IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:18-cv-00406 (JEB)
ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, *et al.*,	)	
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS AS MOOT,
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statues

Rules

Regulations

**The authorities upon which we chiefly rely are marked with asterisks.*

INTRODUCTION

Six years ago, in *Citizens for Responsibility and Ethics in Washington v. Securities & Exchange Commission*, 858 F. Supp. 2d 51 (D.D.C. 2012) (Boasberg, J.) ("*CREW v. SEC*"), this Court confronted a set of facts that is functionally identical to those of this case. In *CREW v. SEC*, CREW alleged that the SEC's records-retention policy did not comply with the Federal Records Act ("FRA"). *Id.* at 56. The SEC contended that any challenge to the policy was moot because it had withdrawn the policy. *See id.* CREW opposed the motion and argued that "1) there is a lack of evidence before the Court regarding the SEC's new policy; 2) there are questions as to whether the new policy is in fact being implemented; 3) the claimed 'new policy' is an interim, non-final policy; and 4) there is a reasonable possibility that the previous policy will be reenacted." *Id.* at 62.

This Court rejected CREW's arguments and held that any challenge to the withdrawn policy was moot. As the Court explained, "where the defendant is a government actor — and not a private litigant — there is less concern about the recurrence of objectionable behavior." *Id.* at 61. Rejecting CREW's fears of future unlawful action, the Court explained that "Plaintiffs' concerns . . . are largely speculative," and that the Court could "not find record evidence to undermine Defendants' claim that the SEC has abandoned its previous policy." *Id.* at 62; *accord id.* at 63 ("While Plaintiff's brief raises concerns about the possible recurrence of unlawful document destruction, there are no facts to suggest any intent by the SEC to abandon its efforts to comply with the FRA or to suggest that the SEC's new policy is some sort of sham for continuing possibility unlawful conduct, or that the new policy is somehow not genuine." (citations omitted)). "Although Plaintiff's speculations about potential recurrence might be sufficient were Defendants private litigants, such conjecture is insufficient here, where the SEC is a governmental entity." *Id.* at 63.

That same analysis controls this case. Just as in *CREW v. SEC*, Plaintiffs here alleged that EPA once had a records policy that did not satisfy the FRA. Just as in *CREW v. SEC*, EPA has taken steps to make clear that to the extent it ever had a policy that did not comply with the FRA (a proposition that EPA vigorously disputes), that policy has been withdrawn, and all employees are expected to follow the FRA. *See generally* ECF No. 21 ("Defs' Mot."). Specifically, on August 28, 2018, EPA adopted Interim Records Management Policy 2155.4, which expressly states that employees must "[d]ocument the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically." *See* Second Declaration of John B. Ellis (ECF No. 21-1, "Second Ellis Decl.") Ex. A. On September 14, 2018, EPA sent an email to every single EPA employee, informing them that the Interim Records Management Policy had been adopted, emphasizing that "all substantive decisions and commitments reached orally must be documented as records," and stating that the Interim Records Management Policy "controls and supersedes any prior policy to the extent such policy is inconsistent with this Interim Records Management Policy." *Id.* Ex. B.

In addition to these actions post-dating the Court's ruling on Defendants' initial motion to dismiss, EPA is continuing to, as in prior years, (1) make available a frequently asked question ("FAQ") page to all employees indicating that "[a]ny oral communication where an Agency decision is made, and that is not otherwise documented, needs to be captured and placed in your recordkeeping system," Second Ellis Decl. Ex. C; (2) require all EPA employees to complete annual training instructing them that "[v]erbal communications, voicemail or meetings, if they are records, must be documented by notes, or transcripts, and the documentation managed as any other record according to the appropriate records schedule," *id.* Ex. D; and (3) provide new senior

leadership with a Records Management Briefing reminding them of their obligation to "[d]ocument, in an approved Agency records management system, the substance of meetings and conversations where decisions are made, issues are resolved, or policy is established." *Id.* Ex. E.

Because EPA's policy is today and will be tomorrow that employees must fully comply with the FRA, this case is moot. In the alternative, because EPA's policy has always been compliant with the FRA, Defendants are entitled to summary judgment. On either basis, this case should be dismissed.

ARGUMENT

I. The Case Is Moot Because EPA's Policy Is To Fully Document All Decisions And Commitments, Including Those Reached Orally.

