IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil No. 18-cv-00406 (JRB)
ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, *et al.*	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT

INTRODUCTION

While Defendants' voluntary promulgation of a new interim written recordkeeping policy is a welcome first step towards addressing the Federal Records Act ("FRA") violations Plaintiffs allege, it neither resolves nor moots Claims One and Two. As detailed in the Complaint, both claims reach far beyond the inconsistencies between the agency's written policy and controlling law and regulations. Plaintiffs have alleged that the Environmental Protection Agency ("EPA") through its leadership engaged in a policy and practice of affirmatively violating the FRA by directing staff not to create records (Claim One) and by failing to maintain an effective records management program that includes effective training and safeguards (Claim Two). These claims raise questions about whether the agency's leadership has issued oral or written directives or communications countermanding the agency's former or interim policies, how EPA trained and now trains both leadership and rank and file employees, and whether the agency has put

protocols in place to ensure it is actually complying with its obligations to create a sufficient record of agency business. Updates to EPA's records management policy, which form the basis for Defendants' latest motion to dismiss, represent just one form of relief that the alleged violations, if proven, would justify, and do not address the full spectrum of violations plaintiffs have alleged. In short, Defendants' motion should be denied because their actions to date have not in fact mooted either claim.

Defendants also have not met the special burdens that they must meet in claiming that their voluntary cessation of conduct moots Plaintiffs' claims. Defendants have not demonstrated that there is no reasonable expectation that the unlawful conduct will recur or that their issuance of an interim recordkeeping policy has completely and irrevocably eradicated the effects of the alleged violations. *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008).

Defendants' alternative motion for summary judgment should be denied because it fails to satisfy Defendants' procedural and evidentiary burdens and raises factual questions that can be answered only through discovery and the creation of a full factual record. Defendants ask the Court to rely on a woefully incomplete record of the EPA's records management practices and program that they attempt to "certify" as the "administrative record," even though Plaintiffs are challenging EPA's failure to act for which there is no administrative record within the meaning of the Administrative Procedure Act ("APA"). The declarations and exhibits that Defendants have produced fail to detail the prior or current recordkeeping practices of top agency officials, to demonstrate how the issuance of an interim recordkeeping policy by itself cures the alleged violations, and to address whether top agency officials have given countervailing directives or whether top agency officials—including Acting Administrator Andrew Wheeler—have been sufficiently instructed about their obligation to both create and preserve records. Also missing

from Defendants' submission is any commitment by the administrator and senior staff not to issue directives that conflict with EPA's recordkeeping obligations and the new interim written policy. Absent such a commitment the Court has no assurance that, as with the previous policy, agency leadership will not ignore or countermand the updated policy.

Defendants' motion for summary judgment should also be denied on procedural grounds. Defendants have not complied with their obligation to submit a statement of facts with citations to that record, as required by Local Rule 7(h). Finally, ruling on summary judgment at this juncture would be premature. Plaintiffs' accompanying Rule 56(d) declaration lays out facts necessary for Plaintiffs to respond to the summary judgment motion, but that Plaintiffs have not been afforded a chance to discover and are uniquely in Defendants' possession.

ARGUMENT

I. EPA'S INTERIM WRITTEN POLICY DOES NOT IN FACT MOOT EITHER OF PLAINTIFFS' CLAIMS.

Defendants' motion to dismiss should be denied first and foremost because the events that have transpired since the filing of this action have not in fact resolved the violations alleged in either of Plaintiffs' remaining claims. As explained below, the only factual development that Defendants rely on in their motion for mootness is EPA's promulgation of a revised interim written records management policy. However, changes to that policy do not moot Claim One because the violations it addresses were allegedly caused by the conduct and directives of top agency officials, not the shortcomings of the agency's written policies. While changes to the agency's records management policy are directly relevant to Claim Two, the violations alleged are systematic failures in the agency's records management program—of which an FRA-compliant policy is only one component. *See Powell v. McCormack*, 395 U.S. 486, 497 (1969) ("Where one of the several issues presented becomes moot, the remaining live issues supply the

constitutional requirement of a case or controversy."). Because plaintiffs continue to pursue two live claims that could result in this court granting plaintiffs additional relief, neither claim is moot. *Cody v. Cox*, 509 F.3d 606, 608 (D.C. Cir. 2007) ("For a case to become moot, it must be 'impossible for the court to grant 'any effectual relief whatever.'"") (quoting *Church of Scientology of Cal. v. United States,* 506 U.S. 9, 12 (1992)).

