IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA; and CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiffs, v. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT; TAE D. JOHNSON, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement; NATIONAL ARCHIVES AND RECORDS ADMINISTRATION; and DEBRA S. WALL, in her official capacity as Acting Archivist of the United States,* Defendants.	)	Civil Action No. 1:22-cv-01129 (CJN)

DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED

Defendants U.S. Immigration and Customs Enforcement; Tae D. Johnson, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement; National Archives and Records Administration; and Debra S. Wall, in her official capacity as Acting Archivist of the United States, hereby move to dismiss the complaint in its entirety pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The motion is supported by the attached memorandum of law and the declaration of Daniel Tucker, U.S. Immigration and Customs Enforcement Records Officer. A proposed order accompanies the motion.

* Acting Archivist Wall is automatically substituted as a Defendant pursuant to Federal Rule of Civil Procedure 25(d).

Dated: June 27, 2022

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED

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INTRODUCTION

At its core, this is a case about whether a detention facility operated by a county government in Glades County, Florida, violated its obligations as a contractor for U.S. Immigration and Customs Enforcement ("ICE") by automatically overwriting detainee video recordings after ninety days, in violation of the Federal Records Act ("FRA"). Plaintiffs have not sued Glades County, nor are they seeking a ruling that the deletion of any particular records by Glades County violated the FRA. Those choices are not difficult to understand, for long-established D.C. Circuit precedent provides that Plaintiffs may not seek judicial relief concerning the deletion of particular records. *See Armstrong v. Bush*, 924 F.2d 282, 292-295 (D.C. Cir. 1991). Moreover, as Plaintiffs acknowledge, Glades County is not currently detaining immigrants on behalf of ICE.

Unable to squarely challenge the deletion of video recordings by Glades County, Plaintiffs have endeavored to shoehorn their case into two Administrative Procedure Act ("APA") claims against ICE and the National Archives and Records Administration ("NARA"). In Count I, Plaintiffs allege that both ICE and NARA have failed to refer the deletion of records to the Attorney General, in violation of 44 U.S.C. § 3106. In Count II, Plaintiffs allege that ICE has failed to adopt adequate records guidelines and directives for its detention contractors, in violation of 44 U.S.C. § 3102.

Those claims both fail. With respect to Count I, D.C. Circuit precedent sometimes permits an APA action challenging the failure of either the relevant agency head or NARA to request an enforcement action by the Attorney General under 44 U.S.C. § 3106 with respect to unlawfully disposed records. *See Armstrong*, 924 F.2d at 292-95. Critically, however, any obligation to make a referral to the Attorney General exists for records that "have been unlawfully removed from th[e] agency," 44 U.S.C. § 3106(a)—not for records that have been deleted. *See Citizens for Resp. & Ethics in Washington ("CREW") v. SEC*, 916 F. Supp. 2d 141, 148 (D.D.C. 2013) (Boasberg, J.)

("Because the plain meaning of the statute is clear that the mandatory enforcement duty in the second clause of § 3106 refers only to removed records, the SEC was under no duty to undertake restoration efforts as to the . . . records that were destroyed in this case."). Moreover, if the statute were understood to require referral to the Attorney General where records have been deleted, Plaintiffs would lack standing because they do not allege that the Attorney General could recover any records and thereby redress the injury alleged in the complaint. *See Judicial Watch, Inc. v. Pompeo*, 744 F. App'x 3, 4 (D.C. Cir. 2018) (no justiciable case or controversy where "referral to the Attorney General would be 'pointless'" (quoting *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 956 (D.C. Cir. 2016))).

The central allegation supporting Count II is that "ICE's recordkeeping guidelines and directives for its detention contractors fail to inform contractors of their records preservation obligations under the FRA, its implementing regulations, and NARA directives." Compl., ECF No. 1, ¶ 77. That is simply wrong, and Plaintiffs cannot survive a Rule 12 motion by asking the Court to ignore unambiguous, judicially noticeable ICE policies. In actuality, ICE's official records policy states that "[a]ll ICE employees *and contractors* are required to adequately maintain, identify, capture, retain, file, dispose, and transfer all ICE records within their respective Directorate or Program Office," and that "[a]ll ICE records are required to be preserved appropriately, easily accessible, and dispositioned at the end of their lifecycle." *See* ICE Directive 4007.1, Records and Information Management, Declaration of ICE Records Officer Daniel Tucker ("Tucker Decl.") Ex. C, at 1 (emphasis added). In addition, following Judge Mehta's decision in *CREW v. NARA*, No. 20-739, 2021 WL 950142 (D.D.C. Mar. 12, 2021), ICE's Office of Information Governance and Privacy issued a memorandum that, coupled with informing Enforcement and Removal Operations ("ERO") about the court's ruling, instructed ERO that

"detention case files will need to be maintained indefinitely." *See* Memo from Kenneth N. Clark, Chief Data Officer (May 20, 2021), Tucker Decl. Ex. K, at 2. Against that backdrop, Plaintiffs' challenge to ICE's records policies cannot possibly succeed.

The Court should therefore grant Defendants' motion to dismiss.

