UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, et al.,

Plaintiffs,

v.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, et al.,

Defendants.

Civil Action No. 20-cv-739-APM

MEMORANDUM IN SUPPORT
OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND
IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Federal Records Act ("FRA"), 44 U.S.C. Chapters 21, 29, 31, and 33, "is a collection of statutes governing the creation, management, and disposal of records by federal agencies." *Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999). As pertinent here, the FRA requires every Federal agency to work with the National Archives and Records Administration ("NARA") to "facilitate the segregation and disposal of records of temporary value." 44 U.S.C. § 3102(3). An agency must (1) categorize the various types of records in its possession; (2) propose a retention period for each category of record; and (3) submit these proposals to NARA in the form of records-disposition schedules. *See id.* §§ 3102, 3302, 3303; 36 C.F.R. §§ 1225.10–.26. NARA staff appraise each proposed schedule, working with the agency to revise it as needed. *See* 36 C.F.R. §§ 1220.12, 1225.16. Once the appraiser recommends that the schedule be approved, NARA provides an opportunity for public comment, and ultimately "the Archivist of the United States determines which Federal records have temporary value and may be destroyed and which Federal records have permanent value and must be preserved." *Id.* § 1220.12; *see also* 44 U.S.C. § 3303a.

In October 2015, Immigrations and Customs Enforcement ("ICE") submitted to NARA a records-disposition schedule for eleven types of records related to immigration detention that were not previously covered by any schedule. A NARA appraiser provided feedback; ICE modified its proposal in light of that feedback; and, in July 2017, NARA invited public comment on the proposed schedule. In consideration of comments received, NARA and ICE made several changes to the proposed schedule. In June 2019, NARA issued what ended up being the final version of Records Schedule DAA-0567-2015-0013 ("Schedule"), along with an appraisal memorandum and consolidated reply to the public comments. In its final form, the Schedule contains eight categories of records related to immigration detention, two of which are to be permanently preserved and six of which are to be retained for periods ranging from three to 25 years. In December 2019, after a second notice-

and-comment period, the Archivist approved the Schedule.

The present lawsuit contains a single count alleging that the Archivist's approval of the Schedule was arbitrary and capricious in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). This claim fails under the applicable, "highly deferential" standard of review, *Ashton v. U.S. Copyright Office*, 310 F. Supp. 3d 149, 156 (D.D.C. 2018) (Mehta, J.) (quoting *Hagelin v. Fed. Election Comm'n*, 411 F.3d 237, 242 (D.C. Cir. 2005)). Plaintiffs do not challenge the Archivist's decision to permanently preserve two of the eight groups of records, and the administrative record demonstrates that NARA carefully considered the relevant factors under its Appraisal Policy and determined a reasonable retention period for each of the remaining six groups of records. *See* Nat'l Archives & Recs. Admin., Appraisal Policy of the National Archives (revised September 20, 2007), https://www.archives.gov/records-mgmt/scheduling/appraisal (last visited Aug. 27, 2020) ("Appraisal Policy").

The first two sets of records scheduled for temporary retention relate to investigations into incidents of sexual abuse and deaths at ICE detention facilities. Applying the criteria set forth in its Appraisal Policy, NARA decided not to permanently preserve these records because key information about such incidents is already maintained in other long-term temporary (75-year) records and permanent records. NARA further determined that retaining these two types of records for 25 years and 20 years, respectively, will adequately protect legal rights and permit interested individuals to obtain the records for research and advocacy purposes. The next set of records consists of a weekly digest for operational awareness distributed to ICE detention center staff. NARA reasonably determined that these records do not warrant permanent preservation to protect legal rights, document significant actions of Federal officials, or document the national experience, and that a three-year retention period is appropriate because any significant events described in the weekly digest are captured by other records scheduled to be preserved for 75 years. The three remaining groups of

records document successful escapes from ICE detention facilities, placement of detainees in segregated housing, and calls to a toll-free ICE hotline. NARA reasonably determined that these records do not meet the criteria for permanent preservation under its Appraisal Policy, and that a seven-year retention period would adequately protect legal rights and ensure public accountability.

Plaintiffs fail to carry their burden of showing that NARA's approval of these record retention periods was arbitrary. Plaintiffs take issue with NARA's assessment of the records' potential future research value, but they cannot show any "clear error of judgment," *Lester E. Cox Med. Ctrs. v. Sebelius*, 691 F. Supp. 2d 162, 166 (D.D.C. 2010) (quoting *Bloch v. Powell*, 348 F.3d 1060, 1070 (D.C. Cir. 2003)). Moreover, future research value is just one of many factors that NARA appraisers consider holistically in determining whether records warrant permanent preservation under §§ 7 and 8 of the Appraisal Policy. The mere fact that records could be used for future research does not mean that they warrant permanent preservation in the National Archives. *See* Appraisal Policy §§ 7, 8, app. 1. Nor have Plaintiffs shown any deficiency in NARA's response to public comments. NARA appropriately summarized the main concerns raised by commenters and addressed each of them in turn. This Court should reject Plaintiffs' invitation to second-guess NARA's well-reasoned application of its subject-area expertise to the records-disposition schedule at issue in this case. Accordingly, Plaintiffs' motion for summary judgment should be denied, and Defendants' cross-motion for summary judgment should be granted.

BACKGROUND

I. Statutory and Administrative Background

The FRA imposes numerous recordkeeping obligations on Federal agencies. Each agency must "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of

persons directly affected by the agency's activities." 44 U.S.C. § 3101. Agencies must also "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency." *Id.* § 3102. The Archivist of the United States "provide[s] guidance and assistance to Federal agencies" in carrying out these obligations. *Id.* § 2904(a)(1)–(2); *see also id.* § 2904(c)(1) (authorizing the Archivist to "promulgate standards, procedures, and guidelines with respect to records management"); 36 C.F.R. §§ 1222.1–.34 (NARA regulations governing the creation and maintenance of Federal records).

Federal agencies are responsible not only for making and preserving records, but also for controlling their accumulation. To that end, the FRA requires each Federal agency to "cooperat[e] with the Archivist in applying standards, procedures, and techniques designed to . . . facilitate the segregation and disposal of records of temporary value." 44 U.S.C. § 3102(3); *see also id.* § 2902(5) (identifying "judicious preservation and disposal of records" as a goal of the FRA). Each agency must create, and submit to the Archivist,

> schedules proposing the disposal after the lapse of specified periods of time of records of a specified form or character that either have accumulated in the custody of the agency or may accumulate after the submission of the schedules and apparently will not after the lapse of the period specified have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government.

44 U.S.C. § 3303(3). NARA has promulgated regulations and published detailed guidance to assist Federal agencies in creating such schedules. *See* 36 C.F.R. §§ 1225.10–.26; Nat'l Archives & Recs. Admin., Guide to the Inventory, Scheduling, and Disposition of Federal Records (revised Oct. 2, 2018), https://www.archives.gov/records-mgmt/scheduling (last visited Aug. 27, 2020). "All Federal records, including those created or maintained for the Government by a contractor, must be covered by a" records schedule. 36 C.F.R. § 1225.10.

The Archivist examines each records schedule submitted by a Federal agency and, following an opportunity for public comment, makes a final determination about the value and disposition of

the covered records. 44 U.S.C. § 3303a. NARA's Appraisal Policy provides a consistent framework for deciding whether a given set of agency records should be permanently preserved in the National Archives or disposed of after a set period of time. Under this policy, the vast majority of Federal records are not suitable for permanent preservation. *See* Appraisal Policy § 6 ("NARA authorizes agencies to destroy most . . . records when they are no longer needed to meet agency business needs.").

