

IN THE
Supreme Court of the United States

DONALD J. TRUMP,
President of the United States,
Petitioner,

v.

CYRUS R. VANCE, JR., in his official capacity as
District Attorney of the County of New York, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

**BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY
INFORMATION CENTER (EPIC) AND SEVENTEEN
SCHOLARS AND TECHNICAL EXPERTS
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C.¹ EPIC was established in 1994 to focus public attention on emerging civil liberties issues, to promote government transparency, and to protect privacy, the First Amendment, and other constitutional values.

As one of the nation’s leading advocates for both privacy protection and open government, EPIC has a particular interest in how the Court assesses the privacy claims of the President regarding the release of his tax returns. In EPIC’s view, following from the famous Brandeis/Warren article *The Right to Privacy*, the returns should be released because the President, by virtue of his office, has the most diminished privacy claim of any person. This was well understood in the 1890 article and events since have only underscored this key insight.

EPIC has also litigated two cases for the public disclosure of President Donald J. Trump’s tax returns and related records. In *EPIC v. IRS*, 910 F.3d 1232 (D.C. Cir. 2018), EPIC sought public disclosure of the President’s personal tax returns pursuant to the FOIA and the Internal Revenue Service (“IRS”) authority under 26 U.S.C. § 6103(k)(3) to “disclose return information . . . to correct a misstatement of fact published or disclosed with respect to [a] taxpayer’s return[.]” In *EPIC v. IRS II*, No. 18-902 (D.D.C. filed Apr. 17, 2018),

¹ Both parties consent to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

EPIC is seeking records of offers-in-compromise accepted by the IRS from President Trump and several hundred associated business entities, which “shall be disclosed to members of the general public” under 26 U.S.C. § 6103(k)(1) and the FOIA.

Moreover, EPIC has filed numerous briefs before this Court and other federal courts concerning government accountability and public access to information. *See, e.g.*, Brief of Amici Curiae EPIC et al., *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019) (No. 18-966) (arguing that the Census Bureau unlawfully failed to publish privacy impact assessments before introducing a citizenship question to the 2020 Census); Brief of Amici Curiae EPIC et al., *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019) (No. 18-841) (arguing that public access to business records under the Freedom of Information Act (“FOIA”) promotes accountability of enforcement agencies); Brief of Amici Curiae EPIC et al., *FCC v. AT&T*, 562 U. S. 397 (2011) (No. 09-1279) (arguing that the phrase “personal privacy” in the FOIA applies to individuals, not corporations); Brief of Amici Curiae EPIC et al., *ATF v. City of Chicago*, 537 U.S. 1229 (2003) (02-322) (arguing that FOIA procedures should be updated “in an age of electronic record keeping” to ensure both government oversight and personal privacy).

EPIC’s brief is joined by the following distinguished experts in law, technology, and public policy.

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SUMMARY OF THE ARGUMENT

For half a century, Presidents have routinely released their tax returns to the American public. These disclosures are an essential check on the modern Presidency. Presidents Richard Nixon, Jimmy Carter, Ronald Reagan, George H. W. Bush, Bill Clinton, George W. Bush, and Barack Obama—along with dozens of other presidential candidates—have disclosed their returns to the public. President Donald J. Trump has not. The secrecy of President Trump’s tax returns has raised questions about foreign influence, financial entanglements, and possible wrongdoing. Yet the public “remain[s] in the dark” about what the President’s returns would reveal. *EPIC v. IRS*, 261 F. Supp. 3d 1, 3 (D.D.C. 2017), *aff’d*, 910 F.3d 1232 (D.C. Cir. 2018).

Even as the President insists on the privacy of his financial information, this administration has sought to obtain the voting records and citizenship status of Americans. Both efforts were unprecedented. A presidential commission tried to obtain state voter records until bipartisan opposition from state secretaries and members of Congress led to the shuttering of the commission and the deletion of the personal information wrongly obtained. The Department of Commerce attempted to collect data about citizenship status through a controversial modification to the decennial census. The agency reversed course only after this Court ruled that the Government’s stated rationale for adding the citizenship question was “incongruent” with the record evidence. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

This is inverted liberty: privacy for the President and compelled disclosure of personal data for the public. That is antithetical to the structure and

practice of modern democracies which safeguard the privacy of citizens and impose transparency obligations on political leaders, most notably the President.

The Court in this case can take a half step toward undoing the information asymmetry that is now emerging. EPIC urges the Court to allow enforcement of the grand jury subpoena for the President's tax returns—information that was previously and routinely made available to the public.

