IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON *et al*.,

Plaintiffs,

v.

MICHAEL R. POMPEO *et al*.,

Defendants.

No. 1:19-cv-3324 ABJ

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

Regulations

INTRODUCTION

In this case, three organizational plaintiffs ("Plaintiffs") bring Administrative Procedure Act ("APA") claims against defendants the U.S. Department of State (the "Department") and Secretary of State Michael R. Pompeo (collectively, "Defendants"), alleging violations of the Federal Records Act ("FRA"), the statutory scheme governing the creation, management, and disposal of records by federal agencies. As the D.C. Circuit explained nearly thirty years ago in *Armstrong v. Bush* ("*Armstrong I*"), 924 F.2d 282 (D.C. Cir. 1991), the scope of permissible FRA-related claims is limited. Most importantly, as relevant here, challenges to an agency's recordkeeping guidelines and directives may be permissible, but challenges to acts of noncompliance by agency employees are not.

Plaintiffs' claims here fall squarely in the latter, impermissible category. Although Plaintiffs try to position their claims as somehow arising from the allegations at issue in the recent impeachment hearings in the U.S. House of Representatives, this ripped-from-the-headlines approach should gain Plaintiffs no traction here because the alleged scandals that they purport to describe have nothing to do with the FRA violations that they allege, much less do they relate to Department recordkeeping guidelines or directives. Boiled down to their undramatic essence, Plaintiffs' claims seek relief under the APA on two grounds, both of which focus on employee compliance rather than alleged deficiencies in any Department guideline. First, Plaintiffs assert that Defendants follow a "pattern and practice" of failing to create and maintain adequate documentation of Department activities, in violation of 44 U.S.C. §§ 3101 and 3301 and 36 C.F.R. § 1222.22. Second, citing the same alleged failures, Plaintiffs assert that Defendants have failed to establish "effective controls" over the creation and preservation of records by Department employees, in violation of 44 U.S.C. § 3102.

Although the Complaint is packed with irrelevant assertions, Plaintiffs seek to support their claims primarily by reference to the use of instant messaging applications by a small number of Department officials. But employee use of such applications does not, by itself, violate the FRA. To the contrary, the FRA permits use of such applications as long as any resulting federal records are forwarded to an official electronic messaging account. 44 U.S.C. § 2911. Moreover, Department recordkeeping policies are fully consistent with the FRA when it comes to the creation of adequate documentation and the preservation of federal records sent through private electronic messaging applications. Accordingly, Plaintiffs assert no viable claim of FRA violation, and this case therefore should be dismissed.

BACKGROUND

I. The Federal Records Act ("FRA")

The FRA, 44 U.S.C. Chapters 21, 29, 31, and 33, is "a collection of statutes governing the creation, management, and disposal of records by federal agencies." *Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999). The FRA governs records that are "made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them." 44 U.S.C. § 3301(a)(1)(A). The FRA's provisions "establish a unified system for handling the 'life cycle' of federal records—covering their creation, maintenance and use, and eventually their disposal by either destruction or deposit for preservation." *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29,

36 (D.C. Cir. 1983).[1]

While most FRA litigation has involved attempts to enjoin the destruction of records, Plaintiffs here seek to focus on the FRA's records-creation provisions. The FRA addresses the creation and maintenance of records in general terms, reflecting Congress's intent to "strike a balance 'between developing efficient and effective records management, and the substantive need for Federal records.'" *Armstrong I*, 924 F.2d at 292 (quoting S. Rep. 94-1326, 1976 U.S.C.C.A.N. 6150). The statute thus seeks to allow for the "[a]ccurate and complete documentation of the policies and transactions of the Federal Government," on the one hand, while establishing and maintaining control mechanisms that would both "prevent the creation of unnecessary records" and facilitate "the effective and economical operations of an agency," on the other. 44 U.S.C. § 2902(1), (3).

The FRA broadly requires agency heads to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the

[1] Significantly, the FRA does *not* apply to Presidential records. Rather, Presidential records—materials that are "created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President," 44 U.S.C. § 2201(2)—are governed by a separate statutory scheme, the Presidential Records Act ("PRA"). "The FRA and the PRA apply to distinct categories of documentary materials." *Armstrong v. Exec. Office of the President* ("*EOP*") ("*Armstrong II*"), , 1 F.3d 1274, 1290 (D.C. Cir. 1993); *see also* 44 U.S.C. § 2201(2)(B) (excluding from the definition of Presidential records any materials that qualify as "official records of an agency (as defined in [the Freedom of Information Act ('FOIA'), 5 U.S.C. § 552(f)]"); *Armstrong v. EOP* ("*Armstrong III*"), 90 F.3d 553, 556 (D.C. Cir. 1996) ("[T]he coverage of the FRA is coextensive with the definition of 'agency' in the FOIA."). Many White House components, including the White House Office and the National Security Council ("NSC"), are thus not subject to the FRA. *E.g.*, *Democracy Forward Found. v. White House Office of Am. Innovation*, 356 F. Supp. 3d 61, 66 (D.D.C. 2019).

agency's activities." 44 U.S.C. § 3101. Agency heads must also "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency." *Id.* § 3102. At the same time, the FRA vests the Archivist of the United States ("the Archivist") with the responsibility to provide guidance and assistance to Federal agencies in carrying out these obligations. *Id.* § 2904(a)(1)–(2); *see also id.* § 3102(3) (requiring agency records management programs to cooperate with the Archivist). The FRA also directs the Archivist to "promulgate standards, procedures, and guidelines with respect to records management." *Id.* § 2904(c)(1). Pursuant to Congress's direction, the Archivist has promulgated regulations setting forth more detailed descriptions of agencies' recordkeeping obligations. *See* 36 C.F.R. §§ 1222.1 to –.34 ("National Archives and Records Administration ('NARA') regulations"). An agency's records management "program" as a whole must "provide for . . . compliance" with FRA requirements, and with the Archivist's regulations. 44 U.S.C. § 3102(4).

