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)
SCOTT PRUITT, Administrator, U.S. Environmental Protection Agency, *et al.*	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS

Defendants Scott Pruitt, Administrator, U.S. Environmental Protection Agency; U.S. Environmental Protection Agency; David S. Ferriero, Archivist of the United States; and the National Archives and Records Administration, by and through undersigned counsel, respectfully move to dismiss this case pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). As explained in the accompanying memorandum of law, judicial review is precluded over certain of Plaintiffs' claims, others fail for lack of standing, and others fail to state a claim on which relief may be granted. A proposed order accompanies this request.

Dated: May 1, 2018

Respectfully submitted,

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INTRODUCTION

In this case, Plaintiffs contend that the Environmental Protection Agency ("EPA") and the National Archives and Records Administration ("NARA") are not complying with the Federal Records Act ("FRA"). Specifically, Plaintiffs assert that EPA is failing to create records of its essential transactions (Claim One); that EPA has failed to adopt a policy requiring employees to create such records when decisions are made orally (Claim Two); and that NARA has failed to tell EPA, Congress, and the President about EPA's FRA violations (Claim Three). *See generally* Complaint, ECF No. 1 ("Compl."). These claims all fail, for different but related reasons.

At the outset, Claim One fails because under well-established D.C. Circuit precedent, federal courts are precluded from evaluating whether an agency's decisions with respect to particular records comply with the FRA or the agency's own FRA guidelines. *See Armstrong v. Bush*, 924 F.2d 282, 294 (D.C. Cir. 1991) ("Because it would clearly contravene this system of administrative enforcement to authorize private litigants to invoke federal courts to prevent an agency official from improperly destroying or removing records, we hold that the FRA precludes judicial review of such actions."). Because the FRA's preclusion of this kind of claim renders the Administrative Procedure Act's ("APA's") waiver of sovereign immunity inapplicable, and because the FRA does not itself contain a waiver of sovereign immunity, the Court lacks jurisdiction to hear this claim.

The gravamen of Claim Two is that EPA's records guidelines are inadequate because they do not "address the obligation . . . to memorialize in writing all substantive decisions and commitments reached orally." Compl. ¶ 65. As explained in the Declaration of John B. Ellis, EPA's Agency Records Officer, that is wrong: EPA already has exactly such guidelines, which clearly provide that "[a]ny oral communication where an Agency decision or commitment is made, and that is not otherwise documented, needs to be captured and placed in your recordkeeping

system." Declaration of John B. Ellis ("Ellis Decl.") ¶ 6 & Ex. B. EPA employees are regularly trained on their obligations pursuant to this policy. *See id.* ¶ 7 & Ex. C. Because there is no injury for the Court to redress, there is no live controversy between the parties and the Court should dismiss Claim Two for lack of standing.

Finally, Claim Three fails. The FRA provides that, "[w]hen the Archivist finds that a provision of [the FRA] has been or is being violated, the Archivist shall (1) inform in writing the head of the agency concerned of the violation and make recommendations for its correction; and (2) unless satisfactory corrective measures are demonstrably commenced within a reasonable time, submit a written report of the matter to the President and the Congress." 44 U.S.C. § 2115(b). Under the plain text of the statute, no duties are triggered until such time as the Archivist finds that an agency has violated the FRA. At the same time, nothing in the statute requires the Archivist to make such a finding on any timeframe or suggests that his failure to make such a finding is reviewable in federal court. The Court should therefore also dismiss Claim Three.

BACKGROUND

I. Statutory And Regulatory Framework

The FRA is "a collection of statutes governing the creation, management, and disposal of records by federal agencies." *Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999); *see* 44 U.S.C. §§ 2101-20, 2901-11, 3101-07, 3301-14. These statutory provisions "establish a unified system for handling the 'life cycle' of federal records — covering their creation, maintenance and use, and eventually their disposal by either destruction or deposit for preservation." *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 36 (D.C. Cir. 1983).

A. Agencies' Duties

Under the FRA, each agency head is required to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency,"

44 U.S.C. § 3102, and to "establish safeguards against the removal or loss of records the head of such agency determines to be necessary and required by regulations of the Archivist" of the United States. *Id.* § 3105. Each agency head is also directed to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. § 3101.