A. Claim Two Is Moot In Light Of EPA's Adoption Of An Interim Records Management Policy Expressly Stating The Obligation To Document Significant Decisions And Commitments Reached Orally.

As the Court has recognized, Claim Two contended that "the Agency's current recordkeeping policy does not conform to the FRA and implementing regulations." ECF No. 19 ("Mem. Op.") at 12. Specifically, the Court explained, Claim Two "allege[s] that the Agency's policies fail to incorporate a NARA regulation that requires agencies to 'prescribe the creation and maintenance of records that [d]ocument . . . the formulation and execution of all basic policies and decisions and . . . all substantive decisions and commitments reached orally.'" *Id.* (quoting 36 C.F.R. § 1222.22) (alterations in original). In determining that Plaintiffs had stated a claim, the Court observed that EPA's former Records Management Policy "does not mention any mandate to create records for 'substantive decisions and commitments reached orally' as required by NARA." *Id.* at 13. Because EPA has now amended its Records Management Policy to include the regulatory language that the Court found was absent, Claim Two is moot.

Plaintiffs no longer have any objection to the content of the Records Management Policy. Instead, Plaintiffs seek to describe Claim Two as challenging "systematic failures in the agency's records management program — of which an FRA-compliant policy is only one component." ECF No. 24 ("Pls' Opp.") at 3. Plaintiffs' argument, in other words, is that Claim Two permits them to challenge not only Defendants' records management policies, but also how effectively the agency has implemented those policies and how carefully agency personnel are following them.

The Court should reject this attempt to redefine Claim Two. In addition to the fact that Plaintiffs' current construction is inconsistent with the Court's, any attempt to expand Claim Two to reach the question of compliance with policies, rather than policies themselves, renders Claim Two duplicative of Claim One. Claim One alleges a "policy and practice of affirmatively violating the FRA by directing staff not to create records," Pls' Opp. at 1; in other words, Claim One is focused on alleged violations of formal FRA policies that amount to an informal policy, rather than on the text of formal polices themselves. Yet Plaintiffs now seek to redefine Claim Two to also allege that there will be violations of EPA's formal records policies. That framing renders Claim Two duplicative — and subject to dismissal for all the reasons discussed with respect to Claim One below.[1]

[1] Invoking 44 U.S.C. § 3102, which requires agencies to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency," Plaintiffs argue that they are entitled to challenge how effectively EPA has enforced its records policies. *See* Pls' Opp. at 8. The mere fact that that the statute directs the agency to create a records program, however, does not mean that judicial review is available as to how well the agency has done so. As the Court has explained, this is an APA case, and so review is only available over final agency action. *See* Mem. Op. at 11; *see also infra* Part II.B (discussing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004)). In the context of this case, that means review of records policies, not a wide-ranging inquiry into the sufficiency of EPA's records programs. *See* Mem. Op. at 11-12.

B. Claim One Is Moot Because EPA Has Instructed All EPA Employees Of Their Obligation To Document Significant Decisions And Commitments Reached Orally And Made Clear That This Instruction Supersedes Any Alleged Policy To The Contrary.

Claim One is also moot. Construing Claim One, the Court held that Plaintiffs may only challenge EPA's recordkeeping practices to the extent that such practices amount to an informal policy. Rejecting Defendants' concerns of "future suits challenging every purported FRA violation," the Court made clear that it was permitting judicial review only of "policies and regulations regarding what records an agency must create," Mem. Op. at 11 (emphasis omitted), and that under the APA, only "[a]n agency policy — formal or otherwise — that refuses to 'make . . . records' in accordance with the FRA is reviewable." *Id.* at 12 (alterations in original). In contrast, Plaintiffs "may not demand judicial review of isolated acts allegedly in violation of § 3101." *Id.* at 11; *see also, e.g.*, Aug. 28 Status Conf. Tr. at 11:1-3 ("I think they're saying there was a policy, unwritten, to not memorialize oral decisions, right?").

Plaintiffs observe in response that the Court described Claim One as "based on a belief 'that Pruitt and EPA engaged in a *practice* violating [44 U.S.C. §] 3101." Pls' Opp. at 6 (quoting Mem. Op. at 8; alteration in original). The Court's description of how Plaintiffs pleaded their claim, however, has no bearing on what aspects of the claim the Court found to be justiciable. In light of the Court's actual ruling, which was clear, Claim One can only challenge an EPA policy, whether that policy was formally written down or informally communicated to employees.

