[ORAL ARGUMENT NOT YET SCHEDULED]

No. 17-5225

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

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff-Appellant,

v.

INTERNAL REVENUE SERVICE,
Defendant-Appellee.

On Appeal from an Order of the
U.S. District Court for the District of Columbia
Case No. 17-cv-670(JEB)

REPLY BRIEF FOR APPELLANT

MARC ROTENBERG
ALAN BUTLER
JOHN DAVISSON
Electronic Privacy Information Center
1718 Connecticut Ave. NW, Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Authorities principally relied upon are designated by an asterisk (*).

Statutes

Other Authorities

Regulations

Constitutional Provisions

GLOSSARY

APA	Administrative Procedure Act
Doc.	Documents of record as numbered by the Clerk of the District Court
EPIC	Electronic Privacy Information Center
FOIA	Freedom of Information Act
IRC	Internal Revenue Code of 1986 (26 U.S.C.)
IRM	Internal Revenue Manual
IRS	Internal Revenue Service
JCT	Joint Committee on Taxation
JA	Joint Appendix
Treas. Reg.	Treasury Regulation (26 C.F.R.)

ARGUMENT

The IRS's novel argument that a FOIA request cannot be processed without prior approval of a Joint Committee of Congress is without basis as a matter of public law and constitutional doctrine. The IRS's argument is also contrary to the agency's prior statements and the procedures concerning disclosures under IRC § 6103(k)(3). This Court should find in favor of EPIC and remand with instructions to order the agency to process EPIC's request and take "reasonable steps" to identify and release nonexempt information.

I. The IRS misunderstands its obligations under the FOIA and applicable regulations; the agency must make a determination in response to a request for disclosure pursuant to § 6103(k)(3).

The IRS's central contention, that "EPIC's FOIA claims fail as a matter of law because it failed to submit a perfected request," Appellee Br. 26, is based on a misreading of the FOIA, the IRC, and the applicable Treasury Regulations. The IRS cannot cite to any case that supports its interpretation of Treas. Reg. § 601.702(c) because no court has previously applied that regulation to a (k)(3) disclosure request. And the IRS's interpretation of the regulation is inconsistent with the text and purpose of (k)(3).

Even the IRS appears uncertain as to the application of the statute and regulation to EPIC's unique request. In fact, the IRS's view of the FOIA process in this case is upside-down. First, the IRS argues that EPIC's request was denied

because (k)(3) "does not invest private parties with the right to force the disclosure of protected return information." Appellee Br. 14. But it is the FOIA, not the IRC, that gives EPIC the right to seek disclosure of agency records, and the IRS has the burden "to sustain its action in not making the requested records available." Treas. Reg. § 601.702(c)(13); 5 U.S.C. § 552(a)(4)(B). Second, the IRS argues that under Exemption 3 "an agency's decision not to make a discretionary disclosure of [information] is unreviewable." Appellee Br. 14. But the D.C. Circuit has never held that such decisions are categorically unreviewable, quite the contrary. *See Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Retirement Bd.*, 830 F.2d 331, 336–37 (D.C. Cir. 1987) (declining to "decide if the scrutiny varies by individual statute") [hereinafter *R.R. Workers*]. And finally, the IRS argues that "EPIC has not satisfied" the "condition precedent" to a (k)(3) disclosure. Appellee Br. 14. But it is the agency, not the requester, in a FOIA case that is responsible for making the determination under an Exemption 3 statute. *R.R. Workers*, 830 F.2d at 333. And because the IRS Secretary's (k)(3) determination is a "condition precedent" to processing the request, making that determination is a "reasonable step[] necessary to segregate and release nonexempt information" which the law requires the agency to take. 5 U.S.C. § 552(a)(8)(B)(ii).

But rather than process EPIC's request as required, the IRS simply refused; ignored the procedures outlined in the IRM; performed no search for records; and

asserted (without actually deciding) that all of the records were exempt. Appellee Br. 33–34, 40–45, 57–58. The IRS also refused to take any steps to effect disclosure of potentially nonexempt information. Now the agency argues that EPIC failed to exhaust remedies by virtue of the agency's inaction, and that the court cannot review an Exemption 3 determination that the agency never made. Appellee Br. 30–32; 36–40; 51–57. These arguments are contrary to the plain text of the FOIA, the IRC, and the regulations and should be rejected.

A. The IRS misconstrues § 6103(k)(3) by importing limitations from § 6103(c).

The IRS concedes at the outset that the (k)(3) determination is the necessary "condition precedent" to release of the records EPIC requested. Appellee Br. 14. The agency's "failure to perfect" argument ignores the central point that 6103(c) (which requires permission of the taxpayer) and (k)(3) (which does not) are entirely independent disclosure authorities, neither governed by the other's provisions or regulations. The IRS has no authority to require that EPIC's (k)(3) request comply with proof-of-consent regulations that "implement[] section 6103(c)." Appellee Br. 25.

