IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.* Defendants.	Case No. 22-cv-3350-TSC

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Citizens for Responsibility and Ethics in Washington ("CREW") alleges that four federal agencies—the United States Secret Service, the Department of Homeland Security ("DHS"), the Department of Defense ("DoD"), and the Department of the Army—unlawfully deleted text messages on agency-issued phones relating to the January 6, 2021 assault on the U.S. Capitol, that Ken Cuccinelli, a former senior DHS official, unlawfully alienated federal records by using a personal phone to conduct government business, and that all four agencies and the National Archives and Records Administration ("NARA") have failed to take mandatory actions to recover the federal records in question. CREW also alleges that NARA violated its own regulations in setting a deadline for DHS to report on the potentially missing text messages.

CREW's claims require dismissal due to a host of jurisdictional and merits defects. Starting with jurisdiction: The relief CREW seeks is an order requiring the head of each agency and NARA to ask the Attorney General to initiate an enforcement action under the Federal Records Act ("FRA"). But the injury CREW alleges is to its ability to access agency records under the Freedom of Information Act ("FOIA"), and it cannot demonstrate that an order requiring such a request would be likely to remedy that injury as to any federal records that may have been on the agency-issued phones in question, which are either already in agency custody or irretrievably lost, as the declarations accompanying this motion demonstrate. And CREW identifies no theory of how it could have been injured by NARA's deadline for a report from DHS, or of how referral to the Attorney General would redress any such injury.

CREW's claims fare no better on the merits. The mandatory enforcement duty under the FRA that CREW invokes applies only in cases of removal of records from agency custody, not in cases of alleged destruction of records by the agency itself. The FRA likewise precludes judicial review of CREW's challenge to NARA's application of its regulations to DHS, which was in any

case entirely proper. Statutory issues aside, CREW's claims also fail at the starting gate because it has not adequately alleged that any of its claims satisfy both of the necessary factual predicates that (i) any federal records requiring preservation existed, and (ii) that the custodians did not follow applicable law or agency policy, as they must be presumed to have done absent specific allegations to the contrary, requiring them to preserve text messages constituting federal records.

The Court should thus dismiss the complaint for lack of jurisdiction as to the claims concerning agency-issued phones and NARA's application of its regulations, and to the extent that the Court determines it has jurisdiction to consider CREW's claims, dismiss the complaint in its entirety for failure to state a claim.

I. STATUTORY BACKGROUND

The FRA is "a collection of statutes governing the creation, management, and disposal of records by federal agencies." *Public Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999), *cert denied* 529 U.S. 1003 (2000); *see* 44 U.S.C. §§ 2101-18, 2901-09, 3101-07, 3301-24. The FRA "authorizes the head of each Federal agency to establish a records management program and to define the extent to which documents are appropriate for preservation as agency records." *Kissinger v. Reporters Committee For Freedom of the Press*, 445 U.S. 136, 147 (1980). Agency heads are directed by the FRA to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency," and "shall establish safeguards against the removal or loss of records [they] determine[] to be necessary and required by regulations of the Archivist." 44 U.S.C. § 3105. Additionally, the Act "provides the exclusive means for record disposal."[1] *Id.*; *see* 44 U.S.C. § 3303(a).

[1] The Records Disposal Act, 44 U.S.C. § 3101, et seq., controls the disposition of records, but as the D.C. Circuit has treated the RDA as a portion of the FRA, *Public Citizen*, 184 F.3d at 902 (referring to "the RDA portion of the FRA"), defendants do so as well.

Records covered by the FRA include

> all recorded information, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.

44 U.S.C. § 3301(1)(A). By regulation, records under the FRA are deemed either "permanent" or "temporary." Permanent records include any federal record that "has been determined by [the National Archives Record Administration ("NARA")] to have sufficient value to warrant its preservation in the National Archives of the United States." 36 C.F.R. § 1220.14 (2006). Temporary records are any records "which have been determined by the Archivist of the United States to have insufficient value . . . to warrant its preservation by [NARA]." *Id.*

The FRA also establishes an administrative enforcement scheme, consisting of two complementary mechanisms for protecting records. *Armstrong v. Bush*, 924 F.2d 282, 294 (D.C. Cir. 1991). Under 44 U.S.C. § 2905, if the Archivist learns that federal records are being mishandled in certain material ways, then he or she may notify the relevant agency head, assist the agency head in initiating an action through the Attorney General (or initiate the action himself or herself if the agency head refuses) "for the recovery of records unlawfully removed and for other redress provided by law," and (in certain situations) notify Congress. 44 U.S.C. § 2905(a). Under 44 U.S.C. § 3106, in turn, each agency head may alert the Archivist of the material mishandling of federal records and seek to initiate an action through the Attorney General to recover records that have been unlawfully removed: "The [agency head] shall notify the Archivist of any actual, impending, or threatened unlawful removal . . . or destruction of records in the custody of the agency. . . [and] shall initiate action through the Attorney General for the recovery of records [the

agency head] knows or has reason to believe have been unlawfully removed from that agency[.]" 44 U.S.C. § 3106.