ARGUMENT

The longstanding practice of disclosing presidential tax returns reflects a central principle of modern democracies: privacy must sometimes yield to accountability. As Samuel Warren and Louis Brandeis observed long ago, “[i]t is the *unwarranted* invasion of individual privacy which is reprehended, and to be, so far as possible, prevented. . . . There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the subject of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation.” Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 215 (1890) (emphasis added). Brandeis and Warren made clear that “[t]he right to privacy does not prohibit any publication of a matter which is of public or general interest.” *Id.* at 214. The authors further explained, “the design of the law must be to protect those persons with whose affairs the community has no legitimate concern from being dragged into an undesirable and undesired publicity.” *Id.* The authors provided the specific example of a “would-be congressman,” *id.* at 15, to make clear that the privacy

protections that would apply for a private person would not apply to a public figure.

By refusing to disclose his tax returns, President Trump has claimed a right of privacy that is at odds with the original conception and has broken from more than 40 years of precedent. The President's secrecy has prevented the public from fully assessing the nature of his financial entanglements and the lawfulness of his tax filings. At the same time, the administration has sought to undertake the unprecedented collection of voter records and citizenship data from the general public. This should concern the Court. "In countries lacking strong democratic institutions [there is] surveillance of the public, secrecy for the leaders." Marc Rotenberg, Opinion, *Trump's Double Standard When It Comes to Privacy*, Newsweek (Sept. 16, 2017) ("[P]rivacy and openness operate as twin pillars that sustain modern democratic governments.")² Through this inverted liberty, the President and the administration have "turn[ed] privacy into a weapon," using it as a tool "to reduce the transparency of [government] operations and the accountability of officials." Anita L. Allen, *Unpopular Privacy: The Case for Government Mandates*, 32 Okla. City U. L. Rev. 87, 93–94 (2007).

This Court should not allow the President's claim of privacy to block a lawful grand jury subpoena for the President's tax returns. The Court should affirm the ruling of the lower court and ensure that basic presidential accountability is maintained.

² <https://www.newsweek.com/trumps-double-standard-when-it-comes-privacy-666234>.

- I. **The secrecy of President Trump’s tax returns is unprecedented.**
 - A. **Presidents and presidential candidates have routinely disclosed their tax returns since 1973.**

The practice of presidential tax return disclosure stretches back to the Nixon administration. In 1969, Congress amended the Internal Revenue Code to “eliminate the excessive benefits stemming from the [charitable] contribution of appreciated property,” including—notably—the letters and memoranda of Presidents. Ira L. Tannenbaum, *Income Tax Treatment of Donation of Nixon Pre-Presidential Papers*, 134 Tax Notes 313, 314 (2012) (originally published July 1973); see also Tax Reform Act of 1969, Pub. L. No. 91-172 § 514, 83 Stat. 487, 643 (1969). “As a result, only if President Nixon made a gift of Presidential documents in 1969 . . . could he qualify for a charitable contribution deduction for any amount in excess of the cost of the paper on which the documents were written.” Tannenbaum, *supra*, at 314.

In June 1973, the Washington Post reported that President Nixon had claimed a deduction of over \$500,000 on his 1969 tax return after donating many of his papers to the National Archives just before the new law took effect.³ Nick Kotz, *Nixon Gift Raises Questions*, Wash. Post, June 10, 1973, at A1. Over the

³ A Congressional investigation later determined that President Nixon had not completed a “valid gift” of his papers before the 1969 deadline. Joint Comm. on Internal Revenue Taxation, Examination of President Nixon's Tax Returns For 1969 Through 1972, S. Rep. No. 73-768, at 41 (1974).

next several months, the controversy surrounding the President's charitable deductions "expanded to include numerous issues with the returns Nixon had filed between 1968 and 1972. . . . Nixon, it seemed, had played fast and loose with the revenue laws, exploiting his position to minimize taxes and avoid scrutiny from the IRS." Joseph J. Thorndike, *JCT Investigation of Nixon's Tax Returns*, 151 Tax Notes 1527, 1527 (June 13, 2016). In October 1973, an IRS employee "leaked key information about Nixon's returns," including the revelation that the Nixons had paid less than \$1,000 in federal income taxes in 1970 and 1971. *Id.* at 1530.

President Nixon initially resisted calls for greater transparency of his finances, famously answering that he was "not a crook." R. W. Apple Jr., *Nixon Declares He Didn't Profit From Public Life*, N.Y. Times (Nov. 18, 1973).⁴ But in December 1973, President Nixon gave into public pressure, publishing tax returns and related records from his first four years in office. John Herbers, *Nixon Reveals Financial File, Asks Congress Panel to Decide if He Owes \$267,000 More in Tax*, N.Y. Times, Dec. 9, 1973, at A1.⁵ In a statement released with his returns, Nixon explained that the "confidentiality of my private finances is far less important to me than the confidence of the American people in the integrity of the President." *The President's Finances*, 9 Weekly Comp. Pres. Doc. 1411 (Dec. 8, 1973). Among other revelations, Nixon's financial records showed that he had "more than tripl[ed]

⁴ <https://www.nytimes.com/1973/11/18/archives/nixon-declares-he-didnt-profit-from-public-life-predicts-both.html>.