When appraising whether records are appropriate for permanent preservation, NARA starts from the premise that Federal records fall into at least one of three categories: (a) "Records documenting the rights of citizens"; (b) "Records documenting the actions of Federal officials"; and (c) "Records documenting the national experience." *Id.* § 7. Records that fall into category (a) are generally retained only long enough to protect interested individuals' legal rights. *See id.* § 7(a) ("In most cases, the legal rights implications of records eventually expire."). Of records that fall into category (b), NARA permanently retains only the relatively small "portion containing significant documentation of Government activities and essential to understanding and evaluating Federal actions." *Id.* § 7(b). This includes "records that document the basic organizational structure of Federal agencies and organizational changes over time, policies and procedures that pertain to an agency's core mission, and key agency decisions and actions." *Id.* "Much of" the information in category (c) does not warrant permanent preservation, either, but "some is essential to understanding the role of the Federal Government and the history of our nation, its people, and the environment." *Id.* § 7(c).

Accordingly, in assessing the three categories described above, NARA will identify for permanent preservation records that:

a. Retain their importance for documenting legal status, rights and obligations of individuals, groups, organizations, and governmental bodies despite the passage of time;

b. Provide evidence of significant policy formulation and business processes of the Federal Government;

c. Provide evidence of our Government's conduct of foreign relations and national defense;

d. Provide evidence of Federal deliberations, decisions, and actions relating to major social, economic, and environmental issues;

e. Provide evidence of the significant effects of Federal programs and actions on individuals, communities, and the natural and man-made environment;

f. Contribute substantially to knowledge and understanding of the people and communities of our nation.

Id. § 8.

NARA's Appraisal Policy provides a number of factors to be considered in determining whether a given set of records (1) fits within one or more of the six categories listed above; (2) if so, whether the records warrant permanent preservation; and (3) if not, how long the records should be retained before disposal. *See id.* app. 1. These factors include the records' significance for current and future research use, their source and context, whether the information they contain is available elsewhere, how usable they are, whether they document decisions that set precedents, whether they add significantly to the meaning of other records already appraised as permanent, their volume, and the costs of their long-term maintenance. *See id.* The Appraisal Policy makes clear that NARA staff should consider these factors "together, rather than in isolation," and that applying them to a specific case is not "a mechanical process akin to adding up points or checking boxes." *Id.* In sum, records appraisal "is not a rote exercise"; to the contrary, NARA appraisers use their expertise to make "informed judgments" about how long a given set of records should be retained. *Id.* § 1.

II. Factual and Procedural Background

A. Relevant Proposed Schedules and Public Comments

On October 26, 2015, ICE submitted to NARA the initial version of Records Schedule DAA-0567-2015-0013, which proposed retention periods for eleven categories of records related to immigration detention. *See* AR 646–54. As relevant here, the proposed schedule included:

- A 20-year retention period for "[r]ecords relating to sexual abuse and assault between detainees as well as by employees, contractors, or volunteers against detainees." AR 648.

- Permanent retention of "[c]omprehensive reports on findings from reviews of circumstances surrounding detainee deaths." *Id.*

- A three-year retention period for weekly reports "derived from information received from the staff on the status of each detention facility." AR 649–50.

- A seven-year retention period for reports "documenting the details of detainee escapes from custody or detention facilities." AR 651.

- A five-year retention period for records of Detention Information Reporting Line ("DRIL") communications "from individuals in ICE custody, the public, non-governmental organizations, faith-based organizations, academic institutions, attorneys, and advocacy groups." AR 651–52.

- A three-year retention period for case files regarding detainees placed in segregated housing (which may be for administrative or disciplinary reasons, for the detainee's protection, or at the detainee's request). AR 652; *see* AR 7.

A NARA appraiser reviewed this proposed schedule and provided input. *See* AR 627–35. For example, the appraiser recommended that reports about detainee deaths should not be retained permanently, explaining that they "may be of interest to individuals and organizations but do not warrant permanent retention in the National Archives" under §§ 6–8 of the Appraisal Policy. AR 631. The appraiser also asked whether ICE maintains "other series of records where information on sexual assault incidents is captured permanently." *Id.*

On November 25, 2016, NARA returned the proposed schedule to ICE for revision. AR 624. On May 23, 2017, ICE submitted to NARA a revised version of the proposed schedule. *See* AR 614–623. This time, ICE proposed a 20-year retention period, instead of permanent preservation, for reports about detainee deaths. AR 616–17. On June 20, 2017, the NARA appraiser recommended approval of this revised proposal. *See* AR 610–13. For each item, the appraiser briefly noted why the records did not warrant permanent preservation under the Appraisal Policy and why the proposed retention period was adequate. *See id.*

On July 14, 2017, NARA published a notice in the Federal Register inviting public comments on the proposed schedule. *See* Records Schedules; Availability and Request for Comments, 82 Fed. Reg. 32,585 (July 14, 2017). In response, "NARA received three congressional letters with a total of 36 signatures; a petition from the American Civil Liberties Union (ACLU) with 23,758 comments; a petition from UltraViolet with 1,475 signatures; written comments from 187 individuals and six organizations; and phone calls from seven individuals." AR 154; *see* AR 213–14, 484–89 (congressional letters); AR 272–483, 490–587, 591–601 (other public comments). Many of these comments were duplicates; about 20,000 of the individuals who signed the ACLU petition submitted an unaltered, ACLU-provided template, and more than 2,000 others altered the template only slightly. *Id.* Still, this was an unprecedented number of comments for a proposed record-disposition schedule. *See* AR 200.

On January 9, 2018, NARA returned the proposed schedule to ICE for further revisions in light of the public comments. *See* AR 195. Over the next several months, "NARA appraisal staff conducted extensive research and met with ICE officials to gather all information necessary to adjudicate [the] public . . . comments." AR 171; *see also* AR 166, 197, 207–11, 271, 588–90 (correspondence between NARA and ICE). "NARA also conducted a comprehensive review of all ICE schedules that relate to deaths and assaults of detainees in ICE facilities." AR 171.

During this research and review process, NARA and ICE officials concluded that it would be appropriate to modify the schedule in several ways. *Id.* As relevant here, these modifications included the following:

- The proposed retention period for records relating to incidents of sexual assault at ICE facilities was increased from 20 years to 25 years. AR 173–74.

- The original group of records related to detainee deaths was split into two items, one for ICE Enforcement and Removal Operations ("ERO") Detainee Death Review Files and another for ICE Office of Professional Responsibility ("OPR") Detainee Death Review Files. AR 174. The ERO files received a 20-year retention

period, while the OPR files were slated for permanent preservation. *Id.*

- An additional permanent-preservation item "consist[ing] of summary data on detainee deaths in ICE custody" was added to the schedule, reflecting a transfer of responsibility for maintaining this data from ICE Health Services Corps to ERO. AR 176.

- The proposed retention period for DRIL email and phone records was increased from five years to seven years. AR 178.

- The proposed retention period for case files regarding detainees placed in segregated housing was increased from three years to seven years. AR 178–79.

On October 25, 2018, ICE submitted to NARA a new proposed schedule reflecting these changes. *See* AR 162.

On June 14, 2019, NARA published a consolidated reply to the public comments it had received in response to the schedule proposed on July 14, 2017. AR 153–61 ("First Consolidated Reply"). In its reply, NARA summarized the comments received, including both general comments and comments related to a specific item. *See* AR 154–56. NARA then responded to these comments, explaining how ICE had modified the proposed schedule in light of the comments and why NARA agreed with these modifications. *See* AR 156–61.

