No. 16-629

IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION and
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Petitioners,

—v.—

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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PRELIMINARY STATEMENT

In seeking to avoid this Court's review, Respondents minimize the deep tension that exists between this Court's and the D.C. Circuit's tests for "agency control" under the Freedom of Information Act ("FOIA"). Respondents also seek to minimize the consequences of denying review in this case, which concerns an exceptionally important agency record in their possession: a 6,963-page report on the Central Intelligence Agency's former program of detention, torture, and other abuse of detainees (the "Final Report"). However, for the reasons below, neither attempt to downplay the issues at stake is persuasive. This Court should grant the Petition to clarify the scope of FOIA, and to ensure that the American public learns the full story of the CIA's abuses—subject to the proper application of relevant statutory exemptions—so that unlawful torture is never repeated.

Over the past two decades, the D.C. Circuit has repeatedly distorted this Court's test for whether a document is an "agency record" under FOIA, rendering the scope of the statute uncertain. Pet. 10–13. In *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), this Court held that a record is an agency record for FOIA purposes if (1) the agency created or obtained the requested record, and (2) the agency is "in control" of the record at the time of the FOIA request. *Id.* at 144–45. The Court explained that an agency is "in control" of a document when "the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.* at 145. In contrast, when evaluating a document authored by Congress, the D.C. Circuit

focuses on whether Congress manifested a clear intent to control the document—despite this Court's guidance that the agency-record determination should not "turn on the intent of the creator of a document." *Id.* at 147.

Respondents contend that *Tax Analysts* is distinguishable, but their efforts to narrow the scope of this Court's ruling cannot be squared with the plain language of the case. Although *Tax Analysts* involved documents created by the judiciary, the Court's reasoning and holding were not limited to the facts before it. Rather, after accounting for Supreme Court precedents and the purposes of FOIA, the Court articulated a general test to govern the agency-record determination, regardless of the author of the document.

Respondents are also mistaken in asserting that Petitioners failed to preserve the argument that *Tax Analysts* is in tension with the D.C. Circuit's agency-control test. Petitioners squarely presented that argument at each stage of the litigation.

Finally, Respondents argue that release of the Executive Summary is adequate public disclosure, and citing events that post-date the November 10, 2016 Petition, they further contend that Petitioners exaggerate the consequences of denying review. But if anything, intervening events only underscore the urgent need for this Court's intervention. The Final Report, unlike the Executive Summary, is the full and definitive account of the CIA's torture program, one of the darkest chapters in our nation's history. As such, the Final Report is a document of exceptional importance to the American public—particularly now, when the Executive is apparently

still willing to consider a return to past methods, in violation of domestic and international law. The lessons the Final Report teaches cannot be learned unless it is released. Because the Final Report is a record of critical national importance, this Court's review is warranted.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE MEANING OF "AGENCY RECORDS" AND THE SCOPE OF FOIA.

As Petitioners have explained, the D.C. Circuit's agency-control test is in tension with the straightforward definition of agency control articulated by this Court in *Department of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989): "By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties." Pet. 11–13. This case is an ideal vehicle to clarify the definition of agency control and the meaning of "agency record" because it is undisputed that the Final Report came into Respondents' possession in the legitimate conduct of their official duties. *Cf.* BIO 16–17.

As an initial matter, Respondents' contention that agency possession is not alone dispositive of agency control, *see* BIO 13–14, is a red herring. Petitioners nowhere suggest that this Court's control test is based solely on an agency's possession of a document. Nor, for that matter, did this Court do so in *Tax Analysts*, in which the Court explicitly endorsed the "teaching [of *Kissinger v. Reporters Committee for Freedom of Press*, 445 U.S. 136 (1980)]

that the term 'agency records' is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency." *Tax Analysts*, 492 U.S. at 145.

