

No. 99-\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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PUBLIC CITIZEN, *ET AL.*  
*Petitioners,*

v.

JOHN CARLIN,  
ARCHIVIST OF THE UNITED STATES, *ET AL.*,  
*Respondents.*

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On Petition for a Writ of Certiorari to the  
Court of Appeals for the District of Columbia Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Was the Archivist correct in concluding that the format in which government records are stored -- electronic, paper, or microform -- is irrelevant to determining whether the records have “sufficient administrative, legal, research or other value to warrant their further preservation” under 44 U.S.C. § 3303a(d)?

2. Should a Court reviewing an agency decision under the Administrative Procedure Act, 5 U.S.C. § 706, give *Chevron* deference to interpretations of the relevant statute or regulation when the interpretations were not articulated by agency officials during the administrative proceedings, but were offered for the first time in defending the agency decision in court?

**PARTIES TO THE PROCEEDINGS BELOW**

Petitioners are Public Citizen, Inc., a national nonprofit corporation and membership organization with approximately 150,000 members; the American Historical Association, a non-profit association, with a membership of approximately 15,000 historians, which is the oldest and largest association of historians in the United States; the American Library Association, a non-profit association with more than 58,000 members; the Center for National Security Studies, a nonprofit public interest scholarly research institute organized and operated as a project of The Fund for Peace, Inc.; the National Security Archive, a non-profit public interest research institute and library organized and operated as a project of the Fund for Peace; the Organization of American Historians, the largest association devoted to research and teaching on the history of the United States, with a membership of approximately 12,000 members; Scott Armstrong, a journalist, author, foreign policy researcher, and founder of the National Security Archive; and Eddie Becker, a professional researcher specializing in documentary reconstruction of historical events, with a particular expertise in using computerized information.

Respondents are John Carlin, the Archivist of the United States, who is sued in his official capacity; the Executive Office of the President ("EOP"); the Office of Administration, a component agency of the EOP; and the Office of the United States Trade Representative, which is also a component agency of the EOP.

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### **OPINIONS BELOW**

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 184 F.3d 900 and is set forth in the Appendix at pages 1a-20a. The opinion of the District Court is reported at 2 F. Supp. 2d 1 and is set forth at pages 21a-53a of the Appendix. The Archivist's statement concerning the adoption of the rule at issue is published at 60 Fed. Reg. 44,643-44,650 and the relevant portions are set forth at pages 56a-71a of the Appendix.

### **JURISDICTION**

The judgment of the Court of Appeals was entered on August 6, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **PERTINENT PROVISIONS**

The relevant provisions of the Records Disposal Act, 44 U.S.C. §§ 3301, 3303, 3303a, 3314 and "General Records Schedule 20," are set forth in the Appendix to this petition at 69a-75a.

### **STATEMENT OF THE CASE**

This case concerns the rules governing the destruction of all government records created using word processors and electronic mail. These technologies are used throughout the government and, because electronic records can be used in ways that paper records cannot, they have revolutionized the way that information is recorded and exchanged. Unlike paper records, documents in electronic formats can be searched and sorted automatically; can be transmitted instantly across the country; and can be stored in electronic archives to be accessed by multiple researchers on a network. Most government records are now created using electronic technologies that store information in formats with these capabilities.

Under the Records Disposal Act, the Archivist is charged with determining whether government records should be retained or destroyed, depending on whether they have sufficient value to warrant their further preservation. The Archivist has promulgated a rule that directs agencies to destroy all records created with word processing or electronic mail, regardless of their content, once they have created a copy for record keeping purposes in an electronic, paper, or microform format. The District Court for the District of Columbia struck down this rule because it ignored the unique value of electronic records and because it applied to all records, even those worthy of preservation in their electronic format.

The Circuit Court reversed and held that 44 U.S.C. § 3303a(d) allows the Archivist to direct the wholesale destruction of these records for all agencies, as long as his rule is interpreted as requiring that agencies transfer all of the content, structure and context of the original electronic format to a paper recordkeeping system. In order to uphold the Archivist's rule, the Court of Appeals had to accept as authoritative certain interpretations of the rule and of Section 3303a(d) that were not articulated by the Archivist during the administrative proceedings, but were presented for the first time in the litigation. The Court of Appeals concluded that *Auer v. Robbins*, 519 U.S. 452 (1997), requires that courts give controlling deference to agency interpretations, even if they are first presented in the briefs of litigation counsel defending an agency decision.

#### **A. The Records Disposal Act**

The Records Disposal Act, 44 U.S.C. § 3301-3314, makes the Archivist of the United States responsible for ensuring that valuable government records, including historically important records, are not destroyed prematurely. The Act provides that original records (and even most copies) may not be destroyed unless the Archivist has

determined that the records lack “sufficient administrative, legal, research, or other value to warrant their continued preservation by the United States Government.” 44 U.S.C. § 3303a(a), (d).