When a government policy is withdrawn, a challenge to that policy is moot. As the D.C. Circuit has explained, "executive action rescinding or repromulgating a regulation can moot a challenge to its validity." *Gulf Oil Corp. v. Brock*, 778 F.2d 834, 840 (D.C. Cir. 1985); *accord, e.g.*, *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 274 (D.C. Cir. 2001) (case

moot where agency "has eliminated the allegedly unlawful provision"); *Ctr. for Sci. in the Pub. Interest v. Regan*, 727 F.2d 1161, 1164-65 (D.C. Cir. 1984) (similar).

In *CREW v. SEC*, the Court noted that the "[c]hanged policy need not come in the form of a formal revocation of the previous policy." 858 F. Supp. 2d at 62. Here, however, any alleged policy contrary to the Interim Records Management Policy has indeed been formally withdrawn: EPA has informed every single EPA employee that the revised Records Management Policy requires the documentation of oral decisions and "controls and supersedes any prior policy to the extent such policy is inconsistent with this Interim Records Management Policy." Second Ellis Decl. Ex. B. "Because the Constitution nowhere licenses [the Court] to rule on the legality of an agency policy that no longer exists and that, according to the district court, will never again exist," Claim One is moot. *See Worth v. Jackson*, 451 F.3d 854, 861 (D.C. Cir. 2006).

Nor are Plaintiffs' claims saved from mootness by the expansive relief that they seek. *See* Pls' Opp. at 9, 16 (highlighting their requests that the Court enter an injunction compelling Defendants to comply with the FRA in the future). As the Court has recognized, this is an APA case, with review limited to final agency action. *See* Mem. Op. at 11. Under the APA, the Court is authorized to "hold unlawful and set aside" final agency action that does not comport with the APA standard of review. *See* 5 U.S.C. § 706(2). But "[u]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995). As the Supreme Court explained in *Norton v. S. Utah Wilderness Alliance*,

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved — which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work

> out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management. . . . The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA.

542 U.S. 55, 66-67 (2004). Under this binding law, even if Plaintiffs were to win this case, they would be entitled only to an order setting aside the old policy and directing the agency to promulgate a new policy — precisely what the agency has already done. The case is therefore moot. *See LaRoque v. Holder*, 679 F.3d 905, 909 (D.C. Cir. 2012) (case is moot where "appellants have obtained everything that they could recover from this lawsuit" (alterations and internal quotation marks omitted)).

In *CREW v. SEC*, CREW argued that the SEC had not actually withdrawn the challenged policy because there were factual disputes as to "whether, in fact, document destruction continues notwithstanding the SEC's claim to have withdrawn the policies authorizing that destruction." Pl's Opp. to Def's Mot. to Dismiss, *CREW v. SEC*, No. 1:11-cv-01732-JEB, ECF No. 8, at 19 (D.D.C. Jan. 13, 2012); *accord id.* at 20 (contending that "staff failed to cease their unlawful document destruction in the face of this new guidance"). The Court nevertheless found that the relevant claims were moot, as it suffices for the defendant to show that it is "taking seriously Plaintiff's concerns with the prior policy and is undertaking efforts to ensure that any unlawful [action] is discontinued." *CREW v. SEC*, 858 F. Supp. 2d at 62-63. Even assuming that EPA ever had a policy of failing to comply with the FRA, which it did not, the analysis in *CREW v. SEC* compels the conclusion that any challenge to such a policy is now moot.

C. Plaintiffs Cannot Invoke The Voluntary Cessation Exception To Mootness.

Plaintiffs further contend that this case is not moot because "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." Pls' Opp. at 2. Plaintiffs are wrong.

