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

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INTRODUCTION

Now that Plaintiffs have abandoned their second claim for relief, *see* ECF No. 13 ("Opp.") at 3 n.2, the sole remaining question in this case is whether Plaintiffs may pursue a referral to the Attorney General with respect to records that have already been deleted. Whether analyzed as a matter of Article III standing or statutory interpretation, the answer is no: (1) absent allegations that the Attorney General could actually recover any records, Plaintiffs' claim is not redressable, and (2) in any event, the statutory text does not contemplate referral with respect to previously deleted records, as the only courts to consider the question have held. *See generally* ECF No. 10 ("Mot."). The Court should therefore grant Defendants' motion to dismiss.

ARGUMENT

I. The Complaint Does Not Allege—Even Once—That Referral To The Attorney General Would Redress Plaintiffs' Injury By Leading To The Recovery Of Records.

There is no real dispute about the legal standard governing whether a claim under 44 U.S.C. § 3106 is redressable: Plaintiffs must show a "substantial likelihood that [records] will be recovered in an action by the Attorney General," *Cause of Action Inst. v. Tillerson*, 285 F. Supp. 3d 201, 205 (D.D.C. 2018), and where referral to the Attorney General would be "pointless," there is no Article III controversy, *Judicial Watch, Inc. v. Pompeo*, 744 F. App'x 3, 4 (D.C. Cir. 2018); *see also* Opp. at 13 (appearing to assume that "redressability depends on DOJ being able to 'actually recover' deleted records").

Because Defendants have challenged the sufficiency of the complaint's standing allegations, it is Plaintiffs' burden to show that the complaint "clearly allege[s] facts demonstrating each element" of Article III standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (internal quotation marks and alterations omitted). The complaint's eighty paragraphs are entirely devoid of such allegations.

A. Plaintiffs Never Allege That Referral To The Attorney General Would Lead To The Recovery Of Records.

The complaint nowhere alleges that referral to the Attorney General would lead to the recovery of deleted records, let alone any facts rendering such an allegation plausible. According to Plaintiffs, that does not matter because "general allegations embrace those specific facts that are necessary to support the claim." Opp. at 12 (quoting *Osborn v. Visa Inc.*, 797 F.3d 1057, 1063-64 (D.C. Cir. 2015)). Plaintiffs' argument rests upon a misunderstanding of both well-established pleading standards and the text of their own complaint.

For more than fifteen years, it has been black-letter law that in evaluating a complaint, a court need not credit "naked assertions devoid of further factual enhancement," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 557 (2007) (internal quotation marks omitted)), or "accept inferences that are unsupported by the facts set out in the complaint," *Baez v. U.S. Dep't of Homeland Sec.*, No. 18-1013, 2019 WL 5102827, at *3 (D.D.C. Oct. 11, 2019) (Nichols, J.) (quoting *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015)). In addition, "factual allegations in the complaint will bear closer scrutiny in resolving a 12(b)(1) motion than resolving a 12(b)(6) motion for failure to state a claim." *Edwards v. Aurora Loan Servs.*, 791 F. Supp. 2d 144, 149 (D.D.C. 2011).

Osborn is not to the contrary. That case involved a challenge to ATM access pricing schemes, and the plaintiffs articulated a clear theory of all three elements of standing: if they prevailed, "ATM operators would offer consumers differentiated access fees at the point of transaction, consumers would then demand multi-bug PIN cards from their banks, their banks would provide these cards, and the market for network services would become more competitive, all resulting in more choice of networks and lower access fees for consumers." *Osborn*, 797 F.3d at 1063 (quoting *Nat'l ATM Council, Inc. v. Visa Inc.*, 7 F. Supp. 3d 51, 60 (D.D.C. 2013)). The

district court had found that theory "attenuated" and "speculative," but the D.C. Circuit held that it should not have "demand[ed] proof of an economic theory" in the complaint. *Id.* Because the plaintiffs' economic theory was "specific, plausible, and susceptible to proof at trial," *id.* at 1066, the district court should have credited it on a motion to dismiss. Nothing in *Osborn*, however, absolved the plaintiffs of their obligation to plead a theory of standing that was "specific, plausible, and susceptible to proof at trial" in the first place.[1]