For most government records, this determination is made thorough individual agency record schedules. Each agency submits to the Archivist “lists” or “schedules” describing records in its custody that, in the agency’s view, lack sufficient value to warrant further preservation. *Id.* § 3303. The Archivist then publishes a notice in the Federal Register describing the proposed schedule and soliciting public comment, and the National Archives and Records Administration (“National Archives” or “NARA”) appraises the records to evaluate their value. If that appraisal indicates that the records have sufficient historical value, the records will eventually be transferred to the Archives as “permanent” records. 44 U.S.C. § 2107. Otherwise, the Archivist will approve a schedule authorizing disposition of the records after they have been retained for an appropriate period of time. *Id.* § 3303a(a). To ensure that records are not destroyed based solely on the agency’s “immediate, operational needs,” no agency may destroy records without first obtaining the Archivist’s approval. *American Friends Serv. Comm. v. Webster*, 720 F.2d 29, 37, 54-57, 65 (D.C. Cir. 1983); *see also* 44 U.S.C. § 3314; *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 147 (1980).

The Records Disposal Act also authorizes “General Record Schedules,” in which the Archivist mandates the destruction of certain categories of records for all agencies. The Archivist may promulgate a general schedule for the destruction of “records of a specified form or character common to several or all agencies” if he finds that “such records will not, at the end of the periods specified [in the schedule], have sufficient administrative, legal, research, or

other value to warrant their further preservation by the” government. 44 U.S.C. § 3303a(d).

General Records Schedules eliminate a number of the procedural safeguards against improper records destruction that apply to individual schedules. While individual schedules require public notice and comment on an agency’s records destruction plans, no such notice is issued when records fall within a General Schedule. Moreover, where an individual agency schedule is used, an agency official must certify that the records do not, or will not, warrant retention, 36 C.F.R. § 1228.26(b), and the National Archives undertakes “a thorough study of the records that takes into account” their “historical or other value.” 61 Fed. Reg. 34449 (1996). No such certification or individualized appraisal occurs where the records are covered by a General Records Schedule.

The legislative history of the statute shows that Congress anticipated that such General Schedules would be used for the disposal of “routine ‘housekeeping’ records, such as those relating to the hiring of personnel, procurement of supplies, and fiscal management, that are common to most agencies.” H. Rep. No. 361, 79th Cong., 1st Sess. 1 (1945). Accordingly, as the District Court found, “every general records schedule promulgated to date, except GRS 20, covers administrative housekeeping records common to all agencies,” such as civilian personnel records, payroll records, and travel records. App. at 39a.

General Records Schedules and the individual agency schedules are not recommendations or guidelines, but are “mandatory” rules that agencies must follow. 44 U.S.C. § 3303a(b). If records are covered by a schedule, agencies must destroy the records in accordance with the schedule unless they specifically request and

obtain an exemption from the Archivist. *See* 36 C.F.R. §§ 1228.30(a), 1228.40, 1228.42(b).

### **B. General Records Schedule 20.**

The Archivist confronted the issue of preserving historically valuable electronic records in *Armstrong v. Executive Office of the President*, 810 F. Supp. 335 (D.D.C.), *aff'd in relevant part*, 1 F.3d 1274, 1282 (D.C. Cir. 1993), when the Executive Office of the President planned to destroy, without any record schedule, the only electronic copies of its word processing and electronic mail records, including electronic mail that had been instrumental in conducting the Iran-Contra Affair. In that litigation, the Archivist's attorneys maintained that, if agencies instructed staff to print the electronic communications that qualified as "records" on paper, the electronic records need not be scheduled because they were "extra copies retained only for convenience of reference," and, therefore, were exempt from the definition of "record" in 44 U.S.C. § 3301. The District of Columbia Circuit Court rejected this claim in 1993, and held that the electronic communications are not "extra copies," but unique records that contain information not found in the paper print-outs and, therefore, may not be destroyed unless the Archivist has determined that they lack sufficient value to warrant their retention. *Armstrong v. EOP*, 1 F.3d at 1284-86.<sup>1</sup>

A year later, the Acting Archivist proposed to issue a General Record Schedule that would authorize the practice that had been rejected in *Armstrong*. *See* 59 Fed. Reg. 52313 (Oct. 17, 1994).

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<sup>1</sup> During this litigation the Archivist's counsel originally maintained, as an alternative argument, that the General Record Schedules authorized destruction of the electronic data, but later conceded that none of the records at issue were subject to the General Schedules. *See Armstrong v. EOP*, 810 F. Supp. at 342.

Despite uniformly adverse comments from the public, professional organizations, and state archivists, who urged the Archivist to appraise these records using individual agency schedules, rather than General Schedules, Archivist John J. Carlin adopted this proposal, which is known as “GRS 20.” App. at 56a-71a.

GRS 20 is remarkable in three respects. First, it regards the format of the records as being irrelevant to whether the records have “sufficient administrative, legal, research, or other value to warrant” their preservation. 44 U.S.C. § 3303a(d). The Schedule provides that agencies shall delete the original, electronic version of electronic mail records if the records have been copied for recordkeeping purposes, and provides that the copy may be in “an electronic recordkeeping system, paper or microform.” App. at 71a. Likewise, word processing records are to be destroyed if they have been copied to any one of these three formats and are “no longer needed for updating or revision.” *Id.* at 70a-71a. Thus, all three formats are treated as being of equal value, and agencies are authorized (indeed, directed) to destroy the only electronic version of the record if they have a “hard copy” on paper or microform for recordkeeping purposes.

