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

REPLY IN SUPPORT OF
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

As detailed in Defendants' opening memorandum, NARA reasonably determined that two of the eight groups of records listed on Schedule DAA-0567-2015-0013 ("Schedule") warrant permanent preservation, and the other six warrant temporary retention. NARA explained that most of the records in the latter six groups do not meet the permanent-preservation criteria set forth in §§ 7 and 8 of its Appraisal Policy, and the key information they contain is largely preserved in other long-term temporary or permanent collections. NARA recognized that these six sets of records have some value, however, and assigned each of them a multi-year retention period to protect legal rights and facilitate research. It also provided two separate opportunities for public comment on the proposed Schedule, summarized the concerns raised, and responded to them in the Federal Register. Accordingly, NARA's decision to approve the schedule was both "reasonable and reasonably explained," *Carlson v. Postal Reg. Comm'n*, 938 F.3d 337, 343–44 (D.C. Cir. 2019) (quoting *Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009)), and easily passes muster under the applicable, "highly deferential" standard of Administrative Procedure Act ("APA") 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' contrary arguments misunderstand the criteria by which NARA determines whether a given set of Federal records should be permanently preserved in the National Archives. These criteria are listed in §§ 7 and 8 of NARA's Appraisal Policy. *See* Nat'l Archives & Recs. Admin., Appraisal Policy of the National Archives §§ 6–9 (revised Sept. 20, 2007), https://www.archives.gov/records-mgmt/scheduling/appraisal (last visited Oct. 8, 2020) ("Appraisal Policy"). Myriad considerations that may help NARA appraisers determine which records meet these criteria are set forth in Appendix 1 of the policy. *See* Appraisal Policy § 9, app. 1. Plaintiffs turn this framework on its head: They steadfastly refuse to engage with the dispositive criteria listed in §§ 7 and 8, and instead

frame their preferred consideration from Appendix 1—"future research potential"—as the dispositive criterion. *See, e.g.*, Reply in Supp. of Pls.' Mot. for Summ. J. and Opp. to Defs.' Cross-Mot. for Summ. J. 7–9, ECF No. 16 ("Pls.' Reply"). This Court should reject Plaintiffs' misreading of NARA's Appraisal Policy.

Perhaps recognizing that their approach is inconsistent with the Appraisal Policy, Plaintiffs assert that it is required by the Federal Records Act ("FRA"), specifically 44 U.S.C. §§ 3303a(a).[1] *See, e.g.*, Pls.' Reply at 5–6. This assertion does not appear in Plaintiffs' opening memorandum and, in any event, it is meritless. The FRA gives the Archivist broad authority to determine which Federal records "have sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government." 44 U.S.C. § 3303a(a). There should be no serious dispute that the Archivist permissibly exercised that authority by establishing and applying the more specific permanent-preservation criteria listed in §§ 7 and 8 of the Appraisal Policy.

NARA reasonably explained its determination that the six groups of records at issue here do not meet these criteria. *See* Mem. in Supp. of Defs.' Cross-Mot. for Summ. J. and Opp. to Pls.' Mot. for Summ. J. 13–23, ECF No. 14-1 ("Defs.' Mem."). Plaintiffs maintain that certain records—corrective action plans created in response to detainee deaths, correspondence between ICE Enforcement and Removal Operations ("ERO") and facilities where detainee deaths occur, Detention Reporting Information Line ("DRIL") intake records, and records documenting the placement of detainees in segregated housing—are more valuable than NARA assessed them to be. *See* Pls.' Reply at 14–19. Plaintiffs' arguments may show that there is room for reasoned disagreement about the records' significance, but they do not show any "clear error of judgment" that would amount to an

[1] Plaintiffs refer to 44 U.S.C. Chapter 33 as part of the Records Disposal Act ("RDA") while Defendants refer to it as part of the Federal Records Act ("FRA"). *Compare* Pls.' Reply at 2, *with* Defs.' Mem. at 1. Both terms are accurate, as the RDA is a "portion of" the FRA. *Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999).

APA violation, *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)).

Unable to show any defect in the explanation NARA provided, Plaintiffs spend much of their reply brief contending that NARA should have said more. First, Plaintiffs suggest that the numerous considerations in Appendix 1 of the Appraisal Policy are all "relevant factors" that NARA had an affirmative obligation to specifically address. *See, e.g.*, Pls.' Reply at 7–8, 10. But the APA requires only that NARA "state the main reasons for its decision"—*i.e.*, assess each item against the controlling provisions of §§ 7 and 8—not that it discuss each and every potentially helpful consideration listed in Appendix 1. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 885 F.3d 714, 720 (D.C. Cir. 2018) (quoting *Simpson v. Young*, 854 F.2d 1429, 1434 (D.C. Cir. 1988)). It would be impractical for NARA to address these myriad factors for every item on each of the hundreds of schedules it appraises each year.

Second, Plaintiffs argue that NARA's responses to public comments about the records' potential research uses should have contained greater specificity and detail. *See* Pls.' Reply at 23–26. Again, Plaintiffs demand more than the APA, which requires only that the agency "indicate that it has considered the most important objections" raised by commenters. *Resolute Forest Prod., Inc. v. USDA*, 130 F. Supp. 3d 81, 93 (D.D.C. 2015) (quoting *Simpson*, 854 F.2d at 1435). NARA cleared this relatively low hurdle by summarizing and responding to the major concerns expressed. Moreover, many of the comments did not require a specific response because they did not challenge the fundamental grounds for NARA's decision—*i.e.*, that the scheduled records do not satisfy §§ 7 and 8 of the Appraisal Policy, and that the significant information they contain is largely preserved elsewhere.

