UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. UNITED STATES CAPITOL POLICE, et al., Defendants.	Case No. 1:21-cv-00401-ACR

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendants, the United States Capitol Police; J. Thomas Manger, sued solely in his official capacity as Chief of the Capitol Police; Thomas A. DiBiase, sued solely in his official capacity as General Counsel for the Capitol Police; and James W. Joyce, sued solely in his official capacity as Senior Counsel for the Capitol Police, hereby move the Court to dismiss Plaintiff's Amended Complaint in its entirety pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Attached in support of this motion are a memorandum of points and authorities, the Declaration of Thomas A. DiBiase, and a proposed order.

Dated: September 29, 2023

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

MARCIA BERMAN
Assistant Director
Federal Programs Branch

/s/ M. Andrew Zee
M. ANDREW ZEE (CA Bar No. 272510)
Attorney
United States Department of Justice
Civil Division, Federal Programs Branch

450 Golden Gate Ave.
San Francisco, CA 94102
Tel: (415) 436-6646
E-mail: m.andrew.zee@usdoj.gov

Counsel for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. UNITED STATES CAPITOL POLICE, et al., Defendants.	Case No. 1:21-cv-00401-ACR

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTRODUCTION

The Court should dismiss Plaintiff's common-law right of access claim, which seeks from the U.S. Capitol Police over 14,000 hours of sensitive security video footage from the insurrection attempt at the Capitol on January 6, 2021. For multiple independent reasons, the Court lacks subject matter jurisdiction, and Plaintiff's action cannot proceed.

First, there has been no waiver of the sovereign immunity of the United States, nor is there any exception to sovereign immunity that applies here. The so-called *Larson-Dugan* exception encompasses only claims alleging action by federal officials in excess of statutory or constitutional authority, and does not stretch to cover the common-law claim Plaintiff raises here. Any language to the contrary from the D.C. Circuit has not been uniform, and, in any event, does not bind this Court where the D.C. Circuit did not address the very question of how broadly the *Larson-Dugan* exception should be construed.

Second, although the D.C. Circuit has, in *dicta*, stated that the common-law right of access to public records enables a litigant to seek records from the Legislative Branch, neither it nor this Court, so far as Defendants are aware, has relied upon that asserted right to compel an individual or entity in Article I to produce such records. Doing so here would raise grave separation-of-powers concerns, particularly when the right in question has principally been understood as a means of access to *judicial* records. The Court should not entertain Plaintiff's invitation for it to determine, under the guise of the common law, what records an entity in the Legislative Branch should and should not be able to withhold from public view.

Third, even assuming Plaintiff possess its asserted common-law right, a claim under the common law can proceed only where the legislature has not otherwise spoken to the issue. Here, Congress has preempted any right Plaintiff may have possessed since Plaintiff seeks "security information" in the possession of the USCP. Title 2, Section 1979 of the U.S. Code prohibits the

USCP from releasing any security information, such as the requested footage, to Plaintiff without the approval of the Capitol Police Board, and there is no dispute that approval has not occurred. As the declaration testimony of its general counsel shows, the USCP treats the aggregate of Plaintiffs' requested footage as "security information," and the more than 14,000 hours of footage showing the extensiveness of the USCP's surveillance system, and its officer movements and activities on January 6, 2021 fall squarely within the statutory definition of "security information."

Fourth and finally, Plaintiff cannot show that the aggregated volume of security footage it seeks is a "public record" that is subject to disclosure in the first instance. The USCP did not "create" and "keep" that footage for the purpose of memorializing or recording some official Capitol Police action, as the governing test requires. And even if that test had been met, the USCP has compelling reasons to demand the continued confidentiality of the entirety of its footage. Releasing this material in its entirety could enable future potential assailants of the Capitol by providing them with detailed data on the extent of the USCP's surveillance system, its techniques and methods, and the physical structure of the Capitol Grounds.

For any or all of these reasons, Plaintiff's action should be dismissed with prejudice.

BACKGROUND

I. The U.S. Capitol Police.

The U.S. Capitol Police is a law enforcement agency within the Legislative Branch. It is charged with safeguarding the Congress and its Members, employees, and visitors, and congressional buildings and grounds from crime, disruption, and terrorism. The mission of the USCP is to protect and secure Congress so it can fulfill its constitutional and legislative responsibilities in a safe, secure, and open environment. *See* Declaration of Thomas A. DiBiase (DiBiase Decl.) ¶ 5.

Pursuant to statute, the USCP is headed by the Chief of the Capitol Police, and carries out

its mission under the direction of the Capitol Police Board. 2 U.S.C. §§ 1901, 1961(a), 1969(a). The Board consists of the Sergeant at Arms of the U.S. Senate, the Sergeant at Arms of the House of Representatives, and the Architect of the Capitol. *Id.* § 1961; *see District of Columbia v. United States*, 67 Fed. Cl. 292, 326 (2005) ("The Capitol Police is an entity created by Congress and overseen by the Capitol Police Board, which consists of the Sergeant of Arms of the United States Senate, the Sergeant of Arms of the House of Representatives, and the Architect of the Capitol."). Additional oversight of the USCP is conducted by committees in both the House of Representatives and the Senate.

As the "backbone" of the USCP's security and policy operations, it maintains an "extensive system of cameras located throughout the [Capitol] Grounds." DiBiase Decl. ¶ 5. This closed circuit video system covers both the inside and outside of buildings on the Grounds, and is monitored by the USCP on a 24-7 basis to "provide real time information regarding any incident occurring on the Grounds." *Id.* The USCP's security camera system was in full effect on January 6, 2021, and for the period between 12:00 p.m. and 9:00 p.m.—corresponding to Plaintiff's request—it recorded more than 14,000 hours of total footage. *Id.* ¶ 6.

II. Plaintiff's request to the USCP and this litigation.

On January 21, 2021, Plaintiff Judicial Watch, under an asserted common law right of access to public records, submitted a request to the USCP for three categories of information:

> 1. Email communications between the U.S. Capitol Police Executive Team and the Capitol Police Board concerning the security of the Capitol on January 6, 2021. The timeframe of this request is from January 1, 2021 through January 10, 2021.
>
> 2. Email communications of the Capitol Police Board with the Federal Bureau of Investigation, the U.S. Department of Justice, and the U.S. Department of Homeland Security concerning the security of the Capitol on January 6, 2021. The timeframe of this request is from January 1, 2021 through January 10, 2021.

> 3. All video footage from within the Capitol between 12pm and 9pm on January 6, 2021.

See Letter from Judicial Watch to USCP, ECF No. 12-4, attached as Exhibit A to Declaration of James W. Joyce (Joyce Decl.) ¶ 3, ECF No. 12-3. By email dated February 11, 2021, the USCP declined to provide the requested information, stating that "[t]he email communications and video footage information requested . . . are not public records." ECF No. 12-5, Ex. B to Joyce Decl.

Shortly after, on February 16, 2021, Plaintiff filed the instant action, asserting a common law right of access to the requested materials. *See* Compl., ECF No. 1. Plaintiff amended its Complaint on August 31, 2022, and dropped its request for the second category of documents listed above. Am. Compl., ECF No. 30. Following briefing and an August 15, 2023 hearing on the parties' cross-motions for summary judgment, ECF Nos. 12, 23, the Court denied both parties' motions without prejudice. *See* Minute Order dated August 15, 2023. The Court directed Defendants to provide Plaintiff with additional information on certain categories of the requested emails, and set a briefing schedule for a renewed motion to dismiss or, in the alternative, for summary judgment. *Id.*

On September 14, 2023, Defendants provided Plaintiff with the Second Declaration of James W. Joyce, which provided additional detail on specified categories of USCP emails. *See* ECF No. 41. Soon after, Plaintiff confirmed that it no longer seeks the records described in category one of its original request. The lone remaining category at issue is thus the USCP's security footage from 12:00pm to 9:00pm on January 6, 2021.