The FRA recognizes that "electronic mail and other electronic messaging systems," when used for official business, may generate federal records. 44 U.S.C. § 2911. It requires agency employees who create or send records via a "non-official electronic messaging account" either to copy their official electronic messaging account when originally creating or transmitting the record or to forward a complete copy of the record to their official electronic messaging account within 20 days. *See id.* § 2911(a).

II. State Department Records Management Policies

To comply with the FRA and NARA regulations, the Department has established information management systems and promulgated policies governing its employees' recordkeeping obligations. *See* 5 Foreign Affairs Manual ("FAM") 400 and Records Management Handbook, 5 Foreign Affairs Handbook ("FAH")-4, *available at* https://fam.state.gov/;

Declaration of Eric F. Stein ("Stein Decl.," attached hereto) (attaching relevant Department policies).[2] The FAM sets forth general recordkeeping goals in accord with the FRA. *See* 5 FAM 413. It also assigns responsibility for coordinating employee compliance with FRA requirements to specific personnel within each Department component. *See, e.g.*, 5 FAM 414.4(b) (assigning role within Department bureaus to "bureau records coordinator"), 414.5(b) (assigning role within Department diplomatic posts to "information management officer").

In regard to records creation, the FAM—reflecting the same balance sought in the FRA—emphasizes that "[c]ontrols over the creation of records are essential to ensure that: (1) Important policies, decisions, and operations are adequately recorded; (2) Routine paperwork is kept to a minimum; and (3) The accumulation of unnecessary files is prevented." 5 FAM 422.1(a). The FAM incorporates the applicable NARA regulation, 36 C.F.R. 1222.22, on adequacy of documentation. *See* 5 FAM 422.2.[3] In addition, the Department's Records Management

[2] The Court may consider the Department's official records management policy on a motion to dismiss because it is incorporated by reference in Plaintiffs' Complaint, and Plaintiffs' Complaint necessarily relies on the Department's policy. *See* Compl. ¶¶ 26–28; *cf. Judicial Watch, Inc. v. FBI*, No. 18-2316, 2019 WL 4194501, at *3 (D.D.C. Sept. 4, 2019) (holding that court could consider FBI's recordkeeping policy guide on motion to dismiss); *CREW v. Pruitt*, 319 F. Supp. 3d 252, 261 (D.D.C. 2018) (holding that court could consider EPA's records management policy on motion to dismiss). The Department's official records management policy is set forth in the FAM and the FAH, as revised and supplemented by later Departmental policy updates, including, as relevant here, three "All Diplomatic and Consular Posts Collective" ("ALDAC") cables, one dated February 5, 2018 (*Policy and Procedures for the Use of Electronic Messaging Applications in the Conduct of State Department Business*, 18 STATE 11006, Feb. 5, 2018 [hereinafter "February 2018 ALDAC"] (attached as Exhibit A to Stein Decl.); one dated May 3, 2018 (*Records Management Requirements for Messaging Services and Social Media*, 18 STATE 43244, May 3, 2018 [hereinafter "May 2018 ALDAC"] (attached as Exhibit B to Stein Decl.); and one dated July 9, 2019 (*A Message from the Under Secretary for Management on Electronic Messaging Applications and other Records Management Responsibilities*, 19 STATE 72880, July 9, 2019 [hereinafter "July 2019 ALDAC"] (attached as Exhibit C to Stein Decl.). As publicly-available official agency statements of policy, the FAM and FAH are also properly subject to judicial notice. *CREW v. Trump*, 924 F.3d 602, 607 (D.C. Cir. 2019).

[3] Specifically, the FAM states that "the recording of activities of officials of the Department should be complete to the extent necessary to:

Handbook, 5 FAH-4, "sets forth the methods and procedures" that Department offices "should follow when creating records." 5 FAM 422.1(b). The Records Management Handbook describes specific categories of records within each type of Department component; the files in which those records are kept, including central files, chronological files, program files, reference materials, and working files; and how those files are managed and arranged. *See* 5 FAH-4 H-215.

The FAM also makes clear that its recordkeeping obligations apply to materials based on their content, regardless of format. *See* 5 FAM 415.1 (defining "record" to include "[a]ll" materials, "regardless of physical form or characteristics," that meet the definition of record in 44 U.S.C. § 3301(a)(1)(A)); 5 FAH-4 H-218(a) (recognizing that records are often in electronic form). At the same time, specific recordkeeping procedures apply to electronic records. *See* 5 FAM 441. For example, in accord with the FRA, the FAM recognizes that personal email accounts may be used to conduct official business, and requires that, in such circumstances, individuals must copy their official Government email accounts, or forward a complete copy of the work-related email to their official Government email account, within "20 days after the original creation or transmission." 5 FAM 443.4(b), (d).