On June 21, 2019, NARA published a notice in the Federal Register providing a link to the First Consolidated Reply and inviting public comments on the modified proposed schedule. *See* Changes to Agency Records Schedule; Request for Comments, 84 Fed. Reg. 29,247 (June 21, 2019). NARA received a number of additional submissions during this second opportunity for public comment. *See* AR 25–113.

On December 13, 2019, NARA published another consolidated reply. *See* AR 14–24 ("Second Consolidated Reply"). NARA summarized the comments received, grouping them into eight categories; responded to the concern raised by each category of comments; and indicated that it was "approving the proposed schedule as revised, without further changes." AR 15.

B. Approved Schedule DAA-0567-2015-0013

The final version of Schedule DAA-0567-2015-0013 ("Schedule"), as approved by the Archivist on December 11, 2019, contains the following eight categories of records pertaining to detainees held in ICE custody:

1. **Detainee Sexual Abuse and Assault Files—25-year retention period from end of fiscal year in which investigation is closed.** These records "document[] the reporting and investigation of sexual abuse or assault allegations between detainees as well as by employees, contractors, or volunteers against detainees." AR 3.

2. **ERO Detainee Death Review Files—20-year retention period from end of fiscal year in which investigation is closed.** These records document ERO's "reporting of detainee deaths that occur in ICE custody, including detention facilities, medical facilities, or in transit to or from any such facility." AR 3–4. "Records include, but are not limited to, correspondence; medical reports; investigative reports; detainee's detention and medical files; death certificates; toxicology reports; and autopsy reports." *Id.*

3. **OPR Detainee Death Review Files—permanent preservation.** These records "document[] OPR investigation of detainee deaths that occur in ICE custody, including but not limited to deaths that occur in a detention facility, a medical facility, or in transit to or from any such facility. Records include, but are not limited to, investigative reports and their exhibits, correspondence, witness statements, extracts of pertinent information, immigration records, medical records, photographs, video and voice recordings, death certificates, toxicology report, and autopsy reports." AR 4.

4. **Detainee Death Reports—permanent preservation.** These records contain "[c]umulative reports of individuals who have died while in ICE custody each fiscal year. Reports include alien's name, alien number, date of death, location at time of death, type of death (natural causes, suicide, homicide, accidental overdose, etc.), and cause of death as reported on the death certificate." AR 5.

5. **Detention Monitoring Reports—3-year retention period from end of calendar year in which report is issued.** These records "document[] on-site monitoring of detention facilities for appropriate and timely resolution of problems and concerns that may arise daily during facility operations. Facilities provide weekly reports to the Detention Monitoring Unit (DMU) identifying concerns within the facility and corrective actions taken to remedy them." AR 6.

6. **Detainee Escape Reports—7-year retention period from end of fiscal year in which report is issued.** These records "document[] details of successful detainee escapes from ICE custody or detention facilities." AR 6–7.

7. **Detention Reporting Information Line (DRIL) Records—7-year retention period from end of calendar year in which call is received.** These records document communications via DRIL, "a toll-free service providing a direct channel for individuals in ICE custody, the public, non-governmental organizations, faith-based organizations, academic institutions, attorneys, and advocacy groups to communicate directly with ICE to answer questions and resolve concerns." AR 7.

8. **Detainee Segregation Reports—7-year retention period from end of fiscal year in which detainee is released from segregation.** These records "document[] the placement of detainees in segregated housing, including reasons for segregation placement, compliance with applicable detention standards, alternative arrangements explored, and assessment of the best course of action. Segregation may be administrative, disciplinary, protective actions, or self-requested by the detainee." *Id.*

C. The Present Lawsuit

Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW"), the American Historical Association ("AHA"), and the Society for Historians of American Foreign Relations ("SHAFR") filed this lawsuit on March 16, 2020. *See generally* Compl. for Injunctive and Declaratory Relief ("Compl."), ECF No. 1. Plaintiffs allege that NARA's approval of the Schedule was arbitrary and capricious under the APA, and seek vacatur of NARA's decision and an injunction preventing ICE from destroying any records under the Schedule. *See* Compl. ¶¶ 84–88. On March 25, 2020, the parties entered a stipulation pursuant to which ICE has "issue[d] a litigation hold instructing all relevant personnel not to destroy records under [the] Schedule" during the pendency of this litigation. Stipulation, ECF No. 5. On July 24, 2020, Plaintiffs moved for summary judgment. *See* Pls.' Mot. Summ. J., ECF No. 9. Defendants now cross-move for summary judgment.

LEGAL STANDARD

In APA cases, such as this one, "the typical summary judgment standards set forth in Federal Rule of Civil Procedure 56 are not applicable." *Accrediting Council for Indep. Colleges & Schs. v. DeVos*, 303 F. Supp. 3d 77, 94 (D.D.C. 2018); *see also* L.R. 7(h)(2). Instead, "when a party seeks review of

agency action under the APA, the district court sits as an appellate tribunal. The 'entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). The Court's "role is limited to determining whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Kort v. Burwell*, 209 F. Supp. 3d 98, 107 (D.D.C. 2016) (Mehta, J.) (citation and internal quotation marks omitted).

"Judicial review in APA cases is 'highly deferential' and 'presumes the validity of agency action.'" *Ashton*, 310 F. Supp. 3d at 156–57 (quoting *Hagelin*, 411 F.3d at 242). The Court "is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Nor may it "ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). Rather, the Court's limited role is to determine "whether the [challenged] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Lester E. Cox Med. Ctrs.*, 691 F. Supp. 2d at 166 (quoting *Bloch*, 348 F.3d at 1070); *see also Duckworth v. U.S. ex rel. Locke*, 705 F. Supp. 2d 30, 40 (D.D.C. 2010) (on arbitrary-and-capricious review, the court must accept the agency's factual determinations unless "the record is so compelling that no reasonable factfinder could find to the contrary." (quoting *Orion Reserves Ltd. P'ship v. Salazar,* 553 F.3d 697, 704 (D.C. Cir. 2009)).

APA review is especially deferential where, as here, the challenged decision "implicates the agency's technical expertise." *Multimax, Inc. v. FAA*, 231 F.3d 882, 887 (D.C. Cir. 2000); *see, e.g.*, *Humane Soc'y of U.S. v. Jewell*, 76 F. Supp. 3d 69, 104 (D.D.C. 2014) ("[W]hen an agency has acted in an area in which it has 'special expertise,' the court must be particularly deferential to the agency's determinations." (quoting *Sara Lee Corp. v. Am. Bakers Ass'n Ret. Plan*, 512 F. Supp. 2d 32, 37 (D.D.C. 2007))). The D.C. Circuit has recognized that the records-disposal standards of 44 U.S.C. §§ 3303 and 3303a give the Archivist "substantial discretion" to determine whether a given set of records warrants

permanent preservation. *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 42 (D.C. Cir. 1983); *see also Green v. NARA*, 922 F. Supp. 811, 823 (E.D. Va. 1998) (affirming that document-retention policies are "committed to NARA's sound discretion" by the FRA).

ARGUMENT

I. NARA Considered the Relevant Factors and Set a Reasonable Retention Period for Each Set of Records Scheduled for Disposition.

