UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. CENTERS FOR DISEASE CONTROL AND PREVENTION, et al., Defendants.	Civil Action No. 25-1020 (TJK)

DEFENDANTS' REPLY IN SUPPORT OF THEIR PARTIAL CROSS-MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

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The Centers for Disease Control and Prevention ("CDC"), Jim O'Neill, in his official capacity as Acting Director of the CDC, the Department of Health and Human Services ("Agency" or "HHS"), and Robert F. Kennedy, Jr. in his official capacity as Secretary of Health and Human Services (the "Secretary," and all collectively, "Defendants"), by and through undersigned counsel, respectfully submit this reply in support of their motion to dismiss Count II and Count III under Federal Rules of Civil Procedure ("Rules") 12(b)(1) and 12(b)(6), or, in the alternative, for summary judgment in their favor on those two counts under Rule 56 of the Amended Complaint filed by Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW"). *See* ECF No. 43.

INTRODUCTION

3,462 pages of documents produced. A total of 3,989 pages reviewed. 135 FOIA litigation productions released. All issued by the Agency's FOIA Office since the reorganization of the CDC's FOIA function beginning April 1, 2025, in response to FOIA requests for records of the CDC. *See* Fifth Holzerland Decl. ¶ 16, attached here as Exhibit 1. And 64,835 pages reviewed and 51,797 total pages produced to FOIA requesters for requests related to other HHS components since then. *Id.* ¶ 16. Defendants have also completed processing four out of five of Plaintiff's FOIA requests at issue in their Amended Complaint as of today. *Id.* ¶¶ 4–13; Defs.' Stmt. of Mat. Facts ("Def. Stmt.") ¶¶ 60–91; Fourth Holzerland Decl. ¶¶ 16–47. These facts do not show that Defendants are "so delinquent or recalcitrant as to warrant injunctive relief." *Wash. Lawyers' Comm. for C.R. & Urb. Affs. v. Dep't of Just.*, 145 F.4th 63, 69 (D.C. Cir. 2025) (citing *Jud. Watch, Inc. v. Dep't of Homeland Sec.*, 895 F.3d 770, 783-84 (D.C. Cir. 2018)). Instead, Defendants are entitled to summary judgment on CREW's policy and practice claims (Count II) because these facts highlight that the record demonstrates no genuine dispute of material fact that Defendants are

engaging in "good faith effort[s] and due diligence" to process FOIA requests in accordance with the law. *Jud. Watch, Inc.*, 895 F.3d at 781-82.

Legal errors defeat the rest of CREW's policy and practice claims (Count II) and its Administrative Procedure Act ("APA") claims (Count III). As a matter of law, Count II cannot state a FOIA policy and practice claim for regulatory—not statutory—violations, under *Payne*. *Infra*, § II. Plaintiff has clarified that it has not raised claims based on the rights of third-party CDC employees affected by reductions in force ("RIFs") and further clarified it is not seeking their reinstatement as a form of relief. *Infra*, § III. Plaintiff likewise clarified it is not seeking redress on any freestanding claims based on alleged violations of HHS' regulations on FOIA reading rooms and research records. *Infra*, § V. With those issues out of the way, Plaintiff's APA claims fail because 1) the FOIA provides an adequate remedy precluding duplicative APA review and 2) it has not challenged final or agency action *Infra*, §§ IV, VI. And Defendants are following HHS' regulations, defeating Counts II and III. *Infra*, § VII.

Thus, this Court should dismiss Plaintiff's policy and practice claims (Count II) and APA claims (Count III), or, in the alternative, grant summary judgment for Defendants—as argued in Defendants' opposition to Plaintiff's motion for summary judgment and partial cross-motion for summary judgement and motion to dismiss. ECF No. 43 (hereafter, "Def. Opp. & Cross-Mot." and referred to as "Defendants' opening brief").

I. The Record Compels Summary Judgment for Defendants' on Plaintiff's Policy and Practice Claims (Count II).

A. Plaintiff Misstates the Legal Standards for FOIA Policy and Practice Claims.

Plaintiff has not met its burden to make the extraordinary showing that there is no genuine dispute of material fact that this case represents the "rare instance of agency delinquency," *CREW*, 846 F.3d at 1246, for which the FOIA provides for prospective relief against "an agency policy or

practice" that "impair[s] [a] party's lawful access to information in the future." *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988) (emphasis omitted). Instead, the record shows Defendants are engaging in "good faith effort[s] and due diligence" to process FOIA requests in accordance with the law. *Jud. Watch, Inc.*., 895 F.3d at 781-82 (quotation marks omitted).

At summary judgment, Plaintiff misstates the legal standard for FOIA policy and practice claims. Plaintiff disagrees with Defendants' assertion that the D.C. Circuit "held that the test for a policy-or-practice claim 'turn[s]' on whether an agency can establish its 'good faith effort and due diligence' in handling certain FOIA requests." ECF No. 47 at 21 (citing Def. Opp. & Cross-Mot. 44). Yet that is *exactly* what the D.C. Circuit has held, time and again: after an agency has been given an opportunity "to explain its delay," the ultimate question of agency "compliance with FOIA depends upon its good faith effort and due diligence" to process requests for records "in as short a time as is possible." *Jud. Watch*, 895 F.3d at 781, 782 (quotation marks omitted).