BACKGROUND

I. The Federal Records Act

The FRA "governs the creation, management and disposal of federal records," in order to ensure "'[a]ccurate and complete documentation'" of Federal Government business and "'[j]udicious preservation and disposal of records.'" *Armstrong*, 924 F.2d at 284-85 (quoting 44 U.S.C. § 2902 (alterations in original)). The FRA requires agencies to create and preserve records that document the organization, functions, policies, decisions, procedures, and essential transactions of the agency, and establish safeguards against the removal or destruction of records. 44 U.S.C. §§ 3101, 3105. The Archivist of the United States has the ultimate authority to determine whether "recorded information" constitutes a "record" under the FRA and to authorize agencies to dispose of records. *Id.* § 3301(b); *see id.* §§ 2904, 3303.

Pursuant to the FRA, "records" are defined to include, with limited exceptions, "all recorded information, . . . made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them." 44 U.S.C. § 3301(a)(1)(A).

The FRA is based upon a "system of administrative enforcement." *Armstrong*, 924 F.2d at 294. Under this system, "the agency head and Archivist may proceed first by invoking the agency's 'safeguards against the removal or loss of records,' and taking . . . intra-agency actions"

to prevent the potential loss or removal of records. *Id.* at 296 n.12 (quoting 44 U.S.C. § 3105). If those efforts are unsuccessful, "the agency head, in the first instance, and then the Archivist [must] request that the Attorney General initiate an action to prevent the destruction of documents." *Id.* at 294; *see* 44 U.S.C. § 3106. As described more fully below, while the statute requires an agency to notify the Archivist "of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency," it only requires the agency to seek the assistance of the Attorney General for "the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully *removed* from that agency." 44 U.S.C. § 3106(a) (emphasis added).

Because "Congress . . . decided to rely on administrative enforcement, rather than judicial review at the behest of private litigants, to prevent the destruction or removal of records," the FRA "precludes judicial review" of actions by private litigants seeking to prevent an agency official from improperly destroying or removing records. *Armstrong*, 924 F.2d at 294. Instead, under the APA, a private party may challenge (1) the sufficiency of an agency's record-keeping guidelines and directives; or (2) the agency head's or the Archivist's failure to seek initiation of an enforcement action by the Attorney General under 44 U.S.C. § 3106. *See Armstrong*, 924 F.2d at 292-95.

II. Factual Background

As set out above, Count I focuses on the deletion of video recordings by Glades County, while Count II challenges ICE's records guidelines and directives for all of its detention contractors, particularly with respect to detention case files. The relevant factual background for these two claims is set forth below.

A. Video Recordings

Count I concerns the Glades County Detention Center, which began detaining immigrants on behalf of ICE in May 2007. *See* Compl. ¶ 32. The relevant background begins with an unauthorized disposal case concerning a different facility, however. Specifically, in November 2019, NARA opened an unauthorized disposition case, UD-2020-0009, concerning a facility in New Mexico. *See id.* ¶ 60. On July 13, 2020, NARA instructed ICE to "immediately cease the deletion of any surveillance footage until ICE has an approved records retention schedule for the surveillance video footage of ICE facilities." Tucker Decl. Ex. E, at 1. On July 29, 2020, ICE's Records Officer led a telephonic meeting with ICE's ERO, as well as certain other offices, in which he informed "all attendees that all video surveillance within ICE detention facilities, to include areas where individuals are temporarily held, needed to be indefinitely preserved until NARA issued an approved records schedule." Tucker Decl. ¶ 8. He further indicated that "all vendors involved in operating detention facilities on behalf of ICE needed to be informed of this requirement." *Id.*

On January 29, 2021, ICE's Acting Assistant Director for Field Operations for ERO sent a broadcast message informing all field offices that they should inform all detention facilities that "they are to retain all video surveillance data . . . until further notice." Email Correspondence, Tucker Decl. Ex. F. On February 1, 2021, the ERO Miami Deputy Field Office Director forwarded that email to other ERO Miami field leadership, informing the recipients to ensure all ERO detention facilities are notified of the NARA instruction to "retain **all** video surveillance data." *Id.* That same day, a contracting officer from the ICE Miami Field Office wrote to Commander Chad Schipansky, the Glades County Detention Operations Commander, to notify him of that instruction. *Id.* Commander Schipansky responded that Glades County's "capabilities are

currently at 90 days retention of video records" and that adding additional storage capacity would entail "astronomical cost." *Id.*

On September 23, 2021, NARA approved records schedule DAA-0567-2021-0001, which permits the deletion of non-evidentiary video recordings after sixty days. *See* Tucker Decl. ¶ 11; *see also* NARA, *Request for Records Disposition Authority*, DAA-0567-2021-0001, https://perma.cc/35BP-GBNQ. In November 2021, ICE disseminated a memo signed by ICE's Chief Information Officer to notify ICE leadership, to include ERO's Executive Assistant Director, of the new records schedule. *See* Tucker Decl. Ex. G.

On January 24, 2022, Plaintiff submitted a letter to both ICE and NARA, requesting that each "promptly take action to address the ongoing deletion of surveillance video" at Glades. Letter from Am. Civil Liberties Found. (Jan. 24, 2022), Tucker Decl. Ex. H, at 1. On February 17, 2022, NARA wrote to ICE, indicating that it was concerned about "any non-evidentiary video surveillance records that may have been destroyed during the period between July 2020 and September 2021," *i.e.*, between the NARA directive to preserve all video surveillance records and the approval of records schedule DAA-0567-2021-0001. *See* Letter from Laurence Brewer, Chief Records Officer (Feb. 17, 2022), Tucker Decl. Ex. I, at 1.