A. The Only Remedial Action Defendants Have Taken to Date Is the Promulgation of an Interim Records Management Policy.

After the Court denied Defendants' first motion to dismiss Claims One and Two, Defendants issued "Interim Records Management Policy 2155.4," which they assert supersedes the records management policy Plaintiffs challenge in the Complaint. *See* Second Ellis Decl. Ex. A. On September 14, 2018, Defendants distributed the new interim policy in an email to all EPA employees and certain EPA contractors. Second Ellis Decl. Ex. B. The email failed to acknowledge any deficiencies in EPA's previous recordkeeping practices or program; in fact, it underscored the temporary and changeable nature of the policy by informing employees that "[in] FY19, the National Records Management Program will be initiating a comprehensive review of EPA's Records Management Policy with opportunities for Agency wide input." *Id*.

B. Claim One Is Not Premised on the EPA's Records Management Policy and Therefore Remains a Live, Viable Claim.

In Claim One, Plaintiffs allege that top agency officials—including, but not limited to, the administrator—"affirmatively elected not to create and preserve records adequately documenting the organization, functions, policies, decisions, procedures and essential transactions of the EPA." Compl. ¶ 57. Plaintiffs further allege that the administrator and other top officials "directed other EPA employees not to create and preserve records adequately documenting the organization, functions, policies, decisions, procedures and essential transactions of the EPA." *Id*. ¶ 58. As alleged, these violations are not premised on the mere

technical noncompliance of the agency's written recordkeeping policy with the FRA and accompanying regulations. Rather, the gravamen of the claim is that top officials in the agency took active steps to frustrate compliance with the FRA and the agency's records management program and that those actions denied Plaintiffs and the public access, now and in the future, "to important agency documents that would shed light on the conduct of EPA officials and the reasons for their actions and decisions." *Id*. ¶ 60. To redress these violations, Claim One seeks declaratory and injunctive relief beyond the actions Defendants have taken—namely, an order compelling Defendants "to make and preserve as federal records all records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency." *Id*. ¶ 61.

Defendants' mootness argument with respect to Claim One stems from a fundamental misconstruction of the Complaint and the Court's July 24, 2018 Memorandum Opinion ("Mem. Op.") denying Defendants' first motion to dismiss. Seizing on a single sentence from that opinion, divorced from its context, Defendants argue that standing alone their modest interim modifications to EPA's policy reduce Plaintiffs' claims to "isolated instances of noncompliance with EPA's policy in the future" that are no longer subject to judicial review. Defs.' Mem. at 10, Dkt. 21. To the contrary, these modifications have no effect on and do not even purport to address the allegations in Claim One, which flow from an entirely different and distinct pattern of conduct by top EPA officials to override governing law, regulations, and the prior recordkeeping policy to ensure records of the agency's actions and decisions are not even created. *See* Compl. ¶¶ 57-61.

Defendants' mootness argument also rests on the patently falsely assertion that the Court's Memorandum Opinion "narrowed the scope of the claim Plaintiffs could bring." Defs.'

Mem. at 4. To the contrary, in the process of holding that Claim One was justiciable, the Court characterized that claim broadly as based on a belief "that Pruitt and EPA engaged in a *practice* violating [44 U.S.C.] § 3101, which requires agencies to 'make and preserve records containing adequate and proper documentation of the organization, function, policies, decisions, procedures, and essential transactions of the agency.'" Mem. Op. at 8 (emphasis added). The Court went on to distinguish between claims like those Plaintiffs raise that concern an agency practice "in the aggregate" and therefore are justiciable, and those requesting review of "isolated acts" that are not. *Id.* at 11. In reaching this conclusion this Court drew support from *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993), and its implication "that such claims are appropriate for judicial review." Mem. Op. at 11.

