IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN HISTORICAL ASSOCIATION, *et al.,*
Plaintiffs,

v.

THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, *et al.,*
Defendants.

No. 1:01CV02447 (CKK)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In 1978, Congress enacted the Presidential Records Act ("PRA"), 44 U.S.C. § 2201 *et seq.*, to secure public ownership and control of the papers and other records of Presidents and Vice Presidents, beginning with those who would take office on January 20, 1981. The PRA provides that outgoing Presidents and Vice Presidents may restrict access to records reflecting their communications with their advisers for up to 12 years. After the 12-year restriction period ends, the PRA provides that such materials become freely available to the public, unless they fall within a statutory restriction category (for example, national security classified material) or are subject to a legitimate, *constitutionally based* claim of executive privilege.

On January 20, 2001, the 12-year restriction period for records containing confidential communications among President Ronald Reagan, Vice President George H.W. Bush, and their advisers expired. Their records, however, did not become available to the public as required by the PRA. Instead, the White House first directed the Archivist to withhold the records while it "studied" the matter, and then, on November 1, 2001, President George W. Bush promulgated Executive Order No. 13,233 (the "Bush Order"), which purports to give binding directions to the Archivist about how to administer presidential and vice presidential records under the PRA. The Bush Order turns the PRA's public access requirement on its head by granting former Presidents, Vice Presidents, and their "representatives" veto power over any release of materials by the Archivist simply by claiming executive privilege, regardless of the merits of the claim. Only with the "authorization" of a former President or Vice President does the Bush Order permit the Archivist to disclose any presidential or vice presidential records.

In this action, the plaintiffs, who are individuals and organizations with interests in access to the historical records of former Presidents and Vice Presidents, seek an order directing the Archivist and his agency, the National Archives and Records Administration ("NARA"), to administer the PRA without regard to the Bush Order, on the grounds that the Bush Order is unauthorized, violates the PRA and its lawfully promulgated implementing regulations, and is not, as the White House has asserted, necessary to preserve the constitutional privilege of the presidency. Clear precedents of this circuit and this court, including *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir.), *cert. denied*, 459 U.S. 1035 (1982), *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988), and *American Historical Association v. Peterson*, 876 F. Supp. 1300 (D.D.C. 1995), compel the conclusion that the Bush Order is unlawful.

The facial illegality of the Bush Order is a matter that can be decided without reference to any disputed material facts. Accordingly, the plaintiffs seek a summary judgment declaring that the Bush Order is unlawful and may not be implemented by the Archivist and NARA to the extent it purports to give former Presidents, Vice Presidents, and their representatives unilateral authority to direct the Archivist to withhold presidential and vice presidential records from the public. Plaintiffs further seek a permanent injunction ordering the Archivist and NARA no

to implement the Bush Order, and to make Reagan and Bush presidential and vice presidential records available to the public promptly and without regard to the Bush Order.

LEGAL AND FACTUAL BACKGROUND

A. The Presidential Records Act

For much of our nation's history, the documentary materials generated during a President's term in office were largely subject to the President's control, both during and after his presidency, unless the President chose to donate them to the United States. *See generally Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992). Congress enacted the PRA in 1978 to establish public ownership and control of presidential records and to provide for public access to presidential records after a President leaves office. *Id.* at 177 n.19. The PRA was made applicable to the materials of Presidents beginning with the President who would take office on January 20, 1981, making President Ronald Reagan the first President subject to the PRA. *See* 44 U.S.C. § 2201 note (citing effective date of PRA).

The PRA provides that when a President leaves office, custody and control over all his presidential records are immediately vested in the Archivist of the United States, who thereafter is solely responsible for preserving and securing the records and preparing them for public access. 44 U.S.C. § 2203(f)(1). The PRA specifically charges the Archivist with the "affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act." *Id.*

The PRA provides that there shall be no right to compel public access to the records of an outgoing President for the first five years after th Archivist acquires them. 44 U.S.C. § 2204(b)(2)(A). After the expiration of the five-year period, the records become subject to public availability through the provisions of the Freedom of Information Act (FOIA), which the PRA incorporates. *Id.* § 2204(c)(1). The availability o presidential records through FOIA requests, however, is limited by an outgoing President's right to restrict certain records from up to 12 years after he leaves office. 44 U.S.C. § 2204(a). Specifically, an outgoing President may specify a period of restriction, not to exceed 12 years, for records that contain:

i. National security information that is "properly classified pursuant to & Executive order," *id.* § 2204(a)(1);

ii. Information "relating to appointments to Federal office," *id.* § 2204(a)(2);

iii. Information "specifically exempted from disclosure by statute," *id.* § 2204(a)(3);

iv. "Trade secrets and commercial or financial information obtained from a person and privileged or confidential," *id.* § 2204(a)(4);

v. "Confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers," *id.* § 2204(a)(5); and

vi. Information "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 2204(a)(6).

After expiration of the 12-year restriction period, formerly restricted materials become available to the public through FOIA to the same extent as materials that were not restricted by the former President. *See id.* § 2204(b)(2), (c)(1). The PRA provides that presidential records are subject to all the exemptions from release under FOIA, except for the exemption set forth in 5 U.S.C. § 552(b)(5), which incorporates th "deliberative process" and "executive" privileges. 44 U.S.C. §§ 2204(c)(1).

The effect of these provisions is that, under the PRA, a President may prevent disclosure of records that reflect confidential communication with or among his advisers for no more than 12 years. Thereafter, such materials may not be withheld on the basis of nonconstitutional privileges that may otherwise shield deliberative executive branch communications, but must be released to the public unless they continue to fall into a FOIA exemption other than exemption 5 (for example, the exemptions for materials that are properly subject to national securit classification or that relate to law enforcement investigations), or unless there is some "constitutionally based" right or privilege that prevent public release. *See* 44 U.S.C. § 2204(c)(2).