One week later, on February 24, 2022, ICE's Records Officer visited Glades to assess its records compliance, and also spoke with Commander Schipansky by telephone. *See* Tucker Decl. ¶ 12. Although ICE "emphasized Glades' responsibility to retain all evidentiary video surveillance indefinitely," Commander Schipanksy "communicated the facility's inability to retain all video surveillance past 90 days due to financial constraints." *Id.* In particular, "during the site visit, Glades confirmed that after 90 days, the videos are overwritten, and previous data is unretrievable, as recent surveillance data replaces the older surveillance data." *Id.* On April 22, 2022, ICE

responded to NARA. *See* Letter from Daniel Tucker (Apr. 22, 2022), Tucker Decl. Ex. J. Its letter summarized the steps that ICE had taken to investigate and respond to the allegations and acknowledged that an "unauthorized deletion of records occurred due to financial burden." *Id.* at 2. The letter indicated that "Glades was only able to retain video for 90 days, after which time it was overwritten, and therefore unretrievable." *Id.* As of the date of this filing, the unauthorized disposition case remains pending with NARA.

Following the initiation of litigation, on May 19, 2022, ICE's Records Officer again wrote to Commander Schipansky, reminding Glades of its obligations under records schedule DAA-0567-2021-0001, as well as in light of this litigation. Four days later, Commander Schipansky responded, reiterating that "Glades[']s capabilities in video retention for non-evidentiary video was approximately 90 days," whereas "any and all identified evidentiary video was retained indefinitely." *See* Correspondence Between Daniel Tucker and Chad Schipansky, Tucker Decl. Ex. L.

B. Detainee Records

In December 2019, NARA approved ICE records schedule DAA-0567-2015-0013, which governed the disposition of eight categories of detainee records. *See* Tucker Decl. ¶ 15. This records schedule would have generally required the retention of these records for various periods of years, depending on their type, after which time they could be deleted. *See id.* CREW and others filed suit challenging NARA's approval of the records schedule, *see CREW v. NARA*, No. 20-739 (D.D.C.), and the parties stipulated that "Defendant ICE will issue a litigation hold instructing all relevant personnel not to destroy records under Schedule No. DAA-0567-2015-0013." *Id.* ECF No. 5 ¶ 1; *see* Tucker Decl. ¶ 15 (indicating that such a litigation hold was implemented and remains in effect at this time). After Judge Mehta issued a decision substantially vacating the records schedule, *see CREW v. NARA*, 2021 WL 950142, ICE's Office of Information

Governance and Privacy ("IGP") notified ERO of the court's ruling and instructed it that it "is required to indefinitely preserve and retain the [vacated] categories of records," Tucker Decl. Ex. K. at 1. That instruction will remain "in effect until NARA has issued an approved records schedule pertaining to these categories of detainee records." Tucker Decl. ¶ 17. With respect to detention case files (a distinct category of records subject to NARA schedule N1-567-11-14), IGP further instructed ERO that "all ERO detention facilities, contract vendors, and personnel be notified to indefinitely preserve all detention case files until further notice." *Id.* at 1; *accord id.* at 2 ("[U]ntil further notice, the detention case files will need to be maintained indefinitely."). That instruction also remains in effect. *See* Tucker Decl. ¶ 17.

LEGAL STANDARD

Defendants move to dismiss for lack of jurisdiction under Rule 12(b)(1) and for failure to state a claim upon which relief may be granted under Rule 12(b)(6). Under Rule 12(b)(1), "[i]t is to be presumed that a cause lies outside [federal courts'] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The Court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction. *See, e.g.*, *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947). Under Rule 12(b)(6), a plaintiff must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. Count I Fails Because Plaintiffs Do Not Allege That Records Have Been Removed From ICE Or That An Enforcement Action By The Attorney General Would Likely Redress Their Asserted Injury.

In Count I, Plaintiffs seek an order compelling ICE and NARA to initiate an enforcement action through the Attorney General "to address Glades's unlawful destruction of federal records."

Compl. Prayer for Relief ¶ 4. The Court should dismiss that claim because the plain text of 44 U.S.C. § 3106 contemplates referral to the Attorney General only where records have been "removed"—not when they have been deleted or otherwise destroyed. Even if the statute did require referral to the Attorney General with respect to deleted records, Plaintiffs would lack standing to demand such a referral because they do not allege that the Attorney General could recover any deleted records or stop an ongoing deletion of records.

A. 44 U.S.C. § 3106 Requires Referral To The Attorney General Only Where Records Have Been "Removed" From An Agency.

The text of 44 U.S.C. § 3106 is clear. The first clause of subsection (a) provides that agencies shall notify the Archivist of seven separate potential unauthorized dispositions of records: "removal, defacing, alteration, corruption, deletion, erasure, or other destruction." 44 U.S.C. § 3106(a). The second clause provides that agencies "shall initiate action through the Attorney General for the recovery of records" in only one of those cases: where records have been "unlawfully removed." *Id.*; *accord Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 148 (1980) ("The head of the agency is required under 44 U.S.C. § 3106 to notify the Attorney General if he determines or 'has reason to believe' that records have been improperly removed from the agency.").[1] As Judge Boasberg has explained in a comprehensive opinion, "the plain meaning of the statute is clear that the mandatory enforcement duty in the second clause of § 3106 refers only to removed records." *CREW v. SEC*, 916 F. Supp. 2d at 148; *accord, e.g.*, *Slockish v.*

[1] NARA has promulgated regulations defining "removal" and "destruction" as distinct concepts. "Removal means selling, donating, loaning, transferring, stealing, or otherwise allowing a record to leave the custody of a Federal agency without the permission of the Archivist of the United States." 36 C.F.R. § 1230.3(b). "Unlawful or accidental destruction" is "disposal of an unscheduled or permanent record; disposal prior to the end of the NARA-approved retention period of a temporary record . . . and disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records." *Id.*

U.S. Fed. Highway Admin., No. 08-1169, 2015 WL 13667112, at *4 (D. Or. Dec. 17, 2015).[2] Because Plaintiffs' allegations concern deletion and destruction, not removal, *see, e.g.*, Compl. ¶¶ 1, 3, 5, 12, 41, 44, 47, 59, 59, 67, there is no obligation to "initiate action through the Attorney General for the recovery of records" under the unambiguous text of 44 U.S.C. § 3106(a).