Third, Plaintiffs assert that NARA should have discussed researchers' asserted interest in the preservation of "primary sources," as opposed to "secondary summaries"; an extra-record guidance document regarding "periodic reports"; the purported relevance of Record Group 85; and the projected costs of permanently preserving all records on the Schedule. *See* Pls.' Reply at 10–13, 29–

34. These arguments are not properly before the Court, however, as they were not raised before NARA in the notice-and-comment proceedings below; and in any event, none of them shows NARA's decision to be unreasonable.

Finally, Plaintiffs cite recent allegations of misconduct by ICE officials in support of their claim that "ICE is no ordinary federal agency, and the records at issue in this case are no ordinary federal records." Pls.' Reply at 1. Subsequent reporting has cast doubt on the veracity of the cited allegations. *See, e.g.*, Nick Miroff, *Hospital Where Activists Say ICE Detainees Were Subjected to Hysterectomies Says Just Two Were Performed There*, Wash. Post (Sept. 22, 2020), https://www.washingtonpost.com/immigration/ice-detainee-hysterectomies-hospital/2020/09/22/aaf2ca7e-fcfd-11ea-830c-a160b331ca62_story.html. But regardless of whether these allegations are true, they have no bearing on NARA's December 2019 decision to approve the Schedule. As NARA repeatedly noted below, records that document significant misconduct by ICE employees are designated for permanent preservation. *See* AR 21, 153, 173–74. Indeed, the very records Plaintiffs reference in the opening paragraph of their reply brief—whistleblower complaints and an Inspector General investigation—are permanently preserved. *See* Records Schedule N1-563-07-5, Items 2, 5 (approved Feb. 22, 2007), https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-homeland-security/rg-0563/n1-563-07-005_sf115.pdf.

For these reasons, and as explained further below, this Court should affirm NARA's decision by granting Defendants' motion for summary judgment.

ARGUMENT

I. Plaintiffs Mischaracterize NARA's Appraisal Policy and NARA's Legal Obligations Under the FRA and APA.

Sections 7 and 8 of NARA's Appraisal Policy define which Federal records warrant permanent preservation in the National Archives. First, NARA permanently preserves records that "[r]etain their importance for documenting legal status, rights and obligations . . . despite the passage of time." *See*

§ 8(a); *accord id.* § 7(a). Second, NARA permanently preserves records that "contain[] significant documentation of Government activities and [are] essential to understanding and evaluating Federal actions." *Id.* § 7(b); *see also id.* § 8(b)–(e) (providing additional detail about which records meet this standard). Third, NARA permanently preserves records that "[c]ontribute substantially to knowledge and understanding of the people and communities of our nation." *Id.* § 8(f); *accord id.* § 7(c).

There is no merit to Plaintiffs' assertion that the "controlling provisions" of NARA's Appraisal Policy are found in Appendix 1, rather than §§ 7 and 8. Pls.' Reply at 6, 9. Appendix 1 lists a host of considerations that may assist NARA appraisers "[i]n determining which records . . . warrant permanent retention" under §§ 7 and 8. Appraisal Policy § 9; *see also* Defs.' Mem. at 5–6. While "future research potential of records" is one of these considerations, it is not to be assessed "in isolation" from the others. Appraisal Policy, app. 1. Future research potential is not the "controlling" consideration for records that clearly fail to satisfy §§ 7 and 8. *See id.* (instructing appraisers to assess "[t]he significance of the functions and activities" covered by the records in relation to the preservation objectives set forth in §§ 7 and 8). Nor is future research potential "controlling" where key information contained in a set of records is captured in other permanent or long-term temporary records. *See id.* (explaining that records generally do not warrant preservation if the "significant information" they contain is "duplicated in other sources").

The FRA gives the Archivist broad authority to determine which Federal records "do not, or will not after the lapse of the period specified, have sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government." 44 U.S.C. § 3303a(a). The Archivist has exercised this authority by establishing the permanent-preservation criteria listed in §§ 7 and 8 of the Appraisal Policy. *See* Appraisal Policy §§ 6–9. Broadly speaking, Sections 7(a) and 8(a) relate to legal value; §§ 7(b) and 8(b)–(e) relate to research value; and §§ 7(c) and 8(f) relate to other value. The Archivist's determination that these types of records "warrant . . . continued preservation

by the Government," 44 U.S.C. § 3303a(a), is reasonable and well within his "substantial discretion" to determine Federal records-preservation standards. *See Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 42 (D.C. Cir. 1983); *see also* 44 U.S.C. § 2904(c)(1) (authorizing the Archivist to "promulgate standards, procedures, and guidelines with respect to records management"); *Green v. NARA*, 992 F. Supp. 811, 823 (E.D. Va. 1998) (recognizing that Federal records-preservation policies are "committed to NARA's sound discretion" by the FRA).

Plaintiffs argue that in addition to considering the criteria listed in §§ 7 and 8, NARA has a "freestanding statutory obligation" under the FRA to "independently address" the future research potential of each set of records it schedules. Pls.' Reply at 5–6, 25 (citing 44 U.S.C. § 3303a(a)); *see also id.* at 2, 12–13, 22–23, 26, 29. Plaintiffs err by conflating "future research potential," Appraisal Policy app. 1, with the type and degree of "research . . . value" that makes a record suitable for permanent preservation by the Federal Government under 44 U.S.C. § 3303a(a). *See* AR 17 (distinguishing between records' "anticipated research use" and records' "archival value"). As explained above, NARA evaluates archival value, including "research . . . value," through the criteria set forth in §§ 7 and 8 of the Appraisal Policy. *See also, e.g.*, AR 159–61, 177–78 (indicating that records that do not document "significant" Government activities lack "research value"). Difficult-to-make projections about "future research potential" are one consideration, but not the key inquiry. Appraisal Policy app. 1. Accordingly, NARA satisfies the FRA by assessing records under §§ 7 and 8 of its Appraisal Policy, and has no "freestanding obligation" to discuss the future research potential of each set of records it schedules, Pls.' Reply at 2.