Pursuant to 44 U.S.C. § 3106, "[t]he head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency." 44 U.S.C. § 3106(a).

B. NARA's Duties

The Archivist acts in concert with federal agencies and agency heads in implementing the FRA. The FRA provides that the Archivist shall "provide guidance and assistance to Federal agencies with respect to . . . ensuring . . . proper records disposition," 44 U.S.C. § 2904(a), "promulgate standards, procedures, and guidelines with respect to records management," *id.* § 2904(c)(1), and "conduct inspections or surveys of the records and the records management programs and practices within and between Federal agencies," *id.* § 2904(c)(7). The Archivist has promulgated regulations governing the creation and maintenance of federal records pursuant to this authority. *See* 36 C.F.R. § 1222.22, *et seq*. Among other things, NARA's regulations provide that agencies must "prescribe the creation and maintenance of records that"

> Document 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.

Id. § 1222.22(e). NARA regulations further provide that agencies must "develop recordkeeping requirements for records series and systems that include:

> Policies and procedures for maintaining the documentation of phone calls, meetings, instant messages, and electronic mail exchanges that include substantive information about agency policies and activities.

Id. § 1222.28(d).

Finally, when the Archivist "finds that a provision of [the FRA] has been or is being violated, the Archivist shall (1) inform in writing the head of the agency concerned of the violation and make recommendations for its correction; and (2) unless satisfactory corrective measures are demonstrably commenced within a reasonable time, submit a written report of the matter to the President and the Congress." 44 U.S.C. § 2115(b).

II. Plaintiffs' Allegations

Plaintiffs are two organizations that have submitted FOIA requests to EPA in the past and allege that they intend to submit such requests to EPA in the future. *See generally* Compl. ¶¶ 5-12. Plaintiffs' allegations support three claims for relief.

In Claim One, Plaintiffs seek a "declaratory judgment that the failure of Defendants Pruitt and the EPA to adequately document agency decisions is arbitrary, capricious, and contrary to the FRA," and request an order "compelling them to make and preserve all records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency." Compl. Claim One (capitalization modified). The purported basis for this claim is Plaintiffs' allegation that "EPA Administrator Pruitt has operated

in extensive secrecy and avoided creating an adequate record of his and the EPA's actions." *Id.* ¶ 36.

In Claim Two, Plaintiffs seek "a declaratory judgment that Defendants Pruitt and the EPA have failed to establish and maintain an adequate program to preserve federal records in compliance with the FRA," as well as an order "compelling Defendants Pruitt and the EPA to establish and maintain an FRA-compliant program." Compl. Claim Two (capitalization modified). The purported basis for this claim is Plaintiffs' allegation that EPA's records management policy "contains no provision implementing the requirement, at 36 C.F.R. § 1222.22, that records of 'all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference)' be created." *Id.* ¶ 35.

In Claim Three, Plaintiffs seek a "declaratory judgment that the Archivist and NARA have failed to inform Administrator Pruitt in writing of the EPA's FRA violations, make recommendations for their correction, and submit a written report to the president and congress," as well as "an order compelling the Archivist and NARA to do so." Compl. Claim Three (capitalization modified). According to the Complaint, CREW has written to advise NARA of the allegations that form the basis of the Complaint, *see generally id.* ¶¶ 49-52, but "CREW has not received any additional correspondence or information from NARA on this matter," *id.* ¶ 53.

STANDARD OF REVIEW

Defendants move to dismiss for lack of jurisdiction under Rule 12(b)(1) and for failure to state a claim upon which relief may be granted under Rule 12(b)(6). Under Rule 12(b)(1), "[i]t is to be presumed that a cause lies outside [federal courts'] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994). The Court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction. *See, e.g.*, *Land v. Dollar*, 330 U.S.

731, 735 n.4 (1947). Under Rule 12(b)(6), a plaintiff must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. The Court Should Dismiss Claim One Because The FRA Precludes Review Over Claims That An Agency Is Violating The FRA Or Its Own FRA Guidelines.