1. There Is No Reasonable Expectation That The Alleged Unlawful Conduct Will Recur.

At the outset, there is no reasonable expectation that, in the future, EPA will adopt a policy of failing to comply with the FRA's records-creation requirements. In contending otherwise, Plaintiffs simply ignore this Court's holding that speculation is inadequate to show that a governmental defendant will violate the law in the future. As this Court has recognized, "other Circuits have consistently recognized that where the defendant is a government actor — and not a private litigant — there is less concern about the recurrence of objectionable behavior." *CREW v. SEC*, 858 F. Supp. 2d at 61-62 (citing copious authority). Speculation about future unlawful action "might be sufficient were Defendants private litigants, [but] such conjecture is insufficient here, where the [defendant] is a governmental entity." *Id.* at 63; *see also Worth*, 451 F.3d at 861 (crediting agency affidavit that agency would not renew challenged practice).

Here, EPA has made clear that it is committed to ongoing compliance with the FRA, now and in the future: EPA has adopted an Interim Records Management Policy that satisfies the FRA, has distributed that policy to all agency employees, has instructed them to follow that policy to the exclusion of any other policy, and will continue to train all employees on the substance of that policy. In a sworn declaration, the agency has further stated that it "intends to maintain the reference to employees' obligation to document oral decisions in any future update of the Interim Records Management Policy to a final Records Management Policy." Second Ellis Decl. ¶ 5.

Plaintiffs nonetheless insist that "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." Pls' Opp. at 13. Yet just as in in *CREW v.*

SEC, there are "no facts to suggest any intent by the [EPA] to abandon its efforts to comply with the FRA or to suggest that the [EPA]'s new policy is some sort of sham for continuing possibly unlawful conduct, or that the new policy is somehow not genuine." 858 F. Supp. 2d at 63. The argument that the plaintiffs made in *CREW v. SEC*, in fact, is all but identical to the argument that Plaintiffs make here:

> Plaintiff, however, adamantly disputes Defendants' claims that the challenged policy has been abandoned. It argues, among other things, that 1) there is a lack of evidence before the Court regarding the SEC's new policy; 2) there are questions as to whether the new policy is in fact being implemented; 3) the claimed "new policy" is an interim, non-final policy; and 4) there is a reasonable possibility that the previous policy will be reenacted.
>
> Plaintiff's concerns, however, are largely speculative, and the Court does not find record evidence to undermine Defendants' claim that the SEC has abandoned its previous policy for preliminary investigative materials and that it is actively developing a new policy that will be approved by NARA.

Id. at 62 (citations omitted). Just as in *CREW v. SEC*, Plaintiffs' speculation that employees might not follow the records policy is not enough to save this case from mootness.

Instead of addressing this Court's analysis in *CREW v. SEC*, Plaintiffs invoke case law that is plainly distinguishable. For example, Plaintiffs rely upon *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), which held that the repeal of an ordinance did not render a challenge moot because the defendant admitted that it would reenact the ordinance if the judgment were vacated. *See* 455 U.S. at 289 & n.11; *see also Initiative & Referendum Inst. v. U.S. Postal Serv.*, 741 F. Supp. 2d 27, 34 (D.D.C. 2010) ("The court held that the city's repeal of the ordinance did not moot the issue because the city announced an intention to reenact the provision if the district court judgment holding the ordinance unconstitutionally vague were vacated."); *Nat'l Black Police Ass'n v. Dist. Of Col.*, 108 F.3d 346, 349 (D.C. Cir. 1997) (*City of Mesquite* does not apply where "[t]here is no evidence in the record to suggest that the D.C. Council might repeal the new legislation and reenact strict contribution limits"). *City of Mesquite* has no application here,

where there is no reason to believe that EPA will adopt an unlawful FRA policy in the future and indeed EPA has specifically made clear that it will not do so. *See* Second Ellis Decl. ¶ 5.

Plaintiff's reference to the mootness analysis in *Los Angeles v. Lyons*, 461 U.S. 95 (1983), is likewise irrelevant, since in that case the Court held only that a temporary moratorium on the challenged activity was insufficient to moot the case (though the Court held that it lacked jurisdiction for other reasons). *See* 461 U.S. at 101. Again, in this case, EPA has made clear that it "intends to maintain the reference to employees' obligation to document oral decisions in any future update of the Interim Records Policy to a final Records Management Policy," Second Ellis Decl. ¶ 5; there is nothing temporary about EPA's actions. "[T]he Supreme Court has occasionally addressed challenges to laws no longer in force, but it has done so only when the statute or ordinance in question has been replaced by a substantially similar enactment, or where the governing body expressed an intent to re-enact the allegedly defective law." *Worth*, 451 F.3d at 861 (citations omitted). As in *Worth*, "[n]either condition exists here." *Id.*[2]