Plaintiffs' complaint does not make *any* factual allegations—specific, plausible, or otherwise—that referral to the Attorney General would be substantially likely to redress their injury. Plaintiffs' opposition brief identifies six pertinent paragraphs of the complaint, *see* Opp. at 13 (citing Compl., ECF No. 1, ¶¶ 1, 7, 8, 18, 67, 68), but none comes close to satisfying Plaintiffs' burden. To the contrary, paragraphs 1, 7, and 8 are requests for relief. *See* Compl. ¶ 1 (complaint seeks "an enforcement action through the Attorney General of the United States to prevent the unlawful destruction of federal records and to recover records unlawfully destroyed by an ICE detention contractor"); *id.* ¶ 7 (summarizing pre-litigation correspondence containing same request); *id.* ¶ 8 (similar). Yet the mere fact that a plaintiff wants something does not mean that getting it would constitute redress; "[j]ust because Plaintiffs ask for the moon does not mean that they are entitled to it." *CREW v. Wheeler*, 352 F. Supp. 3d 1, 11 (D.D.C. 2019). Paragraph 18 paraphrases the requirements of the FRA. *See* Compl. ¶ 18. Finally, paragraphs 67 and 68 are background factual allegations about Glades. *See id.* ¶ 67 ("Glades has deleted, and continues to

[1] *Freedom Watch, Inc. v. Google Inc.*, 816 F. App'x 497, 499 (D.C. Cir. 2020) (cited in Opp. at 13), does not support Plaintiffs' position. In that case, Freedom Watch made allegations "that the Platforms conspired to suppress Freedom Watch's audience and revenue," and "that its audience and revenue declined." *Id.* As for the initial decision in *CREW v. SEC*, 858 F. Supp. 2d 51, 61 (D.D.C. 2012) (cited in Opp. at 13) to the extent it suggests that referral to the Attorney General is itself constitutional redress, it is incompatible with subsequent D.C. Circuit decisions in the Clinton email litigation establishing otherwise. *See* Mot. at 12 & 13 n.4.

delete, surveillance video every 90 days in violation of the FRA, NARA regulations and directives, and ICE directives and contractual requirements."); *id.* ¶ 68 ("The surveillance video Glades has unlawfully deleted, and continues to unlawfully delete, are federal records within ICE's legal ownership, custody, or control."). No paragraph so much as hints at alleging that the Attorney General would actually recover the deleted records if the matter were referred to him.

Against that backdrop, Plaintiffs' suggestion that they "are not required to plead the specific technological means by which DOJ might be able to recover deleted records," Opp. at 13, misses the mark. *Osborn* indicates that a "Rule 12(b)(1) motion . . . is not the occasion for evaluating the empirical accuracy of an economic theory," 797 F.3d at 1065-66, but the very next sentence makes clear that the plaintiffs had only satisfied their pleading burden "[b]ecause the economic facts alleged by the Plaintiffs are specific, plausible, and susceptible to proof at trial," *id.* at 1066. Defendants here are not asking the Court to disregard specific and plausible redressability allegations, but instead to reasonably conclude that no such allegations exist.