There is a material difference between stating and sustaining a FOIA policy and practice claim. Plaintiff wrongly relies on the former at this summary judgment stage. To state its claim, Plaintiff relies caselaw that a claim lies based on agency conduct "that will impair the party's lawful access to information in the future." *Jud. Watch*, 895 F.3d at 777 (*cited in* ECF No. 47 at 21). But prevail on summary judgment, a plaintiff must show more. To obtain a judgment, Plaintiff must show "a lack of due diligence and" that the agency "is so delinquent or recalcitrant as to warrant injunctive relief." *Wash. Lawyers' Comm.*, 145 F.4th at 69 (citing *Jud. Watch*, 895 F.3d at 783-84). The evidence shows that Plaintiff has not cleared that high bar. *See* Def. Opp. & Cross-Mot. 38-45 (and the record cites therein).

B. The Record Shows Defendants Exercising Good Faith and Due Diligence to Address FOIA Requests.

Agency declarations "are accorded a presumption of good faith." *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). Just last year, the D.C. Circuit reaffirmed this long-standing principle in FOIA cases, writing that "[a]gency affidavits are accorded a presumption of good faith[.]" *Cabezas v. Fed. Bureau of Investigation*, 109 F.4th 596, 602 (D.C. Cir. 2024) (quoting *SafeCard Servs., Inc.*, 926 F.2d at 1200. The first through fifth declarations from Mr. Holzerland show Defendants are processing FOIA requests and releasing responsive, non-exempt records to requesters.

Since reorganization, OS-FOIA has made substantial progress responding to FOIA requests. "Since April 1, 2025, when the FOIA reorganization started, as of December 5, 2025, OS-FOIA has issued one hundred and thirty-five (135) litigation productions, encompassing sixty-four thousand eight hundred thirty-five (64,835) pages reviewed and fifty-one thousand seven hundred ninety-seven (51,797) released during this time." Fifth Holzerland Decl. ¶ 16. Furthermore, "[s]ince April 1, 2025, as of December 5, 2025, OS-FOIA has been actively reviewing over one hundred thousand (100,000) pages of records currently in the final stage of their review process by senior OS-FOIA personnel, and those records are responsive to approximately seven hundred (700) pending FOIA requests outside of litigation." *Id.* ¶ 17.

Of these numbers, a significant portion are CDC FOIA requests. "Of those litigation productions, OS-FOIA has issued at least nineteen (19) CDC-related productions, reviewing at least three thousand nine hundred eighty-nine (3,989) pages and releasing at least three thousand four hundred sixty-two (3,462)." *Id.* ¶ 16. This contradicts Plaintiff's argument that Defendants have not "suppl[ied] proof of CDC-specific processing[.]" ECF No. 47 at 14.

Also since reorganization, Defendants have posted "an additional two hundred twenty-three (223) discrete items to its electronic FOIA library." Fifth Holzerland Decl. ¶ 17. Defendants also plan to post online all records produced in FOIA responses as part of Secretary Kennedy's "Radical Transparency initiative." *Id.* ¶ 17.

At the macro-level, Defendants are modernizing, centralizing, and streamlining the Agency's and CDC's FOIA responsibilities and functions. Def. Stmt. ¶¶ 8–10; Fourth Holzerland Decl. ¶ 9. Mr. Holzerland extensively detailed this progress in his 112-paragraph Fourth Declaration.

Defendants have made very significant progress in processing Plaintiff's five at-issue FOIA requests that underlie its Amended Complaint. Defendants completed processing four out of the five. Fifth Holzerland Decl. ¶¶ 4–13. Defendants sent final responses letters for three of them on September 30, 2025, and a fourth on December 8, 2025. *Id.* For the fifth request, while not yet complete, Defendants have identified approximately one thousand eight hundred (1,800) pages of potentially responsive records and then processed one thousand seven hundred eighty-three (1,783) pages. *Id.* ¶¶ 6–9. Processing of this last pending request continues, with an update promised for January 30, 2026. *Id.* ¶¶ 8-9.

Plaintiff has not provided evidence of intentional efforts to delay production of records. There is no evidence showing Defendants engaged in bad faith by restructuring the FOIA response process or that they did so with the purpose of denying Plaintiff or other requesters access to CDC's records to which the FOIA entitles them. Nor is there evidence that the restructuring was done with the purpose of delaying anyone's access to CDC's records under FOIA. In fact, the evidence detailed in the various Holzerland declarations shows the opposite. Fourth Holzerland Decl. ¶ 97. In addition to the production of tens of thousands of records discussed above, all the evidence

shows that the restructuring is being done with the purpose to improve, speed up, and make more efficient the processing of FOIA requests. Fourth Holzerland Decl. ¶¶ 14, 86, 97, 105. As Mr. Holzerland has explained, these centralization and restructuring efforts were "lawfully commenced . . . for the explicit purpose of enhancing customer service and consistency of application of the law." Fourth Holzerland Decl. ¶ 91. Defendants are doing so "to enhance the efficiency of the service and effect the reorganization under orders from the Secretary." *Id.* at ¶ 86. The Agency FOIA Office is implementing Secretary Kennedy's "Radical Transparency" initiative. Fourth Holzerland Decl. ¶¶ 95, 97. Not only are records provided to requesters, but also "the OS-FOIA Program will be posting all third-party FOIA responses online" at hhs.gov. *Id.* ¶¶ 95, 105. "HHS anticipates that technical issues permitting, by the end of December 2025 the HHS 'Radical Transparency Portal' will be live. This portal will serve as the centralized location for required disclosures under 5 U.S.C. § 552(a)(2) as well as additional proactive disclosures that the Department elects to make publicly available." Fifth Holzerland Decl. ¶ 17. (Before this initiative, the Agency only published records online if three FOIA requesters sought the same records.) The Agency reading room is online. Fourth Holzerland Decl. ¶ 95. Two hundred and nine (209) discrete items of documents responsive to FOIA requests have been published to the Agency Reading Room between May 19 and September 3, 2025. *Id.*