Second, GRS 20 is not based on whether an agency has the technical ability to retain the electronic format. Regardless of whether preservation of the records in electronic format is easy or difficult for a particular agency, GRS 20 authorizes the agency to destroy the electronic original and retain only a hard copy, without any consideration of whether it is worthwhile to retain the electronic version because it has special value for research or other purposes.

Third, GRS 20 applies to *all* agencies, and *all* types of government records, regardless of their importance or value. The Schedule covers everything created by word processing or

electronic mail, from the most historically important State Department memoranda analyzing diplomatic options in the Middle East for the President, to the most trivial electronic mail discussing payments on a Small Business Administration loan.

### **C. The District Court's Rulings.**

In 1996, the EOP agencies responsible for advising the President on international trade and science and technology planned to rely on GRS 20 to destroy electronic records that had been preserved as a result of the *Armstrong* litigation. App. at 32a. Petitioners brought this action challenging GRS 20 under 28 U.S.C. § 1331. The district court concluded that the Schedule should be set aside because it is inconsistent with the statute.

The district court observed that, because GRS 20 is indifferent to format, it assumes that “a paper copy invariably adequately preserves” the value of an electronic record “in *all* cases.” App. at 48a. This premise is illogical because the “differences between electronic and paper records illustrate the fact that the administrative, legal, research and historical value of electronic records is not always fully captured -- by paper or microfiche copies.” App. at 46a. Citing the Archivist’s own statements, the Court summarized the unique features of electronic records:

For example, records in electronic recordkeeping systems have searching, manipulating and indexing capabilities not found in paper records, an advantage recognized by NARA itself. *See* Notice of Issuance of General Records Schedule, 60 Fed. Reg. at 44,643. In addition, electronic records can be transmitted over telephone or communication lines and therefore can be distributed or made available to the public more readily than paper copies. [citing NARA, Final Rule,

60 Fed. Reg. 44,634, 44,639 (1995)]. Finally and most importantly, electronic records often contain information that is not preserved in a print-out record or even in other computerized systems of records.

*Id.* (footnotes omitted).

More specifically, the district court found that GRS 20 was flawed in three respects. First, comments on the GRS 20 proposal protested that it was inconsistent with the Archivist's manuals, which state that, because general schedules are for records that have the same value regardless of the agency that creates them, such schedules should only be used for "administrative records," and should not be used for "program records." NARA, DISPOSAL OF FEDERAL RECORDS, IV-9, IV-10 (1992). "Administrative records" are those relating to "budget, personnel, supply, and similar housekeeping, or facilitative, functions common to most agencies," *Id.* at D-1, while "program records" document "the unique substantive functions for which an agency is responsible." *Id.* at D-11. The Archivist did not respond to these comments.<sup>2</sup> The district court agreed with the comments, and moreover, concluded that "Congress did not intend that records of such disparate value be lumped together under one disposition schedule." App. at 38a-43a.

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<sup>2</sup>In response to other comments, the Archivist did amend the provision of GRS 20 governing spreadsheets to clarify that it applies "only if [the spreadsheets] support administrative, rather than program functions or if they were generated by an individual only for background purposes." App. at 68a. Other provisions of GRS 20 are also expressly limited to "administrative" records. *See* 60 Fed. Reg. at 44,648/1, item 3.b. The provisions governing word processing and electronic mail records are not subject to such a limitation.

Second, comments on the GRS 20 proposal also objected that, because the Schedule covered everything from high-level policy memoranda to trivial correspondence, the Archivist could not rationally find that all the records covered by the Schedule do not have sufficient value to warrant their further preservation. In adopting GRS 20, the Archivist made no such finding. On review, the district court held that the Archivist's failure to make the determination required by statute was an independent ground for setting aside GRS 20, and rejected as irrational the Archivist's "implicit" finding that *all* word processing and electronic mail records lack value once copied to paper. App. at 48a.

Finally, the district court focused on the language of the statute requiring that general schedules authorize disposal "after the lapse of specified periods of time." 44 U.S.C. § 3303a(d). GRS 20 did not specify a time period for retention but left the task of establishing specific retention periods to the agencies. *See* App. at 49a. The district court held that, by leaving the determination of the retention period to the agencies, GRS 20 turns the statute "on its head" and ignores Congress's directive that the Archivist must specify the retention period so that agencies do not destroy records prematurely or retain them for too long. *Id.* at 49a-50a.