Plaintiffs also mischaracterize the APA's highly deferential standard of review. For one thing, Plaintiffs assert that the APA requires "more than a 'brief statement' justifying the agency's action" because the term "brief statement" comes from 5 U.S.C. § 555(e), not 5 U.S.C. § 706(a)(2), which is the applicable provision here. Pls.' Reply at 10 (citing *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737

(D.C. Cir. 2001)). But numerous judges in this District have held that a "brief statement" is sufficient under 5 U.S.C. § 706(a)(2). *See, e.g.*, *Ramirez v. ICE*, --- F.Supp.3d ---, 2020 WL 3604041, at *6 (D.D.C. July 2, 2020) (Contreras, J.); *Mashpee Wampanoag Tribe v. Bernhardt*, --- F. Supp. 3d ---, 2020 WL 3037245, at *8 (D.D.C. June 5, 2020) (Friedman, J.); *Hensley v. United States*, 292 F. Supp. 3d 399, 407 (D.D.C. 2018) (Kelly, J.); *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 190 (D.D.C. 2011) (Walton, J.); *see also Intercity Transp. Co. v. United States*, 737 F.2d 103, 108 (D.C. Cir. 1984) (noting that "a brief statement" is an adequate basis for judicial review "in other contexts" besides 5 U.S.C. § 555(e)).

Relatedly, Plaintiffs suggest that each of the myriad considerations listed in Appendix 1 of the Appraisal Policy is a "relevant factor" that NARA must specifically address in its appraisal decisions. *See* Pls.' Reply at 2–5, 7–10, 13–16, 31. It is well established, however, that the APA requires an agency "only [to] state the main reasons for its decision and indicate it has considered the most important objections." *E.g.*, *Util. Air Regulatory Grp.*, 885 F.3d at 720 (quoting *Simpson*, 854 F.2d at 1434). The APA's requirement "that [an] agency adequately explain its result" is not "particularly demanding," *Pub. Citizen*, 988 F.2d at 197; it merely requires the agency to "explain[] why it chose to do what it did," *Ramirez*, 2020 WL 3604041, at *6 (D.D.C. July 2, 2020). Accordingly, NARA has an APA obligation to explain whether a given set of records satisfies the relevant permanent-preservation criteria set forth in §§ 7 and 8 of the Appraisal Policy, to set a reasonable retention period for records that do not warrant permanent preservation, and to respond to major issues raised by commenters. *See Webster*, 720 F.2d at 60, 65 (requiring "some reasoned justification" for decisions about whether records warrant retention or preservation). But NARA has no obligation to—and does not—discuss the numerous considerations listed in Appendix 1 for every item on the hundreds of schedules it appraises each year. Indeed, such a requirement would be unduly burdensome. *Cf. Resolute Forest Prod.*, 130 F. Supp. 3d at 93 (holding that the APA should not be interpreted to impose "exacting obligation[s]" that "would grind the federal government to a halt").

II. NARA Followed Its Appraisal Policy and Fulfilled Its FRA and APA Obligations in Approving the Schedule.

A. Plaintiffs Ignore NARA's Explanations and Mischaracterize NARA's Findings Regarding the Scheduled Records' Research Value.

There is no merit to Plaintiffs' assertion that NARA "fail[ed] to explain how its decision comported with its Appraisal Policy guidelines on assessing 'research value.'" Pls.' Reply at 9; *see also id.* at 2, 4–8, 12–19. NARA explained that the records at issue do not meet the research-value criteria set forth in §§ 7 and 8 for two main reasons. First, most of the records do not "contain[] significant documentation of Government activities" within the meaning of § 7(b) or fall into any of the categories listed in § 8. *See* Defs.' Mem. at 17–18 (Detention Monitoring Reports); *id.* at 19 (Detainee Escape Reports); *id.* at 20–21 (DRIL records); *id.* at 22 (Detainee Segregation Reports). Second, to the extent that these records may contain significant documentation of Government activities, that information is largely captured in other permanent or long-term temporary records. *See id.* at 14 (Sexual Assault Files); *id.* at 16–17 (ERO Death Review Files); *id.* at 17 (Detention Monitoring Reports); *id.* at 19 (Detainee Escape Reports); *id.* at 20 (DRIL records). Plaintiffs' reply brief largely ignores these explanations, persistently refusing to engage with §§ 7 and 8.

In addition, Plaintiffs mischaracterize NARA's findings regarding research value. First, Plaintiffs misconstrue the NARA appraiser's statements that several groups of records have "little or no research value." *See* Pls.' Reply at 2, 6, 9, 22–23, 26 (all quoting AR 17). As Defendants have explained, "'[l]ittle 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." Defs.' Mem. at 28 n.6 (citing AR 11, 177–78, 611–13). Even as NARA explained why six of the Schedule's eight items do not warrant permanent retention under §§ 7 and 8, however, it acknowledged that "many organizations and individuals . . . have interest in these records for purposes of accountability and transparency." AR 17; *see also* AR 156–61, 172–79. NARA did not overlook

these interests; it accounted for them by establishing lengthy retention periods during which researchers may obtain the records through FOIA. *See* Defs.' Mem. at 14–16, 24; AR 12, 17, 156–57, 160–61, 173–79; *cf. Webster*, 720 F.2d at 68 (invalidating aspects of a records-disposition schedule that "d[id] not reveal a glimmer of recognition that [the] records may be of administrative, legal, or research value," but upholding aspects that "reflect[ed] some consideration of research interests other than those of the [records-creating agency]").