Defendants have offered no countervailing facts to rebut the allegations supporting Claim One. The Complaint cites reports that then-Administrator Scott Pruitt "and other EPA political appointees . . . have verbally instructed EPA staff not to create a written record about major substantive matters[.]" Compl. ¶ 38; *see also id.* ¶ 58. Further, these top EPA officials have themselves "affirmatively elected not to create and preserve records adequately documenting the organization, functions, policies, decisions, procedures and essential transactions of the EPA." *Id.* ¶ 57. Plaintiffs identified a specific example of top EPA officials giving verbal instructions regarding a new analysis of an existing rule that was described as "political staff giving verbal instructions to get the outcome they want, essentially overnight." *Id.* ¶ 41. And while much of the Complaint focuses on the conduct of former Administrator Pruitt and the "extraordinary lengths" he went to "to avoid creating federal records and maintain secrecy," *id.* ¶ 45, it makes clear Plaintiffs also challenge the conduct of other top agency officials who acted at the direction of or in concert with Administrator Pruitt.

Finally, although Defendants "vigorously dispute" that the EPA ever had an informal or formal policy that failed to comply with the FRA, *see* Defs.' Mem. at 1, neither the two proffered declarations from Agency Records Officer John B. Ellis nor the attached exhibits even purport to support this categorical denial. Nor do they rebut Plaintiffs' allegations about the directives and practices of agency leadership. For the purposes of this motion, the Court must therefore assume those unrebutted allegations (and any inferences drawn from them) to be true. *Jeong Seon Han v. Lynch*, 223 F. Supp. 3d 95, 103 (D.D.C. 2016) ("When ruling on a Rule 12(b)(1) motion, the court must treat the complaint's factual allegations as true and afford the plaintiff the benefit of all inferences that can be derived from the facts alleged.") (internal citations and quotations omitted).[1]

C. Claim Two Is Not Moot Because It Challenges EPA's Records Management Program, Not Merely Its Policy.

Defendants' adoption and promulgation of an interim records management *policy* also fails to moot Claim Two because Defendants have not established that the minor changes to EPA's written policy completely address and resolve the more systemic deficiencies with the agency's records management *program* that Claim Two alleges. Nor does the adoption of an interim policy even assure that the interim changes will be adopted on a permanent basis. The fact that one of several issues raised by this claim may have been resolved does not moot the remainder of the live issues that the Court may yet address. *See Powell* 395 U.S. at 497 (1969).

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[1] Defendants have captioned their motion as one to dismiss this case as "moot under Article III of the Constitution," Defendants' Motion to Dismiss as Moot, or, in the Alternative, for Summary Judgment (Dkt. 21), but they fail to even cite Fed. R. Civ. P. 12(b)(1), much less explain how that rule's standards are met here. Their supporting memorandum is equally deficient and, under the confusing title "Standard of Review," references only Article III of the Constitution and Fed. R. Civ. P. 56. *See* Defs.' Mem. at 7.

Claim Two charges that Defendants have not met this statutory obligation to implement and maintain effective controls over EPA's records management program. The FRA requires the head of the agency to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency" that must provide for "effective controls over the creation and over the maintenance and use of records in the conduct of current business." 44 U.S.C. § 3102(1) ; *see also* 36 C.F.R. § 1220.30(c)(1). The FRA defines the term "records management" in a manner that clearly contemplates much more than simply establishing a paper policy. Rather, records management means:

> the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations.

44 U.S.C. § 2901(2). Regulations promulgated by the National Archives and Records Administration ("NARA") further require that "procedures, directives and other issuances; systems planning and development documentation; and other relevant records include recordkeeping requirements for records in all media . . ." 36 C.F.R. § 1222.24(a).

As pleaded, Claim Two constitutes more than an allegation that the agency's policy was inconsistent with the FRA and NARA regulations. The Complaint specifically alleges that "[n]otwithstanding the existence of a written records management policy dating back to 2015, Administrator Pruitt and other EPA officials have overridden or ignored their FRA obligations with impunity." Compl. ¶ 64. The Complaint further alleges that the ability of officials to flout their FRA obligations stems not from the absence of certain language in the agency's written policy but rather from "[t]he lack of effective controls over the agency's records program[.]" *Id.* Beyond these systemic problems with the agency's records program, the Complaint notes the

failure of the then-current policy "to address the obligation the FRA and implementing NARA regulations impose on all agencies to memorialize in writing all substantive decisions and commitments reached orally . . . or electronically." *Id.* ¶ 65.

