

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,

[REDACTED]

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY,
245 Murray Lane SW
Washington, DC 20528-0075,

ALEJANDRO N. MAYORKAS, in his
official capacity as Secretary of Homeland
Security,
245 Murray Lane SW
Washington, DC 20528-0075,

UNITED STATES SECRET SERVICE,
245 Murray Lane SW - BLDG T-5,
Washington, DC 20223,

KIMBERLY A. CHEATLE, in her official
capacity as Director of the United States
Secret Service,
245 Murray Lane SW - BLDG T-5,
Washington, DC 20223,

U.S. DEPARTMENT OF DEFENSE,
1000 Defense Pentagon
Washington, DC 20301-1000,

LLOYD J. AUSTIN III, in his official
capacity as Secretary of Defense,
1000 Defense Pentagon
Washington, DC 20301-1000,

U.S. DEPARTMENT OF THE ARMY,
104 Army Pentagon
Washington, DC 20310-0104,

Civil Action No. _____

CHRISTINE E. WORMUTH, in her official capacity as Secretary of the Army,
104 Army Pentagon
Washington, DC 20310-0104,

NATIONAL ARCHIVES AND RECORDS
ADMINISTRATION,
700 Pennsylvania Avenue NW
Washington, DC 20408, and

DEBRA STEIDEL WALL, in her official capacity as Acting Archivist of the United States,
700 Pennsylvania Avenue NW
Washington, DC 20408,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) brings this action for declaratory and injunctive relief against Defendants U.S. Department of Homeland Security (“DHS”); Alejandro N. Mayorkas, in his official capacity as Secretary of Homeland Security; U.S. Secret Service (“Secret Service”); Kimberly A. Cheatle, in her official capacity as Director of the Secret Service; U.S. Department of Defense (“DOD”); Lloyd J. Austin III, in his official capacity as Secretary of Defense; U.S. Department of the Army (“Army”); Christine E. Wormuth, in her official capacity as Secretary of the Army; the National Archives and Records Administration (“NARA”), and Debra Steidel Wall, in her official capacity as acting Archivist of the United States (the “Archivist”), under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701, *et seq.*, the Federal Records Act (“FRA”), 44 U.S.C. §§ 3301, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.*, alleging as follows:¹

¹ In this Complaint, “DOD” includes both DOD and the Secretary of Defense, “Army” includes both the Army and the Secretary of the Army, “DHS” includes both DHS and the Secretary of

INTRODUCTION

1. This action challenges Defendants’ violation of their nondiscretionary duties under the FRA to initiate an enforcement action through the Attorney General to recover federal records unlawfully destroyed or alienated from government custody.² The missing records include text messages of Trump administration officials at DHS, the Secret Service, DOD, and the Army that were improperly deleted after being requested as part of investigations into the January 6, 2021 attack on the United States Capitol. Also missing are federal records from former acting DHS Deputy Secretary Ken Cuccinelli’s personal phone that remain, on information and belief, unlawfully outside of government custody.

2. Defendants have known for months of the records’ unlawful deletion or alienation, yet they have failed to initiate an FRA enforcement action through the Department of Justice (“DOJ”). Defendants are therefore in violation of the FRA’s “mandatory enforcement provisions,” which “‘*require[] [an] agency head and [the] Archivist to take enforcement action’ through the Attorney General whenever they [become] aware of records being unlawfully removed or destroyed” and “leave no discretion to determine which cases to pursue.”* *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 956 (D.C. Cir. 2016) (quoting *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991)) (emphasis in original); *see* 44 U.S.C. §§ 3106, 2905(a).

3. The missing records may contain critical evidence concerning the January 6 attack on the Capitol—a violent insurrection that disrupted the lawful transfer of presidential

Homeland Security, “Secret Service” includes both the Secret Service and the Director of the Secret Service, and “NARA” includes both NARA and the acting Archivist of the United States.

² In this Complaint, the term “alienated records” refers to federal records outside of the government’s physical custody. *See* NARA Directive 1462, *Recovery of Alienated Archival Materials*, § 1462.3(a) Sept. 28, 2006, <https://perma.cc/QE22-3AL3>.

power for the first time in American history. The records could shed light on the reasons for the government's lack of preparedness for the January 6 attack, the government's day-of response, and the actions or inaction of key White House and Trump administration officials on and around January 6. The records may also contain evidence of criminal misconduct or other wrongdoing. Their loss would leave a major gap in the factual record, impeding efforts to obtain answers and accountability for an unprecedented assault on American democracy.

4. DOJ is best situated to investigate the pattern of multiple federal agencies illegally deleting January 6-related text messages. And members of Congress have raised grave concerns about the DHS Inspector General's current investigation of the matter, with some urging DOJ to "assume control" of it.³ These facts underscore the need for Defendants to promptly comply with the FRA's command to "marshal[] the law enforcement authority of the United States." *Judicial Watch*, 844 F.3d at 956.

5. Accordingly, CREW respectfully requests that the Court declare Defendants in violation of the FRA, order Defendants to immediately initiate an enforcement action through the Attorney General to recover any federal records unlawfully destroyed or alienated from agency custody and to seek any other redress authorized by law, and grant any other appropriate relief.