Plaintiff nonsensically contends that Defendants have conceded a policy and practice violation regarding the ten-business day extension Defendants have sought to respond to Plaintiff's five at-issue FOIA requests. ECF No. 47 at 3–5. First, Defendants' opening brief refuted this argument. *See* Def. Opp. & Cross-Mot. 20, 44. In any event, an agency establishes exceptional circumstances if "the agency demonstrates reasonable progress in reducing its backlog of pending requests." 5 U.S.C. § 552(a)(6)(C)(ii). As the D.C. Circuit explained, this exceptional-

circumstances provision is a "safety valve" that "allow[s] agencies to deal with broad, time-consuming requests (or justifiable agency backlogs)." *CREW v. FEC*, 711 F.3d 180, 189 (D.C. Cir. 2013). It "accommodates" the "reality" that "it would be a practical impossibility for agencies to process all FOIA requests completely within twenty days." *Id.* (alteration and quotation marks omitted). Second, Plaintiff does not state a FOIA policy and practice claim, much less submit enough evidence to sustain one on summary judgment, just because the Agency says it needs ten extra business days to handle a request. *Id.* "In other words, while tardiness would violate FOIA, it only becomes actionable when some policy or practice also undergirds it. This aligns with the rule that the sole penalty for mere procrastination is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court." *Am. Ctr. for L. & Just. v. United States Dep't of State*, 249 F. Supp. 3d 275, 283 (D.D.C. 2017). Third, the greater includes the lesser argument here. Defendants have extensively argued that delays alone do not establish a FOIA policy and practice claim:

> As then-Judge Kavanaugh observed, it is simply a "reality" that it is "practical[ly] impossib[le] for agencies to process all FOIA requests completely within twenty days." CREW, 711 F.3d at 189 (citation modified). When, in any given case, the agency "does not adhere to FOIA's explicit timelines, the 'penalty' is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court." *Id.* But the larger question of the agency's "compliance with the Act," depends on the agency's "good faith effort and due diligence," not on its ability to meet the statutory deadlines. *Open Am.*, 547 F.2d at 616. And this Court has long recognized that "delay alone cannot be said to indicate an absence of good faith" in processing FOIA requests. *Goland v. CIA*, 607 F.2d 339, 355 (D.C. Cir. 1978).

ECF No. 43 at 43. Next, Plaintiff cannot argue forfeiture as a reason for the Court to grant its motion for summary judgment. *See Winston & Strawn, LLP v. McLean*, 843 F.3d 503, 505 (D.C. Cir. 2016). That is because the "burden is always on the movant to demonstrate why summary judgment is warranted." *Id.* (quoting *Grimes v. District of Columbia*, 794 F.3d 83, 97 (D.C. Cir. 2015) (Griffith, J., concurring)). This Court "must determine for itself that there is no genuine

dispute as to any material fact and that the movant is entitled to judgment as a matter of law, and then 'should state on the record the reasons for granting or denying the motion.'" *Id.* at 509 (quoting Fed. R. Civ. P. 56(a)).

Finally, Plaintiff argues "[i]f Defendants genuinely wanted to improve their FOIA operations, they could have considered a variety of already thought-out and considered proposals." ECF No. 47 at 13 n.7 (citing two examples). Yet Plaintiff's disagreement alone with the Secretary's approach to processing of records sought under the FOIA does not prove Defendants have adopted or engaged in a policy and practice to deny access to agency records under the FOIA.

Defendants have thus produced a record supporting summary judgment in their favor on Plaintiff's policy and practice claims (Count II). There remains no genuine dispute of material fact that Defendants are engaging in "good faith effort[s] and due diligence" to process FOIA requests in accordance with the law. *Jud. Watch, Inc.*, 895 F.3d at 781-82.

II. FOIA Policy and Practice Claims Based on Alleged Regulatory Violations Fail.

Plaintiff admits that the FOIA lacks "some clearly established and explicit provision under FOIA for litigants to press claims related to regulatory violations . . . ." ECF No. 47 at 26. Instead, it presses its FOIA policy and practice claim based on alleged violations of Defendants' own regulations.

Yet a regulatory violation standing alone cannot state a FOIA policy and practice claim. *See* Def. Opp. & Cross-Mot. 23-24. Plaintiff disagrees. ECF No. 47 at 20. It so insists in one short paragraph without citing any legal authority in support. *Id.*[1] But a FOIA policy and practice