In Claim One, Plaintiffs contend that EPA is failing to make and preserve records in compliance with the FRA and EPA's own FRA guidelines. Judicial review over such a claim is squarely barred under binding precedent.

At the outset, it is black-letter law that the FRA does not authorize a private right of action to enforce its provisions. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148-50 (1980). That conclusion is based on the FRA's administrative enforcement scheme, which provides agency heads, the Archivist, and the Attorney General with responsibility for redressing any unlawful removal, defacing, alteration, or destruction of federal records. *Id.*; *see also* 44 U.S.C. §§ 2905, 3106. Thus, CREW cannot challenge any of the EPA's actions pursuant to the FRA itself.

As for the APA, the D.C. Circuit has held that private parties may obtain very limited judicial review of an agency's compliance with the FRA. Specifically, a private party may challenge (1) the sufficiency of an agency's record-keeping guidelines and directives; or (2) the agency head's or the Archivist's failure to seek initiation of an enforcement action by the Attorney General under 44 U.S.C. § 3106. *See Armstrong*, 924 F.2d at 292-95. In contrast, the FRA "preclud[es] private litigants from suing directly to enjoin agency actions in contravention of agency guidelines." *Id.* On that basis, the Court held that, "[b]ecause it would clearly contravene this system of administrative enforcement to authorize private litigants to invoke federal courts to

prevent an agency official from improperly destroying or removing records, we hold that the FRA precludes judicial review of such actions." *Id.*

Under *Armstrong*, therefore, while a party may bring an APA action challenging the sufficiency of an agency's FRA guidelines, it may not challenge an agency's compliance with those guidelines (or compliance with the FRA itself). *See e.g.*, *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 527 F. Supp. 2d 101, 111 (D.D.C. 2007) ("*CREW v. DHS*") ("Given the firm language in *Armstrong I*, CREW is precluded from suing the DHS to enjoin the agency from acting in contravention of its own recordkeeping guidelines or the FRA." (citation omitted)); *Competitive Enter. Inst. v. U.S. Envt'l. Prot. Agency*, 67 F. Supp. 3d 23, 32 (D.D.C. 2014) ("*Armstrong I* distinguished between reviewable challenges to an agency's record-keeping guidelines under the APA, and unreviewable challenges to the agency's day-to-day implementation of its guidelines."). While the D.C. Circuit in *Armstrong* applied that principle to hold that private parties could not challenge an agency's records destruction and retention decisions (the only decisions at issue in that case), the same logic applies to an agency's records creation decisions. Indeed, it would be illogical to hold that a private plaintiff could seek an injunction compelling an agency to create a record even though the plaintiff could not seek an injunction barring the agency from destroying the record immediately after creating it.

Contrary to Plaintiffs' suggestion, *see* Compl. ¶ 28, *Armstrong* did not hold that the APA authorizes judicial review of claims that an agency has failed to make records. Rather, the D.C. Circuit expressly noted that under its decision, "agency personnel will implement the guidelines on a daily basis," and "agency personnel, *not the court*, will actually decide whether specific documents . . . constitute 'records' under the guidelines." *Armstrong*, 924 F.2d at 293-94

(emphasis added). Because the Federal Records Act precludes review over an agency's compliance with the FRA and its own FRA guidelines, the Court should dismiss Claim One.[1]

II. The Court Should Dismiss Claim Two Because EPA Has Already Issued The Guidance That Plaintiffs Contend Is Missing.

In contrast to Claim One, Claim Two is not barred from judicial review under *Armstrong*: the D.C. Circuit has held that a court may "entertain plaintiffs' claim that [an agency's] recordkeeping guidelines and directives . . . are inadequate because they permit the destruction of 'records' that must be preserved under the FRA." *Armstrong*, 924 F.2d at 291. But while judicial review is available, it is apparent that Plaintiffs lack standing and have failed to state a claim on which relief may be granted.