LEGAL STANDARD

Defendants move for dismissal under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. In reviewing a motion to dismiss under Rule 12(b)(1), a court is guided by the principle that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins.*

Co. of Am., 511 U.S. 375, 377 (1994). Thus, a federal court must presume that it "lack[s] jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (citation omitted). The burden of demonstrating the contrary rests upon "the party asserting federal jurisdiction." *Id.* When considering jurisdiction based on the face of a plaintiff's complaint, a court must accept "well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). However, the court need not assume the truth of "legal conclusions," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), nor "accept inferences that are unsupported by the facts set out in the complaint," *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 732 (D.C. Cir. 2007).

"Where a motion to dismiss a complaint presents a dispute over the factual basis of the court's subject matter jurisdiction . . . . the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Feldman v. FDIC*, 879 F.3d 347, 351 (D.C. Cir. 2018) (citation omitted). Because, as explained *infra*, the Court's sovereign immunity analysis may entail reviewing the merits of Plaintiff's claim, to the extent the Court reaches those arguments, Defendants have presented declaration testimony from USCP officials. The Court may consider these materials in resolving the motion to dismiss. *See, e.g.*, *Artis v. Greenspan*, 223 F. Supp. 2d 149, 152 (D.D.C. 2002) ("A court may consider material outside of the pleadings in ruling on a motion to dismiss for lack of . . . subject-matter jurisdiction.).

ARGUMENT

Plaintiff's action should be dismissed for lack of subject matter jurisdiction because the United States has not waived its sovereign immunity from suit. *See, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (explaining that it is "axiomatic that the United States may not be sued without

its consent and that the existence of consent is a prerequisite for jurisdiction"). That is so for several independent reasons. Initially, the so-called *Larson-Dugan* exception to sovereign immunity—on which Plaintiff will likely rely—does not extend to claims that a federal official violated a mere common-law duty, as Plaintiff here asserts. Even if the Court disagrees and concludes that Plaintiff's common-law action fits within the *Larson-Dugan* exception, the jurisdictional analysis merges with the merits of the asserted common-law claim. And that claim is meritless for multiple reasons. First, no decision that binds this Court has applied the common-law right of access to public records against entities or officials in the Legislative Branch. And for this Court to compel disclosure here would raise substantial separation of powers concerns. Second, even apart from the constitutional concerns, Plaintiff's claim fails because the requested security footage does not meet the governing test for disclosure. The footage is not a "public record" subject to the asserted common-law right and even if it were, the USCP has compelling interests in keeping confidential the over 14,000 hours of sensitive security footage Plaintiff has requested.

I. Plaintiffs' action is barred by sovereign immunity.

"The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983); *see also Meyer*, 510 U.S. at 475 ("Sovereign immunity is jurisdictional in nature."). That immunity covers not only suits against government entities themselves but also "lawsuits brought against employees in their official capacity," which are simply "another way of pleading an action against an entity of which an officer is an agent." *Lewis v. Clarke*, 581 U.S. 155, 162 (2017) (citation omitted). Thus, both USCP and the individually named USCP officials are immune from suit absent a waiver. *See McLean v. United States*, 566 F.3d 391, 401 (4th Cir. 2009), *abrogated on other grounds by Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721 (2020) (sovereign

immunity bars suit against Congress); *Clark v. Library of Cong.*, 750 F.2d 89, 102-03 (D.C. Cir. 1984) (same for suit against Librarian of Congress). And there is no dispute from Plaintiff that no applicable congressional waiver exists here. *See* Pl.'s Mem. in Opp'n to Defs.' Mot. for Summ. J. & in Supp. of Pl.'s Cross-Mot. for Summ. J., ECF No. 22 at 3 (Pl.'s Mem.) (failing to identify any congressional waiver of sovereign immunity).

A. The so-called *Larson-Dugan* exception to sovereign immunity does not encompass claims that a federal officer violated a common-law duty.

Rather than rely on an express sovereign immunity waiver, Plaintiff is likely to resort, as it has before, to the so-called "*Larson-Dugan* exception," under which courts have recognized that there are two categories of "suits for specific relief against officers of the sovereign which are not suits against the sovereign." *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689 (1949); *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *see also, e.g.*, *Pollack v. Hogan*, 703 F.3d 117, 120 (D.C. Cir. 2012) (per curiam). The first is "where the officer's powers are limited by statute" and the officer takes "actions beyond those limitations." *Larson*, 337 U.S. at 689. The second is where "the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional." *Id.* at 690. In both circumstances, the unauthorized actions are considered "beyond the officer's powers" and therefore "not the conduct of the sovereign," such that they "may be made the object of specific relief" without implicating sovereign immunity. *Id.* at 689-90; *see also Dugan*, 372 U.S. at 621-22 (explaining that "the recognized exceptions" to the "general rule" of sovereign immunity "are (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void").

The Supreme Court has made clear that these "two types" of suits are "the *only ones* in which a restraint may be obtained against the conduct of Government officials." *Larson*, 337 U.S.

at 690 (emphasis added). In *Larson* itself, the Court expressly rejected the argument that "there exists a third category of cases in which the action of a Government official may be restrained or directed," based on claims that the official's conduct is "'illegal' as a matter of general law," such as the common law of torts. *Id.* at 692. Under the *Larson-Dugan* exception, then, an officer's action "can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." *Id.* at 701-02; *see Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 688-89 (1982) (summarizing *Larson*'s holding).

Plaintiff's common-law right of access claims do not fall within this exception to sovereign immunity. That is clear from *Larson* itself, which expressly rejected the argument that an officer's conduct alleged to violate a common-law duty "is ipso facto beyond his delegated powers." 337 U.S. at 695. The Supreme Court explained that an officer's actions are imputed to the sovereign (and are therefore immune from suit) as long as they "do not conflict with the terms of his valid statutory authority," regardless of "whether or not they are tortious under general law." *Id.* at 695. Thus, a claim based in common law to challenge such actions "may not be brought unless the sovereign has consented." *Id.* at 693. A straightforward application of the *Larson-Dugan* rule, as articulated by the Supreme Court long ago, thus compels dismissal of this action on jurisdictional grounds.

As it has before, Plaintiff will likely contend that the D.C. Circuit's decision in *Washington Legal Foundation v. U.S. Sentencing Commission* (*WLF II*) counsels otherwise and permits this Court to hear the case. *See* Pl.'s Mem. at 3; Reply in Supp. of Pl.'s Cross-Mot. for Summ. J., ECF No. 28 at 1. The *WLF II* court stated that "[w]hether the *Larson-Dugan* exception applies" to a common-law claim of access to records of the U.S. Sentencing Commission turned on "whether

the Government has a duty to the plaintiff, *viz.* to allow it access" to those records. 89 F.3d 897, 901 (D.C. Cir. 1996). But the *WLF II* court also acknowledged that "the *only* basis upon which [the Government] resist[ed] application" of the exception was that the common law did not impose such a duty. *Id.* at 901-02 (emphasis added).[1] The D.C. Circuit was thus never confronted with the antecedent question whether a duty based on the common law should be treated akin to a duty imposed by statute, and *WLF II* did not address the language in *Larson* that answers that question.