Defendants have offered no evidence challenging the factual accuracy of these allegations. The two Ellis Declarations and associated exhibits fail to address Plaintiffs' broader allegations regarding unlawful directives of top agency officials and an agency practice of affirmatively electing not to create records. They document no changes to the agency's records management program beyond the issuance and communication of the interim written policy. For instance, EPA apparently has not modified either the National Records Management Program FAQ (Second Ellis Decl. Ex. C) or the FY18 Mandatory Records Management Training (Second Ellis Decl. Ex. D). Nor does the excerpt of the records management briefing issued to Administrator Wheeler (Second Ellis Decl. Ex. E) on May 30, 2018 demonstrate that the agency has incorporated the interim policy into its leadership training or made other adjustments to its records management program.

Properly construed, Claim Two is therefore not mooted by the addition of "the language Plaintiffs alleged that EPA's policy should have included." Defs.' Mem. at 8. Standing alone, the inclusion in EPA's written records management policy of "specific language, drawn directly from NARA regulations," *id.*, ignores a critical aspect of Claim Two, namely, Defendants' failure to institute "*effective controls* over the agency's records program," Compl. ¶ 63 (emphasis added). To redress these alleged violations of the FRA, Plaintiffs seek relief that goes beyond merely requesting that Defendants issue a written policy that is consistent with the FRA and NARA regulations. Rather, Plaintiffs have requested "an injunction compelling defendants Pruitt and the EPA to maintain a records management *program* to adequately document agency

decisions and activities," and a declaration that Defendants' "failure to maintain a *program* to adequately document agency decisions and activities is in violation of 5 U.S.C. §§ 702, 706." *Id.* at ¶ 66 (emphasis added).

In sum, Defendants rely only on their adoption and promulgation of the interim records management policy as evidence that Plaintiffs' claims are moot. But the unrebutted programmatic problems Plaintiffs have alleged remain untouched by the modest modifications Defendants have made on an interim basis to their written policy and therefore continue to present a live controversy.

II. DEFENDANTS HAVE NOT MET THEIR BURDEN OF DEMONSTRATING THEIR VOLUNTARY CESSATION OF UNLAWFUL CONDUCT MOOTS THIS ACTION.

Whether Defendants' issuance of an interim recordkeeping policy renders Plaintiffs' claims moot depends not on "what EPA's policy currently is," as Defendants mistakenly suggest, Defs.' Mem. at 1, but rather on whether "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). Defendants' motion for mootness rests entirely on the assertion that their promulgation of an interim records management policy evinces their cessation of all unlawful conduct.[2] For the reasons articulated in Section I, *supra*, Plaintiffs dispute whether that is the case, but even if the Court were to presume that EPA's new policy represents more sweeping change and that the interim policy will be adopted as a permanent policy, Defendants still would not have met their

[2] To be sure, Defendants also represent that they "vigorously dispute that they ever had a policy—formal, informal, or otherwise—of failing to comply with the FRA, including its records-creation requirements," Defs.' Mem at 1, but they have neither challenged the sufficiency of Plaintiffs' allegations under Rule 12(b)(6) of the Federal Rules of Civil Procedure nor come forward with facts supporting this assertion.

"formidable burden" of demonstrating that their voluntary cessation of unlawful conduct moots Plaintiffs' claims in their entirety. *Already, LLC*, 568 U.S. at 91. When evaluated against the background of serious and systemic violations of the FRA by top level EPA officials, the limited modifications Defendants have made to their written records policy fail to demonstrate that there is no reasonable that the alleged violations will recur or that the remedial action they have taken completely and irrevocably eradicated the effects of the alleged violations. *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008)

A. Governing Standards.

It is "well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *see also Friends of the Earth, Inc.*, 528 U.S. at 193. A defendant seeking to moot its case through its voluntary compliance "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC*, 568 U.S. at 91 (quoting *Friends of the Earth, Inc.*, 528 U.S. at 190). This burden is met by satisfying two requirements: "(1) there is no reasonable expectation . . . that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Larsen*, 525 F.3d at 4 (internal citations and quotation marks omitted).

Courts impose such a "stringent standard" on a defendant claiming mootness "to ensure that [a] defendant[] cannot 'insulate itself from any challenged to its illegal conduct simply by suspending the illegal activity.'" *Fund for Animals v. Jones*, 151 F. Supp. 2d 1, 7 (D.D.C. 2001) (quoting *Blue Ocean Pres. Soc'y v. Watkins*, 767 S. Supp. 1518, 1524 (D. Haw. 1991)). Applying this standard, the Supreme Court refused to find moot a claim seeking to enjoin illegal activity by police officers simply because an administrative moratorium had banned the practice.