³ Letter from Senate Judiciary Committee Chair Richard Durbin to Attorney General Merrick Garland, July 29, 2022, <https://perma.cc/MD79-QEHQ> ("Durbin Letter, July 29, 2022"); *see also* Letter from House Oversight and Reform Committee Chair Carolyn Maloney and House Homeland Security Committee Chair Bennie Thompson to Inspector General Joseph Cuffari, July 26, 2022, <https://perma.cc/34WQ-GYNL> ("Maloney & Thompson Letter, July 26, 2022"); Letter from House Oversight and Reform Committee Chair Carolyn Maloney and House Homeland Security Committee Chair Bennie Thompson to Inspector General Joseph Cuffari, Aug. 1, 2022, <https://perma.cc/KW2G-FWTJ> ("Maloney & Thompson Letter, Aug. 1, 2022"); Letter from Senate Committee on Homeland Security and Governmental Affairs Chair Gary Peters to Inspector General Joseph Cuffari, Aug. 10, 2022, <https://perma.cc/6QFL-LMHL> ("Peters Letter, Aug. 10, 2022").

JURISDICTION AND VENUE

6. This action arises under the APA, 5 U.S.C. §§ 701, *et seq.*, the FRA, 44 U.S.C. §§ 3301, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.* Because this action arises under federal law, this Court has jurisdiction under 28 U.S.C. § 1331.

7. Venue lies in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

8. Plaintiff CREW is a nonprofit, nonpartisan organization organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the rights of citizens to be informed about the activities of government officials and agencies and to ensuring integrity in government. CREW seeks to empower citizens to have an influential voice in government decision-making through the dissemination of information about public officials and their actions. To further its mission of promoting government transparency and accountability, CREW routinely files FOIA requests with federal agencies; disseminates the documents it receives through FOIA requests on its website, www.citizensforethics.org, and social media; and uses the documents in preparing reports, complaints, litigation, blog posts, and other publications widely disseminated to the public.

9. Given its status as a frequent FOIA requester, CREW has a strong operational interest in Defendants' compliance with their recordkeeping obligations under the FRA. The unlawful destruction, alienation, or removal of federal records relevant to CREW's work impedes its ability to fulfill its mission and its informational rights under FOIA.

10. CREW has several pending FOIA requests with DHS, the Secret Service, DOD, and the Army seeking records (including but limited to text messages) concerning the January 6

attack on the Capitol and related events.⁴ CREW intends to submit additional FOIA requests to Defendants for other records relating to the January 6 attack.

11. As detailed below, Defendants have acknowledged that text messages potentially responsive to CREW's pending and future FOIA requests were deleted. Permanent loss of these records would directly impede CREW's ability to fulfill its mission and its informational rights under FOIA by depriving it of records it has requested and will request in the future. Defendants' initiation of a DOJ enforcement action and enlistment of "the significant law enforcement authority of the Attorney General," *Cause of Action Inst. v. Tillerson*, 285 F. Supp. 3d 201, 205–209 (D.D.C. 2018), is substantially likely to redress CREW's injuries by leading to the recovery of at least some of the records at issue.

12. Defendant DHS is an agency within the meaning of the APA, 5 U.S.C. § 551(1), and the FRA, 44 U.S.C. § 2901(14). DHS operates under the supervision and direction of the Secretary of Homeland Security.

13. Defendant Alejandro J. Mayorkas is the Secretary of Homeland Security and is sued in his official capacity only.

14. Defendant Secret Service is an agency within the meaning of the APA, 5 U.S.C. § 551(1), and the FRA, 44 U.S.C. § 2901(14). The Secret Service operates under the supervision and direction of the Director of the Secret Service.

15. Defendant Kimberly A. Cheatle is the Director of the Secret Service and is sued in her official capacity only.

⁴ See, e.g., FOIA Request to DOD, Jan. 8, 2021, <https://perma.cc/H7JH-8PZ4>; FOIA Request to Army, Jan. 8, 2021, <https://perma.cc/6AG9-FRWW>; FOIA Request to DHS, Jan. 10, 2021, <https://perma.cc/S3N3-D38W>; FOIA Request to DOD, Jan. 10, 2021, <https://perma.cc/4SQ9-CB5S>; FOIA Request to Army, Jan. 10, 2021, <https://perma.cc/BFG8-K8JU>; FOIA Request to DOD, Jan. 26, 2022, <https://perma.cc/GB3X-725J>; FOIA Request to Secret Service, July 25, 2022, <https://perma.cc/UMT2-PBR5>.

16. Defendant DOD is an agency within the meaning of the APA, 5 U.S.C. § 551(1), and the FRA, 44 U.S.C. § 2901(14). DOD operates under the supervision and direction of the Secretary of Defense.

17. Defendant Lloyd J. Austin III is the Secretary of Defense and is sued in his official capacity only.

18. Defendant Army is an agency within the meaning of the APA, 5 U.S.C. § 551(1), and the FRA, 44 U.S.C. § 2901(14). The Army operates under the supervision and direction of the Secretary of the Army.

