IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON; AMERICAN HISTORICAL ASSOCIATION; and SOCIETY FOR HISTORIANS OF AMERICAN FOREIGN RELATIONS, Plaintiffs, v. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION; DAVID S. FERRIERO, in his official capacity as Archivist of the United States; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; and MATTHEW T. ALBENCE, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement, Defendants.	Civil Action No. 20-cv-739-APM

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

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INTRODUCTION

In the last few weeks alone, several deeply disturbing reports from ICE detention centers across the country have come to light. This Monday, a whistleblower at an ICE detention center in Georgia provided a horrific account of a doctor performing "mass hysterectomies" on immigrant women without their informed consent, prompting 173 Members of Congress to demand an Inspector General investigation into possible forced "sterilization" practices at the facility.[1] The whistleblower further alleged "jarring medical neglect," including "refusal to test detained immigrants for COVID-19 who have been exposed to the virus and are symptomatic, shredding of medical requests submitted by detained immigrants, and fabricating medical records."[2] Another complaint filed in August alleges that guards at an ICE detention center in Texas "sexually assaulted and harassed inmates in a 'pattern and practice' of abuse."[3]

These are not isolated incidents. They are symptomatic of an immigration detention system rife with human and civil rights abuses, overseen by an agency—ICE—that has resisted efforts to promote accountability, transparency, and meaningful reform. Simply put, ICE is no ordinary federal agency, and the records at issue in this case are no ordinary federal records. They document years of abuse and neglect within a detention system that, by all accounts, will be the focus of intense scrutiny from legislators, advocates, historians, researchers, and scholars, both in the near term and far into the future.

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[1] Letter from Rep. Jayapal et al. to DHS OIG, Sept. 15, 2020, https://bit.ly/35Lkypq.

[2] Complaint to DHS OIG re: Lack of Medical Care, Unsafe Work Practices, and Absence of Adequate Protection Against COVID-19 for Detained Immigrants and Employees Alike at the Irwin County Detention Center, *Project South*, Sept. 14, 2020, https://bit.ly/2E36vQE.

[3] Lomi Kriel, ICE Guards "Systematically" Sexually Assault Detainees in an El Paso Detention Center, Lawyers Say, *ProPublica*, Aug. 14, 2020, https://bit.ly/32wrdBO.

Much like NARA's decision below, Defendants' opposition brushes past these concerns. Defendants insist that NARA, in approving the ICE Schedule, provided a reasoned explanation for its determination that the ICE records have "little or no research value," adequately addressed the more than 23,000 public comments it received objecting to the schedule, and sufficiently took into account relevant appraisal policies and precedent. At every turn, however, Defendants mischaracterize both the law and the record below.

Defendants' most fundamental error is their misunderstanding of NARA's duties under the Records Disposal Act ("RDA") and the Administrative Procedure Act ("APA"). Under the RDA, NARA has a freestanding obligation to evaluate whether records have "sufficient . . . research . . . value" to warrant permanent retention, 44 U.S.C. § 3303a(a), and under the APA, NARA must provide a "reasoned explanation" for its "research value" determination, in which it addresses all "relevant factors" and "important aspect[s] of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983); *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 60 (D.C. Cir. 1983). Research value thus is not, as Defendants claim, "one of many factors" NARA is free to weigh against other concerns, but rather is a statutorily-mandated consideration.

Measured against the proper legal standards, NARA's action cannot stand. NARA conveyed its lynchpin determination—that the ICE records' "anticipated research use will be more contemporary rather than many years into the future," A.R. 17—in a single conclusory sentence, with no supporting analysis. NARA also failed to explain how its decision comported with its Appraisal Policy guidelines on assessing research value, failed to address important aspects of the problem, and disregarded substantial record evidence that ran counter to its

decision. Defendants try to excuse these errors by minimizing NARA's explanatory burden, but the case law they cite construes an APA review provision not even implicated here.

Defendants fare no better in claiming NARA adequately addressed public comments. The law of this Circuit is clear: an agency errs not only when it outright ignores significant and relevant comments, but also where it misinterprets them, fails to actually respond to the concerns raised, or merely quotes those concerns only to dismiss them in conclusory fashion. NARA committed each of these errors below. And despite Defendants' efforts to make up for NARA's deficiencies with new rationales, an "agency must defend its actions based on the reasons it gave when it acted," and cannot rely on "*post hoc* rationalizations" raised for the first time "in court." *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909 (2020).

Defendants' opposition also confirms that NARA failed to consider *any* of its appraisal precedent in approving destruction of the ICE records, including (but not limited to) one particularly relevant precedent: Record Group 85. *See Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 647 (D.C. Cir. 2020) ("An agency's wholesale failure to address 'past practice . . . regarding an issue . . . is arbitrary and capricious.'") (internal brackets omitted); *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010) ("[W]e have never approved an agency's decision to completely ignore relevant precedent."). Defendants myopically dismiss Record Group 85 as irrelevant because it includes records significantly older than the ICE records. But Plaintiffs flagged the records archived in Record Group 85 precisely *because* they are "historical predecessors" of the ICE records, and thus provide some indication of the types of immigration detention records historians will value decades into the future. Had NARA actually followed its Appraisal Policy, it might have

appreciated that point. *See* NARA Directive 1441, Appraisal Policy of the National Archives and Records Administration, Sept. 20, 2007, App. 1, https://bit.ly/2HM7YZQ ("Appraisal Policy") (requiring NARA to assess "future research potential" by considering "the kinds and extent of current research use" and making "inferences about anticipated use"). And even if Record Group 85 was irrelevant, that would not excuse NARA's wholesale failure to consider any of its *other* appraisal precedent regarding records comparable to the ICE records.

The consequences of NARA's action cannot be understated. Where, as here, "the Archivist errs in authorizing disposal, . . . valuable federal records could be lost forever." *Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999). That concern is particularly acute in the case of ICE—a relatively new agency that has never previously sought disposition authority for records of this type, and for which there are widely-documented concerns of civil and human rights abuses. In these circumstances, it was imperative that NARA adhere closely to the APA's requirements for reasoned decisionmaking. Because it failed to do so in multiple respects, the Court should grant summary judgment for Plaintiffs and vacate NARA's Approval Decision.