See City of Los Angeles v. Lyons, 461 U.S. 95, 100-101 (1982). The Court reasoned that the case was not moot because the moratorium was not permanent and could be lifted at any time. *Id.* at 101. Likewise, the Supreme Court rejected a city's claim that retracting unlawful components of a city ordinance mooted a case challenging the legality of the original language. *City of Mesquite*, 455 U.S. at 289.

In an apparent effort to escape their burden of proof, Defendants erroneously invoke authorities on Article III standing, including *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), that place the burden of proof on a plaintiff, rather than those addressing mootness based on voluntary compliance where the defendant bears the burden of proof. Defs.' Mem. at 7-8. The Supreme Court, however, has drawn a clear distinction between standing and mootness. In *Friends of the Earth, Inc.*, 528 U.S. at 190, the Court explained that its previous "description of mootness as 'standing set in a time frame'" was not accurate in part because where a defendant asserts that a case is moot due to voluntary compliance, the defendant bears the burden of proof. By contrast, where a defendant challenges a plaintiff's standing, the plaintiff bears the burden of proof. *Id.*

Defendants also mistakenly quote from the portion of *Lyons* that addresses standing, *see* Defs.' Mem. at 8 (citing *Lyons*, 461 U.S. at 105), rather than the part of the opinion rejecting the city's mootness defense, *see Lyons*, 461 U.S. at 101 ("We agree with the City that the case is not moot, since the moratorium by its terms is not permanent. Intervening events have not irrevocably eradicated the effects of the alleged violation.") (internal quotation omitted). Here, where Defendants have not challenged Plaintiffs' standing to bring this action in either the

instant motion or in Defendants' previous motion to dismiss, the standing authorities they cite are completely inapposite.[3]

B. Defendants Have Failed to Demonstrate There Is No Reasonable Expectation the Alleged Violations Will Not Recur.

Defendants have not established a reasonable expectation that the alleged violations will not reoccur because, as discussed *supra*, the modest changes in Defendants' interim recordkeeping policy leave the bulk of Plaintiffs' claims untouched. Defendants have made no showing that the policy changes are sufficient to create a reasonable expectation that top officials will not issue directives and engage in a practice of failing to create records, as Plaintiffs have alleged in Claim One. Nor have Defendants made a showing that the policy changes are sufficient to protect against the programmatic failures that Plaintiffs allege in Claim Two. For instance, even though Defendants claim that there will be "agency-wide training on the substance of that policy," Defs.' Mem. at 12, Defendants have not in fact produced training materials that reflect the changes to the policy or special emphasis on protecting against the violations Plaintiffs allege. *See* Second Ellis Decl. Exs. C-E. It necessarily follows that Defendants have fallen far short of providing the required absolute clarity that the alleged wrongful behavior, which goes well beyond any omissions in EPA's former recordkeeping policy, "could not reasonably be expected to recur." *Already, LLC*, 568 U.S. at 91 (internal quotation and citation omitted).

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[3] Defendants' invocation of *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 78 (2013), Defs.' Mem. at 7, is even further afield. There the Court held that a collective action brought under the Fair Labor Standard Act of 1938 by a single named plaintiff was not justiciable once the lone plaintiff's claim was moot. In so doing, the Court explicitly refused to consider whether the plaintiff's claim was moot because the issue of mootness was not properly before it, and instead simply assumed that fact in its discussion of the justiciability of the collective action. *Id.* at 69, 73.

C. Defendants Have Failed to Prove Their Modest Additions to Their Policy Completely and Irrevocably Eradicate the Effects of the Alleged FRA Violations.

In addition, Defendants fail to meet their burden of demonstrating that the EPA's limited modifications to its policy completely and irrevocably eradicated the effects of the FRA violations alleged in Claims One and Two.

In response to the allegations in Claim One about a pattern of conduct by top EPA officials, Defendants have proffered no evidence of communications from the EPA's leadership disavowing prior instructions not to create records, changes to its training documents for EPA leadership or for rank-and-file employees, or any other programmatic changes to ensure that records of agency decisions are created in fact, not just in theory. Those and other additional curative actions are likely to form part of the relief Plaintiffs seek given the culture of secrecy Plaintiffs allege emanated from the highest levels of the agency.