Finally, Plaintiffs state that Defendants "have not . . . produced training materials that reflect the changes to the policy or special emphasis on protecting against the violations Plaintiffs allege." Pls' Opp. at 13. The training materials do not reflect changes to the policy because the policy has not changed: EPA has always required the documentation of significant decisions and

[2] Plaintiffs also suggest that Defendants "erroneously invoke authorities on Article III standing" in "[a]n apparent effort to escape their burden of proof." Pls' Opp. at 12. Defendants understand their burden. *See* Defs' Mot. at 11 (recognizing that "it is the burden of the party asserting mootness to demonstrate that the conduct cannot be expected to recur"). Yet Plaintiffs' suggestion that there is a bright line between standing and mootness is belied by abundant case law. *See, e.g., Hardaway v. Dist. Of Col. Housing Auth.*, 843 F.3d 973, 979 (D.C. Cir. 2016) ("[W]hereas standing is measured by the plaintiff's 'concrete stake' at the outset of the litigation, mootness depends on whether the parties maintain 'a continuing interest' in the litigation today."); *Cause of Action Inst. v. Tillerson*, 285 F. Supp. 3d 201, 207 (D.D.C. 2018) (describing line between standing and mootness as "almost inconsequential").

commitments reached orally. Indeed, the training materials (which pre-dated the development of the Interim Policy) are explicit:

> Verbal communications, voicemail, or meetings, if they are records, *must be documented by notes, or transcriptions*, and the documentation managed as any other record according to the appropriate records schedule.

Second Ellis Decl. Ex. D (emphasis added). The Records Management Briefing for Senior Officials similarly makes clear that senior officials must "[d]ocument, in an approved Agency records management system, the substance of meetings and conversations where decisions are made, issues are resolved, or policy is established." *Id.* Ex. E. Plaintiffs have not identified a single respect in which these training materials are deficient. It is of course possible that future trainings and briefings may refer specifically to the Interim Records Management Policy, now that it has been adopted, but the key point is that the training already instructs employees to document significant decisions and commitments reached orally.

Plaintiffs also ignore the fact that the supposed mastermind behind the FRA violations that they allege, former EPA Administrator Scott Pruitt, has resigned and no longer leads the Agency. Indeed, Plaintiffs' opposition memorandum states that "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,' . . . Plaintiffs also challenge the conduct of other top agency officials who acted *at the direction of or in concert with Administrator Pruitt*.'" Pls' Opp. at 6 (citation omitted and emphasis added). In other words, Plaintiffs' opposition brief makes even clearer that they challenge (1) things that former Administrator Pruitt allegedly did, and (2) things that other people allegedly did "at the direction of or in concert with Administrator Pruitt." *Id.* Insofar as Scott Pruitt no longer works at EPA and he can no longer direct any EPA employee to do anything in concert with him, Plaintiffs' concerns about future violations are even more speculative.

Finally, it bears underscoring that, if Plaintiffs' fears about future unlawful agency action come to pass, they will not be left without a remedy. Dismissal on mootness grounds is without prejudice. *See, e.g.*, *Wilderness Soc'y v. Salazar*, 603 F. Supp. 2d 52, 72 (D.D.C. 2009). Should CREW one day come to believe that EPA is violating the FRA, it may file a new complaint seeking appropriate relief. That is a far more efficient use of the parties' and the Court's resources than litigating the question of whether people who used to work at EPA used to violate the FRA. *See CREW v. SEC*, 858 F. Supp. 2d at 63 (moot claims would be "dismissed without prejudice so that they may be renewed in the event the SEC does not follow through on the creation of the new policy").

2. Any Remaining Effects Of Defendants' Alleged FRA Violations Are Not Remediable.

Plaintiffs further contend that Defendants have not "m[e]t 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." Pls' Opp. at 14. Their argument on this point largely consists of repackaged and repeated arguments that the Interim Records Management Policy, agency-wide dissemination of that policy, and training concerning the substance of that policy will not be effective — arguments to which Defendants have previously responded in detail. *See supra* Part I.C.1.