44 U.S.C. § 3106(b), in turn, makes clear that the Archivist's obligation only attaches when the agency fails to initiate the action required by 44 U.S.C. § 3106(a). In particular, the statute provides that it applies where the agency "does not initiate an action for such recovery or other redress," 44 U.S.C. § 3106(b), which is best understood as referring back to the only action described in 44 U.S.C. § 3106(a); *i.e.*, an action seeking the "recovery" of "unlawfully removed" records. 44 U.S.C. § 3106(a). When the agency fails to do that, then "the Archivist shall request the Attorney General to initiate *such an action*," 44 U.S.C. § 3106(b) (emphasis added)—*i.e.*, the action that the agency should have brought under 44 U.S.C. § 3106(a). Reading the statute otherwise would inexplicably (1) place greater referral obligations on the Archivist than on the agency itself, and (2) mean that the Archivist must wait a "reasonable period of time after [the agency is] notified of any such unlawful action" for an agency to make a referral to the Attorney General even in cases where the agency has no obligation to make such a referral. The far more

[2] Following Judge Boasberg's ruling in *CREW v. SEC*, Congress amended 44 U.S.C. § 3106 to expand the types of dispositions requiring notification to the Archivist: while the statute previously only required such notification in the case of "unlawful removal, defacing, alteration, or destruction," Congress in the Presidential and Federal Records Act Amendments of 2014 added "corruption," "deletion," and "erasure" to that list. *See* Pub. L. No. 113-187, sec. 4(a), 128 Stat. 2003, 2009. Yet it continued to only require referral to the Attorney General where records have been "unlawfully removed."

logical reading is that the Archivist's obligations are derivative of the agency's and only attach where the agency fails to make a legally required referral.[3]

B. If 44 U.S.C. § 3106 Required Referral To The Attorney General With Respect To Deleted Records, Plaintiffs Would Lack Standing Because They Do Not Allege That Such A Referral Would Redress Their Injury.

Because Plaintiffs do not allege that records have been unlawfully removed from ICE, the Court need not consider whether they have standing to seek relief that the statute does not contemplate. Yet if the Court did conclude that 44 U.S.C. § 3106 requires referral to the Attorney General where records have been deleted, Plaintiffs would lack standing to demand such a referral because they do not allege that a referral would bring them any redress other than a general interest in seeing the law followed.

Because it is the Executive Branch's responsibility to enforce the law, *see, e.g.*, U.S. Const. Art. II, sec. 1, private parties generally lack standing to compel the Executive Branch to do so. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (plaintiffs may not vindicate "undifferentiated public interest in executive officers' compliance with the law"); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (similar). A plaintiff asserting a claim under 44 U.S.C. § 3106, like any other Plaintiff in an Article III court, must therefore be able to answer the question: "What's it to you?" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (internal quotation marks omitted). As is particularly relevant here, a plaintiff must allege that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 38, 43 (1976)).

[3] 44 U.S.C. § 3106(b) also requires the Archivist to make a referral when the agency head is "participating in, or believed to be participating in any such unlawful action." Plaintiffs do not make such allegations here.

D.C. Circuit cases under 44 U.S.C. § 3106 make clear that referral to the Attorney General is not, on its own, sufficient redress under Article III. Instead, Article III requires that it be reasonably likely that a referral will lead to the recovery of records. Most significantly, in the FRA litigation concerning former Secretary of State Hillary Clinton's use of a personal email server, the D.C. Circuit initially rejected the contention that the case was moot because the government had not made "a showing that the requested enforcement action could not shake loose a few more emails," *Judicial Watch, Inc. v. Kerry*, 844 F.3d at 955, though it acknowledged that a mootness argument "might well succeed"—even absent referral to the Attorney General—if the government had searched an additional account for the removed emails, *see id.* at 955. Following additional recovery efforts, the D.C. Circuit held that the case was moot because "referral to the Attorney General would be 'pointless.'" *Judicial Watch, Inc. v. Pompeo*, 744 F. App'x at 4 (quoting *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952). Similarly, in *Cause of Action v. Tillerson*, 285 F. Supp. 3d 201 (D.D.C. 2018), which concerned former Secretary of State Colin Powell's use of a personal email account, Judge McFadden rejected the contention that "referral to the Attorney General will itself constitute redress for the alleged injury," *id.* at 206 n.3, but initially held that Plaintiffs' injury was potentially redressable because Plaintiffs had demonstrated a "substantial likelihood that emails will be recovered in an action by the Attorney General," *id.* at 205 (internal quotation marks omitted). Following additional recovery efforts, Judge McFadden held that the case was moot because "it is only speculation to think that referral to the Attorney General might remedy the Plaintiff's inability to access Secretary Powell's emails." *Cause of Action v. Pompeo*, 319 F. Supp. 3d 230, 232 (D.D.C. 2018). These cases make clear that referral to the Attorney General only constitutes Article III redress where it would be reasonably likely to lead to the recovery of records.