Although Respondents attempt to limit the significance of *Tax Analysts*, their arguments cannot overcome the fact that D.C. Circuit precedent, and the Circuit's ruling in this case, are at odds with the plain language of this Court's controlling decision. Respondents first contend that, in *Tax Analysts*, "the agency's possession of the documents would itself confer the requisite 'control,'" because the documents were publicly available judicial opinions. BIO 16. However, the Court in *Tax Analysts* was well aware that FOIA requesters routinely, if not mostly, seek documents that are not publicly available; the Court's reasoning and holding were not limited to the facts before it. *See* 492 U.S. at 142–48 (discussing cases involving requests for records that were not publicly available). Rather, after considering prior precedents and the purposes of FOIA, the Court articulated a general test to govern the agency-record determination—regardless of the author of the document, and regardless of whether the document is publicly available. *See id.* at 144–45, 147. It is particularly telling that the Court in *Tax Analysts* was presented with the D.C. Circuit's four-factor control test, and declined to adopt it. *See Tax Analysts v. Dep't of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988), *aff'd on other grounds*, 492 U.S. 136 (1989).[1]

[1] Contrary to Respondents' suggestion, *see* BIO 15, the fact that the Final Report was "highly classified" is irrelevant to the

Respondents next contend that *Tax Analysts* does not stand for the proposition that a creator's intent is irrelevant, but rather, that "a document's status as an 'agency record' does not turn on the *purpose* for which the document was created." BIO 17. But Respondents' argument inverts the reasoning of *Tax Analysts*. The Court rejected a purpose-based approach precisely because it "makes the determination of 'agency records' *turn on the intent* of the creator of a document relied upon by an agency. Such a *mens rea* requirement is nowhere to be found in the Act." 492 U.S. at 147 (emphasis added).[2]

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question whether the document is an agency record—under this Court's test or the D.C. Circuit's test. It is only after an agency processes a record and asserts withholdings under 5 U.S.C. § 552(b)(1), the FOIA exemption for properly classified information, that courts adjudicate whether any such assertion is in fact proper. Furthermore, the record in this case is clear that the classification of the Final Report reflects an executive branch judgment, not a congressional one. *See, e.g.*, Decl. of Neal Higgins, Director, Office of Congressional Affairs, CIA ¶ 15, *ACLU v. CIA*, No. 13-cv-1870 (D.D.C. Feb. 28, 2014), ECF No. 17-2 ("the Executive Branch does not consider SSCI's control over the document to extend to control over the classification of the information therein"); *see also* Exec. Order No. 13,526, 75 Fed. Reg. 707, 708 (Dec. 29, 2009) (Congress is not an "original classification authority").

[2] Although it is true that *Tax Analysts* did not consider the precise separation-of-powers issues that the D.C. Circuit weighed in *Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d 208, 221, 225–26 (D.C. Cir. 2013), *see* BIO 15, the fact remains that the D.C. Circuit's resolution of those issues is inconsistent with this Court's clear definition of agency control and its rejection of an intent-based test.

Respondents also argue that this case is a poor vehicle for the Court's review because no court of appeals has adopted an analytical approach in conflict with the D.C. Circuit's. BIO 17. Here, however, the absence of a circuit split is no surprise, because the vast majority of the litigation concerning agency control occurs in the D.C. Circuit. That makes it all the more important for this Court to correct the Circuit's failure to follow the dictates of *Tax Analysts*.

Finally, even if the Court were to accept the D.C. Circuit's agency-control test, the lower court erred in applying that test, for the reasons set forth in the Petition. *See* Pet. 13–21.

II. PETITIONERS PRESERVED THE ARGUMENT THAT THE D.C. CIRCUIT'S AGENCY-CONTROL TEST IS IN TENSION WITH THIS COURT'S TEST.

Respondents argue that Petitioners failed to preserve any disagreement with the D.C. Circuit's agency-control test, *see* BIO 17, but for several reasons, Respondents' contention is meritless.