Specifically, the Complaint alleges, among other things, that:

- "EPA Administrator Pruitt and other EPA political appointees reportedly have verbally instructed EPA staff not to create a written record about major substantive matters, including significant proposed changes to a rule regarding water quality in the United States," Compl. ¶ 38;

- "Administrator Pruitt reportedly also has prohibited staff from bringing cell phones into meetings and directed staff not to take notes to avoid the creation of any record of his questions and/or directions," Compl. ¶ 39;

- "Administrator Pruitt's deputies gave agency economists verbal instructions to produce a new analysis of the rule that eliminated consideration of the economic benefits that the agency had previously identified," Compl. ¶ 41;

- Top EPA officials themselves "affirmatively elected not to create and preserve records adequately documenting the organization, functions, policies, decisions, procedures and essential transactions of the EPA," Compl. ¶ 57, and

- "Administrator Pruitt 'does not send emails out,' disperses orders verbally, and acts 'like a very good attorney not leaving a paper trail.'" Compl. ¶ 47.

Until Plaintiffs have had an opportunity to conduct discovery to prove the scope of these alleged violations or Defendants come forward with evidence rebutting the factual allegations in the Complaint, the Court has no basis from which to conclude that modest modifications to the EPA's written records management policy completely and irrevocably eradicate the effects of the conduct alleged in Claim One.

Similarly, Defendants have failed to carry their burden of demonstrating the changes to their written policy fully and completely address and eradicate the conduct alleged in Claim Two. As discussed, the allegations supporting Claim Two address the agency's failure to "establish and maintain" an adequate records management program that has "effective controls" in place. Compl. ¶ 63. Merely changing a few passages in the written guidance, with no corresponding changes to agency training or the way in which EPA monitors and ensures compliance, is a half-measure that falls far well short of completely and irrevocably addressing the violations that Plaintiffs allege.

To overcome this deficiency, Defendants claim they are entitled to a presumption of good faith "that there is no reasonable expectation of EPA adopting a contrary policy in the future," Defs.' Mem. at 12, but the facts do not bear this out. EPA's policy is "interim" in nature, and subject to change when EPA undergoes the forthcoming "comprehensive review of its records management policy" in fiscal year 2019. Second Ellis Decl. Ex. B; *see also* Second Ellis Decl. ¶ 5. Even if EPA's stated intention "to maintain the reference to employees' obligation to document oral decisions in any future update," *id.*, sufficed to meet the agency's burden of proving there is no reasonable expectation EPA will in the future revert to its former deficient policy, it does not provide Defendants with a basis for asserting mootness with respect to Plaintiffs' far broader claims of programmatic deficiencies with the agency's records

management program. Faced with a similar blanket assertion of mootness in *CREW v. SEC*, 858 F. Supp. 2d 51 (D.D.C. 2012), this Court concluded a changed policy did not moot claims regarding other issues—in that case, the "recovery of documents that [had] already been unlawfully destroyed," *id.* at 61. That same reasoning applies here.

In sum, the partial and limited steps the EPA has voluntarily undertaken do not render the rest of Plaintiffs' action moot. *Compare Church of Scientology of California v. United States*, 506 U.S. 9, 13 (1992) (holding that the availability of a partial remedy "is sufficient to prevent this case from being moot") *with Nat. Res. Def. Council, Inc. v. U. S. Nuclear Regulatory Comm'n*, 680 F.2d 810, 814 (D.C. Cir. 1982) (explaining that the Plaintiff "'obtained everything that it could recover . . . by a judgment of this court in its favor'") (quoting *People of State of California v. San Pablo & T.R. Co.*, 149 U.S. 308, 314 (1893)). Nor do they provide the full spectrum of relief requested in the complaint, including an injunction compelling the Defendants "to maintain an adequate and proper record of the EPA's organization, functions, policies, decisions, procedures and essential transactions," and to "maintain a program to adequately document the EPA's organization, functions, policies, decisions, procedures and essential transactions." Compl., Prayer for Relief, ¶¶ 2, 4. Because this is an action brought under the Administrative Procedure Act ("APA"), plaintiffs are entitled to relief that both "hold[s] unlawful and set[s] aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." and to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706. Defendants' actions to date do not come close to providing this relief.

III. DEFENDANTS' ALTERNATIVE MOTION FOR SUMMARY JUDGMENT IS PROCEDURALLY DEFICIENT AND PREMATURE.

The Court should deny Defendants' alternative motion for summary judgment because resolution of Plaintiffs' claims will require discovery beyond the incomplete and procedurally deficient "administrative record" that Defendants have asked the Court to recognize. Not only is discovery a routine practice in federal civil litigation but, as set forth in Plaintiffs' Rule 56(d) declaration, it would provide Plaintiffs with access to facts crucial to responding to Defendants' motion for summary judgment.