Second, Plaintiffs misconstrue NARA's statement that the "anticipated research use" for non-permanent records is "more contemporary rather than many years into the future." *See* Pls.' Reply at 2, 7–8, 25–26 (quoting AR 17). This was not NARA's "lynchpin determination," *id.* at 2, 7, as Plaintiffs suggest. Again, the critical determination was that the six group of records at issue here do not satisfy the criteria set forth in §§ 7 and 8 of the Appraisal Policy. Nor did NARA "summarily proclaim" that the records at issue here lack long-term research value, *id.* at 25–26. To the contrary, NARA specifically considered each group of records' research value under §§ 7 and 8 of its Appraisal Policy, as well as the extent to which similar data is available through other permanent and long-term temporary records. *See* Defs.' Mem. at 13–23. Plaintiffs err by reading NARA's statement about "anticipated research use" in a vacuum, ignoring the supportive analyses in the First Consolidated Reply and Appraisal Memo. *Compare* AR 17 (acknowledging that the scheduled records have contemporary research uses), *with* AR 159–61, 177–78 (explaining why specific sets of scheduled records lack long-term research value under the Appraisal Policy, but setting multi-year retention periods ranging during which researchers will be able to obtain the records).

B. Plaintiffs' and *Amici*'s Criticisms of NARA's Decision Fall Well Short of Showing That It Was Arbitrary or Capricious.

1. Contemporary Studies on Immigration Detention Do Not Show That NARA's Approval of the Schedule Was Arbitrary or Capricious.

Amici cite several studies relying on "records that would be destroyed under the ICE

disposition schedule," and suggest that these studies "would not have been possible" without the scheduled records. Br. of *Amici* American Immigration Council and National Immigration Justice Center 10, ECF No. 11 ("Br. of *Amici*"); *see also id.* at 12–13. As explained in Defendants' opening memorandum, this is flat-out wrong. *All* of the multi-year studies *amici* reference—as well as those mentioned in a public comment by two Durham University professors—used records obtained through FOIA within the generous retention periods set forth in the Schedule. The fact that the Schedule will not interfere with *any* of this research tends to highlight the reasonableness of NARA's decision below. *See* Defs.' Mem. at 21–23, 29

To be clear, NARA is not attempting to rely on these studies to justify its approval of the Schedule. *Compare id.* at 21 (observing that *amici*'s brief unintentionally illustrates the adequacy of the retention periods NARA adopted), *with* Pls.' Reply at 20 (misconstruing Defendants' response to *amici* as a *post hoc* attempt to "justify its action" below). NARA's approval of the Schedule was amply justified by the reasons set forth in the Appraisal Memorandum, First Consolidated Reply, and Second Consolidated Reply. *See* Defs.' Mem. at 13–23. But the bar on *post hoc* rationalizations does not prevent Defendants pointing out that the central premise of *amici*'s brief—that the scheduled records illuminate important issues in the U.S. immigration detention system, *see* Br. of *Amici* at 1–2, 10–14—does not support *amici*'s conclusion that these issues "will escape scrutiny" if the Schedule is upheld, *id.* at 15.

2. NARA's Reliance on Significant Event Notification System Records Did Not Render Its Decision Arbitrary or Capricious.

Plaintiffs contend that NARA acted arbitrarily by failing to address whether "secondary summaries" of significant incidents "sufficiently fulfilled research interests so as to render retention of the primary records unnecessary." Pls.' Reply at 10 (citing Mem. in Supp. of Pls.' Mot. for Summ. J. 30–33, ECF No. 9-1 ("Pls.' Mem.")). This contention should be rejected for three independent

reasons.

First, the issue is not properly before the Court because no commenters raised it. *See, e.g.*, *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1297 (D.C. Cir. 2004) (per curiam) ("It is a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review."). Plaintiffs belatedly assert that submissions by the Archivists Round Table of Metropolitan New York ("ART") and by two Durham University professors "highlighted" the purported inadequacy of "secondary summaries" to capture "primary source material." Pls.' Reply at 12–13 (citing AR 96, 110). They did no such thing. The former comment argued that the Sexual Assault Files should be retained permanently because they are "more robust" than the SEN data, and the latter raised a similar concern with respect to the Detention Monitoring Reports. *See* AR 96, 110. Neither so much as hinted at the distinction between "primary" and "secondary" sources on which Plaintiffs' argument is based. Indeed, the term "primary" appears only once in the entire Administrative Record—in a three-line comment that generally describes the scheduled records as "primary documents upon which [history] should be based," AR 368—and the term "secondary" never appears at all.

Second, Plaintiffs inaccurately portray the SEN data as "secondary summaries" of events that are "downstream" from the "primary source material" contained in the Sexual Abuse and Assault Files, ERO Detainee Death Review Files, Detention Monitoring Reports, and Detainee Escape Reports. *See* Pls.' Reply at 10–13; Pls.' Mem. at 30–33. As NARA has explained, it does not consider the scheduled records to be "primary" and the SEN data to be "secondary"; all of these records are "primary" because they are created by ICE personnel to serve the agency's needs. *See* Defs.' Mem. at 24–25. Moreover, SEN reports are not "summaries" of the scheduled records, nor are they necessarily "downstream" from them. *Contra* Pls.' Mem. at 30. For example, ICE personnel create SEN reports containing data about incidents of alleged sexual assault, "including biographical information and

event summaries," "within 24 hours" of receiving notice of any such allegation. AR 157. Sexual Assault Files are developed much later. *See id.* at 172–73.