See also CREW v. SEC, 916 F. Supp. 2d at 148 (recognizing jurisdictional problems with a suit seeking records that are "permanently unrecoverable").[4]

In light of this case law, Plaintiffs could only satisfy their burden of establishing redressability if they alleged a substantial likelihood that referral to the Attorney General would lead to the recovery of deleted video recordings. Yet Plaintiffs do not allege—anywhere, even once—that the Attorney General could somehow recover video recordings that Glades County has repeatedly overwritten. To the contrary, Plaintiffs' pre-litigation letter highlighted the possibility of records being "irretrievably destroyed" in violation of the FRA. Tucker Decl. Ex. H at 7. And Glades has informed ICE that the records at issue have been "overwritten, and previous data is unretrievable, as recent surveillance data replaces the older surveillance data." Tucker Decl. ¶ 12. Because Plaintiffs do not allege that the Attorney General could actually recover records that they could then access, they are "raising only a generally available grievance about government—claiming only harm to [their] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [them] than it does the public at large." *Lujan*, 504 U.S. at 573-4. That is not an Article III case or controversy that this Court may adjudicate.[5]

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[4] To the extent that Judge Kennedy's decision in *CREW v. Executive Office of the President*, 587 F. Supp. 2d 48, 62 (D.D.C. 2008), suggests that referral to the Attorney General is itself sufficient redress, it is irreconcilable with these cases.

[5] In the principal FRA cases concerning agencies' obligations under 44 U.S.C. § 3106, the question was whether the government had made a sufficient attempt to recover removed records while the litigation was pending, such that the case, while a live controversy at the time of filing, had become moot. *See, e.g.*, *Judicial Watch, Inc. v. Kerry*, 844 F.3d at 955. Demonstrating such mootness was the government's burden. *See, e.g.*, *Cierco v. Lew*, 190 F. Supp. 3d 16, 23 (D.D.C. 2016). Defendants here are not raising a mootness challenge, however, but instead asserting that the complaint fails to allege required elements of Article III standing. *See, e.g.*, *Hardaway v. D.C. Hous. Auth.*, 843 F.3d 973, 979 (D.C. Cir. 2016) ("[W]hereas standing is measured by the plaintiff's 'concrete stake' at the outset of the litigation, mootness depends on whether the parties maintain 'a continuing interest' in the litigation today." (quoting *Friends of the Earth, Inc. v.*

To be sure, as Judge Boasberg acknowledged in *CREW v. SEC*, *Armstrong* involved the destruction of records. *See* 916 F. Supp. 2d at 147. But that similarity ignores a critical distinction: the plaintiffs in *Armstrong* sought the Attorney General's assistance to put a stop to ongoing destruction, and not just to punish destruction that had already occurred. *See Armstrong*, 924 F.2d at 296 n.12 ("agency head and Archivist are required to take action to *prevent* the unlawful destruction or removal of records") (emphasis added); *see also CREW v. SEC*, 916 F. Supp. 2d at 147 (*Armstrong* cases "were forward looking, seeking to prevent the future destruction of records"); *Judicial Watch, Inc. v. Kerry*, 844 F.3d at 954 (*Armstrong* "involved a threatened destruction of records"). While prevention of future destruction might amount to sufficient redress under Article III, in this case Plaintiffs are seeking a referral to the Attorney General exclusively with respect to records that have already been deleted. Plaintiffs acknowledge that "ICE is not currently detaining immigrants at Glades," Compl. ¶ 40, and they recognize that an approved NARA schedule now permits the routine deletion of non-evidentiary video. *See, e.g.*, Compl. ¶ 61 (NARA is concerned about records "that may have been destroyed during the period between July 2020 and September 2021"). *Armstrong* is thus entirely distinguishable. *See also, e.g.*, *CREW v. DHS*, 527 F. Supp. 2d 101, 111 (D.D.C. 2007) (Lamberth, J.) ("The APA . . . authorizes the Court to entertain a claim that the [agency] head . . . or the Archivist have breached their statutory obligations to take enforcement action to *prevent an agency official from improperly destroying records* or to *recover records unlawfully removed* from the agency." (emphasis added)). As distinguished from *Armstrong*, where there was the existence of a continued threat to the destruction of records, such a threat simply does not exist in the matter at hand.

Laidlaw Environmental Services (TOC), 528 U.S. 167, 191-92 (2000)). It is therefore Plaintiffs' burden to demonstrate that their alleged injury is redressable, rather than Defendants' burden to demonstrate that it is not. *See, e.g.*, *Kokkonen*, 511 U.S. at 377.

One other point bears emphasis: Nothing in the FRA dictates what the Attorney General should or should not do upon receiving a referral from an agency or NARA. At most, a court could direct NARA or an agency to make a request; the Attorney General has prosecutorial discretion as to how to proceed from that point, and his decision is not subject to judicial review. *See Wayte v. United States*, 470 U.S. 598, 607 (1985) (government has "broad discretion" to enforce the laws of the United States); *Morris v. Gressette*, 432 U.S. 491, 500-01 (1977) (holding that the Attorney General's exercise of discretion under § 5 of the Voting Rights Act is judicially unreviewable); *In re Sealed Case*, 131 F.3d 208, 214 (D.C. Cir. 1997) ("In the ordinary case, the exercise of prosecutorial discretion . . . has long been held presumptively unreviewable."); *see also* 5 U.S.C. § 701(a)(2) (no review under the APA where "agency action is committed to agency discretion by law"); *Heckler v. Chaney*, 470 U.S. 821, 838 (1985) ("agency refusals to institute investigative or enforcement proceedings" are presumed immune from judicial review under 5 U.S.C. § 701(a)(2)). Thus, even if Defendants referred this matter to the Attorney General, Plaintiff can only speculate about whether the Attorney General would elect to initiate action. And that speculation is even more far-fetched here where the video recordings have been overwritten, and not even Plaintiffs allege that they can be recovered. That is all the more reason why Plaintiffs cannot satisfy their burden of demonstrating redressability.