The PRA provides that vice presidential records are also public property and are to be opened for access to the public on the same terms a presidential records. 44 U.S.C. § 2207. Thus, the requirement that confidential communications be made public once the 12-year restriction period expires applies to vice presidential records as well.

The PRA requires that the Archivist give a former President notice "when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have." 44 U.S.C. § 2206(3). NARA has implemented this requirement through a regulation providing that whenever the Archivist intends to make public any presidential record, he must provide 30 days' notice to the former President to allow him (or his designated representative) to assert any rights or privileges that would foreclose access to the materials. 36 C.F.R. § 1270.46(a), (b), (d). NARA's implementing regulation further provides that the Archivist may reject such assertion of a right or privilege by the former President provided that the Archivist states the basis for his decision in writing and notifies the former President of the date on which he will disclose the records in question. *Id.* § 1270.46(c). When the Archivist rejects a former President's claim of privilege, NARA must withhold public access for an additional 30 days to allow the former President to seek judicial review. *Id.* § 1270.46(c), (d). Finally, the regulation states that a copy of any notice to the former President of the impending release of his records shall also be provided to the incumbent President. *Id.* § 1270.46(e).

B. The Reagan/Bush Presidential and Vice Presidential Materials

President Reagan and Vice President Bush left office on January 20, 1989. Thereafter, the Archivist received the Reagan presidential records, which include almost 44 million pages of documents, a great number of electronic records including e-mail messages, and many thousands of photographs and audio-visual materials. The Reagan presidential records are housed in the Ronald Reagan Presidential Library in Simi Valley, California, a facility made available to the federal government under the Presidential Libraries Act (44 U.S.C. § 2112) and operated by NARA. The Bush vice presidential records, similarly, were received by the Archivist and are housed in the George Bush Presidential Library in College Station, Texas. *See* Plaintiffs' Statement of Undisputed Facts in Support of Motion for Summary Judgment ("Pl. Statement") ¶ 7.

Before leaving office, President Reagan and Vice President Bush exercised their rights under the PRA to restrict for the maximum period o 12 years materials falling within the confidential advice restriction category, 44 U.S.C. § 2204(a)(5). The 12-year period of restriction expire on January 20, 2001. Pl. Statement ¶ 7.

During the 12-year restriction period, NARA's Reagan Library opened to the public, in response to FOIA requests, approximately 4.5 millior pages of documents. Pl. Statement ¶ 3, Exh. 5. In accordance with the PRA, NARA withheld from public access documents that fell within any of the categories of material restricted by President Reagan, including the restriction category for "confidential communications" with advisers. For example, Professor Hugh Davis Graham, one of the plaintiffs, made specific requests on July 10, 1996, and July 20, 1999, fo Reagan presidential records concerning Edwin Meese's role in developing Reagan Administration policy on civil rights, affirmative action, and voting rights. In its responses to those requests on June 9, 1997, and August 24, 2000, NARA's Reagan Library withheld a total of 257 pages of records under the PRA's restriction category for "confidential communications." *See* Pl. Statement, ¶ 4, Exh. 6.

As of the date on which the 12-year restriction period expired, NARA had identified approximately 68,000 pages of documents that were restricted solely because of President Reagan's invocation of the PRA's "confidential communications" restriction category. Those 68,000 pages of documents were not otherwise subject to restriction under the PRA or exempt from release under FOIA on grounds of national security classification or any other basis. Soon after President George W. Bush took office in early 2001, NARA provided notice to him and to former President Reagan that it intended to open the 68,000 pages to the public. *See* Pl. Statement, ¶ 3, Exh. 5. Under the PRA and its implementing regulations, NARA's decision to notify the White House and former President Reagan of its intention to open these formerly restricted documents to public access reflected its determination that, but for the now-expired restriction imposed by former President Reagan, there was no statutory basis under the PRA for withholding them from the public.

In response to the Archives' notice, the White House, through White House Counsel Alberto Gonzales, three times directed the Archivist to postpone any release of the Reagan records (as well as any release of formerly restricted Bush vice presidential records) pending White House review of the PRA. Pl. Statement, ¶ 2, Exhs. 2, 3 & 4. On November 1, 2001, the White House's review culminated in President Bush's issuance of Executive Order 13,233. Pl. Statement, ¶ 1, Exh. 1.

C. The Bush Executive Order

The Bush Order, entitled "Further Implementation of the Presidential Records Act," purports to set forth procedures and substantive standards governing the assertion of claims of executive privilege by both former and incumbent Presidents following the expiration of the 12-year restriction period for materials involving communications between Presidents and their advisers. The Order opens with a descriptio of the supposed scope of the constitutional executive privilege of former Presidents and Vice Presidents as well as incumbent Presidents. The Order includes within that scope not only the privilege for confidential communications between the President and his close advisers, but also the common-law attorney-client, work-product, and deliberative process privileges, as well as the state secrets privilege. Bush Order, § 2(a). Moreover, in contrast to the PRA, which makes presidential records available under FOIA standards (which require no

showing of need for access) after the 12-year restriction period has ended, the Bush Order asserts that "a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a 'demonstrated, specific need' for particular records, a standard that turns on the nature of the proceeding and the importance of the information to that proceeding." Bush Order, § 2(b

The Bush Order provides that the Archivist must notify both the former President and the incumbent of any request for access to presidenti records that are subject to the PRA, and must provide them with copies of the relevant records upon their request. Bush Order, § 3(a). The Order states that the former President shall review the records "as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome." Bush Order, § 3(b). However, the Order goes on to provide that if the Archivist receives a request for an extension of time from the former President, the Archivist "shall not permit [public] access" to the materials, regardless of whether the forme President's request is reasonable. *Id.* Upon completion of the former President's review, the Bush Order provides that the former President shall either request that the records be withheld on the basis of executive privilege or "authorize access" to them. Bush Order, § 3(c).