Since the last official version of the FAM, the Department has issued a number of interim updates to its records management policy in regard to the use of email and other electronic

---

(1) Facilitate the making of decisions and policies and the taking of action by the incumbents and their successors in office;
(2) Fulfill the requirements of Federal statutes;
(3) Make possible a proper scrutiny by the Congress and duly authorized agencies of the U.S. Government of the manner in which the functions of the Department have been discharged;
(4) Protect the financial, legal, and other rights of the U.S. Government and of the persons affected by the actions of the Department; and
(5) Provide appropriate documentary materials for research and other historical purposes.

Id.

messaging applications. In February 2018, the Department issued a policy addressing the use of third-party applications such as WhatsApp. *See* February 2018 ALDAC, at 2. The policy emphasized that employees who create or receive records through such applications must "copy an official electronic messaging account in the original transmission of the record (text messages and chats)" or "forward a complete copy of the record to his or her official electronic messaging account within 20 days." *Id.* In the May 2018 ALDAC, the Department clarified the requirements set forth in the February 2018 ALDAC, stating that third-party electronic messaging applications such as WhatsApp were allowed on government-issued mobile devices, but again emphasizing that any records transmitted through such applications should be forwarded to the user's official Department email address within 20 days of creation or receipt. May 2018 ALDAC, at 1. The Department issued an additional update to its policy on the use of personal electronic messaging applications in the July 2019 ALDAC, again setting forth the requirement that any messages sent through personal messaging applications be sent to the employee's official Department e-mail account within 20 days. *See* July 2019 ALDAC, at 2.[4]

Above and beyond the designation of records officers and the specific procedures set forth in the FAM, FAH, and subsequent ALDAC updates, the FAM imposes on each Department employee the obligation, "[w]ithin his or her area of responsibility," to "create and preserve records that properly and adequately document the organization, functions, policies, decisions, procedures, and essential transactions of the Department." 5 FAM 422.3. The Department has established a number of mechanisms to facilitate employees' compliance with such obligations. For example,

[4] A note at the beginning of 5 FAM 440 indicates that the May 2018 ALDAC supersedes the FAM in certain respects and that the FAM will be revised to reflect the new guidance set forth in the ALDAC. *See* 5 FAM 440. This note was added on or prior to October 25, 2018, and has not yet been revised to reflect the Department's issuance of the July 2019 ALDAC. *See id.* (identifying Change Transmittal IM-221, issued October 25, 2018, as the last change to the subchapter).

the Department requires employees to undertake records management training on an annual basis. 13 FAM 301.1-4 (requiring annual records management training); July 2019 ALDAC, at 3 (referencing annual records management training requirement).

III. Procedural History

Plaintiffs filed the instant Complaint on November 5, 2019, raising claims under the APA based on alleged FRA violations by Defendants the Department and Secretary Pompeo. [ECF 1.] At the same time, Plaintiffs filed a Notice of Related Case, seeking to relate this case to *CREW v. Trump*, No. 19-1333 (D.D.C. filed May 7, 2019), a case to which neither the Department nor Secretary Pompeo are parties. [ECF 2.] Defendants have separately filed an objection to Plaintiffs' related case designation. [ECF 12.]

The Complaint in this case asserts two claims. First, Plaintiffs allege that Secretary Pompeo "and other State Department officials" follow a "pattern and practice of affirmatively electing not to create and preserve records adequately documenting" the activities of the Department, and that these officials have also "directed other State Department employees" not to create and preserve required records. Compl. ¶¶ 71–72 ("Claim One"). Plaintiffs also include within this claim an allegation that Secretary Pompeo "and other top State Department officials" have failed to "identify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel." *Id.* ¶ 73. Plaintiffs contend that Defendants have thereby violated 44 U.S.C. §§ 3101 and 3301 and NARA regulation 36 C.F.R. § 1222.22. Compl. ¶ 75.

Second, Plaintiffs allege that Defendants have acted in violation of 44 U.S.C. §§ 3102 and 3105 by failing to establish "effective controls" over employees' records creation and preservation practices. Compl. ¶¶ 77–78 ("Claim Two"). According to Plaintiffs, this alleged failure has resulted in "widespread non-compliance" with recordkeeping requirements by Department

employees, "particularly with respect to the use of private phones and email accounts and encrypted messenger apps." *Id.* ¶ 78.

Plaintiffs seek declaratory and injunctive relief with respect to both counts.