Third, Plaintiffs' reliance on *Webster* is misplaced. The records schedules in *Webster* permitted the FBI to "retain summaries of field office files and to destroy the original documents upon which the summaries [were] based." 720 F.2d at 65. The Court considered this unreasonable because neither the FBI nor NARA had given *any* consideration to "research interests and the rights of affected individuals" when deciding to discard the original documents and retain the summaries; they were "only concerned about preserving records that might serve [the FBI's] own institutional needs." *Id.* Here, by contrast, NARA has expressly considered both legal and research interests in the scheduled records and has accounted for them by establishing lengthy retention periods during which members of the public may obtain the scheduled records through FOIA. *See* Defs.' Mem. at 13–23. This heeds *Webster*'s teaching that records schedules should not be based solely on "the [agency's] immediate, operational needs." *Id.* at 65.

Plaintiffs' contention that NARA "fail[ed] to consider that the SEN System's retention period of 75 years is too short to fulfill historical research needs," Pls.' Reply at 13, is also meritless. For starters, no commenter questioned the adequacy of the SEN records' 75-year retention period. *See* Pls.' Mem. at 31 (raising this argument for the first time based on declarations, without citing any public comment). NARA separately approved the SEN data for a 75-year retention period in 2011. *See* Records Schedule N1-567-11-4, Item 1 (approved Sept. 2, 2011), https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-homeland-security/rg-0567/n1-567-11-004_sf115.pdf (last visited Oct. 8, 2020). NARA had no occasion, much less obligation, to revisit the adequacy of this 2011 determination in connection with approving the Schedule at issue in this case. *See* Appraisal Policy app. 1 (instructing appraisers to consider the extent to which "significant information" is "available in other records," but not to

second-guess previously approved retention periods).

To the extent Plaintiffs mean that NARA "failed to address" whether the records at issue here warranted preservation for more than 75 years, they are also incorrect. For the Sexual Assault Files and ERO Death Review Files, NARA relied not only on the 75-year SEN data, but also on the fact that much of the key information these files contain is *permanently* preserved elsewhere. This includes records of all investigations where "an ICE official is found to have committed misconduct involving sexual abuse or assault," records of all sexual abuse and assault allegations investigated by the DHS Office of Civil Rights and Civil Liberties, records of investigations into all detainee deaths in ICE custody (through the OPR Death Files), and "records such as the death certificate, consular notification and charging documents" (through A-Files). Defs.' Mem. at 14–16. Far from "fail[ing] to consider" whether "75 years is too short," Pls.' Reply at 13, NARA expressly determined that it was appropriate to preserve the Sexual Assault Files and ERO Death files for 25 and 20 years, respectively, in light of existing long-term temporary and permanent records. *See* AR 19–21, 157–58, 173–76.

NARA also considered whether the Detention Monitoring Reports and Detainee Escape Reports warranted preservation for more than 75 years. It first determined that neither group of records warrants permanent preservation under §§ 7 and 8 of its Appraisal Policy. *See* Defs.' Mem. at 17–19. It then approved 3- and 7-year retention periods for these records, explaining that a longer period was not necessary because the key information these files contain is preserved in the SEN data. *See id.* While Plaintiffs' believe that "75 years is too short," Pls.' Reply at 13, because researchers "routinely rely on source material dating back well over 100 years," Pls.' Mem. at 31, there should be no serious dispute that NARA considered and reasonably rejected that view.

3. NARA Sufficiently Explained Its Approval of a 20-Year Retention Period for ERO Detainee Death Review Files.

NARA complied with the APA by articulating "the main reasons for its decision" to approve

a 20-year retention period for ERO Detainee Death Review Files. *See Util. Air Regulatory Grp.*, 885 F.3d at 720. "The most significant contents of the ERO Death Review file" are permanently preserved in the OPR Death Review File. AR 175. "Many [other] records included in the ERO Death Review [file] are duplicates of records" permanently preserved in the detainee's A-File or preserved for 75 years through the SEN system. AR 175; *see* AR 158. The remaining records do not meet the criteria set forth in §§ 7 and 8 of the Appraisal Policy. *See* AR 158 (noting that "[m]ost if not all" of the remaining records "are already scheduled . . . as *temporary* records") (emphasis added); *see also* AR 174–75. NARA recognized that "individuals and organizations . . . may wish to obtain the [complete] ERO Death Review Files," however, and it prescribed a "long retention period" in which they may do so. NARA concluded that a 20-year retention period, combined with the availability of partially duplicative 75-year and permanent records, was "[a]dequate from the standpoint of legal rights *and accountability*." AR 175 (emphasis added).

There is no merit to Plaintiffs' assertion that NARA's handling of the ERO Death Review Files was not "reasonably explained," Pls.' Reply at 19 (emphasis omitted). Plaintiffs fault NARA for not spelling out why "'ERO's corrective action plan based on the OPR report' and 'correspondence between ERO and the facility where the detainee died' warranted only temporary retention." *Id.* (quoting Pls.' Mem. at 36). But nothing in the APA, FRA, or Appraisal Policy requires this level of granularity. In any event, NARA's reason—that the activities documented by the corrective action plan and correspondence are not so significant as to warrant permanent detention under §§ 7 and 8 of the Appraisal Policy—"may reasonably be discerned based on the administrative record," *Gilbert v. Wilson*, 292 F. Supp. 3d 426, 440 (D.D.C. 2018). *See* AR 158, 174–75.

4. NARA Sufficiently Explained Its Approval of a 3-Year Retention Period for Detention Monitoring Reports.

Plaintiffs also assert that NARA acted arbitrarily by failing to address a guidance document

illustrating types of records typically appraised as permanent. *See* Pls.' Reply at 32–33 (citing 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 Oct. 8, 2020)). Plaintiffs argue that the Detention Monitoring Reports are "periodic reports" within the meaning of this document and warrant permanent retention on that basis. *See* Pls.' Mem. at 36–38. This argument fails for several reasons.