The IRS mistakenly contends that 6103(c) is the lone "provision that was designed for third parties to obtain tax returns and return information," Appellee Br. 31. That claim ignores the other twelve subsections of 6103 that set out many other circumstances in which tax information may be disclosed to a party other

than the taxpayer. *See* IRC §§ 6103(d)–(o). As the D.C. Circuit has explained, at least three of these provisions— (k)(1), (k)(3), and (m)(1)—permit disclosure of tax information to "the public at large." *Church of Scientology of Cal. v. IRS* (*Church of Scientology I*), 792 F.2d 146, 149 (D.C. Cir. 1986). Section (k)(3) and the other confidentiality exceptions of 6103 are "literally made for" FOIA requests like EPIC's. *Id.*

A direct comparison of 6103(c) and (k)(3) demonstrates that they are distinct authorities for IRS disclosure of tax return information. Each provision (1) sets out a distinct category of what the agency "may" disclose; (2) explains how that disclosure serves "tax administration" purposes; and (3) identifies apparent extrinsic restrictions on the IRS's authority to disclose**.** However, the significant differences between the two provisions—which are central to this case— are (1) the factual predicate required for disclosure and (2) the permissible recipients of the information disclosed. Unlike Section 6103(c), the (k)(3) provision requires no proof-of-authorization and places no limits on who may receive information**.** *See Final Remarks by Margaret Milner Richardson, Commissioner of Internal Revenue*, Fed. B.A. Sec. Tax'n Rep., Spring 1997 [hereinafter *Richardson Remarks*] ("[Section 6103(k)(3)] permits the IRS to disclose tax return information to correct misstatements of fact without a waiver from the taxpayer.").

B. The IRS created a hurdle to a (k)(3) request where none exists.

The IRS places great weight on the notion that (k)(3) lacks a private right of action, reviving its argument that (k)(3) does "not afford any rights to requesters under the FOIA . . . ." Appellee Br. 30 (quoting JA 41). Unfortunately for the IRS, the "FOIA contains an express private right of action and provides that review in such cases shall be 'de novo.'" *CREW v. DOJ*, 846 F.3d 1235, 1245 (D.C. Cir. 2017) (quoting 5 U.S.C. § 552(a)(4)(B)); *see also Goldstein v. IRS*, 174 F. Supp. 3d 38, 53 (D.D.C. 2016) ("[A]lthough the IRS processes requests for tax returns under a 'non-FOIA' procedure, its refusal to produce returns is nevertheless actionable under FOIA.").

EPIC, like many other plaintiffs before, has properly relied on the FOIA right of action to seek disclosure of IRS records. *See, e.g.*, *Church of Scientology I*, 792 F.2d at 152–153 (FOIA requester sought disclosure of records pursuant to 6103(c)); *Life Extension Found., Inc. v. IRS*, 915 F. Supp. 2d 174, 185 (D.D.C. 2013), *aff'd*, 559 F. App'x 3 (D.C. Cir. 2014) (FOIA requester sought disclosure of records pursuant to 6103(e)(7)); *Goldstein*, 174 F. Supp. 3d at 53 (FOIA requester sought disclosure of records pursuant to 6103(e)(1)).

The IRS offers no coherent explanation as to why a request pursuant to (k)(3) would be uniquely unreviewable under the federal open government law. It would be incomprehensible for (k)(3), which pertains to "disclosure to . . . the

public at large," to fall outside of FOIA review when 6103 and FOIA were "quite literally made for each other." *Church of Scientology I*, 792 F.2d at 150. The safeguards built into (k)(3)—the need for a qualifying misstatement, the nexus to tax administration purposes, and the agency's discretionary decision-making power—more than adequately address the IRS's policy-based fears about the statute being misused. *See* Appellee Br. 30–31.

C. The IRS misunderstands the Joint Committee appoval process set out in (k)(3).

The IRS urges—for the first time on appeal—that EPIC failed to obtain and submit an "authorization" from the Joint Committee on Taxation. Appellee Br. 32–36. But again, this is upside down and cannot be reconciled with earlier statements by the agency, the text of (k)(3), or the applicable Internal Revenue Manual procedures.

Indeed, the IRS stated in the Motion to Dismiss that JCT approval is "solely in the Secretary's discretion"—not something in the power of a FOIA requester. Doc. 14. This interpretation is wholly consistent with the IRS procedures for handling "[r]equests involving disclosure to correct a misstatement of fact under IRC § 6103(k)(3)," IRM 34.9.1.4.1 ¶ 2. The IRM states that the IRS Commissioner has exclusive authority to refer (k)(3) requests to the JCT. IRM 11.3.11.3.3 ¶ 3; IRM 1.2.49 ("Delegation Order 11-2 (Rev. 2) Reference Chart"). Even then, the referral only comes at the end of a multi-stage process that begins with a

notification from the relevant FOIA Public Liaison. *See* IRM 11.3.11.3 ¶ 4. Neither the IRS nor Congress ever contemplated that an individual FOIA requester would be responsible for obtaining "approval" from the JCT pursuant to (k)(3). Moreover, it would be nonsensical for the IRS to require JCT authorization from the FOIA requester before the agency initiated the JCT approval process.