19. Defendant Christine E. Wormuth is the Secretary of the Army and is sued in her official capacity only.

20. Defendant NARA is an agency within the meaning of the APA, 5 U.S.C. § 551(1), and the FRA, 44 U.S.C. § 2901(14). NARA operates under the supervision and direction of the Archivist of the United States.

21. Defendant Debra Steidel Wall is the acting Archivist of the United States and is sued in her official capacity only.

LEGAL FRAMEWORK

I. The Federal Records Act

22. The FRA governs the creation, management, and disposal of federal records. *See* 44 U.S.C. §§ 2101, *et seq.*; §§ 2901, *et seq.*; §§ 3101, *et seq.*; and §§ 3301, *et seq.* It ensures the “[a]ccurate and complete documentation of the policies and transactions of the Federal Government.” 44 U.S.C. § 2902(1).

23. The FRA requires federal agencies to “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions,

procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. § 3101.

24. The FRA further requires agencies to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency." 44 U.S.C. § 3102. The agency's records management program "shall provide for," among other things, "effective controls over the creation and over the maintenance and use of records in the conduct of current business." *Id.* § 3102(1).

25. Federal records cannot be destroyed without NARA's approval. *See* 44 U.S.C. § 3314; *Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999). NARA can authorize the destruction of records by approving either a schedule governing the disposition of specified agency records, *see* 44 U.S.C. §§ 3303a(a), or a general records schedule listing types of records held by multiple agencies, *id.* 3303a(d).

26. The FRA generally requires that federal records, including those generated in personal electronic messaging accounts, be preserved in a government recordkeeping system. To that end, the statute prohibits agency officials from "creat[ing] or send[ing] a record using a non-official electronic messaging account unless such officer or employee—(1) copies an official electronic messaging account of the officer or employee in the original creation or transmission of the record; or (2) forwards a complete copy of the record to an official electronic messaging account of the officer or employee not later than 20 days after the original creation or transmission of the record." 44 U.S.C. § 2911(a).

27. To prevent the unlawful destruction or removal of records, the FRA creates a "system of administrative enforcement." *Armstrong*, 924 F.2d at 284. If an agency head becomes

aware of “any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency,” the agency head “shall notify the Archivist” and “with the assistance of the Archivist shall initiate action through the Attorney General for the recovery” of those records. 44 U.S.C. § 3106(a); *see also* 36 C.F.R. § 1230.14 (detailing how agencies “must report promptly any unlawful or accidental removal, defacing, alteration, or destruction of records in the custody of that agency to NARA”).

28. Similarly, “[t]he 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 the recovery of records unlawfully removed and for other redress provided by law.” 44 U.S.C. § 2905(a).

29. If the agency head “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 . . . 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(b); *see also id.* § 2905(a) (“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.”).

30. The FRA’s “mandatory enforcement provisions” reflect Congress’s judgment that “marshalling the law enforcement authority of the United States [is] a key weapon in assuring record preservation and recovery.” *Judicial Watch*, 844 F.3d at 956.

31. Under NARA regulations, “[u]nlawful 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 (other than court-ordered disposal under § 1226.14(d) of this subchapter); and disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.” 36 C.F.R. § 1230.3(b). “The penalties for the unlawful or accidental removal, defacing, alteration, or destruction of Federal records or the attempt to do so, include a fine, imprisonment, or both.” *Id.* § 1230.12 (citing 18 U.S.C. §§ 641, 2071).

II. The Administrative Procedure Act

32. The APA provides that a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

33. The term “agency action” includes “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13).

34. A court reviewing a claim under 5 U.S.C. § 702 “shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706. The reviewing court shall “compel agency action unlawfully withheld or unreasonably delayed” and “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* §§ 706(1), (2)(A).

35. In the FRA context, the APA authorizes claims challenging the failure of an agency and NARA to initiate a DOJ enforcement action pursuant to 44 U.S.C. § 3106 and § 2905(a). *Judicial Watch*, 844 F.3d at 954.

FACTUAL BACKGROUND

I. The January 6, 2021 Attack on the U.S. Capitol and Related Investigations

36. “On January 6, 2021, a mob professing support for then-President Trump violently attacked the United States Capitol in an effort to prevent a Joint Session of Congress from certifying the electoral college votes designating Joseph R. Biden the 46th President of the United States.” *Trump v. Thompson*, 20 F.4th 10, 15 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 1350 (2022). “The rampage left multiple people dead, injured more than 140 people, and inflicted millions of dollars in damage to the Capitol.” *Id.* “Then-Vice President Pence, Senators, and Representatives were all forced to halt their constitutional duties and flee the House and Senate chambers for safety.” *Id.* at 16.

37. The January 6 attack “marked the most significant assault on the Capitol since the War of 1812.” *Id.* at 18–19. Several participants have been charged with seditious conspiracy, some of whom have pled guilty. Each branch of the federal government has called the attack an “insurrection” and the participants “insurrectionists.” *See State ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, *17–*19 (N.M. 1st Jud. Dist. Ct., Sept. 6, 2022) (collecting authorities and declaring the January 6 attack and surrounding events an “insurrection” under the Fourteenth Amendment).