II. PROCEDURAL BACKGROUND

CREW is a "nonprofit, nonpartisan organization . . . committed to protecting the rights of citizens to be informed about the activities of government officials and agencies and to ensuring integrity in government." Compl. ¶ 8, ECF 1 at 5. It alleges that "text messages of Trump administration officials at DHS, the Secret Service, DOD, and the Army . . . were improperly deleted after being requested as part of investigations into the January 6, 2021 attack on the United States Capitol," or are unlawfully outside of government custody. *Id.* ¶ 1, ECF 1 at 2.

CREW filed this lawsuit on November 2, 2022, seeking an order requiring NARA and the agencies whose records are allegedly missing to initiate an enforcement action under the FRA through the Attorney General. *See* Compl. Prayer for Relief, ECF 1 at 27.

STANDARD OF REVIEW

On a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), "the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). In considering a motion to dismiss for lack of subject matter jurisdiction, including for lack of standing, the Court may consider the records generally available to it on a motion to dismiss for failure to state a claim, namely "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the Court] may take judicial notice," *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997). "[W]here necessary," however, for a jurisdictional motion to dismiss, the Court may also consider "the complaint supplemented by undisputed facts in the

record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

To survive a motion to dismiss for failure to state a claim, a plaintiff must show that the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Zukerman v. USPS*, 961 F.3d 431, 441 (D.C. Cir. 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

ARGUMENT

I. PLAINTIFF'S CLAIMS MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

Federal courts are courts of limited subject-matter jurisdiction and "possess only that power authorized by the Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Because of "the nature and limits of the judicial power of the United States," the Court must determine its jurisdiction "as a threshold matter" and may not resolve the merits of a case without first confirming its jurisdiction. *Steel Co.*, 523 U.S. at 94-95.

Article III of the Constitution restricts the jurisdiction of the federal courts to "cases" or "controversies," and the "core component of standing is an essential and unchanging part" of that requirement. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To establish Article III standing, a Plaintiff must satisfy three elements: (1) injury-in-fact; (2) causation; and (3) redressability. *Id.* at 560-61. "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561.

A. Plaintiff's Claims Relating To Agency-Issued Phones Are Not Redressable

Standing doctrine's redressability requirement "examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by

the plaintiff." *Fla. Audobon Soc'y v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Cir. 1996) (en banc). "The key word is 'likely.'" *West v. Lynch*, 845 F.3d 1228, 1235 (D.C. Cir. 2017) (quoting *Lujan*, 504 U.S. at 561). "[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation omitted); *see also, e.g.*, *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 (1976) (no standing when "the complaint suggests no substantial likelihood that victory in this suit" would redress the underlying injury).

CREW's claims concerning agency-issued phones are not redressable, because they concern potential federal records that are either already in agency custody or, if they ever existed, are no longer recoverable. The issue "may sound like one of mootness . . . but the timing makes [Plaintiff's] problem one of standing." *Advanced Mgmt. Tech., Inc. v. F.A.A.*, 211 F.3d 633, 636 (D.C. Cir. 2000). "Mootness and standing are related concepts," and "[t]he Supreme Court has characterized mootness as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Garden State Broad. Ltd. P'ship v. F.C.C.*, 996 F.2d 386, 394 (D.C. Cir. 1993) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). In this context, the substantive "difference is almost inconsequential," and cases deciding FRA claims on mootness grounds are "both factually and legally instructive" on the question of redressability. *Cause of Action Inst. v. Tillerson*, 285 F. Supp. 3d 201, 207-08 (D.D.C. 2018). The difference is one of burden: as "[t]he party invoking federal jurisdiction," the plaintiff "bears the burden of establishing the[] elements" of standing, including redressability, *Lujan*, 504 U.S. at 561; once jurisdiction has been established, however, "[t]he burden of establishing mootness rests on the

party that raises the issue." *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998).

In the context of the FRA, "no court action can provide further relief" if "the requested enforcement action could not shake loose a few more [records]," including in cases in which the records have been "fatal[ly] los[t]." *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 954-56 (D.C. Cir. 2016). To establish redressability, Plaintiff must show that "there is a 'substantial likelihood' that the Attorney General could find some [federal records]." *Cause of Action Inst. v. Pompeo*, 319 F. Supp. 3d 230, 234 (D.D.C. 2018).

This Court's decision in *Cause of Action Institute v. Pompeo*, 319 F. Supp. 3d 230, is illustrative. Plaintiff in that case sought an order requiring the Secretary of State and the Archivist to request an enforcement action from the Attorney General to recover "work-related emails that [former] Secretary [of State Colin] Powell exchanged on a person email account." *Id.* at 232. The government moved to dismiss on mootness grounds. *Id.* at 234. This Court determined that "the Government's evidence satisfie[d] th[e] high bar" for establishing mootness because, "[b]y establishing that Secretary Powell's missing emails cannot be obtained through Secretary Powell himself, his devices, or his service provider, the Government has established the fatal loss of these federal records." *Id.* at 236.

Unlike the scenario in that case, which concerned the admitted exchange of federal records on a personal account, CREW's allegations here about agency-issued phones concern devices that were erased and reset in the ordinary course of government operations. To show a substantial likelihood that the Attorney General could recover missing federal records in the form of text messages from those devices, CREW must first adequately allege as a factual predicate (i) that federal records existed on those devices in the first place, and if so, (ii) that those federal records

existed only on those devices and not elsewhere in agency custody. As discussed *infra* at Part II.D-E, CREW has failed to adequately allege that any of its claims satisfy both factual predicates.