The district court emphasized that its ruling did not hamper the government's ability to manage electronic records because the Archivist may promulgate general schedules covering electronic records that document administrative functions, and agencies remain free to submit individual agency schedules for program records. *Id.* at 51a. Shortly after the district court's decision, the Archivist directed a task force to draft new procedures for scheduling electronic records using general schedules for administrative records

and individual schedules for program records. *See* 63 Fed. Reg. 39,195 (July 21, 1998)

Moreover, the Archivist declared that he agreed that general records schedules should be “limited to common administrative records,” 63 Fed. Reg. 54,503, 54,504/3 (Oct. 9, 1998); *see also* John W. Carlin, *Moving Ahead on Electronic Records Challenges*, THE RECORD, Vol. 4, No. 3, at 4 (Jan. 1998) (“In my view GRS-20 needs changing. General records schedules definitely have their place, but they should be applied to the disposition of routine administrative ‘housekeeping’ records, not to programmatic records.”). Furthermore, the Archivist declared that he “has determined that indefinite retention periods,” such as “destroy when no longer needed” are “inappropriate under the GRS,” and proceeded to replace schedules that use such language with “more specific retention periods.” 63 Fed. Reg. 41,869 (Aug. 5, 1998).

#### **D. The Circuit Court’s Decision.**

The Court of Appeals reversed and upheld GRS 20 because, in contrast to the district court, it accepted the agency’s conclusion that, in all cases, “a record in electronic form lacks sufficient value to warrant preservation once it is transferred intact to a paper recordkeeping system.” App. at 18a.

The Court of Appeals maintained that this conclusion was supported by two sets of statements in the Archivist’s preamble. First, it cited the Archivist’s statements that the benefits of electronic records are significant “only for electronic records that are maintained in an electronic recordkeeping system.” App. at 14a-15a; *accord id.* at 13a, 17a-18a (“electronic records are of limited

use unless maintained in a recordkeeping system”).<sup>3</sup> Second, the Court of Appeals endorsed the Archivist’s decision to allow each agency to decide whether its records will be collected in an electronic, paper or microform recordkeeping system. *Id.* at 16a-17a. According to the Court, allowing agencies to choose the format for storing records based solely on their operational needs did not ignore the research or historical value of the records because the only alternative would be for the Archivist to require all agencies “either to establish electronic recordkeeping systems immediately or to retain their electronic records until such time as they have electronic recordkeeping systems.” *Id.* at 17a.

The Court of Appeals also rejected the district court’s three reasons for finding GRS 20 is inconsistent with 44 U.S.C. § 3303a(d), but did so based on interpretations that were first articulated in litigation by counsel or the Court of Appeals, not by the Archivist:

C In response to the argument that GRS 20 was inconsistent with the Archivist’s statements that General Schedules should only be used for “administrative,” not “program,” records, *see supra* 8, the Court of Appeals concluded that GRS 20 did not represent an unexplained departure because, it stated, the prior statements “apparently concerned authorizations to discard the only extant version of a record, not a record that had been copied to a recordkeeping system.” App. at 10a. This limitation does not

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<sup>3</sup> A “recordkeeping system” is defined as a system “in which records are collected, organized, and categorized to facilitate their preservation, retrieval, use and disposition.” 34 C.F.R. § 1220.14, and an “electronic recordkeeping system” is an electronic system that performs these functions. *Id.* § 1234.2.

appear in the prior statements, and had never been articulated by the Archivist.

- C The Court of Appeals rejected the district court's holding that GRS 20 failed to provide for disposal of records "after the lapse of specified periods of time," 44 U.S.C. § 3303a(d), by concluding that a "specified period of time" may be an occurrence, such as the transfer of the records to a recordkeeping system. App. at 12a. Although the Court of Appeals accepted this as "the Archivist's interpretation of § 3303a(d)," this construction was first articulated by litigation counsel. *Id.* at 12a-13a & n.\*. In endorsing this new interpretation, the Court did not explain how this occurrence could be "the lapse of" a specified period of time required by the statute.
- C The Court of Appeals also rejected the district court's ruling that GRS 20 was flawed because information in the original electronic record may not be preserved in print outs or other copies. App. at 44a-46a. Despite the decision in *Armstrong v. EOP*, and comments in the rule making proceedings that print-outs do not contain all of the information in the electronic original, GRS 20 does not state that the recordkeeping copies must preserve all the information contained in the electronic format. *See id.* at 70-71a (specifying information that must be captured in recordkeeping system in Note). In the district court, the Archivist did not dispute that GRS 20 contains no such requirement. In the Court of Appeals, however, appellate counsel asserted that GRS 20 requires retention of *all* information in the electronic original. The Court of Appeals concluded that, under this Court's decision in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), the new interpretation offered by

appellate counsel is entitled to deference that makes it “controlling unless plainly erroneous or inconsistent with the regulation,” App. at 19a.

### **REASONS FOR GRANTING THE WRIT**

#### **I. THE ISSUE OF WHETHER AGENCIES SHOULD DESTROY ELECTRONIC RECORDS ONCE THEY HAVE BEEN COPIED TO ANOTHER FORMAT IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT.**

The issue of how computer-generated records are treated under the federal records laws is an important question of federal law that should be decided by this Court. The decision below directly affects the preservation of an enormous and growing body of federal records: all documents created by federal agencies with word processing or electronic mail, regardless of their historical importance.<sup>4</sup> All agencies use word processing to create government records, and agencies are increasingly using electronic mail technologies to carry-out government business. 60 Fed. Reg. 44,634 (1995). Indeed, “virtually all materials that are printed today exist at some point in an electronic format that could also be used to support dissemination using other technologies.” H.R. Rep. No. 215, 103d Cong., 1st Sess. 5 (1993). Moreover, the Court of Appeal’s interpretation of how the “value” of records is determined under 44 U.S.C. § 3303a(d) potentially affects all

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<sup>4</sup> The Records Disposal Act governs not only executive agencies, but establishments in the legislative and judicial branches as well. 44 U.S.C. § 2901(14). The Act exempts the Supreme Court, the Senate, the House of Representatives, the Architect of the Capital, and units within the EOP that solely advise the President. *Id.*; *Armstrong v. EOP*, 1 F.3d at 1290-93.

records in digital formats -- from the formats routinely used to make information available on the Internet to sophisticated databases.