⁵ <https://www.nytimes.com/1973/12/09/archives/voluminous-data-emergency-preparation-president-concedes-material.html>.

his net worth” while in office; that he “ha[d] not paid any state income tax” during his Presidency; and that he had “tak[en] advantage of a wide assortment of deductions and exemptions” to lower his tax burden to that of a typical worker earning just \$15,000 per year. Herbers, *supra*.

President Nixon’s “extensive disclosures, unprecedented for an American President,” were a watershed development in the history of the Presidency. *Id.* The public release of tax returns quickly became standard practice among Presidents and presidential candidates. In 1975, President Ford published a detailed compilation of income and tax information covering the preceding nine years. *Income and Tax Information for the President and Mrs. Ford*, Gerald R. Ford Library (Dec. 31, 1975).⁶ The data revealed that the Fords’ income had more than doubled in the time leading up to President Ford’s assumption of office. *Id.*

President Carter followed suit, releasing five years of complete tax returns running from 1975 to 1979. *Presidential Tax Returns*, Tax Notes (2020);⁷ Ryan Kelly, *Presidential Candidates’ Tax Returns*, Roll Call (Oct. 21, 2016).⁸ The Carters’ 1977 return showed that President Carter had received \$137,404 in royalties on his autobiography but that his “peanut warehouse business and his farming operations in Plains, Ga., experienced a difficult year[.]” Wendell

⁶ <https://www.fordlibrarymuseum.gov/library/document/factbook/taxes.htm>.

⁷ <https://www.taxnotes.com/presidential-tax-returns>.

⁸ <https://www.rollcall.com/2016/10/21/chart-presidential-candidates-tax-returns/>.

Rawls Jr., *Returns Show Carter Paid \$48,000 in Taxes in '77*, N.Y. Times, June 16, 1978, at A16.⁹

President Reagan released nine years of tax returns running from 1979 to 1987. *Presidential Tax Returns, supra*; Kelly, *supra*. The Reagans' 1987 return revealed that the first couple "paid nearly \$6,000 less in Federal income taxes for 1987 than for 1986 after the sweeping changes in the tax code" that President Reagan had signed into law. Julie Johnson, *Revisions in U.S. Tax Code Saved Reagans About \$6,000 in 1987*, N.Y. Times, Apr. 9, 1988, at A12.¹⁰

President George H. W. Bush released eighteen years of tax returns running from 1974 to 1991. *Presidential Tax Returns, supra*; Kelly, *supra*. The Bushes' 1987 return showed that, like the Reagans, they had personally "benefited from the sweeping changes in Federal income tax law" that took effect in 1987. *Bush Returns Show Benefit From '87 Tax Law Changes*, N.Y. Times, Apr. 22, 1988, at A17.¹¹

President Clinton released twenty-three years of tax returns running from years 1977 to 1999. *Presidential Tax Returns, supra*; Kelly, *supra*. During the 1992 campaign, the Clintons' returns confirmed that the couple had "improperly deducted at least \$5,000 on their personal tax returns in 1984 and 1985 for interest paid on" bank loan payments. Jeff Gerth, *Clintons*

⁹ <https://www.nytimes.com/1978/06/16/archives/returns-show-carter-paid-48000-in-taxes-in-77-new-worth-increased.html>.

¹⁰ <https://www.nytimes.com/1988/04/09/us/revisions-in-us-tax-code-saved-reagans-about-6000-in-1987.html>.

¹¹ <https://www.nytimes.com/1988/04/22/us/bush-returns-show-benefit-from-87-tax-law-changes.html>.

Joined S. & L. Operator in an Ozark Real-Estate Venture, N.Y. Times, Mar. 8, 1992, at A1.

President George W. Bush released seventeen years of tax returns running from 1991 to 2007. *Presidential Tax Returns*, *supra*; Kelly, *supra*. In 2002, President Bush faced controversy when the first couple released only “part of their income tax returns . . . , breaking with a 26-year tradition of sitting presidents fully informing the public about their income and taxes.” *The Bushes Report Income But Only Part of the Returns*, N.Y. Times (Apr. 12, 2003).¹² The Bushes’ 2003 return also showed that “President Bush and his wife saved about \$31,000 as a result of the tax cuts he championed[.]” David Cay Johnston, *Tax Cuts Helped President But Far Less So the Cheneys*, N.Y. Times (Apr. 14, 2004).¹³

President Obama released sixteen years of tax returns running from 2000 to 2015. *Presidential Tax Returns*, *supra*; Kelly, *supra*. In 2008, the Obamas’ returns showed that the couple had declined to place then-candidate Obama’s book royalties in a tax-deferred retirement account, prompting concern that Obama was anticipating significantly higher tax rates if elected. Chris Suellentrop, *Obama Takes No Shelter*, N.Y. Times (Mar. 27, 2008).¹⁴ And the Obamas’ 2011 return revealed that the first couple paid a lower effective tax rate than President Obama’s secretary, who earned far less than the President. Mark Landler,

¹² <https://www.nytimes.com/2003/04/12/us/the-bushes-report-income-but-only-part-of-the-returns.html>.