[1] Plaintiff refers back to its one-page argument in its motion for summary judgment (ECF No. 47 at 20), which in turn cited only two cases. *See* ECF No. 33-1 at 21 (citing *Elec. Priv. Info. Ctr. v. Nat'l Sec. Agency*, 795 F. Supp. 2d 85, 95-96 (D.D.C. 2011); and *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977)). Neither supports Plaintiff's claim that a regulatory violation alone states a FOIA policy and practice claim. First, *contra* Plaintiff's telling, the former dismissed an APA claim because FOIA provided an adequate remedy for the

claim requires "facts establishing that the agency has adopted, endorsed, or implemented some policy or practice that constitutes an ongoing 'failure to abide by the terms of *the FOIA*.'" *Muttitt v. Dep't of State*, 926 F. Supp. 2d 284, 293 (D.D.C. 2013) (quoting *Payne*, 837 F.2d at 491) (emphasis added). Valid claims of this kind require a statutory, not a regulatory violation, as the caselaw establishes. *See, e.g.*, *id.* That makes sense; FOIA policy and practice claims are about violating terms of the statute, not implementing regulations. *See Greenspan v. U.S. Dep't of Transp.*, Civ. A. No. 22-00280 (DLF), 2023 WL 11658312, at *2 (D.D.C. Jan. 23, 2023) ("At most, [plaintiff]'s allegation is that the Administration violates its own regulation implementing FOIA, which arguably establishes a timeline by which the Administration will tell third parties whether their information will be treated as confidential. There are compelling reasons to question [plaintiff]'s interpretation of the regulation. But even if his interpretation is correct, a violation of an agency regulation does not mean that the agency has violated FOIA, much less that the agency has done so repeatedly."), *motion for relief from judgment denied*, Civ. A. No. 22-00280 (DLF), 2023 WL 11658515 (D.D.C. May 17, 2023). This approach to FOIA policy and practice claims—that only a statutory violation states a claim—is consistent with the principle that if a statute and a regulation are inconsistent, it is the regulation, not the statute, that must yield. *See Brown v. Gardner*, 513 U.S. 115, 121–22 (1994). This Court would break new ground if it ruled that an agency violating its own FOIA regulation stated a FOIA policy and practice claim. If the Court

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plaintiff's claim about "the [agency]'s failure to abide by its own regulations." *Elec. Priv. Info. Ctr.*, 795 F. Supp. 2d at 96. Second, the latter considered *not a FOIA policy and practice claim*, but instead a run-of-the mill FOIA litigation over the appropriateness withholding documents based on a FOIA exemption. *See generally Mead Data Cent.*, 566 F.2d 242. An agency regulation only became relevant because "an agency may impose upon itself a more liberal disclosure rule than that required by the FOIA[,]" and the agency had done so with a regulation providing a higher standard for justifying withholding records. *Id.* at 258. A far cry from Plaintiff's claim here.

rules in Defendant's favor on this argument, the Court need not wade into interpreting the FOIA regulations at issue in Counts II and III.

III. Plaintiff Does Not Challenge the Reduction in Force of Third-Party CDC Employees or Seek Their Reinstatement.

Plaintiff's Opposition clarifies it is not challenging the reduction-in-force affecting CDC employees nor is it seeking as relief in this suit their reinstatement. Plaintiff wrote, "[t]hird-party employee interests have no bearing on this case . . . CREW does not seek to vindicate the former CDC employees' personnel rights or otherwise allege third-party standing[.]" ECF No. 47 at 23. Accordingly, Plaintiff disavowed bringing employment-law claims on CDC employees' behalf and the reinstatement of those employees. *See Richardson v. Nat'l R.R. Passenger Corp.*, Civ. A. No. 24-2517 (SLS), 2025 WL 1568198, at *3 n.1 (D.D.C. June 3, 2025) ("[P]laintiffs are 'masters of the complaint' with the power to bring those claims they see fit[.]") (quoting *de Csepel v. Republic of Hungary*, 714 F.3d 591, 598 (D.C. Cir. 2013)). Given this clarification, the Court should enter judgment in Defendants' favor to the extent the Amended Complaint seeks redress for CDC employees affected by the reduction in force.

IV. Plaintiff's APA Claim Is Precluded by the Adequate Remedy of the FOIA.

The FOIA provides an adequate remedy, precluding Plaintiff's APA claim in Count III. *See* Def. Opp. and Cross-Mot. 11–16. As explained, the "FOIA offers CREW precisely the kind of 'special and adequate review procedure[ ]' that Congress immunized from 'duplic[ative]' APA review." *CREW*, 846 F.3d at 1245–46 (alterations in original; quoting *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988)); *see also* 5 U.S.C. § 704. Plaintiff disagrees. ECF No. 47 at 25–29. None of its reasons persuade.

First, Plaintiff asserts that there are "unique facts presented here" (ECF No. 47 at 29), arguing its claim differs because it relies on alleged regulatory violations by Defendants instead of

failure to provide particular records. ECF No. 47 at 25. (It attempts to distinguish some of Defendants' cited caselaw on that basis too. *See id.* at 26, 26 n.15.) As already explained, that argument fails. *See* Def. Opp. and Cross-Mot. 11–16. Multiple times, this Court has squarely rejected this position: when a plaintiff "assert[ed] an APA violation that stems not from failure to disclose documents responsive to its FOIA request, but rather from the [agency]'s failure to abide by its own regulations. This distinction is not persuasive. The plaintiff is requesting the same relief for its APA claim that it is requesting for its FOIA claims[.]" *Elec. Priv. Info. Ctr. v. Nat'l Sec. Agency*, 795 F. Supp. 2d 85, 96 (D.D.C. 2011) (internal citation omitted); *see also Feinman v. FBI*, 713 F. Supp. 2d 70, 77 (D.D.C. 2010). When a plaintiff brought APA claims for alleged violations of an agency's FOIA regulations, "settled precedent ma[de] clear that a FOIA requester may not seek relief under the APA for a violation of FOIA or the governing FOIA regulations." *Harvey v. Lynch*, 123 F. Supp. 3d 3, 6, 8 (D.D.C. 2015).