It is now widely recognized that the unique characteristics of these electronic formats often make them significantly more valuable than paper print-outs of the same information. Electronic records can be distributed more easily and more widely, as illustrated by the development of the Internet and the fact that this Court, and other federal courts, now use computers to make their decisions available worldwide in a fraction of the time that it takes to distribute printed slip opinions.<sup>5</sup> Electronic records can be searched and indexed more easily, as illustrated by electronic legal research services that allow attorneys to locate legal authorities that could not be identified using paper records.<sup>6</sup> Electronic records can also be stored in ways that paper records cannot, as illustrated by the development of systems for filing all court papers electronically in order to relieve overburdened court clerks and increase the efficiency of the court

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<sup>5</sup> See Comments of the Department of Justice Before the Judicial Conference of the United States, ¶ 3 (March 14, 1997) ("The advent of computerization and high-speed data transmission makes swift and accurate access to judicial opinions feasible in a way that was unimaginable 25 years ago.")

<sup>6</sup> *Matthew Bender & Co. v. West Publ. Co.*, 158 F.3d 693, 697-98, 705-06 (2d Cir. 1999), *cert. denied*, 522 U.S. 3732 (1999); *see also United Transportation Union-Illinois v. Surface Transportation Board*, 132 F.3d 71, 74 (D.C. Cir. 1998) (it was "eminently reasonable" for an agency to require parties to submit both paper and electronic versions of textual documents and spreadsheets because the electronic version allows the agency "to use a computer to search those documents for key information.")

system.<sup>7</sup> Moreover, the law governing access to federal records allows private requesters to specify the form or format in which electronic records are made available to the public, and requires that the government make certain records available in both electronic and paper formats. *See* 5 U.S.C. § 552(a)(2), (a)(3)(B); *see also* 44 U.S.C. § 4101 (requiring Superintendent of Documents to provide online access to government publications).

The importance of record format is also reflected in the treatment of historically valuable records that have been evaluated outside the context of GRS 20. When the National Archives has examined electronic records under individual agency schedules, it has sometimes concluded that the electronic format of the records is more valuable than paper, or that both hard copy and electronic formats are worthy of retention. For example, the record below shows that archivists appraising electronic mail records written by the staff of the Office of the United States Trade Representative over a seven year period concluded that it would be better to preserve the thousands of historically valuable messages in an electronic form that could be automatically indexed, rather than save paper copies. Similarly, archivists decided that records from the State Department's electronic communications system and the Congressional Record should be permanently retained in *both* the electronic and hard copy formats because of the unique properties of each format. While paper copies may be an adequate substitute for the electronic original in some cases, for many historically

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<sup>7</sup> *See* Admin. Office of the U.S. Courts, *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues and the Road Ahead*, 2-3 (March 1997).

important records, even if a paper copy exists, the electronic format has sufficient value to warrant its preservation.

GRS 20 and the decision below, however, impose a result that is directly contrary to this experience because they treat record formats as fungible. According to the Archivist and the Court of Appeals, whether the records are stored on paper, microfiche or an electronic medium is irrelevant to whether they have “administrative, legal, research or other value” under 44 U.S.C. § 3303a(d).

This counter-intuitive result springs from an erroneous legal premise. The Court of Appeals assumed that the Archivist was faced with giving agencies complete discretion to choose the format of their records (as he did in GRS 20), or requiring that all agencies establish electronic record keeping systems. App. at 17a. Nothing in the statute imposes such an all or nothing dichotomy. The Records Disposal Act does not provide that, if the Archivist does not adopt GRS 20, he must adopt a rule that requires *all* agencies to preserve *all* their electronic records in an electronic format. Rather, under the statute, the alternative to GRS 20 is for the Archivist to approve individual agency schedules and/or narrower general schedules that distinguish electronic records that are worth preserving from those that are not.