The Order goes on to state that the incumbent President has an unlimited amount of time in which to review, either concurrently with or afte the review by the former President, any presidential materials that are subject to a request for access under the PRA. Bush Order, § 3(d). Upon completion of the incumbent's review process, Order provides that the incumbent shall decide whether he "concurs in" the former President's decision to "request withholding of or authorize access to the records." Bush Order, § 3(d). The Order provides that "[a]bsent compelling circumstances, the incumbent President will concur in the privilege decision of the former President" and "will support" a former President's privilege claim "in any forum in which the privilege claim is challenged." Bush Order ,§ 4.

When the incumbent President "concurs in" a former President's request that materials be withheld on privilege grounds, the Order provide that the incumbent shall so inform the Archivist, and that the Archivist thereafter shall not permit access to the materials unless both Presidents change their minds or a court orders that the materials be released. Bush Order, § 3(d)(1)(i).

Even when the incumbent President finds that "compelling circumstances" require him to disagree with a former President's request that materials be withheld on grounds of privilege, the Bush Order provides that the Archivist is still forbidden to disclose the assertedly privileged materials to the public "[b]ecause the former President independently retains the right to assert constitutionally based privileges.' Bush Order, § 3(d)(1)(ii). Under such circumstances, the Bush Order provides that the Archivist must deny public access to the materials claimed to be privileged by the former President unless and until the incumbent President informs the Archives that both he and the former President agree to their release, or until a final, nonappealable court order requires that the records be released.

The Bush Order further provides that even when the former President has "authorized access," the Archivist must nonetheless deny public access to records when the incumbent President so directs. Bush Order, § 3(d)(2)(ii). Only when both the former President and the incumbent President "authorize access" does the Order permit the Archivist to grant public access to presidential records under the PRA.

The Bush Order purports to authorize surrogates to assert constitutionally based privileges on behalf of a former President. The Order provides that a former President or his family may designate a representative "to act on his behalf for purposes of the Presidential Records Act and this order." Bush Order, § 10. Upon the former President's death or disability, such a designated representative "shall act" on the former President's behalf, "including with respect to the assertion of constitutionally based privileges." *Id.*

Finally, the Bush Order provides that a former Vice President may assert an independent claim of executive privilege to bar access to his materials under the PRA, and that such a claim will be treated exactly the same as a claim of privilege by a former President meaning that the Archivist must withhold access to materials once such a claim has been made, unless the former Vice President authorizes public access or a court orders release of the records. Bush Order, § 11.

D. NARA's Continued Withholding of Records

Following the promulgation of the Bush Order, the Archivist publicly announced his intention to abide by and implement the Bush Order, an NARA continued to withhold the 68,000 pages of formerly restricted Reagan records pending completion of the reviews called for by the Order. Pl. Statement ¶ 5, Exh. 10. On January 3, 2002, NARA released approximately 8,000 of the 68,000 pages after the completion of review under the Order by both the White House and former President Reagan's representatives, but the remaining 60,000 pages remain unavailable. Pl. Statement, ¶ 6, Exh. 12. The materials that remain unavailable to the public include the materials sought by Professor Graham concerning Edwin Meese's role in civil rights policy. Pl. Statement, ¶ 4, Exhs. 6-9.

In addition, the Order has been applied to Bush vice presidential records at the George Bush Presidential Library. NARA has informed plaintiff National Security Archive, for example, that requested materials concerning Vice President Bush's work on a task force on terrorisn will not be opened until they have been reviewed under the Bush Order. Pl. Statement, ¶ 5, Exh. 11. And, of course, in addition to the 60,0(

pages of formerly restricted materials at the Reagan Library and materials responsive to pending requests at the Bush Library, the Order w henceforth be applied, according to its terms, to *all* presidential and vice presidential records proposed for release at both libraries. Pl. Statement, ¶¶ 7-8.

ARGUMENT

I.

THE BUSH ORDER IS REVIEWABLE

The Archivist of the United States and his agency, NARA, have clearly announced not only that they intend to follow Executive Order 13,23 in their administration of the Presidential Records Act, but that they are already doing so. Both Reagan presidential records at the Ronald Reagan Presidential Library and Bush vice presidential records at the George Bush Presidential Library have been withheld from public access pending application of the terms of the Order to them. Moreover, the Order will continue to be applied to subsequent proposed releases of presidential and vice presidential records from both Libraries. Under these circumstances, the lawfulness of the Order that is directing the Archivist's actions is subject to judicial review.

This lawsuit does not seek relief against President Bush, who issued the Order, but only against the officer and agency charged with implementing it. The law is clear that to the extent the Bush Order is carried out by subordinate Executive Branch officers and agencies, its legality may be reviewed as part of the review of the actions of those officers and agencies. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328-29 (D.C. Cir.), *modified on other grounds*, 83 F.3d 439 (D.C. Cir. 1996); *see, e.g., Building & Const. Trades Dept., AFL-CIO v. Allbaugh*, 172 F. Supp. 2d 138 (D.D.C. 2001). As the court in *Reich* explained:

> That the "executive's" action here is essentially that of the President does not insulate the entire executive branch from judicial review. We think it is now well established that "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive."

74 F.3d at 1328 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 815 (1992) (Scalia, J., concurring)). Thus, even though the Archivist ma be "acting at the behest of the President, this 'does not leave the courts without power to review the legality [of the action], for courts have power to compel subordinate executive officials to disobey illegal Presidential commands.'" *Id.* (quoting *Soucie v. David*, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971)).