Second, Plaintiff presses on a distinction without a difference in a familiar case in *CREW v. Dep't of Just.*, 846 F.3d 1235 (D.C. Cir. 2017). Plaintiff insists that *CREW* does not apply here because the plaintiff there sought specific records. *See* ECF No. 47 at 25-26. But the D.C. Circuit rejected CREW's gambit to obtain records through a free-standing APA claim without actually filing a FOIA request. *See CREW*, 846 F.3d at 1235, 1244–46. And Plaintiff's lawsuit here does seek records now and says it will in the future—the premise of its alleged Article III standing. So, no basis exists to distinguish the controlling authority in *CREW* holding that the FOIA constitutes an adequate remedy precluding a separate APA claim.

Third, Plaintiff insists that the relief available between the policy and practice doctrine (Count II) and APA (Count III) are different and thus not "adequate"—that the APA count seeks to "set aside" the closure of the CDC FOIA office while the FOIA policy and practice count seeks

an order for Defendants "to augment FOIA review resources for CDC FOIA requests." ECF No. 47 at 28. But Plaintiff cannot plead or brief its way out. Plaintiff misunderstands the standard, which examines the available remedies under the statutes—not the precise remedy a plaintiff seeks. The alternative remedy "need not provide relief identical to relief under the APA, so long as it offers relief of the same genre." *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (internal citations omitted). Similarly, it need not be "as effective as an APA lawsuit against the regulating agency" to qualify as "adequate." *Id.* at 525. The FOIA's remedy is adequate even though the APA would not provide identical relief. As the D.C. Circuit held, "despite some mismatch between the relief sought and the relief available, FOIA offers an 'adequate remedy' within the meaning of section 704 such that CREW's APA claim is barred." *CREW*, 846 F.3d at 1246 (quoting 5 U.S.C § 704). Applying this standard, this Court held that the FOIA precluded a separate APA claim. *See Khan v. U.S. Dep't of Homeland Sec.*, Civ. A. No. 22-2480 (TJK), 2023 WL 6215359, at *8 (D.D.C. Sept. 25, 2023). When plaintiffs there sued over alleged FOIA "procedural policies" instead of "substantive determinations" about records' disclosure, the "Plaintiffs attempt to distinguish their APA claim . . . from their FOIA claims by arguing that this is the rare case in which there is too great of a gap between the relief sought [through an APA claim] and the relief FOIA affords." *Id.* (citations and quotation marks omitted, alterations in original). This Court rejected plaintiff's assertion and explained, "that distinction is unpersuasive, because FOIA imposes no limits on courts' equitable powers in enforcing its terms, and so 'the statutory and equitable remedies available to [Plaintiffs] under FOIA would provide the same relief from the alleged policies as would the APA.'" *Id.*

Fourth, Plaintiff relies on inapplicable caselaw, some of which is out-of-circuit, thus non-binding. *See* ECF No. 47 at 27. Odd support, considering the comparative specialization of the

D.C. Circuit and its courts in handling FOIA. *See Belgiovine Enters., Inc. v. City Fed. Sav. Bank*, 748 F. Supp. 33, 35 (D.D.C. 1990) (quoting *In re Scott*, 709 F.2d 717, 720 (D.C. Cir. 1983)) ("The 'special venue' provision of FOIA . . . reflected 'an express congressional design to render the District of Columbia an all-purpose forum in FOIA cases' . . . 'to provide plaintiffs with an opportunity to bring complaints in a court which has "substantial expertise" in working with FOIA,'").[2] Plaintiff also cites caselaw that it asserts stand for the proposition "that APA review is available for rulemaking issues, apart from FOIA processing" (ECF No. 47 at 27), but "rulemaking" is not at issue here and thus irrelevant.[3] Cases cited by Plaintiff are simply inapposite. In *Public Citizen, Inc. v. Lew*, 127 F. Supp. 2d 1, 7 (D.D.C. 2000), the Court did not consider whether the FOIA provides an adequate remedy precluding APA review. And this Court already rejected as unpersuasive the reasoning in *National Security Counselors v. CIA*, 898 F. Supp. 2d 233, 268 (D.D.C. 2012) (another case cited by Plaintiff), that an APA claim is possible for violation of an agency's FOIA regulations. *See Khan*, 2023 WL 6215359, at *8 n.10 (Kelly, J.).[4]

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[2] Other jurisdictions recognize this specialization too. *See Wilson v. Fed. Bureau of Investigation*, 91 F.4th 595, 598 (2d Cir. 2024) ("look[ing] approvingly to the decisions of the D.C. Circuit for guidance" because "the D.C. Circuit is something of a specialist in adjudicating FOIA cases, given the nature of much of its caseload.").

[3] Plaintiff's Opposition refers to inapposite cases previously cited in its opening brief. *See* ECF No. 47 at 27). For brevity's sake, Defendants refer the Court to Defendants' own opening brief, which addressed and distinguished those cases. *See* Def. Opp. & Cross-Mot. at 14-15)—on which it again relies.

[4] As this Court explained in *Khan*,

> Plaintiffs argue that the court in this case distinguished between allegations of "a policy or practice of the CIA violating its own FOIA regulation" and "the procedural requirements of the FOIA itself." *Nat'l Sec. Couns.*, 898 F. Supp. 2d at 266; *see also* ECF No. 12 at 15–16. For similar reasons, Plaintiffs also cite *Snyder v. CIA*, 230 F. Supp. 2d 17, 24–25 (D.D.C. 2002), which they say "allow[ed] [an] APA challenge to agency compliance with referral provisions of its FOIA

Accordingly, under settled law, Plaintiff has no viable APA claims.

