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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiffs' lawsuit, brought under the Administrative Procedure Act ("APA"), seeks to enforce the mandatory obligations the Federal Records Act ("FRA") imposes on Environmental Protection Agency ("EPA") Administrator Scott Pruitt and his agency to create records of essential agency activities and to establish and maintain an adequate recordkeeping program for those records. Plaintiffs also sue to compel the Archivist to perform his mandatory FRA obligations, including informing EPA of its FRA violations, making recommendations for their correction, and submitting a written report to Congress and the President. Plaintiffs raise their claims against a backdrop where Administrator Pruitt faces 12 different investigations into his conduct at the EPA and details continue to emerge about the extent to which he has demanded secrecy for his agency actions and decisions.[1]

[1] *See, e.g.*, Eric Lipton and Lisa Friedman, 'Smoke and Mirrors': Emails Detail Pruitt's Drive for Secrecy at the E.P.A., *New York Times*, May 7, 2018, *available at* https://www.nytimes.com/2018/05/07/climate/epa-pruitt-emails-secrecy.html. *See also* Eric Lipton and Lisa Friedman, Pruitt's Dinner With Cardinal Accused of Abuse Was Kept Off Public Schedule, *New York*

Defendants have now moved to dismiss this lawsuit, arguing plaintiffs have failed to raise justiciable claims for relief. According to defendants, the Court has no power to review EPA's outright refusal to document essential agency policies, decisions, and transactions (Claim One) under "well-established D.C. Circuit precedent[.]"[2] In response to plaintiffs' claim that the EPA and Administrator Pruitt failed to establish and maintain an adequate program to preserve federal records (Claim Two), defendants offer extra-record submissions they mischaracterize as establishing that the EPA has implemented appropriate guidance and plaintiffs therefore lack standing. Finally, on the claim that the Archivist and the National Archives and Records Administration ("NARA") violated the FRA by failing to inform Administrator Pruitt, Congress, and the President of the EPA's FRA violations (Claim Three), defendants advance an interpretation of the Archivist's obligations under the FRA that finds no support in the statute and, if accepted, would eviscerate its intended purpose.

First, defendants' argument for dismissing Claim One misapplies D.C. Circuit precedent, which concerns challenges to the improper destruction of records and not, as alleged here, to an agency's systematic failure to create records. This is a significant distinction because the FRA contains an administrative enforcement mechanism for the unlawful removal and destruction of records, 44 U.S.C. § 3106, but provides no equivalent mechanism for the unlawful failure to create records. *See* 44 U.S.C. §§ 3101, *et seq.* Given the absence of an alternative process for vindicating their interest in ensuring agency actions are properly documented, plaintiffs are

Times, May 11, 2018, *available at* https://www.nytimes.com/2018/05/11/climate/pruitt-cardinal-pell-dinner.html; Anthony Adragna, EPA Watchdog Launches New Probe Into Pruitt's Email Habits, *Politico*, May 15, 2018, *available at* https://www.politico.com/story/2018/05/15/pruitt-epa-email-watchdog-544462.

[2] Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss ("Ds' Mem.") at 1.

entitled here to the "basic presumption of judicial review to one 'suffering legal wrong because of agency action[.]'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702).

Second, defendants' argument that Claim Two must be dismissed because plaintiffs lack standing to challenge the EPA's failure to establish and maintain an adequate recordkeeping program contravenes Supreme Court and D.C. Circuit precedent by raising a merits-based argument as a standing question that rests on factual assertions properly considered on a motion for summary judgment. At this stage in evaluating defendants' motion to dismiss, the Court must take the allegations in the complaint at face value, and limit its review to the complaint and any document it references. Even if the Court were to consider defendants' extra-record submissions, which it should not, they fail to address the complaint's allegations that agency leadership has given verbal instructions to EPA staff overriding and contravening their obligations under the FRA. Given the existing questions of fact, Claim Two is properly resolved on a Rule 56 motion for summary judgment after discovery, not a Rule 12(b) motion to dismiss.

Third, defendants' motion to dismiss Claim Three ignores the express language of the FRA, which imposes a mandatory obligation on the Archivist to inform Administrator Pruitt and then Congress and the President of the agency's FRA violations, and D.C. Circuit precedent that challenges to a failure to take enforcement action, as in this case, present justiciable claims. Moreover, defendants' attempt to impose on the Archivist an obligation to make a formal "finding" before exercising his enforcement authority finds no support in the statutory language. Furthermore, defendants' argument, if accepted, would leave them free to ignore their FRA obligations at will with no possibility of redress by the courts or Congress, contrary to congressional intent in enacting the FRA.

STATUTORY AND REGULATORY BACKGROUND

The FRA consists of a collection of statutes that governs the creation, management, and disposal of federal records. *See generally* 44 U.S.C. §§ 2101, *et seq.*; §§ 2901, *et seq.*; §§ 3101, *et seq.*; and §§ 3301, *et seq.* Among other things, the FRA ensures the "[a]ccurate and complete documentation of the policies and transactions of the Federal Government." 44 U.S.C. § 2902.