STANDARD OF REVIEW

A motion under Federal Rule 12(b)(6) focuses on "the legal sufficiency of the complaint." *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A court need not "assume the truth of legal conclusions," *Iqbal*, 556 U.S. at 678, nor "accept inferences that are unsupported by the facts set out in the complaint," *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 732 (D.C. Cir. 2007). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557) (alterations in original). Thus, in order to withstand a motion to dismiss under Rule 12(b)(6), a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The plaintiff's allegations must be sufficiently detailed "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The court may consider "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

ARGUMENT

I. CLAIM ONE SHOULD BE DISMISSED BECAUSE IT FAILS TO SET FORTH A VIABLE APA CLAIM OF FRA VIOLATION

A. Claim One Impermissibly Challenges Acts of Employee Noncompliance Rather Than Any Specific Deficiency in a Recordkeeping Guideline or Directive

Plaintiffs' Claim One purports to challenge an unwritten "pattern and practice" by the Secretary and other Department officials of "affirmatively electing not to create and preserve records adequately documenting" Department activities. Compl. ¶ 75. Official Department policy, however, plainly requires adequate documentation. *See* 5 FAM 422.2; 5 FAH-4 H-212. The import of Plaintiffs' claim, therefore, is that certain Department officials have allegedly failed to comply with that official written policy. Because, under established D.C. Circuit authority, such compliance-based claims are not viable, Claim One should be dismissed. *See Armstrong I*, 924 F.2d at 294 (holding that the FRA "preclud[es] private litigants from suing directly to enjoin agency actions in contravention of agency guidelines"); *see also Competitive Enter. Inst.* ("*CEI*") *v. EPA*, 67 F. Supp. 3d 23, 32 (D.D.C. 2014) ("*Armstrong I* distinguished between reviewable challenges to an agency's recordkeeping guidelines under the APA, and unreviewable challenges to the agency's day-to-day implementation of its guidelines."); *CREW v. DHS*, 527 F. Supp. 2d 101, 111 (D.D.C. 2007) ("Given the firm language in *Armstrong I*, CREW is precluded from suing the DHS to enjoin the agency from acting in contravention of its own recordkeeping guidelines or the FRA." (citation omitted)); *Pruitt*, 319 F. Supp. 3d at 260 (plaintiffs "may not demand judicial review of isolated acts allegedly in violation of [the FRA]").

The D.C. Circuit issued its foundational decision on the FRA nearly three decades ago, in *Armstrong I*. The court recognized as permissible only two claims—both brought under the APA, 5 U.S.C. § 706, because the FRA lacks a private right of action, *Judicial Watch, Inc. v. Kerry*, 844

F.3d 952, 954 (D.C. Cir. 2016). First, the court allowed an APA claim that an agency's "recordkeeping guidelines and directives do not adequately describe the material that must be retained as 'records' under the FRA." *Armstrong I*, 924 F.2d at 292. In *Armstrong*, the plaintiffs alleged that National Security Council ("NSC") guidelines did not conform to the FRA because they failed to require the preservation of records created or received on an intra-office e-mail system, called PROFS.[5] *See Armstrong I*, 924 F.2d at 286. The D.C. Circuit emphasized that "the FRA understandably leaves the details of records management to the discretion of individual agency heads." *Id.* at 293. Moreover, "agency personnel, not the court, will actually decide whether specific documents—whether they be scraps of paper or [the electronic] PROFS notes [at issue in *Armstrong*]—constitute 'records' under the guidelines." *Id.* at 293–94. However, the court held that the plaintiffs' challenge was justiciable because "the only issue a court would be asked to consider" was whether the agency's guidelines were in "conformity" with statutory directives and "consistent with" NARA regulations. *See id.*

Second, the court held that, although plaintiffs may not challenge an agency's alleged illegal destruction of records, they may seek "judicial review of the agency head's or Archivist's refusal to seek the initiation of an enforcement action by the Attorney General" under 44 U.S.C. § 3106. *Armstrong I*, 924 F.2d at 295; *cf. Pruitt*, 319 F. Supp. 3d at 258.

[5] It should be noted that, at the time of *Armstrong I* and *II*, NSC, the EOP component whose guideline was at issue, considered itself to be subject to the FRA. *See Armstrong II*, 1 F.3d at 1290. In a later decision in the *Armstrong* case, the D.C. Circuit held that the NSC in fact was not governed by the FRA because, as an EOP component with the primary function of advising and assisting the President, it did not qualify as an agency subject to FOIA. *Armstrong III*, 90 F.3d at 557, 567 (describing post-*Armstrong II* Office of Legal Counsel opinion determining that NSC was not a "federal agency," and ultimately holding, consistent with that opinion, that NSC was not an agency subject to FOIA and therefore was not required to comply with the FRA).

Plaintiffs' Claim One does not resemble either of the two claims allowed by *Armstrong*. In particular, Claim One does not allege any deficiency in the Department's recordkeeping guidelines or directives. In fact, Plaintiffs concede that existing Department policy "echoes" the statutory requirements of the FRA, as well as the requirements of NARA regulations, in imposing obligations on agency employees to ensure adequate documentation of agency activities. *See* Compl. ¶ 26 (citing 5 FAM 422, 422.1, 422.2). Instead, Claim One attempts to raise the very claim that *Armstrong* held was *not* permitted—seeking to challenge alleged recordkeeping failures by specific Department officials. *See* Compl. ¶¶ 71–72.

The fact that Plaintiffs purport to challenge a "pattern and practice" in no way brings their claim within the ambit of what *Armstrong* deemed permissible. After all, Plaintiffs' theory is that certain Department employees are intentionally acting in violation of written Department guidance in order to engage in, or facilitate, a "shadow diplomacy" outside regular Department channels. *See* Compl. ¶¶ 71–72. Far from a guidelines-based challenge, this is exactly the kind of compliance-based challenge that *Armstrong* prohibits.