Nor is it correct that Plaintiffs require "discovery to prove the scope" of any alleged violations, *contra* Pls' Opp. at 15, for the Court to resolve Defendants' mootness challenge. Whether discovery would reveal past violations of the FRA (as Plaintiffs believe it would), or would not (as Defendants submit), it is undisputed that EPA has promulgated a revised Interim Records Management Policy and instructed all employees to follow it prospectively. It simply is not relevant to the mootness analysis whether Defendants' policies satisfied the FRA in the past.

Plaintiffs are also wrong that "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." Pls' Opp. at 15. The relevant question is whether "interim relief or events have completely and irrevocably eradicated the *effects* of the alleged violation." *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (emphasis added). To defeat mootness, however, any residual effects of the ceased conduct must be "curable by the relief demanded." *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1019 (D.C. Cir. 1991). Here, the "effects" about which Plaintiffs complain are an inability to access through FOIA documents that they allege were never created. *See* Compl. ¶¶ 7, 11. Yet none of the relief that Plaintiffs are seeking would bring back records that were allegedly not created in the first place. It follows that there are no lingering effects of the alleged violations that are curable by the relief demanded. The Court can only grant prospective relief, but none is needed because EPA is now in full compliance with the FRA, irrespective of the parties' dispute about the past.

Plaintiffs also observe that EPA's policy is "'interim' in nature," thereby suggesting that it could change in the future. Pls' Opp. at 15. The Court rejected that argument in *CREW v. SEC*, and it should reject it again here. *See* 858 F. Supp. 2d at 62 (dismissing as "largely speculative" Plaintiffs' observation that "the claimed 'new policy' is an interim, non-final policy"). Indeed, EPA's sworn declaration makes clear that the "Policy was designated as an Interim Policy to ensure the Agency reviewed the Records Policy consistent with the Policy's review cycle timeframe, and to meet certain time-critical needs such as a current Office of Inspector General Audit requirement," but that "EPA intends to maintain the reference to employees' obligation to

document oral decisions in any future update of the Interim Records Management Policy to a final Records Management Policy." Second Ellis Decl. ¶ 5.[3]

II. In The Alternative, Defendants Are Entitled To Summary Judgment Because They Never Had A Policy Of Failing To Create Records In Compliance With The FRA, A Conclusion That The Court May Reach On The Existing Record.

Because this case is moot, the Court should not reach Defendants' alternative request for summary judgment. Should the Court reach the issue, however, Defendants submit that they are entitled to summary judgment and that the Court can decide the motion on the existing record.

A. Defendants Are Entitled To Summary Judgment Because They Have Never Had A Policy Of Failing To Create Records In Compliance With The FRA.

Defendants are entitled to summary judgment because their FRA policies have always fully complied with the FRA. As explained in Defendants' motion, while former Records Management Policy 2155.3 did not explicitly reference the obligation to document decisions and commitments reached orally, that obligation has since 2013 been stated in an FAQ page that represents "authoritative guidance from the NRMP regarding the EPA's records management policies, procedures, and standards," Second Ellis Decl. ¶ 8, as well as in training that EPA employees are obligated to complete every year, *see id.* Ex. D. Those materials are entirely faithful to the FRA, and at this juncture, Plaintiffs have zero admissible evidence with which to contend that Defendants ever had a secret policy to the contrary.

[3] To be sure, in *CREW v. SEC*, this Court found that Defendants "ma[de] no argument regarding the recovery of documents that have already been unlawfully destroyed," and accordingly held that certain counts "which concern Defendants' failure to take action to recover documents that were unlawfully destroyed, may proceed." 858 F. Supp. 2d at 55, 61; *see* Pls' Opp. at 16 (referencing this aspect of *CREW v. SEC*). The counts that this Court permitted to go forward, however, sought to compel the SEC to refer the alleged destruction of records to the Attorney General. That holding was premised on the fact that the FRA specifically contemplates action by the Attorney General to recover records that have been deleted or lost. *See* 44 U.S.C. § 3106. Plaintiffs in this case are not asking the EPA to refer anything to the Attorney General, or to do anything else that could possibly remedy the alleged past violations of the FRA.

B. The Court Has A Sufficient Basis Upon Which To Evaluate Defendants' Motion.

Because Plaintiffs have no evidence in support of their claims, they have instead filed a Rule 56(d) affidavit, contending that they are entitled to discovery on their 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." Pls' Opp. at 17.