Even assuming that federal records existed on the phones in question, and that those records were not copied to other locations within the agency's custody prior to the phones' being reset, CREW still cannot establish a substantial likelihood that federal records would be recovered because the data on those phones is either already in agency custody or has been fatally lost.

As each agency's declaration establishes, data that resided on the agency phones in question during the times for which CREW seeks records is either already in agency custody or no longer retrievable, from either the device itself or from the service providers. (Unlike in the case of Secretary Powell, which involved the use of a personal account, there is no reason to believe that any text messages created or exchanged on government-issued phones would be recoverable from the relevant custodian personally, and CREW makes no allegations that would provide any basis for assuming otherwise.)

1. Secret Service

The Secret Service conducted a migration of all agency-issued iPhone and iPad devices to the Microsoft Intune Mobile Device Management System from January 27, 2021 to April 1, 2021. *See* Declaration of Gloria Armstrong ¶¶ 3, 4 (attached as Exhibit 1). Prior to the migration, the Secret Service instructed employees to preserve federal records, including text messages, stored on their phones, and provided instructions for doing so. *Id.* ¶ 3. As a result of the migration, "all data on the iPhones [was] erased," and any "iPhone data that was not backed up or otherwise preserved prior to an iPhone's enrollment in Intune was lost." *Id.* ¶ 4. Verizon, the Secret Service's cellular phone service provider, was unable to recover copies of any text messages lost in the migration. *Id.* ¶ 5. Verizon only maintains Short Message Service (SMS) text messages for seven days after they are transmitted, and Verizon does not maintain iMessages, which are "texts, photos,

or videos that are sent to another iPhone, iPad, etc. over Wi-Fi or cellular data networks." *Id.* & *id.* ¶ 3 n.2. Data lost during the Intune migration is thus not recoverable from the devices themselves or from the service providers. *Id.* ¶ 5.

The Secret Service's preservation instructions and subsequent attempts to recover any federal records that nevertheless may not have been preserved were "in keeping with the steps" NARA "expect[s] agencies to take when migrating systems and attempting to recover records." Declaration of Laurence Brewer ¶ 23 (attached as Exhibit 2).

2. DHS

During the relevant period, DHS contracted with WidePoint Integration Solutions Corporation to dispose of electronic cellular devices returned by departing employees or employees who received new devices. Declaration of Christopher Granger ¶ 12 (attached as Exhibit 3). "As part of the E-Cycle process, WidePoint E-Cycle signed for the relevant devices, processed them to ensure all data was sanitized from the devices, and received a certificate of data destruction as well as a report that confirmed the devices were physically destroyed or recycled." *Id.* ¶ 12 n.6.

Between November 13, 2019 and his resignation on January 11, 2021, Chad Wolf was assigned an Apple iPhone serviced by AT&T. *Id.* ¶ 12. That device was returned to DHS's Office of the Chief Information Officer ("OCIO") on or about January 11, 2021, and WidePoint disposed of the device through its E-Cycle program on or about May 15, 2021. *Id.*

Between November 13, 2019 and his resignation on January 19, 2021, Ken Cuccinelli was assigned an Apple iPhone and an Apple iPad serviced by Verizon. *Id.* ¶ 14. Those devices were returned to OCIO on or about January 19, 2021, and WidePoint disposed of the devices through its E-Cycle program in April 2021. *Id.*

Due to a security breach that occurred in December 2020, both Wolf and Cuccinelli were assigned temporary phones, serviced by AT&T, from December 2020 until their respective resignations in January, 2021. *Id.* ¶ 20. Because of the security breach, OCIO instructed Wolf and Cuccinelli to use Signal, an encrypted end-to-end messaging service, rather than SMS or iMessage. *Id.* Wolf sent or received eight Signal messages in December 2020, and none in January 2021; DHS maintains copies of the Signal messages from his temporary device. *Id.* Cuccinelli did not send or receive any Signal messages on his temporary device. *Id.* WidePoint disposed of both temporary devices through its E-Cycle progam on February 15, 2021. *Id.* ¶ 21.

Randolph D. "Tex" Alles was assigned an Apple iPhone and an Apple iPad, each serviced by Verizon, on July 8, 2019. *Id.* ¶ 17. In February 2022, he received a new Apple iPhone. *Id.* ¶ 18. Before his old iPhone was returned to OCIO, Alles performed a factory reset of the phone. *Id.* OCIO sent the old iPhone to DHS OIG on August 17, 2022. *Id.*

Alles did not designate any text messages from his iPhone as federal records warranting preservation. *Id.* ¶ 19. As described in DHS's declaration accompanying this motion, Alles has explained that, "while he has sent and received text messages on his DHS phones, and possibly even on his iPad, his text messages are generally limited to exchanging logistical information such as the location of a government building, or seeking technology related assistance," and that "he views the ability to send and receive text messages as having limited functionality" because "texting is not an effective way to discuss policies and substantive matters." *Id.*[2]

[2] Per NARA's General Records Schedule 5.2, *available at* https://www.archives.gov/files/records-mgmt/grs/grs05-2.pdf (last visited March 2, 2023), messages of kind described by Alles, such as "messages coordinating schedules, appointments, and events," may be destroyed "when no longer needed for business use, or according to agency predetermined time period or business rule."