ARGUMENT

I. NARA's Approval of the ICE Schedule was Arbitrary and Capricious

A. NARA Failed to Sufficiently Evaluate the Research Value of Each Category of ICE Records Slated for Destruction

Defendants' opposition only reinforces Plaintiffs' central argument: NARA's determination that the ICE records lack sufficient research value to warrant permanent retention

was neither "reasonable" nor "reasonably explained." *See Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 343-44 (D.C. Cir. 2019).[4]

1. NARA's Determination that Federal Records Lack Sufficient "Research Value" to Warrant Permanent Retention Must Be Both Reasonable and Reasonably Explained

Defendants begin by faulting Plaintiffs for "myopically focusing" on the research and historical value of the ICE records, which they claim is "just one of myriad factors" NARA must consider in making appraisal decisions. Defs.' Mem. at 23. But this misstates NARA's duties under both the RDA and the APA. Under the RDA, NARA has a freestanding obligation to evaluate whether records have "sufficient . . . research . . . value" to warrant permanent retention, 44 U.S.C. § 3303a(a), and under the APA, NARA must provide a reasoned explanation for its "research value" determination, in which it addresses all "relevant factors" and "important aspect[s] of the problem," *State Farm*, 463 U.S. at 42-43; *Webster*, 720 F.2d at 60. Research value thus is not "one of many factors" NARA is free to weigh against other concerns, *see* Defs.' Mem. at 23, 26, but rather is a statutorily-mandated consideration.

NARA cannot give mere lip service to this mandatory consideration, even if it has some degree of discretion in making appraisal determinations. *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010) (agency "knowledge" and "expertise" on an issue "does not absolve [it] from providing a reasoned explanation for its

[4] Defendants confuse the issues by suggesting Plaintiffs do not "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." Defs.' Mem. at 24. That is incorrect. Plaintiffs challenge NARA's "overall" failure to sufficiently address the research value of *each category* of records slated for destruction under the ICE Schedule. *See* Pls.' Mem. at 19-21; *infra* Part I.A.

decision"). Indeed, *Webster* makes clear that a central purpose of APA review in RDA cases is "ensuring that [NARA] and the [originating agency] d[o] not overlook" the "interests" of private researchers and historians "when applying the statutory standards on records disposal and preservation." 720 F.2d at 45; *see also id.* at 57, 66 n.61. It follows that NARA's failure to sufficiently address research interests, and its related failure to explain how controlling provisions of its Appraisal Policy supported its conclusion that the ICE records have "little or no research value," Pls.' Mem. at 19-21, are indisputably grounds for deeming its action arbitrary and capricious. *See Webster*, 720 F.2d at 66 n.61 (concluding that NARA report did "not provide a suitable . . . reasoned justification" under the APA for its approval of agency disposal schedules where, among other things, it "reflect[ed] an insensitivity to research needs," and overlooked that "certain records may be of particular interest to historians, researchers, or other private parties"); *see also Green v. NARA*, 992 F. Supp. 811, 822 (E.D. Va. 1998) (deeming NARA's disposal decision arbitrary and capricious where it was "based on an erroneous factual premise").

Webster also reinforces the broader point that NARA must independently evaluate *each* of the archival "value" criteria specified in § 3303a(a)—*i.e.*, "administrative, legal, [and] research . . . value"—and that its failure to sufficiently address any one of these criteria is grounds for deeming its action arbitrary and capricious. *See* 720 F.2d at 68. Thus, the fact that NARA may have separately addressed the "legal rights" implications of some of the ICE records has no bearing on whether it adequately addressed the records' "research value," which is a distinct statutory consideration. *See, e.g.*, Defs.' Mem. at 28, 30 (erroneously relying on

NARA's consideration of the ICE records' legal value in arguing that NARA adequately considered their research value).

Defendants assert *Webster* is distinguishable because the records disposal schedules there were accompanied by little to no justification, whereas here, NARA separately provided a justification for each item on the ICE Schedule. Defs.' Mem. at 25. But that is beside the point. Regardless of whether NARA's Approval Decision here was more detailed in certain respects than the disposal decisions in *Webster*, the general principles announced by the Circuit governing APA review in RDA cases are directly applicable here.

2. NARA Did Not Provide the Requisite Reasoned Explanation Here

Defendants next argue that NARA satisfied the APA by providing a reasoned explanation for its determination that the ICE records lack sufficient research value to warrant permanent retention. Defs.' Mem. at 26. Yet they do not contest that NARA failed to offer *any* reasoning in support of its lynchpin determination that the records' "anticipated research use will be more contemporary rather than many years into the future." A.R. 17; *see* Pls.' Mem. at 20-21. Nor do they dispute that NARA's Approval Decision failed altogether to address key considerations outlined in its Appraisal Policy, such as: (1) "the kinds and extent of current research use" of the ICE records; (2) the "future research potential" of the records, as "infer[red]" from use of comparable immigration detention records by historians and others; (3) the unique "significance" of the immigration enforcement "functions and activities performed by" ICE, including the fact that ICE was created relatively recently as part of a major restructuring of our nation's immigration agencies, and that it is at the center of an historically unprecedented surge in immigration detention; (4) the "business context within which the records are created"; and (5)

the "major social . . . issues" implicated by the agency's widely-condemned and widely-scrutinized detention practices. Pls.' Mem. at 19-21 (citing Appraisal Policy §§ 1, 8, App. 1). Without contesting Plaintiffs' position that these are "relevant factors" and "important aspects of the problem," *id.*, Defendants argue that NARA had no obligation to "specifically address" them in its "public explanation of why it approved the [ICE] Schedule," Defs.' Mem. at 26. Defendants are wrong on the law.

Under the APA, an agency must provide more than "conclusory statements" to prove it "consider[ed] [the relevant] priorities," and merely "[s]tating that a factor was considered . . . is not a substitute for considering it." *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055-57 (D.C. Cir. 1986); *accord Cigar Ass'n of Am. v. FDA*, 436 F. Supp. 3d 70, 88 (D.D.C. 2020) (Mehta, J.). By merely quoting public comments and then proclaiming in a single sentence, with no supporting analysis, that the ICE records' "anticipated research use will be more contemporary rather than many years into the future," A.R. 15-17, NARA failed this test. *See Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) (agency's "analysis of [a] substantial and important problem" was arbitrary and capricious where it merely "not[ed] the concerns of others and dismiss[ed] those concerns in a handful of conclusory sentences"); *Int'l Union*, 626 F.3d at 93 (rejecting agency's "conclusory" finding that was "unsupported by the rulemaking record"); *Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 448 (D.C. Cir. 2012) (rejecting agency's conclusory explanation where it "point[ed] to nothing in the record supporting [its] assertions"); *see also Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017) (faulting agency for "brush[ing] aside critical facts" and not "adequately analyz[ing]" the consequences of a decision).