At every stage of the case, Petitioners squarely presented the argument that the *Tax Analysts* test is in tension with the D.C. Circuit's test. As Petitioners argued in their appellate brief:

> Although FOIA does not define the term "agency record," the Supreme Court has supplied a clear definition. *See Tax Analysts*, 492 U.S. at 144. A record is an "agency record" for FOIA purposes if it satisfies two requirements: first, the agency must have created or obtained

> the requested material, and second, the agency must be in control of the material at the time of the FOIA request. *Id.* By "control," the Supreme Court means that "the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.* at 145. *Here, it is undisputed that Defendants obtained the Final Report in the legitimate conduct of their official duties. See* Defs.' Mot. Dismiss at 11–12, ECF No. 39 (Defendants "do not dispute that [the Final Report] was delivered to them in December 2014").

Appellants' Br. 19, *ACLU v. CIA*, No. 15-5183 (D.C. Cir. Nov. 16, 2015) (emphasis added); *see also* Appellants' Pet. for Reh'g 7, *ACLU v. CIA*, No. 15-5183 (D.C. Cir. June 27, 2016) (describing *Tax Analysts* test and arguing that there is "no dispute that Defendants obtained the Final Report in the legitimate conduct of their official duties").

In the briefing below, after explaining that the *Tax Analysts* test controlled and was satisfied, Petitioners necessarily also analyzed the relevant factors under the precedents of the D.C. Circuit. *See* Appellants' Br. 19–21; Appellants' Pet. for Reh'g 7–8. This analysis, however, did not constitute an endorsement of the lower courts' approach. Because Respondents did not dispute that they obtained the Final Report in the legitimate conduct of their official duties, there was no question that *Tax Analysts* would have resolved the agency-record issue in Petitioners' favor—and, accordingly, that Petitioners supported the application of this Court's test in lieu

of the D.C. Circuit's test. Petitioners' argument was and is preserved.

Even if the Court were somehow to conclude that Petitioners did not squarely present this argument, Petitioners have consistently claimed that the Final Report is an agency record, and "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondito*, 503 U.S. 519, 534 (1992); *see also, e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Lebron's contention . . . [is] not a new claim within the meaning of [the *Yee*] rule, but a new argument to support what has been his consistent claim"); *Citizens United v. FEC*, 558 U.S. 310, 330–31 (2010) ("Citizens United's argument that *Austin* should be overruled is 'not a new claim.' Rather, it is—at most—'a new argument to support what has been a consistent claim[.]'").

In any event, Respondents' reliance on *United States v. Vonn*, 535 U.S. 55 (2002), is misplaced. *See* BIO 17–18. Both *Vonn* and the case that it cites, *United States v. Williams*, 504 U.S. 36 (1992), address the rule precluding a grant of certiorari when the *question presented* in the petition was not pressed or passed upon below. *See Williams*, 504 U.S. at 40–43; *Vonn*, 535 U.S. at 58–59 & n.1. In contrast, here, the question presented—"whether the report became an 'agency record,' subject to FOIA, when the Senate Committee transmitted it to several executive agencies with instructions for its wide dissemination and use," Pet. (i)—is the precise issue that Petitioners have litigated over the entire course of this case, beginning when Respondents moved to

dismiss the complaint on the ground that the Final Report was not an agency record. *See* Defs.' Mot. Dismiss 22–23, *ACLU v. CIA*, No. 13-cv-1870 (JEB) (D.D.C. Jan. 21, 2015), ECF No. 39.

III. THE PRESIDENT'S STATEMENTS ON TORTURE UNDERSCORE THE EXCEPTIONAL IMPORTANCE OF THE FINAL REPORT.

Respondents contend that release of the Executive Summary is adequate disclosure, and citing events that post-date the November 10, 2016 Petition, further contend that Petitioners "exaggerate" the consequences of denying review. BIO 21. To the contrary, intervening events—including the election of a U.S. President who entertains a return to the unlawful methods described in the Final Report—only underscore the urgent need for the report's release under FOIA, subject to the proper application of any statutory exemptions.