Plaintiffs further argue that their injury is redressable because they are seeking a referral to prevent future destruction. *See* Opp. at 13-14. To be sure, when Plaintiffs filed their complaint, they alleged that Glades "continues to delete" surveillance video. *See* Compl. ¶ 67; *see also id.* ¶ 68. Yet even taking that allegation as true as of April 25 (the day Plaintiffs filed their complaint), the complaint's allegations make clear that as of today, Glades no longer has any federal records to delete. To the contrary, (1) the complaint alleges that when Glades housed ICE detainees, it deleted video records after ninety days, *e.g.*, Compl. ¶ 3; (2) the complaint further alleges that "ICE is not currently detaining immigrants at Glades," *id.* ¶ 40; and (3) more than ninety days have passed since the complaint was filed. According to Plaintiffs' own allegations, there are no video records left for the Attorney General to somehow save; whether this issue is analyzed under

principles of standing or mootness, *cf.* Opp. at 15, there is no meaningful relief for this Court to award and the appropriate remedy is dismissal. Plaintiffs allege that ICE has "left open the possibility of detaining immigrants [at Glades] in the future," Compl. ¶ 40, but that entirely speculative possibility does not satisfy Plaintiffs' burden of pleading an injury that is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013). That is particularly true because any future video recordings would be subject to records schedule DAA-0567-2021-0001, and the complaint contains no allegations suggesting that Glades would fail to comply with that schedule. Finally, Plaintiffs offer no theory of what legal action the Attorney General could file to prevent the deletion of records that do not yet exist.[2]

B. This Is A Facial Challenge To The Allegations Of The Complaint, And It Is Not Defendants' Burden To Disprove Redressability.

Instead of forcefully defending the complaint's allegations, Plaintiffs principally accuse Defendants of "offering their own facts at the pleading stage." *See* Opp. at 15. That is wrong: Defendant's challenge to Count I attacks the sufficiency of the complaint, which fails to adequately plead redressability. *See supra* Part I.A. Paragraph 12 of the Tucker declaration (which describes Glades' statement to ICE that "overwritten" video is "unretrievable") provides helpful background, and it is entirely consistent with Plaintiffs' allegations that the records at issue have already been deleted. *See, e.g.*, Compl. ¶ 3 ("The facility . . . deletes surveillance video every 90 days . . . ."); *id.* ¶ 47 (Commander "Schipansky stated unequivocally that Glades only maintains

[2] Plaintiffs also observe that they requested certain video within ninety days of its creation, and suggest that if Glades "is in fact retaining video as having 'evidentiary value' within 90 days of when the video is recorded, then at least this requested video should be recoverable without any need to restore deleted records." Opp. at 19 n.7 (citation omitted). If records have been "retain[ed]," however, then they have not been removed and there is no basis for a referral to the Attorney General.

surveillance video for 90 days"); *see also id.* Ex. A at 7 (records "could be irretrievably destroyed"). But to be clear, Defendants are not asking the Court to dismiss Count I on the basis of the Tucker Declaration: Defendants bring a facial challenge to the allegations of the complaint, not a factual challenge based on extraneous materials. *See, e.g.*, *Hale v. United States*, No. 13-1390, 2015 WL 7760161, at *3 (D.D.C. Dec. 2, 2015) (distinguishing between facial and factual jurisdictional challenges).

Plaintiffs' suggestion that courts "have rejected motions to dismiss FRA claims on Article III justiciability grounds where, as here, an agency insists at the outset of the case that all recovery efforts have been exhausted and any DOJ enforcement action would be futile," Opp. at 17, thus rebuts an argument that Defendants are not making and relies on cases that are distinguishable. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952 (D.C. Cir. 2016), was not a challenge to the allegations of the complaint; the question was whether the government had taken sufficient steps to recover emails that had resided outside of government control, such that the litigation was moot. *See id.* at 953. *Cause of Action Institute v. Tillerson*, 285 F. Supp. 3d 201, was a standing challenge, but not a facial one, for the plaintiffs in that case (1) did not allege that the relevant emails had already been deleted, and (2) proposed specific ways in which the emails that resided outside of government control could be located. *See* Compl., *Cause of Action v. Kerry*, No. 16-2145, ECF No. 1, ¶ 5 (D.D.C. Oct. 26, 2016) (alleging that State had not "directly contacted Secretary Powell's internet service or email provider" to seek recovery of the emails); *see also id.* ¶¶ 6, 38, 41, 50, 51-52. The defendants therefore attached various materials to their motion to dismiss and asked the court to conclude "that there are no emails remaining in the AOL system from former Secretary Powell's tenure as Secretary of State." Mem. in Supp. Defs.' Mot. to Dismiss, *Cause of Action Inst. v. Tillerson*, No. 16-2145, ECF No. 16, at 12 (D.D.C. Feb. 8, 2017); *see also Cause of*

