public's business.

Email is one of—if not the most—ubiquitous and important means of communication today. In the more than 25 years since the Supreme Court decided *Kissinger*, there has been an explosion in the use of digital forms of communication in both private and public workplaces. This Court should not ignore the implications of this sea change for public access to agency records under FOIA in ruling on this case. *See Consumer Fed'n of Am.*, 455 F.3d at 290 (observing that "the technological changes in the period since [a 1984 case involving access to paper calendars was decided were] not without significance").

According to a recent study by the Pew Research Center, 78% of office-based workers in the United States in both the public and private sector say that email is very important for doing their job. Kristen Purcell & Lee Raine, *Email and the Internet Are the Dominant Technological Tools in American Workplaces*, Pew Res. Center (Dec. 30, 2014), http://perma.cc/K9WH-CBUB. Indeed, many crucial communications now exist *only* digitally: "[t]he more we as a society rely on electronic devices to communicate and store information, the more likely it is that information that was once found in filing cabinets, letters, and photo albums

will now be stored only in electronic form." *Going Dark: Encryption, Technology, and the Balance Between Public Safety and Privacy*, *before the Sen. Comm. on the Judiciary*, 114th Cong. (Jul. 8, 2015) (statement of Sally Quillian Yates and James B. Comey).

Moreover, federal government employees routinely use *private* email accounts for correspondence relating to their official work duties. A recent survey by the Government Business Council of high-level federal employees found that personal email is frequently used to conduct government business. Charles S. Clark, *Hillary Clinton Not Alone in Using Private Emails to Govern*, Gov't Executive (Mar. 3, 2015), http://bit.ly/188JIwO. The results of that survey show that 16% of agency personnel *always* or *often* use personal email accounts for government business, and 63% do so with varying degrees of frequency. *See id.*[5]

Private or personal email accounts are used at all levels of the federal government to discuss government business of significant public importance. In 2012, for example, it was reported that more than a dozen employees at the Department of Energy used personal email accounts to discuss controversial taxpayer-funded loans. Carol D. Leonnig and Joe Stephens, *Energy Department loan program staffers were warned not to use personal email*, The Wash. Post

[5] The survey also shows that 78% of federal employees either do not know or disagree that those same email records are being preserved for archiving within their departments or agencies. *Id*.

(Aug. 14, 2012), http://perma.cc/5VYP-J77L. Such practices extend to federal employees at the highest levels. *See*, *e.g.*, *Associated Press v. United States Department of State*, No. 1:15-cv-345 (D.D.C. filed Mar. 11, 2015) (concerning Secretary of State Hillary Clinton's use of personal email); *Landmark Legal Found.*, 959 F. Supp. 2d 175 (D.D.C. 2013) (concerning the personal email accounts of EPA leaders); *Democratic Nat'l Comm. v. United States DOJ*, 539 F. Supp. 2d 363, 366 (D.D.C. 2008) (noting that a "report prepared for the United States House of Representatives Committee on Oversight and Government Reform indicates that it was common for many of the 88 White House officials who received RNC email accounts to use them for official government business."). *See also* Sheryl Gay Stolberg, *Advisers' E-Mail Accounts May Have Mixed Politics and Business, White House Says*, The N.Y. Times (Apr. 12, 2007), http://nyti.ms/1DBbLNX; Letter from United States House of Representatives, Committee on Oversight and Government Reform, to Lois Lerner, Internal Revenue Service (Aug. 13, 2013), *available at* http://perma.cc/683H-SX6R (stating that the Committee learned Ms. Lerner sent email from her IRS email account to a personal account, raising "serious questions concerning [her] use of a non-official email account to conduct official business.").

The use of personal email accounts to conduct public business is also endemic within state governments. *See*, *e.g.*, Dorian Hargrove, *City accused of*

subverting public records law in lawsuit over Convention Center expansion, San Diego Reader (Jul. 10, 2013), http://bit.ly/1P93VTo (noting that "public officials [in San Diego] and throughout the state are using private email accounts and personal cell phones to conduct city business and broker big development deals."). As is in the federal government, this phenomenon reaches the highest levels of state government, including governors. *See*, *e.g.*, Chris Zubak-Skees, *Palin used six email accounts as governor*, The Sunlight Found. (Jun. 15, 2011), https://perma.cc/KT52-UPYX; Bill Barrow, The Associated Press, *Beyond Clinton, many 2016 hopefuls have used private email—including Martin O'Malley*, The Balt. Sun (Mar. 7, 2015), http://bsun.md/1MQ88Nu (noting that Martin O'Malley, Bobby Jindal, Scott Walker, Jeb Bush, and Rick Perry have used private email for government business.)