The same is true of NARA's total failure to explain how its decision comported with its Appraisal Policy guidelines on assessing "research value." NARA disputes any obligation to provide such an explanation, despite having repeatedly stressed below that the Appraisal Policy guided its decision. *E.g.*, A.R. 17-18, 184-85, 200. In so arguing, NARA overlooks that its Appraisal Policy is not merely for internal reference, but also serves to "limit [NARA's] discretion in individual cases" and to provide "specifications against which *a court* may analyze [NARA's] decision on disposal schedules" under the APA. *Webster*, 720 F.2d at 43 & nn.18-19 (emphasis added); *see also* Appraisal Policy, App. 1 ("[T]hese guidelines . . . will result in more consistent appraisal judgments that can be *readily explained . . . to outside constituents*.") (emphasis added). To enable a court to "analyze" NARA's "decision[s] on disposal schedules" against the "specifications" outlined in NARA's Appraisal Policy, NARA must at a minimum endeavor to explain why the controlling provisions of its Appraisal Policy support its determination. NARA's utter failure to provide such an explanation as to its determination that the ICE records have little or no research value—in the face of substantial public comments and record evidence to the contrary, no less—was arbitrary and capricious. *See Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404 (D.C. Cir. 1995) ("The arbitrary and capricious standard of the APA 'mandat[es] that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision.'"); *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 12 (D.C. Cir. 2014) (vacating agency action for failure to provide a "reasoned explanation for how [the agency's] decision comport[ed] with statutory direction" and "prior agency practice," among other things).

Defendants attempt to minimize NARA's explanatory burden by claiming the APA requires "[n]othing more than a 'brief statement'" justifying the agency's action. Defs.' Mem. at 26 (quoting, among others, *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001)). But the "brief statement" language quoted by Defendants concerns a separate APA provision not implicated here. *See Tourus*, 259 F.3d at 737 (construing 5 U.S.C. § 555(e), which requires agencies to provide "a brief statement of the grounds for denial" of "a written application, petition, or other request"). Nor do any of the other cases cited by Defendants support their legally-erroneous view that NARA need not "specifically address" relevant factors or applicable policy guidelines in explaining why records lack sufficient research value to warrant permanent retention under the RDA.

3. NARA Failed to Address Whether the SEN System Summaries of Records Slated for Destruction Sufficiently Accounted for Research Interests

Plaintiffs challenged NARA's failure to address whether "secondary summaries" of information from the Sexual Abuse and Assault Files, ERO Detainee Death Review Files, Detention Monitoring Reports, and Detainee Escape Reports—captured in ICE's Significant Event Notification System ("SEN System Summaries")—sufficiently fulfilled research interests so as to render retention of the primary records unnecessary. *See* Pls.' Mem. at 30-33. Defendants' response largely misses the point. *See* Defs.' Mem. at 24-25.

Defendants first claim they are confused by Plaintiffs' use of the term "primary source material," *id.* at 24, overlooking that Plaintiffs were merely quoting the Circuit's decision in *Webster*, *see* Pls.' Mem. at 30-31 (quoting *Webster*, 720 F.2d at 66 n.61). There, NARA approved the FBI's decision to "retain summaries of field office files and to destroy the original

documents upon which the summaries are based." *Webster*, 720 F.2d at 65-66 & n.61. The Circuit faulted NARA's decision because it disregarded that in cases of "substantial public or historical interest, it will be valuable for researchers to examine *primary source material* instead of relying on *secondary source summaries*" of that material. *Id.* at 66 n.61 (emphasis added). As the court explained, "[i]n some cases, summaries cannot be trusted to address all important research issues that may arise, especially when the summaries are prepared with the FBI's objectives in mind." *Id.* For example, "a researcher may find an FBI informant's reports on his involvement with the Ku Klux Klan of great historical value . . . even though those reports may not have helped the FBI to make an investigative decision." *Id.* While the court stressed it was not mandating preservation of all "raw investigative data," it held that the APA required NARA to provide a reasoned explanation for why the "summaries . . . account[ed] in some reasonable fashion for historical research interests" in the primary records, and "not just the FBI's immediate, operational needs." *Id.* at 65.

NARA made a similar error here. It deemed "secondary source summaries" (the SEN System records) sufficient substitutes for the "primary source material" slated for destruction (Sexual Abuse and Assault Files, ERO Detainee Death Review Files, Detention Monitoring Reports, and Detainee Escape Reports) because the secondary summaries would purportedly capture all "significant events" documented in the primary records. Pls.' Mem. at 31. Yet, as in *Webster*, NARA failed to consider that what *ICE* deems "significant" enough to lodge in its SEN System may not align with what *researchers* deem significant, and may well omit information of "substantial public or historical interest" that would be lost forever if the primary source records were destroyed. 720 F.2d at 66 n.61. That is particularly likely because the SEN System's

"primary purpose," according to ICE, is to "disseminate information to relevant management and interdivisional personnel about events to allow them to respond by allocating appropriate resources and facilitating appropriate responses to significant events." Pls.' Mem. at 31. Because the SEN System records are "summaries . . . prepared with the [ICE's] objectives in mind" and to fulfill ICE's "immediate, operational needs," NARA needed to at least acknowledge that point and explain why the SEN System records nonetheless "account[ed] in some reasonable fashion for [the] historical research interests" in the records slated for destruction. *Webster*, 720 F.2d at 65-66 & n.61. Its failure to do so was arbitrary and capricious.[5]

Defendants incorrectly claim that "[n]o commenters" highlighted any disconnect between the research value of the SEN System Summaries and the primary records slated for destruction. Defs.' Mem. at 25. They disregard the comment of the Archivists Round Table of Metropolitan New York ("ART"), which urged that "Detainee Sexual Abuse and Assault Files" be "retained permanently" because they "comprise a more robust documentation of detainee sexual abuse than the data retained in" the SEN System. A.R. 19, 110. In rejecting this concern below, NARA focused solely on whether the SEN System Summaries were "sufficient to protect the rights and interests of those abused and detained," and erroneously disregarded concerns about

[5] Stating the obvious, Defendants stress that "*all* records covered by the [ICE] Schedule are created to serve the agency's needs, not researchers' interests." Defs.' Mem. at 25. The relevant question, though, is whether ICE's secondary summaries of the primary records slated for destruction sufficiently account for research interests (and not *just* the agency's needs), such that retention of the primary records is unnecessary. Insofar as Defendants deem this consideration "[ir]relevant," *id.*, *Webster* held otherwise.

long-term research value. A.R. 20; *see supra* Part I.A.1 (explaining that NARA has independent obligation to sufficiently address records' research value).

Defendants likewise ignore the research paper submitted by two Durham University professors, which flagged issues from Detention Monitoring Reports that were not deemed "serious" enough to be logged in the SEN System, but still "raise[d] important . . . health and safety concerns," including "fire alarms not working, no soap in the holding cells, no religious services for Haitian detainees and a missing classification detail for a detainee." A.R. 96. The professors explained that this type of information, though not captured in the SEN System, has high research value because it is routinely "interrogated within academic literature addressing 'minor' politics (Manning 2016), slow violence within carceral institutions (Mayblin 2019) and how sovereign power operates across the multiple domains of everyday life (Hall 2012, Turner and Peters 2017)." *Id.*; *see also id.* (asserting the information is "necessary for academic research interrogating everyday life within carceral spaces (including of migration control) to progress").[6] As previously noted, NARA failed to address the professors' submission below. *See* Pls.' Mem. at 25-26; *infra* Part I.B.3.