OCIO has access to the iCloud accounts associated with both Wolf and Cuccinelli's devices. *Id.* ¶ 23. OCIO confirmed that no iMessages were synced to Wolf's iCloud account, and recovered approximately 1.6 GB of iMessages in Cuccinelli's iCloud account. *Id.*

OCIO also sought text message data maintained by AT&T and Verizon pertaining to Wolf and Cuccinelli. *Id.* ¶¶ 24-26. Neither provider could recover text message contents from January 2021. *Id.*

In NARA's judgment, "DHS has taken reasonable steps to ensure the recovery of federal records from the government issues phones." Brewer Decl. ¶ 30.

3. DoD

On or about January 20, 2021, former Acting Secretary of Defense Christopher Miller and former General Counsel Paul Ney returned their DoD mobile devices and left DoD. Declaration of Roger Greenwell ¶ 9 (attached as Exhibit 4). On or about January 21, 2021, former Chief of Staff to the Acting Secretary of Defense Kashyap Patel returned his DoD mobile device and left DoD. *Id.*

All three devices were "reprovisioned" on or around January 20-22, 2021. *Id.* ¶ 10. "Reprovisioning is a standard procedure undertaken by IT staff to reset devices to their factory condition when a DoD user departs, in order to either decommission the device or reissue the device to another DoD user. A device that has been reprovisioned does not contain recoverable text message content from the prior user." *Id.* ¶ 8. Under DoD policy at the time, devices were not automatically imaged or backed up prior to being reprovisioned. *Id.* ¶ 7.

The DoD officials in question used devices serviced by AT&T. *Id.* ¶ 12. DoD made an inquiry to AT&T to ascertain if it preserved text messages sent or received by DoD officials, but AT&T informed DoD that it does not retain text messages for more than forty-eight hours after

the message is sent or received, and that at the time of DoD's inquiry it did not retain text messages from the devices associated with any of the DoD officials in question. *Id.* ¶ 13.

In NARA's judgment, DoD "has taken all reasonable steps necessary to recover federal records." Brewer Decl. ¶ 14.

4. Army

Former Secretary of the Army Ryan McCarthy left office in January 2021, and his government-issued cell phone was reprovisioned and issued to a new user at that time. Declaration of Paul DeAgostino ¶ 2.a (attached as Exhibit 5). Army contacted the new user to determine if any of McCarthy's communications were recoverable, and the new user reported that the phone was like new with no indication of McCarthy's communications. *Id.*

Army Chief of Staff James McConville received a new government-issued phone in April 2021, and his previous government-issued phone was reprovisioned and issued to a new user. *Id.* ¶ 2.b. Army contacted the new user to determine if any of McConville's communications were recoverable, and the new user reported that the phone was like new with no indication of McConville's communications. *Id.*

Director of Army Staff Lieutenant General Walter Piatt's government-issued cell phone was reprovisioned in April 2021 and returned to the carrier for account credit. *Id.* ¶ 2.c. He was issued a new phone in May 2021. *Id.*

Former Under Secretary of the Army James McPherson left office on January 20, 2021, and left his government-issued cell phone with his Executive Officer. *Id.* ¶ 2.d. The Executive Officer returned the phone to the Army General Counsel Office, where McPherson worked as General Counsel before being confirmed as Under Secretary. *Id.* Army retains custody of the phone, which has not been reprovisioned. *Id.* However, the phone is locked and requires a PIN code to open. *Id.* Army has attempted several possible PIN codes to open the phone, including one

suggested by McPherson, and has also made multiple attempts to reset the PIN, all without success. *Id.*

Army has attempted to retrieve text message data from the service provider, but has been unable to obtain the content of any text messages sent or received by the relevant officers in January 2021. *Id.* ¶ 2.e.

B. Plaintiff Lacks Standing For Its Claim That NARA Violated Its Regulations By Not Requiring DHS To Issue A Report Within 30 Days

CREW alleges that "NARA's August 1, 2022 determination to not require DHS to issue a report within 30 days as required by NARA regulations (*see* 36 C.F.R. §§ 1230.14, 1230.16(b)) and to defer further NARA action pending completion of DHS OIG's separate investigation" was arbitrary and capricious. Compl. ¶ 93, ECF 1 at 24. CREW does not even attempt to demonstrate injury-in-fact or redressability for this claim, which must be dismissed for lack of jurisdiction.

First, CREW does not allege that it has any "concrete," "legally protected interest" in how NARA enforces its regulations against DHS, or that any such interest was impaired by NARA's actions here. *Lujan*, 504 U.S. at 560. Unlike its information theory of injury premised on its pending FOIA requests for the alleged missing text messages from Defendants, CREW does not allege that it has sought, or has any plans to seek, reports issued by DHS to NARA. In the absence of any outstanding requests for records, even a "significant likelihood that Plaintiffs will again seek access" to federal records is insufficient to make any "future injury" premised on possible future records requests "sufficiently imminent" to create standing. *Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, 310 F. Supp. 2d 216 (D.D.C. 2004). CREW has not even attempted to establish any such likelihood that it would seek any DHS report to NARA, and its allegations on this point thus amount to nothing more than "a generally available grievance about government—claiming only harm to [it] and every citizen's interest in proper application of the

Constitution and the laws, and seeking relief that no more directly and tangibly benefits [it] that it does the public at large." *Lujan*, 504 U.S. at 573-74.