B. Access under FOIA to agency records maintained on government employees' personal email accounts is critical if the public is to be kept informed about what their government is up to.

Access to email sent or received by public officials from personal email accounts has proved instrumental in revealing misconduct. For example, in 2014 it was reported that Wisconsin government employees in the governor's office "used personal computers and email to conceal that they were mixing government and campaign business." Monica Davey & Steven Yaccino, *Aides' Emails Provide Detailed Look at Wisconsin's Governor*, The N.Y. Times (Feb. 19, 2014),

http://nyti.ms/1fzpwRk. That conduct eventually led to the criminal convictions of two of the governor's aids. *Id.* In New Jersey, it was an email from the personal account of the governor's chief of staff to the personal account of a Port Authority official that led to the closing of the George Washington Bridge in 2013. Aaron Blake, *E-mails suggest top Christie aide used lane closures for retribution*, The Wash. Post (Jan. 8, 2014), http://perma.cc/5YXK-LF4T.

The use of private email accounts by public officials can have the effect of shielding important public decisions from public scrutiny. *See* Bryan Lowry, *Lobbyists got a sneak peek at Gov. Sam Brownback's budget*, The Kan. City Star (Jan. 27, 2015), http://perma.cc/8L22-HKEP (noting that the governor's budget director used a private email account to share a working version of the proposed budget with lobbyists three weeks before it was unveiled to lawmakers.). Such conduct is antithetical to our democratic form of government and undermines the very purpose of FOIA, which was enacted to ensure government accountability to all members of the public.

As Appellant's brief notes, many states recognize that their public records laws extend to email records on personal email accounts and computers when they concern public matters. *See*, *e.g.*, *Bradford v. Dir. Empl. Sec. Dep't.*, 128 S.W.3d 20, 28 (Ark. Ct. App. 2003) ("The creation of a record of communications about the public's business is no less subject to the public's access because it was

transmitted over a private communications medium than it is when generated as a result of having been transmitted over a publicly controlled medium."); *Burton v. Mann*, 74 Va. Cir. 471, 474 (Va. Cir. Ct. 2008) ("Whether a record is found in a public databank, or one privately contracted for by the officer, agent, or employee of a public body is not determinative of the outcome. To rule otherwise would permit public records of significance to a consideration of the affairs of governance to be shielded from public scrutiny . . . ."); *O'Neill v. City of Shoreline*, 240 P.3d 1149, 1155 (Wash. 2010) (authorizing inspection of a public employee's home computer for email metadata because "[i]f government employees could circumvent the [Public Records Act] by using their home computers for government business, the [Public Records Act] could be drastically undermined."); *Hayes v. Oregonian Publishing Co.*, No. 15CV04530 at *2 (Or. Cir. Ct., 3rd Jud. D., Aug. 5, 2015), *available at* http://perma.cc/8MWH-AGXV (holding that "any emails concerning state business that plaintiff sent or received during that time are records *of* a state agency") (emphasis in original). Because a number of state courts rely on federal court decisions applying FOIA for guidance in interpreting their own state open records laws, this Court's decision could have far reaching implications on this important issue.

The rule governing access to email records should be simple: "[w]hen public officials conduct public business, their constituents get to watch. That's true no

matter the platform." The L.A. Times Editorial Board, *Public officials in a wired world: How much privacy should they get?*, latimes.com (Apr. 15, 2014), http://lat.ms/1IQHi5p. If email that meets the definition of an "agency record" is not subject to FOIA simply because it happens to be stored on a private email account, vast swaths of government conduct will be hidden from public view. Not only is such a result disastrous for democratic governance, its impact on history will be felt for generations to come. *See* Adam Sneed, *Colin Powell says he doesn't have any of his State emails*, Politico (Mar. 8, 2015), http://perma.cc/GA8M-P5E6 (reporting that Secretary of State Colin Powell used a personal email account and did not keep copies of any of his email).