38. Investigations commenced quickly after the attack. Congressional committees and inspectors general sought records from agencies with key roles in the government’s preparations

for and response on January 6, including DHS, the Secret Service, DOD, and the Army. CREW and other organizations likewise sought these records through FOIA.

39. These investigations uncovered an alarming pattern: text messages of key Trump administration officials at DHS, the Secret Service, DOD, and the Army from on and around January 6 were deleted. Even worse, the deletions occurred *after* the records were requested by government investigators and FOIA requesters in January 2021. And federal records from at least one former top DHS official’s personal phone remain, on information and belief, outside of government custody.

A. Deleted Secret Service Text Messages

40. On January 10, 2021, CREW submitted an expedited FOIA request to DHS for certain January 6-related records. The request explicitly sought responsive “text messages” from “any DHS component,” including but not limited to DHS headquarters and the Secret Service. *See* FOIA Request to DHS, Jan. 10, 2021, <https://perma.cc/S3N3-D38W>.

41. By letter dated January 16, 2021, four congressional committees requested that DHS and other agencies produce “[a]ll documents or materials that refer or relate to events that could or ultimately did transpire on January 6.” Letter from Four House Committee Chairs to Four Federal Agencies, Jan. 16, 2021, <https://perma.cc/46FH-WR34>.

42. In violation of the agency’s legal obligation to preserve records subject to pending record requests, *see* 36 C.F.R. §§ 1230.3(b), 1230.12, the Secret Service undertook a “system migration process” on January 27, 2021 that “caused the erasure of text messages related to January 6.” Maloney & Thompson Letter, July 26, 2022.

43. The Secret Service informed the DHS Office of Inspector General (“OIG”) of the deleted text messages in May 2021, but the OIG did not notify Congress of the deletions until 14

months later. Maloney & Thompson Letter, Aug. 1, 2022. Specifically, in a July 13, 2022 letter to congressional committees, DHS Inspector General Joseph Cuffari revealed “many U.S. Secret Service (USSS) text messages, from January 5 and 6, 2021, were erased as part of a device-replacement program.” Letter from Inspector General Joseph Cuffari to Senate Homeland Security and Governmental Affairs Committee and House Homeland Security Committee, July 13, 2022, <https://perma.cc/XK5G-UAZD> (“Cuffari Letter, July 13, 2022”).

44. Inspector General Cuffari claimed the Secret Service “erased [the] text messages *after* OIG requested records of relevant electronic communications from the [Secret Service], as part of [the OIG’s] evaluation of events at the Capitol on January 6.” Cuffari Letter, July 13, 2022. He also accused DHS personnel of delaying the OIG’s access to records. *Id.*

45. In a press release the next day, the Secret Service confirmed that “data resident on some [Secret Service] phones was lost” due to what the agency called a “pre-planned, three-month system migration” in January 2021. Press Release, *Statement of Anthony Guglielmi, Chief of Communications for the United States Secret Service on Accusations of Deleted Text Messages From DHS Inspector General*, July 14, 2022, <https://perma.cc/V678-SZJ7>. The Secret Service denied the OIG’s claim that it deleted the text messages after receiving the OIG’s records request, but did not deny that it deleted the messages after receiving pertinent congressional and FOIA requests. *See id.*

46. By letter dated July 19, 2022, NARA alerted the Secret Service it had become “aware of the potential unauthorized deletion of ... Secret Service ... text messages” from “January 5 and January 6, 2021” and requested that the agency “send NARA a report within 30 calendar days ... documenting the deletion” pursuant to “36 CFR 1230.16(b).” Letter from

NARA Chief Records Officer Laurence Brewer to DHS Agency Records Officer Damian Kokinda, July 19, 2022, <https://perma.cc/WT6S-7P5X> (“Brewer Letter, July 19, 2022”).

47. By letters dated July 26 and August 1, 2022, House Oversight Committee Chair Carolyn Maloney and Homeland Security Committee Chair Bennie Thompson accused Inspector General Cuffari of violating the Inspector General Act by waiting 14 months to report the missing Secret Service text messages to Congress, outlined evidence that the DHS OIG sought to cover up the extent of the missing records, and urged Cuffari to recuse from the OIG’s January 6 investigation. *See* Maloney & Thompson Letter, July 26, 2022; Maloney & Thompson Letter, Aug. 1, 2022.

48. In a July 29, 2022 letter, Senate Judiciary Committee Chair Richard Durbin urged DOJ to “assume control” of the DHS OIG’s investigation of deleted January 6 records, given “Inspector General Cuffari’s failure to promptly notify Congress of the Secret Service’s months-long refusal to produce text messages that OIG had requested in February 2021, or of the Secret Service’s belated admission that those text messages had been erased as part of a device-replacement program.” Durbin Letter, July 29, 2022.