A. NARA Reasonably Concluded That a 25-Year Retention Period Is Appropriate for Detainee Sexual Abuse and Assault Files.

The first scheduled item, Detainee Sexual Abuse and Assault Files, covers "the reporting and investigation of sexual abuse or assault allegations between detainees as well as by employees, contractors, or volunteers against detainees." AR 3. These records "are created and maintained in accordance with the Prison Rape Elimination Act of 2003." AR 172. Recognizing the legal implications of the Sexual Abuse and Assault Files, NARA considered how long they should be retained to protect the rights of individuals who suffer sexual assault at an immigration detention facility. *See* Appraisal Policy §§ 7(a), 8(a) (prescribing retention of Federal records as necessary to "provide evidence of the legal status, rights, and obligations of individuals, groups, organizations, and governmental bodies"). In addition, because these records concern actions of Federal officials, NARA considered whether they contain "significant documentation of Government activities and [are] essential to understanding and evaluating Federal actions." Appraisal Policy § 7(b) (prescribing preservation of "records that document the basic organizational structure of Federal agencies and organizational changes over time, policies and procedures that pertain to an agency's core mission, and key agency decisions and actions"); *see also id.* § 8(b)–(e) (providing additional detail about which types of records documenting actions of Federal officials warrant permanent preservation).

Pursuant to §§ 7(a) and 8(a) of its Appraisal Policy, NARA reasonably concluded that a 25-year retention period, measured from the close of the investigation, is adequate to "ensur[e] that legal

rights of detainees are protected." AR 156; *accord* AR 20, 173–74. As NARA explained, "[t]his lengthy retention period surpasses all applicable statutes of limitation," and is "well in excess" of the 10-year retention period for data regarding alleged sexual abuse established by 6 C.F.R. § 115.89, the DHS regulation implementing a requirement of the Prison Rape Elimination Act. AR 156–57; *accord* AR 20, 174. And any need for such records to support a visa application would likely arise relatively soon after the incident of assault or abuse, and certainly within 25 years from the close of the investigation. AR 156–57. Moreover, any files subject to a pending FOIA request or litigation hold would be preserved even after the 25-year retention period. AR 157.

Pursuant to §§ 7(b) and 8(b)–(e) of its Appraisal Policy, NARA reasonably concluded that a 25-year retention period is adequate to document significant actions of Federal officials because key information from the Sexual Assault Files is captured in other long-term temporary and permanent records. *See* AR 20–21, 157, 173. As NARA explained, key data about sexual assaults at ICE detention facilities—"including biographical information and event summaries"—is preserved in searchable form in ICE's Significant Event Notification ("SEN") System, which has a 75-year retention period. AR 157. In addition, "[i]f an ICE official is found to have committed misconduct involving [an incident of] sexual abuse or assault, the record of the investigation is permanent." AR 21; *accord* AR 157, 173. Permanent records also exist for all sexual abuse and assault allegations investigated by the DHS Office of Civil Rights and Civil Liberties. AR 157, 173.

Thus, NARA's decision that the Sexual Assault Files should be retained for 25 years "is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *State Farm*, 463 U.S. at 42.

B. NARA Reasonably Concluded That a 20-Year Retention Period Is Appropriate for ERO Detainee Death Review Files.

"When a detainee dies in ICE custody, ICE's Office of Professional Responsibility (OPR) and Enforcement and Removal Operations (ERO) both create and maintain Death Review Files." AR

157. The OPR Death Review File documents OPR's

> focused examination of the circumstances surrounding the death, and of the exhibits cited in the investigation. The review includes a determination of whether deficiencies in detention practices contributed to the death. OPR examines medical files of the deceased, speaks to health care providers at the facility, and examines the security of the facility. Its report includes an analysis and any findings relating to deficiencies in following the National Detention Standards. The review also discusses problems encountered that are areas of concern but do not rise to the level of violations of the standards.

Id.

The ERO Death Review File contains the OPR file, minus exhibits, as well as "all records the facility has on the detainee who died." *Id.*; *see also* AR 174. Thus, an ERO Death Review File

> sometimes includes a copy of the entire Alien File (A-File) . . . . [and] typically includes the death certificate; a memorandum of issue ERO creates for the Executive Associate Director of ERO summarizing findings; background on the detainee and his or her arrest; the removal order statement; consular notification information; the autopsy exam report; the toxicology report; ERO's corrective action plan based on the OPR report; a copy of the Significant Incident Report (SIR) from the Significant Event Notification (SEN) System; and correspondence between ERO and the facility where the detainee died.

AR 158.

NARA determined that records of investigations into detainee deaths in ICE custody should be preserved permanently because they "[p]rovide evidence of the significant effects of Federal programs and actions on individuals," Appraisal Policy § 8(e), including "conditions of detention and the Federal government's treatment of detainees." AR 176. Specifically, the OPR files provide "a focused examination and analysis of the circumstances surrounding . . . death[s]" in Federal immigration detention facilities, as well as "all exhibits cited in the investigation." AR 175; *see also* AR 4, 19. Noting that the proposed disposition for death review files "ha[d] flipped between temporary and permanent" during various stages of the agencies' decisionmaking process, the appraiser determined that "the level of public interest" ultimately mitigated in favor of permanent preservation. AR 176. Plaintiffs do not challenge NARA's decision to preserve OPR Death Review Files. *See* Pls.'

Mem. Supp. Pls.' Mot. Summ. J. ("Pls.' Mem.") at 10–12, ECF No. 9-1.

NARA further determined that permanently preserving both OPR Death Review Files and ERO Death Review Files "would be unnecessarily duplicative." AR 19. NARA explained that an ERO file contains duplicates of many records that are permanently preserved elsewhere—not only the OPR file (minus exhibits) but also "records such as the death certificate, consular notification and charging documents," which are permanently preserved in the detainee's Alien File ("A-File"). AR 158; *see id.* at 175. In addition, ERO files contain duplicates of Significant Incident Reports, which are retained for 75 years through the SEN system. AR 158. NARA further explained that ERO files contain numerous documents that are unrelated to the detainee's death. *See id.* Accordingly, NARA reasonably concluded that "[t]he OPR files constitute sufficient documentation" of detainee deaths, and that permanent preservation of the ERO files is unnecessary. AR 19; *see also* AR 175.

Plaintiffs err in suggesting that NARA failed to consider relevant factors in approving a 20-year retention period for the ERO Death Files, *see* Pls.' Mem. at 33–36. NARA did not ignore the "public and research interest in *any* records concerning individuals who die in ICE custody," *id.* at 34. To the contrary, NARA considered this interest and addressed it by establishing a 20-year retention period for portions of ERO Death Files that are not scheduled for long-term-temporary or permanent retention. *See* AR 175 ("The long retention period ensures that individuals and organizations who may wish to obtain the ERO Death Review Files have many years to request them from ICE through the Freedom of Information Act."). For example, a Detention Case File is ordinarily retained for only six years after an individual is released from detention, but is retained for 20 years (in the ERO Death File) for an individual who dies in ICE custody. *See* AR 158.

Nor did NARA "fail[] to consider that the ERO file possesses research value that the OPR file lacks," Pls.' Mem. at 35. NARA explained, in detail, the extent to which ERO files contain more information than OPR files. *See* AR 157–58, 174–75. NARA assessed the likely research value of this

information—including "ERO's corrective plan based on the OPR report" and "correspondence between ERO and the facility where the detainee died," Pls.' Mem. at 36 (quoting AR 157–58)—and concluded that it warrants a 20-year retention period. AR 157–58; *see also* AR 175 (explaining that "[t]he most significant contents of the ERO Death Review [F]ile are covered by the OPR Death Review File").

Thus, Plaintiffs are wrong to suggest that NARA "failed to consider" arguments in favor of permanently preserving both sets of Death Review files, *see* Pls.' Mem. at 34–36. NARA expressly considered and rejected these arguments. *See* AR 18–21, 157–58, 174–75. And while Plaintiffs disagree with NARA's approval of a 20-year retention period for the ERO files, they have not shown any "clear error of judgment" that would amount to an APA violation, *Lester E. Cox Med. Ctrs.*, 691 F. Supp. 2d at 166. Therefore, NARA's approval of a 20-year retention period for ERO Death Review Files should be affirmed.