Plaintiffs may obtain review of the lawfulness of the Archivist's implementation of the PRA under the Administrative Procedure Act, 5 U.S.C §§ 701-06, because the Archivist's determination to abide by the terms of the Order, his withholding of records pursuant to the Order, and his other actions in implementation of the order constitute agency actions that are subject to review for their conformity to the requirements of the PRA. *See American Historical Ass'n v. Peterson*, 876 F. Supp. 1300, 1315-18 (D.D.C. 1995). Even leaving the APA aside, however, a line of Supreme Court and D.C. Circuit cases establish that there is a nonstatutory right to judicial review of agency action in excess of statutory authority, which may be invoked by a plaintiff who challenges (as do plaintiffs here) an executive officer's conduct in carrying out a unauthorized and unlawful executive order. *Chamber of Commerce v. Reich*, 74 F.3d at 1327-28 (citing, *inter alia*, *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902)). As the Court of Appeals explained in *Reich*, "The message of this line of cases is clea enough: courts will 'ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.'" 74 F.3d at 1328 (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986)).

Finally, the issues posed here are ripe for review. The Archives is now applying the Bush Order and will continue to do so as long as it remains in force. *Cf. Public Citizen v. Burke*, 843 F.2d 1473, 1477 n.5 (D.C. Cir. 1988). Moreover, materials have been and are still being withheld from the public because of the Bush Order. Finally, the issues of the legality of the Order raised by this action are purely legal and do not turn on the particular circumstances of its application to any one document or group of documents. *See, e.g., Whitman v. American Trucking Ass'n*, 121 S. Ct. 903, 915 (2001); *Public Citizen v. Department of State*, No. 005387. 276 F.3d 634 (D.C. Cir. Jan. 25, 2002) (holding that a legal challenge to an across-the-board policy is ripe without regard to its particular applications). Thus, the controversy with respect to the Bush Order satisfies the crux of the ripeness inquiry: it presents a legal issue that is fit for review without further factual development. As the D.C. Circuit has stated, "A case is ripe 'when it presents a concrete legal dispute [and] no further factual development is essential to clarify the issues, & [and] there is no doubt whatever that the challenged agency practice has crystallized sufficiently for purposes of judicial review.'" *Id.*, slip op. at 8 (quoting *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 540 (D.C. Cir. 1999)). That is precisely the situation here.

II.

THE BUSH ORDER UNLAWFULLY GRANTS FORMER

PRESIDENTS AUTHORITY TO COMMAND THE ARCHIVIST TO

WITHHOLD RECORDS THAT ARE SUBJECT TO THE PRA

The terms of the Bush Order are unlawful, as they violate not only the terms of the PRA, but also the obligation of the Executive Branch to "take Care that the Laws be faithfully executed" as required by Article II, section 3 of the Constitution. The D.C. Circuit's opinion in *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988), establishes unambiguously that the Order's requirement that the Archivist withhold records upon a mere assertion of privilege by a former President cannot be squared with the law, and this Court's own decision in *American Historical Association v. Peterson*, 876 F. Supp. 1300 (D.D.C. 1995), confirms the impropriety of ceding control over records to a former President.

The Presidential Records Act provides that records reflecting confidential communications among former Presidents and their advisers may be restricted entirely from public access for no more than 12 years after the former President leaves office. 44 U.S.C. § 2204(a)(5). Thereafter, such materials become available to the public under the standards of the Freedom of Information Act ("FOIA"), "except that paragraph (b)(5) of that [Act] shall not be available for purposes of withholding any Presidential record." *Id.* § 2204(c)(1). Since FOIA's (b)(5) exemption is the mechanism through which privileges attaching to confidential communications are asserted, the import of its unavailability under the PRA is clear: Confidential communications among the former President and his adviser may be shielded for 12 years, but thereafter are not subject to any statutory protection (unless, of course, they fall within some other protected category, such as information properly classified on national security grounds). The PRA goes on to provide that it does not "confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." *Id.* § 2204(c)(2). Thus, the effect of the Act's provisions, read together, is that confidential communications among the former President and his advisers must be made public after 12 years except when they are subject to a valid claim that their disclosure is barred by a constitutionally based privilege. Consistent with the terms of the Act, NARA's regulations provide that a former President may assert a constitutionally based claim of privilege, but that records will be released the face of such a claim if the Archivist concludes that the claim is not proper. 36 C.F.R. § 1270.46(c).

The Bush Order fundamentally reverses this statutory and regulatory scheme. It provides that upon the assertion of a privilege by a former President, the incumbent President (and the litigating apparatus of the federal government) will support the claim, whether they judge it valid or not, absent "compelling circumstances." And even if the incumbent President finds compelling reasons for opposing a former President's privilege claim, the Archivist still is not permitted to release any records as to which a former President has claimed privilege unless a party contesting the privilege claim obtains a court order requiring release. In short, the Order gives a former President the power to veto release by the Archivist by making a privilege claim, whether it is valid or not. Only if the former President "authorizes" disclosure may *any* presidential records be released by the Archivist under the terms of the Bush Order.

In requiring that records be withheld even when a former President's claim of privilege is *not* valid, the Bush Order is contrary to the plain terms of the Act. The Act expressly states that, while not limiting any constitutionally based privileges, it does not expand them either. 44 U.S.C. § 2204(c)(2). Authoritative precedents of the Supreme Court and the D.C. Circuit, including *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir.), *cert. denied*, 459 U.S. 1035 (1982), and, most unambiguously, *Public Citizen v. Burke*, hold that the scope of the constitutionally based executive privilege does not require that the Archivist bow to claims of privilege by a former President. By purporting to require the Archivist to do so, the Bush Order expands the protections afforded by the constitutionally based executive privilege, with the result that records required by the Act to be released are withheld from the public by the Archivist.