As explained in the Petition, the Final Report describes widespread human rights abuses committed by the CIA, in far more extensive detail than the Executive Summary. *See* Pet. 6–7. The Final Report also elaborates on the CIA's efforts to evade oversight through misrepresentations to Congress, other executive branch agencies, the courts, the media, and the American public. *See id.* In a foreword to the Executive Summary, Senator Dianne Feinstein, then-Chair of the Senate Select Committee on Intelligence, emphasized that the Final Report should be used by the agencies to guide future programs, correct past mistakes, and to

"ensure [that] coercive interrogation practices are not used by our government again." Foreword to the Executive Summary, S. Rep. No. 113-288, at viii (2014).

These lessons are more urgent than ever. The President has repeatedly indicated his willingness to consider a return to waterboarding and similar methods, despite the fact that doing so would violate both domestic and international law.[3] As just one example, in a post-inauguration statement, the President endorsed torture as an intelligence-gathering technique, stating that it "absolutely" works.[4] The Executive's decision not to allow the use of torture currently seems dependent in part on public opinion and the views of certain cabinet members—a tenuous state of affairs.[5]

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[3] *See, e.g.*, Jenna Johnson, *Trump Says 'Torture Works,' Backs Waterboarding And 'Much Worse'*, Wash. Post (Feb. 17, 2016), http://wapo.st/1WstlhU; David Nakamura, *Trump Says 'Torture' Works, But He'll Defer On Decision Over Tactics To His Defense Secretary*, Wash. Post (Jan. 27, 2017), http://wapo.st/2kbU60T.

[4] *President Donald Trump: The White House Interview* (ABC News Jan. 25, 2017), http://abc.tv/2ozil8v; *see also* Fortune, *Read Donald Trump's First TV Interview as President* (Jan. 26, 2017), http://for.tn/2nPR17O.

Although the effectiveness or ineffectiveness of torture is irrelevant to its status under law, the Final Report definitively puts to rest the myth that the CIA's torture program saved lives, disrupted terrorist plots, or produced unique, otherwise unavailable intelligence. *See* Foreword to the Executive Summary, S. Rep. No. 113-288, at viii; Findings & Conclusions, S. Rep. No. 113-288, at xi–xii.

[5] *See, e.g.*, Charlie Savage, *White House Pulls Back From Bid to Reopen C.I.A. 'Black Site' Prisons*, N.Y. Times (Feb. 4, 2017),

In light of the President's expressed willingness to consider a return to unlawful methods, it is essential that the American people are afforded the full account of one of the most disturbing chapters in our nation's history—in order to prevent a repeat of past wrongs.

Moreover, although one copy of the Final Report has been lodged with Court Information Security Officers for the District Court for the District of Columbia, and President Barack Obama's copy has been transferred to the National Archives, *see* BIO 10–11, 21, neither copy will be released to the public in the foreseeable future. The district court's copy is not publicly available, and President Obama restricted access to the National Archives' copy for twelve years, pursuant to the Presidential Records Act.[6] Thus, absent review by this Court, the public will continue to be deprived of the Final Report at this critical time for our nation.

FOIA was enacted by Congress "to ensure an informed citizenry" and "to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The

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http://nyti.ms/2l4UXkO; James Risen & Sheri Fink, *Trump Said 'Torture Works.' An Echo Is Feared Worldwide*, N.Y. Times (Jan. 5, 2017), http://nyti.ms/2nuLcsP.

[6] *See, e.g.*, Spencer Ackerman, *Senate Torture Report To Be Kept From Public For 12 Years After Obama Decision*, The Guardian (Dec. 12, 2016), http://bit.ly/2gQLSFS. This does not necessarily mean that the Report will become public after twelve years. After that time, members of the public can seek access under FOIA to the copy preserved in the National Archives; at that time, the Executive could attempt to refuse to disclose the Report for the same reasons it asserts today.

fundamental purpose of the statute is "to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976). As the definitive account of the CIA's torture program, the Final Report is an extraordinarily important record. Its release would open unlawful agency action to the light of public scrutiny, precisely when that scrutiny is needed most. Accordingly, this Court's review of the D.C. Circuit's erroneous opinion is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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