¹³ <https://www.nytimes.com/2004/04/14/us/tax-cuts-helped-president-but-far-less-so-the-cheneys.html>.

¹⁴ <https://opinionator.blogs.nytimes.com/2008/03/27/obama-takes-no-shelter/>.

Obama, Like Buffett, Had Lower Tax Rate Than His Secretary, N.Y. Times (Apr. 13, 2012).¹⁵

The practice of disclosing tax returns is also consistent among presidential candidates and Vice Presidents. Since 2004, at least twenty-eight presidential candidates have disclosed one or more tax returns, including every runner-up in the general election. *Presidential Tax Returns, supra*. Vice Presidents Al Gore, Dick Cheney, Joe Biden, and Mike Pence have all released multiple returns as well. *Id.*

In refusing to disclose his tax returns, President Trump thus stands alone in the modern era. For the first time in over 40 years, the American public has been denied a critical perspective on the President's financial affairs, legal compliance, and personal character.

B. The disclosure of tax returns allows the public to evaluate the President and presidential candidates.

As history demonstrates, the disclosure of presidential tax returns is a vital check on the presidency and a key feature of the U.S. political system.

First, tax return disclosure allows the public to determine whether an individual has financial entanglements or incentives that may influence their decision-making as President. *See Trump v. Mazars USA, LLP*, 940 F.3d 710, 741 (D.C. Cir.) (noting that “[r]equiring presidential candidates and Presidents to disclose earlier years’ information” could “reveal forgiven debts, financial partnerships, or favorable

¹⁵ <https://www.nytimes.com/2012/04/14/us/politics/obamas-release-tax-returns.html>.

deals”), *cert. granted*, 140 S. Ct. 660 (2019). For example, President Nixon’s disclosure of financial records revealed that “a wealthy friend established a trust fund of more than \$25,000 for Mr. Nixon’s older daughter” while Nixon had served as Vice President. David E. Rosenbaum, *Nixon Friend Gave Tricia \$25,000 Trust Fund in ’58*, N.Y. Times, Dec. 9, 1973, at A1.¹⁶ And numerous Presidents have signed into law statutes that directly affect their own tax burden. *See, e.g.*, Johnston, *supra*. But releasing tax returns is also prophylactic in this regard: individuals are less likely to seek the Presidency in the first place if public scrutiny of their returns will reveal problematic financial associations or positions. *See* Joseph J. Thorndike, *Private Returns, Public Rewards: The Politics of Tax Records*, Tax Analysts (Apr. 2, 2008) (“In our modern, tightly scripted, hyperscrutinized political environment, we can be fairly sure that no candidate will release a return with major problems.”).¹⁷

Second, tax return disclosure can reveal whether a President or presidential candidate has fully complied with the tax code. The release of President Nixon’s and President Clinton’s returns, for example, alerted the public to questionable assertions by both men about their past tax liability. *See* Herbers, *supra*; Gerth, *supra*. Here again, disclosure also serves a preventative function. Because “candidate returns are unlikely to reveal any sort of malfeasance,” Thorndike, *Private Returns, Public Rewards, supra*, the

¹⁶ <https://www.nytimes.com/1973/12/09/archives/nixon-friend-gave-tricia-25000-trustfund-in-58-tricia-had-25000.html>.

¹⁷ <http://www.taxhistory.org/thp/readings.nsf/Art-Web/AD4D852FAB4226708525742500831B42>.

practice of releasing tax returns means that an individual who has made major misrepresentations to the IRS is less likely to seek the Presidency in the first place. For similar reasons—“sound tax administration” and “everything that has happened in the past”—the IRS has “automatically audit[ed] the President’s and Vice President’s tax returns each year” since 1977. Bill Curry, *Yearly Audits Set for Carter, Mondale*, Wash. Post, June 21, 1977; *see also* IRM 4.2.1.15(1) (Apr. 23, 2014) (“The individual income tax returns for the President and Vice President are subject to mandatory examinations[.]”).