II. Count II Fails Because ICE's Recordkeeping Guidelines And Directives Adequately Describe Contractors' Obligations To Comply With The FRA.

Count II challenges the sufficiency of ICE's recordkeeping guidelines and directives. Without identifying the guidelines and directives that it challenges, the complaint alleges that those guidelines and directives are arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A). Compl. ¶ 79. Alternatively, it alleges that ICE's failure to adopt and implement sufficient guidelines and directives constitutes a failure to act under 5 U.S.C. § 706(1). *See id.* ¶ 80. The apparent theory

behind both claims is that whatever guidelines or directives ICE has, they "fail to inform contractors of their records preservation obligations under the FRA, its implementing regulations, and NARA directives." *Id.* ¶ 77.

Count II fails for both lack of jurisdiction, under Rule 12(b)(1), and for failure to state a claim, under Rule 12(b)(6). "For an FRA claim brought under the APA to survive a motion to dismiss, Plaintiff must allege facts that could plausibly lead the court to find that the contested policy is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law *because [it] permit[s] the destruction of record material that should be maintained*.'" *Judicial Watch, Inc. v. FBI*, No. 18-2316, 2020 WL 5505347, at *2 (D.D.C. Sept. 11, 2020) (Contreras, J.) (quoting *Armstrong*, 924 F.2d at 297) (emphasis added). Plaintiffs nowhere make such factual allegations, and in any event ICE has clear records policies stating that contractors are bound by the FRA.

A. ICE Maintains FRA-Compliant Recordkeeping Guidelines And Directives.

Plaintiffs nowhere allege that ICE records policies permit the destruction of record material that should be maintained, *see Judicial Watch, Inc. v FBI*, 2020 WL 5505347, at *2, which is itself sufficient reason to dismiss Count II. Even if more were required, it is indisputable from judicially noticeable documents that ICE already has guidelines and directives that "inform contractors of their records preservation obligations," Compl. ¶ 77. Pursuant to Department of Homeland Security ("DHS") Directive 141-01, each component of DHS must [i]mplement the DHS [Records Information Management] Program within their Components." *See* DHS Directive 141-01, Records and Information Management, Tucker Decl. Ex. A, § IV.F.1. DHS Instruction 141-01-001 "authorizes all DHS components to develop and implement more specific policies and procedures as it relates to records and information management." Tucker Decl. ¶ 5; *see also* DHS

Instruction 141-01-001, Tucker Decl. Ex. B. ICE Directive 4007.1, which was issued pursuant to the delegation from DHS, unambiguously states that:

- "The preservation of all ICE records must be done in accordance with applicable laws, regulations, and policies." Tucker Decl. Ex. C. ¶ 1.
- "All ICE employees *and contractors* are required to adequately maintain, identify, capture, retain, file, dispose, and transfer all ICE records within their respective Directorate or Program Office. *Id.* ¶ 2 (emphasis added).
- "All ICE records, either electronic or hardcopy, must be maintained and stored in a centralized electronic records repository in accordance with records schedules approved by ICE's Office of Information Governance and Privacy (IGP) Records and Data Management Unit (RDM) and the National Archives and Records Administration (NARA)." *Id.*
- "ICE Employees *and Contractors* are responsible for" "[c]omplying with the terms of this Directive," and "[w]orking . . . to maintain, store, transfer, and/or dispose of records in accordance with law and policy." *Id.* ¶ 4.7(1), (3) (emphasis added).

ICE Directive 4007.1 further requires "ICE Employees and Contractors" to complete annual records training. *See id.* ¶ 4.7(4); Tucker Decl. ¶ 6. That required training provides that ICE "contractors" and "[o]utside (contractor) service providers" "are bound by Federal recordkeeping requirements," and are obligated "to follow the applicable records management laws and regulations codified in ICE and DHS policies." Records Management for ICE Personnel, Tucker Decl. Ex. D, at 12. These essential facts are simply incompatible with Plaintiffs' baseless assertion that ICE does not "inform contractors of their records preservation obligations under the FRA, its implementing regulations, and NARA directives." Compl. ¶ 77.

In a comprehensive opinion, Judge Contreras has already looked to some of these policies and held—in a case brought by CREW—that DHS's recordkeeping guidelines and directives satisfy the APA standard of review. As Judge Contreras explained, they "may be general in substance, but the FRA gives agencies latitude to craft records-creation policies appropriate for their circumstances." *CREW v. DHS*, 507 F. Supp. 3d 228, 248 (D.D.C. 2020). While these

policies speak "at a general level," they "unequivocally require compliance with the FRA and with NARA regulations." *Id.* at 247. As in *CREW v. Wheeler*, Plaintiffs "do not point to any specific requirement imposed by the FRA that [the policy] lacks." 352 F. Supp. 3d 1, 12 (D.D.C. 2019) (Boasberg, J.); *accord, e.g.*, *CREW v. DHS*, 507 F. Supp. 3d at 248 ("They do not identify what portions of the policies are deficient or explain how the policies fall short with respect to each regulatory provision."); *Judicial Watch, Inc. v. FBI*, No. 18-23016, 2019 WL 4194501, at *9 (D.D.C. Sept. 4, 2019) (Contreras, J.) (claim lacked "precise factual allegations that highlight *which* particular deficiencies make the challenge to [agency's] policy inadequate").