Plaintiffs' requests amount to a fishing expedition. To obtain relief under Rule 56(d), the party seeking discovery must establish a reasonable basis to believe that discovery would reveal triable issues of fact. *See Messina v. Krakower*, 439 F.3d 755, 762 (D.C. Cir. 2006). Discovery is not permissible when it "would only . . . afford[] [the plaintiff] an opportunity to pursue a 'bare hope of falling upon something that might impugn the [agency's] affidavits.'" *Military Audit Project v. Casey*, 656 F.2d 724, 751-52 (D.C. Cir. 1981) (quoting *Founding Church of Scientology v. NSA*, 610 F.2d 824, 836-37 n.101 (D.C. Cir. 1979)).

Plaintiffs utterly fail to meet their burden. As their Rule 56(d) affidavit makes clear, they want to conduct discovery focused principally on alleged secret instructions not to make records. The only basis that Plaintiffs have for imagining that anyone at EPA has ever provided such instructions, however, is a single news article. *See, e.g.*, Compl. ¶ 38 (citing *New York Times* article); *id.* ¶ 39 (citing same article); *id.* ¶ 41 (citing same article); *id.* ¶ 58 (bare allegation).

To be clear, EPA disputes the accuracy of that article and denies the substance of the allegations. Even if every single word of that article were hypothetically taken as true, however, only two sentences even remotely suggest that anyone at EPA ever told anyone else not to create records:

- "Some employees say they are also told to leave behind their cellphones behind when they meet with Mr. Pruitt, and are sometimes told not to take notes."

- "His aides recently asked career employees to make major changes in a rule regulating water quality in the United States — without any records of the changes they were being ordered to make."

See Coral Davenport & Eric Lipton, Scott Pruitt Is Carrying Out His E.P.A. Agenda In Secret, Critics Say (Aug. 11, 2017), https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html. In other words, as relevant here, the article suggests that (1) certain unnamed employees were "*sometimes*" told not to takes notes when meeting with Mr. Pruitt, and (2) Mr. Pruitt's aides *once* asked employees to make changes to a water quality rule without documenting the changes. That would amount, at the very most, to occasional, stray instructions not to create records. Yet stray violations are exactly what the Court has held are insufficient to state a claim. *See* Mem. Op. at 11 (no review of "isolated acts" in violation of FRA).[4] Beyond the few isolated alleged acts that the Court has already held are insufficient to state a claim, Plaintiffs have no basis whatsoever for imagining the existence of a widespread policy of violating the FRA.[5]

Much of the discovery that Plaintiffs propose is also irrelevant. For example, Plaintiffs propose to seek "records and testimony of other oral communications and in-person meetings

[4] Similarly, in the FOIA context, courts have held that isolated violations of the statute do not amount to an actionable pattern and practice. *See*, *e.g.*, *Middle East Forum v. U.S. Dep't of Treasury*, 317 F. Supp. 3d 257, 265 (D.D.C. 2018) ("isolated failures" do not amount to pattern and practice); *see also Payne Enters. v. United States*, 837 F.2d 486, 491, 495 (D.C. Cir. 1988) ("isolated mistakes by agency officials" distinct from pattern and practice).

[5] Indeed, these reports, if true, would not even suffice to show isolated violations of the FRA. For example, that employees were allegedly sometimes told not to take notes is not necessarily an FRA violation; Plaintiffs do not allege that significant decisions and commitments were made at these meetings, nor do they allege that these meetings were not otherwise documented. As to the water quality rule as to which employees were allegedly told to make changes without documenting reasons, *see* Compl. ¶ 41, there is a wealth of publicly available information about the basis for that rule change. *See generally* Regulations.gov: Definition of Waters of United States - Recodification of Pre-Existing Rules, https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-0001. Plaintiffs also allege that former Administrator Pruitt sometimes made phone calls from phones other than his own, *see* Compl. ¶ 40, but Plaintiffs have never explained why they believe that such a practice, assuming it occurred, would violate the FRA.

where key agency business was conducted," *see* Declaration of Conor Shaw, ECF No. 24-1, ¶ 4(d), as well as "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," *id.* ¶ 4(g). As to the former, it is not apparent how discovery of records that do exist could shed light on records that allegedly do not exist; as to the latter, there is nothing probative of FRA violations in agency leadership meeting without career staff present: at any federal agency, political appointees sometimes meet with other political appointees, career staff sometimes meet with other career staff, and career staff sometimes meet with political appointees. None of those meetings is inherently more suspicious, or probative of an FRA violation, than any other.