Third, tax return disclosure by a President or presidential candidate “provide[s] a valuable window on his or her integrity” and can reveal “points of inconsistency between a candidate’s public rhetoric and his or her private finances.” Thorndike, *Private Returns, Public Rewards*, *supra*. The release of President Nixon’s returns raised numerous “questions and controversies” about his past use of the tax code and his public assertions that he had acted appropriately. Herbers, *supra*. The release of President George H. W. Bush’s 1991 tax return, by contrast, revealed that the Bushes had donated over 60 percent of their income to charitable causes and other nonprofits. *U.S. Individual Income Tax Return of George H. W. Bush & Barbara P. Bush*, 1, 24–27 (Mar. 24, 1992).¹⁸

Finally, tax return disclosure by Presidents and presidential candidates promotes compliance with the tax code by the general public. “Presidential tax transparency bolsters the confidence of individual income taxpayers that their elected leader also pays part of

¹⁸ https://s3.amazonaws.com/pdfs.taxnotes.com/2019/GH_Bush_1991.pdf.

the price ‘for civilized society.’” Daniel J. Hemel, *Can New York Publish President Trump’s State Tax Returns?*, 127 Yale L.J. Forum 62, 62–63 (2017) (quoting *Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting)). “Disclosure dispels the pernicious notion that ‘only the little people pay taxes,’ a notion that undermines tax morale and tax compliance where it takes root.” *Id.* at 63 (quoting Enid Nemy, *Leona Helmsley, Hotel Queen, Dies at 87*, N.Y. Times (Aug. 20, 2007)¹⁹).

C. The secrecy of the President’s tax returns raises questions about improper conduct.

Just as tax return disclosure holds Presidents and presidential candidates accountable to the public, President Trump’s refusal to disclose his tax returns raises questions about financial entanglements and possible wrongdoing. Without access to the President’s returns, the public is unable to fully evaluate the President’s financial obligations and associations; the risk of improper influence from parties who have a business relationship with the President, including foreign entities; the President’s past and present compliance with the tax code; and the defensibility of the President’s self-reported tax burden. As a result, the public “remain[s] in the dark” about key aspects of President Trump’s fitness for office. *EPIC v. IRS*, 261 F. Supp. 3d at 3, even as credible questions have been raised about the handling of his returns. See Jeff Stein & Erica Werner, *Senate Investigators Interview IRS*

¹⁹ <http://www.nytimes.com/2007/08/20/nyregion/20cnd-helmsley.html>.

Whistleblower About Alleged Interference with Trump or Pence Audit, Wash. Post (Jan. 31, 2020) (“Senate investigators have conducted an extensive interview of a whistleblower at the Internal Revenue Service who has alleged improper political interference in the audit of the president or vice president[.]”).²⁰

The tax returns of President Franklin D. Roosevelt offer a cautionary tale about the perils of nondisclosure. Although President Roosevelt’s returns were not made public during his lifetime, they were later disclosed by the National Archives. Thorndike, *Private Returns, Public Rewards*, *supra*. The returns showed that President Roosevelt—“a vicious and moralistic scourge of tax avoiders everywhere—had a penchant for minimizing his own taxes.” *Id.* As President, Roosevelt decried the use of “clever little schemes” and “evil practices” to limit tax liability. *Tax Evasion and Avoidance, Hearing Before the Joint Comm. on Tax Evasion & Avoidance*, 75th Cong. 6–7 (1937) (statement of President Franklin D. Roosevelt). “The example of successful tax dodging by a minority of very rich individuals breeds efforts by other people to dodge other laws as well as tax laws,” Roosevelt warned. *Id.* at 6.

Yet “Roosevelt’s tax returns reveal him to be something of a hypocrite. At various points, both before and after his election to the White House, he indulged in the sort of tax avoidance that he claimed to find so objectionable.” Thorndike, *Private Returns, Public Rewards*, *supra*. For example, “FDR repeatedly claimed [in his tax filings] that he was exempt from the high tax rates on personal income that Congress

²⁰ <https://www.washingtonpost.com/business/2020/01/31/irs-whistleblower-trump-pence-audit/>.

had enacted” in the mid-1930s, asserting that “Article II, section 1 of the Constitution forbids any reduction in the president's compensation during his term in office[.]” *Id.*; *see also* Claim of Franklin D. Roosevelt to the Dep’t of Treasury (1935) (“Tax on such compensation should be computed under the Revenue Act of 1932, which was in effect at the beginning of the term for which elected.”).

If President Roosevelt had disclosed his tax returns while in office, the public reaction may well have changed the course of his Presidency. But like President Trump today, President Roosevelt denied the public access to the vital information contained in his returns.

D. Congress and state legislatures have introduced or enacted legislation requiring the disclosure of presidential tax returns.

President Trump’s resistance to releasing his tax returns has given rise to legislative measures that would require such disclosure by Presidents and presidential candidates. For example, the Restoring the Public Trust Act, H.R. 706, 116th Cong. (2019) would require Presidents and Vice Presidents to “submit to the Federal Election Commission a copy of the individual’s income tax returns for the taxable year and for the 9 preceding taxable years.” *Id.* § 222(b)(1)(B); *see also id.* § 222(b)(1)(A) (requiring presidential and vice-presidential candidates to submit 10 years of individual tax returns). The same legislation would also require the “chairman of the Federal Election Commission [to] make publicly available each income tax return submitted” by a President, Vice President, or covered candidate. *Id.* § 222(b)(3).