Respectfully, *WLF II* should not be interpreted to resolve the very question it did not consider, much less in a way that would be inconsistent with well-established Supreme Court precedent. *See, e.g.*, *Am. Portland Cement All. v. EPA*, 101 F.3d 772, 776 (D.C. Cir. 1996) ("[J]urisdictional issues that were assumed but never expressly decided in prior opinions do not thereby become precedents."). As this Court has observed, interpreting *WLF II* to permit common-law claims under the *Larson*-Dugan exception represents an "expansion of the *Larson-Dugan* doctrine" that "significantly broadens this exception to sovereign immunity beyond the parameters articulated by the Supreme Court." *Leopold v. Manger*, 630 F. Supp. 3d 71, 80 n.6 (D.D.C. 2022), *appeal filed*, No. 22-5304 (D.C. Cir. Nov. 22, 2022). And the D.C. Circuit itself, both before and after *WLF II*, has followed the original limitations set by the Supreme Court in *Larson*, and limited the *Larson-Dugan* exception to suits against federal officers "allegedly acting beyond statutory authority or unconstitutionally," making no reference to the common law. *Pollack*, 703 F.3d at 120 (citation omitted); *see also, e.g.*, *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996); *Clark*, 750 F.2d at 102. Reading *WLF II* to permit Plaintiff's common-law action to proceed under the *Larson-Dugan* exception would go beyond those limits. Plaintiff's action should be dismissed on

[1] The Court agreed that no duty existed, and that it therefore lacked jurisdiction, on the ground that the documents sought were not public records. *WLF II*, 89 F.3d at 907.

jurisdictional grounds because there has been no waiver of sovereign immunity, and no exception applies.

B. Even assuming it encompasses claims brought under the common law, the *Larson-Dugan* exception does not apply here.

If the Court concludes that asserting a bare common-law claim is enough to trigger the *Larson-Dugan* exception, Plaintiff's action would nonetheless fail because Defendants have violated no common-law duty. In *WLF II*, the D.C. Circuit explained that when a plaintiff seeks mandamus-style relief to compel the disclosure of government records, application of "the *Larson-Dugan* exception . . . depends upon whether the Government has a duty to the plaintiff, *viz.* to allow it access." 89 F.3d at 901. The "applicability of the [*Larson-Dugan*] exception turns first on the existence of the duty, and the application of sovereign immunity merges with the claimed duty to disclose asserted in the Complaint." *Leopold v. Manger*, 630 F. Supp. 3d at 80; *WLF II*, 89 F.3d at 900 ("[T]he jurisdictional inquiry therefore merges with . . . whether the [defendant] has a legal duty to provide public access to the requested documents . . . ."). For several independent reasons, Plaintiff cannot show that the USCP has a duty to disclose the requested records, and its suit should be dismissed for a lack of subject matter jurisdiction.

1. There is no common-law right of access to records in the Legislative Branch.

It has long been held that although "the common law bestows upon the public a right of access to public records and documents," *WLF II*, 89 F.3d at 902, that right "is not absolute," *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). One critical limitation that forestalls Plaintiff's claim here is that its asserted common-law right of access does not apply to the Legislative Branch, which undisputedly includes all Defendants here.

When the common law right is invoked in federal court, it is "almost always in cases involving access to court documents." *WLF II*, 89 F.3d at 902; *see, e.g.*, *Cable News Network,*

Inc. v. FBI, 984 F.3d 114 (D.C. Cir. 2021); *In re Leopold*, 964 F.3d 1121 (D.C. Cir. 2020); *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661 (D.C. Cir. 2017). Indeed, the D.C. Circuit found itself "in uncharted waters" even when it was faced with "a claim of access to the documents of a government entity, the Sentencing Commission, that is within the judicial branch but is not a court." *WLF II*, 89 F.3d at 903. Neither this Court nor the D.C. Circuit has ever exercised common lawmaking power to compel disclosure of documents from within the Legislative Branch.

Courts applying the common-law right of access have long distinguished between judicial records and other types of records. *See, e.g., Undisclosed LLC v. State*, 807 S.E.2d 393, 397 n.4 (Ga. 2017) ("The rights of access to public records and court records were historically distinct and separate."). In *Nixon*, the Supreme Court appeared to suggest otherwise when it said that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." 435 U.S. at 597 (footnote omitted). But that case specifically involved only "the right to inspect and copy judicial records." *Id.* at 598. In a subsequent case involving a claim of access to other types of documents, the Court clarified that for "non-judicial records," there was "'no general common law right in all persons (as citizens, taxpayers, electors or merely as persons) to inspect public records or documents.'" *McBurney v. Young*, 569 U.S. 221, 233 (2013) (quoting Harold L. Cross, *The People's Right to Know* 25 (1953)). The Court cited English and American cases alike limiting access to such records to individuals who could show some kind of "personal interest" in them. *Id.* at 233-34; *see also Undisclosed LLC*, 807 S.E.2d at 397 ("Under the common law, the right of access to *public* records was generally restricted to those persons with a sufficient interest in them, such as those needing the records to prosecute or defend a legal action. The right of access to *court* records, however, did not require a special interest." (citations omitted)).

Indeed, when the D.C. Circuit first recognized the common-law right of access, it explained that state courts had distinguished "between judicial records and other mere official records." *Ex parte Drawbaugh*, 2 App. D.C. 404, 407 (1894) (citing *Brewer v. Watson*, 71 Ala. 299 (1882)). The court of appeals further stressed that "a public court of record" is "governed by very different principles and considerations, in respect to its records and proceedings, from those that apply to an executive department." *Id.* at 405.

Aside from the uncertainty underlying the proposition that the common-law right of access historically extended to the Legislative Branch, federal courts are limited by the Constitution, and creating a common-law right of access to records in the Legislative Branch would raise significant separation-of-powers concerns. The separation of powers "built into the tripartite Federal Government" guards against "the encroachment or aggrandizement of one branch at the expense of the other." *Mistretta v. United States*, 488 U.S. 361, 382 (1989). Recognizing that there is a "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power," the Supreme Court has stood vigilant against efforts to "either accrete to a single Branch powers more appropriately diffused among separate Branches or [to] undermine the authority and independence of one or another coordinate Branch." *Id.* (citation omitted). The Court has specifically warned against the danger "that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches.'" *Id.* at 383 (alteration in original) (quoting *Morrison v. Olson*, 487 U.S. 654, 680-81 (1988)).

Courts may properly fashion common law to govern access to judicial records because "[e]very court has supervisory power over its own records and files." *Nixon*, 435 U.S. at 598. But courts have no similar inherent supervisory power over the records and files of other branches. On the contrary, the Constitution's Journal Clause gives Congress the authority to determine which activities of the Legislative Branch to make public and which to keep confidential. *See* U.S. Const.

art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such parts as may in their Judgment require Secrecy . . . ."); *see Goland v. CIA*, 607 F.2d 339, 346 (D.C. Cir. 1978) (per curiam) ("Congress has undoubted authority to keep its records secret, authority rooted in the Constitution, longstanding practice, and current congressional rules." (footnotes omitted)). Thus, just as "[p]roviding public access to judicial records is the duty and responsibility of the Judicial Branch," *In re Leopold*, 964 F.3d at 1134, determining access to records of entities in the Legislative Branch is the province of that branch as well.

The fact that access is ultimately determined under the governing test by an ad hoc weighing of interests exacerbates the level of potential interference. The absence of clear standards means that access is ultimately "dependent upon the court's gestalt judgment or overarching impression" of the appropriate level of transparency for a particular government process. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997). The Constitution does not, however, "give the federal judiciary a 'chancellor's foot' veto over [confidentiality] practices of which it did not approve." *United States v. Russell*, 411 U.S. 423, 435 (1973). And "courts must be reluctant to expand their authority by requiring intrusive and unremitting judicial management of the way [another] Branch performs its duties." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 617 (2007) (Kennedy, J., concurring).

The D.C. Circuit has recognized these separation-of-powers concerns in cases seeking to compel disclosure under FOIA of congressional documents in the possession of Executive Branch agencies. *See, e.g.*, *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 221, 225-26 (D.C. Cir. 2013). If such concerns arise where Congress has created a statutory right of access, they are necessarily heightened if a court were to exercise a common lawmaking power to compel disclosure. *See Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020) ("Judicial lawmaking in the form

of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States.").