C. NARA Reasonably Concluded That a 3-Year Retention Period Is Appropriate for Detention Monitoring Reports

Detention Monitoring Reports are "weekly reports filed by Detention Service Monitors" at ICE detention facilities. AR 159. They "include significant events at facilities as well as information about media contacts and administrative awareness items such as job vacancy announcements." *Id.* These reports are "distributed throughout ERO"—*i.e.*, to detention center staff—"in the form of an itemized narrative that serves as a digest for operational awareness." AR 159; *see also* AR 12.

Long-term retention of a weekly "digest for operational awareness" is plainly unnecessary to protect legal rights and obligations, document significant actions of Federal officials, or document the national experience. *See* Appraisal Policy §§ 7, 8. To the extent that Detention Monitoring Reports describe significant events at ICE facilities, those events are already documented and retained for 75 years through the SEN system. AR 159. Accordingly, NARA reasonably concluded that these weekly

reports "do not warrant retention in the National Archives once the business needs of the agency to maintain operational awareness have been fulfilled." AR 177.

There is no merit to Plaintiffs' suggestion that NARA "disregarded its relevant appraisal guidance on 'periodic reports' without acknowledgment or explanation," Pls.' Mem. at 36; *see id.* at 36–38. Plaintiffs reference a NARA publication that lists "Analytical Research Studies and Periodic Reports" as an illustrative category of records that are often retained permanently. *See* Nat'l Archives & Recs. Admin., Examples of Series Commonly Appraised as Permanent (revised June 6, 2019), https://www.archives.gov/records-mgmt/scheduling/perm-examples#guideline%2011 (last visited Aug. 27, 2020). This guidance is applied consistently with the criteria set forth in §§ 7 and 8 of the Appraisal Policy; it in no way suggests that the mere fact that a report is "periodic"—as are countless reports created across the Federal Government—makes it worthy of permanent preservation. *See id.* Formal, analytical, periodic reports, particularly those prepared for high-level agency officials, may be appropriate for permanent preservation as evidence of "key agency decisions and actions," Appraisal Policy § 7(b).[1] By contrast, periodic reports that do not meet the Appraisal Policy's criteria for permanent preservation are routinely scheduled for short-term temporary retention.[2] NARA

[1] *See, e.g.*, Records Schedule N1-16-07-01, Item 1.A (approved Feb. 5, 2002), https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-agriculture/rg-0016/n1-016-02-001_sf115.pdf (last visited Aug. 27, 2020) (permanently preserving certain weekly reports to the Secretary of Agriculture); *see also* Examples of Series Commonly Appraised as Permanent § 7 ("Regional reports prepared by field offices and forwarded to the agency's headquarters are frequently permanent because they contain information on ethnic, social, economic, or other aspects of specific localities.").

[2] *See, e.g.*, Records Schedule N1-406-08-11, Item 1 (approved Sept. 15, 2008), https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-transportation/rg-0406/n1-406-08-011_sf115.pdf (last visited Aug. 27, 2020) (three-year retention of "weekly, monthly and bi-weekly reports . . . pertaining to the daily operation of" the Federal Highway Administration); Records Schedule N1-129-00-12 (approved Jan. 28, 2000), https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0129/n1-129-00-012_sf115.pdf (last visited Aug. 27, 2020) (two- to three-year retention of periodic reports regarding Bureau of Prisons operations); Records Schedule N1-220-97-6, Item 41 (approved Aug. 18, 1997), https://www.archives.gov/files/records-mgmt/rcs/schedules/independent-

reasonably concluded that the Detention Monitoring Reports fall into the latter category. *See* AR 159, 177.

D. NARA Reasonably Concluded That a 7-Year Retention Period Is Appropriate for Detainee Escape Reports.

When a detainee successfully escapes from an ICE detention facility, the relevant field office generates a report for ICE's Detention Standards Compliance Unit. AR 6. These reports "include[] records of investigation into whether proper procedures were observed." AR 177. "Erroneous releases on ICE's part are considered a category of successful escape." *Id.*

NARA reasonably concluded that these records "have insufficient historical value to warrant preservation in the National Archives once the business needs of the agency to support any escape related litigation have been met." *Id.*; *accord* AR 160. Permanent preservation of Detainee Escape Reports is not necessary to protect legal rights or obligations, to document significant actions of Federal officials, or to document the national experience. *See* Appraisal Policy §§ 7, 8. Moreover, records of all detainee escapes are already registered in the SEN system and retained for 75 years therein. AR 177. Accordingly, NARA's approval of a seven-year retention period for Detainee Escape Reports was plainly reasonable. Plaintiffs all but concede this point; they only mention Detainee Escape Reports twice in their opening memorandum, and offer no reason why these records should be preserved for more than seven years. *See* Pls.' Mem. at 12, 31.

E. NARA Reasonably Concluded That a 7-Year Retention Period Is Appropriate for Detention Reporting Information Line Records.

DRIL "provides a direct channel for detainees, the public, non-governmental organizations, academic institutions, and advocates to communicate directly with ERO to answer questions and resolve concerns." AR 160.

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agencies/rg-0600/n1-220-97-006_sf115.pdf (last visited Aug. 27, 2020) (two-year retention of "weekly status reports from field investigators" for the National Indian Gaming Commission).

> Call center representatives answer calls and assist with resolution on subjects such as: incidents of sexual or physical assault or abuse; serious or unresolved problems in detention; reports of victims of human trafficking; and requests for basic case information. ICE telephone operators create records in a web-based platform in response to calls received in call centers. Call reports are collected at ICE headquarters and sent to the appropriate field offices for investigation.

Id. The DRIL records in the Schedule "consist of initial case intake data," which is "referred to other offices as appropriate." AR 178.

Following its appraisal policy, NARA considered how long DRIL files must be preserved to protect legal rights. *See* Appraisal Policy §§ 7(a), 8(a). NARA approved a seven-year retention period—as opposed to the five-year period initially proposed, *see* AR 651–52—to "ensure the maintenance of records for a length of time to ensure the protection of detainees' legal rights." AR 160. As NARA explained, the seven-year period is appropriate because "the statute of limitations applicable to a civil action for deprivation of rights torts is two to six years." *Id.* (citing 42 U.S.C. § 1983).

NARA also considered whether the records should be preserved permanently as documentation of "significant actions of federal officials." AR 17; *see* Appraisal Policy §§ 7(b), 8(b)–(e). NARA permanently preserves "records that document the basic organizational structure of federal agencies and organizational changes over time; policies and procedures that pertain to an agency's core mission; and key agency decisions and actions." AR 17 (paraphrasing Appraisal Policy § 7(b)). "[C]all center intake records . . . do not meet this threshold." *Id.* Moreover, to the extent the DRIL records contain evidence of significant incidents at ICE facilities, "documentation of significant incidents will be captured in records specific to the type of allegation being made." AR 160. For example, "if a sexual assault is reported" through DRIL, "the agency would create records covered by [the Sexual Assault Files]," which would retained for 25 years, and the incident would be further documented through a SEN record that would be retained for 75 years. *Id.*; *see supra* p. 14. Thus, NARA reasonably explained why, under its Appraisal Policy, a seven-year retention period is

appropriate for DRIL records.

Plaintiffs misread NARA's discussion of the DRIL records. *See* Pls.' Mem. at 23–24. NARA never "conclud[ed] that the records only document 'decisions of lower-level officials about operational matters.'" *Contra id.* at 24 (quoting AR 17). NARA applied that description to Detainee Segregation Reports, *see infra* p. 22, and accurately described the DRIL records as "call center intake records." AR 17. As discussed above, NARA reasonably concluded that call center intake records do not warrant permanent preservation under the Appraisal Policy.