Both the Archivist and the heads of the various executive branch departments and agencies share responsibility to ensure that an accurate and complete record of agency policies and transactions is compiled. 44 U.S.C. §§ 2901, *et seq.*, §§ 3101, *et seq.* Consistent with that objective, the FRA requires the head of each agency 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. The Archivist specifically must "provide guidance and assistance to Federal agencies" and bears the responsibility "to promulgate standards, procedures, and guidelines with respect to records management and the conduct of records management studies." 44 U.S.C. § 2904. Pursuant to this authority, the Archivist has promulgated regulations governing the creation and maintenance of federal records. 36 C.F.R. §§ 1222.22, *et seq.*

Regulations promulgated by the Archivist describe in greater detail each of the FRA's requirements:

> To meet their obligation for adequate and proper documentation, agencies must prescribe the creation and maintenance of records that:
>
> (a) Document the persons, places, things or matters dealt with by the agency.

> (b) Facilitate action by agency officials and their successors in office.
>
> (c) Make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government.
>
> (d) Protect the financial, legal, and other rights of the Government and of persons directly affected by the Government's actions.
>
> (e) 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.
>
> (f) Document important board, committee, or staff meetings.

36 C.F.R. § 1222.22.

The FRA also requires the head of each agency 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. Regulations promulgated by the Archivist detail these obligations.[3] Each program an agency establishes to manage agency records "must develop recordkeeping requirements that identify . . . [t]he record series and systems that must be created and maintained to document program policies, procedures, functions, activities, and transactions." 36 C.F.R. § 1222.26. Further, each program "must develop recordkeeping requirements for records series and systems that include" among other things "[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." 36 C.F.R. § 1222.28.

The FRA requires the Archivist to take action to remediate FRA violations. Specifically,

> [w]hen the Archivist finds that a provision of any such chapter has been or is being violated, the Archivist *shall* (1) inform in writing the head of the agency concerned of the violation and make

[3] Agency records management programs must comply with regulations the Archivist promulgates. 44 U.S.C. § 3101(4).

> 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 (emphasis added).

The EPA has a written records management policy ("EPA Policy") that is publicly available on its website at https://www.epa.gov/sites/production/files/2015-03/documents/cio-2155.3.pdf. Compl. ¶ 31.[4] Under that policy, the EPA Administrator bears responsibility for creating and preserving records that adequately and properly document the organization, functions, policies, decisions, procedures and essential transactions of the EPA. EPA Policy ¶ 8.a; Compl. ¶ 34. The policy imposes on all EPA employees, *inter alia*, the obligation to create and manage records that are necessary to document the EPA's official activities and actions. EPA Policy ¶ 8.l.1. EPA employees may destroy records only in accordance with approved records schedules. *Id.* ¶ 8.l.2. Conspicuously absent from the EPA's policy, however, is any 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. Also absent are specific "[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." 36 C.F.R. § 1222.28.

[4] With their motion to dismiss, defendants have included a copy of this policy as Exhibit A, noting that because it is referenced in the complaint, "the Court may take judicial notice of it." Ds' Mem. at 9 n.2. Plaintiffs agree, but, as discussed *infra*, dispute the admissibility of the other proffered documents.

FACTUAL BACKGROUND[5]

Before his confirmation as EPA Administrator, Mr. Pruitt served as the Oklahoma attorney general and established himself in part by suing to block EPA actions under the previous administration. Compl." ¶ 37. Industry groups opposed to the EPA's agenda joined him in this effort. *Id.* The full extent of Mr. Pruitt's ties to these groups, however, was not revealed until after his confirmation as EPA Administrator, when an Oklahoma state court ordered, over his objection, that more than 7,500 pages of Mr. Pruitt's emails as attorney general be made public. *Id.*[6]

Since assuming the office of EPA Administrator, Mr. Pruitt has operated in extensive secrecy unmatched by his predecessors. Compl. ¶ 36. He 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. *Id.* ¶ 38. Administrator Pruitt reportedly 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. *Id.* ¶ 39. Further, Administrator Pruitt reportedly has used telephones other than his own to make important calls, thereby avoiding having the calls appear on his own call log. *Id.* ¶ 40. The *Washington Post* reported that Administrator Pruitt holds face-to-face meetings, prefers to deliver instructions verbally, and avoids using emails all to avoid creating a record of his statements.[7]

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[5] The facts set forth below, which defendants do not contest, are drawn from the complaint and public record sources.

[6] Those emails can be found on the website of the Center for Media and Democracy at https://www.exposedbycmd.org/Scott-Pruitt-Missing-Emails.

[7] Brady Dennis, EPA Spending Almost $25,000 to Install a Secure Phone Booth for Scott Pruitt, *Washington Post*, Sept. 26, 2017, *available at* https://www.washingtonpost.com/news/energy-

The EPA's handling of a rule promulgated by the previous administration, "Waters of the United States," 80 Fed. Reg. 37053 (June 29, 2015), illustrates Administrator Pruitt's efforts to avoid his statutory responsibilities to create federal records. The rule was designed to expand existing federal protections of large water bodies to include wetlands and small tributaries that are crucial to their health. Compl. ¶ 41. A cost-benefit analysis accompanied the rule and showed that the economic benefits from protecting those additional bodies of water might outweigh the economic costs to farmers, landowners, and real estate developers. *Id.* In mid-June 2017, 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. *Id.* According to Elizabeth Sutherland, the former director of Science and Technology in EPA's Office of Water who spent 30 years at the agency before retiring in July 2017, as well as numerous other experts in federal rulemaking, these kinds of analyses typically would be accompanied by enormous written records that include scientific, technological, and economic facts. *Id.* ¶ 41. Ms. Sutherland described to the *New York Times* the repeal process under Administrator Pruitt as "political staff giving verbal directions to get the outcome they want, essentially overnight."[8]