Unsurprisingly, the Treasury Regulations do not include any requirement that a FOIA request under (k)(3) include proof of JCT authorization. The IRS appears to suggest that Treas. Reg. §§ 601.702(c)(4)(i)(E) and (5)(iii)(C) impose such a requirement. Appellee Br. 32, 32 n.8. But those regulations solely "implement[] section 6103(c)" and do not apply to a (k)(3) request. Appellee Br. 25. Indeed, the "tax information authorization" described in those regulations is a particular IRS form for taxpayer consent. But both sides agree that EPIC's (k)(3) request is not based on taxpayer consent, so such proof would not be "appropriate" in this context.

The agency's mischaracterization of the JCT approval process provides no basis to refuse processing of EPIC's request.

D. The IRS cannot escape its FOIA obligations, which include taking "reasonable steps" to make a (k)(3) determination.

The IRS argues that it has no obligation to take any steps to identify or release non-exempt information responsive to EPIC's FOIA request. Appellee Br. 32–36. The IRS also contends that it would be "unlawful" for a court to order the

agency to take such steps—even the steps outlined in the agency's own Manual. Appellee Br. 33–34, 40–45, 57–58. These arguments are directly contrary to the FOIA and find no support in this Court's precedents.

First, the IRS erroneously assumes that the records EPIC seeks are "exempt" from disclosure even though the agency has refused to process the request under (k)(3). Appellee Br. 53–54 ("The IRS did not reach a conclusion regarding the merits of invoking section 6103(k)(3) to release that information[.]"). In order to determine whether records are exempt under 6103, the agency must consider not only the confidentiality rule of 6103(a), but also determine whether the relevant exceptions to that rule apply. *See, e.g.*, *Life Extension Found.*, 915 F. Supp. 2d at 185 (reviewing IRS's exercise of discretion under 6103(e)(7)); *Sea Shepherd Conservation Soc'y v. IRS*, 208 F. Supp. 3d 58, 87–88 (D.D.C. 2016) (same). The IRS has made no such determination, and the agency is therefore wrong to state that the records at issue are "exempt," *see* Appellee Br. 31, 33, a fact which is assuredly not "undisputed" by EPIC. Appellee Br. 57.

Second, the IRS mischaracterizes EPIC's argument, which is not that the Court "must seek approval from the Joint Committee," Appellee Br. 33, but that the agency must *make a determination* under (k)(3), which includes whether or not certain tax return information can be released. By refusing to make this determination, the agency is necessarily in violation of its duty to "take reasonable

steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A)(ii)(II); JA 54. The IRS's response that this provision applies to a "partially exempt record," and does not "require disclosure" of a record "exempted" under (b)(3), Appellee Br. 35, is again is putting the cart before the horse. The IRS has not yet determined how much, if any, of the information requested by EPIC is exempt because it has neither reviewed the records nor made a (k)(3) determination.

Third, the IRS strains credulity by arguing that the IRM provisions (the agency's own guidance) concerning (k)(3) are irrelevant to the handling of a (k)(3) request. Appellee Br. 40–45. As an initial matter, EPIC's arguments referencing the IRM are properly before this Court, as they represent a further enumeration of EPIC's contention below that the IRS failed to take reasonable steps to release nonexempt information. *See, e.g.*, Doc. 15 at 19; *see also Elliott v. USDA*, 596 F.3d 842, 852 (D.C. Cir. 2010) (holding that a search adequacy argument was "not forfeited" for the purposes of a FOIA appeal where appellant "challenged [search adequacy] in the district court").

Indeed, EPIC does not argue that the IRM imposes *additional* obligations on the IRS beyond what the FOIA requires. Rather, the IRM (k)(3) provisions are an authoritative (or at a minimum, highly persuasive) statement of what the IRS considers to be the "reasonable steps necessary" to identify and release nonexempt

information in these circumstances. If the IRS wishes to argue that its own procedures are not "reasonable"—for example, the instruction to prepare a letter to the JCT, IRM 11.3.11.3 ¶ 8—then the agency may do so once it has made a determination on EPIC's request.