Adopting a categorical rule that the common-law right of access does not apply to Legislative Branch documents would not contradict the holdings of any prior decision of the D.C. Circuit or the Supreme Court. Neither has invoked common law to compel the disclosure of such documents. The D.C. Circuit has on two occasions suggested that the common-law right of access applied to Legislative Branch records, but these statements were plainly *dicta*. First, in *WLF II*—where the plaintiff sought records from a judicial branch entity—the court of appeals observed that "*it has been said* in this district that '[t]he general rule is that all three branches of government, legislative, executive, and judicial, are subject to the common law right.'" 89 F.3d at 903 (alteration in original) (emphasis added) (quoting *Schwartz v. U.S. Dep't of Just.*, 435 F. Supp. 1203, 1203 (D.D.C. 1977)). Seven years later, and without further explanation, the D.C. Circuit cited *WLF II* as having "held that the common law right of access extends beyond judicial records to the 'public records' of all three branches of government" before finding "any pre-existing common law right" pre-empted by FOIA as to Executive Branch agencies. *Ctr. for Nat'l Sec. Stud. v. U.S. Dep't of Just.*, 331 F.3d 918, 936-37 (D.C. Cir. 2003).

While prior decisions of this Court can be read to have reached contrary conclusions, those decisions are not binding here, and none of them appear to have resulted in a judicial order requiring disclosure of records from within the Legislative Branch. For example, in the earliest such decision that Defendants have located, *Schwartz v. Department of Justice*, the court determined at the motion-to-dismiss stage that "Congress is subject to the common law rule," but did not then order the defendant—an elected member of the House of Representatives—to produce any documents. 435 F. Supp. at 1204. Moreover, the *Schwartz* court made no reference to the

separation-of-powers concerns Defendants have articulated above (let alone the Government's sovereign immunity), assuming it considered them at all. Subsequent decisions in this Court to have cited *Schwartz* also have not grappled with the concerns that would arise from judge-fashioned intervention into the affairs of the Legislative Branch. *See, e.g.*, *Leopold v. Manger*, 630 F. Supp. 3d at 81; *Musgrave v. Warner*, 21-cv-2198 (BAH), 2022 WL 4245489, at *8 (D.D.C. Sept. 15, 2022), *appeal filed*, No. 22-5252 (D.C. Cir. Sept. 28, 2022)..

And insofar as the D.C. Circuit in *WLF II* stated that it had "affirmed" the *Schwartz* decision, 89 F.3d at 903, it appears to have been inaccurate in its citation. What the D.C. Circuit actually affirmed was a later ruling in the *Schwartz* case regarding the Department of Justice's withholding under FOIA; that ruling did not involve the common-law right of access, let alone the right to Legislative Branch records. *See* H. Comm. on the Judiciary, 97th Cong., Rep. Identifying Court Proceedings and Actions of Vital Interest to Congress, No. 5, at 94-97 (Comm. Print 1980) (summarizing the litigation history); H. Select Comm. on Congressional Operations & S. Comm. on Rules & Admin., 95th Cong., Rep. Identifying Court Proceedings and Actions of Vital Interest to Congress, pt. 6, at 106-09, 273-81 (Comm. Print 1978) (reprinting the district court decisions).

In view of the separation-of-powers concerns that would ensue and the absence of binding precedent to the contrary, this Court should decline to recognize a common-law right of access to records in the Legislative Branch.

2. Section 1979 preempts any common-law right of access with respect to security information.

Assuming *arguendo* the Court recognizes a common law right of access to record in the Legislative Branch, it should nonetheless refuse to compel the disclosure of the USCP's security footage from January 6. That is because the footage constitutes "security information" whose disclosure Congress prohibited under 2 U.S.C. § 1979 (Section 1979), absent the express approval

of the Capitol Police Board. Because Congress enacted legislation that dictates the circumstances under which "security information" can be disclosed, it preempted any common-law right that might otherwise apply.

The Supreme Court has long recognized that "[f]ederal common law is a necessary expedient" to be invoked only "in absence of an applicable Act of Congress." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 314 (1981) (alteration and quotation marks omitted). "[W]hen Congress addresses a question . . . the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.*; *see also Rodriguez*, 140 S. Ct. at 717 (noting the "necessarily modest role" for common law in a constitutional system that reserves the legislative power to Congress). Thus, the common-law right of access "must yield to a statute 'when Congress has spoken directly to the issue at hand.'" *Metlife*, 865 F.3d at 669 (quoting *Ctr. for Nat'l Sec. Stud.*, 331 F.3d at 937).

In *Center for National Security Studies*, the D.C. Circuit confirmed the "principle that a statutory disclosure scheme preempts the common law right" of access. 331 F.3d at 936. The court held that FOIA preempts any common-law right that would apply to records held by federal agencies because Congress has already "balanc[ed] the benefits and harms of disclosure" in that "carefully calibrated statutory scheme." *Id*. at 937. And in *In re Motions of Dow Jones & Co.*, after rejecting the argument that the common law had ever provided a right of access to grand jury materials, the court held in the alternative that "the common law has been supplanted" by the Federal Rules of Criminal Procedure, which "now govern" the disclosure of such material. 142 F.3d 496, 504 (D.C. Cir. 1998).

Likewise here, Section 1979 speaks directly to the issue of access to Capitol Police security information and prohibits the release of "any security information in the possession of the Capitol

Police" absent the approval of the Capitol Police Board. 2 U.S.C. § 1979(b). Congress defined "security information" broadly to mean information that

> (1) is sensitive with respect to the policing, protection, physical security, intelligence, counterterrorism actions, or emergency preparedness and response relating to Congress, any statutory protectee of the Capitol Police, and the Capitol buildings and grounds; and
>
> (2) is obtained by, on behalf of, or concerning the Capitol Police Board, the Capitol Police, or any incident command relating to emergency response.

Id. § 1979(a). Congress also identified the standard that must be met before any release could be made: "only if the Capitol Police Board determines in consultation with other appropriate law enforcement officials, experts in security preparedness, and appropriate committees of Congress, that the release of the security information will not compromise the security and safety" of Capitol facilities or personnel. *Id.* § 1979(b).

Section 1979 plainly displaces Plaintiff's asserted common-law right of access. It "expressly directs secrecy as the default position," *In re Leopold*, 964 F.3d at 1130; specifies a "standard . . . different from the interests balanced" under the prevailing common-law test, *id.*; and grants to the Capitol Police Board, not the courts, the "[a]uthority . . . to determine conditions of release," 2 U.S.C. § 1979(b). Moreover, Congress instructed that § 1979 applies "[n]otwithstanding any other provision of law." *Id.*

As Judge Howell concluded when considering this provision in a common-law right of access case against the USCP, "'[i]t would make no sense' for Congress to create such a scheme only for courts to 'turn and determine that the statute ha[s] no effect on a preexisting common law right of access.'" *Leopold v. Manger*, 630 F. Supp. 3d at 82 (quoting *Ctr. for Nat'l Sec. Stud.*, 331 F.3d at 937)). Because "[m]uch of the requested material still at issue" in *Leopold* was security

information, the court concluded that it was therefore "subject to this statutory scheme governing disclosure, not to the common-law right of public access." *Id.*

Here, the requested security footage readily satisfies the two prongs of the statutory definition of "security information." There can be no dispute that the security footage was "obtained by . . . the Capitol Police," and thereby satisfies § 1979(a)(2). And the footage falls squarely within the bounds of § 1979(a)(1): as Thomas DiBiase, USCP General Counsel, explains in his attached declaration, the footage contains "extremely sensitive information" about the "the layout of the Capitol Building and Grounds, including entry and exit points, evacuation routes, office locations, locations of Sensitive Compartment Information Facilities, and the relation of the crucial chambers and offices . . . to other areas of the Capitol." DiBiase Decl. ¶ 7. Releasing this aggregation of footage would reveal "information that could be harnessed to expose and exploit security vulnerabilities and weaknesses," and thereby used to "plan and execute future breaches of the Capitol Building or other criminal activity"— the very outcomes Congress evidently intended to prevent when it passed Section 1979. DiBiase Decl. ¶ 10. For these reasons, the USCP treats all of the requested footage—roughly 14,000 hours in total—as "security information" under Section 1979. DiBiase Decl. ¶¶ 8-9. And Plaintiff rightly has not alleged that the Board has authorized the release of the requested aggregate security footage, as the Board indisputably has not done so. *See* DiBiase Decl. ¶ 9.