V. Plaintiff No Longer Pursues Any Freestanding Claim Based on Alleged Violations of HHS' FOIA Regulations On Reading Rooms and Research Records.

Defendants' opening brief argued that Plaintiff lacks standing to assert two separate claims based on alleged violations of agency reading-room and research-data regulations. *See* Def. Opp. & Cross-Mot. 36–38. In response, Plaintiff clarifies "[it] is not arguing that these particular regulatory violations are freestanding ones that injure it and entitle it to relief in the form of reading-room and research records." ECF No. 47 at 24. Plaintiff instead relies on these two regulatory provisions as support for their APA claim in Count III that Defendants have violated the alleged regulatory requirement to maintain a separate CDC FOIA office. *Id.* Thus, given Plaintiff's clarification, the Court should enter judgment in Defendants' favor to the extent Plaintiff seeks redress on any free-standing claim based on either the agency reading-room or research-data regulations. *See Richardson*, 2025 WL 1568198, at *3 n.1.

VI. Plaintiff Does Not Challenge Final Agency Action Under the APA.

If the Court rules that the FOIA provides an adequate remedy precluding an APA claim, *supra* § IV, then the Court need not decide whether Plaintiff has challenged either "final" or

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regulations." ECF No. 12 at 16. But these cases are inapposite, because the complaint lacks any allegation that Plaintiffs seek to challenge an agency's compliance with its own regulations, rather than "violations of FOIA's procedural requirements." *Id.* at 15 (emphasis added). Courts have also correctly observed that "[a] close reading of [*Snyder*] reveals ... that the court actually applied ... the judicial review provisions of the FOIA statute, not the general APA judicial review provisions." *See Elec. Priv. Info. Ctr. v. Nat'l Sec. Agency*, 795 F. Supp. 2d 85, 95 (D.D.C. 2011) (holding that even if the *Snyder* court had entertained both a FOIA and APA claim, it "would [have] still dismiss[ed] the APA claim in this case in view of the binding precedents from the D.C. Circuit.").

Khan, 2023 WL 6215359, at *8 n.10 (Kelly, J.).

"agency action" reviewable under the APA. On that argument, Defendants rely on their opening brief. *See* Def. Opp. & Cross Mot. 16–19.

Contrary to Plaintiff's arguments, it has not shown that the actions it challenges constitute "the consummation of the agency's decisionmaking process . . . by which rights or obligations have been determined or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Plaintiff has not shown that restructuring the Agency's FOIA operations on April 1, 2025, determines any *legal* rights held by Plaintiff or any *legal* consequences to Plaintiff. *See id.* Plaintiff complains only of slower FOIA processing. Plaintiff can still submit FOIA requests for CDC records and receive responsive, nonexempt records. Notably, Plaintiff is currently receiving responsive records to its five FOIA requests, including final responses for four of the five. Fifth Holzerland Decl. ¶¶ 4–13.

Distilled to its argument's core, Plaintiff essentially seeks impermissible programmatic review. Plaintiff has not identified a discrete and circumscribed agency action that the Agency has taken which could specifically be redressed by a federal court. Plaintiff must plead "an identifiable action or event" and "direct [their] attack against some particular 'agency action' that causes [them] harm." *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891, 899 (1990). These final agency actions must be "circumscribed [and] discrete." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004). The APA does not provide for "general judicial review of [an agency's] day-to-day operations," *Lujan*, 497 U.S. at 899, like "constructing a building, operating a program, or performing a contract," *Vill. of Bald Head Island v. Army Corps. of Eng'rs*, 714 F.3d 186, 193 (4th Cir. 2013). The APA thus contains "a prohibition on programmatic challenges," meaning "challenges that seek 'wholesale improvement' of an agency's programs by court decree." *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 490 (5th Cir. 2014) (cleaned up).

"Because 'an on-going program or policy is not, in itself, a final agency action under the APA,' [a court's] jurisdiction does not extend to reviewing generalized complaints about agency behavior." *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006) (citation omitted). *See also Treasury Employees Union v. Vought*, ---- F.4th ----, 2025 WL 2371608 (D.C. Cir. Aug. 15, 2025).

The Amended Complaint presents precisely the type of programmatic challenge the APA forbids. Plaintiff's allegations reveal it does not seek judicial review of a discrete agency action. Rather, Plaintiff seeks wholesale judicial review of the Agency's FOIA program. Instead of presenting the Court with a "narrow question to resolve," *Cobell*, 455 F.3d at 307, Plaintiff challenges a host of individual actions: individual processing in its own FOIA requests, the requests of other organizations and individuals, and the technical expertise of OS-FOIA staff to handle CDC FOIA requests. Addressing this type of claim requires the Court to supervise all agency activities and determine how the agency would accomplish each FOIA function—an even more extreme kind of supervisory APA claim than was at issue and rejected in *Lujan*. *See* 497 U.S. at 892-93. Thus, Defendants are entitled to judgment on Plaintiff's APA claim (Count III).