49. In an August 10, 2022 letter, Senate Homeland Security and Governmental Affairs Committee Chair Gary Peters demanded Inspector General Cuffari respond to “troubling allegations” that he knew of the deleted text messages much earlier than he reported to Congress, and that “senior officials in [his] office directed DHS OIG staff with forensic expertise on recovery issues ... to ‘stand down’ on pursuing efforts to recover information from Secret Service phones,” abandoning prior plans for “retrieval and recovery of phone information.” Peters Letter, Aug. 10, 2022.

50. In an August 16, 2022 letter, the House Oversight and Homeland Security Committee Chairs revealed that Inspector General Cuffari was refusing “to produce responsive documents,” was “block[ing] employees in [his] office from appearing for transcribed interviews,” and gave “no indication that [he] would step aside from the investigation” as the committee chairs had demanded. Letter from House Oversight and Reform Committee Chair Carolyn Maloney and House Homeland Security Committee Chair Bennie Thompson to Inspector General Joseph Cuffari, Aug. 16, 2022, <https://perma.cc/NCL7-Y3ST>.

51. On September 14, 2022, January 6 Committee Chair Bennie Thompson told the press that the Secret Service had produced to the committee “a number of text messages, radio traffic ... thousands of exhibits.” Andrew Solender, *Jan. 6 panel’s subpoena yields “thousands” of Secret Service records*, Axios, Sept. 14, 2022, <https://perma.cc/3RX6-X5XM>. A Secret Service spokesperson said, however, that none of the text messages deleted in January 2021 had been recovered and produced to the committee. *Id.*

52. In a letter released on September 23, 2022, DHS OIG staff took the extraordinary step of anonymously writing to President Biden to request Inspector General Cuffari’s removal, citing his “continuous mismanagement”; his “prolonged, deserved criticism in the media, from Congress, from other oversight entities, and from his own staff”; and his attempts “to weaken and undercut his career staff at every step.” Letter from DHS OIG Staff to President Biden, <https://perma.cc/H26U-TFWK>. They claimed, among other things, that Cuffari “delay[ed] the release of audits, inspections and investigations, sometimes for months or even years” and “interfer[ed] with staff efforts to gather information necessary to perform independent oversight.” *Id.*

53. Inspector General Cuffari has rejected the congressional calls to recuse from the investigation into the missing Secret Service texts. Instead, he has opened his own criminal investigation into the matter. This prevents other agencies from investigating, unless DOJ decides to assume control of the investigation. *See* Durbin Letter, July 29, 2022; Peters Letter, Aug. 10, 2022; 5 U.S.C. app. § 6(f)(5).

54. The missing Secret Service texts likely include critical evidence about the leadup and response to the January 6 attack. They could include communications with the Oath Keepers, a violent paramilitary group whose members were in contact with the Secret Service prior to January 6 and who are presently facing seditious conspiracy charges for their role in the insurrection. *See* Julia Ainsley and Ali Vitali, *Congress asks Secret Service for an account of all contacts between agency, Oath Keepers up to and on Jan. 6, 2021*, NBC News, Oct. 14, 2022, <https://perma.cc/HJ4N-S6DN>. They may corroborate the account of Trump White House aide Cassidy Hutchinson, who testified that former President Trump wanted to lead the mob from the Ellipse to the Capitol despite knowing they were armed, and that she was told Trump assaulted a Secret Service agent for refusing to take him to the Capitol. *See* Carol D. Leonnig and Maria Sacchetti, *Secret Service cannot recover texts; no new details for Jan. 6 committee*, Washington Post, July 19, 2022, <https://perma.cc/LRE2-TANL>. At a minimum, the missing records would reveal real-time communications and reactions of agents who interacted directly with the former President and helped coordinate his plans on and around January 6.

B. Deleted and Missing Phone Records of Former DHS Leadership

55. Reports have also revealed that January 6-related text messages of former top DHS officials Chad Wolf and Ken Cuccinelli, and current Deputy Under Secretary for Management Randolph D. “Tex” Alles, were erased in a “reset” of their government phones in

January 2021. *See* Nick Schwellenbach & Adam Zagorin, *Missing: More January 6 Texts Sought by Congress*, Project on Government Oversight, July 28, 2022, <https://perma.cc/ZY32-LH9V>.

56. DHS informed the OIG of the missing records in February 2022, but the OIG “did not notify Congress of this critical information.” Maloney & Thompson Letter, Aug. 1, 2022. Nor did the OIG press DHS “leadership at that time to explain why they did not preserve these records” or “seek ways to recover the lost data.” Carol Leonnig and Maria Sacchetti, *Jan. 6 texts missing for Trump Homeland Security’s Wolf and Cuccinelli*, Washington Post, July 28, 2022, <https://perma.cc/5EGV-YXEL>.

57. Separately, the DHS OIG “became aware in January 2022 that Mr. Cuccinelli was using his personal phone” to communicate about government business, but “did not seek to collect messages from this device.” Maloney & Thompson Letter, Aug. 1, 2022. These federal records remain, on information and belief, outside of agency custody.