A. The Court Should Not Rely on an "Administrative Record" That Is Incomplete and Procedurally Deficient.

Defendants have moved for summary judgment based on evidence they have denominated as the "administrative record." Regardless of the label Defendants use, the record currently before the court is incomplete and therefore insufficient to resolve material—and at this point, unexplored—questions of fact. Plaintiffs' allegations that the EPA and its leadership issued unlawful directives, engaged in a practice of noncompliance, and failed to maintain an effective records management program—including up-to-date training and procedures—cannot be resolved without discovery. *See Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487–88 (D.C. Cir. 2011) ("[I]f a party makes a significant showing—variously described as a strong, substantial, or prima facie showing—that it will find material in the agency's possession indicative of bad faith or an incomplete record, it should be granted limited discovery.") (internal citation and quotation omitted).

As explained above, Plaintiffs are challenging the directives and practices of top agency officials as well as the agency's failure to maintain an effective records management program. But "when it comes to agency *inaction* under 5 U.S.C. § 706(1), 'review is not limited to the record as it existed at any single point in time, because there is no final agency action to

demarcate the limits of the record.'" *Nat'l Law Ctr. on Homelessness & Poverty v. U.S. Dep't of Veterans Affairs*, 842 F. Supp. 2d 127, 130 (D.D.C. 2012) (emphasis in original) (quoting *Friends of the Clearwater v. Dombeck,* 222 F.3d 552, 560 (9th Cir. 2000)). Courts have recognized in similar circumstances that discovery may be appropriate because there is no way for the agency to know what materials were considered or relied upon. *See, e.g. Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) ("[T]here may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action."), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977).

The "record" Defendants have proffered, which consists of the two Ellis Declarations and accompanying exhibits, fails to meet the baseline requirements of the APA. At the very least, "[t]he administrative record includes all materials compiled by the agency, that were before the agency at the time the decision was made." *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (internal citations and quotations omitted). The two Ellis Declarations and accompanying exhibits do not meet that standard because they do not contain materials the agency considered when it updated its written policy but took no further action. Nor does this "record" address the serious FRA violations that Plaintiffs have alleged, including oral directives from EPA's leadership and systemic failures to maintain an effective records management program.

In addition, this incomplete "administrative record" is not even properly before the Court because Defendants failed to submit a "statement of facts with references to the administrative record," as is required by Local Rule 7(h)(2). *Kight v. United States,* 850 F. Supp. 2d 165, 170 n.2 (D.D.C. 2012). Failure to comply with this rule deprives the Court and Plaintiffs of the

ability to examine the factual assertions on which Defendants purport to rely and is independent grounds for denying Defendants' alternative motion for summary judgment. *See, e.g.*, *Tabb v. D.C.*, 477 F. Supp. 2d 185, 187 (D.D.C. 2007).[4]

B. Defendants' Motion for Summary Judgment Is Premature Because Plaintiffs Have Not Had an Opportunity to Discover Facts Required to Oppose It.

Defendants' motion for summary judgment is also premature. Courts in the D.C. Circuit have repeatedly recognized that "summary judgment ordinarily 'is proper only after the plaintiff has been given adequate time for discovery.'" *Americable Int'l, Inc. v. Dep't of Navy*, 129 F.3d 1271, 1274 (D.C. Cir. 1997), *as amended* (Jan. 30, 1998) (*quoting First Chicago Int'l v. United Exch. Co.*, 836 F.2d 1375, 1380 (D.C. Cir. 1988)). Not only have Plaintiffs not been given time for discovery, but they cannot state their opposition to Defendants' motion for summary judgment without discovery of certain facts, as set forth in Plaintiffs' Rule 56(d) declaration. Rule 56(d) of the Federal Rules of Civil Procedure provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." As this Court has previously recognized, "Rule 56(d) is intended to prevent railroading a non-moving party through a premature motion for summary judgment before the non-moving party has had the opportunity to make full discovery." *Trudel v. SunTrust Bank*, 288 F. Supp. 3d 239, 256 (D.D.C. 2018) (citations and internal quotation marks omitted). In this Circuit, a Rule 56(d)