VII. Defendants Are Following HHS' Regulations, Defeating Counts II and III.

A. Defendants Properly Interpreted HHS' FOIA Regulations.

Plaintiff presses the bureaucratically byzantine claim about who handles the CDC's FOIA responsibilities. Defendants have explained how consolidating the CDC's FOIA functions within the Agency FOIA Office lawfully follows the plainly interpreted Agency regulations for four main reasons: 1) the regulations provide the Agency FOIA Office with wide-ranging, unqualified "discretion" to handle CDC's FOIA requests, 45 C.F.R. § 5.3; 2) CDC's FOIA Office exercised only "delegated" authority—inherently revocable, *id.*; 3) Defendants' pre-lawsuit practice treated CDC's FOIA responsibilities as delegated, thus revocable, Def. Stmt. ¶ 11; 4th Holzerland Decl. 83–86; 4) and the regulation's structure. *See* Def. Opp. & Cross-Mot. 23–34. Plaintiff argues two

points worth responding to: (1) the word "certain" constrains Defendants' discretion, and (2) the explanation is a post-hoc rationalization unentitled to deference. ECF No. 47 at 33–45. Defendants address these below.

1. The Phrase "Certain Circumstances" Does Not Prevent The Agency's FOIA Reorganization.

The relevant regulations state, "*In certain circumstances* and at the HHS FOIA Office's discretion, the HHS FOIA office may also process FOIA requests involving other HHS [Operating Divisions], as further described in § 5.28(a)." 45 C.F.R. § 5.3 (emphasis added). Plaintiff argues that the Agency FOIA Office's discretion to handle FOIA requests involving other divisions is restricted by the phrase "[i]n certain circumstances." ECF No. 47 at 34-35. But Defendants explained that the phrase "[i]n certain circumstances" is exceedingly broad and easily satisfied by recent Executive Order 14,210, directed at bureaucratic reforms and efficiencies, entitled "Implementing the President's 'Department of Government Efficiency' Workforce Optimization Initiative." Def. Opp. & Cross-Mot. 33-34; Def. Ex. 2. Mr. Holzerland explained that the Agency FOIA Office, to comply with that Executive Order, "thereby exercised its discretion to process FOIA requests that involved other" Agency Operating Divisions, "including FOIA requests that involved CDC moving forward." *Id.* at 34. Far from an "extravagant assertion of power." ECF No. 47 (Pl. Mem.) at 40.

Without any textual or other support, Plaintiff also argues that the Agency FOIA Office can only exercise discretion to handle FOIA requests if that request "implicates overlapping jurisdictions." ECF No. 47 at 35. That phrase does not appear in the regulations. And that unnatural interpretation ignores the natural reading of the phrase "requests involving other HHS [Operating Divisions]" which expresses the discretionary power of the Agency FOIA Office to handle the other divisions' FOIA requests, including those of CDC. *See* 45 C.F.R. § 5.3. The

discretion provided by the regulations also makes this question committed to agency discretion by law, thus unreviewable under the APA. *Infra*, § VIII.

2. Defendants Are Owed Deference to Their Regulatory Interpretation.

If the Court views the regulations as genuinely ambiguous after exhausting all the traditional tools of statutory interpretation, then the Court should defer to Defendants' reasonable interpretation of its own regulations. *See Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 983 F.3d 498, 507 (D.C. Cir. 2020) (citing *Kisor v. Wilkie*, 588 U.S. 558, 563 (2019); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997)).[5] Defendants have shown that their interpretation is reasonable. *See* Def. Opp. & Cross-Motion 26–34. And to receive deference, "[t]he interpretation must be the agency's 'authoritative' or 'official position,' 'implicate its substantive expertise' and reflect 'fair and considered judgment' to receive deference." *Doe v. SEC*, 28 F.4th 1306, 1311 (D.C. Cir. 2022) (quoting *Kisor*, 588 U.S. at 576-79); *see also Nat'l Lifeline Ass'n*, 983 F.3d at 507. Plaintiff does not challenge the first two points—that this interpretation is the agency's official position and that it implicates the agency's substantive expertise, failing to respond to

[5] Defendants recognize that the Supreme Court recently ruled that "courts need not and under the APA may not defer to an agency interpretation of the law simply because a *statute* is ambiguous." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (emphasis added). Plaintiff has not argued that *Loper Bright* overruled *Auer* deference. Defendants do not believe the Supreme Court overruled *Auer* because the doctrines are different for deference to regulatory versus statutory interpretation. The Supreme Court upheld *Auer* deference just six years ago in *Kisor v. Wilkie*, 588 U.S. 558 (2019). And the Chief Justice—the author of *Loper Bright*—concurred in *Kisor* explaining that deference to agency interpretations of their own regulations was different: "Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. *See Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Kiso*r, 588 U.S. at 591 (Roberts, C.J., concurring). Chief Justice Robert emphasized that the "Court's decision today [does not] touch upon the latter question." *Kiso*r, 588 U.S. at 591 (Roberts, C.J., concurring). *See also Campaign Legal Ctr. v. Fed. Election Comm'n*, Civ. A. No. 24-2585 (SLS), 2025 WL 1768099, at *7 (D.D.C. June 26, 2025) (quoting *Barber v. Emmert*, Civ. A. No. 23-2465 (LLA), 2025 WL 870364, at *5 n.10 (D.D.C. 2025)) ("*Auer* deference is separate and survived *Chevron*'s overruling[.]").

Defendants' briefing.[6] *See* Def. Opp. & Cross-Mot. 34-35. Plaintiff challenges only the third point, discussed below.