Plaintiffs' Claim One is analogous to the claim rejected in *CEI*. There, the plaintiffs claimed that, despite EPA's official policy requiring preservation of records in the form of text messages, the EPA actually followed an unwritten "concealed" policy of destroying such records. *See CEI*, 67 F. Supp. 3d at 32. But the court recognized that a guidelines-based claim cannot properly challenge an alleged unwritten policy where a FRA-compliant written policy already exists. The court held that the plaintiffs' claim was not cognizable because the plaintiffs were attempting to bootstrap an impermissible "compliance-based claim" (alleging that EPA employees failed to comply with EPA policy, which *Armstrong* prohibits) into a "guidelines-based claim." *Id.* at 33 (plaintiffs "cannot challenge EPA's decision to destroy text messages by casting its claim

as a challenge to an illusory record-keeping policy"). In dismissing the claim, the court rejected the notion, implicit in the plaintiffs' theory, that agency employees could be assumed to act "in bad faith, i.e., in contravention of their stated policies and guidance," by adopting the unwritten policy that the plaintiffs alleged. *Id.* As the court recognized, the D.C. Circuit "requires courts to apply the *opposite* presumption, namely, that government officials discharge their duties in good faith." *Id.* (citing *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008)).

Other cases have similarly rejected challenges based on alleged specific acts of noncompliance—even where such acts of noncompliance were alleged to be widespread. In *CREW v. DHS*, 387 F. Supp. 3d 33 (D.D.C. 2019), the court rejected the plaintiffs' claim that DHS was in violation of the FRA's adequate documentation requirement because the claim did not challenge a written guideline or directive with respect to some particular recordkeeping deficiency, but instead derived from allegations that DHS employees had, in practice, failed to create records sufficient to link separated alien children to the adults with whom they were apprehended at the border. *See id.* at 50–51. The court recognized that such "deficiencies in compliance" did not qualify as "agency action" that could be reviewed under the APA. *Id.* at 51. Instead, the plaintiffs' claim would require "the supervising court, rather than the agency, to work out compliance with the [FRA], injecting the judge into day-to-day agency management" by empowering him "to decide just how much detail is necessary," in any given instance, to satisfy the adequate documentation requirement. *See id.*

The court in *CREW v. DHS* also discussed an earlier decision, in *CREW v. Pruitt*. There, the agency's operative written policy was silent regarding a specific FRA requirement—that agencies "create records for 'substantive decisions and commitments reached orally,'" *Pruitt*, 319 F. Supp. 3d at 261—while the plaintiffs had plausibly alleged the existence of an unwritten policy

of "refus[ing]" to create the required records, *id.* at 260. *See DHS*, 387 F. Supp. 3d at 53 (recognizing the court in *Pruitt* initially allowed the plaintiffs to proceed with their challenge to an "unofficial, *de facto* policy of refusing to create records"). But after the agency revised its written policy to add the missing requirement, and the agency's head, whose alleged statements had leant plausibility to plaintiffs' claim of an unwritten noncompliant policy, had left, the Court determined that the plaintiffs' claims were moot. *CREW v. Wheeler*, 352 F. Supp. 3d 1, 5 (D.D.C. 2019).

Just as in *CEI*, Plaintiffs' challenge to an unwritten "pattern and practice" allegedly followed by a few Department employees in violation of written Department policy is really an impermissible compliance-based claim, not a guidelines-based claim. As such, their claim is squarely prohibited under *Armstrong*. And like the similar claim at issue in *DHS*, Claim One also fails to challenge a discrete "agency action" as required for an APA claim. *DHS*, 387 F. Supp. 3d at 49 (citing *Norton v. SUWA*, 542 U.S. 55, 64 (2004)). The Court should dismiss Claim One on this basis alone.

B. Plaintiffs Fail To Identify any Judicially Manageable Standards Applicable To the Adequate Documentation Claim That They Allege

Plaintiffs' Claim One also falls outside the scope of *Armstrong* because it alleges failures by certain Department officials to *create* records. A claim regarding the creation of records was not endorsed by *Armstrong*. To the contrary, the court in *Armstrong* emphasized that the plaintiffs there "d[id] *not* seek the creation of any new records, but rather ask[ed] only that the records already created be appropriately classified and disposed of." *Armstrong II*, 1 F.3d at 1287 (emphasis added) (quoting *Armstrong I*, 924 F.2d at 288).[6] The court recognized that Congress's

[6] The court in *Armstrong* initially made this statement when addressing the defendants' argument that the plaintiffs were outside the applicable "zone of interests" of the FRA's records-creation provisions. *See Armstrong I*, 924 F.2d at 295. In *Armstrong II*, however, the court repeated this observation when explaining why its conclusion there—that paper copies omitting certain

concern with "balanc[ing] complete documentation with efficient, streamlined recordkeeping" was at its apex when it comes to decision-making about records creation. *See id*.; *see also* S. Rep. 81-2140, 1950 U.S.C.C.A.N. 3547, 3550 (recognizing that "records come into existence, or should do so, not in order to . . . satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them," and that agencies have "primary responsibility" over such issues). Indeed, when Congress enacted the Federal Records Management Amendments of 1976, Pub. L. No. 94-575, 90 Stat. 2723, which set forth specific goals for agency recordkeeping and directed NARA to promulgate standards for records management, it did so out of a concern that agencies were getting bogged down by creating too many unnecessary records. *See* S. Rep. 94-1326, 8, 1976 U.S.C.C.A.N. 6150, 6157 (explaining that "[t]he emphasis on specific objectives in the new section 2902 is designed" to introduce "control with respect to records creation," where "80 percent of total costs are incurred").