Without a cognizable injury, the impossibility of judicial redress for CREW's grievance is obvious. But even assuming CREW had adequately alleged an injury, dismissal would still be necessary, because CREW has also failed to request any relief that even plausibly relates to this claim, beyond its generic request that the Court "[d]eclare Defendants in violation of the APA, the FRA and NARA regulations." Compl. Prayer for Relief, ECF 1 at 27. CREW cannot show that "the relief sought" would redress its injury, *Fla. Audobon Soc'y*, 94 F.3d at 663-64, when it has failed to seek any relief at all.

II. PLAINTIFF HAS FAILED TO STATE CLAIMS FOR RELIEF ON THE MERITS

Even if the Court were to determine that jurisdiction is proper to consider any or all of CREW's claims, they all must nevertheless be dismissed for failure to state a claim on the merits.

A. The FRA's Enforcement Duty Applies Only When Records Have Been Removed From Agency Custody

All four of CREW's claims are brought under the APA as a challenge to agency inaction. *See* 5 U.S.C. § 706(1); Compl. ¶¶ 83, 92, 101, 109, ECF 1 at 23-27. To prevail on such a claim, a plaintiff must "assert[] that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) ("*SUWA*"). That, in turn, requires the plaintiff to show that the relevant federal statute contains a "specific, unequivocal command" directing the agency to undertake a discrete action. *Id.* at 63. The FRA does impose mandatory duties on agency heads and the Archivist to request enforcement action from the Attorney General in certain circumstances, *see Armstrong*, 924 F.2d at 295, but those duties apply "only to removed records," not to alleged destruction of records. *Citizens for Resp. & Ethics in Washington v. U.S. S.E.C.*, 916 F. Supp. 21 141, 149 (D.D.C. 2013) ("*CREW I*").

Here, CREW alleges that the Secret Service, DHS, DOD, and the Army each "unlawfully deleted text messages," Compl. ¶¶ 78, 86, 96, 104; that in each case the "records have not been restored, recovered, retrieved, salvaged, or reconstructed," *id.* ¶¶ 81, 90, 99, 107; and that neither the relevant agency nor NARA "has initiated an FRA enforcement action through the Attorney General," *id.* ¶¶ 82, 91, 100, 108. In each case, CREW alleges that "[t]he failure . . . to initiate an FRA enforcement action through the Attorney General is 'agency action unlawfully withheld or unreasonably delayed.'" *Id.* at 83, 92, 101, 109 (quoting 5 U.S.C. § 706(1)).[3]

CREW relies on two related statutory provisions as the basis for each Defendant's alleged duty to seek enforcement through the Attorney General. The first, 44 U.S.C. § 3106, states:

> (a) Federal agency notification.—The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency, or from another Federal agency whose records have been transferred to the legal custody of that Federal agency.
>
> (b) Archivist notification.—In any case in which the head of a Federal agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of such unlawful action described in subsection (a), or is participating in, or believed to be participating in any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

44 U.S.C. § 3106 (emphasis added).

The second section CREW relies on, 44 U.S.C. § 2905(a), provides in similar language that:

[3] CREW also alleges that "federal records from former DHS official Ken Cuccinelli's personal phone remain unlawfully outside of the agency's physical custody." Compl. ¶ 87. To the extent that CREW has adequately alleged that Cuccinelli unlawfully removed federal records, *but see infra* Part II.E, the argument in this section does not apply to that allegation.

> The Archivist shall notify the head of a Federal agency of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency that shall come to the Archivist's attention, and assist the head of the agency in initiating action through the Attorney General for recovery of records unlawfully removed and for other redress provided by law. In any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

44 U.S.C. § 2905(a) (emphasis added).

In each case, the statute creates two distinct duties—a notification duty, and a duty to seek enforcement through the Attorney General—with distinct sets of triggering events. In the event of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records, the agency head and the Archivist each have a duty to notify the other. In the event of any unlawful removal of records—and only in that event—the agency head, with the assistance of the Archivist (or, failing timely action by the agency head, the Archivist alone), must request that the Attorney General initiate an action for the recovery of the records.

CREW's complaint assumes that the mandatory duty to seek enforcement through the Attorney General also applies in the case of unlawful destruction of records. That interpretation is contrary to the plain text of the statutory provisions, which in each case requires resort to the Attorney General only when records have been "unlawfully removed." 44 U.S.C. §§ 2905, 3106. As a matter of ordinary usage, "removal" of records and "destruction" of records are distinct concepts; if "removal" encompassed "destruction," there would have been no need to separately list "destruction" in the first clause of each provision. Assigning distinct meaning to each term is consistent with the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be

superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).

This reading likewise comports with the interpretive canon of "*expressio unius est exclusio alterius*, that is, the mention of one thing implies the exclusion of another thing." *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (internal quotation marks omitted). Here, Congress distinguished between removal and destruction in the first clause of each provision, but addressed only removal in the second clause, dealing with requests for enforcement actions by the Attorney General. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks and alteration omitted).