Plaintiffs also challenged NARA's failure to consider that the SEN System's retention period of 75 years is too short to fulfill historical research needs. Pls.' Mem. at 31; *see* A.R. 20 (deeming SEN System's 75-year retention period "sufficient to protect the rights and interests of those abused and detained," without addressing sufficiency to meet long-term research and

[6] *See also Amici* Br. at 14-15 ("As researchers pointed out in [the] comments, . . . important and innovative research may require data about ICE detention operations that appears insignificant or mundane," but in actuality is critical to examining important issues such as "violations of medical standards" that later become "contributing factors in . . . [detainee] deaths.").

historical interests). Defendants rejoin that the fact that "some immigration historians 'routinely rely on source material dating back well over 100 years' does not obligate NARA to retain all agency documents indefinitely." Defs.' Mem. at 24. But that is not Plaintiffs' argument. Plaintiffs claim only that NARA needed to *address* this obviously relevant factor in evaluating whether the SEN System Summaries sufficiently fulfilled long-term research interests, and that its undisputed failure to do so was arbitrary and capricious.[7]

4. NARA Made Additional Errors in Evaluating the Research Value of Detainee Segregation Reports, DRIL Records, and ERO Detainee Death Review Files

In addition to the overall deficiencies discussed above, Plaintiffs highlighted further errors in NARA's consideration of the research value of three categories of records: Detainee Segregation Reports, DRIL records, and ERO Detainee Death Review Files. *See* Pls.' Mem. at 22-24, 33-36. Defendants fail to refute any of these points.

i. Detainee Segregation Reports

NARA determined below that Detainee Segregation Reports did not warrant permanent retention because they merely document "decisions of lower-level federal officials about operational matters" rather than "significant actions of federal officials." A.R. 17; *see also* A.R. 178 (concluding reports have "little or no research value" because they "are short-term records created for the purpose of managing and monitoring detainee housing" and thus "do not have

[7] NARA can hardly claim ignorance to the fact that immigration historians, and indeed historians of all types, routinely rely on archival records dating back well over 100 years. *See, e.g.*, NARA San Francisco, Record Group 85, https://bit.ly/2TN7Ij9 (recognizing that NARA's Record Group 85, which includes immigration records from 1787 to 1993, is "considered priceless by historians, social scientists, and genealogists").

long-term . . . historical value"). Plaintiffs challenged this conclusion because it ran counter to substantial evidence before the agency showing that the reports provide unique and valuable proof of ICE's systematic use of abusive solitary confinement practices. *See* Pls.' Mem. at 22-23; *see also infra* Part I.B.2 (separately challenging NARA's failure to address public comments on this point). Defendants do not dispute that NARA failed to specifically address this evidence, but claim Plaintiffs have "fail[ed] to demonstrate" why the ignored evidence would have justified permanent retention under NARA's Appraisal Policy. Defs.' Mem. at 22. Yet this flips NARA's burden to Plaintiffs. It was *NARA's* duty below to confront the relevant evidence and provide a reasoned explanation for its determination that the reports lack sufficient research value to warrant permanent retention. NARA's failure to do that—and resulting mischaracterization of the Detainee Segregation Reports as merely documenting "decisions of lower-level federal officials about operational matters"—is what Plaintiffs challenge here.

Had NARA actually considered the relevant evidence in light of its Appraisal Policy, it would have seen that Detainee Segregation Reports do in fact contain "unique" and "significant documentation of Government activities" that are "essential to understanding and evaluating" certain "key agency decisions and actions," as well as "the impact of [certain] Federal actions on individuals." *See* Appraisal Policy § 7; *see also id.* § 8 ("NARA will identify for permanent retention records that . . . [p]rovide evidence of Federal . . . decisions[] and actions relating to major social . . . issues" and "the significant effects of Federal programs and actions on individuals."); *id.*, App. 1 (repeatedly requiring NARA to consider whether records contain "unique" information, and providing that such records "are more likely to warrant permanent retention" than non-unique records).

The record before NARA showed, for instance, that Detainee Segregation Reports are a "unique source of information about a governmental practice that has received widespread condemnation and is likely to change significantly in the coming decades." A.R. 499 (ACLU comment). Specifically, revelations about ICE's abusive segregation practices in 2013 led to "significant congressional interest" on the issue, as well as major policy reforms by ICE, including a "new segregation policy directive establishing stricter policies and procedures for the use and monitoring of solitary confinement in ICE detention facilities." A.R. 499-500 & n.26 (citing ICE, *Policy Directive 11065.1: Review of the Use of Segregation for ICE Detainees*, Sept. 4, 2013, https://bit.ly/3lRECfy). This "new policy substantially increases ICE headquarters' monitoring of solitary confinement and sets important limits on its use, especially for vulnerable populations such as individuals with mental disabilities and alleged victims of sexual assault." A.R. 500. It remains to be seen, however, whether these reforms have "work[ed] as contemplated," and, critically, Detainee Segregation Reports "*may be the only source of agency records available to answer this question*." *Id.* (emphasis added); *see also* Appraisal Policy, App. 1 (requiring NARA to consider records' "uniqueness"). Retaining the reports only temporarily—and particularly under the short seven-year retention period approved by NARA—"will both make it more difficult for government officials to evaluate the long-term impacts of ICE's own policies and deprive future historians of information about how these practices did (or did not) change at a time of increasing public pressure." A.R. 500.

Other evidence disregarded by NARA shows that ICE has an unofficial policy or practice of "[p]lacing LGBT people in solitary confinement for their own protection," in violation of ICE's detention standards and United Nations prohibitions on torture. A.R. 80-82 (Jenny Patino

comment and attached report by Center for American Progress). Detainee Segregation Reports have "essential long-term historical value in documenting these" issues, as well. A.R. 80; *see also* A.R. 350 (LatinoJustice comment); A.R. 324-25 (The Constitution Project comment).

ICE's 2013 segregation policy itself, which commenters cited below, *e.g.*, A.R. 500 n.26, further refutes NARA's conclusion that Detainee Segregation Reports merely document "decisions of lower-level officials about operational matters," rather than "significant actions of federal officials." A.R. 17. The policy stresses that "[p]lacement of detainees in segregated housing is a serious step that requires careful consideration of alternatives." ICE, *Policy Directive 11065.1: Review of the Use of Segregation for ICE Detainees*, Sept. 4, 2013, https://bit.ly/3lRECfy. It adds that "[p]lacement in segregation should occur only when necessary and in compliance with applicable detention standards," and "placement in administrative segregation due to a special vulnerability should be used only as a last resort and when no other viable housing options exist." *Id.* Thus, even *ICE* recognizes that segregation is not a routine "operational matter," A.R. 17, but rather an extraordinary measure to be taken only in narrowly-defined and closely-monitored circumstances.