C. If The Court Determines That It Needs Additional Facts To Resolve Defendants' Motion, It Should Permit Defendants To Supplement The Record.

Should the Court determine that this case is not moot and that the existing record is insufficient, the Court should permit Defendants to supplement the record, rather than proceed immediately to discovery. This is an APA case, and so discovery is only permitted in circumstances where there is a "'strong showing of bad faith or improper behavior.'" *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 339 (D.C. Cir. 2011) (quoting *Baptist Mem'l Hosp.-Golden Triangle v. Sebelius*, 566 F.3d 226, 230 (D.C. Cir. 2009)). Such circumstances do not exist here; rather, the record that Defendants put before the Court was intended to permit the Court to evaluate whether there was an "[a]n agency policy — formal or otherwise — that refuses to 'make . . . records' in accordance with the FRA," Mem. Op. at 12, which is what the Court has indicated is the question remaining to be decided.[6]

[6] Plaintiffs assert that "discovery [is] a routine practice in federal civil litigation," Pls' Opp. at 17, but it certainly is not a routine practice in APA litigation. Plaintiffs also suggest that review

Should the Court now adopt a more expansive construction of Plaintiffs' claims and determine that it needs additional facts before ruling on Defendants' motion, Defendants should be permitted to provide those facts, rather than by proceeding immediately to burdensome discovery. *See* Fed. R. Civ. P. 56(d)(2) (court may "allow time to obtain affidavits or declarations or to take discovery"). For example, should the Court determine that additional factual development is necessary regarding "how EPA trained and now trains both leadership and rank and file employees," Pls' Opp. at 1, or "whether top agency officials — including Acting Administrator Andrew Wheeler — have been sufficiently instructed about their obligation to both create and preserve records," *id.* at 2, Defendants could supply declarations regarding these efforts. Indeed, in many instances, the information Plaintiffs seek regarding meetings or phone calls has already been released through FOIA or is otherwise publicly available. Although EPA maintains that these facts are not relevant to Plaintiffs' claims as they have been construed by the Court, EPA is prepared to address the substance of these allegations through affidavits, rather than intrusive and disruptive discovery, should the Court determine that these facts are relevant.

Finally, should the Court reject all of the foregoing arguments and conclude that Plaintiffs are entitled to discovery, the Court should invite additional briefing concerning the scope of discovery before any discovery proceeds. Because Defendants do not yet know which (if any) claims will survive this motion and be deemed appropriate for discovery, they are not in a position to meaningfully brief what the scope of discovery should be, how long a discovery period should be permitted, what kinds of discovery are appropriate, and various other issues. Thus, if the Court

---

is not limited to the record because they are challenging failure to act. That argument is incompatible with both this Court's earlier ruling and with *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991), both of which make clear that review is available as to the sufficiency of existing guidelines and policies. There is no authority that would permit Plaintiffs to bring a broader failure to act claim.

permits any discovery (which it should not), it should require Plaintiffs to submit a narrowly tailored proposed discovery plan, and permit Defendants to respond to it, before authorizing discovery.

* * *

This case was filed because of limited, often anonymous, allegations in news articles of isolated FRA violations during the tenure of a former EPA administrator. That administrator no longer works at EPA; EPA has disavowed any violations to the extent that they occurred; and EPA has repeatedly instructed all employees to comply with the FRA going forward. If discovery is permitted in these circumstances, a plaintiff could select virtually any federal agency, allege that there have been isolated FRA violations, and open the door to discovery. That cannot be and is not the law.

CONCLUSION

Defendants respectfully request that the Court grant their motion and terminate this case.

Dated: October 29, 2018

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

/s/ *Steven A. Myers*
Steven A. Myers (NY Bar No. 4823043)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, D.C. 20005
Tel: (202) 305-8648
Fax: (202) 616-8470
Email: Steven.A.Myers@usdoj.gov

Attorneys for Defendants