Finally, notwithstanding the IRS's claim that it cannot be required "to seek third-party authorization," Appellee Br. 33–34, this Court has previously required agencies to consult with third parties before determining whether to disclose information under the FOIA. In *Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925 (D.C. Cir. 2008), the Court instructed the lower court "to enjoin the [EEOC] from disclosing Venetian's confidential information without adhering to . . . the agency's regulations implementing the FOIA." *Id.* at 935. Under those FOIA regulations, when the Commission receives a FOIA request implicating a third party's confidential commercial information, the Commission is obligated to notify the third party; provide the third party with an opportunity to submit detailed objections to disclosure; carefully consider the third party's objections; and, if the Commission overrules those objections, issue a reasoned decision to the third party explaining why. *Id.* at 934.

Given "the wide latitude courts possess to fashion remedies under FOIA," a court could just as well order the IRS to take particular steps precedent to disclosing nonexempt information, up to and including consultation with the JCT.

CREW, 846 F.3d at 1242. And to the extent that the IRS is concerned about collateral releases of protected tax information, Appellee Br. 57–58, courts have discretion to fashion appropriate procedures to avoid improper disclosure. Concerns about taxpayer confidentiality have not prevented the IRS from processing requests for protected tax information in the past, and they need not become a categorical bar to disclosure now. *See, e.g.*, *Life Extension Found.*, 915 F. Supp. 2d at 185; *Sea Shepherd*, 208 F. Supp. 3d at 87–88.

E. The IRS misinterprets *R.R. Workers*; Exemption 3 determinations are reviewable.

The IRS advances the breathtaking theory that any discretionary determination the agency makes under (k)(3) is categorically unreviewable. Appellee Br. 36–40. Even if this argument were not contrary to the FOIA and this Court's decision in *Church of Scientology I*, 792 F.2d 16 (D.C. Cir. 1986), it is irrelevant at this stage. The IRS has not made any discretionary decision for this Court to review.

The agency has continually refused to decide whether to exercise its qualified discretion to disclose or withhold records under (k)(3). "[T]he IRS neither 'exercise[d] its discretion and expertise' on, nor 'ma[de] a factual record' regarding, the merits of EPIC's FOIA claims." Appellee Br. 53–54. This refusal is the basis of EPIC's Complaint. JA 54–56. Yet the IRS urges this Court to essentially rewrite § 552 and conclude that the mere existence of a discretionary

(b)(3) statute precludes judicial review and excuses the agency from the duty to process a request. This is "[p]ure applesauce." *King v. Burwell*, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting).

The agency misreads *R.R. Workers*, 830 F.2d 331 (D.C. Cir. 1987)—a case about the interaction between the FOIA and the Railroad Unemployment Insurance Act—to conclude that discretionary (b)(3) determinations under 6103 are unreviewable. That is simply not the law. First, the Court already announced in *Church of Scientology I* that any claimed exemption under 6103 is subject to de novo review. 792 F.2d at 150. Second, the court in *R.R. Workers* explicitly limited its holding to the specific (b)(3) statute at issue. 830 F.2d at 336–37. Third, even in *R.R. Workers* the court did not find the agency's discretionary decision "unreviewable."

Indeed, the court in *Church of Scientology I* already rejected a less strident version of this argument that the IRS advanced thirty years ago (i.e., that 6103 determinations are subject to APA review rather than FOIA review). 792 F.2d at 148–49. The court found that 6103 and the FOIA are "entirely harmonious" and impose on the IRS "the burden of sustaining its claimed exemption in de novo judicial review." *Id.* at 150; *see also* H.R. Rep. No. 1497, at 9 (1966). The court also expressly rejected the logic of an earlier district court case, *Zale Corp. v. IRS*, 481 F. Supp. 486, 490 (D.D.C. 1979), which had subjected the IRS's discretionary

disclosure determinations only to APA review. *Church of Scientology I*, 792 F.2d at 149.

It is clear, too, that *Church of Scientology I* applies with full force to an IRS decision to release or withhold records under (k)(3). First, the court specifically highlighted (k)(3) in adopting FOIA's de novo standard. *See* 792 F.2d at 149 (referring to (k)(3) as an exception to the 6103 "prohibition of disclosure"). Second, the court also held that the lower court "should have required the IRS to sustain its burden of proving that the documents it sought to withhold [under 6103(c)] were exempt from disclosure . . . ." *Id.* at 153. Section 6103(c), which is closely analogous to (k)(3), also gives the IRS qualified discretion to withhold or release tax records. The court could not have reached its holding as to 6103(c) if it believed that discretionary 6103 decisions were unreviewable.