A similar bill, the Presidential Tax Disclosure Act of 2019, H.R. 950, 116th Cong. (2019), would require “[a]ny individual holding the office of President [to] submit to the Director of the Office of Government Ethics a copy of each Federal income tax return filed by such individual with the Internal Revenue Service for any taxable year ending during the period such individual holds such office.” *Id.* § 2(a). Each return submitted would also include “all schedules, supplements, amendments, and attachments with respect to such return.” *Id.* § 2(d)(1). The Director would then “make such return publicly available on the internet” within seven days. *Id.* § 2(c).

Separately, the House Committee on Ways and Means has subpoenaed the President’s returns directly from the IRS for years 2013 to 2018, exercising the Committee’s power under 26 U.S.C. § 6103(f)(1) (“Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives . . . the Secretary shall furnish such committee with any return or return information specified in such request[.]”). See Letter from Richard E. Neal, Chairman, House Comm. on Ways & Means, to Charles P. Rettig, Comm’r, Internal Revenue Serv., & Steven T. Mnuchin, Sec’y, Dep’t of Treasury (May 10, 2019).²¹ The IRS has declined to turn over the President’s returns to the Committee, and the matter is now pending before the U.S. District Court for the District of Columbia. *Comm. on Ways & Means, U.S. House of Representatives v. Dep’t of Treasury*, No. 19-1974 (D.D.C. filed July 2, 2019).

²¹ <https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/WM%20Letter%20Rettig%205.10.19.pdf>.

States have also taken legislative steps to ensure the disclosure of presidential tax returns. For example, in May 2019, New York enacted the Tax Returns Released Under Specific Terms Act, 2019 N.Y. Laws Ch. 91 § 2, which requires the state’s Commissioner of Taxation and Finance to turn over “any . . . [state] returns” to particular Congressional committees upon written request. And lawmakers in Arizona, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New Mexico, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington, and Wisconsin have all introduced legislation that would require presidential and vice-presidential candidates to disclose their tax returns as a condition of appearing on the ballot. *State Elections Legislation Database*, Nat’l Conference of State Legislatures (Jan. 24, 2020).²²

II. The administration has simultaneously sought to compel the disclosure of sensitive personal data from the general public.

Even as President Trump has withheld his tax returns from scrutiny, this administration has made unprecedented attempts to collect personal data from the public. Although these efforts ultimately failed, they reflect an effort to establish a form of inverted liberty: privacy for the President and transparency for the public that is at odds with the structure and practice of the modern democratic state. Allowing the

²² <https://www.ncsl.org/research/elections-and-campaigns/elections-legislation-database.aspx>.

grand jury in this case to access the President’s tax returns—even on a confidential basis—would represent a half step toward restoring the information symmetry between the governors and the governed.

A. The administration sought to obtain state voter records but backed down after bipartisan opposition.

In May 2017, President Trump established the Presidential Advisory Commission on Election Integrity to “study the registration and voting processes used in Federal elections.” Exec. Order 13,799 (May 11, 2017). Among its first acts, the Commission sent letters to the secretaries of state in all fifty states and the District of Columbia seeking the release of state voter records routinely protected by state privacy law. *See, e.g.*, Letter from Kris Kobach, Vice Chairman, Presidential Advisory Comm’n on Election Integrity, to Elaine Marshall, Sec’y of State, North Carolina (June 28, 2017).²³ The Commission urged state secretaries to provide a vast array of personal data, including:

[T]he full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state,

²³ <https://epic.org/privacy/litigation/voter/epic-v-commission/EPIC-v-Commission-complaint-exhibit-3.pdf>.

information regarding military status, and overseas citizen information.

Id. at 1–2.

The privacy risks of the White House plan were incalculable. In a democratic government, voter data is the most sensitive personal information, routinely protected by state law against misuse and improper disclosure. Danielle Root et al., *Election Security in All 50 States*, Ctr. for Am. Progress (Feb. 12, 2018).²⁴ And the secrecy of the ballot remains at the core of the modern democratic state. As the Court explained in *Burson v. Freeman*, 504 U.S. 191, 206 (1992):

an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.

Not surprisingly, the outcry over the Commission's unprecedented demand for voter information was swift, broad-based, and bipartisan. More than forty states opposed the Commission's data collection. *Forty-Four*

²⁴ <https://www.americanprogress.org/issues/democracy/reports/2018/02/12/446336/election-security-50-states/>.

States and DC Have Refused to Give Certain Voter Information to Trump Commission, CNN (July 5, 2017);²⁵ see EPIC, *Protect Voter Data* (2017).²⁶ Arizona Secretary of State Michele Reagan announced that she could not “in good conscience release Arizonans’ sensitive voter data for this hastily organized experiment.” Letter from Michele Reagan, Arizona Sec’y of State, to Kris Kobach (July 3, 2017).²⁷ Mississippi Secretary of State Delbert Hosemann responded that the Commission could “go jump in the Gulf of Mexico” and defended the state’s “right to protect the privacy of our citizens by conducting our own electoral processes.” Press Release, Delbert Hosemann, Miss. Sec’y of State (June 30, 2017).²⁸ And 100 members of Congress announced their opposition to the Commission’s demand for state voter records that had never been previously sought by the federal government.²⁹

²⁵ <https://www.cnn.com/2017/07/03/politics/kris-kobach-letter-voter-fraud-commission-information/index.html>.