The distinction between removal and destruction of records is also consistent with usage in another section of the FRA, and with the authoritative interpretation of NARA, the agency charged with administering the FRA. The FRA requires agencies to "establish safeguards against the removal or loss of records," and requires agencies to inform employees of "the penalties provided by law for the unlawful *removal or destruction* of records." 44 U.S.C. § 3105 (emphasis added). NARA's regulations likewise define removal and destruction as distinct concepts:

> Removal means selling, donating, loaning, transferring, stealing, or otherwise allowing a record to leave the custody of a Federal agency without the permission of the Archivist of the United States.
>
> Unlawful or accidental destruction (also called unauthorized destruction) means disposal of an unscheduled or permanent record; disposal prior to the end of the NARA-approved retention period of a temporary record . . .; and disposal of a record subject to a FOIA request, litigation hold, or any other hold requirements to retain the records.

36 C.F.R. § 1230.3(b).

Distinguishing between removal and destruction of records, and requiring recourse to the Attorney General only in the case of removal, also makes good sense. In cases of removal, but not in cases of destruction, involving the Attorney General creates a prospect for recovery that may not otherwise exist: the Attorney General can sue for recovery of federal records, such as through a civil replevin action. The Attorney General has in fact initiated such actions in the past. *See United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380 (8th Cir. 1987); *cf. also, e.g.*, *United States v. Navarro*, No. 1:22-cv-02292-CKK (D.D.C.) (civil replevin action for recovery of materials under the Presidential Records Act). In the absence of independent litigating authority, other federal agencies cannot take such action acting alone. *See* 28 U.S.C. § 516.

Requiring enforcement action through the Attorney General in cases of destruction of records, in contrast, may "raise some peculiar practical and constitutional difficulties." *CREW I*, 916 F. Supp. 2d at 148. First, in many destruction cases the defendant would likely be a federal agency itself (as CREW seeks here), and the Department of Justice would, in many cases (including those that CREW seeks here) be responsible for both suing and defending the agency in question. *See* 28 U.S.C. §§ 516, 519. Aside from the obvious practical concerns with such an arrangement, such a reading of the FRA would also risk "tension with the constitutional structure." *S.E.C. v. F.L.R.A.*, 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring). "[J]udicial resolution of intra-Executive disputes is questionable under both Article II and Article III"—Article II, because "legal or policy disputes between two Executive Branch agencies are typically resolved by the President or his designee—without judicial intervention," and Article III because such disputes may not involve sufficient adversity "to constitute a case or controversy." *Id.* For such reasons, "[n]o one plausibly thinks, for example, that a federal court would resolve a dispute between the Department of Justice and, say, the Department of Defense"—but that it precisely

what CREW seeks here. *Id.* Because the clear text of the statute avoids such constitutional questions, the Court need not resolve them. But if the Court were to determine that CREW's reading of the statute is also plausible, the canon of constitutional avoidance would nevertheless favor Defendants' "fairly possible" reading of the text "by which the question may be avoided." *Jennings v. Rodriguez*, 138 S.Ct. 830, 842 (2018) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

In short, the text and structure of the FRA, its implementing regulations, and canons of construction all confirm that agency heads and the Archivist have no mandatory duty to seek enforcement action from the Attorney General in cases of destruction of federal records. Nor do the D.C. Circuit's precedents "address[] the specific statutory question at issue here." *CREW I*, 916 F. Supp. 2d at 147; *see also Judicial Watch*, 844 F.2d at 175 (concerning records removed from agency custody). All of CREW's claims regarding failure to seek enforcement action from the Attorney General for records that were destroyed rather than removed from agency custody must therefore be dismissed for failure to state a claim.

B. Declining To Seek Enforcement Action From The Attorney General Was Not Arbitrary Or Capricious

CREW also attempts to ground its claims in 5 U.S.C. § 706(2)(A), concerning agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Review under that section is available only for "'final agency action.'" *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 882 (1990) (quoting 5 U.S.C. § 704). To be final, an action must "(1) 'mark[] the consummation of the agency's decisionmaking process' and (2) be one by which 'rights or obligations have been determined, or from which legal consequences will flow.'" *Am. Anti-Vivisection Soc'y v. U.S. Dep't of Ag.*, 946 F.3d 615, 520 (D.C. Cir. 2020) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Even assuming that a failure to act can qualify as final

agency action, the inaction CREW complains of here does not qualify. First, CREW does not allege that any Defendant has finally and conclusively decided not to ask the Attorney General to initiate legal action. Second, even a final and conclusive decision not to make such a request does not determine any rights or obligations or create any legal consequences. With or without such a request, the Attorney General retains the same discretion over enforcement of the FRA. Making or declining to make such a request thus carries "no direct consequences" and serves "more like a tentative recommendation than a final and binding determination." *Franklin v. Mass.*, 505 U.S. 788, 798 (1992) (presentation of decennial census results that remained subject to correction to the President not final agency action); *see also, e.g.*, *Dalton v. Specter*, 511 U.S. 462, 469-71 (1994) (submission of non-binding base-closure recommendations to the President not final agency action). In any case, it is not arbitrary and capricious not to seek an enforcement action from the Attorney General when doing so is not required by statute, *see supra* Part II.A, and would not likely result in the recovery of any federal records, *see supra* Part I.A.