Under the APA, judicial review is foreclosed when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This exception applies "when a statute provides an agency with such broad decision-making powers that no 'concrete limitations . . . on the agency's exercise of discretion' or 'judicially manageable standards' are discernable." *Wendland v. Gutierrez*, 580 F. Supp. 2d 151, 153 (D.D.C. 2008) (quoting *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002). Although the court in *Armstrong* concluded that the FRA "contain[s] several specific requirements" that allow for judicial review of agency guidelines and directives, it also recognized that the FRA "leaves the details of records management to the discretion of individual agency

information were not adequate substitutes for electronic records—did not unduly interfere with agency discretion. *Armstrong II*, 1 F.3d at 1286. The court thus distinguished the case before it from one where plaintiffs sought to "saddle agencies with . . . new obligations to make additional documents" that the agencies, in their discretion, were not already creating. *Id.*

heads." *Armstrong I*, 924 F.2d at 293. When it comes to the FRA's adequate documentation requirement, the FRA provides no judicially manageable standards that a court could use to review the adequacy of an agency's guidelines or directives, much less an agency official's compliance with the requirement in a specific instance, because the question of what is "adequate" is entirely dependent on the agency's own assessment in the course of carrying out its mission and can vary widely depending on the circumstances.

Indeed, although the claim that the court in *Pruitt* initially allowed was itself a records creation claim, the nature of the claim at issue distinguishes it from Plaintiffs' claim here. The claim in *Pruitt* focused on a clear and straightforward FRA requirement—that agencies "create records for 'substantive decisions and commitments reached orally.'" *Pruitt*, 319 F. Supp. 3d at 261 (quoting 36 C.F.R. § 1222.22). That requirement contains no discretionary language, such as "adequate," that would call for a court's evaluation of whether a particular agency record is sufficient. Here, on the other hand, Plaintiffs focus on the requirement that documentation of agency activities be "adequate." Compl. ¶¶ 71–72. There can be little doubt that agencies themselves are better positioned to determine what level of documentation is adequate in any given circumstance than a court would be. After all, unlike decisions regarding records that already exist, certain decisions regarding records creation—such as the level of detail required for a particular record—may have to be made in real time, as agency personnel are engaged in operational tasks in order to carry out the mission of the agency. In addition, the range of possibilities is vast. There may be circumstances where a meeting is adequately documented by a calendar entry that simply notes that the meeting occurred. In other circumstances, a summary of the meeting may be appropriate, but there may be operational reasons for preparing the summary only after the meeting has concluded, rather than during the meeting itself. Plaintiffs offer no suggestion regarding how

the Court would determine whether Department officials are, in fact, adequately documenting their activities. The Court should reject Plaintiffs' invitation to micromanage the Department's decision-making on such issues.

C. Plaintiffs Fail To Plausibly Allege a Pattern and Practice of Department Noncompliance With the FRA

In addition, even aside from the fact that Plaintiffs' claim is incompatible with *Armstrong* and the APA and would require the Court to inappropriately insert itself into the day-to-day details of Department recordkeeping, Plaintiffs fail to plausibly allege an unwritten "pattern and practice" of violating the FRA's records creation obligations. Plaintiffs include fourteen pages of "factual background" in their Complaint, but none of their factual assertions, even taken as true, demonstrates an FRA violation. Instead, Plaintiffs purport to describe at length matters that have nothing to do with the FRA, let alone the *Department's* records management policies—in particular, the August 2019 whistleblower complaint regarding a July 25, 2019 telephone call between the President and Ukrainian President Zelenskyy (a call that Plaintiffs concede was in fact documented, *see* Compl. ¶ 46), and testimony provided in House hearings after the complaint was made public. Compl. ¶¶ 36–68. While these assertions may demonstrate Plaintiffs' keen interest in the political news of the day, they do nothing to further the allegations in Plaintiffs' Claim One.

Remarkably, even the assertions that Plaintiffs specifically identify as relating to "recordkeeping" fail to implicate any FRA requirement. Plaintiffs assert that the whistleblower complaint identified potential "abuse[s]" of White House "recordkeeping systems" because White House officials stored the transcript of the July 25, 2019 phone call in a particular computer system managed by NSC, an EOP component. Compl. ¶¶ 40–42. But nothing in the FRA purports to dictate where the White House should store particular records, or who within the government should have access to such records, nor does the FRA impose any requirements on the Department

regarding records in the custody of the White House.[7] These assertions simply have nothing to do with Plaintiffs' allegation that Department officials have violated the FRA's records creation requirements and thus do nothing to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

Plaintiffs otherwise assert that officials in the Department of Defense—which, like the White House, is not a defendant here—on one occasion were asked to return transcripts of the President's calls with foreign leaders to the White House, and that on another occasion, the President took possession of the "notes" of an interpreter who had been assigned to interpret the President's communications during a meeting with Russian President Putin. Compl. ¶¶ 43–44. Neither of these assertions supports Plaintiffs' allegation that Department officials have followed a "pattern and practice" of failing to create required records. Plaintiffs' assertions regarding individuals "associated with the Trump Campaign," Jared Kushner, Ivanka Trump, and K.T. McFarland, none of whom are Department employees, are similarly irrelevant. *See id.* ¶¶ 63, 67–68.[8]

Plaintiffs also point to the House hearing testimony of Ambassador William Taylor regarding a June 28, 2019 telephone call in which he, Ambassadors Sondland and Volker, Secretary of Energy Rick Perry, and Ukrainian President Zelenskyy participated. Compl. ¶ 51.

