IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, and

REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, INC.,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, and

KEVIN A. McALEENAN, in his official capacity as Acting Secretary of Homeland Security,

Defendants.

Civil Action No. 18-cv-2473-RC

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

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INTRODUCTION

The Department of Homeland Security ("DHS") is responsible for one of the most catastrophic recordkeeping failures in this country's history. In the process of forcibly separating thousands of migrant families pursuant to the Trump Administration's Zero Tolerance policy, the agency failed to create essential records needed to later reunite those families and to otherwise document the separations, inflicting severe trauma that can never be undone. Because these failures raise serious concerns about DHS's compliance with its records-creation obligations under the Federal Records Act ("FRA"), Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Refugee and Immigrant Center for Education and Legal Services, Inc. ("RAICES") set out to obtain the agency's operative recordkeeping guidelines and directives. When DHS finally disclosed its recordkeeping policies in this suit, Plaintiffs' concerns were fully substantiated—the policies are devoid of *any* guidance on the FRA's records-creation obligations. Even worse, the agency saw no need to revise its policies in light of the systematic recordkeeping failures that manifested during the family separation crisis. DHS's deficient recordkeeping guidelines and directives are now the focus of Plaintiffs' Second Amended Complaint ("SAC"), which asserts a single claim under Administrative Procedure Act ("APA") and the D.C. Circuit's decision in *Armstrong v. Bush* ("*Armstrong I*"), 924 F.2d 282 (D.C. Cir. 1991).

In moving to dismiss the SAC, DHS repeatedly mischaracterizes both Plaintiffs' claim and the governing law, and improperly introduces matters outside the pleadings to dispute the complaint's allegations. Most fundamentally, DHS miscasts Plaintiffs' claim as seeking to

compel the agency to adopt policies that merely parrot the FRA's records-creation requirements. But Plaintiffs want DHS to go beyond just reciting statutory language in its recordkeeping policies. Rather, Plaintiffs want DHS to comply with its non-discretionary legal obligations to formulate *its own* guidelines, directives, and training, tailored to the agency's unique mission and functions, designed to inform DHS components and personnel about their records-creation obligations—something the agency has utterly failed to do. In DHS's view, an agency satisfies its FRA obligations merely by pointing employees to the U.S. Code and Code of Federal Regulations and expecting them to figure it out for themselves. But that is plainly not the law, and, if accepted, would render much of the FRA and its implementing regulations meaningless.

Plaintiffs' claim is squarely authorized by *Armstrong*. There, the Circuit held that "the APA authorizes judicial review of [a] plaintiff[']s claim that [an agency's] recordkeeping guidelines and directives are arbitrary and capricious." *Armstrong I*, 924 F.2d at 297. That is precisely the claim Plaintiffs assert here, DHS's obfuscation notwithstanding.

Armstrong further demonstrates that DHS's request for dismissal is premature. Indeed, the court gave detailed instructions on what constitutes an "adequate" factual record for a district court "to determine whether the [agency's] guidelines are arbitrary and capricious"—namely, the record must contain "the total 'guidance' given to [agency] staff regarding their recordkeeping responsibilities," including any "informal, supplementary guidance." *Id.*; *see also Armstrong v. Exec. Office of the President* ("*Armstrong II*"), 1 F.3d 1274, 1280 (D.C. Cir. 1993) (noting that first *Armstrong* decision "remanded the case to allow for supplementation of the record as to the precise guidance—written and oral—that the defendant agencies had given employees"). DHS

wants to short-circuit this procedure, seeking dismissal prior to discovery and before *any* factual record regarding DHS's records-creation guidelines can be developed, let alone the detailed record mandated by *Armstrong*. DHS, in other words, wants summary judgment at the outset of the case. But neither *Armstrong* nor the Federal Rules permit such premature dismissal where, as here, Plaintiffs have pleaded ample factual content to support a plausible APA claim.

As this Court previously noted in granting Plaintiffs leave to amend, the SAC "states the type of claim recognized in *Armstrong*." ECF No. 30 at 4. Nothing DHS says alters that conclusion. Its motion should be denied, and this case should proceed to discovery so that Plaintiffs may develop a factual record containing "the total 'guidance' given to [agency] staff regarding their recordkeeping responsibilities," including any "informal, supplementary guidance." *Armstrong I*, 924 F.2d at 297.

BACKGROUND

I. The Federal Records Act

The FRA is a collection of statutes governing the creation, management, and disposal of federal records. 44 U.S.C. §§ 2101, *et seq.*; §§ 2901, *et seq.*; §§ 3101, *et seq.*; and §§ 3301, *et seq*. Among other things, the Act is intended to ensure "[a]ccurate and complete documentation of the policies and transactions of the Federal Government." 44 U.S.C. § 2902(1).

Both the Archivist of the United States (the "Archivist") and the various federal agency heads share responsibility to ensure that an accurate and complete record of agencies' policies and transactions is compiled. *See* 44 U.S.C. §§ 2901-11; §§ 3101-07. The Archivist must "provide guidance and assistance to Federal agencies" and has 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(b)-(c)(1). To that end, the National Archives and Records Administration ("NARA") has promulgated regulations governing the creation and maintenance of federal records. *See* 36 C.F.R. §§ 1222.22, *et seq.*

The FRA's primary records-creation provision, 44 U.S.C. § 3101, provides that agencies "shall 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." NARA's regulations detail these obligations as follows:

> 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 agencies 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. As part of an agency's obligation to develop an FRA-compliant records management program, it must issue recordkeeping guidelines and directives, and provide related training, to its employees. The FRA and NARA regulations impose detailed requirements regarding what an agency must include in its recordkeeping guidelines and directives. Among other things, an agency's recordkeeping requirements must:

- "[P]rovide for . . . effective controls over the creation and over the maintenance and use of records in the conduct of current business," and "compliance with" various FRA provisions and implementing regulations, including the records-creation requirements set forth in 44 U.S.C. § 3101 and 36 C.F.R. § 1222.22. 44 U.S.C. §§ 3102(1), (4).
- "Identify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel in the course of their official duties." 36 C.F.R. § 1222.24(a)(1).
- "[I]dentify . . . [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(a).
- Identify "information and documentation that must be included in" the agency's "record series and systems." 36 C.F.R. § 1222.28(a).

- Include "[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(d).

NARA regulations also require agencies to "[p]rovide guidance and training to all agency personnel on their records management responsibilities, including identification of Federal records, in all formats and media." 36 C.F.R. § 1220.34(f); *see also id.* § 1222.24(b) ("Agencies must provide the training described in § 1220.34(f) of this subchapter and inform all employees that they are responsible and accountable for keeping accurate and complete records of their activities.").

The D.C. Circuit has long recognized that the "APA authorizes judicial review" of a claim that an agency's "recordkeeping guidelines and directives are arbitrary and capricious." *Armstrong I*, 924 F.2d at 297. In determining whether an agency's recordkeeping guidelines and directives are arbitrary and capricious, a court reviews the "total 'guidance' given to [agency] staff regarding their recordkeeping responsibilities," including both formal written policies and any "informal, supplementary guidance." *Id.*

II. The Second Amended Complaint's Factual Allegations

A. DHS's Deficient Recordkeeping Guidelines and Directives

As alleged in the SAC, DHS operates under two formal recordkeeping policies: DHS Directive 141-01, Records and Information Management (issued August 11, 2014), and DHS Instruction 141-01-001, Records and Information Management (issued June 6, 2017). *See* SAC Exhibits 1-2. Both policies lack any guidance on the FRA's records-creation requirements, and

fail even to mention them. *See* SAC ¶¶ 26-27. The SAC alleges, on information and belief, that Directive 141-01 and Instruction 141-01-001 are the only formal DHS guidelines or directives designed to implement the FRA's records-creation requirements. *See id.* ¶¶ 28-29, 78-79.

In response to the SAC, DHS adopted a revised version of Instruction 141-01-001, with an effective date of September 9, 2019. Second Declaration of Paul Johnson ("Johnson Decl.") [ECF No. 33-2], Ex. A [ECF No. 33-3]. DHS submitted this revised instruction and accompanying declarations with its motion to dismiss. DHS asserts that it made these revisions "in the interest of removing any doubt that these policies comport with the FRA," and to "clarify that the [records-creation] requirements of 44 U.S.C. § 3101 and 36 C.F.R. § 1222.22 are among the FRA requirements with which DHS employees must comply." Declaration of Donna Roy ("Roy Decl.") ¶ 2 [ECF No. 33-4]. The Roy Declaration adds that the "revised Instruction does not substantively change DHS's policy on this issue." *Id.*

Revised Instruction 141-01-001, like its predecessor, lacks any meaningful guidance on the FRA's records-creation requirements. It merely parrots the language of governing statutory and regulatory provisions, without further elaboration or guidance tailored to DHS's mission and functions. *See* Johnson Decl. Ex. A. [1]

[1] As explained below, the Court should disregard DHS's extra-pleading materials in ruling on Defendants' motion to dismiss, where Plaintiffs' allegations must be accepted as true and cannot be disputed by reference to material outside the pleadings. *See infra* Part I. Even if the Court were to consider these materials, they do nothing to undercut the viability of Plaintiffs' claim. *See infra* n.5.

B. Manifestations of DHS's Deficient Recordkeeping Guidelines and Directives

The SAC outlines how the deficiencies in DHS's recordkeeping guidelines and directives have manifested, in some instances with catastrophic results. It cites NARA reports detailing systematic recordkeeping problems at DHS and one of its components, Customs and Border Protection ("CBP"). *See* SAC ¶¶ 31-34. Among other things, NARA found in July 2018 that "the records management program at CBP is substantially non-compliant" with the FRA and its implementing regulations, and "lacks numerous basic elements of a compliant records management program." *Id.* ¶¶ 32-33. Given that DHS is obligated to provide guidance and instructions to its component agencies to ensure agency-wide FRA compliance, *see* 44 U.S.C. § 3102, CBP's failings are fairly attributable to DHS.

The SAC also details at length how the deficiencies in DHS's recordkeeping guidelines and directives—and specifically its complete lack of *records-creation* guidance—manifested in connection with the Trump Administration's Zero Tolerance policy. *See* SAC ¶¶ 35-61 (summarizing background of policy and related recordkeeping failures). These failures are outlined in a series of reports issued by the DHS Office of Inspector General, the Department of Health and Human Services ("HHS") OIG, and the Government Accountability Office, as well as in news articles. *See id.* ¶¶ 45-61. According to these accounts, DHS systematically failed to create records documenting separations of migrant parents from children during the height of family separation in mid-2018; the agency lacks any centralized system to identify, track, or connect families that had been separated, contrary to public statements that remain on DHS's website; and even after DHS purportedly halted the Zero Tolerance policy in June 2018, the

agency continues to separate migrant families without creating records documenting the separations adequately, or at all. *See id.* Each of these failures "stem from the agency's woefully deficient recordkeeping guidelines and directives," *id.* ¶ 45, which, as noted, lack any guidance on the FRA's records-creation requirements.

C. Harm to Plaintiffs

The SAC further outlines how DHS's deficient recordkeeping guidelines and directives, and resulting recordkeeping failures, have harmed Plaintiffs. *See* SAC ¶¶ 62-73. As to Plaintiff RAICES, DHS's FRA violations "have perceptibly impaired RAICES's efforts to provide legal services to separated migrant families—in direct conflict with its mission—and required RAICES to devote substantial resources to counteract that harm" in several respects, including by depriving RAICES of information needed to "prepare applications for relief and obtain evidence for the children it represents in removal proceedings"; "timely refer detained Unaccompanied Children to federal foster care"; and "comply with [HHS] grant requirements." *Id.* ¶¶ 63-66. DHS's violations have also "led to an increase in removal proceedings against detained migrant children," and a corresponding increase in "RAICES's workload," which has required RAICES to "reallocate resources." *Id.* ¶ 67. And RAICES has been forced "to invest in and implement its own programs and initiatives to assist separated families—all in an attempt to fill the void left by DHS's noncompliance with the FRA." *Id.* ¶ 68.

As to Plaintiff CREW, DHS's FRA violations have resulted, or will result, in the agency failing to create records responsive to CREW's requests under the Freedom of Information Act ("FOIA"). *See* SAC ¶¶ 69-73. Thus, CREW's current and future FOIA requests will yield fewer

or no responsive documents, depriving CREW of critical documents and information it requires to fulfill its mission of promoting governmental transparency and accountability. *Id.* ¶ 73.

III. This Suit

CREW instituted this action on October 26, 2018, and filed its First Amended Complaint ("FAC") on December 14, 2018, adding RAICES as a co-plaintiff. The FAC asserted three claims. FAC ¶¶ 62-87 [ECF No. 7]. Claim One alleged that DHS has failed to establish and maintain an FRA-compliant records management program in violation of 44 U.S.C. § 3102 and 36 C.F.R. §§ 1222.26, 1222.34. *Id.* ¶¶ 62-70. Claim Two alleged that DHS systematically failed to create records sufficiently documenting child separations in violation of 44 U.S.C. § 3101 and 36 C.F.R. § 1222.22. *Id.* ¶¶ 71-80. And Claim Three alleged that DHS failed to create records of agency policy and decisions in violation of 44 U.S.C. § 3101 and 36 C.F.R. § 1222.22. *Id.* ¶¶ 81-87.

Plaintiffs moved for a preliminary injunction, and DHS moved to dismiss. The Court granted DHS's motion to dismiss. *See CREW v. DHS*, 387 F. Supp. 3d 33 (D.D.C. 2019); Order [ECF No. 24]; Mem. Op. [ECF No. 25]. Although the Court ruled that RAICES had standing to assert Claims One and Two, it dismissed all of Plaintiffs' claims on the ground that none of them "point[ed] to a final agency action" reviewable under the APA. *See CREW v. DHS*, 387 F. Supp. 3d at 37.

Plaintiffs then moved for leave to file the SAC. ECF No. 26. The SAC asserts a single claim under the APA, alleging that DHS's recordkeeping guidelines, directives, and training fail to provide adequate guidance on the FRA's records-creation requirements, in violation of the

FRA and implementing regulations. SAC ¶¶ 83. Specifically, DHS's recordkeeping guidelines and directives fail to:

- Provide instructions on, or even make reference to, the records-creation requirements set forth in 4 U.S.C. § 3101 and 36 C.F.R. § 1222.22, including the requirements to create records sufficient to (1) "[d]ocument the persons, places, things, or matters dealt with by the agency"; (2) "[f]acilitate action by agency officials and their successors in office"; (3) "[m]ake possible a proper scrutiny by the Congress or other duly authorized agencies of the Government"; (4) "[p]rotect the financial, legal, and other rights . . . of persons directly affected by the Governments actions"; (5) "[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"; and (6) "[d]ocument important board, committee, or staff meetings." 36 C.F.R. § 1222.22(a)-(f).
- "Identify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel in the course of their official duties." 36 C.F.R. § 1222.24(a)(1).
- 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(a).

- Identify specific "information and documentation that must be included in" the agency's "record series and systems." 36 C.F.R. § 1222.28(a).
- Include "[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(d).

SAC ¶ 77. The SAC further alleges, on information and belief, that DHS fails to provide adequate training on these requirements to agency personnel. *See id.* ¶¶ 30, 80. As outlined above, the SAC details at length how the deficiencies in DHS's recordkeeping guidelines and directives have manifested and harmed Plaintiffs. *See id.* ¶¶ 31-83.

As relief, the SAC seeks a declaration "that DHS's recordkeeping guidelines and directives—consisting of the total guidance given to agency employees regarding their recordkeeping responsibilities, both formal and informal—fail to provide adequate guidance on the FRA's records-creation requirements in violation of the FRA," and an injunction "compelling DHS to adopt and implement revised recordkeeping guidelines and directives that provide adequate guidance regarding FRA's records-creation requirements in compliance with the FRA." *Id.* at 30.

The Court granted Plaintiffs leave to file the SAC. Mem. Op. & Order [ECF No. 30]. In so ruling, the Court explained that the SAC pleads an "alternative theory of recovery" challenging "DHS's failure to implement FRA-compliant regulations and guidelines." *Id.* at 3-4. "At this stage," the Court added, it was "satisfied that Plaintiffs' proposed amended complaint states the type of claim recognized in *Armstrong*." *Id.* at 4.

DHS has now moved to dismiss the SAC. DHS primarily seeks dismissal under Federal Rule of Civil Procedure 12(b)(6), asserting that Plaintiffs have failed to plead a permissible APA claim within the scope of *Armstrong*. *See* DHS Mot. at 13-29. DHS also makes a one-paragraph argument seeking dismissal under Rule 12(b)(1) for lack of standing. *Id.* at 20.

ARGUMENT

I. The Court Should Disregard DHS's Extra-Pleading Submissions

As a threshold matter, the Court should disregard the numerous extra-pleading materials DHS urges the Court to consider in an attempt to dispute the SAC's allegations. Federal Rule of Civil Procedure 12(d) provides: "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Thus, "[w]hen a moving party introduces 'matters outside the pleadings' in support of a motion to dismiss, Rule 12(d) requires the district court either to ignore that evidence in deciding the motion under Rule 12(b)(6), or to convert the motion into one for summary judgment." *Hurd v. D.C. Gov't*, 864 F.3d 671, 686 (D.C. Cir. 2017). If a district court opts to convert the motion, it must first "give the parties notice of the court's intention to convert the motion and a reasonable opportunity to discover and present relevant evidence." *Id.* at 686-87.

Here, DHS attempts to dispute Plaintiffs' complaint allegations by attaching to its motion, and otherwise referencing, two sworn declarations, a purportedly revised version of DHS Instruction 141-01-001, various filings from the *Ms. L* litigation, and "component-level"

recordkeeping guidelines of CBP and ICE. *See* Johnson Decl. & Ex. A; Roy Decl.; DHS Mot. at 24-25 & n.2, 27-28. These extra-pleading materials are not incorporated or referenced in the SAC. Nor may the Court take "judicial notice" of the truth of the matters asserted in these documents in evaluating the sufficiency of Plaintiffs' allegations. *See Hurd*, 864 F.3d at 686 (reversing district court for taking "judicial notice" of court filings from another case in deciding Rule 12(b)(6) motion). Rule 12(d) forbids this premature evidentiary presentation. The Court must either "ignore" the extra-pleading materials, or "give the parties notice of the court's intention to convert the motion [to one for summary judgment] and a reasonable opportunity to discover and present relevant evidence." *Id.* at 686-87; *see also CREW v. Pruitt*, 319 F. Supp. 3d 252, 261 (D.D.C. 2018) (refusing to consider agency's extra-pleading submissions in ruling on motion to dismiss in FRA case).[2]

II. Plaintiffs Have Standing

DHS offers a cursory, one-paragraph argument challenging Plaintiffs' standing, DHS Mot. at 20, which should be rejected out of hand. This Court previously held that Plaintiff RAICES adequately alleged standing to assert both Claims One and Two of the FAC (and thus deemed it unnecessary to analyze CREW's standing). *See CREW v. DHS*, 387 F. Supp. 3d at 44-47. As to Claim One, the Court reasoned "[t]he Complaint identifies multiple deficiencies

[2] To be sure, DHS's motion also invokes Rule 12(b)(1), which permits limited consideration of extra-pleading materials in evaluating the court's subject-matter jurisdiction. But DHS's motion focuses almost entirely on the adequacy of Plaintiffs' allegations under Rule 12(b)(6); the only jurisdictional attack it raises is a one-paragraph argument on standing. DHS Mot. at 20. This argument does not provide any justification for the Court to consider DHS's extra-pleading submissions, as those submissions are immaterial to Plaintiffs' standing.

existing in DHS's records management program prior to the implementation of the zero tolerance policy, and alleges that the harms caused by improper documentation as part of the implementation of the policy were linked to the records management program's overall deficiencies." *Id.* at 47. Thus, RAICES adequately alleged standing to challenge "overall deficiencies" in DHS's records management program, because those deficiencies were linked to the specific recordkeeping failures that harmed it. *Id.*

This reasoning applies with equal force to the SAC. Similar to the FAC, the SAC alleges that the deficiencies in DHS's recordkeeping guidelines and directives—specifically their lack of any guidance on the FRA's records-creation requirements—are linked to the particular recordkeeping failures that injured RAICES. *See* SAC ¶ 45 ("During the government's family reunification efforts, DHS's systematic recordkeeping failures—*which stem from the agency's woefully deficient recordkeeping guidelines and directives*—became readily apparent.") (emphasis added); *id.* ¶ 35 ("DHS's woefully deficient recordkeeping guidelines and directives . . . manifested acutely with disastrous results in connection with Zero Tolerance."); *id.* ¶ 63 ("DHS's deficient recordkeeping guidelines and directives, and *resulting recordkeeping failures* [relating to child separations], have perceptibly impaired RAICES's efforts to provide legal services to separated migrant families—in direct conflict with its mission—and required RAICES to devote substantial resources to counteract that harm.") (emphasis added); *id.* ¶¶ 64-68 (detailing RAICES's injuries). In other words, the deficiencies in DHS's recordkeeping guidelines manifested in a manner that concretely harmed RAICES. As with the FAC, this more than suffices to establish Article III standing, particularly at the pleading stage.

DHS insists that RAICES has not shown its injuries are "fairly traceable to the omitted citations and missing information that Plaintiffs allege in the DHS Policies." DHS Mot. at 20. But this misstates Plaintiffs' claim. Plaintiffs' claim is not that DHS's policies are merely missing a few citations; it is that the agency has failed to comply with its mandatory legal duty to formulate *its own* guidelines, directives, and training concerning the FRA's records-creation requirements, tailored to the agency's unique mission and functions, and that these violations have resulted in concrete recordkeeping failures harmful to RAICES. *See* SAC ¶¶ 74-83. For instance, Plaintiffs allege that DHS has failed to implement any guidance, instructions, or training regarding the FRA's requirement to create records sufficient to "[p]rotect the . . . legal . . . rights . . . of persons directly affected by the Government's actions." 36 C.F.R. § 1222.22(d). There is a clear connection between this lack of FRA guidance and the systematic failure of DHS's component agencies to create records documenting the agency's forcible separation of migrant families—an action which indisputably affects the "legal . . . rights . . . of persons directly affected" by DHS's actions, *id.*, and which has "perceptibly impaired RAICES's efforts to provide legal services to separated migrant families," SAC ¶ 63. Thus, RAICES has plausibly alleged "a causal connection between the injury and the defendant's conduct." *Am. Soc'y For Prevention of Cruelty to Animals v. Ringling Bros.*, 317 F.3d 334, 338 (D.C. Cir. 2003).

Moreover, Plaintiffs' requested relief—a declaration that DHS's recordkeeping guidelines are arbitrary and capricious and an order compelling the agency to adopt proper guidelines—will likely redress RAICES's injury. *See id.* (plaintiff need only show it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision").

DHS itself urges repeatedly that, pursuant to the so-called presumption of regularity, "the Court must presume that agency officials will follow DHS's stated policy." DHS Mot. at 25. Following DHS's own rationale, then, the Court may "presume" that DHS personnel would comply with corrected guidelines and directives if DHS's current guidelines were held unlawful.

If the Court deems it necessary to evaluate CREW's standing, it too passes Article III's threshold. The SAC alleges that DHS's failure to adopt adequate recordkeeping guidelines and directives has resulted, and will result, in the agency failing to create records responsive to CREW's FOIA requests. *See* SAC ¶¶ 69-73. This means that CREW's current and future FOIA requests will yield fewer or no responsive documents, depriving CREW of critical documents and information it requires to fulfill its mission of promoting governmental transparency and accountability. *Id.* ¶ 73. These allegations are bolstered by the Declaration of CREW Executive Director Noah Bookbinder, which explains that CREW has over a dozen FOIA requests pending with DHS, and plans to submit more requests in the future. *See* Declaration of Noah Bookbinder ¶¶ 11-20 [ECF No. 14-21].

For example, CREW has a pending FOIA request seeking documents "reflecting policies, procedures, protocols, directives, or methods by which DHS identifies and tracks alien minors taken in its custody." *Id.* ¶ 12 & Ex. A.[3] Insofar as DHS's recordkeeping policies lack any guidance on the FRA's requirement to create records "[d]ocument[ing] the formulation and execution of basic policies and decisions and the taking of necessary actions, including all

[3] CREW submitted this request nearly a year ago in October 2018, and DHS still has not responded to it.

substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically," 36 C.F.R. § 1222.22(e), and insofar as the agency, in turn, fails to create such records, CREW's FOIA request will necessarily yield fewer responsive documents. That is a cognizable injury, as judges of this Court have repeatedly held in similar circumstances. *See Judicial Watch, Inc. v. FBI*, 2019 WL 4194501, at *7 (D.D.C. Sept. 4, 2019) (Contreras, J.) (serial FOIA requester had standing to assert APA claim challenging the FBI's recordkeeping policy where it pointed to "individual, concrete FOIA requests and pending litigation regarding the electronic messages that are implicated by" the claimed FRA violations); *accord CREW v. Cheney*, 593 F. Supp. 2d 194, 227 (D.D.C. 2009); *CREW v. EOP*, 587 F. Supp. 2d 48, 60–61 (D.D.C. 2008); *Public Citizen v. Carlin*, 2 F. Supp. 2d 1, 6 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999).

III. Plaintiffs Have Plausibly Alleged an *Armstrong*-Based APA Claim Challenging DHS's Recordkeeping Guidelines and Directives

The bulk of DHS's motion rests on a misreading of *Armstrong* and its progeny. A faithful application of those precedents makes clear that Plaintiffs have plausibly alleged an *Armstrong*-based APA claim challenging DHS's recordkeeping guidelines and directives.

A. *Armstrong*

Armstrong was a long-running litigation, spanning nearly a decade, involving an APA challenge to the recordkeeping guidelines and directives of the National Security Council ("NSC"). It began in 1989 when the plaintiffs sued NSC and other components of the Executive Office of the President ("EOP"), seeking a declaration that electronic documents stored in NSC's computer system were records subject to the FRA, and an injunction prohibiting the documents'

destruction. *Armstrong I*, 924 F.2d at 284. Pertinent here, the plaintiffs also alleged that the "NSC's recordkeeping guidelines and directives are inadequate because they fail to provide NSC staff with sufficient guidance about what material constitutes 'records.'" *Id.* at 291.

In *Armstrong I*, the Circuit held "that the district court was authorized to hear plaintiffs' APA claim that the NSC's recordkeeping guidelines and directives do not adequately describe the material that must be retained as 'records' under the FRA." *Id.* at 293; *see also Judicial Watch*, 2019 WL 4194501, at *5 (noting that, per *Armstrong*, "a private litigant may challenge the adequacy of the agency's recordkeeping program in the first instance"). In so holding, the court rejected the government's arguments that the FRA impliedly precluded judicial review, and that the issue was committed to agency discretion by law. *See Armstrong I*, 924 F.2d at 291-94. Because the court determined that "the present record is inadequate to determine the reasonableness of the [NSC's recordkeeping] guidelines," it "remand[ed] for further proceedings on the merits of the adequacy of the guidelines." *Id.* at 296. The Circuit then provided detailed instructions for the district court on remand, explaining that it must allow the parties to develop a factual record containing the "total 'guidance' given to [agency] staff regarding their recordkeeping responsibilities," including both formal written policies and any "informal, supplementary guidance." *Id.* at 296-97; *see Armstrong II*, 1 F.3d at 1280 (noting that *Armstrong I* "remanded the case to allow for supplementation of the record as to the precise guidance—written and oral—that the defendant agencies had given employees").

Following the *Armstrong I* remand, "the parties developed an extensive record, including a Joint Statement of Facts." *Armstrong II*, 1 F.3d at 1280. Based on this record, the Circuit in

Armstrong II ruled that "NSC guidelines for managing electronic documents do not comport with Federal Records Act . . . requirements," because the guidelines called for preserving electronic records by merely printing "on-screen information," which "did not result in 'papering' all federal records material." *Id.* at 1277, 1282. The Circuit further held that NSC's "records management practices were arbitrary and capricious in failing to provide for supervision or auditing of employees' electronic recordkeeping practices by knowledgeable records management personnel," and that the agency "must undertake some periodic review of their employees' electronic recordkeeping practices." *Id.* at 1287-88.[4]

Subsequent decisions clarify the scope of APA review under *Armstrong*. For example, in *CREW v. Pruitt*, the court held that "Plaintiffs pass[ed] the pleading hurdle with little effort," where they challenged EPA's recordkeeping policy for failing to even mention the "mandate to create records for 'substantive decisions and commitments reached orally, as required by NARA [regulations].'" 319 F. Supp. 3d at 261 (quoting 36 C.F.R. § 1222.22). In *CREW v. EOP*, the court held that CREW sufficiently alleged an APA claim challenging the EOP's recordkeeping guidelines, where the guidelines lacked effective controls to prevent the deletion of emails. 587 F. Supp. 2d at 53-54, 56-58. Similarly, in *Judicial Watch v. FBI*, this Court held that the APA authorized a claim challenging the FBI's recordkeeping policy on the ground that it failed to "provide effective controls over the maintenance of electronic messages, excluding emails."

[4] In response to *Armstrong II*, EOP adopted new recordkeeping guidelines that provided detailed instructions concerning electronic records. Those guidelines are attached as Exhibit C to a subsequent district court decision. *See Armstrong v. EOP*, 877 F. Supp. 690, 695 n.3 (D.D.C. 1995), *rev'd*, 90 F.3d 553 (D.C. Cir. 1996).

2019 WL 4194501, at *6. The Court went on to hold that the complaint failed to plausibly allege a concrete deficiency with the FBI's policy, but it granted leave to amend based on statements in plaintiff's opposition brief that did suggest actionable deficiencies, including the policy's "failure to distinguish between transitory and nontransitory records or even nonrecords for non-email electronic communications." *Id.* at *9 (internal quotations omitted).

By contrast, in *Competitive Enterprise Institute v. EPA*, the court dismissed an APA claim challenging EPA's "concealed" or "*de facto* policy" of destroying text messages. 67 F. Supp. 3d 23, 32-33 (D.D.C. 2014). The Court reasoned that EPA's official recordkeeping policy prohibited such destruction, and that the plaintiff's claim was therefore nothing more than a "compliance-based claim" (which *Armstrong* forbids) disguised as a "guidelines-based claim" (which *Armstrong* allows). *See id.* ("CEI cannot challenge EPA's decision to destroy text messages by casting its claim as a challenge to an illusory record keeping policy."); *accord Price v. DOJ*, 2019 WL 2526439, at *5 (D.D.C. June 19, 2019) (dismissing similar claim).

In sum, *Armstrong* and its progeny make clear that the APA authorizes claims challenging an agency's recordkeeping guidelines and directives for failing to provide adequate guidance on the FRA's requirements, but not claims that merely challenge discrete instances of non-compliance with facially-valid recordkeeping policies.

B. Application of the *Armstrong* Framework Here

Armstrong plainly authorizes Plaintiffs' claim. As detailed above, the SAC challenges DHS's recordkeeping guidelines and directives on the ground that they lack guidance regarding the FRA's records-creation requirements, which the FRA and its implementing regulations

explicitly require agencies to include in their recordkeeping policies. Specifically, the FRA and its implementing regulations mandate that an agency's recordkeeping policies:

- "***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" various FRA provisions and implementing regulations, including the records-creation requirements set forth in 44 U.S.C. § 3101 and 36 C.F.R. § 1222.22. 4 U.S.C. §§ 3102(1), (4) (emphasis added).
- "***must*** . . . [i]dentify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel in the course of their official duties. 36 C.F.R. § 1222.24(a)(1) (emphasis added).
- "***must*** . . . 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(a) (emphasis added).
- "***must*** . . . identif[y] information and documentation that must be included in" the agency's "record series and systems. 36 C.F.R. § 1222.28(a) (emphasis added).
- "***must***" include "[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(d) (emphasis added).

The SAC alleges that DHS has failed to comply with these non-discretionary requirements. *See* SAC ¶¶ 74-83. As support for that allegation, the SAC points to the two

recordkeeping policies DHS has disclosed in this suit, which do not comply with the above provisions, and fail to provide any guidance on the FRA's records-creation requirements. *Id.* ¶ 77; SAC Exs. 1 & 2. The SAC further alleges, on information and belief, that DHS lacks any other adequate guidance or training—formal or informal—concerning the FRA's records-creation requirements. SAC ¶¶ 78-79. Such "information-and-belief" allegations are wholly appropriate at this early stage of the proceedings, where no discovery has taken place. *See Runnion ex rel. Runnion v. Girl Scouts*, 786 F.3d 510, 528-29 (7th Cir. 2015) (a plaintiff's "'pleading burden should be commensurate with the amount of information available to them.' We cannot expect, nor does Federal Rule of Civil Procedure 8 require, a plaintiff to plead information she could not access without discovery."). Bolstering the plausibility of these allegations are other complaint allegations detailing DHS's extensive history of recordkeeping failures, as described in NARA inspection reports and by numerous government entities in connection with their review of DHS's family separation practices. *See* SAC ¶¶ 31-61. These recordkeeping failures are symptoms, or "manifestations," of DHS's deficient records-creation guidelines, *see id.* ¶¶ 3, 31-32, 35, 45, and have concretely harmed Plaintiffs, *see id.* ¶¶ 62-73.

The SAC does not assert the type of disguised "compliance-based" FRA claim rejected in *Competitive Enterprise Institute*, 67 F. Supp. 3d at 32-33. Unlike the plaintiff in that case, Plaintiffs here are not attempting to a challenge a series of discrete recordkeeping failures through an amorphous challenge to an unofficial or *de facto* policy. Plaintiffs are instead challenging DHS's *official* recordkeeping policies as non-compliant with the FRA.

In short, Plaintiffs allege that DHS's "recordkeeping guidelines and directives are inadequate because they fail to provide [agency] staff with sufficient guidance about" the FRA's records-creation requirements. *Armstrong I*, 924 F.2d at 291. This is precisely the type of claim *Armstrong* authorizes. Accepting Plaintiffs' allegations as true and drawing all inferences in Plaintiffs' favor, the SAC pleads ample factual content "to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Armstrong also demonstrates that dismissal of Plaintiffs' claim at this stage would be premature. As noted, *Armstrong* requires the district court to develop an "adequate" factual record before "determin[ing] whether the [agency's] guidelines are arbitrary and capricious"—namely, the record must contain "the total 'guidance' given to [agency] staff regarding their recordkeeping responsibilities," including any "informal, supplementary guidance." *Armstrong I*, 924 F.2d at 297; *see also Armstrong II*, 1 F.3d at 1280. DHS wants to short-circuit this procedure, seeking dismissal prior to discovery and before *any* factual record regarding DHS's records-creation guidelines can be developed, let alone the detailed record mandated by *Armstrong*. But neither *Armstrong* nor the Federal Rules permit such premature dismissal where, as here, Plaintiffs have pleaded an eminently plausible APA claim.[5]

[5] Nor would dismissal be any more appropriate if the Court were to consider the revised version of Instruction 141-01-001 DHS has submitted with its motion. *See* Johnson Decl. Ex. A. Like its predecessor, this revised policy lacks any meaningful guidance on the FRA's records-creation requirements. It merely parrots the language of governing statutory and regulatory provisions, without further elaboration or guidance tailored to DHS's mission and functions. *See id.* DHS also gives no indication of how it plans to implement this revised instruction, how it was disseminated within the agency, to whom it was distributed (if anyone), or any related training it has or will provide. Insofar as DHS wishes to introduce this revised policy and any related

C. DHS's Arguments are Unavailing

Perhaps because Plaintiffs' claim is so straightforward and because the agency's recordkeeping guidelines are so plainly deficient, DHS asserts a scattershot of arguments that mischaracterize both the governing law and the SAC. None have merit.

1. DHS contends that under *Armstrong* and its progeny, "a viable challenge to an agency's recordkeeping guideline must raise a plausible assertion that the guideline *contradicts* a specific FRA requirement," and Plaintiffs allege no such "contradiction" here. DHS Mot. at 16-25. DHS is wrong. As outlined above, the FRA and its implementing regulations impose detailed, non-discretionary requirements regarding what an agency must include in its recordkeeping guidelines and directives, SAC ¶¶ 18-20, and the SAC alleges that DHS's recordkeeping guidelines and directives do not comply with these requirements, *id.* ¶¶ 77-81. In other words, the law mandates that an agency's recordkeeping guidelines include certain features that DHS's guidelines lack. That is plainly a "contradiction" between the FRA and DHS's policies that is challengeable under *Armstrong*. *See Armstrong I*, 924 F.2d at 293 (holding that "the FRA provides sufficient law to apply in evaluating the adequacy of [an agency's] guidelines and directives" because it "contain[s] several specific requirements, including the requirement that each agency head shall . . . develop a program that is consistent with the Archivist's regulations").

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matters, the proper context do so is not at the pleadings stage, but in post-discovery summary judgment briefing.

Insofar as DHS is arguing that a recordkeeping guideline can only be challenged if it mandates or permits some concrete action that would violate the FRA (e.g., the destruction of records that the FRA requires be preserved), that view is contrary to law. A recordkeeping guideline wholly *lacking* FRA-mandated guidance is just as challengeable as a guideline that requires or allows some unlawful action. The court held as much in *CREW v. Pruitt*, when it permitted a claim challenging EPA's recordkeeping policy on the ground that it omitted guidance on the FRA's "mandate to create records for 'substantive decisions and commitments reached orally.'" 319 F. Supp. 3d at 261 (quoting 36 C.F.R. § 1222.22).[6]

DHS is likewise wrong when it contends that Plaintiffs' complaint is "simply that the text of the DHS Policies omits explicit reference to these FRA and NARA provisions." DHS Mot. at 19. As explained *supra* Part II, Plaintiffs' real complaint is that the agency has failed to comply with its mandatory duty to formulate *its own* guidelines, directives, and training, tailored to the agency's unique mission and functions, concerning the FRA's records-creation requirements, and that these violations have resulted in concrete recordkeeping failures that have harmed

[6] DHS tries in vain to distinguish *CREW v. Pruitt* by arguing that the claim there concerned the FRA's requirement to create records "[d]ocument[ing] the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally . . . or electronically." 36 C.F.R. § 1222.22(e). DHS argues that § 1222.22(e) is different from the other records-creation requirements of § 1222.22, because those other requirements "rely on an agency's judgment" regarding what records to create. DHS Mot. at 17-18. That is a false distinction for several reasons. First, the issue of "agency judgment" played no role in *CREW v. Pruitt*'s holding regarding the reviewability of the plaintiffs' claim. Second, § 1222.22(e) depends on "agency judgment" just as much as the other provisions of § 1222.22—nothing in the regulation's language suggests that subsection (e) is an outlier in that regard. And third, § 1222.22(e) is implicated in this case, as it was in *CREW v. Pruitt*. *See* SAC ¶ 77.a (alleging that DHS's recordkeeping policies fail to provide any guidance on § 1222.22(e), among other provisions).

Plaintiffs. Fixing these deficiencies will require DHS to do more than simply issue a policy that parrots statutory and regulatory language.

2. DHS next asserts that "the FRA does not include any freestanding requirement that an agency's recordkeeping guideline contain any particular language or level of detail," because the "statute is aimed at an agency's recordkeeping *conduct*, not at the content of its guideline." DHS Mot. at 21 (emphasis added). Again, DHS is wrong on the law. The statute instructs that agencies "shall provide for . . . . effective controls over the creation and over the maintenance and use of records in the conduct of current business," as well as "compliance with" the FRA's substantive requirements, including its records-creation requirements. *See* 44 U.S.C. § 3102. Implementing this statutory provision, NARA regulations direct that "agencies must *prescribe* the creation and maintenance" of several discrete categories of records, 36 C.F.R. § 1222.22 (emphasis added), and "must ensure that procedures, directives and other issuances; systems planning and development documentation; and other relevant records include *recordkeeping requirements* for records in all media, including those records created or received on electronic mail systems," *id.* § 1222.24 (emphasis added). The regulations also outline mandatory features of an agency's "recordkeeping requirements," *see id.* §§ 1222.24, 1222.26, 1222.28, many of which are plainly lacking from DHS's recordkeeping policies, *see* SAC ¶¶ 74-83. DHS is therefore flatly incorrect in claiming that the FRA and its implementing regulations do not impose any requirements as to the content of an agency's recordkeeping guidelines.

DHS also faults Plaintiffs for invoking 44 U.S.C. § 3102, asserting that this provision governs an agency's records management "program," and that this Court previously rejected as

overbroad Plaintiffs' challenge to DHS's records management program. DHS Mot. at 21-22. But that argument cannot be squared with *Armstrong I*, which explicitly identified § 3102 as the statutory hook for an APA challenge to an agency's recordkeeping guidelines and directives. As the Circuit explained, the FRA "contain[s] several specific requirements, including the requirement that each agency head shall . . . develop a program that is consistent with the Archivist's regulations. *See* 44 U.S.C. § 3102. We thus have no difficulty in concluding that the FRA provides sufficient law to apply in evaluating the adequacy of appellants' guidelines and directives." *Armstrong I*, 924 F.2d at 293. DHS's real gripe, then, is not with Plaintiffs' claim, but with *Armstrong*.

3. DHS makes the perplexing argument that Plaintiffs' claim fails to "identify any specific category of records as the subject of their concern," and that Plaintiffs are therefore challenging DHS's recordkeeping policies "with no regard to whether those omissions have any impact on DHS's recordkeeping practices, or on Plaintiffs." DHS Mot. at 18, 20-21. DHS overlooks the bevy of complaint allegations outlining DHS's systematic recordkeeping failures relating to child separations, SAC ¶¶ 45-61, which the SAC alleges "stem from the agency's woefully deficient recordkeeping guidelines and directives," *id.* ¶ 45, and which have concretely harmed Plaintiffs, *see id.* ¶¶ 62-73, 82-83. This is a discrete, identifiable category of records that DHS failed to create due to its lack of proper records-creation guidelines, which the SAC identifies as a "subject of [Plaintiffs'] concern." DHS Mot. at 18.

4. Only as a fallback position does DHS try to defend its barebones recordkeeping policies, which lack even a single reference to the FRA's records-creation provisions, let alone

any substantive guidance on those provisions. DHS claims the policies are not arbitrary and capricious because they "unequivocally require compliance with the FRA and with NARA regulations." DHS Mot. at 22. Yet, as even DHS is forced to recognize, the policies only do so at the most "general level," by "broadly referenc[ing] the various authorities governing federal records management, including the FRA as a whole, the applicable NARA regulations in Title 36 of the Code of Federal Regulations (CFR), and the applicable General Services Administration regulations in Title 41 of the CFR." *Id.* at 22-23.

An agency cannot satisfy its FRA obligations merely by pointing employees to the U.S. Code and CFR and expecting them to figure it out for themselves. That would render 44 U.S.C. § 3102 and 36 C.F.R. § 1222 meaningless. Indeed, if DHS's position were correct, the agency in *Armstrong* could have avoided nearly a decade of protracted litigation by adopting a policy summarily incorporating the entire FRA by reference. That is plainly not the law.

The inadequacy of DHS's records-creation guidelines is made even more apparent when compared to those of other agencies, which go far beyond merely citing or parroting statutory provisions. *See, e.g.*, OSHA Instruction, Revised OSHA Records Management Plan, ADM 03-01-004, Chapt. III (Aug. 3, 1998), *available at* https://bit.ly/2MemjQA (providing detailed "guidance for the proper and adequate documentation of OSHA policies, decisions, organization, functions, procedures and essential transactions," including outlining the "objectives" and "benefits" of records creation, concrete examples of "basic documentation requirements" tailored to OSHA's functions, and how employees should proceed when "questions exist as to what constitutes adequate documentation"). There is a particularly strong need for DHS to implement

detailed guidance tailored to its own activities, given the pervasiveness and significance of its interactions with members of the public, including its apprehension of thousands of migrant persons on a daily basis.

DHS insists that its hands-off approach is justified by the agency's "organizational structure," noting that the agency consists of several components with "distinct missions" and "functions." DHS Mot. at 22. Plaintiffs do not dispute that it may be appropriate for DHS to delegate the formulation of some recordkeeping requirements to component-level records officers. But as the parent agency, DHS bears ultimate responsibility to "establish and maintain" certain baseline recordkeeping guidelines, directives, and training that provide for "effective controls over the creation and over the maintenance and use of records in the conduct of current business," as well as "compliance with" the FRA's substantive requirements, including its records-creation requirements. 44 U.S.C. § 3102. As DHS itself emphasizes, Congress created the agency to combine "22 different federal departments and agencies into a *unified, integrated* Cabinet agency." DHS Mot. at 22 (emphasis added). Consistent with this "unified, integrated" function, it is critical that a single entity oversee, manage, and coordinate agency-wide FRA compliance. The agency cannot simply leave these tasks to its various components, with no centralized guidance, standards, or training regarding the FRA's records-creation requirements. That is abdication, not delegation.[7]

[7] As the above discussion demonstrates, DHS is wrong when it asserts, without any supporting citation, that "Plaintiffs' theory is that DHS has violated the FRA by failing to identify every category of information that must be included in the records of each component, in connection with each program or activity in which the component is involved." DHS Mot. at 29.

To take one example, NARA regulations require that agency "recordkeeping requirements" include "[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(d). This is precisely the type of requirement on which DHS should be issuing uniform guidance. Yet, as the SAC alleges, DHS's operative recordkeeping policies fail even to mention this requirement, let alone do they include any of the specific "policies and procedures" § 1222.28(d) mandates. Nor has DHS implemented any guidance, directives, or training that include baseline principles to guide components' formulation of their own policies and procedures in accordance with § 1222.28(d). This falls well below FRA standards.

5. DHS also contends that judicial review of an "agency's records *creation* guidelines is particularly limited because the question of what records an agency must create in connection with any particular program or activity is in many respects committed to the agency's discretion." DHS Mot. at 16. But this argument conflates judicial review of an agency's individual records-creation *decisions* with its records-creation *guidelines*. Plaintiffs seek review of the latter, not the former. *Armstrong* makes clear that such review is proper, and squarely rejected arguments echoing DHS's position. Indeed, the Circuit held that the adequacy of an agency's recordkeeping guidelines and directives is not an issue "committed to agency discretion by law," because the FRA provides "several specific requirements" and thus "sufficient law to apply in evaluating the adequacy of [an agency's] guidelines and directives." *Armstrong I*, 924 F.2d at 293. The court added that "allowing judicial review of [agency] guidelines will [not]

'unduly interfere with agency functioning'" because "even if a court may review the adequacy of an agency's guidelines, agency personnel will implement the guidelines on a daily basis. Thus agency personnel, not the court, will actually decide whether specific documents . . . constitute 'records' under the guidelines." *Id.* at 293-94.

As in *Armstrong*, judicial review here will not displace the role of DHS personnel in making day-to-day records-creation decisions or otherwise result in judicial "second-guessing" of those decisions, DHS Mot. at 18; it will merely ensure that those decisions are made pursuant to legally-valid guidelines and directives. *See CREW v. Pruitt*, 319 F. Supp. 3d at 260 (noting that *Armstrong I* "found that '[t]he FRA clearly provides sufficiently detailed standards regarding what material the agencies must retain,'" and that the "Court sees no reason why the result would be any different for the policies and regulations regarding what records an agency must *create*." (quoting *Armstrong I*, 924 F.2d at 293)).

The out-of-context snippets from *Armstrong* cited by DHS do not support its position. *See* DHS Mot. at 16-17. *Armstrong I* did highlight that the plaintiffs did "not seek the creation of any new records, but rather ask[ed] only that the records already created be appropriately classified and disposed of pursuant to disposal schedules approved by the Archivist." 924 F.2d at 288. However, the Court made that observation in evaluating not whether the APA authorized the plaintiffs' claim, but whether plaintiffs were within the FRA's "zone of interests"—a point the government disputed on the ground that existing case law only found "private researchers . . . to be within the zone of interests of the records *disposal* provisions of the FRA," rather than the records-creation provisions. *Id.* (emphasis added). That discussion is inapposite here, where

DHS has not, and could not, raise any zone-of-interests challenge. In *Armstrong II*, the Circuit noted that its ruling requiring the agencies to "retain and manage" certain electronic records did not "saddle agencies with any new obligations to make additional documents in order to satisfy the needs of researchers or investigators." *Armstrong II*, 1 F.3d at 1287. But nowhere did the court suggest that judicial review of a claim challenging an agency's records-creation guidelines would be "particularly limited," as DHS claims. Nor would Plaintiffs' claim here "saddle" DHS with any "new obligations" to make "additional documents"—they merely seek to compel the agency to issue adequate guidelines on its *existing* records-creation obligations.

IV. Under *Armstrong*, APA Review of an Agency's "Recordkeeping Guidelines and Directives" Encompasses the "Total" Recordkeeping Guidance Given to Agency Staff

DHS contends that Plaintiffs' claim is "impermissibly overbroad" insofar as it challenges the "total guidance" given to agency staff regarding the FRA's records-creation requirements. *See* DHS Mot. at 26-29. In so arguing, DHS fails altogether to address *Armstrong I*, which, as DHS undoubtedly knows, is the source of the "total guidance" language to which the agency objects. A close reading of that decision readily demonstrates why DHS is wrong.

As noted, *Armstrong I* provides detailed instructions on the factual record that must be developed before a district court can rule on the adequacy of an agency's recordkeeping guidelines and directives. The court stated, in full:

> At the time summary judgment was denied, the record contained copies of several documents informing the NSC staff of their obligation to create and maintain hard copy "records" before erasing the PROFS [computer system] tapes—*e.g.,* the White House Office Staff Manual, the EOP Records Management Program manual, and other memoranda concerning records management. It is not clear from the record, however, whether these documents comprise the total "guidance" given to

> NSC staff regarding their recordkeeping responsibilities or whether, as plaintiffs asked in interrogatories, there are other informal, supplementary guidance. For example, how did appellants respond to questions about whether particular documents or types of documents constitute records that must be maintained? Was any additional guidance provided in staff meetings in which recordkeeping responsibilities were discussed? Did appellants consistently advise their staff that particular types of documents—such as PROFS notes or calendars—are or are not records?
>
> With answers to such questions, which can be obtained "either through affidavits or testimony," the record should contain sufficient information for the district court to determine whether the NSC recordkeeping guidelines and directives satisfy the NSC's statutory obligations to "make and preserve records" documenting the "functions, policies, decisions, procedures, and essential transactions" of the NSC, 44 U.S.C. § 3101, and to ensure that these records are destroyed only pursuant to disposal schedules approved by the Archivist, *id.* §§ 3105(a), 3303a. *Cf. Camp v. Pitts,* 411 U.S. 138, 143 (1973). On remand, therefore, the district court should determine whether the NSC's guidelines and directives are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), because they permit the destruction of record material that should be maintained.

Armstrong I, 924 F.2d at 296-97; *see also Armstrong II*, 1 F.3d at 1280 (noting that *Armstrong I* "remanded the case to allow for supplementation of the record as to the precise guidance—written and oral—that the defendant agencies had given employees").

The Circuit's remand guidance is instructive here for several reasons. First, it makes clear that the phrase "recordkeeping guidelines and directives" is not limited to an agency's formal recordkeeping policies, such as the two DHS policies attached to Plaintiffs' SAC. The phrase instead encompasses "the *total 'guidance'* given to [agency] staff regarding their recordkeeping responsibilities," including both formal policies and any "informal, supplementary guidance." *Armstrong I*, 924 F.2d at 297 (emphasis added). Second, the Circuit recognized that the task of identifying an agency's "total" recordkeeping guidance is highly fact-intensive, and

that the district court must therefore permit the parties to develop—through discovery—a factual record "contain[ing] sufficient information for the district court to determine whether the [agency's] recordkeeping guidelines and directives satisfy" its FRA obligations. *Id.*

DHS nonetheless insists that a claim challenging an agency's "total recordkeeping guidance" is incompatible with the APA's "agency action" requirement. *See* DHS Mot. at 26-27. "Under the terms of the APA," a plaintiff must "direct its attack against some particular 'agency action' that causes it harm." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990); *see* 5 U.S.C. § 551(13) (defining "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof"). This requirement precludes "broad programmatic attack[s]" that "seek wholesale improvement of [an agency] program by court decree." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (quoting *Lujan*, 497 U.S. at 891).

DHS's agency-action argument is precluded by *Armstrong I* and *II*. Both of those decisions, which were decided ***after*** the Supreme Court's decision in *Lujan*, make clear that an agency's "total" recordkeeping guidance qualifies as discrete "agency action" reviewable under the APA. *See Armstrong I*, 924 F.2d at 296-97 (instructing that once the district court develops a factual record containing the "total 'guidance' given to NSC staff regarding their recordkeeping responsibilities," it "should determine whether the NSC's guidelines and directives are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" (quoting 5 U.S.C. § 706(2)(A)); *Armstrong II*, 1 F.3d at 1281-88 (holding, based on "extensive record" containing agency's total recordkeeping guidance, that certain aspects of guidance were "arbitrary and

capricious"). That is because an agency's "total" recordkeeping guidance—whether formal or informal, written or unwritten, memorialized in a single document or several—forms a *single* policy designed to implement the FRA's requirements. The process of identifying an agency's total recordkeeping guidance, as outlined in *Armstrong*, simply refers to compiling a factual record sufficient to discern the contours of the agency's policy—a familiar practice in APA cases. *See Venetian Casino Resort LLC v. EEOC*, 530 F.3d 925, 928-30 (D.C. Cir. 2008) (examining record in APA case to resolve dispute regarding contours of agency policy and concluding that, "[o]n this record it is clear the Commission has a policy of disclosing confidential information without notice"). As recently as 2016, the Circuit has continued to apply *Armstrong*. *See Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 954-55 (D.C. Cir. 2016). Whether DHS likes it or not, *Armstrong* remains the law of this Circuit.

It also bears emphasizing that DHS's argument rests on a dramatic overstatement of Plaintiffs' claim. DHS insists, without any supporting citation, that Plaintiffs are "asking the Court to review the adequacy of every decision of every component within DHS, from the Coast Guard to the Science and Technology Directorate to the Countering Weapons of Mass Destruction Office, regarding what kinds of records to create and what kinds of information to document in connection with every program and activity in which they are engaged." DHS Mot. at 26; *see also id.* at 29 (similarly asserting, without citation, that "Plaintiffs' theory is that DHS has violated the FRA by failing to identify every category of information that must be included in the records of each component, in connection with each program or activity in which the component is involved."). That is false. The SAC only challenges *DHS's* recordkeeping

guidelines and directives—*i.e.*, the recordkeeping guidance provided by DHS headquarters to its staff and components. Nowhere do Plaintiffs suggest they are challenging all recordkeeping guidance issued by each and every DHS component as to each and every component activity.

V. DHS's Request to Dismiss Plaintiffs' Request for Injunctive Relief Should Be Denied

Plaintiffs seek two primary forms of relief: a declaration that DHS's recordkeeping guidelines and directives are arbitrary and capricious, and an injunction compelling DHS to implement revised guidelines and directives with adequate guidance on the FRA's records-creation requirements. SAC at 30. DHS does not dispute the propriety of this first category of relief, and indeed acknowledges that the APA allows the Court to hold "unlawful" and "set aside" agency action. DHS Mot. at 27-29. But DHS moves to dismiss Plaintiffs' request for injunctive relief, claiming it is not available under the APA. *Id.*

While DHS is wrong on the merits, the Court need not reach the issue because DHS's request for dismissal is plainly premature. "The appropriateness of the remedy need not be analyzed by the Court unless and until Plaintiffs prevail." *Roshandel v. Chertoff*, 2008 WL 1969646, at *9 (W.D. Wash. May 5, 2008). Thus, where it is at least possible that injunctive relief may be appropriate, courts routinely deny motions to dismiss requests for injunctive relief as premature. *E.g.*, *id.*; *In re K–Dur Antitrust Litigation*, 338 F. Supp. 2d 517, 550 (D.N.J. 2004); *Friends of Frederick Seig Grove #94 v. Sonoma Cty. Water Agency*, 124 F. Supp. 2d 1161, 1172 (N.D. Cal. 2000); *Zepeda v. Tate*, 2010 WL 4977596, at *5 (E.D. Cal. Dec. 2, 2010); *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, 2007 WL 1007968, at *9 (W.D. Pa. Mar. 30, 2007). Here, the very case law DHS cites recognizes that

injunctive relief is sometimes proper in APA cases. *See Am. Hosp. Ass'n v. Azar*, 385 F. Supp. 3d 1, 11 (D.D.C. 2019) ("Injunctive relief is typically appropriate when 'there is only one rational course for the [a]gency to follow upon remand.'") (cited in DHS Mot. at 28). Because it is at least possible injunctive relief will be appropriate here, DHS's request is premature and should be denied.[8]

CONCLUSION

The Court should deny DHS's motion to dismiss.

[8] DHS appears to suggest that its arguments urging dismissal of Plaintiffs' request for injunctive relief warrant dismissal of Plaintiffs' entire "claim," DHS Mot. at 29, but that is plainly incorrect. As noted, Plaintiffs also request that the Court "hold unlawful and set aside" DHS's arbitrary and capricious actions, and such relief is indisputably available under 5 U.S.C. § 706(2).

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