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[4] In a footnote Defendants argue they are excused from filing a statement of undisputed material facts "[b]ecause this is an APA case in which 'judicial review is based solely on the administrative record.'" Defs.' Mem at 14 n.5 (quoting LCvR 7(h)(2)). As discussed, the law is clear that in cases like this where Plaintiffs are challenging agency inaction and the agency has offered a patently incomplete record, the Court's review is not limited to an "administrative record" of the sort EPA proffers here.

declaration must outline the particular facts the non-movant intends to discover and describe why those facts are necessary to the litigation, explain why those facts cannot be produced in opposition to the motion for summary judgment, and explain how the information can be obtained through discovery. *Convertino v. U.S. Dep't of Justice*, 684 F.3d 93, 99-100 (D.C. Cir. 2012). Plaintiffs' Rule 56(d) Declaration readily satisfies all three requirements and therefore the Court should deny Defendants' motion for summary judgment and permit Plaintiffs to engage in discovery.

First, Plaintiffs' Rule 56(d) Declaration identifies particular facts that Plaintiffs intend to discover, including:

a. formal or informal directives from EPA leadership, both written and oral, that prevented or is preventing agency records from being created, in violation of the FRA;

b. all communications from agency leadership to political appointees and career officials concerning records management;

c. materials and testimony documenting EPA's actual records management practices, including records documenting oral communications, phone calls, and other in-person meetings;

d. records and testimony of other oral communications and in-person meetings where key agency business was conducted;

e. training, safeguards, and procedures that EPA has instituted to ensure that records of oral communications and in-person meetings are created;

f. evidence of disciplinary action taken against EPA employees for records management violations;

g. calendar entries and phone logs that might establish whether career agency employees were systematically excluded from meetings to avoid detection of unlawful failures to create records of agency business;

h. training documents, procedural safeguards, and other aspects of the agency's records management program that ensure that records are properly created;

i. correspondence between the agency and third parties, including NARA, regarding changes to the agency's records management program;[5] and

j. evidence of tangible changes in the recordkeeping practices of the agency since the adoption and promulgation of the Interim Records Management Policy.

Pls.' Rule 56(d) Decl. ¶ 4. Discovery of these facts is necessary to prove the merits of Plaintiffs' remaining claims, establish and justify the scope of relief that Plaintiffs seek, and rebut defenses that Defendants already are asserting, including lack of subject matter jurisdiction. *Id.* ¶ 5.

In particular, this discovery is needed to assess the accuracy of Defendants' unsupported assertion that the limited remedial action the agency has taken provides a sufficient remedy for the broader violations Plaintiffs have alleged. The discovery outlined in Plaintiffs' Rule 56(d) Declaration also is appropriate because it would allow Plaintiffs to raise genuine issues of fact regarding the completeness and effectiveness of voluntary remedial action by Defendants and therefore goes well beyond merely testing the testimony proffered by Defendants' declarant. *See Orlowske v. Burwell*, 318 F.R.D. 544, 548 (D.D.C. 2016) (citing *Strang v. U.S. Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989) (holding discovery denial not abuse of discretion if request based solely on "desire to test and elaborate affiants' testimony") (internal quotation omitted)).

Second, to date Plaintiffs have had no access to these facts because Plaintiffs have yet to be afforded the opportunity to take *any* discovery, and the information Plaintiffs require is uniquely in the possession of Defendants and third parties. In such circumstances, this Court has held that the second requirement for a Rule 56(d) declaration is met. *See Morales v. Humphrey*, 309 F.R.D. 44, 47–48 (D.D.C. 2015) ("There can be no dispute that Plaintiffs satisfy the second

[5] Of note, Defendants have failed to provide the Court with any information concerning the review that NARA and the Archivist conducted of EPA's records management program, and whether NARA has signed off on the new interim written policy.

prong, as they have no independent access to Humphrey's business records and no discovery has yet taken place in the case.").

Finally, Plaintiffs' Rule 56(d) Declaration makes clear that the information Plaintiffs seek is discoverable. Rule 26(b) of the Federal Rules of Civil Procedure permits discovery of "any nonprivileged matter that is relevant to any party's claim or defense, and proportional to the needs of the case." The information outlined in Plaintiffs' declaration easily satisfies this requirement and is obtainable through interrogatories, document requests, and depositions.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion and permit the parties to proceed to discovery.

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Respectfully Submitted,

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