Many courts have exercised de novo review over discretionary § 6103 decisions. *See, e.g., Branch Ministries, Inc. v. Richardson*, 970 F. Supp. 11, 14 (D.D.C. 1997) (rejecting, in FOIA review, the IRS's decision not to disclose return information under its discretionary § 6103(c) authority); *Long v. IRS*, 742 F.2d 1173, 1181–82 (9th Cir. 1984) ("[W]e perceive no inconsistency between FOIA's de novo standard and the seemingly absolute language of section 6103(b)(2) which appears to delegate this determination to the Secretary or his delegate."); *Linsteadt v. IRS*, 729 F.2d 998, 1003 (5th Cir. 1984) (holding that the IRS "bear[s] the

burden" of justifying its decision not to release records under its discretionary § 6103(c) and (e)(7) authority); *Currie v. IRS*, 704 F.2d 523, 527 (11th Cir. 1983) (reviewing under the FOIA the IRS's decision not release records under its discretionary § 6103(e)(7) authority).

And even if the logic of *R.R. Workers* were applicable to 6103—which, again, it is not—review would still be available under the APA, a statute which was never invoked and not at issue in *R.R. Workers*. *See, e.g.*, *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 71 (D.C. Cir. 1983) (reviewing and upholding the FBI's discretionary decision not to disclose tax information in its files to the National Archives under 6103(n)); *see also Aronson v. IRS*, 973 F.2d 962, 967 (1st Cir. 1992) (holding, in contrast to this Circuit's de novo rule, that review of discretionary decisions under 6103 "must take place under [the] more deferential, administrative law standards" of the APA).

EPIC is aware of no case—and the IRS cites to none—in which a court has placed the discretionary disclosure provisions of 6103 beyond judicial review.

F. The IRS misconstrues the administrative exhaustion requirement.

The IRS spends a considerable stretch of its brief making the uncontroversial points that (1) it is generally desirable for FOIA requesters to exhaust their administrative remedies, and (2) failure to exhaust can be fatal to a FOIA lawsuit. Appellee Br. 51–53. Yet the IRS barely stops to explain why it thinks EPIC has

failed to exhaust its remedies here, and the agency certainly fails to explain why it should escape judicial review as a prudential matter.

The IRS begins with the unsubstantiated claim that EPIC is not "entitled to" the requested records, which have "no possibility of being released." *Id.* at 53. The agency does not discuss how either of these statements is rooted in law, but instead cites to five different Treasury Regulations in rapid succession. *Id.* What these provisions have to say about the instant case is left unstated and unclear, but several things are clear. First, the key provision listed by the IRS—Treas. Reg. § 601.702(c)(5)(iii)(C)—is an irrelevant regulation that solely "implements[] section 6103(c)," not (k)(3). Appellee Br. 25. Second, even if Treas. Reg. § 601.702(c)(5)(iii)(C) does apply to EPIC's request, EPIC clearly satisfied those requirements. The regulation only requires that a requester provide proof of taxpayer consent "as appropriate." *Id.* It is definitively not "appropriate" to demand proof of consent for a request under (k)(3). *See* IRC § 6103(k)(3); *Richardson Remarks* at 9. Third, if the IRS's regulation does require proof of taxpayer consent to process a (k)(3) request, the Court should set aside that regulation as an impermissible construction of the FOIA and (k)(3). *See Lehrfeld v. Richardson*, 132 F.3d 1463, 1467 (D.C. Cir. 1998). Finally, the IRS has no way of knowing whether the requested records have any "possibility of being released," because the

agency has refused to conduct the inquiry necessary to make that determination. Appellee Br. 25.

The IRS next argues that EPIC failed to exhaust administrative remedies because the agency unilaterally refused to "exercise[] its discretion and expertise." Appellee Br. 53–54. EPIC does not dispute that the agency neglected to issue a reasoned determination as to EPIC's FOIA request and the applicability of (k)(3). However, it is not apparent how this unlawful refusal to process EPIC's request warrants a prudential determination that EPIC failed to exhaust its remedies. The IRS attempts to distinguish *Wilbur v. CIA*, 355 F.3d 675 (D.C. Cir. 2004), on similar grounds, Appellee Br. 54–55, yet simply begs the same question. Why should the agency be rewarded for violating its FOIA obligations? Where—as here—"the IRS has adopted a legal position under which it can only deny such a reformulated request" and it would be "futile to require [EPIC] to file a new request," *Lehrfeld*, 132 F.3d at 1466–67, the Court should not hesitate to exercise judicial review.

The IRS then makes a final, meritless argument that it the agency is "entitled to a judgment as a matter of law" because the information EPIC seeks is "categorically exempt from disclosure." Appellee Br. 56–57. This is simply false: as stated, the agency cannot corroborate its claim that the requested records are exempt, because it has chosen not to make that the (k)(3) determination. *See*

Appellee Br. 25. The IRS's reliance on *Hull v. IRS*, 656 F.3d 1174 (10th Cir. 2011); *Lehrfeld*, 132 F.3d 1463; and *Church of Scientology I*, 792 F.2d 146, is thus misplaced.

In sum, EPIC has exhausted its administrative remedies. To the extent that has not, it would be futile to require EPIC to refile its FOIA request when the agency has refused to process it. The purposes of exhaustion would not be served by declining to exercise judicial review.