As noted above, the FRA provides that each agency's records management program "shall provide for . . . effective controls over the creation and over the maintenance and use of records in the conduct of current business . . . and compliance with . . . the regulations issued" by NARA. 44 U.S.C. § 3102. NARA's regulations, in turn, provide that "agencies must prescribe the creation and maintenance of records that . . . [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." 36 C.F.R. § 1222.22; *see also id.* § 1222.28 ("[E]ach program must develop . . . [p]olicies and procedures for maintaining the documentation of phone calls, meetings, instant messages, and electronic mail exchanges that include substantive information about agency policies and activities.").

[1] Claim One should be dismissed for lack of jurisdiction pursuant to Rule 12(b)(1). While the APA waives the United States' sovereign immunity with respect to suits for non-monetary relief against agencies and their employees acting in their official capacities, *see* 5 U.S.C. § 702, none of the APA's provisions — including the APA's waiver of sovereign immunity — applies if a "statut[e] preclude[s] judicial review." *Id.* § 701(a)(1).

Plaintiffs' theory is that EPA's records guidance is inadequate because it "contains no provision implementing the requirement, at 36 C.F.R. § 1222.22, that records of 'all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) be created." Compl. ¶ 35. The problem with this theory is that EPA policies fully implement the FRA and NARA's implementing regulations.

At the outset, the EPA policy cited in Plaintiffs' complaint repeatedly observes that EPA employees are obligated to create records in compliance with the FRA and related regulations. *See*, *e.g.*, EPA Information Policy, Records Management Policy, at 1, https://www.epa.gov/sites/production/files/2015-03/documents/cio-2155.3.pdf (Ellis Decl. Ex. A) (noting that the FRA "requires all federal agencies to make and preserve records containing adequate and proper documentation of their organization, function, policies, decisions, procedures and essential transactions" (emphasis added)); *id.* at 6 (similar); *id.* at 8 (similar); *id.* at 13 (similar). Absolutely nothing in the policy "permit[s] the destruction of 'records' that must be preserved under the FRA," *Armstrong I*, 924 F.2d at 291, nor does it excuse the creation of records that must be created under the FRA.[2]

Even more to the point, EPA has specific guidance addressing "Verbal Communications and Records." *See* Ellis Decl. ¶ 6 & Ex. B. This policy explains that verbal communications "can mean a telephone conversation, a voice mail message or a series of voice mails, a formal meeting or even an informal chat with a coworker in the hallway." *Id.* Ex. B. As the document makes clear, "[a]ny oral communication where an Agency decision or commitment is made, and that is not otherwise documented, needs to be captured and placed in your recordkeeping system." *Id.*

[2] This policy is repeatedly referenced in Plaintiffs' complaint, and the Court may take judicial notice of it. *See Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007).

The "best way to capture" such conversations, it explains, is to "[w]rite a memo to the file" that includes the "[d]ate and time of the communication," "[t]ype of communication," "[p]articpants," "[s]ubject," and "[d]etails on any decisions or commitments." *Id.* "An alternative, for recorded meetings, is to create or obtain a transcript which can be saved as a record." *Id.* The Ellis Declaration makes clear that EPA employees are regularly trained on this requirement. *See* Ellis Decl. ¶ 7 & Ex. C.

At its "irreducible constitutional minimum," standing requires satisfaction of three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent, (2) a causal connection between the injury and defendants' challenged conduct, and (3) a likelihood, "as opposed to merely 'speculative' [possibility]," that the injury suffered will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The Ellis Declaration makes plain that Plaintiffs have suffered no injury and that there is nothing for the Court to redress, fatally undermining any claim of standing.[3]

III. The Court Should Dismiss Claim Three Because The Archivist Has Made No Finding That EPA Has Violated The FRA.

Finally, in Claim Three, Plaintiffs seek a "declaratory judgment that the Archivist and NARA have failed to inform Administrator Pruitt in writing of the EPA's FRA violations, make recommendations for their correction, and submit a written report to the President and Congress." Compl. Claim Three (capitalization modified). They further seek an "order compelling the Archivist and NARA to do so." *Id.* (capitalization modified). The asserted basis for this claim is

[3] To the extent that Plaintiffs intended to plead Claim Two more broadly, to imply that failure to abide by written policies amounts to failure to have a policy in the first place, that claim fails. *See Competitive Enterprise Inst.*, 67 F. Supp. 3d at 33 ("CEI cannot challenge EPA's decision to destroy text messages by casting its claim as a challenge to an illusory record-keeping policy. While the form of CEI's claim sounds in a cognizable APA claim, the substance of its allegations constitutes a challenge to EPA's records disposal decisions.").