As the district court recognized, petitioners “are not challenging the destruction of electronic records *per se*” and acknowledge that the destruction of electronic mail and word processing records pursuant to more narrowly focused schedules “certainly will be necessary and practical. Plaintiffs only challenge the use of a General Record Schedule to schedule the destruction of electronic records, without distinguishing valuable electronic records from useless ones.” App. at 31a (footnote admitted). While preserving electronic mail and word processing records in their original form

may, in many cases, not be worthwhile because the records are of minimal value and/or preserving them is costly, this is not true of for *all* records at *all* agencies. “The solution,” as the district court observed, is “not to absolve all agencies of using electronic recordkeeping systems” but to use more specific general schedules and individual agency schedules to assure that, where the unique value of the electronic format is important and can be preserved, the electronic records are not destroyed. *Id.* at 52a.<sup>8</sup>

The decision below also construes 44 U.S.C. § 3303a(d) in a way that seriously distorts this important statute. The Court of Appeals concluded that the Archivist made the determination of value required by the statute by finding that “electronic records are of limited use unless maintained in a recordkeeping system,” App. at 17a-18a. This finding, however, is not the same as finding that the electronic records lack *any* “administrative, legal, research or other value” that would warrant further preservation, as 44 U.S.C. § 3303a(d) requires. Even if word processing and electronic mail

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<sup>8</sup>The Court of Appeals’ assertion that 44 U.S.C. § 3303(1) is analogous to GRS 20, *see* App. at 9a-10a, illustrates the error in its analysis. This statute allows agencies to submit lists of records that have been photographed or micrographed to the Archivist. It does not, however, permit agencies to destroy the original records after they have been photographed or micrographed. Rather, these lists are treated in the same way as individual agency record schedules; the Archivist must publish a notice for comment in the Federal Register, conduct an appraisal of the records identified in the list, and make a specific determination that the records listed lack sufficient value to warrant their preservation. 44 U.S.C. § 3303a(a). Thus, disposition under § 3303(1) is not analogous to GRS 20, which directs the destruction of records copied to another format without any consideration of the value of the original format. To the contrary, § 3303(1) supports the district court’s conclusion that the Archivist cannot authorize the destruction of records solely because they have been copied to microform.

records must be maintained in an organized “recordkeeping system” to be fully useful to the agency and researchers, the question of whether the format of the recordkeeping system should be electronic, paper, or microform remains. However, the Court of Appeals’ construction of Section 3303a treats the format of the recordkeeping system as irrelevant to the determination of value required by the statute and, thus, eliminates consideration of the unique value associated with electronic record formats.<sup>9</sup>

Moreover, the Circuit Court’s opinion confuses the issue of whether records are disorganized, which can always be corrected, with the irreversible decision to destroy them. Other provisions of the federal records statutes and regulations require that agencies organize and control their records by prescribing how records shall be maintained, including specifying how records should be filed. *See* 36 C.F.R. §§ 1222.32(c); 1222.50(b), 1220.36. These regulations already provide that, if an agency retains the electronic records, the records must be controlled, indexed, and filed. *Id.* § 1222.50(b)(1). The function of disposition schedules under 44 U.S.C. § 3303a is not to require that records be organized, but to mandate their destruction. Thus, the significance of GRS 20 is not that it encourages maintaining records in a “recordkeeping system,” but that it directs agencies to destroy the only electronic version of records once records are copied to paper or microform -- without

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<sup>9</sup> The Court’s assumption that electronic mail and word processing systems generally do not have the characteristics of an “electronic recordkeeping system” (i.e., the ability to collect, organize, and categorize records, 44 U.S.C. § 1234.2), is, at best, overstated as these applications generally organize documents and messages in folders and files, generate indices of the folders, and can search for records electronically. Moreover, the electronic format of these records may have links or connections between records that are unique to the electronic format.

regard for the research and historical value of the original, electronic format.

There is no conflict among the circuits on this issue, but that does not diminish the importance of review by this Court. Because of the District of Columbia Circuit's unique position in determining the law applicable to federal agencies located in the nation's capital, its decision is dispositive with respect to the vast majority of electronic records subject to destruction under the Archivist's rule. Moreover, Petitioners represent the leading associations for the professions that are most directly and dramatically harmed by this rule. As the district court recognized, the current and future destruction of records under GRS 20 causes these individuals and institutions "distinct and palpable injury." App. at 28a-30a. This injury is irreparable and becomes more severe each day that GRS 20 remains in effect.

"Our ability to preserve and make available a full and rich documentary history depends on archivists determining what records are of lasting value and which are not." S. Rep. No. 373, 98th Cong., 2d Sess. 10 (1984), *reprinted in* 1984 U.S.C.C. A. N. 3865, 3875. The Court of Appeals' decision construes the Records Disposal Act in a way that makes the format of records irrelevant to these crucial determinations. Because of the importance of this issue to properly preserving the history now being written on computers, this Court should review the decision below.

**II. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUIT COURTS OVER WHETHER COURTS MUST DEFER TO AGENCY INTERPRETATIONS FIRST ARTICULATED IN JUDICIAL REVIEW LITIGATION.**

The decision below accepts, as authoritative, policy decisions on the interpretation of the Records Disposal Act and GRS 20 that were not made by the Archivist, but by litigation counsel. Indeed, the interpretations endorsed by the Court of Appeals not only do not appear in the Archivist's explanation of GRS 20, but they appear to be in tension with, if not directly contrary to, his policy statements. *See supra* at 10, 11-12. The circuit courts are split over whether agency litigating positions should be accepted as authoritative interpretations in circumstances such as this, and this Court should resolve the conflict.