58. By letter dated August 1, 2022, NARA alerted DHS it had “been made aware of the potential loss of text messages” of “former acting Secretary Chad Wolf and former acting Deputy Secretary Ken Cuccinelli.” Letter from NARA Chief Records Officer Laurence Brewer to DHS Department Records Officer Michelle Thomas, Aug. 1, 2022, <https://perma.cc/FE66-2HLH> (“Brewer Letter, Aug. 1, 2022”).

59. However, rather than instructing DHS to provide a report on the missing records within 30 days as required by NARA regulations, *see* 36 C.F.R. §§ 1230.14, 1230.16(b), NARA stated:

We understand that this review may take a considerable amount of time to conduct, and may be put on hold pending an ongoing review by the Office of Inspector General. We are requesting an interim report with 30 calendar days that will include DHS’s plan for review and a timeline to complete this review. If the Department determines that federal records were deleted without proper disposition authority, your final report must include a complete description of the records affected, a

statement of the exact circumstances surrounding the deletion of messages, a statement of the safeguards established to prevent further loss of documentation, and details of all agency actions taken to salvage, retrieve, or reconstruct the records.

Brewer Letter, Aug. 1, 2022.

60. Like the Secret Service records, the missing phone records of top Trump DHS officials could shed considerable light on the January 6 attack and leadup, including DHS's intelligence failures ahead of the attack, DHS leadership's day-of response, and the reported involvement of Wolf and Cuccinelli in the former President's plans to subvert the 2020 election results and even seize voting machines in swing states. *See* Leonnig and Sacchetti, Washington Post, July 28, 2022.

C. Deleted DOD and Army Text Messages

61. On January 8 and 10, 2021, CREW submitted expedited FOIA requests to DOD and the Army seeking certain January 6-related records. The requests explicitly sought responsive "text messages" from top agency officials, including but not limited to former acting Secretary of Defense Christopher Miller, former Chief of Staff to the acting Secretary of Defense Kashyap Patel, former Secretary of the Army Ryan McCarthy, and Chief of Staff of the Army James C. McConville. *See* FOIA Request to DOD, Jan. 8, 2021, <https://perma.cc/H7JH-8PZ4>; FOIA Request to Army, Jan. 8, 2021, <https://perma.cc/6AG9-FRWW>; FOIA Request to DOD, Jan. 10, 2021, <https://perma.cc/4SQ9-CB5S>; FOIA Request to Army, Jan. 10, 2021, <https://perma.cc/BFG8-K8JU>.

62. In a March 10, 2022 joint status report in a FOIA suit seeking January 6-related records, DOD and the Army revealed that for those "custodians no longer with the agency, the text messages were not preserved and therefore could not be searched" because "when an employee separates from DOD or Army he or she turns in the government-issued phone" the

“phone is wiped.” Joint Status Report, *American Oversight v. DOD & Army*, 21-cv-637-RC, ECF No. 15 (Mar. 10, 2022), <https://perma.cc/NGK7-E9QD>.

63. On August 3, 2022, Senate Judiciary Committee Chair Durbin requested that the DOD OIG investigate DOD’s failure to preserve January 6-related text messages. Press Release, *Durbin Calls 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, <https://perma.cc/2DSM-V8VJ>.

64. By letter dated August 5, 2022, NARA alerted the Army that it had “been made aware of the potential loss of text messages of top [Army] officials,” based on a “media report” that “in January 2021, the government phones of former Secretary of the Army Ryan McCarthy, Chief of Staff General James McConville, Director of Army Staff Lieutenant General Walter Piatt, and former General Counsel James McPherson were wiped before preserving potential federal records.” Letter from NARA Chief Records Officer Laurence Brewer to Army Agency Records Officer Andrica Dickerson, Aug. 5, 2022, <https://perma.cc/D8G7-YWQG> (“Brewer Letter, Aug. 5, 2022”). NARA requested that the Army investigate the matter and provide a “final report within 30 calendar days identifying the specific actions taken to investigate this allegation, and the steps taken to mitigate future risk.” *Id.*

65. Similarly, by letter dated August 9, 2022, NARA alerted DOD that it had “been made aware of the potential loss of text messages of top [DOD] officials,” based on a “media report” that “in January 2021, the government phones of former acting Secretary of Defense Chris Miller, Chief of Staff Kash Patel, and General Counsel Paul Ney were wiped after departing their positions.” Letter from NARA Chief Records Officer Laurence Brewer to DOD Agency Records Officer Luz Ortiz, Aug. 9, 2022, <https://perma.cc/D8G7-YWQG> (“Brewer

Letter, Aug. 9, 2022”). NARA requested that DOD investigate the matter and provide a “final report within 30 calendar days identifying the specific actions taken to investigate this allegation, and the steps taken to mitigate future risk.” *Id.*

66. By letter dated September 27, 2022, the DOD OIG responded to Senator Durbin’s August 3, 2022 request to investigate the missing January 6-related text messages. Letter from Acting Inspector Sean O’Donnell to Senate Judiciary Committee Chair Richard Durbin, Sept. 27, 2022, <https://perma.cc/EW36-NCEJ>. Although the Inspector General described plans to update DOD’s recordkeeping policies and to audit prior practices, he mentioned no investigation of or attempts to recover the deleted text messages from on and around January 6. *See id.*

67. The missing DOD and Army records—particularly those of former acting Secretary of Defense Miller, former Chief of Staff Patel, and former Secretary of the Army McCarthy—could help answer unresolved questions about the agencies’ pre-January 6 preparations and the significant delay in their deployment of National Guard troops to the Capitol as it was under siege. *See* Staff Rep. of S. Comm. on Homeland Security & Governmental Affs. & S. Comm. on Rules & Admin., 117th Cong., *Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6*, at 8–9 (June 8, 2021), <https://perma.cc/ZKV7-L8ZY> (discussing conflicting testimony of Trump administration officials on these points).