In enacting FOIA, Congress intended to curb agencies' "unbridled discretion" to decide what information should be disclosed by "'clos[ing] the loopholes which allow agencies to deny legitimate information to the public.'" *Tax Analysts*, 492 U.S. at 150. If "FOIA is to be more than a dead letter," *Kissinger*, 445 U.S. at 159 (Brennan, J., concurring in part and dissenting in part), it must be interpreted in a manner consistent with that purpose, that takes into account the developments of the digital age.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to reverse and remand this matter to the District Court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because this brief contains 6,408 words, excluding the parts of the brief exempted Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Time New Roman font.

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REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Dated: August 17, 2015
Washington, D.C.

APPENDIX A: DESCRIPTIONS OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association of reporters and editors dedicated to safeguarding the right to a free and unfettered press guaranteed by the First Amendment, and the freedom of information interests of the news media and the public. The Reporters Committee has participated as a party and as *amicus curiae* in First Amendment and Freedom of Information Act litigation since 1970

Advance Publications, Inc., directly and through its subsidiaries, publishes more than 20 print and digital magazines with nationwide circulation, local news in print and online in 10 states, and leading business journals in over 40 cities throughout the United States. Through its subsidiaries, Advance also owns numerous digital video channels and internet sites and has interests in cable systems serving over 2.3 million subscribers.

With some 500 members, **American Society of News Editors** ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors

with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

Cable News Network, Inc. ("CNN"), a division of Turner Broadcasting System, Inc., a Time Warner Company, is the most trusted source for news and information. Its reach extends to the following: nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news websites in the United States; CNN Newsource, the world's most extensively syndicated news

service; and strategic international partnerships within both television and the digital media.

Courthouse News Service is a California-based legal news service for lawyers and the news media that focuses on court coverage throughout the nation, reporting on matters raised in trial courts and courts of appeal up to and including the U.S. Supreme Court.

Cox Media Group, Inc. is an integrated broadcasting, publishing, direct marketing and digital media company. Its operations include 15 broadcast television stations, a local cable channel, a leading direct marketing company, 85 radio stations, eight daily newspapers and more than a dozen non-daily print publications and more than 100 digital services.

Dow Jones & Company, Inc., a global provider of news and business information, is the publisher of The Wall Street Journal, Barron's, MarketWatch, Dow Jones Newswires, and other publications. Dow Jones maintains one of the world's largest newsgathering operations, with more than 1,800 journalists in nearly fifty countries publishing news in several different languages. Dow Jones also provides information services, including Dow Jones Factiva, Dow Jones Risk & Compliance, and Dow Jones VentureSource. Dow Jones is a News Corporation company.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Gannett Co., Inc. is an international news and information company that publishes 93 daily newspapers in the United States, including The El Paso Times and USA TODAY. Each weekday, Gannett's newspapers are distributed to an audience of 9 million readers and the websites associated with the company's publications serve online content to 95 million unique visitors each month.

GateHouse Media is a preeminent provider of print and digital local content and advertising in small and midsize markets. Our portfolio of products, which includes 404 community publications and more than 350 related websites and six yellow page directories, serves over 128,000 business advertising accounts and reaches approximately 10 million people on a weekly basis.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

MediaNews Group's more than 800 multi-platform products reach 61 million Americans each month across 18 states.

The Association of Magazine Media, ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

National Public Radio, Inc. is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations that are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and 10 years of archived audio and information.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

News Corporation is a global, diversified media and information services company focused on creating and distributing authoritative and engaging content to consumers throughout the world. The company comprises leading businesses across a range of media, including: news and information services, digital real estate services, book publishing, digital education, and sports programming and pay-TV distribution.

The News Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The News Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: *The Record* (Bergen County), the state's second-largest newspaper, and the *Herald News* (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties and a family of glossy magazines, including (201) Magazine, Bergen County's premiere magazine. All of the newspapers contribute breaking news, features,

columns and local information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing the people, places and events of Bergen County.

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

TEGNA Inc. owns or services (through shared service agreements or other similar agreements) 46 television stations in 38 markets.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

WP Company LLC (d/b/a The Washington Post) publishes one of the nation's most prominent daily newspapers, as well as a website,

www.washingtonpost.com, that is read by an average of more than 20 million unique visitors per month.

Certificate of Service

I certify that a copy of the forgoing was filed electronically with the Clerk and delivered by operation of the CM/ECF system to the counsel of record on August 17, 2015.

/s/ Katie Townsend