Action Inst. v. Pompeo, 319 F. Supp. 3d 230, 232 (D.D.C. 2018) (describing Defendants' motion to dismiss: a "claim that further searching for the emails would be futile."). Unlike in that case, the government here is not contending that the complaint's standing allegations are overcome by external facts—it is observing that they do not exist.

Finally, Plaintiffs suggest that the Attorney General could recover records using the tools of criminal enforcement: "grand-jury subpoenas" and "search warrants." Opp. at 19 (quoting *Cause of Action Inst. v. Tillerson*, 285 F. Supp. 3d at 208-09). At the outset, such a theory is not even hinted at in the complaint, which is reason enough to reject it. *See, e.g.*, *Arbitraje Casa de Cambio, S.A. de C.V. v. U.S. Postal Serv.*, 297 F. Supp. 2d 165, 170 (D.D.C. 2003) ("It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss.") (internal quotation marks omitted). In any event, while the FBI used such tools to seek former Secretary of State Hillary Clinton's emails, it did so in the context of a separate criminal investigation concerning the mishandling of classified information. *See Judicial Watch, Inc. v. Tillerson*, 293 F. Supp. 3d 33, 36 (D.D.C. 2017) (noting that FRA recovery "piggyback[ed] on a parallel investigation by the FBI, which sought all of Clinton's work-related emails . . . to assess whether she had mismanaged classified information"). The complaint in this case nowhere alleges that a criminal investigation of Glades is pending, forthcoming, or otherwise appropriate. Nor does it allege that if such an investigation were commenced, it would be possible to recover overwritten, deleted video recordings. (Indeed, Plaintiffs' opposition nowhere disputes Defendants' contention that the Attorney General has unreviewable discretion in deciding what steps to take in response to a referral under 44 U.S.C. § 3106, *see* Mot. at 15.) For all these reasons, Plaintiffs' speculation about investigatory steps that could be taken in a hypothetical criminal investigation does not satisfy Plaintiffs' burden of pleading redressability.

II. 44 U.S.C. § 3106 Does Not Require Referral To The Attorney General With Respect To Records That Have Already Been Deleted.

Even if Plaintiffs had adequately pleaded standing, the statute does not require a referral with respect to records that have already been deleted. Rather, 44 U.S.C. § 3106(a) requires referral to the Attorney General where records "have been *unlawfully removed* from th[e] agency" (emphasis added), and 44 U.S.C. § 3106(b) makes clear that the Archivist's obligations are derivative of the agency head's. Plaintiffs' contrary arguments are foreclosed by the statutory text, as Judge Boasberg has recognized in a comprehensive opinion. *See CREW v. SEC*, 916 F. Supp. 2d 141, 146-48 (D.D.C. 2013); *accord, e.g.*, *Slockish v. U.S. Fed. Highway Admin.*, No. 08-1169, 2015 WL 13667112, at *4 (D. Or. Dec. 17, 2015). In contrast, no court has adopted Plaintiffs' position on the question presented here.

A. No Case Holds That Referral To The Attorney General Is Required With Respect To Records That Have Already Been Deleted.

Before engaging with the statutory text, Plaintiffs contend that Defendants' interpretation is foreclosed by D.C. Circuit precedent. *See* Opp. at 20-22. Yet neither *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) ("*Armstrong I*") nor *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993) ("*Armstrong II*") "addressed the statutory-interpretation question presented here nor is the language in these opinions sufficient to overcome the plain meaning of § 3106." *CREW v. SEC*, 916 F. Supp. 2d at 147. Nor does *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, speak to the question.