John O'Grady, an EPA environmental scientist and president of the EPA's employee union, has confirmed these recordkeeping practices and policies of Administrator Pruitt. Mr. O'Grady told *Mother Jones* that Administrator Pruitt "does not send emails out," disperses

environment/wp/2017/09/26/epa-spending-almost-25000-to-install-a-secure-phone-booth-for-scott-pruitt/?utm_term=.312a31cc54c0.

[8] Coral Davenport and Eric Lipton, Scott Pruitt is Carrying Out His E.P.A. Agenda in Secret, Critics Say, *New York Times*, Aug. 11, 2017, *available at* https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html.

orders verbally, and acts "like a very good attorney, not leaving a paper trail."[9] Mr. O'Grady contrasted Administrator Pruitt's practices with those of past administrations: "[e]very other administrator, whether it was Republican or Democrat, would come in and establish their principals and communicate as necessary."[10]

Administrator Pruitt has personally gone to extraordinary lengths to avoid creating federal records and maintain secrecy. In addition to the very expensive "privacy booth" he directed be built – a full-scale enclosure that prevents anyone outside of the booth from overhearing what anyone inside is saying and designed to communicate classified information – he has made his political offices on the third floor of the EPA off-limits to almost all career staff. Compl. ¶¶ 45-46. Further, he travels with a 24-hour security detail. *Id.* ¶ 46.

This level of secrecy and disregard for records management laws and regulations is not a recent development. As public records released by the State of Oklahoma show, Pruitt intentionally misled congressional lawmakers on his use of official email as Attorney General of Oklahoma by stating in his 2017 confirmation that he "use[d] only [his] official OAG email address and government issued phone to conduct official business" even though he had used a personal email account to conduct official business a mere two weeks prior.[11] Similarly, he stated in his confirmation paperwork that he "make[s] [his] best efforts to ensure that communications related to state business are copied or otherwise provided to official state systems," but a large

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[9] Rebecca Leber, Meet the One EPA Employee Unafraid to Call Out Scott Pruitt, *Mother Jones*, Sept. 28, 2017, *available at* http://www.motherjones.com/environment/2017/09/meet-the-one-epa-employee-unafraid-to-call-out-scott-pruitt/; Compl. ¶ 47.

[10] *Id.*

[11] Mike Soraghan, Pruitt's Use of Personal Email Appears Routine in State Docs, *E & E News*, May 15, 2018, *available at* https://www.eenews.net/greenwire/2018/05/15/stories/1060081743. Administrator Pruitt apparently has continued this practice at EPA. According to a recent report, EPA's inspector general has launched a probe into his email practices, which include the use of nonpublic email accounts to conduct agency business. Adragna, *Politico*, May 15, 2018.

number of the emails from his personal account handling state business produced in response to a public records request demonstrate this also was not true. *Id.*

In the wake of these revelations, CREW sent a letter to Archivist David Ferriero on September 12, 2017, highlighting many of the actions Administrator Pruitt and the EPA have taken, or refused to take, that appear to violate the FRA. CREW requested that the Archivist investigate the EPA and make recommendations for any recordkeeping violations to be redressed. Compl. ¶ 49.

By letter dated September 25, 2017, Lawrence Brewer, NARA's Chief Records Officer for the U.S. Government, responded to CREW's September 12 letter. Mr. Brewer informed CREW that he had sent a letter to Steven Fine, the EPA's Acting Assistant Administrator, Office of Environmental Information and Senior Agency Official for Records Management, requesting a meeting within 30 days. *Id.* ¶ 50. After hearing nothing further, CREW wrote to Mr. Brewer on November 8, 2017, asking whether a meeting had in fact taken place and whether Mr. Brewer could share any information regarding the issues CREW had raised. *Id.* ¶ 51. Mr. Brewer responded on November 9, 2017 that he had "been in communications with the Senior Agency Official for [records management] at EPA and understood that senior management at EPA are finalizing proposed actions to communicate back to NARA." *Id.*

One month later after hearing nothing further, CREW again wrote to Mr. Brewer on December 19, 2017, requesting an update. Mr. Brewer responded on December 20, 2017 that he had talked to Mr. Fine about the matter and that Mr. Fine had told him "the matter was discussed with the EPA Chief of Staff" who "would be sending NARA formal correspondence next month responding to the issue." Compl. ¶ 52. As of the filing of the complaint on February 22, 2018 –

two months after this response from Mr. Brewer – CREW had not received any additional correspondence or information from NARA on this matter, *id.* ¶ 53, and has not to this day.