Although the Capitol Police Board has not designated the footage in its entirety as "security information," no such affirmative designation is required for the statute's protection to apply. Rather, the statutory scheme only requires that the Board approve *releases* of security information. 2 U.S.C. § 1979. Thus, the fact that USCP, in consultation with the Board, previously designated an especially sensitive portion of the footage (17 hours) that reveals evacuation routes, techniques, and methods as "security information" does not undermine USCP's treatment of the 14,000 hours

of footage as "security information" under Section 1979. *See* Declaration of Thomas A. DiBiase ¶ 13, ECF No. 40-1, *Advance Publ'n Inc. v. EOUSA*, No. 1:23-cv-01014 (D.D.C. July 25, 2023).

The requested security footage falls squarely within the definition of "security information" in Section 1979.[2] Plaintiff's attempt to obtain that footage via the common law is therefore preempted, and the action must be dismissed.

3. The requested security footage is not a public record subject to the asserted common-law right of access and, in any event, the USCP's confidentiality interests outweigh any public interest in disclosure.

Alternatively, Plaintiff's demand for security footage from January 6 fails because none of that footage is a "public record" to which Plaintiff has any right. The D.C. Circuit has established a two-step process to assess a claim under the common-law right of access to public records: First, the court determines "whether the [record] sought is a 'public record.'" *Wash. Legal Found. v. U.S. Sent'g Comm'n*, 17 F.3d 1446, 1451 (D.C. Cir. 1994) (*WLF I*). If so, the court then "proceed[s] to balance the government's interest in keeping the [record] secret against the public's interest in disclosure." *Id.* at 1451-52. Any cognizable public interest in the document is thus relevant solely at the second step, and does not factor into the analysis of whether the document is a "public record" in the first place. Plaintiff's request here—for security footage gathered by the USCP for law enforcement purposes—falters at both steps, and the asserted common law right of

[2] As discussed *infra*, the fact that Congress has made available to the public certain excerpts from the requested footage does not defeat its status as "security information." When it passed Section 1979, Congress applied the disclosure restrictions to "any security information *in the possession of* the Capitol Police." 2 U.S.C. § 1979(b) (emphasis added). There is no doubt that the requested footage remains in the USCP's possession. Congress also made clear that "[n]othing in this section may be construed to affect the ability of the Senate and the House of Representatives (including any Member, officer, or committee of either House of Congress) to obtain information from the Capitol Police regarding the operations and activities of the Capitol Police that affect the Senate and House of Representatives." *Id.* § 1979(c).

access therefore does not apply.

a) The security footage is not a public record.

The D.C. Circuit has defined a "public record" as "a government document created and kept for the purpose of memorializing or recording an official action, decision, statement, or other matter of legal significance, broadly conceived." *WLF II*, 89 F.3d at 905. Assuming video footage can even be considered a "government document," the USCP is aware of no authority holding that law enforcement security footage is a public record subject to mandatory disclosure. Nor would such a conclusion make sense. Raw surveillance footage by definition does not memorialize or record any official action, but instead simply provides a recording of *everything* that occurs within a camera system's view. The video footage at issue here was produced by USCP's extensive system of cameras located throughout the Capitol Grounds. The system is monitored by USCP personnel 24-7 in the USCP Command Center and is relied upon to provide real time information regarding any incident occurring on the Grounds. USCP policy dictates that the USCP camera system, including footage recorded by it within the Capitol and sought by Plaintiff, is solely for national security and law enforcement purposes. DiBiase Decl. ¶ 5; Joyce Decl. ¶¶ 13-14 & Ex. C, USCP Directive 1000.002, *Retrieval of Archived Video* (Directive 1000.002). Like many video surveillance systems, the USCP camera system is designed "to provide situational awareness to USCP personnel, supporting national security, and legitimate law enforcement purposes." *See* Directive 1000.002 at 1-2. It is not, and never has been, intended to record some official government action for the purpose of memorializing that action.

Nor does the mere fact that the USCP, in the immediate aftermath of January 6, made the sensible decision to preserve the requested security footage beyond the default retention period convert it to a public record. DiBiase Decl. ¶ 6. Plaintiff may argue, as it has before, that this act of preservation automatically means that the footage was "kept" and that it thereby became a public

record. But this argument ignores that the D.C. Circuit requires not only that a public record be "created *and* kept," but also that it be created and kept "*for the purpose of* memorializing or recording" some official USCP action. *WLF II*, 89 F.3d at 905 (emphases added). There was no "official action, decision, statement, or other matter of legal significance, broadly conceived" that the 14,000 hours of security footage was intended to memorialize when it was "created and kept." *Id.* The security footage was instead created and kept for the purpose of recording activity at the Capitol building and grounds, just as is true every day that the USCP's security camera system is in use.

The USCP preserved the footage because of its obvious value as a visual log of activities during the January 6 insurrection, and so it could be used as a resource going forward by investigators in Congress and law enforcement agencies. That subsequent investigations or criminal prosecutions may have relied on the USCP's security footage does not alter the fundamental nature of the footage itself. Indeed, subsequent investigative activity is to be expected when potentially unlawful conduct is captured on surveillance video—the video recording becomes critical to the subsequent investigation and any prosecution. How Plaintiff proposes to treat the footage would undermine the investigative interests that typically motivate such preservation decisions by immediately requiring disclosure of the very evidence critical to a pending investigation.

It is true that the USCP has made certain authorized disclosures of video footage from the Capitol on January 6 to Congress and to the FBI. DiBiase Decl. ¶ 11. Those disclosures, however, have all been in support of Congress's and others' pursuit of investigations into the events of January 6, whether for purposes of impeachment proceedings, oversight investigations, or criminal prosecutions. *Id.* To the extent that there have been any public releases of that footage, it has not been by the USCP. *Id.* ¶¶ 7, 11.

It is also true that the Committee on House Administration—distinct from, and over the concerns of the USCP—has, beginning in September 2023, made footage available for viewing by representatives of the news media, qualifying non-profit organizations, defendants charged with crimes related to the January 6, 2021 insurrection, and victims of those events. *Id.* ¶ 12. The Committee has done so, however, on a restricted basis, allowing viewings once per week for a three-hour limit—with any subsequent provision of video clips subject to Committee's discretion. *Id.* Moreover, the Committee was clear that nothing in its access policy "makes or shall be interpreted to make [the January 6 security] footage a public record for any purpose, including but not limited to the common law right of access, or any other open records laws." Ex. B to DiBiase Decl. at 1. By contrast, Plaintiff's request is for its own copy of *all* footage from the entire nine-hour period at the heart of the January 6, 2021 insurrection—more than 14,000 hours in total—which is a far cry from the limited access that the Committee has recently offered.

Because video footage from within the Capitol on January 6 is not a "public record," Plaintiff has no common law right of access to that material.

b) The USCP's interest in keeping the requested security footage confidential outweighs the public interest in its wholesale disclosure.