Starting with *Armstrong I*, the primary language Plaintiffs highlight—"if the agency head or Archivist does nothing while an agency official destroys or removes records in contravention of agency guidelines and directives, private litigants may bring suit," *Armstrong I*, 924 F.2d at 295—comes from a section of the opinion addressing whether a decision to initiate an enforcement action is committed to agency discretion by law. The holding is that review was not precluded.

There may be some "language helpful to CREW," but it did not "address[] the specific statutory question at issue here. *CREW v. SEC*, 916 F. Supp. 2d at 147. This Court is bound by the D.C. Circuit's holdings, not its dicta. *See Latif v. Obama*, 666 F.3d 746, 754 (D.C. Cir. 2011) ("This court is not bound by its prior assumptions." (internal quotation marks omitted); *Gersman v. Grp. Health Ass'n, Inc.*, 975 F.2d 886, 897 (D.C. Cir. 1992) ("Binding circuit law comes only from the holdings of a prior panel, not from its dicta."). Treating the D.C. Circuit's dicta as a holding would fall into the trap of "seeking shades of meaning in the interstices of sentences and words, as though a discursive judicial opinion were a statute." *Schlup v. Delo*, 513 U.S. 298, 343 (1995) (Scalia, J., dissenting); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code."). As for *Armstrong II*, the language upon which Plaintiffs rely simply describes *Armstrong I*, and likewise does not offer a holding on this issue.

Even if the *Armstrong* decisions contained a pertinent holding, there is a critical distinction between the *Armstrong* cases and this one: the *Armstrong* cases "were forward looking, seeking to prevent the future destruction of records." *CREW v. SEC*, 916 F. Supp. 2d at 147; *accord Judicial Watch v. Kerry*, 844 F.3d at 954 (*Armstrong I* "involved a threatened destruction of records," rather than a past destruction). Neither case addresses "the issue of whether § 3106 imposes a restoration duty regarding already-destroyed documents." *CREW v. SEC*, 916 F. Supp. 2d at 147.[3] And as set out above, *see supra* Part I.A, Plaintiffs do not have a plausible claim that

[3] *CREW v. Executive Office of the President*, 587 F. Supp. 2d 48 (D.D.C. 2008) (cited in Opp. at 21), involved emails that "were recoverable . . . on backup tapes," *id.* at 54, and the Court made clear that the plaintiffs sought to restore the emails "before they become irrecoverable," *id.* at 56. Unlike this case, in other words, the plaintiffs sought to stop future destruction. As for NARA Directive 1463 (cited in Opp. at 26), that document does not specifically address referral to the

they are seeking to stop the ongoing or future destruction of records. Thus, any holding that might be divined in the *Armstrong* cases would not apply in this case, which concerns *previously* deleted records.

That leaves only the D.C. Circuit's decision in *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, which was decided after *CREW v. SEC*. That case held that an action did not become moot after an agency took limited but incomplete steps to recover removed records. *See id.* at 953. Like the *Armstrong* decisions, it contains no holding with respect to an obligation to ask the Attorney General to somehow restore records that were already deleted.

B. 44 U.S.C. § 3106 Only Requires Referral To The Attorney General With Respect To Removed Records.

Plaintiffs further suggest that they would prevail even if the Court were to "interpret the FRA anew." Opp. at 22. It is telling that in making that argument, Plaintiffs begin not with the text of the relevant provision, but the FRA's statement of purpose. *See* Opp. at 23 (citing 44 U.S.C. § 2902(1)). As the Supreme Court has explained, "'vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration.'" *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 150 (2016) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993)); *accord, e.g.*, *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). Appeals to statutory purpose are inadequate to overcome the text of 44 U.S.C. § 3106.

Turning to the text of 44 U.S.C. § 3106, Plaintiffs do not meaningfully dispute that subsection (a), on its face, only requires an agency to make a referral when records are unlawfully removed. Instead, Plaintiffs principally contend that the reference to "other redress" in 44 U.S.C.