In *Securities and Exchange Comm'n v. Chenery*, 318 U.S. 80 (1942), this Court held that a reviewing Court may not affirm an agency decision on a rationale that was not articulated by the agency when it made the decision, but developed during litigation. In *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-13 (1988), this Court stated, in emphatic terms, that the deference normally accorded agency interpretations of statutes does not apply where the interpretation "appears to be nothing more than an agency's convenient litigating position." These basic tenets of administrative law serve to assure that discretionary decisions to construe a statute in a particular manner, or adopt a particular policy, are made by agency officials during the administrative process -- not by litigation counsel or courts in the course of judicial review. *See Chenery*, 318 U.S. at 88-89, 92-94; *see also Investment Co. Institute v. Camp*, 401 U.S. 617, 627-28 (1971).

In two instances, this Court has explicitly deferred to interpretations first articulated in litigation. In *Gardebring v. Jenkins*, 485 U.S. 415 (1988), this Court rejected alternative interpretations of a Social Security regulation in favor of the interpretation first articulated in an *amicus* brief submitted by the

agency. *Id.* at 429-30. In *Auer v. Robins*, 519 U.S. 452 (1997), this Court held that the interpretation of a regulation presented in an *amicus* brief filed on behalf of the Secretary of Labor was entitled to “controlling” deference, unless plainly erroneous or inconsistent with the regulation where “[t]he Secretary’s position is in no sense a ‘*post hoc* rationalizatio[n]’ advanced by an agency seeking to defend past agency action against attack.” 519 U.S. at 462 (quoting *Bowen*, 488 U.S. at 212).

Several circuits have concluded that the deference afforded in *Gardebring* and *Auer* is limited to the circumstances presented in those cases, namely where (i) the agency is not a party but submits an *amicus* brief, and (ii) the brief presents an interpretation on an issue that the agency has not previously addressed. In *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563 (1999), the Seventh Circuit refused to defer to a statutory interpretation presented in an agency’s *amicus* brief. Although *Auer* indicates that an *amicus* brief is entitled deference “in some circumstances,” Judge Posner stated that no deference should be accorded where “the agency has, and has exercised, rulemaking powers yet has unaccountably failed to address a fundamental issue on which the brief takes a radical stance,” and the issue is so far-reaching that a more “deliberative, public, and systematic procedure than the filing of an *amicus curiae* brief,” should be required to claim deference. *Id.* at 563. The Fourth, Eighth and Ninth Circuits have also stated that, under *Auer*, they will accept interpretations first articulated in *amicus* briefs only where the interpretation “is in no sense a *post hoc* rationalization advanced to defend its past action against attack, and there is simply no reason to suspect that the proffered

interpretation does not reflect” the agency’s “fair and considered judgment.”<sup>10</sup>

In accord with this view of *Gardebring* and *Auer*, where the agency articulates the interpretation for the first time in litigation challenging the agency’s action, most circuits apply *Bowen* and refuse to defer to the interpretation. *See, e.g., Harco Holdings, Inc. v. United States*, 977 F.2d 1027, 1035 (7th Cir. 1992) (court will not defer to IRS interpretation of its own regulation where interpretation arose after litigation began, citing *Bowen*); *CSI v. Hydrostatic Tester, Inc.*, 62 F.3d 136 (5th Cir. 1995) (court adopts as its own a tax court opinion that, quoting *Bowen*, rejects IRS interpretation of regulation first advanced in litigation); *Williams Brothers Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987) (court refuses to defer to interpretation of agency regulation where it is a “mere litigating position” first argued on appeal).

The Third Circuit and the District of Columbia Circuit have taken contrary positions. The Third Circuit has held that *Gardebring* indicates that *Bowen* only applies to agency interpretations of statutes, and courts must give controlling deference to agency interpretations of regulations, even if proffered for the first time in litigation challenging the agency’s action. *Connecticut Gen. Life Ins. Co. v. Commissioner of Internal Revenue*, 177 F.3d 136,

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<sup>10</sup> *Jones v. American Postal Workers Union*, 1999 U.S. App. LEXIS 21637, 1999 WL 704691 (4th Cir. Sept. 10, 1999); *accord Hertzberg v. Dignity Partners, Inc.*, 1999 U.S. App. LEXIS 20289, 1999 WL 651947 (9th Cir. Aug. 27, 1999); *Northwest Bank of Minnesota v. Sween Corp.*, 118 F.3d 1255, 1259 n.5 (8th Cir. 1997).

144 (3d Cir 1999), *petition for certiorari pending*, Petition No. 99-258.<sup>11</sup>

The District of Columbia Circuit has gone further. Citing *Auer*, that Circuit has accepted interpretations of regulations and statutes first articulated in litigation where the agency is a party, and counsel offers the new interpretation to defend the agency's action. For example, in *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997), the Court stated that it was not precluded from giving *Chevron* deference to an interpretation of a statute that was "merely a litigating position" of the defendant agency "so long as it represented the IRS's 'fair and considered judgment on the matter.'" *Id.* at 613 (quoting *Auer*, 519 U.S. at 462). In *National Mining Ass'n v. Babbitt*, 172 F.3d 906, 910-11 (D.C. Cir. 1999), appellate counsel advanced an interpretation of an agency regulation that was contrary to the agency's position in the district court. Nonetheless, the Circuit Court accepted the interpretation as the agency's own. *See also United Seniors Ass'n v. Shalala*, 182 F.3d 965 (D.C. Cir. 1999) ("[e]ven if the legal briefs contained the first expression of the agency's views, under the appropriate circumstances we would still accord them deference so long as they represented the agency's 'fair and considered judgment on the matter.'" ((quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997))).<sup>12</sup>

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<sup>11</sup> This petition seeks review of whether IRS interpretations of tax regulations that are first advanced by IRS counsel as litigating positions are entitled to deference.