[7] To the contrary, as explained above, records in White House custody that document the activities of the President would most likely be governed by the PRA, not the FRA. *See supra* note 1. Indeed, the NSC, which, according to Plaintiffs, managed the computer system at issue, Compl. ¶ 42, is not subject to the FRA at all. *Armstrong III*, 90 F.3d at 565 (holding NSC is not an agency subject to FOIA and therefore is not subject to the FRA).

[8] To the extent Plaintiffs are attempting to weave together some kind of nebulous conspiracy theory based on the assertion that both Jared Kushner and certain Department officials have used the same encrypted messaging application, WhatsApp—an application that similarly has been used by over a billion other people around the world—their theory should be rejected out of hand.

According to Plaintiffs, Ambassador Sondland limited participation in the call and "said that he wanted to make sure no one was transcribing or monitoring" it. *Id.* However, Ambassador Taylor made clear in his testimony that Ambassador Sondland did not prohibit documentation of the substance of the meeting.[9] To the contrary, Ambassador Taylor himself created a record documenting the meeting after it occurred. *See* Taylor statement. at 6 ("I wrote a memo for the record dated June 30 that summarized our conversation with President Zelenskyy.").

The only factual assertions remotely related to the FRA's recordkeeping requirements are those regarding the use of private phones and the encrypted electronic messaging application WhatsApp by Ambassadors Volker and Sondland and other Department employees when conducting official business. Compl. ¶¶ 60–62. However, the mere assertion that private messaging applications have been used, or even that such use is "widespread," *id.* ¶ 62, does not by itself suggest an FRA violation—much less does it state a permissible challenge to an agency recordkeeping guideline. Both the FRA and Department recordkeeping policies expressly acknowledge that such applications may be used. 44 U.S.C. § 2911; 5 FAM 443.4(b), (d); May 2018 ALDAC, at 1; July 2019 ALDAC, at 1. The FRA itself does not limit the circumstances where such methods of communications may be used. 44 U.S.C. § 2911. The Department has indicated that messaging applications that allow archiving content by transmitting it to official Department accounts may be used in certain circumstances. *See* July 2019 ALDAC, at 1–2.[10]

---

[9] The transcript of Ambassador Taylor's opening statement ("Taylor statement"), upon which Plaintiffs rely, is available at https://games-cdn.washingtonpost.com/notes/prod/default/documents/542ee36f-eafc-4f2b-a075-b3b492d981a5/note/5125c5bd-9723-4ea9-8180-7bb6fd714783.pdf .

[10] Plaintiffs have not challenged the Department's guidance on this issue, and such guidance is undoubtedly reasonable. Indeed, for Department officials engaged in communications with people in other countries around the world, who themselves may use certain instant messaging apps as a matter of course, there may be a variety of possible reasons that such discretion might properly be exercised. (Just as the Department trains its employees to speak foreign languages, so as to

The only strict parameter for Department employees' use of private messaging applications is that employees must copy or forward records that are originally created or sent through such applications to their official electronic messaging accounts within 20 days of the records' creation or transmission. *See* 5 FAM 443.4(d)(2)–(3) (requiring users of personal email accounts to copy or forward complete copies of work-related email to an official Government email account within 20 days of creation or transmission); May 2018 ALDAC, at 1 (requiring users of third-party electronic messaging applications to forward all messages that qualify as federal records to an official Department email address within 20 days f creation or receipt); July 2019 ALDAC, at 2 (requiring federal records created or transmitted through electronic messaging applications be sent to an official state.gov account within 20 days). This policy is in line with the FRA, which similarly requires that such transfer occur within 20 days of the original transmission. *See* 44 U.S.C. § 2911(a)(2). Plaintiffs assert no factual details supporting the notion that Department officials have violated this requirement.[11] But even if they were able to identify specific instances of noncompliance with Department recordkeeping guidelines, they could not rest their APA challenge on such assertions, for the reasons explained above. Rather, under *Armstrong*, such

communicate more effectively with people in other countries, so may it also recognize that its foreign policy mission and diplomatic interests may best be served, in some circumstances, by allowing its employees to communicate with others in their preferred electronic medium.)