II. The IRS misrepresents the relief that EPIC seeks, and cannot escape its mandatory obligation to process EPIC's request.

Both sides are in agreement that judicial review in this case is only available under the APA if "there is no other adequate remedy in a court." 5 U.S.C. § 704; Appellant Br. 39; Appellee Br. 58. EPIC has asserted claims under the APA as an alternative remedy, available if the court determines that certain IRS actions are not subject to review under the FOIA, including (1) the administrative closure of EPIC's request without processing, contrary to the applicable Treasury Regulations, and (2) the refusal by the IRS to take reasonable steps necessary, including making a determination on the application of IRC § 6103(k)(3), to segregate nonexempt information in the records requested by EPIC. The IRS concedes in response that "an agency's closure of a request as imperfect is reviewable under FOIA." Appellee Br. 61. Therefore, the only remaining dispute is whether the IRS's refusal to take any steps to review or otherwise respond to

EPIC's request for disclosure of tax information pursuant to (k)(3) is subject to judicial review. The IRS argues that its final denial of EPIC's request is unreviewable. That simply cannot be right.

None of the cases that the IRS cites stand for the proposition that the agency can arbitrarily deny a request to take a discrete action that is both statutorily required and envisaged by the agency itself in its procedural manual. Unlike in *Southern Utah Wilderness Alliance*, this is not a case challenging an agency's chosen method of carrying out its statutory mission. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004) (noting that the law was "mandatory as to the object to be achieved, but it leaves BLM a great deal of discretion in deciding how to achieve it"). Nor is this a case seeking to remedy unreasonable delay in promulgating a rule, *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987); seeking to compel issuance of a valid rule, *In re Long-Distance Tel. Serv. Fed. Exise Tax Refund Litig.*, 751 F.3d 629 (D.C. Cir. 2014); or seeking review of subordinate official recommendations that do not constitute a rule, *Anglers Conservation Network v. Pritzker*, 809 F.3d 664 (D.C. Cir. 2016).

This is a case about the IRS's refusal to take steps that it argues are a necessary prerequisite to the processing of EPIC's FOIA request. The FOIA itself, in combination with IRC § 6103, provides the unequivocal duty to act. As with any other Exemption 3 statute, it is the obligation of "the agency, and then the court" to

review the statute's "application to the particular matter sought to be disclosed." *R.R. Workers*, 830 F.2d at 333. "The court's evaluation of an Exemption 3 dispute arises only after the agency charged with administering the statute has reached its own conclusions." *Id*. Yet the IRS has refused to reach any conclusion with respect to the Exemption 3 dispute in this case. That failure to act violates the agency's statutory duty, and the Court must have authority to issue mandates to ensure that the core goal of FOIA is not frustrated.

The FOIA provides that an agency "shall make [records] promptly available to any person" in response to a request. 5 U.S.C. § 552(a)(3)(A). The agency is also required to provide the requester with a "determination and the reasons therefor," which are subject to judicial review. *Id*. § 552(a)(6)(A). More pointedly, the FOIA requires that:

> An agency shall
>
> (i) withhold information under [the FOIA] only if
>
> (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or
>
> (II) disclosure is prohibited by law; and
>
> (ii)
>
> (I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and
>
> (II) take reasonable steps necessary to segregate and release nonexempt information.

Id. § 552(a)(8)(A). The FOIA indicates that courts may, in certain circumstances, evaluate "whether agency personnel acted arbitrarily or capriciously with respect to the withholding" of agency records. *Id*. § 552(a)(4)(F).

As the IRS itself explains in its response to EPIC's constitutional argument: the text and structure of (k)(3) reflect Congress's concern "about the breadth of the IRS's authority" and discretion regarding disclosures of taxpayer information. Appellee Br. 50. The proper way to implement Congress's dual intent in the FOIA and in (k)(3)—to make tax information available "to the extent necessary for tax administration purposes to correct a misstatement of fact" with respect to a "return or any transaction of the taxpayer"—while still limiting the breadth of IRS authority would be to subject the agency's determination to judicial review under either the FOIA or the APA.

III. The IRS has not distinguished the JCT approval clause from other similarly unconstitutional provisions, and the agency's waiver argument is frivolous.

All of the IRS's arguments in response to the separation of powers issue miss the mark, and the agency finds no support in either the text of the Constitution or subsequent judicial interpretations thereof. The agency's waiver argument is frivolous and ignores both the role that the lower court played in creating the unconstitutional interpretation of (k)(3) that EPIC is now challenging and the role that this Court must play in reviewing that interpretation. The agency's

constitutional argument fares no better. Indeed, the JCT approval clause in (k)(3) clearly fails the test laid out in the Ninth Circuit case on which the IRS attempts to rely. No court has held that Congress may delegate ultimate authority to its committee members, acting outside of the Article I process, to determine how and whether an executive branch official can release agency records. The agency's arguments are nothing more than a half-hearted attempt to distract from this basic constitutional principle.