Defendants maintain NARA's characterization of Detainee Segregation Reports was accurate even if the record evidence shows that the reports reflect "some . . . poor [segregation] decisions by ICE officials." Defs.' Mem. at 22. This vastly understates the problem and mischaracterizes the record. As explained above, the record shows more than isolated examples of "poor decisions by ICE officials"; it shows ICE's systematic use of an abusive detention practice that is the subject of ongoing external scrutiny by Congress, the press, and others, and internal reform efforts by ICE. It further shows that Detainee Segregation Reports "may be the

only source of agency records available" for future legislators and researchers to effectively examine whether ICE's reform efforts have worked. A.R. 500. By failing to address these "important aspect[s] of the problem" and by rendering a conclusion that ran "counter to the evidence before the agency" in approving destruction of the Detainee Segregation Reports, NARA acted arbitrarily and capriciously. *See State Farm*, 463 U.S. at 43.

ii. DRIL Records

Seeking to clarify NARA's inartful wording below, Defendants insist NARA meant to describe the DRIL records as "call center intake records" that did not document "significant actions of federal officials," and not as "[r]ecords involving decisions of lower-level federal officials about operational matters." Defs.' Mem. at 21; *see* A.R. 17. Even if true, this does not change Plaintiffs' argument. *See* Pls.' Mem. at 23-24, 32-33. The DRIL records include complaints of "sexual or physical assault or abuse; serious or unresolved problems in detention; [and] reports of victims of human trafficking;" as well as how ICE telephone operators "assist[ed] with resolution" of those complaints. A.R. 160; *see* Pls.' Mem. at 33 & n.5 (describing widespread reliance on DRIL records). For NARA to minimize such documents as mere "call center intake records" plainly ran "counter to the evidence before the agency" and reflects "a clear error of judgment." *State Farm*, 463 U.S. at 43.

Plaintiffs also pointed out that NARA failed to address the unique research value of the DRIL records as a "complete data set," which would not be fulfilled by the downstream documentation of "significant incidents" captured in other agency records. *See* Pls.' Mem. at 32-33; *see also supra* Part I.A.3 (explaining that NARA must consider whether secondary

summaries of primary records sufficiently account for research interests). Defendants fail to respond to this argument.

iii. ERO Detainee Death Review Files

Plaintiffs explained that NARA, in approving permanent retention of the OPR Death Review Files but only temporary retention of the ERO Death Review Files, failed to sufficiently address the extent to which the ERO file possess research value that the OPR file lacks. Pls.' Mem. at 35-36. Defendants insist NARA did consider this factor. Defs.' Mem. at 16-17 (citing A.R. 18-21, 157-58, 174-75). At most, the cited portions of the record reflect NARA's understanding that the ERO file contains more information than the OPR file, and its determination that the "most significant contents" of the ERO file "are covered by" the OPR file. A.R. 175. But NARA's *reasoning* for this determination was insufficiently explained. *See Carlson*, 938 F.3d at 343-44 (agency action must be both "reasonable and *reasonably explained*") (emphasis added).

Most notably, NARA failed to explain why some particularly high-value contents of the ERO file that are *not* included in the OPR file—such as "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. *See* Pls.' Mem. at 36. Nor did NARA address the discrete long-term research interests served by the ERO file's "comprehensive accumulation of . . . source documentation," as opposed to the OPR file's "focused examination" of an individual's death in ICE custody. *Id.* at 35; *see also infra* Part I.B.4 (discussing NARA's failure to address public comments on this issue). By describing researchers' concerns only to summarily dismiss them without addressing key issues, NARA failed to provide the requisite reasoned explanation

for approving destruction of the ERO Death Review Files. *See Gresham*, 950 F.3d at 103; *Getty*, 805 F.2d at 1055-57; *Webster*, 720 F.2d at 65-66 & n.61.

5. Contemporary Studies on Immigration Detention Do Not Support NARA's Determination that the ICE Records Have Little or No Long-Term Research Value

Defendants repeatedly argue that contemporary studies on immigration detention relying on the ICE records, cited by *amici* and commenters below, actually "support[] NARA's position" that the records' anticipated research use will be more "contemporary rather than many years into the future," as well as the reasonableness of the ICE Schedule's temporary retention periods. *See* Defs.' Mem. at 21, 22-23, 29. This reasoning is riddled with flaws.

To begin, NARA never articulated this rationale below, so it cannot justify its action now. *See Regents of the Univ. of California*, 140 S. Ct. at 1909 ("An agency must defend its actions based on the reasons it gave when it acted," and cannot rely on "*post hoc* rationalizations" raised for the first time "in court."). Even were the Court to consider this belated rationale, there is no basis for Defendants' illogical inference that contemporary research use of the ICE records suggests a *low* likelihood of future use. If anything, the opposite is true: widespread contemporary use is a plausible indicator of *high* future research value. *See* Appraisal Policy, App. 1 (requiring NARA to both consider "the kinds and extent of current research use" and "try to make inferences about anticipated use"). Moreover, Defendants' singular focus on the time periods within which *contemporary* immigration researchers have used the ICE records is unduly limited, since it overlooks that immigration *historians* routinely seek comparable records decades after their creation—far beyond each of the ICE Schedule's temporary retention periods. *See* Pls.' Mem. 13, 21. NARA might have appreciated that point if

it had, per its Appraisal Policy, tried to draw "inference[s] about anticipated use" of the ICE records based on how historians have utilized comparable immigration detention records. *See* Appraisal Policy, App. 1. But NARA failed to conduct such an analysis. *See* Pls.' Mem. at 19-21; *supra* Part I.A.2.

Finally, Defendants overlook that ICE only recently began creating some of the records relied upon in the cited immigration detention studies. The DRIL Hotline, for example, was "launched in September 2012." ICE ERO Detention Reporting and Information Line, https://bit.ly/3i6AypC. It is therefore unsurprising that the cited studies did not rely upon DRIL records predating 2012, *see* Defs.' Mem. at 21, because no such records exist. Nor is it surprising that studies relying on Detainee Segregation Reports focused on data from 2013 forward, *see id.* at 22-23, because, as noted above, that was the year when ICE "issued a new segregation policy directive establishing stricter policies and procedures for the use and monitoring of solitary confinement in ICE detention facilities," A.R. 500 & n.26.

Suffice it to say that none of Defendants' arguments refute *amici's* basic point: the ICE records slated for destruction have high long-term research value because they enable comprehensive analyses of ICE detention conditions, including how those conditions changed, if at all, over multiple years. *See Amici* Br. at 10-14; *see also* A.R. 213 (comment of seven U.S. Senators) ("Access to historical records over time can help identify specific problems and their causes," and "can also inform the type and scope of any potential reforms to ICE's detention policies and practices."); A.R. 500 (ACLU comment) (raising similar concerns). Since the ICE Schedule's temporary retention periods—some of which are as short as three and seven years—

would significantly frustrate such analyses both in the near term and far into the future, this was a relevant factor NARA should have addressed below.