²⁶ <https://epic.org/voter-data/>.

²⁷ Available at <https://www.santacruzcountyaz.gov/DocumentCenter/View/8359/2017-0703-AZSOS-Response-to-Kobach-Letter>.

²⁸ <https://www.sos.ms.gov/About/Pages/Press-Release.aspx?pr=800>.

²⁹ See Press Release, Senator Amy Klobuchar, *Klobuchar, Reed, Senators Demand That Presidential Advisory Commission Rescind Request for State Election Officials’ Voter Roll Data* (July 6, 2017), <https://www.klobuchar.senate.gov/public/index.cfm/2017/7/klobuchar-reed-senators-demand-that-presidential-advisory-commission-rescind-request-for-state-election-officials-voter-roll-data>; Letter from Representative Anna G. Eshoo, et al. to Kris Kobach (July 18, 2017), <http://eshoo.house.gov/wp->

The President’s proposed collection of sensitive voter data also posed unprecedented national security risks. Michael Chertoff, Opinion, *Trump’s Voter Data Request Poses an Unnoticed Danger*, Wash. Post (July 5, 2017).³⁰ The risks are especially severe because “voting information has been the target of hackers” and, as “data-security experts will tell you, widespread distribution of individual data elements in multiple separate repositories is one way to reduce the vulnerability of the overall database.” *Id.*

The Commission—facing widespread opposition and a raft of litigation concerning the attempt to gather state voter records—was abruptly terminated. Exec. Order 13,820 (Jan. 3, 2018). The Director of White House Information Technology later confirmed that all of the state voter data wrongfully collected by the Commission had been permanently deleted. Notice of Deletion, *EPIC v. Presidential Advisory Comm’n on Election Integrity*, No. 17-1320 (D.D.C. filed Aug. 20, 2018).

B. The administration sought to collect citizenship status information until blocked by this Court.

In March, 2018, Secretary of Commerce Wilbur Ross announced that he “ha[d] determined that reinstatement of a citizenship question on the 2020 decennial census [wa]s necessary” and that he was

content/uploads/2017/07/7.18.17-Letter-to-Election-Integrity-Commission-re-voter-data-request.pdf.

³⁰ https://www.washingtonpost.com/opinions/trumps-voter-data-request-poses-an-unnoticed-danger--to-national-security/2017/07/05/470efce0-60c9-11e7-8adc-fea80e32bf47_story.html.

“directing the Census Bureau to place the citizenship question last on the decennial census form.” Letter from Wilbur Ross, Sec’y of Commerce, to Karen Dunn Kelley, Under Sec’y for Econ. Affairs, at 8 (Mar. 26, 2018).³¹ No such question appeared on the 2010 Census, U.S. Dep’t of Commerce, *United States Census 2010* (2009),³² nor had the Bureau posed a citizenship question to all census respondents since the 1950 Census. Letter from Wilbur Ross to Karen Dunn Kelley, *supra*, at 1. Secretary Ross stated that the citizenship question was added in response to a December 2017 request by the Department of Justice, which allegedly sought citizenship data to enable “more effective enforcement” of the Voting Rights Act. *Id.*

The DOJ’s request for citizenship data, and Secretary Ross’s addition of the citizenship question to the census, raised alarm and opposition from members of Congress, the attorneys general of at least twenty states, and mayors across the country. Letter from Sen. Dianne Feinstein et al. to Wilbur Ross, Sec’y of Commerce (Jan. 5, 2018);³³ Letter from Attorneys Gen. of Twenty U.S. States to Wilbur Ross, Sec’y of Commerce (Feb. 12, 2018);³⁴ U.S. Conference of Mayors,

³¹ <https://epic.org/privacy/litigation/pia/epic-v-commerce/EPIC-v-Commerce-PI-Motion-Exhibit-1.pdf>.

³² <https://epic.org/privacy/litigation/pia/epic-v-commerce/EPIC-v-Commerce-PI-Motion-Exhibit-16.pdf>.

³³ https://www.feinstein.senate.gov/public/_cache/files/3/7/376f8dcd-7f35-4913-9e80-cd1e48e3b312/7E4C59B2988E2CC14866543EDD7E01A6.2018.01.05-census-citizenship-letter.pdf.

³⁴ <https://www.brennancenter.org/sites/default/files/legal-work/Multi-State-Attorney-GeneralLetter-re-2020-Census.pdf>.