Assuming *arguendo* that the requested security footage is a "public record," Plaintiff nonetheless has no right to it because Plaintiff cannot show any public interest in disclosure that outweighs the USCP's countervailing interests against release. While Plaintiff has previously cited the public interest in the events of January 6, 2021—which Defendants do not deny—the governing test demands more than this type of generic assertion. The question is not whether there is a public interest in what happened on January 6, 2021, but rather whether there is public interest *in the actual requested* material, and, if so, whether it outweighs "the government's interest in keeping the [record] secret." *WLF I*, 17 F.3d at 1451-52; *see also ACLU of N. Cal. v. U.S. Dep't*

of Just., No. C 04-4447 PJH, 2005 WL 588354, at *13 (N.D. Cal. Mar. 11, 2005) (explaining in FOIA case that it is "not sufficient for the plaintiffs to show [public] interest in only the general subject area of the request"). "The fact that [Plaintiff] has provided evidence that there is some media interest in [the January 6 attack on the Capitol] as an umbrella issue does not satisfy the requirement that [it] demonstrate interest in the specific subject" of all of the requested security footage. *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 355 F. Supp. 2d 98, 102 (D.D.C. 2004).

Even if the Court could discern a cognizable public interest in the totality of the over 14,000 hours of security footage Plaintiff has requested, it would be outweighed by the USCP's interests in maintaining the footage's confidentiality. First, as discussed above, the USCP treats all of this footage as security information, which by statute means that its release is presumed to "compromise the security and safety of the Capitol buildings and grounds or any individual whose protection and safety is under the jurisdiction of the Capitol Police." 2 U.S.C. § 1979(b); *see* DiBiase Decl. ¶ 9.

Second, those concerns are heightened because Plaintiff seeks the *entirety* of footage from a nine-hour period on January 6—not merely isolated clips of interest, and that footage has been and continues to be used in concurrent investigations by multiple investigative entities. *See* DiBiase Decl. ¶ 11. Releasing this aggregated video data in such sweeping fashion could jeopardize the integrity of those investigations in a way that disclosure of individual clips would not. *See, e.g.*, *Ctr. for Nat'l Sec. Stud.*, 331 F.3d at 928 (withholding detainee names under a mosaic theory because release "would give terrorist organizations a composite picture of the government investigation" even if release of "any individual detainee may appear innocuous or trivial").

Third, disclosure of the footage could also reveal the locations of USCP surveillance cameras, Capitol entry and exit points, and Members' office locations, as well as certain security

techniques and methods employed by the USCP on January 6. DiBiase Decl. ¶ 7; Joyce Decl. ¶¶ 18, 20. Release of that information could enable or encourage prospective wrongdoers to commit future unauthorized actions against the Capitol complex, including by "assess[ing] the angle and span of each camera and harness[ing] that information to exploit vulnerabilities, such as dead or blind spots, in the CCV system and other security weaknesses." DiBiase Decl. ¶ 7; Joyce Decl. ¶¶ 18, 20; *see also* Directive 1000.002 at 2 ("Retrieving, using, or duplicating archived video footage in cases not related to national security or significant law enforcement operations . . . could expose the location of [USCP's] CCTV cameras or identify [USCP's] surveillance tactics. This presents a threat to national security, as making this information public could be utilized by a potential adversary.").

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be granted and Plaintiffs' Amended Complaint should be dismissed with prejudice.

Dated: September 29, 2023

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

MARCIA BERMAN
Assistant Director
Federal Programs Branch

/s/ M. Andrew Zee
M. ANDREW ZEE (CA Bar No. 272510)
Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
450 Golden Gate Ave.
San Francisco, CA 94102
Tel: (415) 436-6646
E-mail: m.andrew.zee@usdoj.gov

Counsel for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. UNITED STATES CAPITOL POLICE, et al., Defendants.	Case No. 1:21-cv-00401-ACR

DECLARATION OF THOMAS A. DIBIASE

I, Thomas A. DiBiase, declare as follows:

1. I have been the General Counsel for the United States Capitol Police ("USCP") since August of 2020. From October 2019 to August of 2020, I served as the Acting General Counsel, and from April of 2010 to October 2019, I served as the Deputy General Counsel. From 2007 to 2010, I worked as a litigator at a law firm in the District of Columbia, and from 1995 to 2007, I served as an Assistant United States Attorney at the United States Attorney's Office for the District of Columbia. I worked as a litigator at a New York-based law firm from 1991 to 1995.

2. As part of my duties as General Counsel and my prior duties as the Deputy General Counsel, I review access and release requests for camera footage from the USCP's extensive system of surveillance cameras on the U.S. Capitol Grounds. Through the exercise of my official duties, I have become familiar with this civil action and Plaintiff Judicial Watch's underlying request under an asserted common-law right of access to public records for all of the USCP's security camera footage recorded from 12:00 p.m. to 9:00 p.m. on January 6, 2021.

3. I submit this declaration in support of Defendants' motion to dismiss, contemporaneously filed by the Department of Justice in this proceeding. I have also filed declarations in several other criminal and civil cases arising out of the events of January 6, 2021,

including *United States v. Timothy Louis Hale-Cusanelli*, No. 21-cv-00037, ECF No. 67-1; *United States v. William Pope, et al.*, No. 21-cv-00128, ECF Nos. 71-1, 88-1; *Advance Publication Inc. v. Executive Office for U.S. Attorneys, et al*., 23-cv-1014 (APM), ECF No. 13, Attachment 4; and *United States v. Ryan Taylor Nichols*, No. 1:21-cr-117-RCL, ECF No. 255-1. These declarations are incorporated by reference and have been filed in this case at ECF No. 40 and, for the declaration in *United States v. Ryan Taylor Nichols*, attached as Exhibit A (without attachments).

4. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

5. The primary mission of the USCP is to protect the United States Congress, including its Members, employees, visitors, and the U.S. Capitol Building and Grounds ("Grounds") so that Congress can fulfill its constitutional and legislative functions in a safe, secure, and open environment. The USCP has the power to enforce the laws of the United States and the District of Columbia pursuant to 2 U.S.C. § 1961. The USCP is part of the Legislative Branch. *See* 2 U.S.C. §§ 1901, 1901a, 1961. The backbone of the USCP's security and policing operations is the USCP's extensive system of cameras located throughout the Grounds. These cameras are part of a sophisticated closed circuit video ("CCV") system that reside both inside and outside the buildings on the Grounds, including the U.S. Capitol itself and the other Congressional office buildings located on the Grounds. The CCV system is monitored by USCP personnel 24-7 in the USCP Command Center and is relied upon to provide real time information regarding any incident occurring on the Grounds. Per USCP Directive 1000.002, CCV footage may only be used for matters related to national security and legitimate law enforcement purposes (*e.g.*, serious crimes).

6. As relevant here, the USCP recorded security footage using its CCV system on January 6, 2021. The aggregate footage from that day between 12:00 p.m. and 9:00 p.m. amounts

to more than 14,000 hours of footage. In the immediate aftermath of the events of January 6, the USCP preserved all the security footage from that date.