[11] Plaintiffs baldly assert that "[t]he circumstances under which the State Department eventually acquired copies of" messages sent from Ambassador Volker to Ambassadors Taylor and Sondland, Andrey Yermak, and Rudy Giuliani "make clear they were not placed into a State Department recordkeeping system upon or even shortly after their creation." Compl. ¶ 61. However, the asserted failure to "provide[]"certain Department officials "with copies" of other officials' messages, *id.*, does not identify any FRA violation, nor does it support an inference that Ambassador Volker failed to forward these messages to his Department email account in compliance with the FRA. Ambassador Volker, who was himself part of the State Department at the time, clearly retained copies of these messages. The FRA does not dictate who else within the Department should have been "provided . . . with copies" of those messages. *See id.* In any event, Plaintiffs' assertions have no bearing on any legitimate APA challenge to a recordkeeping guideline or directive.

isolated acts of noncompliance are not subject to judicial review. *Armstrong I*, 924 F.2d at 294; *Pruitt*, 319 F. Supp. 3d at 260; *CEI*, 67 F. Supp. 3d at 32; *DHS*, 527 F. Supp. 2d at 111. The lack of any nexus between Plaintiffs' factual assertions and a viable FRA claim therefore presents another basis to dismiss Claim One of their Complaint.

II. CLAIM TWO SHOULD ALSO BE DISMISSED BECAUSE IT SIMILARLY PRESENTS AN IMPERMISSIBLE COMPLIANCE-BASED CLAIM AND IGNORES RELEVANT DEPARTMENT GUIDELINES

Claim Two of Plaintiffs' Complaint fares no better. In Claim Two, Plaintiffs allege that the Department has improperly given employees "unchecked discretion" to comply with adequate documentation requirements without establishing "effective controls" to ensure that employees in fact meet those obligations. Compl. ¶¶ 77–78. Like Claim One, this claim should be dismissed because it also seeks to raise a compliance-based challenge rather than a guidelines-based challenge, contrary to *Armstrong*. Moreover, even if Claim Two were construed as permissible under *Armstrong*, Plaintiffs mischaracterize the Department's recordkeeping policy, and fail to identify any deficiency in the policy as it actually exists.

An FRA challenge asserting a lack of "effective controls" was previously raised in *Judicial Watch, Inc. v. FBI*, 2019 WL 4194501 (D.D.C. Sept. 4, 2019). There, the plaintiff specifically alleged that the defendant agency had failed to establish "effective controls" over the agency's maintenance of records in the form of "non-email electronic messages, including text messages." *Id.* at *1. The court held that the plaintiff's claim was reviewable under *Armstrong* and the APA because it did not merely rely on the "systemic noncompliance of FBI employees" for the notion that the agency's controls were ineffective, but instead "expressly contest[ed] the adequacy of the FBI's recordkeeping policy for a specific category of records: electronic records, excluding email." *Id.* at *6. The court nevertheless dismissed the plaintiff's claim because the plaintiff had failed to

make "precise factual allegations that highlight *which* particular deficiencies" in the FBI's written recordkeeping guidelines rendered their controls ineffective. *Id.* at *9. The court concluded that the plaintiff thus failed to make out a plausible claim for relief. *Id.* at *10.

Plaintiffs' Claim Two does not identify a claim that is permissible under *Armstrong*, nor does it make out a plausible claim for relief. Unlike the claim at issue in *Judicial Watch*, Claim Two relies solely on alleged "systemic noncompliance" by Department employees to support the notion that the Department's controls over adequate documentation are ineffective. Although Claim Two cites a single FAM provision, Plaintiffs identify no flaw in the provision itself, which simply places responsibility on each Department employee to "create and preserve records that properly and adequately document" Department activities. *Id.* ¶ 78 (quoting 5 FAM 422.3). Instead, Plaintiffs baldly assert that the provision amounts to a wholesale "delegat[ion]" of all recordkeeping responsibility to employees themselves, without any guidance or oversight. *See id.* In support of this proposition, they point to nothing in the FAM itself, but instead rely solely on the notion that "non-compliance at the State Department with recordkeeping requirements" is "widespread," particularly when it comes to the "use of private phones and email accounts and encrypted messenger apps" by Department employees. Compl. ¶ 78. It should be noted that Plaintiffs fail to assert any facts suggesting that use of private messaging applications by Department employees has in fact resulted in inadequate documentation of Department activities. Thus, they fail to state a plausible claim even under their own theory. But the theory itself is also flawed. By suggesting that the Court judge the effectiveness of the Department's controls by evaluating employee compliance with FRA requirements, Plaintiffs are once again attempting to circumvent the well-established prohibition on review of compliance-based claims, as recognized in *Armstrong*.

Claim Two also fails to state a plausible claim to relief because Plaintiffs' assertion that controls are entirely lacking is belied by Department recordkeeping guidelines themselves. Plaintiffs ignore the framework of controls that is set forth elsewhere in the Department's records management policy, which directly contradicts the notion that the Department has simply, as Plaintiffs put it, "delegated" all responsibility to individual employees. The Department's policy instead identifies key personnel responsible for overseeing employee compliance with the FRA, and sets forth specific procedures for creating and preserving records. 5 FAM 414.4(b), 415.4(b), 422.1; 5 FAH-4. As in *Judicial Watch*, Plaintiffs fail to make "precise factual allegations" that identify "particular deficiencies" in the Department's policy, with respect to any specific category of records, that lead to inadequate documentation of Department activities. *See Judicial Watch*, 2019 WL 4194501, at *9. Claim Two therefore should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' claims in their entirety, with prejudice.

Dated: January 13, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

/s/ Kathryn L. Wyer
KATHRYN L. WYER
Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street, N.W., Room 12014
Washington, DC 20005
Tel. (202) 616-8475 / Fax (202) 616-8470
kathryn.wyer@usdoj.gov
Attorneys for Defendants