Attorney General for allegations of previous destruction, as opposed to ongoing destruction that can still be prevented.

§ 3106(b) as something the agency head might have sought under 44 U.S.C. § 3106(a) indicates by implication that 44 U.S.C. § 3106(a) requires referrals by the agency head for violations other than removal. *See* Opp. at 24-25.

The problem with Plaintiffs' argument is best understood by looking to the history of the statute. The provision that would become 44 U.S.C. § 3106 was first promulgated in 1950, *see* Pub. L. No. 81-754, sec. 506(f), 64 Stat. 578, 586 (1950), and the text remained essentially unchanged until the National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, 98 Stat. 2280. Prior to that enactment, the statute read as follows:

> The head of each Federal agency shall notify the Administrator of General Services of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Administrator shall initiate action through the Attorney General *for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency*, or from another Federal agency whose records have been transferred to his legal custody.

44 U.S.C. § 3106 (1982) (emphasis added). As set out above, the statute only contemplated referral for removed records, and it did not include any reference to "other redress"; for that reason, Plaintiffs' opposition identifies no textual theory of why they would win under the pre-1984 version of the provision.

In 1984, Congress amended the FRA to create the National Archives and Records Administration, an independent agency headed by the Archivist. *See* Pub. L. No. 98-497, sec. 101, 98 Stat. at 2280. As relevant here, the statute also amended 44 U.S.C. § 3106 to add a second sentence at the end:

> In any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

Id. sec. 203, 98 Stat. at 2294.[4] As the D.C. Circuit has explained, this amendment was "a direct response to the Supreme Court's decision in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980)," which involved an agency head's own removal of records; Congress wanted to "require the Archivist to ask the Attorney General to sue and to notify Congress if the agency head failed to make a similar request of the Attorney General" and thereby "eliminate the *Kissinger* loophole." *Armstrong I*, 924 F.2d at 292; *see also* H.R. Conf. Rep. No. 98-1124 at 28 (1984) (noting the "anomalous situation created by current law whereby an agency head has a duty to initiate action to recover records which he himself has removed" and explaining that the amendments would "authorize the Archivist independently to seek the initiation of action by the attorney general for the recovery of such records").

There is no indication whatsoever that when Congress added the second sentence empowering the Archivist to act where the agency head does not, it also meant to expand the obligations imposed on the agency head in the first sentence. "It is not lightly to be assumed that Congress intended to depart from a long established policy," *United States v. Wilson*, 503 U.S. 329, 336 (1992) (quoting *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 627 (1925)), and Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).[5] The history of this provision thus forecloses Plaintiffs' "other redress" argument.

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[4] Years later, Congress split the two sentences of 44 U.S.C. § 3106 into two subsections. *See* Pub. L. No. 113-187, sec. 4(a), 128 Stat. 2003, 2009 (2014). That reformatting has no bearing on the issues presented here.

[5] In criticizing the decision in *CREW v. SEC*, 916 F. Supp. 2d 141, Plaintiffs complain that it "wholly disregards the 'other redress'" language in 44 U.S.C. § 3106(b). *See* Opp. at 27. Yet there is a reason why Judge Boasberg did not consider that argument: CREW did not make it. *See* Pl.'s Opp'n to Defs.' Mot. for Summ J. & Mem. in Supp. Pl.'s Mot. for Summ. J., *CREW v. SEC*,