To be sure, the Supreme Court in *Nixon v. Administrator* recognized the standing of a former President to assert claims of executive privilege. 433 U.S. at 448-49. But it also recognized that a former President's authority in this regard was entitled to less respect than an incumbent's (*id.*), and that the privilege attaching to presidential historical records is subject to "erosion over time" (*id.* at 451) because "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding" (*id.* at 450), and even the confidences of close presidential advisers have generally been opened to the public after a President has been out of office for some time (*id.* at 450-51). Most importantly, however, the Court emphasized that a former President does not have *carte blanche* to bar access to his materials simply by invoking the concept of privilege. Rather, a former President "may legitimately assert the Presidential privilege, of course, only as to those materials whose contents fall within the scope of the privilege." *Id.* at 449. In other words, the mere invocation of privilege as to a record does not make that record privileged.

Moreover, the Court did *not* hold that the protection of the privilege requires that the former President be afforded the unilateral ability to block release of materials merely by asserting privilege. Instead, the Court held, the Act was constitutional because it afforded the former President the "*opportunity to assert* any & constitutionally based right or privilege." *Id.* at 450 (emphasis added). An opportunity to assert a privilege and have it accepted if valid and rejected if not is not the same as an absolute right to have that assertion accepted. Because the PRA and its implementing regulations assure former Presidents the *opportunity to assert claims of privilege*, they fully satisfy the constitutional requirements announced in *Nixon v. Administrator*. The additional perquisite granted by the Bush Order unilateral veto power over release of assertedly privileged records is not required by the constitutional doctrine of executive privilege and, absent a constitutional basis, cannot override the terms of the Act and the lawfully promulgated regulations implementing it.

If *Nixon v. Administrator* left any room for doubt on these points, it was laid to rest in the D.C. Circuit's opinions in *Nixon v. Freeman* and *Public Citizen v. Burke*, both of which elaborated on the doctrine of *Nixon v. Administrator* in the context of issues relating to the application of the legislation governing the Nixon materials. In *Nixon v. Freeman*, the court considered, among other issues, challenges by former President Nixon to Archives regulations that permit members of the public to listen to tape recordings of his conversations with his advisers without showing the "particularized need" for access that he contended was required under the Supreme Court's decision in *United States Nixon*, 418 U.S. 683 (1974). The court squarely rejected this argument, holding that protection of the privilege did not require such a showing as a prerequisite to access to communications between the former President and his advisers (access, the court added, that woul in no case take place less than eight years after the former President left office). *Freeman*, 670 F.2d at 356. Rather, the court held, the constitutional privilege was fully protected by regulations that imposed a burden on the former President to invoke privilege on a disclosure by-disclosure basis, and to seek judicial review if his claims were administratively rejected:

> [W]e think that those who see in disclosure a threat to the privilege must be given a meaningful opportunity to contest disclosure o that basis. The regulations give Mr. Nixon such an opportunity. He can raise a challenge by sending a letter to the Administrator explaining his position; only if his claim is rejected administratively need he present his claim in court.

Id. at 359. *Freeman* is thus flatly at odds with the notion, underlying the Bush Order, that preservation of the constitutional executive privilege requires executive branch officials automatically to accept assertions of privilege by former Presidents and to place the burden of seeking judicial review of executive privilege issues exclusively on those who seek access to records.

In *Public Citizen v. Burke*, the D.C. Circuit added an exclamation point to its holding in *Freeman*. There, the issue was the lawfulness of an Office of Legal Counsel directive, imposed on the Archivist during the process of White House review of the regulations implementing the Nixon legislation. The directive required that the Archivist accept any claim of executive privilege by former President Nixon unless ordered otherwise by the incumbent, President Reagan. The Justice Department defended its directive by arguing that its terms were required by th constitutional doctrine of executive privilege as set forth in *Nixon v. Administrator*. *See* 843 F.2d at 1478. The D.C. Circuit rejected the argument out of hand, stating that "[w]e find no support for OLC's constitutional argument in *Nixon v. General Services Administration*." *Id.* 1479. Indeed, the court stated, "we see no reason why the Archivist an appointee of the incumbent President is himself constitutionally compelled to afford any more deference to Mr. Nixon's claim than would be the incumbent President. OLC's discomfort with the role that th Archivist would play under the regulations as written [in ruling on assertions of privilege by the former President] suggests more notions of lèse majesté than unconstitutionality." *Id.* The court also noted that its decision in *Freeman* had already rejected the argument that the constitution did not permit the Archivist to reject a former President's assertion of privilege: "Clearly in *Freeman* we saw no constitutional anomaly in the prospect of the Archivist rejecting a challenge by Mr. Nixon based on executive privilege." *Id.* at 1480.

Nixon v. Administrator, *Nixon v. Freeman*, and *Public Citizen v. Burke* together demonstrate that by requiring the Archivist to abide by any claim of privilege by a former President without regard to its merit, the Bush Order "expands" the scope of protection of the constitutionally based privilege in violation of the clear terms of the Act. By ceding authority to former Presidents to veto releases of records that are required by the PRA, the Order also runs counter to Article II's command that the Executive Branch "take Care that the Laws be faithfully executed." The law here requires that records be released unless subject to a *valid*, constitutionally based claim of privilege. It is therefore unlawful for the Archivist to withhold records from the public upon a claim of privilege that is not meritorious. Indeed, the Bush Order implicitly acknowledges as much by recognizing that the Archivist can be ordered by a court to release records as to which an improper claim of privilege has been made. Thus, as the D.C. Circuit explained in *Public Citizen v. Burke*, it is an evasion of the Archivist's obligation to "take care" to conform his conduct to the law for the Archivist to withhold records without first making a determination of the merits of a claim of privilege:

> To say & that [a former President's] invocation of executive privilege cannot be disputed by the Archivist, a subordinate of the incumbent President, but must rather be evaluated by the Judiciary in the first instance is in truth to delegate to the Judiciary the Executive Branch's responsibility as set forth in the statute and the accompanying regulations. It may well be unpleasant for the Executive Branch to be forced to consider the host of difficult questions that arise in this area, and the statute may place the

> incumbent in an awkward position by obligating him to take a position on claims of executive privilege put forward by former President Nixon. Nonetheless, since the Archivist is part of the Executive Branch, we do not see how the incumbent President's responsibility to take care that the laws be faithfully executed can properly be transferred to the Judiciary.