44 U.S.C. § 2115, which provides that "[w]hen the Archivist finds that a provision of [the FRA] has been or is being violated, the Archivist shall (1) inform in writing the head of the agency concerned of the violation and make recommendations for its correction; and (2) unless satisfactory corrective measures are demonstrably commenced within a reasonable time, submit a written report of the matter to the President and the Congress." 44 U.S.C. § 2115(b).

This claim fails. Plaintiffs have not alleged that the Archivist has found that EPA is violating the FRA — a finding that is necessary to trigger any potential obligations under the FRA. To the extent Plaintiffs mean to allege that the Archivist should have made such a finding, nothing in the FRA requires him to make such a finding on any particular timeframe, nor does it require the Archivist to provide advocacy groups with intermittent updates on the progress of his inquiry. Finally, failure to make an intergovernmental report under 44 U.S.C. § 2115 does not constitute agency action that is reviewable under the APA.

A. 44 U.S.C. § 2115(b) Does Not Apply Because Plaintiffs Do Not Plead That The Archivist Has Found That EPA Has Violated The FRA.

44 U.S.C. § 2115(b) sets up a simple sequence: (1) *when* the Archivist finds that a provision of the FRA has been violated, (2) *then* the Archivist shall inform the agency in writing of the violation, and, (3) *unless* satisfactory corrective measures are commenced with a reasonable time, (4) *then* the Archivist shall submit a written report to the President and the Congress. *See generally* 44 U.S.C. § 2115(b). In other words, the statute does not require the Archivist to do anything at all unless and until the Archivist finds that a provision of the FRA has been or is being violated.

Plaintiffs' complaint contains no allegation that the Archivist has made such a finding. Instead, it suggests that Plaintiffs brought a matter to the Archivist's attention, received confirmation that the Archivist was looking into it, and then became dissatisfied when the Archivist did not continue providing contemporaneous updates on the status of his inquiry. *See*

generally Compl. ¶¶ 49-53. While Plaintiffs are evidently frustrated that the Archivist has not concluded his investigation, that does not mean that the Archivist has failed to satisfy obligations that only attach upon making a finding that EPA has violated the statute. For that reason alone, Claim Three should be dismissed.

B. To The Extent Plaintiffs Mean To Allege That The Archivist Should Have Found An FRA Violation, No Judicial Review Is Available.

For the reasons set out above, any potential obligations under 44 U.S.C. § 2115(b) only attach at such time as the Archivist concludes that an agency has violated or is violating the FRA. To the extent that Plaintiffs meant to allege that the Archivist should have made that predicate finding, that claim fails.

Nothing in the statute requires the Archivist to make such a finding, and certainly not to do so on any particular timeframe. Because there is no duty to make findings that any particular agency has violated the FRA, Plaintiffs cannot contend that the Archivist has "unlawfully withheld or unreasonably delayed" action pursuant to 5 U.S.C. § 706(1). Indeed, the Supreme Court has explained that "a delay cannot be unreasonable with respect to action that is not required," *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 n.1 (2004); *see also, e.g.*, *Ctr. for Biological Diversity v. U.S. E.P.A.*, 794 F. Supp. 2d 151, 157 (D.D.C. 2011) ("[A]n unreasonable-delay claim requires that the agency has a duty to act in the first place."); *United Mine Workers of Am., Int'l Union v. Dye*, No. 06-1053, 2006 WL 2460717, at *9 (D.D.C. Aug. 23, 2006) ("[E]ven in the context of an unreasonable delay claim, a plaintiff still must establish a clear duty to act under the relevant statute.").[4]

[4] In addition, it is well established that the government's decision to commence enforcement actions is subject to its unreviewable discretion. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 838 (1985) ("agency refusals to institute investigative or enforcement proceedings" are presumed immune from judicial review); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (government has "broad discretion" to enforce the laws of the United States.); *Morris v. Gressette*, 432 U.S. 491,