ARGUMENT

I. STANDARD OF REVIEW.

When resolving a Rule 12(b)(1) motion, a court must accept all factual allegations in a complaint as true and draw all reasonable inferences in the plaintiff's favor. *Citizens for Responsibility & Ethics in Washington v. Cheney*, 593 F. Supp. 2d 194, 210 (D.D.C. 2009). Under Rule 12(b)(1), a court may consider the pleadings as supplemented "by undisputed facts evidenced in the record." *Nat'l Harbor GP, LLC v. Gov't of D.C.*, 121 F. Supp. 3d 11, 17 (D.D.C. 2015); *see also Boritz v. United States*, 685 F. Supp. 2d 113, 117 (D.D.C. 2010). This is particularly true when deciding a motion to dismiss on ripeness grounds. *Venetian Casino Resort, L.L.C. v. EEOC*, 409 F.3d 359, 366 (D.C. Cir. 2005).

By contrast, in ruling on a motion to dismiss under Rule 12(b)(6) for failure to state a claim, the court "may consider only the facts alleged in the complaint, any documents either attached or incorporated in the complaint and matters of which [the court] may take judicial notice." *Hurd v. Dist. of Columbia*. 864 F.3d 671, 678 (D.C. Cir. 2017) (citation omitted). Further, the court must construe the complaint liberally, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor. *Id.* "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . [f]actual allegations must be enough to raise a right to relief above the speculative level[.]" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and quotations omitted).

II. CLAIM ONE OF THE COMPLAINT IS SUBJECT TO JUDICIAL REVIEW.

In Claim One, plaintiffs challenge under the APA the failure of Administrator Pruitt and the EPA to create records of essential agency actions in violation of the FRA. Compl. ¶¶ 54-61. Defendants have now moved to dismiss this claim under Rule 12(b)(1), Ds' Mem. at 8 n.1, arguing that the FRA precludes judicial review of this and any other claim that an agency is violating either the FRA or agency FRA guidelines. According to the defendants, "black-letter law" compels this conclusion. *Id.* at 6.

The FRA contains no express statutory preclusion of review and therefore the Court must start with the "basic presumption of judicial review to one 'suffering legal wrong because of agency action,'" *Abbott Labs*, 387 U.S. at 140 (quoting 5 U.S.C. § 702). Here, as spelled out in the complaint and neither challenged nor rebutted by defendants, plaintiffs have suffered "legal wrong" as a direct result of defendants' actions. *See* Compl. ¶¶ 7-8, 11-12. Accordingly, they are entitled to the presumption of judicial review, which can be overcome only with "clear and convincing evidence" that Congress impliedly precluded review. *Abbott Labs.*, 387 U.S. at 141; *Armstrong v. Bush*, 924 F.2d 282, 291 (D.C. Cir. 1991) ("*Armstrong I*").

No provision of the FRA even suggests, much less clearly evidences, a congressional intent to preclude judicial review of challenges to an agency's failure to fulfill its affirmative obligation to document agency policies, decisions, procedures and other essential transactions – the challenge here. *See* 44 U.S.C. §§ 3101, 3301, and implementing NARA regulations, 36 C.F.R. § 1222.22; Compl. ¶¶ 55-60. To be sure, courts have found no judicial review of a specific subset of FRA provisions that prohibits the improper destruction or removal of agency records based on the availability of an administrative enforcement scheme in the FRA specifically for such actions, 44 U.S.C. § 3106. But where, as here, no such administrative

mechanism exists for violations of § 3101, plaintiffs are entitled to pursue the private right of action courts presume to be available under the APA. *Abbott Labs.*, 387 U.S. at 141.

Lacking any "clear and convincing evidence" Congress intended to preclude judicial review of plaintiffs' FRA claims, defendants rely on mischaracterizations of case law interpreting the FRA. Defendants first suggest that the Supreme Court in *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980), reached the sweeping conclusion that the FRA precludes judicial review of *any* violation of the statute's provisions. *See* Ds' Mem. at 6. To the contrary, the Court's holding was grounded in the administrative enforcement scheme of 44 U.S.C. § 3106 that, as defendants correctly point out, "provides agency heads, the Archivist, and the Attorney General with responsibility for redressing any unlawful removal, defacing, alteration, or destruction of federal records." Ds' Mem. at 6. In finding no private right of action for the alleged unlawful removal of agency records, the Supreme Court focused on the language of the FRA, which "establishes only one remedy *for the improper removal of a 'record from the agency*," namely notification by the head of the agency to the attorney general, who "may bring suit to recover the records." 45 U.S. at 148 (citing 44 U.S.C. § 3106) (emphasis added). The Court reasoned that by specifically providing "a system of administrative standards and enforcement" for these specific statutory violations, Congress evidenced an intent that federal courts not have "jurisdiction to adjudicate" the question of improper removal, vesting it instead "in the administrative authorities." *Id.* at 149-50. Nothing in the decision, however, extends the preclusion of judicial review to claims that do not concern document destruction or removal.