7. The USCP strongly opposes the public release of any of its security footage from January 6, 2021, outside of the criminal prosecutorial process, particularly the public release of thousands of hours of footage in the aggregate. Publicly releasing the entirety of security footage from an approximately nine-hour period would present a dire safety risk to the Capitol Grounds and its inhabitants. Indeed, the USCP is aware of efforts made before January 6, 2021, including by those who participated in the events of January 6, 2021, to gather information regarding the interior layout of the U.S. Capitol, including references to the tunnels below the Capitol Grounds and maps of the Capitol Building's layout—information that is generally not available. Providing unfettered access to thousands of hours of extremely sensitive information will result in the layout of the Capitol Building and Grounds, including entry and exit points, evacuation routes, office locations, locations of Sensitive Compartment Information Facilities, and the relation of the crucial chambers and offices (such as the Speaker's Office and Majority Leader's Office) to other areas of the Capitol being exposed. Further, given that the physical locations of many CCV surveillance cameras are not publicly known or facially obvious, release of all the requested security footage, in the aggregate, will also enable potential bad actors to identify the location of each CCV camera, assess the angle and span of each camera and harness that information to exploit vulnerabilities, such as dead or blind spots, in the CCV system and other security weaknesses.

8. Pursuant to 2 U.S.C. § 1979, USCP "security information" may be released, other than to Congress, only with the approval of the Capitol Police Board. Security information is defined as information that:

> (1) is sensitive with respect to the policing, protection, physical security, intelligence, counterterrorism actions, or emergency preparedness and response relating to Congress, any

> statutory protectee of the Capitol Police, and the Capitol buildings and grounds; and
>
> (2) is obtained by, on behalf of, or concerning the Capitol Police Board, the Capitol Police, or any incident command relating to emergency response.

9. The USCP treats the aggregate security footage recorded on January 6, 2021, including the footage encompassed by Plaintiff's request, as "security information" under 2 U.S.C. § 1979. As discussed above, the footage was obtained by the USCP through its CCV system and contains sensitive information regarding USCP's efforts to police, protect and secure the Capitol Grounds.[1] The Capitol Police Board has not authorized the release of any of the security footage from January 6, 2021, except for those isolated clips that have been used by prosecutors in federal criminal trial related to January 6.

10. Public disclosure of thousands of hours of CCV footage in the aggregate would reveal the layout of the Capitol Buildings and Grounds and the locations of the CCV cameras—information that could be harnessed to expose and exploit security vulnerabilities and weaknesses. This knowledge could be used by prospective bad actors to plan and execute future breaches of the Capitol Building or other criminal activity, risking the physical safety of not just the Capitol compound but also Members of Congress, Congressional employees, and visitors. In 2021, the USCP, in consultation with the Capitol Police Board, designated approximately 17 hours of the security footage from January 6, 2021, as "security information," because the footage relates to

[1] The USCP's decision to treat, in the aggregate, the CCV footage recorded on January 6, 2021 as "security information" under 2 U.S.C. § 1979 is consistent with the Architect of the Capitol's decision to treat "blueprints" of the Capitol as "security information" under 2 U.S.C. § 1979.

the evacuation of Members of Congress from their respective chambers, and reveals evacuation routes, as well as evacuation techniques and methods.

11. Since January 6, 2021, the USCP has provided the aggregate of its January 6 security footage to other entities: the House Impeachment managers, committees in the House and in the Senate, and the Federal Bureau of Investigation.[2] It did so to further those entities' investigations or prosecutions regarding the events of January 6, and I understand that several of these investigations remain ongoing. I am aware that certain individual clips of footage have been released by Congress in the course of impeachment proceedings or by congressional committees. These releases, however, are not decisions by the USCP, and are made solely by those individuals or committees in Congress. When the USCP provided its security footage to the FBI, it did so subject to several restrictions. The footage was: (a) to remain in the legal control of the USCP; (b) not to be subject to the FOIA; and (c) to be returned to the USCP at the conclusion of any investigation. These restrictions did not apply to any footage used as evidence or discovery as part of any prosecution of any criminal offense. The use of individual clips from the USCP's aggregate of security footage from January 6, 2021 in federal criminal prosecutions has been approved by the Capitol Police Board.

12. Recently, one of the USCP's congressional oversight committees, the Committee on House Administration ("CHA"), has chosen to make security footage from January 6, 2021 available for qualified individuals to view in three-hour sessions. Under CHA's policy, "representatives of U.S. news outlets, qualifying non-profit organizations, as well as defendants charged with crimes related to January 6, 2021 and their counsel, and individuals who were

[2] The USCP has also provided several individual clips from its January 6 security footage—but not the entirety of its footage from that day—to the U.S. Attorney's Office for the District of Columbia and the D.C. Metropolitan Police Department for those entities' investigative purposes.

physically harmed on January 6, 2021 at the United States Capitol and their counsel" are allowed to access terminals to view the footage. *See* Committee on House Administration, *Oversight Subcommittee Chairman Loudermilk Announces Capitol Security Video Footage Policy* (Sept. 1, 2023), available here. CHA's policy, a copy of which is attached as Exhibit B, does not entitle any viewers to copies of individual video clips, and any provision of video clips "is subject to CHA's discretion and is final, not subject to appeal." Before CHA implemented this policy, the USCP alerted CHA of its security concerns with making this amount of footage available to the broader public.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 29th day of September 2023.

Thomas DiBiase

Thomas A. DiBiase

Exhibit A

DECLARATION OF THOMAS A. DIBIASE

I, Thomas A. DiBiase, have personal knowledge of the following facts and will testify to them, if called to do so:

1. I am the General Counsel for the United States Capitol Police[1] (hereinafter, "USCP"), and have served in that position since August 2020. As part of my duties with USCP, I am responsible for reviewing and approving the release of Closed Circuit Video (hereinafter, "CCV") from the United States Capitol Buildings and Grounds.

2. I hereby incorporate by reference previously declarations that I have attested to and have been filed in *United States v. Timothy Hale-Cusanelli*, 21-cr-37 (TNM), ECF No. 67, Attachment 1, *United States v. William Pope*, 21-cr-128 (RC), ECF No. 71, Attachment 1, and ECF No. 88, Attachment 1, and *Advance Publication Inc. v. Executive Office for U.S. Attorneys et al*., 23-cv-1014 (APM), ECF No. 13, Attachment 4. They are attached as Exhibits 1 – 4.

3. Consistent with prior declarations, the USCP has previously provided the U.S. Department of Justice all the USCP footage from the Capitol Complex, with the exception of the Library of Congress, for the hours of 12:00 p.m. to 8:00 p.m. on January 6, 2021. This footage totals more than 14,000 hours. In connection with a separate investigation, USCP provided the Department of Justice a few select clips from January 5, 2021.

4. Of the footage that was provided to the Department of Justice, the Capitol Police Board designated 17 hours of that footage as "security information" pursuant to 2 U.S.C. § 1979, as it showed evacuation routes that members of Congress, congressional staff, or official

[1] The USCP is a distinct and separate entity from both the United States House of Representatives and the United States Senate, any committees or subcommittees thereof, and any member or leader of either House of Congress.

visitors used on January 6, 2021. Subsequently to this initial designation, USCP designated that footage showing sensitive infrastructure or footage showing sensitive office areas such as Sensitive Compartmented Information Facilities should be excluded from production. At this time, the aggregate of the CCV footage is treated as "security information" under 2 U.S.C. § 1979 because of the risk that bad actors, including those who previously sought to subvert the democratic process on January 6, 2021, could use the aggregation of such footage to learn the security vulnerabilities and weakness of the Capitol Building or Grounds. See *Pope*, 21-cr-128 (RC), ECF No. 88, Attachment 1, at ¶¶ 6-7; *see also Advance Publications*, 23-cv-1014 (APM), ECF No. 13, Attachment 4, ¶ 14.