C. The FRA Does Not Permit Private Actions To Enforce Agency Recordkeeping Guidelines, And In Any Case CREW's Claim Fails On The Merits

CREW's challenge to "NARA's August 1, 2022 determination to not require DHS to issue a report within 30 days as required by NARA regulations," Compl. ¶ 93, ECF 1 at 24, fails on the merits because the FRA "preclud[es] private litigants from suing directly to enjoin agency actions in contravention of agency guidelines" under the FRA. *Armstrong*, 924 F.2d at 294.

In the original FRA, Congress "opted in favor of a system of administrative standards and enforcement" rather than relying on "private part[ies]" to bring enforcement actions. *Kissinger*, 445 U.S. at 149-50, and the 1984 amendments to the Act aimed to "establish a more effective administrative enforcement process," *Armstrong*, 924 F.2d at 292. The D.C. Circuit determined that Congress intended to allow very limited judicial review under the FRA, permitting challenges

to "the adequacy of an agency's recordkeeping guidelines." *Id.* at 292-93. The Court of Appeals also determined that "it would not be inconsistent with *Kissinger* or the FRA to permit judicial review of the agency head's or Archivist's refusal to seek the initiation of an enforcement action by the Attorney General."[4] *Id.* at 295. But judicial review under the FRA remains "circumscribed," and the FRA "*prohibits* any judicial assessment of agency compliance in specific factual contexts." *Competitive Enterprise Inst. v. U.S. E.P.A.*, 67 F. Supp. 3d 23, 33 (D.D.C. 2014) (emphasis in original).

CREW's challenge to NARA's implementation of its regulations does not fit into either category of judicial review permitted by Circuit precedent: it does not challenge the substance of NARA's regulations, but rather their implementation in a particular factual context, and unlike CREW's other claims, it does not challenge an alleged failure to seek an enforcement action by the Attorney General. Review is thus precluded on the merits under the FRA.

In any case, even if judicial review were available for CREW's claim, it would still fail. The letter CREW cites requested "an interim report with[in] 30 calendar days that will include DHS's plan for review and a timeline to complete this review." Compl. ¶ 59 (quoting Letter from NARA Chief Records Officer Laurence Brewer to DHS Department Records Officer Michelle Thomas, Aug. 1, 2022). CREW claims that NARA thereby failed to "instruct[] DHS to provide a report on the missing records within 30 days as required by NARA regulations." *Id.* But the regulations CREW cites confirm that NARA acted appropriately. The first describes the contents that must be included in an agency "report" to NARA following unlawful or accidental removal or destruction of records, but does not specify the time for submitting a report beyond requiring

[4] The Court's decision established the existence of judicial review as a statutory matter, but a plaintiff bringing such a claim must still satisfy the constitutional requirements of standing. *See supra*, Part I.A.

that the agency do so "promptly." 36 C.F.R. § 1230.14. The second requires NARA to contact an agency if it receives credible information of a risk of unlawful removal or destruction of records, and provides that "NARA will notify the agency in writing promptly with a request for a response within 30 days." 36 C.F.R. § 1230.16. The second regulation does not cross-reference the first, and does not require that the requested "response" within 30 days constitute the full "report" required by the first regulation. CREW does not, and cannot, dispute that NARA did in fact request a response within 30 days of its letter. That request fulfilled NARA's duties under the regulations.

D. As To DoD, Army, And Tex Alles, Plaintiff Has Not Adequately Alleged That Any Federal Records Were Destroyed

As CREW alleges, and as the Defendant agencies' declarations confirm, *see supra*, Part I.A, data on government issued cell phones was wiped at each Defendant agency at various times after January 6, 2021. But merely wiping a phone does not destroy any federal records if there were no federal records on the phone to begin with. To succeed on its claims, CREW must therefore establish, at a minimum, that text messages constituting federal records existed on the phones before they were wiped.

As to Tex Alles, CREW cites a media report for the proposition that "January-6 related text messages of . . . Alles" were "erased in a 'reset' of [his] government phone[] in January 2021." Compl. ¶ 55 (citing Nick Schwellenbach & Adam Zagorin, *Missing: More January 6 Texts Sought by Congress*, Project on Government Oversight, July 28, 2022).[5] (As DHS's declaration clarifies, there was no such "reset" of DHS phones in January 2021, but Alles's phone was separately wiped prior to being replaced in February 2022, *see* Granger Decl. ¶ 18). That article, in turn, claims that DHS reported to OIG in February 2022 that "Alles' own texts are now missing." But the article does not quote the letter it references, and it does not clarify whether it merely refers to the fact

[5] Available at https://perma.cc/ZY32-LH9V.

that Alles's phone was wiped, or instead actually confirms that it contained federal-record text messages required to be preserved beyond their immediate use at the time it was wiped.