Nation's Mayors to Secretary Ross: Don't Politicize Census. Remove the Citizenship Question (Mar. 27, 2018).³⁵ The decision was also challenged in a series of federal lawsuits brought by state attorneys general, nonprofit organizations, and U.S. residents. *See* EPIC, *EPIC v. Commerce (Census Privacy)* (2019).³⁶

The collection of sensitive information by the Census poses significant privacy risks where the Government seeks to use that information for non-census purposes. For example, a Freedom of Information Act lawsuit, after 9/11, revealed that the Census Bureau had provided the Department of Homeland Security with a list of cities containing more than 1,000 Arab-American residents as well as a zip-code level breakdown of Arab-American populations throughout the United States, sorted by country of origin. Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, N.Y. Times (July 30, 2004);³⁷ *see also* EPIC, *Department of Homeland Security Obtained Data on Arab Americans from Census Bureau* (2020).³⁸ The Census Bureau and Customs and Border Protection subsequently revised their data request policies. Lynette Clemetson, *Census Policy on Providing Sensitive Data Is Revised*, N.Y. Times (Aug. 31, 2004).³⁹ Still, many Americans are justifiably fearful that their

³⁵ <https://www.usmayors.org/2018/03/27/nations-mayors-to-secretary-ross-dont-politicize-census-remove-the-citizenship-question/>.

³⁶ <https://epic.org/privacy/litigation/pia/epic-v-commerce/>.

³⁷ <http://www.nytimes.com/2004/07/30/us/homeland-security-given-data-on-arab-americans.html>.

³⁸ <https://epic.org/privacy/census/foia>.

³⁹ <http://www.nytimes.com/2004/08/31/us/census-policy-on-providing-sensitive-data-is-revised.html>.

census responses will be used against them by other federal agencies, which can lead individuals to provide false or incomplete information. Mikelyn Meyers, U.S. Census Bureau, *Presentation on Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for the 2020 Census* (2017).⁴⁰

There were similar concerns about the use of census data for non-census purposes in the first half of the 20th Century. The 1910 census law prohibited the use of information supplied by businesses for non-statistical, non-census purposes, but there was no such prohibition regarding individual citizen data. Act of July 2, 1909 (to provide for the expenses of the Thirteenth December Census, and for other purposes), ch. 2, § 25, 36 Stat. 1, 9. As a result, during World War I, the Census Bureau did in fact disclose census records to the Department of Justice and local draft boards to help enforce the draft. Margo Anderson & William Seltzer, *Challenges to the Confidentiality of U.S. Federal Statistics, 1910-1965*, 23 J Official Stat. 1, 6–7 (2007). Similarly, in 1920, the Department of Justice requested census data about individuals' citizenship for use in deportation cases. *Id.* at 8–9. In 1930, Congress passed a census law that would become known as Title 13, which prohibited the Census Bureau from publishing any data identifying individuals. Act of June 18, 1929 (to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress), ch. 28, § 11, 46 Stat. 21, 25. However, the Second War Powers Act weakened this restriction and permitted the Census Bureau in 1943 to provide the U.S. Secret Service with

⁴⁰ <https://www2.census.gov/cac/nac/meetings/2017-11/Meyers-NAC-Confidentiality-Presentation.pdf>.

the names, addresses, occupations, and citizenship status of every Japanese American residing in the Washington, D.C. area. Margo Anderson & William Seltzer, *Census Confidentiality Under the Second War Powers Act (1942-1947)* 16 (2007) (unpublished manuscript).⁴¹ The Census Bureau also provided the War Department with census-block level data on Japanese-Americans residing in western states to facilitate their internment. Comm'n on Wartime Relocation & Internment of Civilians, *Personal Justice Denied* 104-05 (1982).

Given these historical misuses of census data, it was not difficult to see the risk posed by adding the citizenship question to the 2020 census. Communications between the Department of Commerce, the Department of Justice, and the White House indicated that the Government planned to use personal data obtained from the citizenship question for law enforcement purposes, unrelated to the preparation of the decennial census. *Dep't of Commerce*, 139 S. Ct. at 2574.

Indeed, when one of those lawsuits challenging the addition of the citizenship question reached this Court, the Court ruled that the Government's stated reasons for adding the citizenship question were "incongruent" with the evidence in the record. *Dep't of Commerce*, 139 S. Ct. at 2575. "Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision," the Court wrote. *Id.* at 2575. Accordingly, the Court affirmed in part a lower court decision enjoining the addition of the

⁴¹ Available at <http://studylib.net/doc/7742798/census-confidentiality-under-the-second-war-powers>.

citizenship question and remanded the case for further proceedings. *Id.* at 2576.

Although the administration ultimately failed to collect voter records and citizenship status information, both efforts marked a shift toward inverted liberty: a state in which ordinary people are forced to disclose personal data to the government, while the President shields much of his financial affairs from public view. The Court should not permit this trend to continue.

CONCLUSION

For the above reasons, EPIC respectfully ask this Court to affirm the decision of the U.S. Court of Appeals for the Second Circuit.

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