B. NARA Failed to Adequately Address Significant and Relevant Public Comments

In claiming NARA adequately responded to public comments, Defendants both mischaracterize the record below and operate under the misunderstanding that *any* response to a comment—no matter how responsive to the concerns raised—satisfies the APA. The law of this Circuit holds otherwise. *See, e.g.*, *Duncan*, 681 F.3d at 449 (agency acted arbitrarily and capriciously by summarizing public comments and providing a response that "never really answered" and "misinterpreted" the "concerns raised by the commenters"); *Gresham*, 950 F.3d at 103 ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking.").

Defendants likewise distort the law by suggesting NARA only needed to address comments specifically challenging the sufficiency of the ICE Schedule's temporary retention periods, and not comments challenging its broader decision to designate those records as temporary rather than permanent. In reality, NARA needed to respond to comments that could "be thought to challenge a fundamental premise underlying the proposed agency decision." *Carlson*, 938 F.3d at 344. The comments flagged by Plaintiffs here easily meet this threshold, since they all challenged the "fundamental premise" that the ICE records possess "little or no

research value" and thus did not warrant permanent retention under the RDA. *See id.* at 347 (agency must respond to comments raising "substantial countervailing statutory considerations").

With these threshold clarifications, Defendants' specific arguments are refuted below.

1. Defendants misstate the record in arguing that NARA adequately addressed comments on the ICE records' anticipated historical value. *See* Defs.' Mem. at 27-28. True, NARA directly responded to each of the 28 Members of Congress who signed a letter opposing the ICE Schedule, *id.* at 27, but none of those responses actually addressed the Members' concerns regarding the records' historical value, *see* A.R. 115-39, 215-268. Perhaps recognizing that fact, Defendants assert that NARA sufficiently addressed the Members' concerns in responding to other comments in its Final Consolidated Reply. *See* Defs.' Mem. at 27-28 (citing A.R. 15-20). But there too NARA failed to acknowledge or address the legislators' concerns about "the relatively recent government restructuring of our immigration agencies, the increased centrality of immigration in American public debate, and strong congressional attention to this issue," all of which indicate that ICE's "treatment of immigrants will be of high historical and research value to future scholars and legislators interested in understanding our country's actions during this moment in time." A.R. 485-86 & n.9 (citing Appraisal Policy). These "significant" and "relevant" concerns, relayed by 28 Members of Congress, plainly required a direct response from NARA. *See Carlson*, 938 F.3d at 344. It never provided one.

Defendants make no attempt to defend NARA's deficient response to Andrew Harman's comment. *See* Pls.' Mem. at 25 (citing A.R. 22-23). They instead claim NARA elsewhere addressed Harman's concerns in its response to other comments, *see* Defs.' Mem. at 27-28 (A.R. 15-20), but the cited portions of the record reveal no consideration of Harman's concerns that the

ICE records are needed "to complete the historical record" given the "growing media coverage of the mistreatment of detainees by ICE in detention facilities," which "several historians have shown . . . fit any rational definition of concentration camps." A.R. 22.

Defendants note that NARA generically acknowledged "many organizations and individuals" have an "interest in these records for purposes of accountability and transparency," which NARA surmised would be sufficiently served by temporary access to the records through FOIA. Defs.' Mem. at 27-28 (quoting A.R. 17). But this failed to sufficiently address the commenters' concerns, which focused not just on near-term "accountability and transparency" interests, but long-term historical interests of "future scholars and legislators." A.R. 485-86. Similarly, NARA's reference to FOIA was a non-sequitur because "future scholars and legislators" cannot obtain records through FOIA that have already been destroyed. *See* Pls.' Mem. at 21.

2. Defendants also mischaracterize the record in arguing NARA adequately addressed comments on Detainee Segregation Reports' long-term research value. Defs.' Mem. at 28. They claim NARA's First Consolidated Reply summarized the ACLU's comments on Detainee Segregation Reports, and increased the retention period from three to seven years "in response to those comments." *Id.* (citing A.R. 155, 160-61). But while NARA's summary of comments encompassed some of the ACLU's other points, it made no reference to the group's significant and relevant concerns about the records' *research value—i.e.*, that Detainee Segregation Reports serve as a "unique source of information" that "may be the only source of agency records available to answer" questions by "future historians" over whether major policy changes ICE implemented in 2013 to curb abusive segregation practices actually "work[ed] as contemplated."

A.R. 499-500. NARA instead summarized commenters' concerns about the records' "legal value," without discussing concerns about their long-term research value. A.R. 155.

Similarly, contrary to Defendants' suggestion that NARA increased the retention period for Detainee Segregation Reports "in response to" the ACLU's concerns about research value, Defs.' Mem. at 28, the record makes clear that NARA made that change only to "ensure that legal rights and accountability are supported," A.R. 160-61 (explaining that seven-year retention period sufficed to accommodate the statute of limitations for civil actions brought under 42 U.S.C. § 1983, without discussing research or historical value); *see also* Defs.' Mem. at 22 (confirming that NARA increased the retention period for Detainee Segregation Reports "to protect the legal rights of detainees"). Because NARA had a freestanding statutory obligation to adequately address the ICE records' "research" value, *see* 44 U.S.C. § 3303a(a); *supra* Part I.A.1, its separate consideration of the records' "legal" value does not refute Plaintiffs' point.

NARA made the same error in addressing Jenny Patino's comment. Although NARA's Final Consolidated Reply quoted an excerpt of Patino's comment, Defs.' Mem. at 28, that excerpt (and NARA's response) addressed only the "legal rights" implications of Detainee Segregation Reports. *See* A.R. 23-24. NARA wholly omitted the portion of Patino's comment, and the attached analysis by the Center for American Progress, describing the "long term historical value" of Detention Segregation Reports. *See* Pls.' Mem. at 22; A.R. 80-82.

Defendants assert NARA adequately addressed both the ACLU's and Patino's concerns in its general response to comments regarding the value of the ICE records to "historical and human rights research," Defs.' Mem. at 28, where it summarily proclaimed that the records' "anticipated research use will be more contemporary rather than many years into the future,"

A.R. 17. But, as explained above, that response was plainly deficient because it merely "[n]odd[ed] to concerns raised by commenters" regarding the records' long-term research value "only to dismiss them in a conclusory manner." *Supra* Part I.A.2.

Defendants also suggest in passing that NARA had no obligation to respond to the ACLU's or Patino's comments because they did not "directly . . . challenge NARA's conclusion that a seven-year retention period is adequate for research purposes." Defs.' Mem. at 28. This misstates the law. NARA was required to respond to comments that could "be thought to challenge a fundamental premise underlying the proposed agency decision." *Carlson*, 938 F.3d at 344. And the comments here directly challenged NARA's "fundamental premise" that Detainee Segregation Reports are merely "short-term records created for the purpose of managing and monitoring detainee housing" that lack "long-term . . . historical value." A.R. 178; *see also* A.R. 160 (noting that "NARA reaffirms that a temporary disposition is appropriate for these records" without mentioning research value); A.R. 17 (concluding reports "have temporary value because they have little or no research value"). Because the comments raised "substantial countervailing statutory considerations" bearing on NARA's determination of the Detainee Segregation Reports' research value, *see Carlson*, 938 F.3d at 347, NARA was required to address them.