843 F.2d at 1479.

The Bush Order also runs afoul of Article II by delegating to persons outside the Executive Branch, and indeed outside the government, the power to give binding directions to the Archivist, a duly appointed officer of the United States. Under the Order, once a former President or Vice President or a representative appointed by him or his family makes a claim of privilege, the archivist is compelled to refrain from releasing records to the public even in the face of the incumbent President's opposition to that claim. Only with the "authorization" of the former officeholder or his representative may the Archivist take the actions otherwise required by the PRA. Thus, the Bush Order places authority to give a binding directive to the Archivist in the hands of private citizens holding no government position. The D.C. Circuit found just such a delegation to a former President improper in *Public Citizen v. Burke*:

> If, whenever [the former President] asserts executive privilege, the Archivist in effect loses jurisdiction over his responsibilities to [e]ffect disclosure, the former President has gained power to withdraw from the Archivist some indefinite portion of the responsibilities that Congress delegated to him & .

Id. at 1480.

In addition, by requiring "authorization" by the former President before any of his records may be released, the Bush Order conflicts with or of the most fundamental terms of the PRA: the provision that vests the Archivist, once a President leaves office, with responsibility for "custody, control, and preservation of, and access to, the Presidential records of that President." 44 U.S.C. § 2203(f)(1). The Bush Order's requirement that any release be "authorized" by the former President violates this provision by placing control over access in the hands of the former President. As the court held in *AHA v. Peterson*, the PRA "leaves no room for any government official to & confe[r] & control of Presidential records [on] any person or entity other than the United States" not even a former President. 876 F. Supp. at 1319.

By granting the former President the power to "control" the Archivist's release of materials under the PRA, the Bush Order not only runs afoul of the plain language of the Act, but also, again, of the principle that Executive Branch authority to execute the laws may not properly be ceded to private persons. In *AHA v. Peterson*, the court found an improper delegation of Executive Branch authority in an agreement between former President Bush and then-Archivist Wilson, which purported to cede "control" over the Archivist's disclosure of presidential records to former President Bush:

> Under *Burke* and Article II of the Constitution, the & Archivist is subject to the direction of [the incumbent President], and former President Bush has 'no constitutional power to direct the Archivist.' & Under the terms of the Bush-Wilson Agreement, however, which former Archivist Wilson signed, former President Bush is purportedly empowered to direct the Archivist's disposition of Presidential information & and to oversee decisions by NARA concerning access to information on the materials. & [T]his Court, a in *Burke*, finds that such an Agreement cannot be sustained under the Constitution.

Id. at 1321. The Bush Order's cession of authority to former Presidents can no more be sustained than could the Bush-Wilson Agreement.

III.

THE BUSH ORDER IS UNAUTHORIZED

Under the constitutional scheme of separation of powers, the President has no general authority to legislate, whether through issuance of "executive orders" or otherwise. An executive order is lawful only if it constitutes an exercise of power that is granted to the President by ar Act of Congress or directly by the Constitution: "The President's power, if any, to issue the order must stem either from an act of Congress from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *see also Building & Const. Trades Dept., AFL-CIO v. Allbaugh*, 172 F. Supp. 2d at 158. Justice Jackson elaborated on this elemental proposition in his influential concurring opinion *Youngstown*:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. &

> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matte enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidentia claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

343 U.S. at 635-38 (Jackson, J., concurring) (footnotes omitted). As Justice Jackson put it, the question facing a court addressing a challenge to the lawfulness of an executive order is, "Into which of these classifications does this executive [order] fit?" *Id.* at 638.

Here, as in *Youngstown*, "There is no statute that expressly authorizes the President to [act] as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied." *Id.* at 586 (opinion of the Court). The Bush Order itself does not purport to be based on the Presidential Records Act or any other enactment of Congress. Thus, as in *Youngstown*, it is evident that the government does not "rely on statutory authorization for this [order]." *Id.* According to Justice Jackson's typology, the Bush Order must be either a "category 2" or "category 3" executive order, and its legitimacy necessarily depends on the existence of some constitutional authority for the exercise of presidential power over this subject.

The Presidential Records Act itself answers the question whether the case fits into the second or third of Jackson's categories, for it comprehensively governs the disposition of presidential records following a President's term in office. Hence, this case falls into "category 3." Far from leaving open the possibility of presidential authority to engage in unilateral lawmaking regarding the procedures and substantiv standards applicable to claims of executive privilege, the Act expressly states that the power to promulgate regulations "necessary to carry out [its] provisions" is granted to the Archivist of the United States, and that this power must be exercised "in accordance with section 553 c title 5, United States Code" (providing for notice-and-comment rulemaking). 44 U.S.C. § 2206. Moreover, the Act provides that such regulations must include "provisions for notice by the Archivist to the former President when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have." *Id.* Thus, the very subject of the Bush Order has been committed by Congress to the rulemaking authority of the Archivist as constrained by the procedural requirements of the APA which have been bypassed entirely through the promulgation of the Bush Order.

Moreover, the Archivist has already exercised the power delegated by Congress and, through the lawful APA process, promulgated regulations that not only address the subject matter covered by the Bush Order, but are fundamentally incompatible with that order. Thus, the Archivist's regulations provide that whenever the Archivist intends to make any presidential record public, he must provide 30 days' notice to the former President to allow him to assert any rights or privileges that would foreclose access to the materials. 36 C.F.R. § 1270.46(a), (b), (d). The regulations further provide for the same 30-day notice period for the incumbent President. *Id.* § 1270.46(e). Of critical importance, the regulations provide in direct opposition to the Bush Order that the Archivist may reject an assertion of right or privilege by the former President provided that the Archivist states the basis for his decision in writing and notifies the former President of the date on which he will disclose the records in question. *Id.* § 1270.46(c). The regulation further provides that when the Archivist rejects a former President's claim of privilege, public access will be withheld for an additional 30 days to allow the former President to seek judicial review. *Id.* § 1270.46(c), (d). The regulations promulgated pursuant to the statute thus contemplate exactly the opposite of the scheme envisioned by the Bush Order. Under the regulations, only *proper* assertions of executive privilege are to be accepted by the Archivist, and the burden is on the *former President*, not members of the public, to seek judicial review when the Archivist determines that materials are t be released in the face of an assertion of privilege by a former President.