Amici's discussion of two recent studies that made use of DRIL records does not suggest that NARA's approval of a seven-year retention period was unreasonable. *See* Br. of *Amici* American Immigration Council and National Immigration Justice Center ("Br. of *Amici*") at 12–13, ECF No. 11.[3] Each study referenced by *amici* analyzed DRIL records from less than five years prior to the study's publication. *See id.* (stating that a 2017 complaint "analyzed DRIL hotline calls between October 2012 and March 2016" and a 2018 law review article "analyzed more than 48,800 facility-related grievances received through DRIL from FY 2013 through 2015"). *Amici*'s suggestion that "[n]one of these studies . . . would have been possible [without] multiple years of data and agency records," *id.* at 14, overlooks the fact that the Detainee Schedule requires ICE to preserve DRIL records for *seven* years after their creation, AR 7. If anything, *amici*'s discussion of these studies supports NARA's position that the DRIL records' "anticipated research use will be more contemporary rather than many years into the future," AR 17, and highlights the reasonableness of NARA's decision that DRIL records be retained for seven years.

[3] The bulk of *amici*'s brief does not discuss the reasonableness of NARA's approval of the Schedule, but rather criticizes ICE for an alleged "lack[] [of] transparency in enforcement and detention policies," Br. of *Amici* at 3 (capitalization altered). *See id.* at 3–10. These allegations are not relevant to the legal question before this Court.

F. NARA Reasonably Concluded That a 7-Year Retention Period Is Appropriate for Detainee Segregation Reports.

Detainee Segregation Reports "are records documenting placement of detainees in segregated housing, either for non-punitive administrative reasons or as a disciplinary action. "Non-punitive detention pertains to detainees with mental health problems, or those who are sexual minorities. These records are created for the purpose of managing and monitoring detainee housing." AR 160.

Following its appraisal policy, NARA considered how long Detainee Segregation Reports must be preserved to protect legal rights. *See* Appraisal Policy §§ 7(a), 8(a). NARA approved a seven-year retention period—as opposed to the three-year period initially proposed, *see* AR 652—to protect the legal rights of detainees who are placed in segregated housing. AR 160–61. As with the DRIL records, NARA explained that a seven-year period is appropriate because "the statute of limitations applicable to a civil action for deprivation of rights torts is two to six years." AR 161 (citing 42 U.S.C. § 1983).

NARA also considered whether the records should be preserved permanently as documentation of "significant actions of federal officials." AR 17; *see* Appraisal Policy §§ 7(b), 8(b)–(e). NARA explained that "[r]ecords involving decisions of lower-level federal officials about operational matters such as segregated housing of individual detainees" are not "[r]ecords documenting significant actions of federal officials" as that term is used in the Appraisal Policy. AR 17. That is so even if some decisions reflected in the records were poor ones. *Cf.* Pls.' 22–23 (alleging that the records contain evidence of poor decisions by ICE officials, but failing to demonstrate that the Appraisal Policy obligates NARA to permanently preserve them for that reason).

Amici's discussion of Detainee Segregation Reports, like their discussion of DRIL records, ignores the fact that the records will be preserved (and available to the public through FOIA) for seven years under the Schedule. *See* Br. of *Amici* at 11–12. One of the studies referenced by *amici*, released in 2020, relied on segregation reports from 2013-2017; the other study, published in 2018,

"relied on FOIA data regarding the use of solitary confinement in California beginning in 2013." *See id.* at 11 & n.40. Thus, *amici* are simply wrong to suggest that the seven-year retention period for segregation reports will prevent researchers from producing similar studies going forward. *See id.* at 10–14.[4]

II. Plaintiffs' Criticisms of NARA's Decision Fall Well Short of Showing That It Was Arbitrary or Capricious.

A. NARA Adequately Evaluated the Research Value of Each Set of Records.

As described above, NARA appropriately evaluated each group of records in the Schedule under the standards set forth in §§ 7 and 8 of its Appraisal Policy, informed by the numerous factors listed in Appendix 1 of the Policy. Plaintiffs assert otherwise by myopically focusing on certain asserted interests of historians, largely ignoring the holistic inquiry called for by the Appraisal Policy. Plaintiffs' suggestion that NARA must permanently preserve all agency records that could be used for future research is fundamentally inconsistent with NARA's mandate to identify the limited set of records essential to documenting the rights of citizens, key actions of the Federal government, and the national experience. *See* Appraisal Policy §§ 7–8. While NARA appraisers do assess the "future research potential of records," this is just one of myriad factors that appraisers "consider together[], rather than in isolation." *Id.* app. 1. Plaintiffs' disagreement with NARA's assessment of some scheduled records' potential utility for research decades in the future—which is undisputedly "the most difficult variable to determine," *id.*—in no way undermines NARA's presumptively valid judgment that these records do not warrant permanent preservation under §§ 7 and 8 of the Appraisal Policy. *See Ashton*, 310 F. Supp. 3d at 156–57 (noting that agency judgments are presumptively valid under the APA).

[4] *Amici* also reference a 2015 analysis that relied on ICE detention facility inspection reports "over a period [of] 5 years," Br. of *Amici* at 13, but those reports are not covered by the Schedule at issue in this case.

Plaintiffs cannot dispute that NARA considered the potential research value of each set of records at issue in this case, as contemplated by Appendix 1 of the Appraisal Policy. They contend, however, that NARA erred in its "overall" assessment of "the research value of all records" covered by the Schedule. Pls.' Mem. at 22; *see id.* at 19–21. Relatedly, they contend that NARA did not "show[] the requisite 'sensitivity to researchers' interests.'" *Id.* at 20 (quoting Appraisal Policy § 1). Neither contention is persuasive.

To the extent Plaintiffs challenge the substance of NARA's assessment of the scheduled records' research value, their challenge fails under the "highly deferential" standard of APA review, *Ashton*, 310 F. Supp. 3d at 156 (quoting *Hagelin*, 411 F.3d at 242). NARA determined that the "anticipated research use" for the records scheduled for short-term temporary retention would be relatively "contemporary"; *i.e.*, most research would occur within the records' retention period. AR 17; *see also* AR 159–61, 177–78. NARA further determined that documents scheduled for 75-year retention or permanent preservation—*e.g.*, SEN data, OPR Death Review Files, Detainee Death Reports, and A-Files—would be adequate for research to be conducted "many years into the future." AR 17; *see also* AR 156–60, 173–76. Plaintiffs' submission that some immigration historians "routinely rely on source material dating back well over 100 years," Pls.' Mem. at 31, does not obligate NARA to retain all agency documents indefinitely.

Plaintiffs' claim that NARA unreasonably discounted "the research value of primary source material" in approving the Schedule, *see id.* at 30–33, also lacks merit. It is not clear how Plaintiffs are defining "primary source material"; from NARA's perspective, all agency records it appraises are primary sources, and Plaintiffs cite no public comments suggesting otherwise. If Plaintiffs' intended meaning is that some of the scheduled records (such as the DRIL intake materials) may contain "unfiltered" statements from detainees and non-ICE employees, NARA addressed that point and explained why those records do not meet the criteria for permanent preservation under §§ 7 and 8 of

the Appraisal Policy. *See* AR 22.[5] Nor did NARA "fail[] to consider that 'SEN's primary purpose' is not to maintain complete records sufficient to serve the long-term needs of historians and researchers, but rather to serve *ICE's* immediate operational needs," Pls.' Mem. at 31 (citation omitted). No commenters raised this point, either, and it is not a relevant consideration under the Appraisal Policy because *all* records covered by the Schedule are created to serve the agency's needs, not researchers' interests. *See, e.g.*, AR 159 (Detention Monitoring Reports "serve as a digest for operational awareness"); AR 160 (Detainee Segregation Reports "are created for the purpose of managing and monitoring detainee housing.").