3. Defendants concede NARA did not address the comment and accompanying research paper submitted by two Durham University professors, but insist NARA had no obligation to do so, and further assert NARA sufficiently addressed the professors' concerns in responding to other comments. Defs.' Mem. at 29. Defendants are wrong on both counts. For starters, the professors' submission was precisely the type of "significant" and "relevant" comment NARA

needed to address, *see Carlson*, 938 F.3d at 344, given the professors' perspective as scholars focused on immigration detention who have worked firsthand with the ICE records, the direct relevance of their submission to assessing the ICE records' "research value" under the RDA, and the relative uniqueness of their submission, which stood apart from other, more generalized comments addressing the ICE records' research and historical value. *See* A.R. 86-102. While Defendants claim NARA addressed the general contention that "all records on the [ICE] Schedule should be kept permanently because of their potential research value," Defs.' Mem. at 29 (citing A.R. 17-24, 156), nowhere did NARA respond to the professors' unique and substantial points with any level of specificity. *See, e.g.*, *supra* Part I.A.3 (noting the professors' points regarding the insufficiency of SEN System Summaries to meet research needs).[8]

4. Defendants offer another *post hoc* rationalization to excuse NARA's disregard of comments describing the research utility of having high-value accumulations of records compiled in one place. Defs.' Mem. at 29. Defendants attempt to refute those comments by citing provisions of the Appraisal Policy that, they claim, stand for the proposition that "ease of access cannot justify *permanently* preserving a group of records that are only *temporarily* accessible elsewhere." *Id.* (citing Appraisal Policy, App. 1). But NARA did not articulate this

[8] Defendants also offer a *post hoc* rationalization for why the professors' submission purportedly "supports NARA's position," Defs.' Mem. at 29, but, as explained above, NARA did not offer this reasoning below, and it is unpersuasive in any event. *See supra* Part I.A.5.

rationale below, *see* A.R. 19, so the Court should disregard it. *See Regents of the Univ. of California*, 140 S. Ct. at 1909.[9]

Even if it were considered, Defendants' belated rationale "misinterpret[s]" the "concerns raised by the commenters." *Duncan*, 681 F.3d at 449. No commenter suggested that ease of access *alone* warrants permanent retention of accumulations of records. Their point, instead, was that certain accumulations of records—even those including records scheduled elsewhere—acquire "high research value as a complete data set" due to intervening events such as an individual's death in ICE custody, or their necessity to enable comprehensive analyses of ICE detention practices. *See* A.R. 110-11 (ART comment); A.R. 496 (ACLU comment). NARA never explicitly addressed this concern, and Defendants do not claim otherwise. And contrary to Defendants' assertions, the comments plainly challenged a "fundamental premise" underlying NARA's Approval Decision—*i.e.*, that the ERO Death Review Files and DRIL records lack sufficient long-term research value to warrant permanent retention. *See, e.g.*, A.R. 11, 19, 157-58, 160, 174-75, 177-78.

5. Finally, no matter how Defendants try to spin it, *see* Defs.' Mem. at 30, it was plainly arbitrary and capricious for NARA to dismiss commenters' comparison of ICE detention to Japanese internment by drawing a distinction based solely on the "basis" for detention and purported "citizen[ship]" status of the detainees. *See* A.R. 18 (explaining that "NARA does not

[9] While NARA did state that the "materials gathered from disparate sources that are included in the ERO file are themselves mostly temporary records," it added that the ERO file can include some "permanent records" as well. A.R. 19. Nowhere did NARA articulate the particular rationale Defendants seek to advance now. Insofar as Defendants claim otherwise, *see* Defs.' Mem. at 29, they are once again mischaracterizing the record.

find the [commenters'] comparison compelling" because "[w]hile ICE detains aliens on the basis of immigration status, Japanese internment involved the detention of U.S. citizens on the basis of ethnicity or national origin."). NARA's reasoning was deeply flawed for several reasons: it misconstrued the comments, rested on erroneous factual premises, and erroneously deemed records documenting human rights abuses perpetrated by the government to be archivally insignificant where the victims are non-citizens detained on purportedly lawful grounds. *See* Pls.' Mem. at 27-28 & n.4. The fact that NARA elsewhere considered the legal rights implications of the ICE records, *see* Defs.' Mem. 30 (citing A.R. 17, 22-23, 173-79), does not redeem its flawed analysis of the internment-related comments, which implicated the separate statutory consideration of the ICE records' research value. *See supra* Part I.A.1.

C. NARA Wholly Disregarded its Appraisal Precedent

Plaintiffs pointed out that NARA's Approval Decision failed to consider *any* of NARA's prior relevant appraisal decisions, and, most notably, its decision to permanently archive the immigration records stored in Record Group 85. *See* Pls.' Mem. at 28-30. Because an "agency's wholesale failure to address 'past practice . . . regarding an issue . . . is arbitrary and capricious,'" *Physicians for Soc. Responsibility*, 956 F.3d at 647 (internal brackets omitted); *accord Am. Wild Horse*, 873 F.3d at 927; *W. Deptford Energy*, 766 F.3d at 12, this alone warrants vacating NARA's decision. None of Defendants' contrary arguments alter this conclusion.

Defendants insist NARA met its obligation to consider its "past treatment of immigration-related records" when it confirmed with ICE "that the records at issue in this case are not covered by any legacy INS schedule." Defs.' Mem. at 31 (citing A.R. 269, 271). This is a non-sequitur: the fact that *ICE* was not using legacy INS schedules for the records covered by

the ICE Schedule and was instead making a "new request for records retention," A.R. 269, 271, has nothing to do with whether *NARA* considered its own appraisal precedent in deciding *whether to approve* the ICE Schedule. And NARA is no doubt aware of the importance of considering its appraisal precedent, having recently done just that in reviewing a records disposition schedule proposed by U.S. Customs and Border Protection ("CBP"). *See* NARA Appraisal Memorandum, CBP Schedule DAA-0568-2018-0001, July 9, 2020, at 11-13, https://bit.ly/3bRJzQU (recommending temporary retention of several categories of CBP records because "[s]imilar records have been approved as temporary" by NARA, and citing the ICE Schedule as relevant appraisal precedent, among other records schedules). Even in its brief before this Court, NARA seeks to analogize and distinguish its appraisal precedent (albeit belatedly). *See* Defs.' Mem. at 18 & nn.1-2; *infra* Part I.D. NARA's "wholesale failure" to conduct that type of analysis in reviewing the ICE Schedule—*i.e.*, to consider how it had previously appraised "similar records" of ICE's predecessors or other agencies—was arbitrary and capricious. *See Physicians for Soc. Responsibility*, 956 F.3d at 647.