Plaintiffs also point to language in 44 U.S.C. § 3106(b) that directs the Archivist to make a referral to the Attorney General when the head of a federal agency does not initiate an action after being notified of "any" unlawful action described in subsection (a). *See* Opp. at 24. At best, that argument would suggest that the Archivist is required to make referrals under 44 U.S.C. § 3106(b) even where the agency has no such obligation under § 3106(a). As Defendants have explained, that is not the best reading of the statute. *See* Mot. at 10. Rather, by indicating that the Archivist's obligations only attach when the agency does not bring "an action for *such* recovery or other redress," at which time the Archivist shall "request the Attorney General to initiate *such* an action," 44 U.S.C. § 3106(b) (emphasis added), the language refers back to the action that the agency should have brought under 44 U.S.C. § 3106(a)—an action seeking recovery of unlawfully removed records. Plaintiffs offer no response to Defendants' observation that any other reading would inexplicably (1) place greater referral obligations on the Archivist than on the agency itself, and (2) mean that before making a referral, the Archivist must wait for the agency to make a referral that the agency is not required to make. The 1984 amendments were intended to empower the Archivist to act when the head of the agency did not, but there is no indication that Congress meant to expand the Archivist's obligations such that he would be obligated to act even in cases where the agency head had no corresponding obligation.

Plaintiffs further complain that under Defendants' reading, "the FRA creates stronger safeguards for record removal than for record destruction." Opp. at 25. Yet the different treatment of removal and destruction is easily explained by the reality of what the Attorney General might do in response to each. When records are removed from an agency, "the legal redress the Attorney

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No. 11-1732, ECF No. 19 (D.D.C. Nov. 13, 2012). CREW's prior failure to even identify the "other redress" language as a potential argument is further proof that Plaintiffs are placing far too much weight upon these two words.

General would seek would take the form of a civil replevin action against the holder of the records." *CREW v. SEC*, 916 F. Supp. 2d at 148; *see also, e.g.*, *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380 (8th Cir. 1987) (example of such an action). But when records are destroyed at an agency, it is far less clear what action the Attorney General might file to recover them. As noted above, the relevant language has remained essentially unchanged since it was promulgated in 1950—a time long before electronic records—and it is highly implausible that the 1950 Congress believed that records, once destroyed, could be forensically recovered.

Even if there were some action that the Attorney General might file to recover destroyed records, that would raise the bizarre prospect of the Department of Justice suing a federal agency that it is simultaneously responsible for defending in litigation.[6] *See CREW v. SEC*, 916 F. Supp. 2d at 148 ("Requiring the Attorney General to bring suit against another federal agency—which is typically represented by the Department of Justice—would be highly unusual, and it is difficult for this Court to overlook the 'constitutional oddity of a case pitting two agencies in the Executive Branch against one another.'" (quoting *SEC v. Fed. Labor Relations Auth.*, 568 F.3d 990, 996 (D.C. Cir. 2009) (Kavanaugh, J., concurring)). This case involves federal records held by a contractor, but in the vast majority of cases the defendant in Plaintiffs' proposed lawsuits would be a federal agency.

Finally, Plaintiffs point to snippets of the 1984 Conference Report that they believe favor their position. *See* Opp. at 25. As explained above, however, the FRA's legislative history supports the government's interpretation. Indeed, in the Conference Report, the entire discussion

[6] The plain meaning of "initiate action" is to initiate a lawsuit. *See, e.g.*, *Chris v. Tenet*, 221 F.3d 648, 652 (4th Cir. 2000); *see also, e.g.*, *Kissinger*, 445 U.S. at 148 (noting that "the Federal Records Act establishes only one remedy for the improper removal of a 'record' from the agency" and that is "the Attorney General *may bring suit* to recover the records" (emphasis added)).

of the Attorney General's involvement is with respect to recovering records that were unlawfully *removed*. *See* H.R. Conf. Rep. No. 98-1124 at 27-28 (discussing the *Kissinger* litigation and noting "the anomalous situation created by current law whereby an agency head has a duty to initiate action to recover records *which he himself has removed*" and correcting that situation by "authoriz[ing] the Archivist independently to seek the initiation of action by the Attorney General *for the recovery of such records*" (emphasis added)). The only mention of destruction of records, by contrast, was to note "the frequency of incidents of removal or destruction of records in recent years." *Id.* at 28. That purely factual statement offers little insight into the proper interpretation of § 3106.

CONCLUSION

The Court should grant Defendants' motion to dismiss.

Dated: August 8, 2022

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