On that basis, 44 U.S.C. § 2115(b) may be distinguished from 44 U.S.C. § 3106, which requires agencies to "notify the Archivist of any actual, impending, or threatened unlawful removal . . . of records in the custody of the agency, and with the assistance of the Archivist . . . initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency." 44 U.S.C. § 3106(a). In *Armstrong*, the Court noted the general "presumption that an agency's decision not to take enforcement action is immune from judicial review under 5 U.S.C. § 701(a)(2)." 924 F.2d at 295. The Court held that that presumption did not apply to 44 U.S.C. § 3106, however, because that provision "leave[s] no discretion to determine which cases to pursue." *Id.* "In contrast to a statute that merely *authorizes* an agency to take enforcement action as it deems necessary, the FRA *requires* the agency head and Archivist to take enforcement action." *Id.* (noting that under § 3106, after becoming aware of "*any*" removal, the Archivist "*shall*" take certain steps).[5]

44 U.S.C. § 2115(b) is entirely unlike 44 U.S.C. § 3106. While 44 U.S.C. § 3106 applies whenever records have been lost, 44 U.S.C. § 2115(b) applies only after the Archivist affirmatively concludes that the FRA has been violated. The statute leaves it to the Archivist to find (or not) that a provision of the FRA has been violated. Nothing in the FRA suggests that Congress intended for federal courts to substitute their own judgment for that of the agency.

500-01 (1977) (holding that the Attorney General's exercise of discretion under § 5 of the Voting Rights Act is judicially unreviewable); *In re Sealed Case*, 131 F.3d 208, 214 (D.C. Cir. 1997) ("In the ordinary case, the exercise of prosecutorial discretion . . . has long been held presumptively unreviewable.").

[5] That is the holding to which Judge Lamberth was referring to when he indicated that the APA "authorizes the Court to entertain a claim that the head of the DHS or the Archivist have breached their statutory obligations to take enforcement action to prevent an agency official from improperly destroying records or to recover records unlawfully removed from the agency." *CREW v. DHS*, 527 F. Supp. 2d at 111 (partially quoted in Compl. ¶ 30). Neither *CREW v. DHS* nor any other case of which we are aware involves judicial review of the Archivist's compliance with 44 U.S.C. § 2115.

C. Failing To Provide An Intergovernmental Report Of This Kind Is Not Reviewable Agency Action.

Finally, providing a report within the government pursuant to 44 U.S.C. § 2115 (or failing to do so) is not reviewable agency action. As the D.C. Circuit has explained, "[e]xecutive responses to congressional reporting requirements . . . represent . . . an entirely different sort of agency action" from exercises of governmental power "affecting . . . the lives and liberties of the American people" that are broadly deemed subject to review. *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 318 (D.C. Cir. 1988); *see also Guerrero v. Clinton*, 157 F.3d 1190, 1195 (9th Cir. 1998) (a reporting provision "is different from the prototypical kind of agency action which is subject to the general presumption of reviewability"); *Am. Trucking Assoc. v. United States*, 755 F.2d 1292, 1296 (7th Cir. 1985) (agency reports do not constitute "agency action" under the APA because they do not change law or policy); *Chem. Weapons Working Grp., Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1495 (10th Cir. 1997) ("Construing the agency action challenged as the Secretary of Defense's certification to Congress that testing was complete is similarly unhelpful" in identifying agency action); *Nat. Res. Def. Council v. Lujan*, 768 F. Supp. 870, 882 (D.D.C. 1991) ("As defendant-intervenors correctly point out, the Report was not explicitly or implicitly intended as anything more than a vehicle to inform Congress. It is for Congress, not the courts, to determine if the Report satisfies the statutory requirements it enacted."). If Congress or the President (or EPA) is dissatisfied with NARA's election not to issue a report about EPA's FRA compliance, that is an issue for them to resolve — it is not the type of agency action that is reviewable under the APA.

Because the Archivist has not concluded that EPA has violated the FRA, and because the Archivist's failure to make such a finding is not judicially reviewable, the Court should dismiss Claim Three.

CONCLUSION

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

Dated: May 1, 2018

Respectfully submitted,

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