5. In January and February 2021, the USCP provided House Impeachment Managers with approximately 15 selected clips.

6. Distinct from what was provided to the U.S. Department of Justice, USCP separately provided this same eight hours of footage, which included all exterior cameras and interior cameras from the Capitol and the Capitol Visitor's Center, to the House Select Committee to Investigate the January 6 Attack (hereinafter, "the Select Committee. However, upon a further request from the Select Committee, USCP provided the Select Committee with footage from all Capitol, Cannon, Longworth, and Rayburn interior cameras for January 3, 4, and 5, 2021, from 7:00 a.m. to 10:00 p.m. The Select Committee also received all footage from 6:00 a.m. to 12:00 p.m. on January 6, 2021, from all Capitol, Cannon, Longworth, and Rayburn cameras, as well as all footage from interior cameras in the Capitol Visitors Center from 7:00 a.m. to 10:00 p.m. *See Pope*, 21-cr-128, ECF No. 88, Attachment 1, n. 1. This additional footage is 28,386 hours in length. In February and March 2023, pursuant

to a request from the Committee on House Administration[2] (hereinafter, "CHA") in their oversight capacity, USCP provided them with access to three Genetec terminals and four hard drives containing the totality of the materials that we provided to the Select Committee as described above in this paragraph.

7. The USCP does not know the extent to which any congressperson, committee, subcommittee, or other congressional entity has provided access to the CCV footage to any member of the public, journalist, attorney, person charged in connection with riot at the United States Capitol on January 6, 2021, or anyone else.[3] We further do not know the extent to which any person has accessed or reviewed footage through the CHA's new access policy. In other words, while the USCP appreciates the scope of the materials provided, the USCP has no insight into the CHA's process of what has been, will or might be provided to a future or current third party.

8. While the USCP does not know the basis or reason for the request by the Select Committee or the CHA for the CCV previously provided to Congress, the materials provided to Congress include many cameras that capture buildings and areas that did not capture rioters or the riot on January 6, 2021. This also includes footage outside of the time frame during which the riot occurred. In other words, based on USCP's assessment, there is no reason to believe that there is any evidentiary value relevant to a January 6 riot prosecution

[2] The CHA is responsible for oversight of the USCP. Consistent with our rules and regulations, we can and will provide footage to the CHA—or any Congressional body—when requested, in light of their oversight responsibilities.

[3] USCP is aware of what material has been provided to persons charged in connection with January 6, 2021, through the discovery portals that the Department of Justice established to assist with discovery production in these cases, such as Evidence.com.

captured on cameras outside of the hours of the riot, and in buildings or areas that were unaffected by the riot.

9. In late August 2023, the CHA announced that, beginning in September 2023, it would allow access to terminals by representatives of U.S. news outlets, qualifying non-profit organizations, defendants charged in connection with the events charged of January 6 and their counsel, and individuals who were physically harmed on January 6 at the Capitol and their counsel. This access is subject to security restrictions, such as requiring viewers to leave their phones in a separate location while viewing the footage. Access will also be both time limited and controlled by CHA staffers. The U.S. Capitol Police is not a party to this process and does not have authority or access to control what is provided by the CHA to third parties.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Thomas DiBiase

Thomas A. DiBiase
General Counsel
United States Capitol Police

Exhibit B

Committee on House Administration Access to USCP Video

Overview: Outside access to review USCP security footage in person.

- Starting September 2023, the Committee will allow access to terminals by representatives of U.S. news outlets (not limited to press accredited through congressional galleries), Qualifying Non-Profit Organizations, as well as defendants charged with crimes related to January 6, 2021 and their counsel, and individuals who were physically harmed on January 6, 2021 at the United States Capitol and their counsel.
- Viewers will be asked to leave cell phones and cameras near the door and must agree not to record footage from terminals.
- Access will be subject to time restrictions to enable CHA Staff to administer this access.
- Access to footage or provision of video clips will be subject to CHA's discretion and is final, not subject to appeal. Neither the limited grant of access to the footage nor the limited provision of video clips by CHA makes or shall be interpreted to make this footage a public record for any purpose, including but not limited to the common law right of access, or any other open records laws.
- These policies do not apply to Members of Congress

News outlets and Qualifying Non-Profit Organizations

1. Terminals will be available for news outlets weekdays except holidays, from (i) 9 am to noon and (ii) 1 pm to 4 pm, eastern time.
2. Only U.S. citizens, U.S. nationals, and U.S. lawful permanent residents, are permitted to access terminals and footage.
3. Qualifying Non-Profit Organization is defined as a non-partisan non-profit organization with the mission of contributing significantly to the public understanding of the operations or activities of the government and a record of advancing that mission.
4. Must email committee staff (CHAREP.OversightRequests@mail.house.gov) to request an appointment time for terminal access.
5. Each appointment is first come, first served.
6. Each appointment slot is no longer than 3 hours per day, with one appointment per week.
7. Up to three separate entities can review footage at the terminals at the same time.
8. Appointments in addition to the one per week allotment may be considered and awarded at the discretion of CHA based on space and time constraints.
9. If demand is high, additional review times could be made available based on availability.

Access by Defendants

1. Terminals will be available for defendants charged with crimes related to January 6, 2021 and their counsel, and individuals who were physically harmed on January 6, 2021 at the United States Capitol and their counsel on weekdays from (i) 9 am to noon and (ii) 1 pm to 4 pm.
2. Only U.S. citizens, U.S. nationals, and U.S. lawful permanent residents are permitted to access terminals and footage.
3. Must email committee staff (CHARep.OversightRequests@mail.house.gov) to request an appointment time.
4. Each appointment is first come, first served.
5. Each appointment slot is no longer than 3 hours per day, with one appointment per week
6. Up to three separate entities can review footage at the terminals at the same time (e.g., same counsel can't request three appointments for the same day)
7. Individuals in this category will have priority over any other category to review footage.

8. Appointments in addition to the one per week allotment will be considered and awarded at the discretion of CHA based on space and time constraints. If demand is high, additional review times could be made available based on CHA staff availability.

Process for requesting clips after terminal review:

U.S. news outlets will be permitted to request video clips of USCP video subject to the following criteria.

1. Each outlet can request [10] clips per week and 20 clips per month.
2. Clips can be no longer than [10 minutes] in length.
3. The total length of clips per request can be no more than 45 minutes or (1 hour 30 minutes per month).
4. Clips will be released based on the following parameters:

- **Category 1.** Clips will be released if the same or similar clips have already been made public by federal government, news media, or documentary filmmakers (i.e., not on social media).
    - "Similar" means the same camera angle or same area in or around the Capitol, at roughly the same time.
    - CHA staff will keep a list of public clips described above. Requester may also point CHA staff to public release (by federal government or news media or documentary films (i.e., not on social media)) if not found on committee list.

- **Category 2.** Clips will be released if from a camera previously identified by USCP as "non-sensitive" and do not show footage that, in the determination of CHA staff, would raise security concerns, such as footage showing officers defusing bombs or other tactical situations.
    - USCP officers' faces will be blurred from Category 2 footage, if possible, by requesting entity.

- **Category 3.** Clips will generally not be released if from a camera previously identified by USCP as "sensitive."
    - Exceptions: If such clips are (a) also Category 1 clips, or (b) in the determination of CHA staff the public interest of the clips outweighs the security sensitivity of the clips.
    - CHA may seek advice of USCP with respect to sensitivity of clips.

Defendants charged with crimes related to January 6th and their counsel may request footage subject to the same procedures in Section 4 above if, after reviewing the footage, they certify to CHA that:

1. The requested footage was not made available to them by prosecutors;
2. That the requested footage contains potentially exculpatory information; and
3. That it will be used exclusively for purposes of their or their client's defense.

General availability of clips:

1. After clips have been released pursuant to procedures above, the clips will be uploaded to a "public reading room" maintained by the Committee on House Administration. The public reading room will also include any clips already released before these procedures were put into place.
2. Clips will not be associated with a particular requester
3. Access to the public reading room will be available via email requests made to the Committee on House Administration. Public access to the reading room will terminate at a time to be determined by the Committee.

4. Only U.S. citizens, U.S. nationals, and U.S. lawful permanent residents are permitted to access the reading room.