Defendants similarly mischaracterize the D.C. Circuit's decision in *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) ("*Armstrong I*"), in which the court, relying on *Kissinger*, also held that the same enforcement mechanism, 44 U.S.C. § 3106, barred litigants from using the

APA to challenge an agency's unlawful destruction of records. 924 F.2d at 294. In reaching this conclusion the court rejected the government's argument – made here as well – that the FRA generally precludes judicial review of all FRA claims, relying instead on a "more natural reading" of the administrative enforcement mechanism and the congressional intent behind it to conclude the FRA did not supplant all judicial review. *Id.* Nor did the court find an intent to preclude judicial review from "the fact that Congress retains some direct oversight over agencies' compliance with the FRA," through the requirement that the Archivist "submit to Congress annual reports evaluating the agencies' records management practices . . . and notify Congress of violations of the FRA[.]" *Id.* at 291-92. To otherwise construe these requirements as evidence of an intent to preclude judicial review would, the *Armstrong I* court reasoned, "create an enormous exception to judicial review: Congress exercises oversight over all agencies, gets reports from many, and is often consulted by the executive branch before specific actions are taken." *Id.* at 291 (quotation and citation omitted). From all this, the *Armstrong I* court concluded it was authorized to hear the APA challenge before it to the adequacy of an agency's recordkeeping guidelines and directives. *Id.* at 292-93.

In arguing that judicial review is foreclosed here, defendants ignore these carefully limited rulings from the Supreme Court and the D.C. Circuit that focus on the specifics of the administrative enforcement scheme Congress created in § 3106 and its application to the threatened destruction or removal of an agency record. In both cases, the court's conclusions stemmed from the fact that through the FRA, Congress already had provided an enforcement path in the event of document destruction that impliedly precluded judicial review. But neither case strayed beyond that context to hold that courts may not hear any challenges to "compliance

with the FRA itself," or challenged violations of the wholly separate provisions of 44 U.S.C. §§ 3101 and 3301, as defendants assert here. Ds' Mem. at 7.

The other cases defendants cite also provide no support for their broad claim of no judicial review. In *CREW v. U.S. Dep't of Homeland Sec.*, 527 F. Supp. 2d 101 (D.D.C. 2007) (cited in Ds' Mem.at 7), the court in fact recognized that under *Armstrong I* it was empowered to review whether the Archivist or agency head "have properly performed their FRA enforcement duties," 527 F. Supp. 2d at 110 (the basis for plaintiffs' claim against NARA and the Archivist, Claim Three), which runs directly contrary to defendants' claim here.

Similarly, *Competitive Enter. Inst. v. U.S. Envtl. Prot. Agency*, 67 F. Supp. 3d 23 (D.D.C. 2014) (cited in Ds' Mem. at 7), also provides no support for defendants' motion to dismiss Claim One. That case involved a challenge to an agency's destruction of text messages and its failure to notify the Archivist of that destruction. Relying on *Kissinger*, the court concluded it had no authority under the FRA to review allegations of document destruction or to order the EPA administrator to notify the Archivist of the ongoing destruction of agency records. 67 F. Supp. 3d at 31-32. Critically, these claims directly implicated § 3106, the administrative enforcement scheme at issue in *Kissinger* for records destruction decisions, and that formed the basis for the court's holding that it could not independently review those claims under the FRA. *Id.* By contrast, the court denied the government's motion to dismiss with respect to the plaintiff's APA claim, which was "based on the Agency's alleged non-compliance with FRA's enforcement scheme." *Id.* at 34. The court pointed to the *Armstrong I* decision and its finding that "'it would not be inconsistent with *Kissinger* or the FRA to permit judicial review [under the APA] of the agency head's or Archivist's refusal to seek the initiation of an enforcement action by the Attorney General." 67 F. Supp. 3d at 33, quoting *Armstrong I*, 924 F.2d at 295. Indeed, the

Armstrong I court found that allowing such review under the APA would "'reinforce[] the FRA scheme by ensuring that the administrative enforcement and congressional oversight provisions operate as Congress intended.'" *Armstrong I*, 924 F.2d at 295.

In sum, none of the cases to which defendants cite bars review of Claim One. In the absence of any enforcement mechanism in the FRA to address the EPA's unlawful failure to create records, this Court is left with the "basic presumption of judicial review" under the APA. *Abbott Labs.*, 387 U.S. at 140. Here the APA provides plaintiffs with a valid cause of action, 5 U.S.C. § 702, to challenge the failure of Administrator Pruitt and the EPA to comply with their affirmative duty under the FRA and implementing regulations to document agency policies, decisions, procedures and other essential transactions. 44 U.S.C. §§ 3101, 3301; 36 C.F.R. § 1222.22. Because defendants' motion to dismiss Claim One rests exclusively on the proposition that judicial review under either the FRA or the APA is precluded, that motion must be denied.

II. PLAINTIFFS HAVE STANDING TO CHALLENGE THE DEFENDANTS' FAILURE TO ESTABLISH AND MAINTAIN AN ADEQUATE RECORDKEEPING PROGRAM.

While conceding, as they must, that the Court properly may review Claim Two, which challenges the failure of Administrator Pruitt and the EPA to establish and maintain an adequate recordkeeping program to preserve federal records, *see* Ds' Mem. at 8, defendants make the curious claim that plaintiffs lack standing because they cannot succeed on the merits. In support, defendants proffer three exhibits they ask the Court to treat as guidance that complies with defendants' FRA obligations, and to ignore the allegations in the complaint that Administrator Pruitt has provided oral directives overriding the FRA, implementing regulations, and any agency guidance by instructing agency employees not to create records.