NARA likewise erred in failing to consider a particularly relevant appraisal precedent: Record Group 85. *See Jicarilla Apache Nation*, 613 F.3d at 1120 ("[W]e have never approved an agency's decision to completely ignore relevant precedent."). Defendants dispute the relevance of Record Group 85 solely because it includes some records that are significantly older than the "modern records at issue in this litigation." Defs.' Mem. at 30-31. But Plaintiffs flagged Record Group 85 precisely *because* it includes records that could reasonably be considered "*[h]istorical [p]redecessors* of the ICE [r]ecords," and thus provide some indication

of the types of immigration detention records historians will value decades into the future. Pls.' Mem. at 28 (emphasis added).[10]

Defendants fail to comprehend that one day the ICE records—if not destroyed—will also be decades old, and at that time may well be considered essential evidence of a pivotal moment in U.S. immigration history, much like Record Group 85 is viewed now. *See, e.g.*, A.R. 485-86, 500. Such an analysis is in fact mandated by the Appraisal Policy, which requires NARA to make a predictive judgment about records' "future research potential." *See* Appraisal Policy, App. 1. Making that assessment here required NARA to consider the extent to which historians have used records comparable to the ICE records, including (but not limited to) those in Record Group 85. Notwithstanding their objection based on the records' relative age, even Defendants acknowledge that the ICE records and Record Group 85 cover similar *subject matter*, including the conditions of immigration detention in regional facilities. *See id.*; *see also* NARA, Record Group 85 (1787-1993), § 85.5 https://bit.ly/2TkHghK (permanent archive of "District Office Records of INS and its Predecessors 1787-1976"). Given this overlap, NARA should have at least considered and addressed the relevance of Record Group 85 in deciding whether to approve the ICE Schedule. Its failure to do so reflects precisely the type of shortsightedness NARA itself has lamented outside of this case—and with respect to Record Group 85, no less. *See* NARA San Francisco, Record Group 85, https://bit.ly/2TN7Ij9 (noting that the immigration records in Record Group 85 are "now considered priceless by historians, social scientists, and

[10] Plaintiffs AHA and SHAFR and many of their immigration historian members share the view that Record Group 85 includes historical "predecessors" of the ICE records. *See* Grossman Decl. ¶¶ 7b-c, 8; Hoganson Decl. ¶¶ 7a, 8; Nofil Decl. ¶ 13; Shull Decl. ¶ 14.

genealogists," but were erroneously "thought by some to have little or no future value fifty years ago" and consequently were destroyed in part "in the 1940s and 1950s by the INS with the approval of the National Archives and the U.S. Congress").

Contrary to Defendants' assertions, Plaintiffs do not point to Record Group 85 as proof that NARA has a "prior agency practice" of "broadly retaining" immigration detention records generally or the "specific types of records covered by the [ICE] Schedule." Defs.' Mem. at 31-32. Plaintiffs merely highlight Record Group 85 as one example of relevant appraisal precedent NARA should have *considered* before approving destruction of the ICE records. *See Jicarilla Apache Nation*, 613 F.3d at 1120. And even if Record Group 85 was irrelevant, that would not excuse NARA's wholesale failure to consider any of its *other* appraisal precedent regarding records comparable to the ICE records. *Cf.* NARA Appraisal Memorandum, CBP Schedule DAA-0568-2018-0001, July 9, 2020, at 11-13, https://bit.ly/3bRJzQU (considering NARA's appraisal precedent in reviewing CBP records schedule).

D. NARA's Wholesale Failure to Acknowledge its Policy on "Periodic Reports" Below Cannot Be Saved by Defendants' *Post Hoc* Rationalizations

Defendants do not contest that NARA failed altogether to acknowledge a policy guidance on "periodic reports" in approving destruction of Detention Monitoring Reports. *See* Defs.' Mem. at 18-19. Nor do they dispute that Detention Monitoring Reports qualify as a "periodic report" within the meaning of NARA's guidance. *See* NARA, Examples of Series Commonly Appraised as Permanent, https://bit.ly/39VaIjO (explaining that such reports are "frequently [retained] permanent[ly]" by NARA). Without disputing these points, Defendants advance a detailed *post hoc* rationalization for why NARA's action was consistent with its policy guidance,

and, to support that conclusion, attempt to analogize and distinguish NARA's appraisal precedent on periodic reports. *See* Defs.' Mem. at 18-19 & nn.1-2. But here again, Defendants are merely attempting to do now what NARA failed to do below. NARA's "wholesale failure to address" its "past practice and formal policies regarding" periodic reports below was "arbitrary and capricious," *Physicians for Soc. Responsibility*, 956 F.3d at 647; *accord Am. Wild Horse*, 873 F.3d at 927; *W. Deptford Energy*, 766 F.3d at 12, and cannot be saved by Defendants' after-the-fact rationalizations, *see Regents of the Univ. of California*, 140 S. Ct. at 1909.

E. NARA Failed to Provide a Reasoned Explanation for its Determination that "Resource Considerations" Outweighed "Researcher Interests" in the ICE Records

Finally, Defendants concede that despite citing "resource considerations" as a basis for its Approval Decision, NARA "did not consider" either the "potential volume of ICE records at issue or the costs associated with permanent retention." Defs.' Mem. at 32-33. They dispute NARA had any obligation to do so, *id.*, but overlook that the APA does not permit agencies to thoughtlessly render conclusions without "examin[ing] the relevant data and articulat[ing] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" *State Farm*, 463 U.S. at 43.

Despite Defendants' efforts to minimize the role that resource considerations played in NARA's analysis, the Approval Decision itself suggests it was a major factor. After devoting several pages to summarizing public comments on the ICE records' research value, NARA dismissed those concerns and stated that "[w]hile we are sensitive to researcher interests, *we must also balance such interests against resource considerations*." A.R. 17 (emphasis added). Given NARA's explicit finding that "resource considerations" outweighed the substantial

"researcher interests" at hand, it was incumbent on the agency to provide some explanation of what exactly those "resource considerations" were and how they supported its finding. *See Duncan*, 681 F.3d at 448 (rejecting agency's conclusory explanation where it "point[ed] to nothing in the record supporting [its] assertions"); *Int'l Union*, 626 F.3d at 93 (same).

CONCLUSION

The Court should grant Plaintiffs' motion for summary judgment and deny Defendants' cross-motion for summary judgment.

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Respectfully Submitted,

/s/ Nikhel Sus
Nikhel S. Sus
(D.C. Bar No. 1017937)
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
1101 K St. N.W., Suite 201
Washington, DC 20005
Telephone: (202) 408-5565
Fax: (202) 588-5020
nsus@citizensforethics.org

Counsel for Plaintiffs