Nor can Plaintiffs rescue Count II by speculating about ways in which ICE's policies could be even clearer than they already are. "It is one thing for a plaintiff to show that an agency completely lacks a policy addressing a particular FRA" requirement, but it is "much more difficult for a plaintiff challenging a policy that is consistent with the FRA on its face to overcome two layers of discretion and show that, in fact, the policy does not go far enough in meeting the aim of a particular FRA requirement." *CREW v. DHS*, 507 F. Supp. 3d at 247. Plaintiffs nowhere "identify what portions of the policies are deficient or explain how the policies fall short." *Id.* at 248. ICE's recordkeeping guidelines and directives are not arbitrary or capricious.

Finally, lest there by any doubt, these recordkeeping documents are properly before the Court on Defendants' Rule 12 motion. Plaintiffs have brought APA claims challenging ICE's "recordkeeping guidelines and directives," *see, e.g.*, Compl. ¶ 77, and these documents *are* those guidelines and directives. They are therefore properly considered under Rule 12(b)(6) as documents "incorporated by reference in the complaint, or documents upon which the plaintiff's complaint necessarily relies." *Hinton v. Corrections Corp. of Am.*, 624 F. Supp. 2d 45, 46 (D.D.C. 2009) (internal quotation marks and citation omitted). Indeed, in previous litigation brought by

CREW concerning DHS's recordkeeping guidelines and directives, Judge Contreras took judicial notice of DHS Instruction No. 141-01-001 because "there is no reason to doubt that it is one of DHS's operative recordkeeping policies and Plaintiffs do not question its authenticity." *CREW v. DHS*, 507 F. Supp. 3d at 243.

Even if these documents were not cognizable under Rule 12(b)(6), they are properly before the Court under Rule 12(b)(1). Article III requires Plaintiffs to show that they have suffered an actual injury that this Court can redress, and in evaluating a challenge to Plaintiff's standing, the Court may consider materials outside the pleadings. *See, e.g.*, *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992). The fact that DHS and ICE already have FRA-compliant policies directly supports Defendants' jurisdictional challenge because it demonstrates that Plaintiffs have not suffered any injury, and that the Court cannot provide any redress because "[t]he remedy the Court could have issued would be one requiring the [agency] to do what it has already done." *CREW v. Wheeler*, 352 F. Supp. 3d at 11. Indeed, *CREW v. Wheeler* uncontroversially considered a revised, FRA-compliant records policy in the context of a mootness challenge made while the litigation was pending, and there is no reason why the result should be different simply because Plaintiffs were unaware that an FRA-compliant policy has existed from the outset of the litigation.

B. Plaintiffs Do Not Sufficiently Allege A Secret Policy Of Failing To Comply With The FRA.

Rather than addressing ICE's actual records guidelines and directives, Plaintiffs' claims focus entirely on what they believe are implementation failures: they allege (1) that "ICE [intergovernmental service agreements] and detention contracts frequently lack NARA's recommended records management language," Compl. ¶ 52; (2) that DHS's Office of Inspector General determined "dozens" of detention case files were improperly destroyed, *id.* ¶ 53; and (3) that ICE's Performance-Based National Detention Standards ("PBNDS") document "states that

field offices need only maintain detention files for 18 months and 'does not reference' applicable NARA retention requirements for longer preservation," *id*. ¶ 54.

Those claims fail because under *Armstrong*, while a party may bring an APA action challenging the sufficiency of an agency's FRA guidelines, it may not challenge an agency's compliance with those guidelines, or with the FRA itself. *See Armstrong*, 924 F.2d at 294. It follows that a plaintiff may not challenge isolated instances of noncompliance by "casting its claim as a challenge to an illusory record-keeping policy"; such a challenge "sounds in a cognizable APA claim," but "the substance of [the] allegations" concerns specific applications of the policy. *Competitive Enter. Inst. v. EPA*, 67 F. Supp. 3d 23, 33 (D.D.C. 2014) (Collyer, J.); *accord, e.g., CREW v. DHS*, 527 F. Supp. 2d at 111 ("Given the firm language in *Armstrong I*, CREW is precluded from suing the DHS to enjoin the agency from acting in contravention of its own recordkeeping guidelines or the FRA."). Put differently, "[t]he APA does not grant federal courts the authority to engage in pervasive oversight of an agency's compliance with the FRA." *CREW v. Wheeler*, 352 F. Supp. 3d at 11.