As to DoD and Army, CREW's allegations likewise merely establish that phones were wiped, and are insufficient to conclude that any federal records were erased. CREW relies on a Joint Status Report in a FOIA case seeking January-6 related records from DoD and Army, which stated that "when an employee separates from DOD or Army he or she turns in the government-issued phone, and the phone is wiped. For those custodians no longer with the agency, the text messages were not preserved and therefore could not be searched, although it is possible that particular text messages could have been saved into other records systems such as email." Joint Status Report, *Am. Oversight v. DOD*, 21-cv-637-RC, ECF No. 15 (D.D.C. Mar. 10, 2022). That language merely confirms that DoD and Army wiped phones turned in by departing employees and did not automatically preserve the contents of the phones before doing so. It does not constitute confirmation that any custodian at issue did or did not send text messages constituting federal records requiring preservation from their government-issued phone. Per the most recent Joint Status Report in that case, Army's supplemental search for text messages remains ongoing, and DoD has completed its searches and productions of records; the Report does not indicate whether any responsive texts have been found, or have been confirmed to have been destroyed. *See* Joint Status Report, *Am. Oversight v. DOD*, 21-cv-637-RC, ECF No. 22 (D.D.C. Jan. 17, 2023).

CREW's remaining evidence as to DoD and Army consists of a press release from Senate Judiciary Committee Chair Durbin, and letters from NARA to Army and DoD respectively. Compl. ¶¶ 63-65. None of those documents includes facts that support a conclusion that text messages constituting the only copy of federal records that were required to be retained beyond their immediate use were actually deleted when the phones in question were reset.

The press release cites a CNN report (which in turn cites the language in the Joint Status Report discussed above) which merely confirms that DoD and Army phones were wiped when the employee to whom they were assigned left the agency. *See* Press Release, *Durbin Call for DOD IG to Investigate Missing Text Messages from Trump's Defense Department Leadership in Lead Up to January 6 Insurrection*, Senate Judiciary Committee, Aug. 3, 2022 (citing Tierney Sneed & Zachary Cohen, *Jan. 6 text messages wiped from phones of key Trump Pentagon officials*, CNN Politics, Aug. 2, 2022.[6] Neither the press release nor the article it relies on provides any factual support for the inference that any of the DoD and Army phones that were wiped contained the recordkeeping copy of federal-record text messages before they were wiped.

The NARA letters CREW cites likewise merely refer to "*potential* loss of text messages" based on media reports that phones were wiped. Compl. ¶¶ 64, 65.

Without sufficiently alleging that any, let alone all, of Alles and the Army and DoD custodians actually sent federal-record text messages that were required to be preserved beyond their immediate use and were subsequently wiped, CREW cannot show that an Attorney General enforcement action is appropriate in those cases, even if it could surmount the jurisdictional and statutory barriers to awarding such relief.

E. Plaintiff Has Failed To Plead Facts Sufficient To Overcome The Presumption Of Regularity

Government employees are entitled to the presumption that they comply with agency policies, absent evidence to the contrary. *Competitive Enterprise Inst. v. Off. of Sci. & Tech. Policy*, 241 F. Supp. 3d 14, 21 (D.D.C. 2017). That presumption applies "to government-produced documents no less than to other official acts." *Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir.

[6] Available at https://www.cnn.com/2022/08/02/politics/defense-department-missing-january-6-texts/index.html (last visited March 2, 2023).

2011). It thus applies to agency "policy that requires all employees to forward work-related correspondence" to the official email accounts. *Competitive Enterprise Inst.*, 241 F. Supp. 3d at 21; *see also, e.g.*, *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) ("Ordinarily, we presume that public officials have 'properly discharged their duties'") (quoting *United States v. Armstrong*, 517 U.S. 456, 468 (1996)).

The presumption of regularity is rebuttable, but to do so requires "specific information" (or, at the motion to dismiss stage, at least specific allegations) to the contrary, not just "pure speculation." *Competitive Enterprise Inst.*, 241 F. Supp. 3d at 22 & n.2 (quoting *Nance v. FBI*, 845 F. Supp. 2d 197, 203 (D.D.C. 2012)).

At all relevant times, the FRA has provided that federal records created or sent using a non-official electronic messaging account must be copied to an official electronic messaging account, *see* 44 U.S.C. § 2911(a), and has generally required the preservation of federal records in accordance with NARA's General Records Schedules, *see* 44 U.S.C. § 3303a(d), and agency record schedules.[7] In addition, agency policy at Secret Service and DHS specifically required agency employees to copy text messages constituting federal records sent or received on an agency-provided phone to an official email account or other agency storage system. *See* Armstrong Decl. ¶ 3 (Secret Service); Granger Decl. ¶ 6 (DHS).

CREW makes no specific allegations that any custodian failed to follow applicable records preservation requirements. In the absence of any such allegations, CREW has not met its burden

[7] NARA's General Records Schedule 5.2 permits the destruction of "[t]ransitory records," including but not limited to "messages coordinating schedules, appointment, and events," "when no longer needed for business use." *See* https://www.archives.gov/files/records-mgmt/grs/grs05-2.pdf (last visited March 2, 2023).

to overcome the presumption of regularity. The complaint thus provides no basis for requesting an enforcement action from the Attorney General.

CONCLUSION

For the foregoing reasons, the Court should dismiss each of Plaintiff's claims for lack of jurisdiction, or if the Court determines that it may exercise jurisdiction as to any of Plaintiff's claims, for failure to state a claim on the merits.

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Respectfully submitted,

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