Plaintiff describes Defendants' regulatory interpretation as a new, conflicting, post-hoc rationalization—thus unentitled to *Auer* deference. ECF No. 47 at 44-45. Not so. Defendants' reading reflects "fair and considered judgment." *Doe*, 28 F.4th at 1315. Defendants have detailed historical practice predating this litigation and this presidential administration that 1) the Deputy Agency Chief FOIA Officer possessed discretion to process FOIA requests within OS-FOIA and 2) agency leadership and personnel understood that CDC exercised FOIA responsibilities only to the extent delegated to it. *See* Def. Opp. & Cross-Motion, 26–31, 36 (ECF No. 43). As evidence, Defendants submitted that a declaration from Mr. Holzerland—the Deputy Agency Chief FOIA Officer—which stated: "For decades, FOIA implementation at HHS' Operating Divisions, including CDC, has operated under delegations of authority that were revocable." 4th Holzerland Decl. ¶¶ 83-84. He detailed a series of prior delegations of authority. *Id.* ¶¶ 84–85. Defendants submitted those memoranda of delegation as exhibits. *See* Def. Exs. 7–10. In sum, everyone from agency leadership to FOIA staff knew that the Operating Division's FOIA Offices (including CDC) exercised only "delegated," not independent authority to process FOIA requests. This dispenses too with Plaintiff's argument that these memos delegated merely "administration" and

[6] In a motion to dismiss context, "[i]t is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." *Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries*, 238 F. Supp. 2d 174, 178 (D.D.C. 2002) (citations omitted). *See also Brett v. Brennan*, 404 F. Supp. 3d 52, 59 (D.D.C. 2019) ("if a party files an opposition to a motion and therein addresses only some of the movant's arguments, the court may treat the unaddressed arguments as conceded.") (quoting *Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014)). Relevant here, Defendants seek dismissal of Plaintiff's APA claim under Rule 12 as legally deficiency and, given Plaintiff's failure to address these two issues, the Court should consider the arguments conceded.

"oversight responsibilities." *See* ECF No. 47 at 43, 45. This understanding predated this litigation. Plaintiff has not contradicted this evidence, nor could it. (The fact that Defendants' August 1, 2025, memorandum rescinding the prior delegations of FOIA authority to CDC (Def. Ex. 11) came after this litigation is of no moment: when the bureaucratic paperwork happens is not relevant to the deference analysis, despite Plaintiff's protest. (ECF No. 47 at 45). What matters is whether there was an agency practice predating litigation. *Doe*, 28 F.4th at 1315. As explained above, there was here.) Accordingly, this is not a new, conflicting, post-hoc rationalization; instead, these interpretations are entitled to *Auer* deference.

VIII. The Court Lacks Jurisdiction Under the APA to Review What the Regulations Commit to Agency Discretion: Exercising Discretion for the Agency FOIA Office to Handle CDC's FOIA Requests.

Now, Plaintiff's challenge based on the regulations has crystalized into one against HHS' discretion that is committed to agency discretion by law—thus outside the scope of judicial review under the APA. *See* 5 U.S.C. § 701(a)(2). Pointing to the term "certain" in the regulations, Plaintiff now appears to argue that the regulations constrain the discretion possessed by the Deputy Agency Chief FOIA Officer to direct OS-FOIA to process CDC's FOIA requests. ECF No. 47 at 34-35. This argument crystalizes Plaintiff's challenge into a challenge to a discretionary decision. But judicial review is unavailable for any decision committed to agency discretion by law.

The APA's judicial review provisions do not allow for review when: (1) another statute precludes review; (2) the agency action is committed to discretion by law; or (3) the action is not final. *Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 36 (D.D.C. 2020) (citing *Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C. Cir. 1996)). If a plaintiff challenges a decision committed to agency discretion by law under the APA, then a court dismisses the action for failure to state a claim. *See Oryszak v. Sullivan*, 576 F.3d 522, 525 (D.C. Cir. 2009). "An agency decision is considered 'committed to agency discretion by law' under 5 U.S.C. § 701(a)(2)

'if no judicially manageable standards are available for judging how and when an agency should exercise its discretion.'" *Claybrook v. Slater*, 111 F.3d 904, 908 (D.C. Cir. 1997) (citation omitted). For instance, the regulations "in no way prescribed how that discretion must be exercised. There are no conditions that the Secretary must satisfy before he can revoke the agency's approval[.]" *Bouarfa v. Mayorkas*, 604 U.S. 6, 14 (2024).

The regulation here holds the hallmarks of being committed to agency discretion by law. The regulation specifically uses the word "discretion." 45 C.F.R. § 5.3. The clause "[i]n certain circumstances" does not provide a judicially manageable standard; no criteria are listed to indicate what satisfies the phrase. Nothing else in the regulations provides a judicially manageable standard by which a court could judge an agency in how it should exercise its discretion. *See Webster v. Doe*, 486 U.S. 592, 600 (1988) (holding that a statute permitting the agency to terminate an employee whenever it "deem[s] such termination necessary or advisable in the interests of the United States" was discretionary). The discretion "may" be exercised. 45 C.F.R. § 5.3. The Supreme Court "has repeatedly observed, the word may clearly connotes discretion." *Biden v. Texas*, 597 U.S. 785, 802 (2022) (citations and quotation marks omitted). In sum, nothing limits the discretion. Therefore, the decision for the Agency FOIA Office to handle CDC's FOIA requests is committed to agency discretion by law, so Plaintiff's claim in Count III is unreviewable under the APA.

* * *

CONCLUSION

For these reasons, Defendants respectfully request that the Court dismiss Counts II and III, or, in the alternative, grant summary judgment in Defendants' favor on these two counts.

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Respectfully submitted,

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