Nothing in *Webster* suggests that NARA's decision to approve the Schedule was arbitrary. *Cf.* Pls.' Mem. at 30–32, 35 (relying on *Webster*). *Webster* is not at all on point; it involved disposition schedules that gave FBI field offices extremely broad authority to destroy files from closed investigations, with no retention period, and that were approved with almost no explanation from either the FBI or the Archivist. *See Webster*, 720 F.2d at 64–69 & nn.57, 58, 61. The court held only that the APA requires "some reasoned justification explaining why certain types or categories of . . . data should be destroyed," and that no such justification had been provided. *Id.* at 65. Here, NARA *has* provided an extensive, well-reasoned justification for each item on the Schedule. *See supra* pp. 13–23. *Webster* does not authorize courts to second-guess the substance of NARA's appraisal decisions on the ground that they reflect insufficient "sensitivity" to "researchers' interests." *Contra* Pls.' Mem. at 32 (citing *Webster*, 720 F.2d at 65–66 & n.61).

[5] NARA has never disputed that "primary source documents provide important details about detention conditions," Br. of *Amici* at 14. But *amici*'s cursory discussion of this point, which describes three recent reports that used documents from no more than six years before their publication, in no way suggests that the retention periods in the Schedule (all but one of which exceeds seven years) are unreasonable.

To the extent Plaintiffs contend that NARA was required to provide further explanation regarding the documents' research value, they are again incorrect. The APA's "requirement that the agency adequately explain its result . . . . is not particularly demanding.'" *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 189–90 (D.D.C. 2011) (quoting *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993)). "Nothing more than a 'brief statement' is necessary, so long as the agency explains 'why it chose to do what it did.'" *Id.* (quoting *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001)); *see also, e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (APA's explanation requirement is satisfied by a "minimal level of analysis").

NARA's explanation of why it approved the Schedule easily satisfies this low standard. As discussed, NARA considered the potential research value of each group of scheduled records in assessing whether the records warranted permanent preservation under §§ 7 and 8 of the Appraisal Policy and in setting appropriate retention periods for six of the eight groups. *See supra* pp. 13–23. But potential research value is just one of many factors that informed NARA's decision to approve the Schedule. *See* Appraisal Policy app. 1 (listing fifteen questions that NARA appraisers should "consider[] together, rather than in isolation"). Neither the APA nor the Appraisal Policy required NARA to specifically address each of these myriad factors in its public explanation of why it approved the Schedule, much less to produce an analysis of "'the kinds and extent of current research use' of [each set of] ICE records by individuals engaged in historical and human rights research," "the unique 'significance' of the immigration enforcement 'functions and activities performed by' ICE," "the fact that ICE is a relatively new federal agency at the center of a historically unprecedented surge in immigration detention," or "the major social . . . issues implicated by the agency's widely-condemned practices." *Contra* Pls.' Mem. at 20–21 (describing these as "critical points" that NARA was obligated to address in its decision). Nor is there any requirement that NARA cite a provision from its Appraisal Policy in support of every reason it gave for its decision. *Contra* Pls.' Mem. at 32.

In sum, NARA considered the relevant factors, set a reasonable retention period for each category of scheduled documents, and adequately explained its reasons for doing so. Plaintiffs' substantive criticisms of NARA's decision fail under the highly deferential standard of APA review, and Plaintiffs' demands for further explanation seek far more than what the APA requires.

B. NARA Adequately Responded to Public Comments.

Like the adequate-explanation requirement discussed above, an agency's obligation to respond to public comments "is not 'particularly demanding.'" *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441-42 (D.C. Cir. 2012) (quoting *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993)). "[T]he agency's response to public comments need only 'enable [courts] to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'" *Pub. Citizen*, 988 F.2d at 197 (quoting *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)); *cf. Simpson v. Young*, 854 F.2d 1429, 1435 (D.C. Cir. 1988) ("The agency need only state the main reasons for its decision and indicate that it has considered the most important objections."). NARA satisfied this requirement in both rounds of public comment by summarizing the concerns raised and responding to them. *See* AR 14–24, 153–61. None of Plaintiffs' arguments to the contrary has merit.

First, Plaintiffs err in asserting that NARA failed to respond to "a letter signed by 28 members of Congress." *Contra* Pls.' Mem. at 24 (citing AR 485–86 & n.9). NARA directly responded to each Member, correcting the Members' misapprehension that ICE was requesting to "shorten[] . . . an existing retention time frame" and informing them that NARA and ICE were in the process of revising the proposed schedule in light of the first round of public comments. *See* AR 215–268. Several months later, NARA followed up with each Member, informing them that NARA had published the revised schedule, appraisal memo, and First Consolidated Reply. *See* AR 115–39. In addition, NARA addressed the Members' suggestion that the scheduled records will have "high historical and research value," AR 486—and to other, similar comments about the records' "potential to shed light on a major

political, social and cultural controversy of our time"—in its Second Consolidated Reply. *See* AR 15–20. *Contra* Pls.' Mem. at 24–25. NARA acknowledged that the records scheduled for temporary retention have contemporary research uses and that "many organizations and individuals . . . have interest in these records for purposes of accountability and transparency." AR 17. NARA explained, however, that the records do not "meet the criteria for permanence established in NARA's appraisal policy," and that the retention period for each group of records would adequately protect the interests of researchers and other interested parties. *Id.*

Second, NARA considered and responded to comments about the Detainee Segregation Reports, including those submitted by the ACLU and by Jenny Patino. *Contra* Pls.' Mem. at 22–23, 25. NARA's First Consolidated Reply not only considered and responded to the ACLU's comment (and four similar comments) on Detainee Segregation Reports, but also increased the retention period for the reports from three years to seven years in response to those comments. *See* AR 155, 160–61. NARA's Second Consolidated Reply reproduced a large excerpt from Ms. Patino's comment and rebutted her contention that a seven-year retention period will not adequately protect the legal rights of detainees. *See* AR 23–24. Plaintiffs inaccurately portray NARA as ignoring these comments and summarily concluding that these documents have "little or no research value," Pls.' Mem. at 25 (quoting AR 11).[6] In reality, NARA considered each comment and acknowledged that the Detainee Segregation Reports have some contemporary research uses. *See* AR 17, 21, 23–24. But these comments do not directly—let alone "persuasively"—challenge NARA's conclusion that a seven-year retention period is adequate for research purposes, *see* AR 155, 160–61, 178–79. *Contra* Pls.' Mem. at 25.

[6] "Little or no research value" is a shorthand phrase that NARA appraisers use to indicate that records do not meet the criteria for permanent preservation set forth in § 8 of NARA's Appraisal Policy. *See* AR 11, 177–78, 611–13.

Third, NARA adequately considered and responded to a submission by two Durham University professors, AR 90–102, which contends that all records on the Schedule should be kept permanently because of their potential research value. *Contra* Pls.' Mem. at 25–26. NARA addressed this concern in both of its Consolidated Replies, *see* AR 17–24, 156, and was not required to specifically reference the professors' comment, *see, e.g.*, *Simpson*, 854 F.2d at 1435. Moreover, like the research cited by *amici*, the professors' comment actually supports NARA's position that temporary retention of the records is adequate for research purposes; the submission gives many examples of scholars requesting and obtaining records within the retention periods set forth in the Schedule, and no examples of scholars using older records. *See* AR 92–93, 95–99. Thus, NARA's approval of the Schedule will not interfere with the research the professors describe.