First, the IRS attempts to sidestep the constitutional infirmity of the JCT approval clause by arguing that this Court should not consider the issue. Appellee Br. 45–46. But there is no question that this Court must conduct a de novo review of the lower court's decision, and it is the lower court's interpretation of (k)(3) that presents a constitutional conflict; this Court simply cannot affirm the lower court's interpretation of the statute without ensuring that the interpretation complies with the Constitution. EPIC was also not required to allege its constitutional argument in the Complaint, because it is a purely legal contention about the constitutionally permissible interpretation of IRC § 6103(k)(3)—not an independent basis for relief. *See* Fed. R. Civ. P. 8(a)(2). And even if the JCT approval clause could give rise to a separate cause of action, EPIC could not have properly asserted such a claim at the time, because the IRS did not actually invoke that clause in its response to EPIC's FOIA Request. JA 41–42.

It is also worth noting *why* EPIC placed its separation-of-powers argument in an extended footnote rather than in the main body of its Opposition below. At no point before the filing of EPIC's Opposition—indeed, at no time before this appeal—did the IRS assert that EPIC's FOIA Request was imperfect for lack of prior JCT disclosure approval. Instead, the IRS simply claimed that "IRC § 6103(k)(3) does not afford any rights to requesters under the FOIA to the disclosure of tax returns or return information of third parties." JA 41; *accord* Doc. 16 at 5. The IRS even insisted that obtaining JCT approval for the release of tax information was "*solely* in the Secretary's discretion"—i.e., not a path available to a FOIA requester. Doc. 14. Had EPIC devoted a section of its Opposition to challenging the constitutionality of the JCT approval clause, that section would have been unresponsive and disfavored. *See Mercadante v. Xe Servs.*, LLC, 864 F. Supp. 2d 54, 57 (D.D.C. 2012) ("[S]ubmissions that stray into collateral or irrelevant matters may be stricken and the offending party subjected to sanctions.").

Nevertheless, EPIC anticipated—correctly—that the lower court might interpret (k)(3) in a way that implicated the separation of powers. For this reason, EPIC included a lengthy footnote arguing that requiring JCT approval "violates the separation of powers and must be severed from paragraph (k)(3)." Doc. 15 at 11 n.2. In support, EPIC quoted from four Supreme Court and D.C. Circuit cases,

cited two others, and referred the District Court to the Title 26 severability clause. *Id.* EPIC's argument was more than twice as long as the final section of the IRS's Brief on appeal. *See* Appellee Br. 64–65. In sum, EPIC's separation-of-powers argument was adequately articulated below. *Cf. United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938). It was the lower court's responsibility, not EPIC's, to adopt an "alternative interpretation of the statute" that would not raise "serious constitutional problems." *INS v. St. Cyr.*, 533 U.S. 289, 299–300 (2001).

Second, the IRS attempts to wield the FOIA's Exemption 3 provision as a magic talisman that can fundamentally shift the balance of powers between the executive and legislative branches. Appellee Br. 46–48. This interpretation of Exemption 3 finds no support in the Constitution or in the FOIA. There is no question that Congress can, through duly enacted legislation, make agency records "specifically exempted from disclosure *by statute*." 5 U.S.C. § 552(b)(3) (emphasis added). But the FOIA does not provide that individual members of Congress, or even a Joint Committee of Congress, can exempt agency records from disclosure by fiat. Indeed, if the JCT approval clause does create such a unilateral exercise of "legislative authority," then clause would clearly violate Article I, § 7 of the

Constitution, as the IRS seems to acknowledge in a footnote. Appellee Br. 46 n.10.[2]

Finally, the IRS attempts to distinguish the Supreme Court's balance-of-powers cases by noting that Congress in (k)(3) "granted [the agency] limited discretion to make, or not make, such disclosures following [JCT] approval." Appellee Br. 48. While that is a fair summary of what Congress did, it in no way distinguishes the JCT approval clause from the statutes at issue in *Metro. Wash. Airports* or *Chadha* or *Bowsher*. The agency's reference to *Lear Siegler* is especially puzzling given that the JCT approval clause would not satisfy the separation-of-powers test adopted by the Ninth Circuit in that case. In fact, the Government tried, and failed, to convince the court in *Lear Siegler* that the separation-of-powers issue can be resolved purely based on whether the action taken is "legislative" or "executive." That is precisely the erroneous argument the IRS makes here. *See* Appellee Br. 47.