The Bush Order is thus not only in conflict with congressional legislation that occupies the field of presidential records by creating a comprehensive administrative scheme governing them, but is also directly at odds with the specific terms of regulations having the force of law promulgated pursuant to that statutory scheme. Such an order is unlawful. *See Chamber of Commerce v. Reich*, 74 F.3d at 1338. Only Congress lacked power to enact the legislation, or if the alterations in the statutory and regulatory scheme worked by the Bush Order were necessary to protect constitutional executive prerogatives that would otherwise be infringed, could the Bush Order be sustained. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.").

There can be no argument that Congress lacks power to legislate upon the subjects of control over and public access to historical

presidential records. In *Nixon v. Administrator*, the Supreme Court held that Congress possesses precisely such power. Addressing a challenge to the Presidential Recordings and Materials Preservation Act of 1974, which seized President Nixon's presidential records and established a process for making them available to the public, the Court "reject[ed] at the outset [the] argument that the Act's regulation of the disposition of Presidential materials within the Executive Branch constitutes, without more, a violation of the principle of separation of powers." 433 U.S. at 441. Rather, recognizing the "abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch," *id.* at 445, the court held that congressional power to regulate presidential records existed as well. *Id.* at 445-46.

More specifically, the Court refused to accept the argument "that Congress is without power to delegate to a subordinate officer of the Executive Branch the decision whether to disclose Presidential materials and to prescribe the terms that govern any disclosure." *Id.* at 440. By contrast, the Bush Order's presumes that permitting the Archivist to consider and reject a former President's claims of executive privileg is unconstitutional a presumption that, as demonstrated above, is directly at odds with the holdings of *Nixon v. Administrator*, *Nixon v. Freeman*, and *Public Citizen v. Burke*.

The notion that the Bush Order has some constitutional basis necessarily rests on the idea, rejected in those cases, that there is some "constitutional anomaly" (*Public Citizen v. Burke*, 843 F.2d at 1480) in holding that claims of executive privilege by a former President must be ruled on in the first instance by the Archivist, as the regulations promulgated under the PRA require. Absent such a constitutional basis, the Bush Order is entirely without any supporting authority, for, as *Youngstown* teaches, a President has no inherent power to make law contrary to the enactments of Congress unless pursuant to some fundamental constitutional grant of power.

IV.

THE BUSH ORDER UNLAWFULLY RECOGNIZES

A "VICE PRESIDENTIAL" PRIVILEGE

One of the most novel features of the Bush Order is that it gives former *Vice President*s the same authority to direct the Archivist to withhol their materials that it gives former Presidents. Specifically, section 11(a) of the Order provides: "Pursuant to section 2207 of title 44 of the United States Code, the Presidential Records Act applies to the executive records of the Vice President. Subject to subsections (b) and (c) this order shall also apply with respect to any such records that are subject to any constitutionally based privilege that the former Vice President may be entitled to invoke, but in the administration of this order with respect to such records, references in this order to a former President shall be deemed also to be references to the relevant former Vice President." In so providing, the Order necessarily posits the existence of an independent, constitutionally based privilege for vice presidential communications, to which it offers protection independent of whether such communications may also fall within the scope of the executive privilege covering confidential presidential communications Indeed, the Order makes clear that the privilege it authorizes a former Vice President to assert is an exclusively vice presidential privilege, because it simultaneously forbids a former Vice President to "invoke any constitutional privilege of a President or former President except a authorized by that President or former President."

There is no basis, however, for the proposition that an independent, constitutionally based *vice presidential* privilege exists. The deliberations of executive branch officers who lack the high constitutional powers and duties of the President receive protection, if at all, on through the deliberative process privilege, which "is primarily a common law privilege." *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). The constitutionally based privilege for presidential communications recognized by the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974), and *Nixon v. Administrator* applies "specifically to decisionmaking of the President" and is "rooted in constitutional separation of powers principles and the President's unique constitutional role." *In re Sealed Case*, 121 F.3d at 745.

The Supreme Court summarized the President's "unique position in the constitutional scheme" in *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982):

> Article II, § 1, of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States & ." This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law it is the President who is charged constitutionally to "take Care that the Laws be faithfully executed"; the conduct of foreign affairs a realm in which the Court has recognized that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret"; and management of the Executive Branch a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."

Id. at 749-50 (footnotes omitted). It is these critical constitutional functions that require that the President's paramount role "in the process o shaping policies and making decisions" receive some protection in the form of a qualified privilege of confidentiality "rooted in the separatio of powers under the Constitution." *United States v. Nixon*, 418 U.S. at 708. As the Supreme Court put it in *Nixon v. Administrator*, "the privilege of confidentiality of Presidential communications derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibilities." 433 U.S. at 447.

In stark contrast to the President, the Vice President's constitutional duties are few. The Vice President does not share in any of the executive powers granted to the President by Article II, except in cases of presidential incapacity. Indeed, the *only* duties and functions of the Vice President under the Constitution are: (1) serving as the presiding officer of the Senate (except in cases of presidential or presumably vice presidential impeachment) and casting tie-breaking votes (Art. I, § 3); (2) opening the certified votes of the electoral colleg (Amend. XII); (3) succession to the presidency in case of the removal, death or resignation of the President (Amend. XXV, § 1); (4) exercise of the powers and duties of the President as "Acting President" in cases of presidential disability (*id.*, § 3); (5) certification of the disability o the President (with the concurrence of a majority of the Cabinet) (*id.*, § 4). Outside of the situations of presidential death, disability, removal or resignation upon which the Vice President assumes the duties of the presidency (and thus becomes the holder of the executive privilege covering confidential *presidential* communications) the Vice President's constitutional duties are extremely limited and are not even executive in nature.