Fourth, Plaintiffs are wrong to suggest that NARA ignored "comments attesting to the research utility of having certain accumulations of records compiled in a single place." *Contra* Pls.' Mem. at 26–27. NARA's Appraisal Policy indicates that NARA does not typically preserve as permanent "records containing data that is duplicated in other sources," but may do so "in the case of records that are more complete or more easily accessible than the alternative source." Appraisal Policy, app. 1. But ease of access cannot justify *permanently* preserving a group of records that are only *temporarily* accessible elsewhere. *See id.* Accordingly, NARA rejected comments suggesting that ERO files should be made *permanent* to avoid "fragmentation of documentary evidence" because "[t]he materials gathered from disparate sources that are included in the ERO file are themselves mostly *temporary* records." AR 19 (emphasis added). In any event, NARA was not required to respond to these comments because they did not "'challenge [any] fundamental premise" underlying NARA's decision to approve the Schedule. *See Carlson v. Postal Reg. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019); *see also Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 17 (D.C. Cir. 2015) ("[A]n agency need not "discuss every item of fact or opinion included in the submissions made to it." (internal

quotation marks and citation omitted)).

Fifth, NARA adequately considered and responded to "comments comparing the historical significance of ICE detention to the internment of Japanese Americans during World War II." *Contra* Pls.' Br. at 27–28. NARA reasonably distinguished between records concerning the "forced relocation and incarceration of Japanese-Americans in the 1940s"—an extraordinary, wartime act involving "the detention of U.S. citizens *on the basis of* ethnicity and national origin"—and records concerning non-citizens in temporary immigration detention. AR 18 (emphasis added). But NARA did not ignore the commenters' assertion that immigration detention, like internment, may involve[] "governmental mistreatment of marginalized populations," Pls.' Mem. at 27. To the contrary, NARA determined the retention period for each set of records based on the need to protect detainees' rights and hold government officials accountable, *see, e.g.*, AR 17, 22–23, 173–79, repeatedly noting that records documenting incidents of significant misconduct by ICE employees are already scheduled for permanent preservation, *see* AR 21, 153, 173–74.

In sum, NARA's response to public comments through its two Consolidated Replies was more than adequate to reveal "what major issues of policy were ventilated . . . and why the agency reacted to them as it did." *Pub. Citizen*, 988 F.2d at 197 (citation omitted). While Plaintiffs disagree with NARA's responses to certain comments, they fail to identify any "relevant and significant" comment that NARA did not address. *See Carlson*, 785 F.3d at 15 (citation omitted).

C. NARA Did Not Arbitrarily Disregard Its Past Practices.

Plaintiffs err in claiming that NARA acted arbitrarily by "failing to consider the relevance of Record Group 85" in approving the Schedule, *see* Pls.' Br. at 28–30. Record Group 85 contains *all* records permanently preserved from the former Immigration and Naturalization Service ("INS") and its predecessors, covering well over 150 years. *See* Nat'l Archives & Recs. Admin., Records of the Immigration and Naturalization Service, https://www.archives.gov/research/guide-fed-

records/groups/085.html#85.1 (last visited Aug. 27, 2020) ("Record Group 85 Webpage"). Plaintiffs observe that this massive collection includes "[d]aily activity reports of immigration inspectors" and "detainment," but neglect to mention that these records of daily operations come from the INS office in Philadelphia, Pennsylvania during 1883–1893 and 1901–1912. *Compare* Pls.' Mem. at 28, *with* Record Group 85 Webpage. Similarly, Plaintiffs reference "immigration investigation case files" from Group 85, but fail to mention that these files come from the INS office in Fort Worth, Texas during 1915–1943. *Compare* Pls.' Mem. at 28, *with* Record Group 85 Webpage. Plaintiffs' claim that these century-old records are "strikingly similar" to the modern records at issue in this litigation, Pls.' Mem. at 28, is misleading at best.

In any event, NARA did not ignore its past treatment of immigration-related records. To the contrary, NARA staff took care to confirm that the records at issue in this case are not covered by any legacy INS schedule. *See* AR 269, 271. And it is plain that the scheduled records are not the "chronological continuations of records already in the National Archives," Appraisal Policy, app. 1. For example, there are no historical predecessors to the Sexual Abuse and Assault Files because such records were not collected prior to the enactment of the Prison Rape Elimination Act of 2003. *See* AR 172.[7] The mere fact that Records Group 85 contains isolated groups of records documenting day-to-day INS operations—many of which, including those cited by Plaintiffs, are 80 to 120 years old—

[7] A-Files provide an example of a "chronological continuation[] of records already in the National Archives," Appraisal Policy, app. 1. An A-File contains all records of an alien not yet naturalized who passes through the U.S. immigration and inspection process, as well as records of enforcement actions against aliens who have not passed through that process. *See* Nat'l Archives & Recs. Admin., Alien Files (revised Jan. 16, 2020), https://www.archives.gov/research/immigration/aliens (last visited Aug. 27, 2020). An A-File "may include visas, photographs, affidavits, and correspondence leading up to an alien's naturalization, permanent residency, death, or deportation." *Id.* INS began creating A-Files in 1944, and those A-Files are permanently preserved as part of Records Group 85. *See id.* When INS was disbanded in 2003, the U.S. Citizenship and Immigration Services began creating A-Files, and these modern-day A-Files are scheduled for permanent preservation just like their historical predecessors. *See* AR 175.

does not show that either ICE or NARA has a "prior agency practice" of broadly retaining such records, let alone a practice of retaining the specific types of records covered by the Schedule. *Contra* Pls.' Br. at 29 (asserting that NARA "departed from prior agency practice without explanation"). Nor did NARA ignore public comments "flagg[ing]" the purported "relevance" of Record Group 85; the lone comment referenced by Plaintiffs states that NARA "permanently keeps all sorts of records" from the Japanese internment camps of the 1940s, *see* Pls.' Mem. at 29, and NARA squarely addressed this comment, *see supra* pp. 29–30. In short, Plaintiffs' arguments about Record Group 85 are specious.

D. NARA Was Not Required to Assess the Costs of Permanent Preservation.

In the final paragraph of their memorandum, Plaintiffs assert that NARA acted arbitrarily because it did not "provide any assessment of either the potential volume of ICE records at issue or the costs associated with permanent retention." Pls.' Mem. at 38. Plaintiffs concede that no statute, regulation, or guidance requires NARA to engage in such an analysis, but claim that NARA "undertook an obligation" to provide this analysis by mentioning "resource considerations" in its Second Consolidated Reply. *Id.* (citing AR 17).

This is plainly incorrect. NARA referenced "resource considerations" only once in the entire administrative record. *See* AR 17. It did so in explaining its obligation to balance researchers' interest in retaining as many records as possible against "the Federal Record Act's goal of managing the accumulation of federal records." AR 17. Conserving resources through the "judicious preservation and disposal of records" is an overarching goal of the FRA, 44 U.S.C. § 2902(5), and this goal is reflected in the NARA's demanding standard for permanent preservation, *see* Appraisal Policy §§ 6–8. NARA rarely considers the costs of long-term retention of records in a particular case, however, *see id.* app. 1, and it did not do so here. Instead, NARA's decision to approve the Schedule rested on a consideration of the archival value of each set of records under §§ 7 and 8 of the Appraisal Policy.

See supra pp. 13–23. NARA therefore had no obligation to assess the volume of the scheduled records or the potential cost of preserving them.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be denied, and Defendants' cross-motion for summary judgment should be granted.

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