The court in *Lear Siegler* considered a challenge to the Navy's refusal to comply with a stay provision in the Competition in Contracting Act of 1984 ("CICA"). In its defense, the Government argued that the stay provision was

---

[2] We will set aside, for the moment, the irony of the IRS making substantive arguments in a footnote in its appellate brief one page after having cited *CTS Corp. v. EPA*, 759 F.3d 52 (D.C. Cir. 2010), for the proposition that "A footnote is no place to make a substantive legal argument *on appeal*." *Id*. at 64 (emphasis added).

unconstitutional and violated the separation of powers. *Lear Siegler, Inc., Energy Products Div. v. Lehman*, 842 F.2d 1102, 1104 (9th Cir. 1988), *modified as to attorney fees*, 893 F.2d 205 (9th Cir. 1989) (en banc). The challenged provision of CICA (1) established that the Comptroller General, a congressional official, could "investigate protests lodged by frustrated bidders claiming agency failure to adhere to competitive procedures," and (2) "impose[d] an automatic stay or suspension of any contract award or performance once a bid protest is timely lodged." *Id*. But the agency could "override the stay at any time" based on a "written finding" of urgency. *Id*. The Navy argued that the Comptroller General stay provision would "permit an officer controlled by Congress to execute the laws." *Id*. at 1107.

> The test, as articulated and applied by the court, was:
>
> > whether Congress or its agent seeks to control (not merely to "affect") the execution of its enactments without respect to the Article I legislative process. *See Bowsher*, 106 S. Ct. at 3192. If Congress "in effect has retained control," its action and the statutory provision on which it is based is unconstitutional. *Id.*

Lear Siegler, 842 F.2d at 1108. The court ultimately held that it was "clear that the stay provisions do not establish such control" because (1) they are "temporary," (2) the "recommendations of the Comptroller General are non-binding," and (3) they "force nothing more than a dialogue between the procuring agency and the legislature." *Id*. at 1110. The court also rejected "any simplistic attempt to define acts as 'legislative' or 'executive' and then confine those acts to the branches that

bear the name." And the court gave several examples of why such a simplistic approach (similar to what the IRS advances in its brief) misconstrues *Chadha* and *Bowsher*. *Id.* at 1108. The agency cannot rectify the constitutional infirmity of the JCT approval clause by categorizing withholding as a "legislative authority." Appellee Br. 47. That merely deflects the issue and raises new problems under Article I.

More fundamentally, the agency's argument—that members of a single congressional committee must retain control to rein in the IRS's discretion to disclose agency records—is irreconcilable with the agency's earlier argument that no court should have the ability to review the IRS's exercise of discretion. In the FOIA, judicial review serves the function of checking the agency's discretion to withhold agency records. That is exactly what EPIC has argued should happen here and why it is appropriate to sever the JCT approval clause pursuant to IRC § 7852(a).

The agency's only argument as to severance is that the entirety of (k)(3) should be severed because the statute would otherwise not "function in a manner consistent with the intent of Congress." Appellee Br. 49. But that argument relies on the agency's premise that its exercise of discretion (or refusal to exercise discretion) is not subject to review by the one branch of government authorized to conduct such review: the judiciary. Since Congress already provided "particular

criteria for withholding" in IRC § 6103, the logical application of the statute would be to subject the agency's exercise of discretion granted under (k)(3) to review in court. That would satisfy Congress's dual intent to permit certain tax information to be disclosed under the FOIA while limiting "the breadth of the IRS's authority to make discretionary disclosures." Appellee Br. 50. The agency's proposal, in contrast, would strike the entire (k)(3) subsection, which Congress went out of its way to add to 6103 in order to provide for disclosure of tax information in certain limited circumstances.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the lower court and remand for further proceedings.

Respectfully Submitted,

/s/ Marc Rotenberg

MARC ROTENBERG
ALAN BUTLER
JOHN DAVISSON
Electronic Privacy Information Center
1718 Connecticut Ave. NW, Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Plaintiff-Appellant

Dated: May 4, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(ii) and D.C. Cir. R. 32(e), because it contains 6,480 words, excluding parts of the brief exempted under Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

/s/ Marc Rotenberg
MARC ROTENBERG

CERTIFICATE OF SERVICE

I, Marc Rotenberg, hereby certify that on May 4, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

Richard Caldarone, Attorney
Direct: 202-514-2947
Email: richard.p.caldarone@usdoj.gov
[COR NTC Gvt US DOJ]
U.S. Department of Justice
(DOJ) Tax Division, Appellate Section
Firm: 202-514-3361
PO Box 502
Washington, DC 20044

Geoffrey Klimas, Attorney
Direct: 202-307-6346
Email: geoffrey.j.klimas@usdoj.gov
Fax: 202-514-8456
[COR NTC Gvt US DOJ]
U.S. Department of Justice
(DOJ) Tax Division, Appellate Section
Room 4644
950 Pennsylvania Avenue, NW
Ben Franklin Station
Washington, DC 20530

/s/ Marc Rotenberg
MARC ROTENBERG