Even considering the merits of defendants' so-called standing claim, defendants all but concede that EPA's records management policy lacks a provision implementing the statutory requirement that agency employees document substantive decisions and commitments reached orally. Ds' Mem. at 9. The best the government can do is point to the EPA's recordkeeping guidance acknowledged in the complaint at ¶¶ 31-34, and attached to their motion as Exhibit A (Dkt. 11-1), which they suggest, at least implicitly, satisfies their recordkeeping obligations. Ds' Mem. at 9. As the complaint alleges, however, this guidance falls short as it fails to implement 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.

Defendants attempt to compensate for this deficiency by introducing via declaration two extra-record documents (Exhibits B and C to Ds' Mem., Dkt. 11-1) that they describe as "guidance," Ds' Mem. at 9, consisting of "a 'Frequently Asked Questions'" sheet and a training slide from a Fiscal Year 2017 "annual records management training[.]" Declaration of John B. Ellis (Dkt. 11-1) ¶¶ 6, 7 ("Ellis Decl."). These two documents are not mentioned in the complaint, are neither attached nor incorporated in the complaint, and are not "matters of which [the court] may take judicial notice." *Hurd*, 864 F.3d at 678. As such, they are not properly considered by the Court in ruling on defendants' Rule 12(b)(6) motion. *Id.*

To evade the clear strictures placed on Rule 12(b)(6) motions, defendants attempt to recast these documents as standing evidence that proves "Plaintiffs have suffered no injury and that there is nothing for the Court to redress[.]" Ds' Mem. at 10. In this way, however, they run directly afoul of the well-established directive that courts not decide a merits argument couched as or intertwined with a standing argument. Abundant case law cautions against conflating

standing and merits questions, recognizing that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Courts therefore have exercised care "not to decide the questions on the merits for or against the plaintiff, and [to] therefore assume that on the merits the plaintiffs would be successful in their claims." *City of Waukeshaw v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

This case illustrates precisely the soundness of not deciding merits disputes dressed up as standing issues. If this Court were to consider the government's proffered exhibits, it would be drawn into a premature resolution of disputed factual issues in the context of a Rule 12(b) motion to dismiss. Claim Two of the complaint alleges that the EPA defendants have violated their FRA obligations in two ways. First, plaintiffs allege that Administrator Pruitt and other EPA officials have overridden or ignored their FRA obligations with impunity, conduct furthered by "[t]he lack of effective controls over the agency's records program[.]" Compl. ¶ 64. Second, plaintiffs allege "the EPA's current recordkeeping policy fails 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[.]" *Id.* ¶ 65.

Defendants' proffered evidence fails to address, much less rebut, the claim that Administrator Pruitt and others have freely overridden or ignored their FRA obligations. *See* Compl. ¶ 64. As the agency head, Administrator Pruitt is empowered to formulate agency guidance that binds agency employees. The complaint alleges here that among other unlawful acts, Administrator Pruitt has exercised that authority to direct, or have other top EPA officials direct agency employees not to create and preserve records of certain essential agency actions and decisions. Compl. ¶ 65. These allegations of a widespread failure to create records, which

defendants have not challenged, clash directly with what Mr. Ellis now claims is governing guidance. Resolution of this conflict lies at the heart of Claim Two, and cannot be determined simply by two extra-record exhibits loosely described as "agency guidance," untethered to specific information about how, when, and to whom the guidance was directed.

On the second part of Claim Two, at most the two documents raise a question about the sufficiency of the EPA's policy, which patently raises a merits question that can be decided only on a fuller factual record. Indeed, the proffered evidence raises more questions than it answers. Mr. Ellis, defendants' declarant, describes the frequently asked questions document found at Exhibit B as one that EPA's National Records Management Program ("NRMP") "has provided EPA employees" "[s]ince at least January 2013[.]" Ellis Decl. ¶ 6. But missing from his declaration is any indication of how widely the NRPM has circulated this document within the EPA, in what context, and specifically whether it has been shared with the EPA Administrator and top agency officials. Indeed, it is impossible to discern from his description whether this is a document that the NRMP simply posts on the agency's intranet page, with no further effort to ensure it is read and understood by agency employees. The answers to these and other questions are critical to resolving the merits of Claim Two, which goes directly to the adequacy of EPA's recordkeeping guidance.

Exhibit C raises just as many critical questions. Mr. Ellis describes this exhibit as a slide from a "Fiscal Year 2017" annual records management training the NRMP developed. Ellis Decl. ¶ 7. Missing from this description, however, is when precisely in Fiscal Year 2017, which commenced before Administrator Pruitt and political appointees at EPA assumed office, the NRMP offered this training. Mr. Ellis also claims that "[f]unctionally identical guidance appears in the Fiscal Year 2018 training," *id.*, but for some unexplained reason the EPA has elected not

to provide that guidance here. As a result, we are left to guess at the meaning of "functionally identical." Moreover, like the Fiscal Year 2017 training guidance, the EPA also has failed to describe how this guidance was disseminated, to whom, and whether it was provided to Administrator Pruitt and top agency officials.