II. CREW’s Requests and Defendants’ Inaction

68. In a July 28, 2022 letter to the acting Archivist (copying the DHS Secretary and Secret Service Director), CREW requested that NARA promptly comply with its statutory duties to initiate a DOJ enforcement to recover text messages unlawfully deleted by the Secret Service and DHS. To date, NARA has not responded to this letter.

69. In a pending FOIA suit seeking January 6-related records from DHS, the Secret Service, DOD, and the Army, *CREW v. DOJ*, 21-cv-572 (D.D.C.), CREW has repeatedly inquired about the agencies' efforts to recover or restore potentially responsive records that the agencies have acknowledged were deleted in January 2021. To date, Defendants have refused to disclose any such recovery efforts.

70. In the same FOIA suit, DHS, DOD, and the Army have thus far released no text messages, and the Secret Service has released only one text message.

71. By email dated September 15, 2022, CREW asked NARA for a status update on the "unauthorized disposition" cases it opened concerning the missing DHS, Secret Service, DOD, and Army records and asked whether NARA had initiated a DOJ enforcement action for any of the cases as required by 44 U.S.C. § 3106(b) and § 2905(a). Although NARA's four "case opening" letters are available on NARA's website, *see* Brewer Letter, July 19, 2022; Brewer Letter, Aug. 1, 2022; Brewer Letter, Aug. 5, 2022; Brewer Letter, Aug. 9, 2022, any agency responses to those letters are not publicly available.

72. Later that day, NARA responded by email: "For each of the cases you are inquiring about, NARA continues to follow its standard procedures for requiring agencies to investigate the allegations and report back to NARA in accordance with 36 CFR 1230.16. We have been in contact with each agency as they continue to conduct their investigations. It is also our practice to not comment on the details of cases that are being actively investigated."

73. CREW later requested that NARA alert CREW if the agency has initiated a DOJ enforcement action as required by 44 U.S.C. § 3106(b) and § 2905(a). To date, NARA has not done so.

74. On information and belief, no Defendant has initiated a DOJ enforcement action concerning the matters alleged above.

CLAIMS FOR RELIEF

COUNT I

**Failure of Defendants Secret Service and NARA to Initiate a DOJ Enforcement Action
(Administrative Procedure Act, 5 U.S.C. §§ 706(1), 706(2)(A))
(Federal Records Act, 44 U.S.C. §§ 3106, 2905)**

75. CREW re-alleges and incorporates by reference all preceding paragraphs.

76. The FRA imposes on the Secret Service a nondiscretionary duty to initiate an enforcement action through the Attorney General when the agency “knows or has reason to believe” of “any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction” of federal records within the agency’s legal ownership, custody, or control. 44 U.S.C. § 3106(a).

77. The FRA imposes on NARA a nondiscretionary duty to request that the Attorney General initiate an enforcement action (and so notify Congress) when a federal agency either (1) fails to initiate such an action “within a reasonable period of time after being notified” of “any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction” of federal records within the agency’s legal ownership, custody, or control,” or (2) “is participating in, or believed to be participating in any such unlawful action.” 44 U.S.C. §§ 3106, 2905(a).

78. The Secret Service unlawfully deleted text messages in January 2021 in violation of the FRA and NARA regulations. The deletions were unlawful because the text messages are federal records within the agency’s legal ownership, custody, or control, and were not destroyed pursuant to any NARA-approved disposition schedule. The deletions were also unlawful because the deleted records were subject to pending congressional, FOIA, and other record requests.

79. On information and belief, Secret Service leadership have been aware of the unlawful deletions since at least May 2021.

80. NARA has been aware of the Secret Service's unlawful deletions since at least July 19, 2022.

81. The deleted Secret Service records have not been restored, recovered, retrieved, salvaged, or reconstructed.

82. On information and belief, neither the Secret Service nor NARA has initiated an FRA enforcement action through the Attorney General.

83. The failure of the Secret Service and NARA to initiate an FRA enforcement action through the Attorney General is "agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), and is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A).

COUNT II

Failure of Defendants DHS and NARA to Initiate a DOJ Enforcement Action (Administrative Procedure Act, 5 U.S.C. §§ 706(1), 706(2)(A)) (Federal Records Act, 44 U.S.C. §§ 3106, 2905)

84. CREW re-alleges and incorporates by reference all preceding paragraphs.

85. The FRA imposes on DHS a nondiscretionary duty to initiate an enforcement action through the Attorney General when the agency "knows or has reason to believe" of "any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction" of federal records within the agency's legal ownership, custody, or control. 44 U.S.C. § 3106(a).