First, the argument is not properly before the Court because it "was not raised before the agency" during either round of public comment on the Schedule. *Nuclear Energy Inst., Inc.*, 373 F.3d at 1297. The guidance document Plaintiffs reference is not part of the Administrative Record, and not a single commenter mentioned it—much less suggested that its reference to "periodic reports" requires the Detention Monitoring Reports to be permanently preserved. It would make no sense to permit Plaintiffs to raise novel arguments at this stage of the proceedings, while simultaneously disregarding any response by NARA as a "*post hoc* rationalization," as Plaintiffs urge the Court to do. *See* Pls.' Reply at 32.

Second, NARA had no obligation to address this extra-record guidance document of its own accord. While an agency must provide an explanation "when departing from precedents or practices," *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 644 (D.C. Cir. 2020), the APA "do[es] not require agencies to address every conceivably relevant line of precedent in their archives," *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013). Here, NARA satisfied the APA by explaining that the Detention Monitoring Reports plainly do not satisfy the criteria set forth in §§ 7 and 8 of the Appraisal Policy, and that any significant events the Reports describe are already documented in the SEN data. *See* Defs.' Mem. at 17–18 (citing AR 159, 177). NARA was not obligated to hunt for, and affirmatively address, conceivably relevant examples or precedents that were not raised in either round of notice-and-comment proceedings on this Schedule.

Third, even assuming that NARA should have anticipated Plaintiffs' argument and preemptively explained why the extra-record guidance on "periodic reports" does not govern here, its failure to do so was harmless error. *See, e.g.*, *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004). The APA directs reviewing courts to take "'due account' of 'the rule of prejudicial error,'" *i.e.*, the harmless-error doctrine. *First Am. Disc. Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) (quoting 5 U.S.C. § 706). This doctrine recognizes that "it would be senseless to vacate and remand for reconsideration" where "the agency's mistake did not affect the outcome," and the challenger therefore has not been prejudiced. *PDK Labs*, 362 F.3d at 799. The harmless-error doctrine applies here: NARA has persuasively explained why its handling of the Detention Monitoring Reports was consistent with its guidance on "periodic reports," and Plaintiffs were not prejudiced by the fact that this explanation did not appear in the Appraisal Memo or Consolidated Replies. *See* Defs' Mem. at 18–19 & nn.1–2; Pls.' Reply at 32–33.

5. NARA Sufficiently Explained Its Approval of a 7-Year Retention Period for DRIL Records.

The DRIL records are "call center intake records." Defs.' Mem. at 21 (quoting AR 17); *see also* AR 160 ("ICE telephone operators create records in a web-based platform in response to calls received in call centers."). As NARA explained, these records do not warrant permanent preservation because they do not "document the basic organizational structure of federal agencies and organizational changes over time; policies and procedures that pertain to an agency's core mission; [or] key agency decisions and actions." AR 17 (paraphrasing Appraisal Policy § 7(b)).

Plaintiffs do not dispute that NARA's description of the DRIL records as "call center intake records" is factually accurate. *See* Pls.' Reply at 18. Remarkably, they simultaneously assert that NARA's use of this accurate description "plainly . . . reflects 'a clear error of judgment,'" on the ground that it "minimize[s]" the DRIL records. *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*

Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). This assertion is baseless. NARA did not ignore the fact that some DRIL records deal with "subjects such as: incidents of sexual or physical assault or abuse; serious or unresolved problems in detention; [and] reports of victims of human trafficking." AR 160. It expressly acknowledged as much, but explained that documentation of these significant incidents will be captured in other records slated for long-term temporary or permanent retention. *See* Defs.' Mem. at 20 (citing AR 17, 160). This reasonable explanation satisfies the APA.

Nor did NARA err by "fail[ing] to address the unique research value of the DRIL records as a 'complete data set,'" Pls.' Reply at 18 (quoting AR 111). NARA's Second Consolidated Reply reproduces the public comment in which this assertion appears and indicates that regardless of how "complete" they may be, the DRIL records do not satisfy its permanent-preservation criteria on "high-level federal decision-making." *See* AR 21–22; *see also* Appraisal Policy § 7(b), 8(d). In any event, NARA had no obligation to specifically address this comment because it did not challenge any fundamental premise underlying NARA's decision. *See infra* pp. 19.

6. NARA Sufficiently Explained Its Approval of a 7-Year Retention Period for Detainee Segregation Reports.

Plaintiffs' arguments about the Detainee Segregation Reports are yet another example of their refusal to engage with the permanent-preservation criteria listed in §§ 7 and 8 of the Appraisal Policy. These records "document[] placement of detainees in segregated housing, either for non-punitive administrative reasons or as a disciplinary action," and are "created for the purpose of managing and monitoring detainee housing." AR 160. As NARA explained, "[r]ecords involving decisions of lower-level federal officials about operational matters such as segregated housing of individual detainees" do not warrant permanent preservation under §§ 7 and 8 of the Appraisal Policy. AR 17. Recognizing that the Detainee Segregation Reports have some legal implications and research uses, however, NARA required ICE to retain them for "seven years from the end of the fiscal year in which the

detainee is released from segregation." AR 160–61; *see also* AR 17, 21, 23–24.

There is no merit to Plaintiffs' assertion that NARA disregarded the Segregation Reports' purported "uniqueness," Pls.' Reply at 15–16; NARA specifically addressed this point by observing that "Detainee Segregation Reports are not the only records documenting administrative segregation," AR 24. Nor did NARA ignore the Segregation Reports' potential to shed light on allegedly "abusive solitary confinement practices," Pls.' Reply at 15. NARA expressly recognized the records' relevance to these allegations, AR 155, and responded by requiring ICE to retain them for seven years—as opposed to the original proposal of three years—to help "ensure . . . accountability," AR 161.