The factual questions this extra-record evidence raise confirm that defendants' so-called standing argument is nothing more than a merits argument masquerading as a standing argument. In this way, defendants seek to selectively introduce material they believe casts them in a better light, while avoiding the factual inquiry that ordinarily results from a unilateral proffer of incomplete and one-sided evidence. Moreover, even if defendants were to submit additional extra-record evidence in an attempt to answer the questions their proffered exhibits raise, it would merely highlight the factual issues plaintiffs' claims present, which are not susceptible to dismissal under Rule 12(b). For all the reasons discussed above, defendants' gambit must fail.

III. CLAIM THREE ADEQUATELY STATES A CLAIM FOR RELIEF.

Claim Three of the complaint challenges the Archivist's failure to take action to remediate the EPA's FRA violations. As alleged in the complaint, the Archivist has failed to fully investigate the EPA's conduct; has failed to inform Administrative Pruitt of NARA's investigative findings; has failed to make recommendations to the EPA defendants for their correction; and has failed to inform the President and Congress of EPA's FRA violations, all in contravention of 44 U.S.C. § 2115. Compl. ¶¶ 69, 70.

Plaintiffs' Complaint includes plausible allegations that the Archivist has failed to take the non-discretionary action section 2115 requires of him, which the Court must accept as true and construe liberally. *Hurd*, 864 F.3d at 678. Specifically, more than eight months ago on September 12, 2017, CREW sent a letter to the Archivist laying out the multiple ways in which

Administrator Pruitt and the EPA have acted in apparent violation of the FRA. Compl. ¶ 49. In response, NARA advised CREW it had communicated with EPA and was taking further steps to act within 30 days on the information CREW had provided. *Id.* ¶ 50. Weeks later, NARA advised CREW that senior management at EPA was "finalizing proposed actions" that EPA would be communicating to NARA. *Id.* ¶ 51. In December, NARA advised CREW the EPA's chief of staff "would be sending NARA formal correspondence next month responding to the issue." *Id.* ¶ 52. This was the last word CREW received from NARA prior to filing its complaint on February 22, 2018. Compl. ¶ 53.

Moreover, as set forth in the complaint, plaintiffs allege that NARA made initial "investigative findings[.]" Compl. ¶ 70. From this, the Archivist took initial steps toward satisfying the notification requirement. After receiving CREW's letter, NARA communicated with the EPA about its contents. NARA took at least some follow-up actions with EPA also based on that information, and as of a few months ago, was on the verge of receiving finalized proposed actions from EPA in response to NARA's communications. Compl. ¶¶ 49-52.

To be sure, plaintiffs assert even these actions fall short of what the FRA requires. The complaint alleges:

> Despite knowledge of the numerous ways in which Administrator Pruitt and the EPA have violated the FRA, the Archivist has failed to fully investigate these violations and effectively inform Administrator Pruitt of NARA's investigative findings, has failed to make recommendations to Administrator Pruitt and the EPA for their correction, and has taken no other action despite the failure of the EPA to commence satisfactory corrective measures during the more than four months that have elapsed since NARA brought these violations to the attention of the EPA.

Compl. ¶ 70. Moreover, the Archivist's complete failure to fulfill step two of the statutorily mandated process – providing written notification to the President and Congress – also forms a key component of Claim Three. *See* Compl. ¶ 70.[12]

Defendants err in contending that plaintiffs must plead that the Archivist has made a formalized, affirmative finding that the EPA has violated the FRA before the non-discretionary enforcement action required of the Archivist by section 2115(b) is triggered. No authority, other than the government's preferred interpretation of the statute, supports such a statutory gloss. Indeed, section 2115 is more plausibly read as spelling out the circumstances in which the Archivist must act rather than requiring a "finding" on the record. *See* 44 U.S.C. § 2115. Under this interpretation, section 2115(b), requires the Archivist to undertake a two-step process "[w]hen the Archivist finds that a provision of [the FRA] has been or is being violated[.]" First, the Archivist must inform the agency head in writing "of the violation and make recommendations for its correction[.]" *Id.* at § 2115(b)(1). Second, where "satisfactory corrective measures are [not] demonstrably commenced within a reasonable time" the Archivist must "submit a written report of the matter to the President and the Congress." *Id.* at § 2115(b)(2). Nothing in the statutory language, however, requires the Archivist to formalize or independently memorialize an initial finding that an agency has violated or is violating the FRA in advance of

[12] Defendants also characterize Claim Three as resting on a pleading deficiency, specifically a failure to plead that the Archivist has found EPA to have violated the FRA. Ds' Mem. at 11. In this way, however defendants cleverly gloss over the fact that they, not plaintiffs, uniquely possess all the facts and can easily confirm for the Court what additional steps the Archivist and EPA have or have not taken and when. Rather than provide this information, however (which would be incompatible with a Rule 12(b)(6) motion), defendants suggest with no proof "that the Archivist has not concluded his investigation" and argue on that basis alone Claim Three must be dismissed. Ds' Mem. at 12. Such unsupported assertions that are contradicted by the facts set forth in the complaint provide no basis to dismiss Claim Three.

taking these steps. Indeed, such a finding is implicit when the Archivist takes the first step of notifying the agency head.