86. DHS unlawfully deleted text messages in January 2021 in violation of the FRA and NARA regulations. The deletions were unlawful because the text messages are federal records within the agency's legal ownership, custody, or control, and were not destroyed

pursuant to any NARA-approved disposition schedule. The deletions were also unlawful because the deleted records were subject to pending congressional, FOIA, and other record requests.

87. On information and belief, federal records from former DHS official Ken Cuccinelli's personal phone remain unlawfully outside of the agency's physical custody.

88. On information and belief, DHS leadership have been aware of the unlawful deletions and alienations since at least February 2022.

89. NARA has been aware of DHS's unlawful deletions and alienations since at least August 1, 2022.

90. The deleted and alienated DHS records have not been restored, recovered, retrieved, salvaged, or reconstructed.

91. On information and belief, neither DHS nor NARA has initiated an FRA enforcement action through the Attorney General.

92. The failure of DHS and NARA to initiate an FRA enforcement action through the Attorney General is "agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), and is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A).

93. 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 the DHS OIG's separate investigation, *see* Brewer Letter, Aug. 1, 2022, was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

COUNT III

**Failure of Defendants DOD and NARA to Initiate a DOJ Enforcement Action
(Administrative Procedure Act, 5 U.S.C. §§ 706(1), 706(2)(A))
(Federal Records Act, 44 U.S.C. §§ 3106, 2905)**

94. CREW re-alleges and incorporates by reference all preceding paragraphs.

95. The FRA imposes on DOD a nondiscretionary duty to initiate an enforcement action through the Attorney General when the agency “knows or has reason to believe” of “any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction” of federal records within the agency’s legal ownership, custody, or control. 44 U.S.C. § 3106(a).

96. DOD unlawfully deleted text messages in January 2021 in violation of the FRA and NARA regulations. The deletions were unlawful because the text messages are federal records within the agency’s legal ownership, custody, or control, and were not destroyed pursuant to any NARA-approved disposition schedule. The deletions were also unlawful because the deleted records were subject to pending congressional, FOIA, and other record requests.

97. On information and belief, DOD leadership have been aware of the unlawful deletions since at least March 10, 2022.

98. NARA has been aware of DOD’s unlawful deletions since at least August 9, 2022.

99. The deleted DOD records have not been restored, recovered, retrieved, salvaged, or reconstructed.

100. On information and belief, neither DOD nor NARA has initiated an FRA enforcement action through the Attorney General.

101. The failure of DOD and NARA to initiate an FRA enforcement action through the Attorney General is “agency action unlawfully withheld or unreasonably delayed,” 5 U.S.C. §

706(1), and is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” *id.* § 706(2)(A).

COUNT IV

Failure of Defendants Army and NARA to Initiate a DOJ Enforcement Action (Administrative Procedure Act, 5 U.S.C. §§ 706(1), 706(2)(A)) (Federal Records Act, 44 U.S.C. §§ 3106, 2905)

102. CREW re-alleges and incorporates by reference all preceding paragraphs.

103. The FRA imposes on the Army a nondiscretionary duty to initiate an enforcement action through the Attorney General when the agency “knows or has reason to believe” of “any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction” of federal records within the agency’s legal ownership, custody, or control. 44 U.S.C. § 3106(a).

104. The Army unlawfully deleted text messages in January 2021 in violation of the FRA and NARA regulations. The deletions were unlawful because the text messages are federal records within the agency’s legal ownership, custody, or control, and were not destroyed pursuant to any NARA-approved disposition schedule. The deletions were also unlawful because the deleted records were subject to pending congressional, FOIA, and other record requests.

105. On information and belief, Army leadership have been aware of the unlawful deletions since at least March 10, 2022.

106. NARA has been aware of the Army’s unlawful deletions since at least August 5, 2022.

107. The deleted Army records have not been restored, recovered, retrieved, salvaged, or reconstructed.

108. On information and belief, neither the Army nor NARA has initiated an FRA enforcement action through the Attorney General.

109. The failure of the Army and NARA to initiate an FRA enforcement action through the Attorney General is “agency action unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1), and is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” *id.* § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, CREW respectfully requests that this Court:

1. Declare Defendants in violation of the APA, the FRA and NARA regulations;
2. Declare Defendants in violation of their nondiscretionary duties under the FRA to initiate an enforcement action through the Attorney General;
3. Order Defendants to immediately initiate an enforcement action through the Attorney General to recover, retrieve, restore, salvage, or reconstruct federal records unlawfully destroyed or alienated from agency custody and to seek any other redress authorized by law;
4. Award CREW costs and reasonable attorneys’ fees in this action; and
5. Grant any other relief the Court deems appropriate.

Date: November 2, 2022

Respectfully submitted,

/s/ Nikhel S. Sus

Nikhel S. Sus (D.C. Bar No. 1017937)

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON

