IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY *et al.*,

Defendants.

No. 18-cv-2473

DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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INTRODUCTION

On its face, Plaintiffs' Second Amended Complaint ("SAC") asserts that the "total guidance" provided by the U.S. Department of Homeland Security ("DHS") to "agency employees," which include the personnel of DHS's various components ranging from the U.S. Coast Guard to U.S. Customs and Border Protection ("CBP") to the U.S. Secret Service, violates an array of statutory and regulatory provisions of the Federal Records Act ("FRA") that reference the creation of records. This claim amounts to a broad programmatic attack on DHS's entire recordkeeping program, contrary to the "final agency action" requirement of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, and thus is unreviewable under the narrow framework set forth in the D.C. Circuit's decision in *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) ("*Armstrong I*"). The Court therefore should dismiss the SAC claim for the same reasons it dismissed Plaintiffs' earlier such claim. *See CREW v. DHS* ("*CREW I*"), 387 F. Supp. 3d 33, 54 (D.D.C. 2019). Plaintiffs' opposition brief takes numerous twists and turns attempting to explain what the SAC claim challenges and what it does not, but ultimately Plaintiffs make one thing clear: The SAC does not assert the claim that Plaintiffs say it does. Just as before, Plaintiffs' attempt to salvage their case by rewriting their claim in their opposition brief should be rejected, and their claim should be dismissed.

Plaintiffs eschew the notion that their attack encompasses the recordkeeping guidance of every DHS component, for each and every program and activity that DHS is involved in, essentially conceding that the claim as written in the SAC is far too broad. But once Plaintiffs try to rewrite their claim, and depart from the language of their SAC, the nature of their claim becomes even more problematic. In particular, Plaintiffs assert that, even though the SAC never says so, they intended only to challenge the "total guidance" of DHS Headquarters, not of its component

agencies. Yet Plaintiffs muddy the waters further by contending that they also sought to focus only on the creation of records "relating to child separations," even though DHS Headquarters does not create such records, and even though, again, the SAC fails to identify any such limitation in the claim it asserts.

Far from refuting the nature of their claim as a broad programmatic attack, these arguments further call into question Plaintiffs' standing to assert either their claim as set forth in the SAC, or their attempted revision through briefing. In neither case do Plaintiffs establish that the injuries they assert are fairly traceable to the violations they allege. Indeed, their underlying assumption that delays in linking separated alien children to their parents, which are already under review in another case, *Ms. L. v. ICE*, No. 3:18-cv-428 (S.D. Cal. filed Feb. 26, 2018), are traceable to the alleged FRA deficiencies in "records creation" guidance that Plaintiffs seek to identify in DHS Headquarters' recordkeeping policies is deeply flawed, particularly given the filings in *Ms. L.* showing relevant recordkeeping procedures in place at the component level, and this Court's recognition that "[i]t is undisputed that DHS creates records of aliens apprehended at the border." *CREW I*, 387 F. Supp. 3d at 53 n.8.

Plaintiffs now also concede that the two DHS Headquarters policies challenged in their SAC—DHS Directive No. 141-01 and DHS Instruction No. 141-01-001 (the "DHS Policies" or the "Policies")—do in fact require compliance with the FRA. Plaintiffs' only quarrel with the Policies, then, is that the Policies, by themselves, omit certain information required by the FRA. Yet, as Plaintiffs concede, the Policies never purport to represent the entirety of DHS's recordkeeping guidance and instead validly exercise DHS's discretion to delegate the creation of further guidance to DHS components. The FRA is silent regarding which office within an agency is responsible for addressing its various requirements, and Plaintiffs fail to explain why the Court,

rather than DHS, should take charge of dividing FRA responsibilities between DHS Headquarters and DHS components, nor do they identify any meaningful standard by which the Court could do so. In sum, Plaintiffs' claim should be dismissed with prejudice.

ARGUMENT

I. THE COURT SHOULD DISMISS PLAINTIFFS' CLAIM

In *Armstrong I*, the D.C. Circuit allowed a narrow APA challenge to an agency's recordkeeping guidelines and directives based on their alleged inconsistency with the FRA. *Armstrong I*, 924 F.2d at 293. When considering whether a claim actually raises such a challenge, a court must guard against attempts to exceed the scope of a proper APA claim by mounting a "broad programmatic attack" on an agency's records management program, on the one hand, *Norton v. SUWA*, 542 U.S. 55, 67 (2004), while being equally vigilant in prohibiting a "compliance-based claim," interfering with the discretion that the FRA grants to agencies to manage their own day-to-day recordkeeping, on the other, *Competitive Enter. Inst. v. EPA* ("*CEI*"), 67 F. Supp. 3d 23, 33 (D.D.C. 2014). In their First Amended Complaint ("FAC"), Plaintiffs asserted claims that were impermissible on each of these extremes, both challenging DHS's entire records management program, and also asserting a compliance-based claim, founded on allegations that DHS was "failing to create records sufficient to link separated children to adults with whom they were apprehended," *CREW I*, 387 F. Supp. 3d at 50, which this Court recognized would "inject[] the judge into day-to-day agency management," *id.* at 51.

The claim set forth in Plaintiffs' SAC also fails to thread this needle and instead continues to raise a broad programmatic challenge to DHS's "total guidance" regarding records creation. Moreover, Plaintiffs' attempts to rewrite their claim in their opposition brief only compound the problematic nature of their allegations. Plaintiffs also lack standing to assert any version of their claim. At the same time, Plaintiffs fail to state a claim that the DHS Policies are deficient,

particularly considering that they do not purport to be, nor are they required to be, the full or final guidance on recordkeeping with respect to any specific category of records.

A. Plaintiffs' Claim Is an Impermissible Broad Programmatic Attack

As explained in Defendants' opening brief, the claim asserted in Plaintiffs' SAC is impermissibly broad under *Armstrong* and the APA's final agency action requirement. Def. Mem. at 13–22, 26. The claim purports to challenge the DHS Policies based on their alleged general "lack [of] adequate guidance regarding the FRA's records-creation requirements." SAC ¶ 77. The claim then proceeds more generally to challenge DHS's "total guidance given to agency employees" regarding records creation. *Id.* ¶ 81. Unbounded by any focus on a specific category of records, the claim amounts to a "broad programmatic attack," *Norton*, 542 U.S. at 67, and therefore should be dismissed.

Courts in past cases, including *Armstrong*, that allowed APA claims of FRA violations to proceed have avoided similar broad programmatic attacks because the claims in those cases asserted inadequacies in recordkeeping guidelines governing the specific category of records with which the plaintiff was concerned. Thus, the claim at issue in *Armstrong* focused on an alleged inadequacy in the agency's recordkeeping guidance regarding a specific category of records—those created or received on the National Security Council ("NSC")'s PROFS system. *See Armstrong I*, 924 F.2d at 286; *see also CREW v. Pruitt* ("*Pruitt*"), 319 F. Supp. 3d 252, 260–61 (D.D.C. 2018) (alleging the agency's refusal to create records in one specific category, namely, "substantive decisions and commitments reached orally"). More recently, this Court held that a plaintiff's claim was justiciable under *Armstrong*, and also satisfied the APA's "final agency action" requirement, because it "contests the adequacy of the FBI's recordkeeping policy *for a specific category of records*: electronic records, excluding email." *Judicial Watch, Inc. v. FBI*, No.

18-2316, 2019 WL 4194501, at *6 & n.7 (D.D.C. Sept. 4, 2019) (Contreras, J.) (emphasis added). In this case, on the other hand, the Court recognized that Plaintiffs' original challenge to DHS's "agency-wide records management program" was squarely prohibited under the APA. *CREW I*, 387 F. Supp. 3d at 54.

The amended claim in Plaintiffs' SAC is no less broad than the claim that this Court earlier dismissed. The SAC asserts a general "lack [of] adequate guidance regarding the FRA's records-creation requirements" based on DHS's alleged failure to include language in the DHS Policies to specifically address various statutory and regulatory directives regarding the documentation of agency activities, including "important board, committee, or staff meetings," as well as "phone calls, meetings, instant messages, and electronic mail exchanges." *Id.* ¶ 77. The SAC then frames Plaintiffs' claim even more broadly, as a challenge to DHS's "total guidance." *Id.* ¶ 81. Rather than identify a specific category of records at issue, the violations that the SAC asserts only serve to emphasize the breadth of Plaintiffs' claim.

In their opposition brief, Plaintiffs make three primary arguments in an effort to avoid dismissal on this ground, but two of them involve impermissibly rewriting their claim, and the third mischaracterizes *Armstrong*. None of Plaintiffs' arguments brings their claim within the ambit of *Armstrong* or the APA.

1. Plaintiffs Cannot Rewrite Their Claim To Challenge Only the Guidance Issued by DHS Headquarters

Plaintiffs first insist that their SAC does not mount a broad programmatic attack because Plaintiffs did not intend their claim to extend beyond the recordkeeping guidelines of DHS Headquarters, to encompass the various components within DHS that include both CBP and U.S. Immigration and Customs Enforcement ("ICE"). Instead, Plaintiffs argue, their SAC claim only challenges DHS's "*centralized* guidance, standards, or training regarding the FRA's records-

creation requirements," *id.* at 30 (emphasis added), or "the recordkeeping guidance provided by DHS *headquarters* to its staff and components," *id.* at 36–37 (emphasis added). According to Plaintiffs, their claim therefore does not ask DHS to "identify every category of information that must be included in the records of each [DHS] component in connection with each program or activity in which the component is involved." Pl. Opp. at 30 n.7.

But no such limitation appears in the SAC claim itself, which does not even use the words "centralized" or "headquarters." SAC ¶¶ 74–83. Rather, the claim asserted in Plaintiffs' SAC, by its own terms, broadly and without limitation challenges "DHS's deficient recordkeeping guidelines and directives." SAC ¶ 1.

The way Plaintiffs structure the claim in their SAC makes clear the broad scope of their challenge. The SAC first purports to identify the DHS Policies, issued by DHS Headquarters, as "the only formal policies designed to implement the FRA's recordkeeping requirements currently in effect at DHS." *Id.* ¶¶ 28, 78. But Plaintiffs identify nothing in the DHS Policies that is *inconsistent* with FRA requirements or that, if applied according to its terms, would lead to an improper failure to create required records or the improper destruction of records that should be preserved. To the contrary, Plaintiffs now concede that the DHS Policies require compliance with the FRA. Pl. Opp. at 29. The only supposed inadequacy that the SAC identifies in the DHS Policies is their failure to set forth, within their four corners, all the information needed to comply with the statutory and regulatory requirements that the SAC cites. *See* SAC ¶ 77. In other words, although ostensibly limited to two documents issued by DHS Headquarters, the claim, by failing to focus on any specific category of records, amounts to an allegation that DHS should include within these documents the totality of records creation guidance that would be applicable to each and every DHS component, in each and every one of the numerous programs and activities in which those

components are engaged—a notion that makes no sense and that even Plaintiffs appear to eschew, Pl. Opp. at 30,[1] but that clearly qualifies as a "broad programmatic attack."

The SAC next challenges "the total guidance given to agency employees regarding their recordkeeping responsibilities, both formal and informal." SAC ¶ 81. The SAC never defines its use of the term "DHS" as referencing only DHS Headquarters. *See generally* SAC. Nor is there any other basis for understanding the term "DHS" to omit its component agencies. On its face, then, this SAC assertion can only be construed as challenging all recordkeeping guidance given to any DHS employees, including employees of its components. This Court previously ruled that Plaintiffs cannot amend their complaint through arguments in their opposition brief. *CREW I*, 387 F. Supp. 3d at 54 (citing *Woytowicz v. George Wash. Univ.*, 327 F. Supp. 3d 105, 121 (D.D.C. 2018)). That rule continues to apply here and forecloses any notion that Plaintiffs' claim, as set forth in their SAC, is anything other than a broad programmatic attack on the totality of DHS recordkeeping guidance.

2. Plaintiffs Cannot Rewrite Their Claim To Challenge Only Recordkeeping Guidance Related to the Separation of Alien Children From Accompanying Adults

Plaintiffs' second argument fares no better. Plaintiffs suggest in their opposition brief that the SAC does actually identify a specific category of records as the subject of Plaintiffs'

[1] As discussed below, Plaintiffs in their opposition brief propose an alternative reading of their challenge to the DHS Policies, suggesting that the FRA requires DHS Headquarters to provide some "baseline" form of "centralized" guidance that would somehow serve to enable DHS components to themselves satisfy FRA requirements, and that the DHS Policies are inadequate for that purpose. *See id.* But even if the SAC could be read to assert such a claim, it would not be viable. The FRA does not require "centralized," "baseline" guidance from a Headquarters-type umbrella entity, much less does it set forth a standard for evaluating the adequacy of such guidance, and after all, many federal agencies manage to satisfy FRA requirements on their own, without help from an umbrella entity, and Plaintiffs identify no reason that DHS's component agencies could not do the same. The SAC fails to state a claim alleging a FRA violation on this basis.

challenge—namely, records "relating to" the separation of alien children from accompanying adults when the adults are taken into custody by CBP or ICE. Pl. Opp. at 28. Fairly read, however, the SAC does no such thing. Although the SAC includes allegations regarding "systematic recordkeeping failures" relating to child separation similar to those presented in earlier versions of Plaintiffs' complaint, *see* SAC ¶¶ 45–61, the *claim* asserted in the SAC nowhere identifies specific record categories, nor does it refer to the DHS recordkeeping guidance specific to such record categories. *See* SAC ¶¶ 74–83. Instead, as described above, the SAC challenges the DHS Policies, which were issued by DHS Headquarters rather than by CBP or ICE, and which do not provide specific guidance on the creation of records that relate solely to component activities, *id.* ¶ 77; and it alternatively challenges the "total guidance" provided to DHS employees throughout the entire agency, with no limitation based on a specific category of records, *see id.* ¶ 81. Plaintiffs' argument in their opposition brief that they intended *not* to challenge CBP or ICE recordkeeping guidelines at all does nothing to bolster their argument that they sought to focus on a specific category of records that only CBP and ICE create. *See* Pl. Opp. at 36–37 (eschewing any intent to challenge recordkeeping guidance of DHS components). Again, Plaintiffs cannot use their opposition brief to rewrite their claim. *Woytowicz*, 327 F. Supp. 3d at 121. Read according to its terms, the SAC claim is not limited to a specific category of DHS records. [2]

[2] As discussed below, to the extent the Court were to accept both of Plaintiffs' proposed revisions, and thus consider Plaintiffs' claim as asserting a challenge solely to DHS Headquarters' guidance on records creation, and solely with respect to records "relating to child separations," the SAC would nevertheless fail to state a valid APA claim. Simply put, it would be impossible to evaluate the adequacy of DHS Headquarters records creation guidance in isolation where the records at issue are being created by a DHS component rather than by DHS Headquarters, and DHS Headquarters has delegated the authority to issue component-specific guidance to the components themselves. Such a claim would contravene the APA's finality requirement, as well as its requirement that there be a meaningful standard by which a court could evaluate an agency's

3. The Totality of DHS's Recordkeeping Guidance Is Not a Discrete Final Agency Action Under *Armstrong*

Third, Plaintiffs argue that their claim need not be limited to a specific category of records at all, and that, instead, "an agency's 'total' recordkeeping guidance qualifies as discrete 'agency action' reviewable under the APA." Pl. Opp. at 35. However, Plaintiffs cite no instance where a court agreed to review an agency's "'total' recordkeeping guidance" in the abstract, unbounded by a specific category of records. As discussed above, *Armstrong*, and subsequent decisions including this Court's recent decision in *Judicial Watch, Inc. v. FBI*, involved claims that *were* confined to a specific category of records. *Armstrong I*, 924 F.2d at 286; *Judicial Watch, Inc. v. FBI*, 2019 WL 4194501, at *6. In fact, the only FRA case that Plaintiffs muster in support of their contrary notion, *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952 (D.C. Cir. 2016), is wholly inapposite, as the court there did not address a challenge to an agency's recordkeeping guidance at all. *See id.* at 954–55 (addressing a different type of challenge, to the agency's alleged failure to make a referral to the Attorney General).

Moreover, the fact that the claim in *Armstrong* did focus on a specific category of records also suffices to rebut Plaintiffs' reliance on the D.C. Circuit's suggestion in that case that, on remand, the district court would allow development of a record reflecting "the total 'guidance' given to NSC staff regarding their recordkeeping responsibilities," *Armstrong I*, 924 F.2d at 297. *See* Pl. Opp. at 24. This language must, of course, be understood in light of the fact that the claim at issue in *Armstrong* only concerned records sent or received on NSC's PROFS system. Thus, the record developed on remand focused on the recordkeeping guidance relating to PROFS, not all NSC recordkeeping guidance. *See, e.g.*, *Armstrong v. Bush*, 139 F.R.D. 547, 552 (D.D.C. 1991)

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action, given that the FRA sets forth no restriction on an umbrella agency's delegation of recordkeeping responsibilities to its components.

(in decision addressing parties' discovery disputes, considering whether information would be "relevant to the issue of how much of the material on PROFS is record material," and whether information would be helpful "to assess the adequacy of the guidelines for the preservation of computer records"); *Armstrong v. EOP*, 810 F. Supp. 335, 338 (D.DC. 1993) (identifying the purpose of the record developed on remand "to determine whether the electronic communications systems" at issue "were within" the FRA's requirements). And the D.C. Circuit's later decision in *Armstrong II* discussed the resulting record, which only described guidance regarding "electronic records management." *See Armstrong v. EOP*, 1 F.3d 1274, 1281 (D.C. Cir. 1993) ("*Armstrong II*"). In a sense, the development of a record in *Armstrong* was intended to collect information reflecting what the "final agency action" actually was, when it came to NSC's recordkeeping guidance regarding PROFS records. It was not an open-ended exploration of all recordkeeping guidance in existence within the agency, nor can it be interpreted to mean that an agency's recordkeeping guidance as a whole is a single discrete "agency action," particularly when an attack on an agency's entire records management program is the epitome of a "broad programmatic attack." *See CREW I*, 387 F. Supp. 3d at 54. The language Plaintiffs quote from *Armstrong I* therefore does not grant license to assert the nebulous challenge that Plaintiffs have set forth here, nor does it suggest that Plaintiffs should be allowed to engage in discovery that would be unbounded by the limits of a specific final agency action at issue.

The distinction between claims such as that in *Armstrong*, focusing on a specific category of records, and the one that Plaintiffs assert here is crucial. Lacking any focus on a specific category of records that would allegedly not be created or preserved under the DHS Policies, Plaintiffs' claim, if allowed to proceed, would balloon into a broad programmatic attack on all aspects of DHS records creation—exactly what the APA prohibits, *see Norton*, 542 U.S. at 67—

and with no clear sense of what "adequacy" would mean, leaving Plaintiffs free to contest every detail of every records creation guideline governing each and every DHS activity. The breadth of Plaintiffs' claim, and of the oversight that the Court would be called upon to provide if it proceeds to adjudicate the claim on the merits, thus cannot be overstated. As NARA has observed: "The complexity of the DHS [Records Information Management] Program is reflected in the diverse missions of its components. Ranging in scope from civil disaster assistance, to intelligence work, to law enforcement, and military operations, the records and systems created by DHS and its components are among the most complex in the Federal Government."[3] By its terms, the SAC claim extends to guidance covering each of these components, in all of their various activities—a broad programmatic attack by any measure. Accordingly, Plaintiffs' claim should be dismissed for falling outside the scope of claims permitted by *Armstrong*, and for failure to satisfy the APA's "final agency action" requirement.

B. Plaintiffs Lack Standing Because Their Claimed Injuries Are Not Fairly Traceable to the DHS Policies or to DHS's "Total Guidance" on Records Creation

As argued in Defendants' opening brief, Plaintiffs' amended claim raises new issues with regard to Plaintiffs' standing, and Plaintiffs fail to establish that their asserted injuries are fairly traceable to the FRA violations that they now allege. The injuries Plaintiffs assert in the SAC are largely the same as those asserted in their prior complaint. *Compare* SAC ¶¶ 62–73, *with* First Am. Compl. ("FAC") [ECF 7] ¶¶ 50–61. And the Court previously held that Plaintiff RAICES's asserted injuries were sufficient to support its standing at the pleading stage. *CREW I*, 387 F. Supp. 3d at 46. However, now that Plaintiffs have revised the object of their challenge, the causation

[3] NARA, Records Management Inspection Report, DHS Records Management Program, at 5 (Jan. 11, 2016), *available at* https://www.archives.gov/files/records-mgmt/resources/dhs-2016-inspection.pdf.

analysis changes accordingly. Plaintiffs fail to identify a "causal connection between th[at] injury and [the] conduct" that they challenge in the SAC, namely the FRA violations that they allege with respect to the DHS Policies, issued by DHS Headquarters, or the "total guidance" provided by DHS regarding records creation, SAC ¶¶ 77, 81. *See CREW I*, 387 F. Supp. 3d at 46 (quoting *ASPCA v. Ringling Bros.*, 317 F.3d 334, 338 (D.C. Cir. 2003)).

RAICES' asserted injuries, for example, allegedly stem from failures of CBP and ICE personnel when creating records of alien children separated from adults at the border. SAC ¶ 64 (identifying source of injury as "separat[ing] migrant children from adult companions . . . and fail[ing] to create records sufficient to later identify and locate those adults"). Indeed, in its prior ruling, the Court identified RAICES' alleged source of harm as "the failure to link separated children to family members." *CREW I*, 387 F. Supp. 3d at 47. The difference now, which makes Plaintiffs' theory of standing in their SAC untenable, is that Plaintiffs now allege DHS recordkeeping guidance is in violation of the FRA by failing to include certain information identified in FRA statutory and regulatory provisions, and they also purport to challenge either the DHS Policies, issued by DHS Headquarters, or DHS's "total guidance" on records creation. SAC ¶¶ 77, 81. Yet they assert no factual details in the SAC that connect CBP's or ICE's alleged failure to create records regarding alien children to the DHS Policies' alleged failure to include each category of information identified in 36 C.F.R. § 1222.22, .24, .26, or .28, which encompasses not only information sufficient to "[d]ocument the persons, places, things, or matters dealt with by the agency," but also information sufficient to "[d]ocument important board, committee, or staff meetings," and "[p]olicies and procedures for maintain the documentation of phone calls, meetings, instant messages, and electronic mail exchanges," SAC ¶ 77(a)–(e). Plaintiffs must establish standing to assert *each* of these specific challenges, but they make no effort to do so.

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) ("a plaintiff must demonstrate standing for each claim he seeks to press"). Much less do they establish any connection between RAICES' asserted injury and DHS records creation guidance governing activities of DHS components other than CBP or ICE, even though the SAC, by challenging the totality of records creation guidance within DHS, ostensibly encompasses such guidance.

Plaintiffs also cannot rely on CREW's invocation of informational standing to support such claims because Plaintiffs do not allege, for example, that CREW has sought records regarding board meetings, phone calls, or instant messages from DHS. *Cf. CREW v. SEC*, 858 F. Supp. 2d 51, 59–61 (D.D.C. 2012) (concluding CREW had standing where it had sought "exactly the type of preliminary investigatory materials that likely have been destroyed").[4] Rather, the only FOIA requests submitted by CREW identified in the SAC are those "seek[ing] various categories of documents relating to DHS's child separation practices, and related policies and procedures." SAC ¶ 71.

Moreover, as noted in Defendants' opening brief, this Court has already concluded that "[i]t is undisputed that DHS creates records of aliens apprehended at the border." *CREW I*, 387 F. Supp. 3d at 53 n.8. That undisputed fact by itself undermines any attempt to draw a causal connection between the DHS Policies and Plaintiffs' asserted injuries. The Court's prior finding also continues to be supported by proceedings in *Ms. L.*, in which public filings have set forth the recordkeeping procedures that CBP and ICE currently follow, most recently explaining that the DHS components "have now implemented the use of a tear sheet for families[,] parents and

[4] The assertion of an informational injury based on the failure to obtain, through FOIA, a record that never existed, as opposed to one that is threatened with destruction, is all the more dubious because "FOIA imposes no duty on the agency to create records." *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 269 (D.D.C. 2012).

children that are separated that provides information about the separation to the separated parent, as well as information about how to locate their children." *Ms. L.*, JSR [ECF 495], at 11 (S.D. Cal. filed Nov. 6, 2019) (attached hereto).[5]

The Court's prior finding, together with the *Ms. L.* proceedings, suggest an "obvious alternative explanation" for the failures regarding separated alien children that Plaintiffs' allege—namely, that, despite the components' creation of records, the information necessary to link separated alien children to the adults who had accompanied them was not readily available, when the *Ms. L.* case was originally filed, without engaging in time-consuming review of those records, and that CBP and ICE have since modified their procedures to make that process easier.[6] *See Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007). Under Supreme Court authority, an "obvious alternative explanation" for Plaintiffs' asserted facts, which does not involve conduct in violation of the FRA, renders Plaintiffs' attempt to draw a causal connection to an alleged FRA violation implausible.[7] *See Iqbal*, 556 U.S. at 682 ("As

[5] *See also* other *Ms. L.* filings, attached to Defendants' memorandum in support of their motion to dismiss Plaintiffs' FAC, and related discussion, in Def. Mem. [ECF 19-1] at 11–14 & attachments at ECF 19-3. Plaintiffs concede that the Court may consider material outside the record when evaluating their standing. Pl. Opp. at 14 n.2; *see also Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). Yet they identify nothing in the outlined procedures as causing their alleged injuries, nor do they trace any alleged deficiency in those procedures to the DHS Policies or to any other recordkeeping guidance provided by DHS Headquarters.

[6] As further support for this alternative explanation, there is no indication in the *Ms. L.* filings that the government has been *unable* to identify the parent of a separated alien child after the parent and child were separated following their entry into the United States.

[7] Plaintiffs' theory of causation is rendered more implausible by their continued reliance on the same reports cited in their original Complaint as showing that "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 . . . ," and that "the agency continues to separate migrant families without creating records documenting the separations adequately, or at all." Pl. Opp. at 8 (citing SAC ¶¶ 45–61). Defendants have previously explained that those reports show no such thing. *See, e.g.*, Def. Mem.[ECF 19-1], at 26–29.

between that 'obvious alternative explanation' for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion." (quoting *Twombl*y, 550 U.S. at 567)). Plaintiffs' conclusory assertions in the SAC, cited and relied upon in their opposition brief, Pl. Opp. at 15, that their injuries stem from the deficiencies they allege in the DHS Policies are not entitled to a presumption of truth. *See Iqbal*, 556 U.S. at 680–81 (recognizing that "the conclusory nature" of a plaintiff's allegations "disentitles them to the presumption of truth"). Rather, they are merely legal conclusions couched as factual allegations and thus fail to meet Plaintiffs' burden to establish the causation prong of standing at the pleading stage. *See Twombly*, 550 U.S. at 555.

Moreover, if the Court were to accept Plaintiffs' contention in their opposition brief that the SAC challenges only the records creation guidance of DHS Headquarters, thus excluding any guidance provided by DHS components such as CBP or ICE, Pl. Opp. at 36–37, their attempt to establish the required causal link would be all the more deficient. *Cf. Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1290 (D.C. Cir. 2007) (rejecting a theory of "under-regulation" as too attenuated to support standing). Plaintiffs' claimed injuries focus on the conduct of DHS components CBP and ICE, not DHS Headquarters. Plaintiffs fail to allege factual details showing how the DHS Policies, which require compliance with the FRA and delegate the authority to issue specific guidance to DHS components, could lead to a failure by CBP or ICE to create required records. Given that agency employees are presumed to act in good faith, *CEI*, 67 F. Supp. 3d at 33, the Court should presume that a direction from DHS Headquarters to comply with the FRA should lead to FRA compliance by DHS employees, including those of CBP and ICE. Plaintiffs therefore fail to establish their standing to assert the SAC claim.

C. Plaintiffs Fail To State a Claim That the DHS Policies Violate FRA Requirements

As discussed in Defendants' opening brief, in addition to its failure to identify a discrete final agency action as the subject of its challenge, or to establish the necessary causal link between Plaintiffs' asserted injuries and the alleged deficiencies in the DHS Policies, Plaintiffs' amended claim fails on the merits. *See* Def. Mem. at 20–25. Plaintiffs concede that the DHS Policies, by their plain language, require compliance with FRA requirements.[8] Pl. Opp. at 29. Their only quarrel is that the Policies do so "at the most general level." *Id.* (internal quotation omitted). Plaintiffs also concede that DHS is well within its discretion in "delegat[ing] the formulation of some recordkeeping requirements to component-level records officers." *Id.* at 30.[9] Yet they

[8] Moreover, if there were any doubt on this score, the revised instruction attached to Defendants' opening brief should remove it. *See* DHS Instruction No. 141-01-001 Revision 00.1, ex.A to Second Declaration of Paul Johnson ("Second Johnson Decl.") [ECF 33-3]. Contrary to Plaintiffs' assertion, the Court may consider an agency's official policies without converting a motion to dismiss to one for summary judgment. *See CREW v. Trump*, 924 F.3d 602, 607 (D.C. Cir. 2019) (court may consider "public records" on a motion to dismiss). Indeed, in a FRA claim, the agency's challenged policy is effectively incorporated in the plaintiff's complaint. *See, e.g.*, *Judicial Watch v. FBI*, 2019 WL 4194501, at *3 (considering FBI Policy Guide in connection with plaintiff's FRA claim). Here, Plaintiffs attached the prior version of DHS Instruction No. 141-01-001 to their SAC, and they do not challenge the authenticity of DHS's revision, attached to a declaration by the same DHS official who authenticated the prior version. *Cf.* Declaration of Paul Johnson & exs. A–B [ECF 19-2]. The revision easily qualifies as a "source[] whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b).

[9] Given Plaintiffs' concession on this point, the SAC's assertion that the DHS Policies are the only recordkeeping guidelines or directives in existence within all of DHS, including its component entities such as ICE and CBP, SAC ¶¶ 78–79, is entirely contrived and contrary to logic as well as the plain terms of the DHS Policies themselves. The nature of DHS as a very large agency encompassing a broad collection of components with entirely distinct missions and functions is enough to suggest that Plaintiffs' assertion cannot conceivably be true. Moreover, the express terms of the DHS Policies, which delegate authority to component agencies to issue more specific recordkeeping guidance, contradict Plaintiffs' assertion. DHS Dir. No. 141-01(II) (delegating authority to components to develop "more specific internal policies and procedures"); *see also* DHS Instr. No. 141-01-001(II), (V)(3)&(6). Similarly, to the extent that Plaintiffs intended the "total guidance" referenced in the SAC to mean only the "total guidance" in existence in DHS Headquarters, such a limitation does not appear in the SAC itself, and if accepted, would create an oxymoron. The guidance provided by DHS Headquarters cannot possibly be the "total guidance"

vaguely argue that DHS cannot delegate *too* much recordkeeping responsibility to components because to do so would be "abdication, not delegation." *See id.*

The problem with Plaintiffs' theory is that the FRA draws no such line. Instead, the FRA leaves the *allocation* of recordkeeping responsibilities entirely up to an agency's discretion. Although Plaintiffs emphasize the statement in *Armstrong* that the FRA requirements set forth standards that a court can apply, Pl. Opp. at 25 (citing *Armstrong I*, 924 F.2d at 293), the FRA provides no meaningful standard for evaluating whether an agency has divvied up recordkeeping responsibilities appropriately between a headquarters and other agency components—a matter that was not considered in *Armstrong*, and one which the agency is best able to address based on its understanding of its internal structure and the complexities of its components' activities. *Cf. Physicians for Soc. Responsibility v. Wheeler*, 359 F. Supp. 3d 27, 48 (D.D.C. 2019) (declining to "second guess" whether an agency had appropriately evaluated the professional qualifications of potential committee members when the agency was in the best position to make such determinations). DHS therefore has full discretion over such issues. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

Plaintiffs again essentially concede as much by failing to point to any FRA provision setting forth such a standard. To the contrary, Plaintiffs rely on a statement from DHS's website, describing Congress's intent to create a "unified, integrated Cabinet agency," as the sole authority for their argument that DHS Headquarters has specific FRA obligations that cannot be delegated to DHS components. *See* Pl. Opp. at 30 (quoting Def. Mem. at 22, which in turn quoted DHS's website). Plaintiffs otherwise rely on bare assertions that DHS Headquarters "should be issuing

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when the DHS Policies delegate the responsibility for further guidance to the components. The fact, cited by Plaintiffs, that NARA issued a report regarding CBP's records management program, distinct from DHS's program, *see* SAC ¶ 32, confirms as much.

uniform guidance" in some areas. *Id.* at 31. But again, the FRA does not require "uniform guidance," nor does it require that any guidance—uniform or otherwise—be issued by a headquarters rather than by component offices in parallel. Given the diverse range of component agencies within DHS, it is perfectly reasonable for DHS Headquarters to issue only "the most general" guidance while delegating the responsibility to address recordkeeping for specific activities and programs to the components that conduct them. The standards set forth in the FRA itself and in NARA regulations are not meaningful when it comes to assessing whether DHS Headquarters is sufficiently active in directing and monitoring the recordkeeping guidelines of component agencies.

Moreover, to the extent Plaintiffs ask the Court to evaluate whether DHS as a whole has satisfied the requirements set forth in 36 C.F.R. §§ 1222.22, .24, .26, and .28, a claim focused solely on DHS Headquarters' guidance concerning the records that CBP and ICE (or other components) create, without regard to the components' own guidance, would not satisfy the APA's finality requirement. *See* 5 U.S.C. § 704. In order to qualify as "final," an agency action must satisfy "two independent conditions." *Soundboard Ass'n v. Fed. Trade Comm'n*, 888 F.3d 1261, 1267 (D.C. Cir. 2018). First, it must "mark the consummation of the agency's decisionmaking process" with respect to the action at issue, and second, it must "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). The DHS Policies cannot qualify as DHS's "final" agency action when it comes to records creation guidance "relating to child separations" because the Policies expressly delegate to DHS components, including CBP and ICE, the task of formulating recordkeeping guidelines that would specifically address the activities of the components. DHS Dir. No. 141-01(II) (delegating authority to components to develop "more specific internal policies

and procedures"); *see also* DHS Instr. No. 141-01-001(II), (V)(3)&(6). Any guidance provided by DHS Headquarters therefore does not represent the consummation of DHS's decisionmaking regarding components' records creation, nor does it represent action that determines rights or obligations, or from which legal consequences will flow. Plaintiffs' claim therefore should be dismissed on this basis as well.

II. PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF

Plaintiffs also fail to show entitlement to injunctive relief, even if they were to prevail in their claim. Defendants explained in their opening brief that the proper remedy under the APA, 5 U.S.C. § 706(2), is to "set aside" the agency action at issue. Def. Mem. at 28–29. Plaintiffs concede that this is so in most cases but suggest that "injunctive relief is sometimes proper in APA cases." Pl. Opp. at 38. However, the only case they cite for that proposition limited the situations where injunctive relief might be proper to those where "there is only one rational course for the agency to follow upon remand." *Am. Hosp. Ass'n v. Azar*, 385 F. Supp. 3d 1, 11 (D.D.C. 2019) (alteration marks omitted). Plaintiffs fail to explain how that circumstance could ever conceivably be present here, where, by Plaintiffs' own assertions, the alleged FRA deficiencies involve the omission of information that only the agency could fill in, and that largely rests on agency discretion. *See* SAC ¶ 77. The Court therefore should dismiss Plaintiffs' request for such relief at the outset.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action with prejudice.

Dated: November 13, 2019

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MS. L, et al.,

Petitioners-Plaintiffs,

vs.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, et al.,

Respondents-Defendants.

Case No. 18cv428 DMS MDD

JOINT STATUS REPORT

The Court ordered the parties to file a joint status report (JSR) by 3:00 pm on November 6, 2019, in anticipation of the status conference scheduled at 2:00 pm on November 8, 2019. The parties submit this joint status report in accordance with the Court's instruction.

I. DEFENDANTS' POSITIONS

A. Update on Reunifications for the Original Class Period

As of November 4, 2019, Defendants have discharged 2,789 of 2,814 possible children of potential class members for the original class period. That is, Defendants have discharged 2,789 of the 2,814 possible children of potential class members who were in the care of the Office of Refugee Resettlement (ORR) as of June 26, 2018. *See* Table 1: Reunification Update. This is an increase of one discharge reported in Table 1 since the JSR filed on October 16, 2019. *See* ECF No. 484.

Currently, there is one child of a class member from the original class period who remains in ORR care and is proceeding towards reunification or other appropriate discharge. This child has a parent who departed from the United States, but the Steering Committee has advised that resolution of parental preference will be delayed. Defendants are supporting the efforts of the Steering Committee to obtain a statement of intent from the parent. Once Defendants receive notice from the Steering Committee, Defendants will either reunify the child or move him into the TVPRA sponsorship process, consistent with the intent of the parent.

The current reunification status for the 2,814 children ages 0 through 17 for the original class period, who have been the focus of Defendants' reporting to date, is further summarized in Table 1. The data in Table 1 reflects approximate numbers on these children maintained by ORR at least as of November 4, 2019. These numbers are dynamic and continue to change as more reunifications, determinations on class membership, or discharges occur.

Table 1: Reunification Update

Description	**Phase 1 (Under 5)**	**Phase 2 (5 and above)**	**Total**
Total number of possible children of potential class members	107	2707	2814
Discharged Children			
Total children discharged from ORR care:	107	2682	2789
• Children discharged by being reunified with separated parent	82	2086	2168
• Children discharged under other appropriate circumstances (these include	25	596	621

discharges to other sponsors [such as situations where the child's separated parent is not eligible for reunification] or children that turned 18)			
Children in ORR Care, Parent in Class			
Children in care where the parent is not eligible for reunification or is not available for discharge at this time:	0	1	1
• Parent presently outside the U.S.	0	1	1
o Steering Committee has advised that resolution will be delayed	0	1	1
• Parent presently inside the U.S.	0	0	0
o Parent in other federal, state, or local custody	0	0	0
o Parent red flag case review ongoing – safety and well being	0	0	0
Children in ORR Care, Parent out of Class			
Children in care where further review shows they were not separated from parents by DHS	0	4	4
Children in care where a final determination has been made they cannot be reunified because the parent is unfit or presents a danger to the child	0	8	8
Children in care with parent presently departed from the United States whose intent not to reunify has been confirmed by the ACLU	0	11	11
Children in care with parent in the United States who has indicated an intent not to reunify	0	0	0
Children in care for whom the Steering Committee could not obtain parental preference	0	1	1

B. Update on Removed Class Members for the Original Class Period

The current reunification status of removed class members for the original class period is set forth in Table 2 below. The data presented in this Table 2 reflects approximate numbers maintained by ORR as of at least November 4, 2019. These

numbers are dynamic and continue to change as the reunification process moves forward.

Table 2: Reunification of Removed Class Members

REUNIFICATION PROCESS	REPORTING METRIC	NO.	REPORTING PARTY
STARTING POPULATION	Children in ORR care with parents presently departed from the U.S.	13	Defs.
PROCESS 1: Identify & Resolve Safety/Parentage Concerns	Children with no "red flags" for safety or parentage	13	Defs.
PROCESS 2: Establish Contact with Parents in Country of Origin	Children with parent contact information identified	13	Defs.
	Children with no contact issues identified by plaintiff or defendant	13	Defs. & Pls.
	Children with parent contact information provided to ACLU by Government	13	Defs.
PROCESS 3: Determine Parental Intention for Minor	Children for whom ACLU has communicated parental intent for minor:	11	Pls.
	• Children whose parents waived reunification	11	Pls.
	• Children whose parents chose reunification in country of origin	0	Pls.
	• Children proceeding outside the reunification plan	0	Pls.
	Children for whom ACLU has not yet communicated parental intent for minor:	1	Pls.
	• Children with voluntary departure orders awaiting execution	0	Defs.

	• Children with parental intent to waive reunification documented by ORR	0	Defs.
	• Children whose parents ACLU has been in contact with for 28 or more days without intent determined	0	Pls.
	Children whose parents steering committee could not obtain parental preference	1	PIs
PROCESS 4: Resolve Immigration Status of Minors to Allow Reunification	Total children cleared Processes 1-3 with confirmed intent for reunification in country of origin	0	Pls.
	• Children in ORR care with orders of voluntary departure	0	Defs.
	• Children in ORR care w/o orders of voluntary departure	0	Defs.
	o Children in ORR care whose immigration cases were dismissed	0	Defs.

C. Update Regarding Government's Implementation of Settlement Agreement

SETTLEMENT PROCESS	DESCRIPTION	NUMBER
Election Forms[1]	Total number of executed election forms received by the Government	**424 (247Parents/177Children)**[2]
	• Number who elect to receive settlement procedures	**264 (145 Parents/119 Children)**
	• Number who waive settlement procedures	**160 (102 Parents/58 Children)**[3]
Interviews	Total number of class members who received interviews	**159**[4]
	• Parents who received interviews	**82**
	• Children who received interviews	**77**
Decisions	Total number of CFI/RFI decisions issued for parents by USCIS	**68**[5]

[1] The number of election forms reported here is the number received by the Government as of October 27, 2019.

[2] The number of children's election forms is lower than the number of parent election forms because in many instances a parent electing settlement procedures submitted an election form on his or her own behalf or opposing counsel e-mailed requesting settlement implementation for the entire family, but no separate form was submitted on behalf of the child.

[3] The number of children's waivers is lower because some parents have submitted waivers only for themselves and some parents who have waived reunification also waived settlement procedures and have therefore not provided a form for the child.

[4] Some individuals could not be interviewed because of rare languages; these individuals were placed in Section 240 proceedings. This number includes credible fear and reasonable fear interviews, as well as affirmative asylum interviews.

[5] This number is the aggregate of the number of parents whose negative CFI/RFI determinations were reconsidered, number of parents whose negative CFI/RFI determination was unchanged, and individuals who were referred to Section 240 proceedings without interview because of a rare language. This number excludes 12 cases where a parent already had an NTA from ICE or was already ordered removed by an IJ (which are included in the interview totals).

	• Number of parents determined to establish CF or RF upon review by USCIS	**67**[6]
	• Number of parents whose CF or RF finding remains negative upon review by USCIS	**1**
	Total number of CFI decisions issued for children by USCIS	**73**[7]
	• Number of children determined to establish CF by USCIS	**73**[8]
	• Number of children determined not to establish CF by USCIS	**0**
	Total number of affirmative asylum decisions by USCIS	**12**
	• Number of parents granted asylum by USCIS	**1**
	• Number of parents referred to immigration court	**2**
	• Number of children granted asylum by USCIS	**2**[9]

[6] This number includes parents who received positive CF/RF determinations upon reconsideration, parents who received a Notice to Appear based on their child's positive CF determination, and parents who were placed in Section 240 proceedings due to a rare language.

[7] This number is the aggregate of the number of children who received a positive CF determination, the number of children who received a negative CF determination, and children who were referred to Section 240 proceedings without interview because of a rare language.

[8] This number includes children who received a positive CF determination, children who received a Notice to Appear as a dependent on their parent's positive CF determination, and children who were placed in Section 240 proceedings due to a rare language.

[9] This number includes children granted asylum as a dependent on their parent's asylum

	• Number of children referred/returned to immigration court	7
Removals	Number of class members who have been returned to their country of origin as a result of waiving the settlement procedures	**102 Parents**[10]

D. Parents Who ICE Records Reflect Have Absconded After Being Released

Absconders	Number of Parents who absconded from enrollment in ATD (Alternatives To Detention)	192[11]

E. Update Regarding Identification of Expanded Class Members

On April 25, 2019, the Court approved Defendants' Plan for identifying members of the expanded class. Defendants have now completed identifying members of the expanded class to Plaintiffs' counsel, and have produced Batches 1 through 11 to Plaintiffs.

application.

[10] This number is as of October 26, 2019.

[11] There are 2,611 possible class members in the original class. Of those 2,611, 970 were enrolled by DHS in the ATD program at some point between June 26, 2018 and October 4, 2019. Of those 970 that were enrolled, 192 absconded. Absconder is defined as an alien who has been ordered deported or removed whose whereabouts are unknown to DHS. This number is current as of October 25, 2019.

F. MMM Settlement Forms—Discrepancies

In accordance with a request by MMM counsel, Defendants conducted a comparison of their own lists of settlement forms received to the lists provided by MMM counsel to determine why there were discrepancies in the parties' reporting. Defendants sent the results of that comparison to MMM counsel on September 19, 2019. MMM counsel sent an email on October 11, 2019, stating that they believed that Defendants' review had resolved the discrepancies, but posing some additional questions. Defendants have provided responses to MMM counsel for all of these inquiries and are continuing to adjust the number of received forms based on resolution of the discrepancies.