The very limited constitutional role of the Vice President hardly justifies recognition of an independent, constitutionally based vice presidential privilege. Indeed, we are aware of no precedents recognizing such a privilege. *See In re Sealed Case*, 121 F.2d at 736-53 (comprehensively canvassing precedents on executive privilege and citing no cases involving a vice presidential privilege). To be sure, the Vice President's role as a subordinate and adviser of the President (when the President sees fit to let him play such a role) may under som circumstances bring vice presidential records within the potential scope of the *presidential* privilege, but (as the Bush Order correctly acknowledges) that privilege would be for the President to assert, not the Vice President. Thus, in empowering a former Vice President to block the Archivist from allowing public access to his records by asserting a claim not of presidential but of vice presidential privilege, the Order requires the withholding of records whose release is otherwise mandated by the PRA *on the basis of a "constitutional privilege" that does not even exist*. This provision of the Order facially violates the terms of the PRA, is not in any way required by the Constitution, and therefore cannot lawfully be relied upon by the defendants to deny plaintiffs and other members of the public the access they have sought t records of former Vice President Bush.

V.

THE BUSH ORDER UNLAWFULLY GRANTS "REPRESENTATIVES"

OF PRESIDENTS, VICE PRESIDENTS, AND THEIR FAMILIES THE

POWER TO DIRECT THE ARCHIVIST TO WITHHOLD RECORDS

The Order does not stop with giving former Presidents and Vice Presidents an unlawful veto power over the release of their records: It extends that veto power far beyond their lifetimes by allowing it to be exercised by "representatives" of deceased or disabled Presidents an Vice Presidents. Moreover, these "representatives" may be designated not only by the former officeholders before their deaths or the onset of their disabilities, but also by members of their families at any time. Under the Order, claims of alleged constitutionally based privilege by these representatives must be treated exactly as claims made by the former President himself that is, they constitute binding directives to the Archivist to withhold records from the public, regardless of their legal merits.

Delegation of authority to private citizens to direct an officer of the United States in the performance of his functions is even more offensive to Article II than delegation of such authority to a former President, who at least once had authority to direct Executive Branch officials. *Cf. Public Citizen v. Burke*, 843 F.2d at 1479-80; *AHA v. Peterson*, 876 F. Supp. at 1321. Even leaving this problem aside, the Order's provisior that give an assertion of privilege by a representative of a deceased or disabled President the same effect as an assertion by the former President himself are unlawful, for the constitutionally based privilege cannot properly be asserted except by the incumbent President or a former President personally.

The constitutionally based executive privilege for confidential presidential communications belongs to the Executive Branch, not to the President individually: It is "the privilege of the Presidency" and serves the "needs of the Executive Branch." *Nixon v. Administrator*, 433 U.S at 448, 449. As such, it is not a personal property right of the President, and it cannot be assigned or descend by gift, bequest or devise. The family of a President or former President has no legitimate interest in it or claim to it.

Moreover, as head of the "department" possessing the privilege, the President must assert it personally. *See United States v. Reynolds*, 34 U.S. 1, 7-8 (1953); *see also In re Sealed Case*, 121 F.2d at 745 n.16 (*Reynolds* suggests "that the President must assert the presidential communications privilege personally"). In *Nixon v. Administrator*, the Supreme Court, with some hesitation, extended standing to assert the privilege to former Presidents in order to protect the institutional needs of the Executive Branch, although it recognized that a former President had "less need of [the privilege] than an incumbent" (433 U.S. at 448) and that a former President's assertion of privilege was entitled to less weight than an incumbent's (*id.* at 449). But nothing in *Nixon v. Administrator* remotely suggests that the Court would have exempted a former President from the generally applicable requirement that the privilege be asserted personally, or that the Court would have countenanced extending the privilege still further by allowing it to be asserted by persons, such as presidential friends, associates, family members, or other designees, who had never been at the head of the branch of government to which the privilege properly belongs.

A purported claim of privilege made by a "representative" who lacks lawful authority to assert it cannot provide a basis for finding that there is a "constitutionally-based privilege" that bars release of records within the meaning of 44 U.S.C. § 2204(c)(2). Absent such a constitutionally based privilege, the PRA does not permit the withholding of presidential or vice presidential records (other than those that fall within specific, non-privilege-based FOIA exemptions) once the 12-year restriction period has expired. To the extent that it purports to authorize withholding of records based on assertions of privilege by "representatives" who lack any constitutionally based authority to claim the privilege, the Order facially conflicts with the PRA; and, again, because no constitutional basis exists for extending the privilege to such "representatives," there can be no basis for any claim that this provision of the Order is necessary to vindicate any constitutional interests o the Executive Branch.

CONCLUSION

As explained above, the Bush Order is unauthorized and unlawful, and NARA and the Archivist cannot implement it without violating the PRA. The White House's sole purported justification for the Order that it is necessary to protect the constitutionally based executive privileg is not only incorrect, but is directly foreclosed by clear precedents binding on this Court. Accordingly, plaintiffs request that the Court grant summary judgment declaring that the defendants may not implement the Bush Order, enjoining them from doing so, and requiring them to open Reagan presidential records and Bush vice presidential records without regard to the terms of the Bush Order.

Respectfully submitted,

Scott L. Nelson, D.C. Bar No. 413548

David C. Vladeck, D.C. Bar No. 945063

Michael Tankersley, D.C. Bar No. 411978

Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Plaintiffs

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