Plaintiffs suggest that NARA should have determined that the Administrative Record "shows . . . ICE's systematic use of an abusive detention practice," Pls.' Reply at 17, and preserved the Segregation Reports as "proof" of such abuses, *id.* at 15. But NARA is neither authorized nor equipped to make this kind of determination; it is an archival entity, not an inspector general's office. NARA did not blind itself to these allegations, but it ultimately concluded that they do not transform the Segregation Reports from "[r]ecords involving decisions of lower-level federal officials about operational matters," AR 17, into "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, [or] key agency decisions and actions," Appraisal Policy § 7(b). This conclusion should be affirmed under the applicable, highly deferential standard of review.

C. NARA Adequately Responded to Public Comments.

As explained in Defendants' opening memorandum, NARA adequately responded to public comments on the proposed Schedule by summarizing the most important concerns raised and responding to them in two Consolidated Replies. *See* Defs.' Mem. at 27–30; AR 14–24, 153–61. Plaintiffs' reply brief fails to demonstrate that NARA's response to comments was deficient.

Plaintiffs' "threshold clarifications," Pls.' Reply at 22–23, mischaracterize both NARA's stated

positions and the governing law. NARA has not asserted that it "only needed to address comments specifically challenging the sufficiency of the . . . temporary retention periods, and not comments challenging the broader decision to designate those records as temporary rather than permanent," Pls.' Reply at 22 (citing nothing to support this statement). Nor has NARA asserted that "*any* response to a comment—no matter how responsive to the concerns raised—satisfies the APA," *id.* Rather, NARA correctly maintains that its response "need only . . . indicate that it has considered the most important objections" raised by the comments. *Resolute Forest Prod.*, 130 F. Supp. 3d at 93 (quoting *Simpson*, 854 F.2d at 1435)). Plaintiffs demand a far more detailed, specific response to public comments than the APA requires. *See Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441-42 (D.C. Cir. 2012) ("An agency's obligation to respond [to public comments] . . . is not 'particularly demanding'" (quoting *Pub. Citizen*, 988 F.2d at 197)); *see also FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 333 (D.D.C. 2016) ("[F]ailing to respond to a comment rises to the level of arbitrariness if 'it demonstrates that the agency's decision was not based on a consideration of the relevant factors.'" (quoting *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984))).

Plaintiffs correctly state that an agency must address comments that "challenge a fundamental premise underlying the proposed agency decision," Pls.' Reply at 22 (quoting *Carlson*, 938 F.3d at 344), but they mischaracterize the "fundamental premise[s]" underlying NARA's decision here. NARA's research-value determinations rested on two key findings: (1) most of the scheduled records do not "contain[] significant documentation of Government activities" within the meaning of § 7(b) or fall into any of the categories listed in § 8(b)–(e); and (2) to the extent that some of the records contain significant information, it is largely captured in other permanent or long-term temporary records. *See supra* p. 8 (citing Defs.' Mem. at 14–22). There is no merit to Plaintiffs' suggestion that NARA was obligated to provide a detailed response to comments that referenced "research value" but failed to call into question either of these two core determinations. *See* Pls.' Reply at 22–23 (incorrectly

asserting that all such comments "challenged the 'fundamental premise' that the [scheduled] records possess 'little or no research value'"); *see also supra* p. 8 (discussing Plaintiffs' misunderstanding of the phrase "little or no research value").

As for Plaintiffs' discussion of specific comments, it is undisputed that NARA specifically responded to letters from Members of Congress, and comments by the ACLU, Jenny Patino, Andrew Harman, and the Archivists Round Table ("ART") regarding internment. *See* Defs.' Mem. at 27–30 (citing AR 15–21, 23–24, 115–39, 155, 160–61, 178–79, 215–68). Plaintiffs concede that NARA adequately responded to some aspects of these comments, but maintain that NARA failed to address the commenters' concerns regarding the records' "research value," *see* Pls.' Reply at 23–26. Here too, Plaintiffs fail to comprehend that NARA considers "research . . . value," 44 U.S.C. § 3303a(a), through the criteria listed in §§ 7(b) and 8(b)–(e) of the Appraisal Policy. *See supra* pp. 5–6. NARA adequately addressed the research-value aspects of the cited comments by explaining why the scheduled records do not warrant permanent retention under these criteria, while acknowledging researchers' "interest in these records for purposes of accountability and transparency," AR 17, and establishing retention periods that adequately protect those interests. *See* AR 17, 21, 23–24, 155, 160–61, 178–79.

Although NARA did not specifically mention the two Durham professors' submission, Pls.' Reply at 26–27, it satisfied the APA by responding to their primary contention that all records on the Schedule should be kept permanently because of their potential research uses. *See* Defs.' Mem. at 27. Like *amici*, the professors' submission provides evidence that certain scheduled records have been used for research into alleged abuses in the U.S. immigration detention system. *See* AR 95–100. Again, NARA repeatedly acknowledged this and established lengthy retention periods to account for it. *See* AR 17, 21, 23–24, 155, 160–61, 178–79. A more specific response was unnecessary because the professors' submission does not challenge either of NARA's core reasons for approving the schedule—*i.e.*, that most of the scheduled records do not meet its high standard for permanent

preservation, *see* Appraisal Policy §§ 7–8, and to the extent some of the records contain important information, it is largely available elsewhere. *Contra* Pls.' Reply at 27 (insisting that NARA should have responded to the professors' submission with greater "specificity"). Moreover, it does not appear that Plaintiffs have been prejudiced by NARA's non-specific response to the professors' submission.