While a court cannot "address individual acts of noncompliance," some courts have held that they may "review an APA claim challenging an agency's informal policy or practice of violating certain directives of the FRA." *CREW v. Pompeo*, No. 19-3324, 2020 WL 1667638, at *4 (D.D.C. Apr. 3, 2020) (Boasberg, J.). Yet even courts that have contemplated such claims have made clear that "Plaintiffs cannot transform an allegedly brazen compliance violation into a 'policy or practice' claim simply by slapping the 'policy or practice' label on it." *Id.* at *5. Rather, courts have been careful to hold that a plaintiff cannot "protest[] individual acts of noncompliance with the FRA," and that "isolated violations" do not "suffice to state a valid claim." *CREW v. Pompeo*, No. 19-3324, 2020 WL 5748105, at *1, 5 (D.D.C. Sept. 25, 2020) (Boasberg, J.) (emphasis and

internal quotation marks omitted); *accord, e.g.*, *Price v. DOJ*, No. 18-1339, 2019 WL 2526439, at *5 (D.D.C. June 19, 2019) (Cooper, J.) (rejecting claim where "Price points to no official, public policy").

Plaintiffs nowhere challenge a "'policy, official or unofficial, setting agency-wide compliance with the FRA.'" *CREW v. Pompeo*, 2020 WL 5748105, at *7 (quoting *CREW v. DHS*, 387 F. Supp. 3d 33, 53 (D.D.C. 2019) (Contreras, J.)). Rather than alleging "systemic non-compliance" or a "policy orchestrated from the highest levels," *CREW v. Pompeo*, 2020 WL 1667638, at *6, Plaintiffs have made a few isolated allegations that ICE or ICE contractors "failed to comply with Department records policy in a 'specific factual context,'" *CREW v. Pompeo*, 2020 WL 5748105, at *6:

- Plaintiffs allege, citing two contracts, that "ICE [intergovernmental service agreements] and detention contracts frequently lack NARA's recommended records management language." Compl. ¶ 52.

- Plaintiffs point to a 2021 report from the DHS inspector general finding that "dozens" of detention case files were prematurely destroyed. *See id.* ¶ 53.

- Plaintiffs point to the same inspector general report's observation that ICE's Performance-Based National Detention Standards only requires maintenance of detention case files for 18 months, without reference to longer NARA requirements. *See id.* ¶ 54.

None of those allegations suffices to show a policy or practice of failing to comply with the FRA. As to the first allegation, while Plaintiffs allege that DHS contracts "frequently" lack appropriate records management language, they have identified only two such contracts, one of which is more than fifteen years old. That does not come close to satisfying Plaintiffs' burden of pleading "facts" that "permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679; *see also CREW v. Pompeo*, 2020 WL 1667638, at *6 (requiring, at a minimum, allegations of "widespread noncompliance" (internal quotation marks omitted)). As to

the second allegation, the inspector general's finding that "dozens" of detention case files were prematurely deleted is not probative of an informal policy or practice given that ICE detains hundreds of thousands of individuals per year. *See* Cong. Rsch. Serv., *Immigration: Alternatives to Detention (ATD) Programs*, at 3 (July 8, 2019), https://crsreports.congress.gov/product/pdf/R/R45804/4. Nor may Plaintiffs survive a Rule 12 motion by speculating about hypothetical violations that the inspector general did not find, *contra* Compl. ¶ 53 (speculating about violations at other facilities). *See, e.g.*, *Metroil, Inc. v. ExxonMobil Oil Corp.*, 672 F.3d 1108, 1116 (D.C. Cir. 2012) (Kavanaugh, J.) (allegations that "rely on mere speculation . . . do not suffice to state a claim"); *Ahmed v. DHS*, No. 21-893, 2022 WL 424967, at *4 (D.D.C. Feb. 11, 2022) ("[T]he court need not accept as true mere speculation."). Finally, nothing in the PBNDS is inconsistent with the FRA; it observes that "Field Offices shall maintain detention files for a *minimum* of 18 months after release of the detainee," but that "[c]losed detention files shall be properly archived." PBNDS § 7.1, Detention Files, ¶¶ 7-8, https://perma.cc/3MCK-C78H (emphasis added). While the inspector general found that this language "caused confusion" because it does not reference applicable NARA regulations, *see* Compl. ¶ 34, it is not inconsistent with the FRA, nor does it "permit the destruction of 'records' that must be preserved under the FRA." *Armstrong*, 924 F.2d at 291. As in *CREW v. Pompeo*, Plaintiffs' "wide-ranging Complaint merely describes Defendants' isolated *violations* of the guidelines governing records creation rather than an agency-wide policy that violates the FRA." 2020 WL 1667638, at *5.

In any event, even if Plaintiffs had sufficiently pleaded that Defendants once had an informal policy of failing to preserve detention case files in compliance with the FRA, ICE has already taken steps to ensure that the entire organization understands what the actual policy is: full compliance with the FRA in all respects. In particular, following Judge Mehta's vacatur of the

NARA schedule governing ICE's detention case files in *CREW v. NARA*, ICE's Office of Information Governance and Privacy informed ERO that while "some detention facility vendors are using their own corporate retention schedules (generally 3 years retention) or citing Performance-Based National Detention Standards (18 months retention) for determining retention periods, . . . none of these retention periods are consistent with the NARA-approved schedule for detention case files (6 years)." Tucker Decl. Ex. K at 2. The memo thus advised that "detention case files will need to be maintained indefinitely." *Id.* ICE has already taken the curative steps that this Court might order—*i.e.,* a clear instruction not to delete detention case files—and there is nothing left for this Court to do. *See, e.g.*, *CREW v. Wheeler*, 352 F. Supp. 3d at 11 ("The remedy the Court could have issued would be one requiring the EPA to do what it has already done."); *CREW v. Pompeo*, 2020 WL 5748105, at *8 (holding that "revision to the Department's recordkeeping policies undermines the viability of their claim").

CONCLUSION

The Court should grant Defendants' motion to dismiss.

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