In any event, while defendant's argument may raise an intriguing question of statutory construction, it has no legal consequence here, as under either interpretation of the statute, plaintiffs are entitled to challenge the Archivist's inaction. The APA explicitly authorizes a court under 5 U.S.C. § 706(1) to "compel agency action unlawfully withheld or unreasonably delayed" or under § 706(2) to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Further, the APA allows plaintiffs to challenge "failures to act" under both provisions because it defines "agency action" as including "failure to act." 5 U.S.C. § 551(13); *All. To Save Mattaponi v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 1, 10 (D.D.C. 2007) ("Thus, plaintiffs' claim here – that EPA wrongly failed to exercise discretion in their favor – is directed not at an 'agency action unlawfully withheld,' but rather at a consummated 'agency action' that APA views as final, notwithstanding the fact that the agency 'did' nothing.").

Defendants also argue the Court may not review Claim Three because it rests on a statutory provision that imposes no duty on the defendants to act or to do so within a particular timeframe, and in any event places the decision to act within NARA's enforcement discretion. Ds' Mem. at 12-13. Contrary to defendants' construction, however, the FRA imposes a clear duty on the Archivist to act, stating that upon a finding that an agency has violated or is violating the FRA, the Archivist "*shall*" inform the agency head. 44 U.S.C. § 2115 (emphasis added). By using the word "shall" Congress left the Archivist no discretion to refrain from acting where, as here, the Archivist has made the initial determination that triggers a response and corrective action from the agency. The statute also dictates when the Archivist must act by directing that if

"corrective measures are [not] demonstrably commenced *within a reasonable time*" the Archivist must "submit a written report of the matter to the President and the Congress." *Id.* (emphasis added). In short, the express language of the FRA directly contradicts defendants' claim that "[n]othing in the statute requires the Archivist to make such a finding [of an FRA violation], and certainly not to do so on any particular timeframe." Ds' Mem. at 12. Moreover, while the parties may disagree here on whether the EPA failed to commence corrective measures "within a reasonable time," thereby triggering the Archivist's notification requirements to Congress and the President, that is a factual matter not susceptible to dismissal under Rule 12(b)(6).

Defendants' claim to unreviewable enforcement discretion, Ds' Mem. at 13, falls equally flat. As discussed *supra*, the FRA's administrative enforcement scheme does not apply to the kind of claims here, which are unrelated to claims of threatened or actual document destruction or transfer. Nor do the Archivist and NARA possess any independent enforcement authority over another executive branch agency. Under the FRA, the Archivist must provide guidance and notify agencies when they violate the statute's provisions, but if an agency does not come into compliance the only avenue available to the Archivist is notification to Congress and the President. Indeed, the absence of an administrative enforcement scheme reinforces the need for judicial review "by ensuring that the . . . congressional oversight provisions operate as Congress intended." *Competitive Enter. Inst.*, 67 F. Supp. 3d at 33 (quotation omitted). Accordingly, because the Archivist lacks enforcement authority, allowing judicial review of Claim Three raises no risk this Court will impermissibly "substitute [its] own judgment for that of the agency." Ds' Mem. at 13.

Finally, defendants cite a host of cases they claim stand for the proposition that statutory provisions like the FRA that require notification to Congress do not constitute reviewable agency

action. Ds' Mem. at 14. Each of those cases differs significantly from the case at hand. For example, the challenge in *Natural Res. Def. Council v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988) (cited in Ds' Mem. at 14), was not to a failure to report, as the court expressly pointed out, but rather to the adequacy of the EPA's report, *id.* at 318. In declining review, the D.C. Circuit cited to the lack of "judicially manageable standards" as to whether the required report to Congress was "sufficiently 'detailed'" within the meaning of the relevant statute. *Id.* at 319. By contrast, the challenge here is the failure of the Archivist to fulfill his statutory obligation to notify Congress and the President. Similarly, in both *Guerrero v. Clinton*, 157 F.3d 1190, 318 (9th Cir. 1998) and *Am. Trucking Ass'n v. United States*, 755 F.2d 1292, 1296 (7th Cir. 1985), cited in Ds' Mem. at 14, the courts also declined to review challenges to the adequacy of statutorily required agency notices to Congress, a decidedly different issue than the utter failure to do so that is alleged here.

Significantly, all the cases that defendants cite involve agencies with independent enforcement authority over outside private entities. The congressional notification requirements at issue were ancillary to the agencies' statutory enforcement schemes. Here, by contrast, neither NARA nor the Archivist possesses independent enforcement authority over the EPA, another executive branch agency. As a necessary result, the notification provisions of the FRA play a singularly pivotal role in enforcing the FRA. If this Court cannot review the Archivist's failure to provide the statutorily mandated notifications, the EPA's FRA violations will go unchecked. Thus, this case stands in direct contrast to *Natural Res. Def. Council v. Lujan*, 768 F. Supp. 870 (D.D.C. 1991) (cited in Ds' Mem. at 14), where the court refused to review a challenge to the sufficiency of a statutorily mandated report, reasoning,

> the function of judicial review of agency action – to check agency exercise of delegated power – has no place where a report is

> simply a management tool employed by Congress for its own purposes.

Id. at 882. The notification requirements at issue here, far from a congressional "management tool," represent a key role in enforcing the FRA's provisions.

Because plaintiffs have adequately pleaded an APA claim against the Archivist and the National Archives, the Court should also deny defendants' motion to dismiss with respect to Claim Three.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss must be denied.

Respectfully submitted,

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