G. Government Processes, Procedures, and Tracking, for Separations Since June 26, 2018.

Data Requested by Plaintiffs. Defendants are providing Plaintiffs updated reports containing information regarding parents and children separated since the Court's June 26, 2018 preliminary-injunction order on the Friday following the filing of each JSR. The parties have discussed amending this schedule so that Defendants will produce these updated reports on a monthly basis. Defendants provided Plaintiffs with an updated report on October 21, 2019, and continue to work to implement monthly reporting on a regular schedule.

Processes and Procedures. Defendants provided a summary outline to the Court and to Plaintiffs memorializing the processes, procedures, tracking, and

communication between the agencies that have been adopted by the agencies since June 26, 2018. The outline also included an overview of the options for separated parents and children to obtain information about reunification options. The parties have met and conferred since then regarding the government's proposals. Defendants have held several internal telephonic meetings, and have spoken with representatives for the Bureau of Prisons and the U.S. Marshals Service to ensure that those entities are included in discussions regarding these processes and procedures. After numerous conferrals, Defendants provided additional information to Plaintiffs on September 4, 2019, and requested that Plaintiffs clarify what information they were seeking with regard to other inquiries. Plaintiffs have not responded to that request for information, nor have they raised any additional concerns regarding Defendants' processes since the last JSR and status conference.

In addition to the procedures described in previous filings, Defendants have now implemented the use of a tear sheet for families parents and children that are separated that provides information about the separation to the separated parent, as well as information about how to locate their children. The tear sheet also includes an email address by which separated parents can provide information to DHS that they wish to have considered. This email address has also been provided to Plaintiffs' counsel and other interested counsel. Defendants stand ready to continue

to meet and confer on this issue if Plaintiffs have any additional concerns they would like to bring to Defendants' attention.

On November 5, 2019, Defendants received an email from Catherine Weiss, who represents non-party Catholic Charities Community Services of the Archdiocese of New York, informing Defendants that she planned to submit an insert for the parties Joint Status Report. Defendants responded that Ms. Weiss is not entitled to submit statements into the JSR because Ms. Weiss does not represent any parties to this litigation.

II. *MS. L.* PLAINTIFFS' POSITION

A. Steering Committee Outreach to Sponsors and Parents of Children of Expanded Class Members

As of the date of this report, the government has provided eleven lists identifying 1,556 children of potential expanded class members. Plaintiffs have focused on reaching children whose membership in the class is not contested, and for whom the government has provided at least one phone number for a sponsor or for the child's parent. There are 998 children that meet that description.[12]

[12] The eleven lists identify a total of 1,556 unique children, 1,095 of which have been identified by the government as being children of potential expanded class members, 312 of which have been categorized as "exclusions", and 149 of which have been identified by the government as being *both* children of potential expanded class members and "exclusions" inconsistently across the government's various lists. The Steering Committee has requested that the government clarify its position with respect to the class membership of the parents of these 149 children. For 998 of the 1,095 children identified by the government as being children of potential expanded class members, the government has provided at least one phone number for a sponsor, parent, relative or other individual. The Steering Committee

The Steering Committee begins by calling the provided phone numbers. Where the phone number is for a sponsor and not a separated parent, the Steering Committee attempts to reach the sponsor, then obtain contact information for the parent, and then finally reach the parent.

As of November 6, the Steering Committee has made over 4,400 phone calls to the families of 832 of these 998 children. Of the 832 families to whom the Steering Committee has attempted outreach, the Steering Committee has successfully reached 451 sponsors or their attorneys, and 250 parents or their attorneys.

There are currently 428 families in this group that the Steering Committee has been unable to reach by telephone despite multiple attempts. This is because either the phone numbers for sponsors do not work or are not answered, or because a sponsor is unable or unwilling to provide the Steering Committee with a way to reach the parent. The Steering Committee has commenced extensive efforts to locate these families in their respective countries of origin, and is currently actively engaged in on-the-ground searches for parents in Guatemala and Honduras. As of November 6, Steering Committee members had successfully tracked down and established contact with 46 of these families.

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intends to reach individuals the government has categorized as excluded from the class, and Plaintiffs reserve the right to contest those exclusions.

B. Additional Lists of Children of Expanded Class Members

Since the last Joint Status Report, the government has provided two more lists that disclose 266 previously unreported children of potential class members. The Steering Committee is actively attempting to reach families of these children.

C. Relief for Deported Parents

The parties are meeting and conferring as to the process by which Defendants will comply with the Court's September 4 Order.

D. Implementation of Tear Sheets and Information Sharing Protocols

Defendants have provided sample templates and guidance on the "tear sheets" it intends to provide to parents of separated children. Plaintiffs will meet and confer with the government on this issue.

Counsel for Legal Service Providers for Children is submitting an account of the current status of negotiations regarding information sharing. That submission outlines Defendants' current process for sharing separation information with representatives for children and for providing Defendants with information that contradicts its stated basis for a separation. Plaintiffs believe that the information-sharing process may require the Court's supervision, and will work with counsel for the Legal Service Providers to raise that issue with Defendants and the Court at a later date.

E. Steering Committee Progress for June 26 Initial Class

The Steering Committee has successfully contacted and confirmed the preferences of nearly all removed parents with respect to reunifications. On October 21, the government reported that 13 children with removed parents remained in ORR custody. The Steering Committee has advised the government that no preference will be forthcoming for one of those parents due to complex and individualized family circumstances, leaving 12 children with removed parents in the operative group. The Steering Committee has delivered preferences for 11 parents of those children. The parent of the remaining child sought and was granted the opportunity to return to the United States pursuant to the Court's September 4 Order, and after returning to the United States looks forward to commencing the process to be reunified with her son.

F. Children Whose Parents Have Submitted Preferences and Are Still Detained

The Steering Committee continues to meet and confer with the government about children who are still in ORR after the Steering Committee has submitted a final reunification election.

III. *MMM-Dora* Plaintiffs' Report Regarding Settlement Implementation

The parties continue to work together to implement the settlement agreement approved on November 15, 2018. Class counsel are providing the Government with signed waiver forms as they are received from class members, and class counsel are continuing to work on outreach efforts to class members who may qualify for relief under the settlement. The parties continue to meet and confer on issues related to settlement implementation as they arise.

DATED: November 6, 2019

Respectfully submitted,

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