NARA also offered a reasonable, contemporaneous response to comments suggesting that the ERO Death Review Files should be permanently preserved to avoid a "burden on the researcher to find and compile information from various places," AR 111. *Contra* Pls.' Reply at 27–28. NARA rejected this comment because "[t]he materials gathered from disparate sources that are included in the ERO file are themselves mostly *temporary* records." AR 19. Defendants' opening memorandum elaborates on this point, explaining that, under the Appraisal Policy, ease of access may justify *permanently* preserving a group of records that are *permanently* accessible elsewhere, but not records that are *temporarily* accessible elsewhere. *See* Defs.' Mem. at 29 (citing Appraisal Policy app. 1). This is not a *post hoc* rationalization, but rather a permissible "amplified articulation" of the agency's *pre hoc* reasoning. *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1908 (2020) (quoting *Alpharma v. Leavitt*, 460 F.3d 1 (D.C. Cir. 2006)). Moreover, comments about the purported utility of preserving certain sets of records "as a complete data set" failed to challenge NARA's determination that the records do not qualify for permanent retention under §§ 7 and 8 of the Appraisal Policy.

Finally, NARA specifically addressed commenters' comparison of ICE detention to Japanese-American internment. *See* AR 18. These commenters asserted that, like historical records from internment camps, the scheduled records at issue here document individuals "suffer[ing] human rights abuses while in the custody of the U.S. government." AR 16. NARA disagreed, distinguishing 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"—from records concerning noncitizens in temporary immigration detention. AR at 18. This

is not an "arbitrary" distinction, as Plaintiffs suggest, Pls.' Reply at 29.

D. NARA Did Not Arbitrarily Disregard Its Past Precedents.

Plaintiffs' assertion that NARA disregarded "prior relevant appraisal decisions" is not properly before the Court. As Defendants pointed out in their opening memorandum, no public comment mentioned the purported relevance of Record Group 85 (or any other past appraisal decision), much less argued that the Schedule represented a departure from NARA's treatment of these records. *See* Defs.' Mem. at 32. Plaintiffs' assertion of these arguments before this Court violates the "hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived." *Nuclear Energy Inst., Inc.*, 373 F.3d at 1297.

Even if these arguments were properly before the Court, they would lack merit. To begin, NARA did not "fail[] to consider *any* of [its] prior relevant appraisal decisions," as Plaintiffs claim for the first time in their reply brief. *See* Pls.' Reply at 29–30 (expanding upon the Record Group 85 argument in Plaintiffs' opening brief). The Appraisal Memo and First Consolidated Reply are replete with discussion about groups of records that have already been scheduled for temporary or permanent preservation, as well as analysis of how these prior decisions informed NARA's approval of the Schedule. *See* AR 158–61, 173–78. Moreover, NARA expressly considered whether *it* had previously approved any records-preservation policies that would cover any of the records listed on the Schedule. *Contra* Pls.' Reply at 29–30 (erroneously describing this as a "non-sequitur").

Plaintiffs' description of "Record Group 85" as a "relevant appraisal precedent," *id.* at 30, is thoroughly inaccurate. Record Group 85 is not a *precedent* at all; it is a compilation of "*all* records permanently preserved from the former Immigration and Naturalization Service ('INS') and its predecessors, covering well over 150 years." Defs.' Mem. at 30. Plaintiffs cannot establish an APA violation by cherry-picking records from this massive collection, pointing out purported similarities to records on the Schedule, and then arguing that NARA should have "considered and addressed"

these records' supposed "relevance . . . in deciding whether to approve the ICE Schedule," Pls.' Reply at 31. *See Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) (holding that the APA "do[es] not require agencies to address every conceivably relevant line of precedent in their archives"). Furthermore, isolated examples of preserved documents—without any analysis of why or how they came to be preserved—do not constitute the type of "directly on point" precedent that an agency is required to address, even when properly raised during administrative proceedings. *Lone Mountain*, 709 F.3d at 222; *see also LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 60 (D.C. Cir. 2004) ("An agency is by no means required to distinguish every precedent cited to it by an aggrieved party.").

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

Little more needs to be said about Plaintiffs' contention that NARA should have assessed the resources it would take to permanently preserve all of the records at issue here. Plaintiffs concede that no statute, regulation, or other guidance directs NARA to engage in this analysis, and that it is not typically part of NARA's appraisal decisions. *Compare* Defs.' Mem. at 32, *with* Pls' Reply at 33–34; *see also* Appraisal Policy app. 1 (instructing that "cost considerations" should come into play "only in marginal cases"). Plaintiffs maintain, however, that Defendants undertook an obligation to assess the costs of permanent preservation here because "resource considerations" were "a major factor" in its decision. Pls.' Reply at 33.

This contention is utterly divorced from reality. The only mention of "resource considerations" *in the entire Administrative Record* is a general statement that NARA's preservation policies "balance [researcher] interests against resource considerations. . . . guided by the Federal Record Act's goal of managing the accumulation of federal records." AR 17. The Record makes crystal clear that NARA did not make any "finding[s]" about projected preservation costs, or otherwise rely on resource considerations in deciding to approve the Schedule. *Contra* Pls.' Reply at 34. Because NARA's decision rested on an assessment of the archival value of each set of records under §§ 7 and

8 of the Appraisal Policy, without regard to preservation costs, NARA had no obligation to assess these costs. *See* AR 153–61, 171–79.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in Defendants' opening memorandum, Plaintiffs' motion for summary judgment should be denied and Defendants' cross-motion for summary judgment should be granted.

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Respectfully submitted,

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