<sup>12</sup> The Second Circuit has noted the D.C. Circuit's practice of accepting litigation positions, but has not decided whether it would follow this practice. *See General Signal Corp. v. Commissioner of Internal Revenue*, 142 F.3d 546, 548 n.1 (2nd Cir. 1998).

The decision below represents a particularly dramatic and broad application of the District of Columbia Circuit's position because the decision defers to interpretations of the Records Disposal Act and GRS 20 that were never articulated by the Archivist when the issues were raised during the administrative process, but were first proposed by litigation counsel on review. Moreover, the Court of Appeals' deference here was critical to the outcome. Specifically, the Court of Appeals relied on new interpretations for three determinations: (1) its conclusion that the Archivist's statements prohibiting the use of general schedules for "program" records do not apply to GRS 20; (2) its construction of the "lapse of a specified period of time" language in the statute; and (3) its interpretation of GRS 20 itself. *See supra* 11-12. In each of these instances, the Court accepted as the authoritative view of the Archivist a litigation position developed *post hoc* to "defend past agency action against attack." *Auer*, 519 U.S. at 462.

Proponents of the view that "an interpretive theory put forth only by agency counsel in litigation, which explains agency action that could be explained on different theories, constitutes an 'agency position' for the purposes of *Chevron*," contend that a position articulated by litigation counsel is as authoritative as any other. *See Church of Scientology v. IRS*, 792 F.2d 153, 165-66 (D. C. Cir. 1986) (Silberman, J., concurring); *but see* 792 F.2d at 162 n. 4 (Scalia, J.) (concluding that interpretation articulated by counsel must be rejected because it fails to explain agency actions). We believe that the proponents' view is inconsistent with *Chenery* and the rationale behind *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As this Court has observed, "[b]ecause statutory and regulatory interpretations furnished [in litigation] occur *after* the agency proceedings have

terminated, they do not constitute an exercise of the agency's delegated lawmaking powers." *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144, 156-57 (1991) (italics in original). Moreover, when Congress leaves "gaps" for agency officials to fill, it delegates interpretive power to duly appointed agency officials acting in accordance with rule making and adjudicatory procedures, not to counsel writing briefs. See *Investment Co. Institute v. Camp*, 401 U.S. at 628.

Furthermore, while agency policy judgments in interpreting statutes and regulations may be based on a variety of factors, the positions developed by litigation counsel will be driven primarily, if not exclusively, by the narrow interest in defeating the specific challenge presented in the litigation. See Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. REG. 1, 60-61 (1990) (litigation positions motivated by advocate's bias should not be afforded *Chevron* deference); Scalia, *Judicial Deference To Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 519-20 ("Whatever else an agency's choice among the various interpretive options may be based upon, it should not be based upon the desire to win a particular lawsuit.") Thus, there is no assurance that the interpretations first articulated by counsel will reflect the same policy decisions that agency officials would adopt in an administrative proceeding. Scalia, *supra* at 519 ("there may be reason to doubt whether the position taken by a low level agency litigator, or perhaps even by the general counsel, has the approval of the agency head.") Indeed, often, as in this case, it is the Justice Department, not employees of the agency charged with administering the statute, that serves as litigation counsel and is most directly responsible for interpretations first articulated in briefs.

This Court should resolve the conflict between the circuits on this issue because it will inevitably lead to inconsistent application of federal law among the circuits. Because the District of Columbia and Third Circuits defer to the agency's litigation position as controlling, but other Circuits continue to apply *Bowen*, litigation positions that are controlling in the circuits granting deference will be rejected in other circuits that conclude that the litigation position is not the most persuasive or reasonable construction of the law. *Cf. Martin v. OSHRC*, 499 U.S. at 150 & n.4 (circuit courts reach inconsistent results because of a division over whose reasonable interpretation of regulations is entitled to deference); *compare Paralyzed Veterans of Am. v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997), *cert. denied* 118 S. Ct. 1194 (1998) (court finds private party in violation of regulations because it treats agency interpretation in technical manual as controlling), *with Caruso v. Blockbuster-Sony Music Entertainment Centre*, 174 F.3d 166, 174-77 (3d Cir. 1999) (court reaches opposite result because it concludes the agency interpretation is not entitled to deference). The uniform application of federal law requires that the circuits apply the same rule in deciding whether to treat particular agency positions as authoritative.

### CONCLUSION

This Court should issue a writ of certiorari to review the District of Columbia's holding that GRS 20 is consistent with the Records Disposal Act.

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