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.

Civil Action No. 19-3324 (JEB)

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

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PRELIMINARY STATEMENT

Plaintiffs in this lawsuit, three non-profit organizations dedicated to ensuring the preservation of our nation's history, challenge the policy and practice of Secretary of State Michael Pompeo and the Department of State of affirmatively refusing to create records of essential agency transactions as the Federal Records Act ("FRA") requires. Most prominently, Defendants have engaged or knowingly allowed others to engage in shadow, off-the-books diplomacy that bypasses the State Department's recordkeeping systems and requirements in the advancement of the President's personal and political interests and in violation of their mandatory obligation under the FRA to create records of these diplomatic efforts.

Defendants have now moved to dismiss the complaint based on a misreading of relevant caselaw, a miscasting of Plaintiffs' claims, a plea to the Court to ignore the mounting evidence of recordkeeping violations that they cavalierly dismiss as "ripped-from-the-headlines" "alleged scandals," and a request that the Court presume they have acted in good faith when the evidence is to the contrary. This Court cannot blind itself to the allegations and facts, which reveal a gross abuse of power by the President aided and abetted by Secretary Pompeo using the power of his agency to evade his recordkeeping responsibilities and pursue the President's personal agenda under the cover of darkness.

Accepting Defendants' interpretation of the FRA and their obligations under that statute, and the clear deficiencies in their recordkeeping guidance, would strip the statute's requirement to create records of all meaning and allow agencies to avoid this mandatory requirement simply by issuing recordkeeping guidance that echoes the records creation language of the FRA. The statute, however, requires affirmative action, not merely the parroting of statutory language.

STATUTORY AND REGULATORY BACKGROUND

The FRA and Implementing Regulations

The FRA imposes on all agencies records creation, maintenance, and destruction obligations and rules. 44 U.S.C. §§ 3101, *et seq.* The statute defines the term "records" to include

> all recorded information, regardless of form or characteristics, 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 information value of data in them.

44 U.S.C. § 3301 (cross-referenced in and applied to chapter 31 of title 44 by U.S.C. § 2901(1)).

Under the FRA, each agency head "shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. § 3101. This "program . . . shall provide for," among other things, "effective controls over the creation and over the maintenance and use of records in the conduct of current business," as well as "compliance with" the FRA's substantive requirements. *Id.* § 3102. An agency head must also "establish safeguards against the removal or loss of records." *Id.* § 3105. Agency heads share with the Archivist of the United States the responsibility to ensure that an accurate and complete record of each agency's policies and transactions is compiled. *See* 44 U.S.C. §§ 2902, 3101.

Regulations promulgated by the Archivist describe in detail that the obligation the FRA imposes on agencies to create "adequate and proper documentation" requires agencies to prescribe the creation and maintenance of records that:

(a) Document the persons, places, things, or matters dealt with by the agency.
(b) Facilitate action by agency officials and their successors in office.
(c) Make possible a proper scrutiny by Congress or other duly authorized agencies of the Government.
(d) Protect the financial, legal, and other rights of the Government and of persons directly affected by the Government's actions.
(e) Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically.
(f) Document important board, committee, or staff meetings.

36 C.F.R. § 1222.22. The Archivist also mandates that agency recordkeeping requirements "identify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel in the course of their official duties." 36 C.F.R. § 1222.24(a)(1).

State Department Guidelines and Regulations

The State Department's publicly available implementing guidance, 5 FAM [Foreign Affairs Manual] 422, charges "the Department's Records Officer, representing the head of the agency" with ensuring that "'[e]ffective controls over the creation and over the maintenance and use of records in the conduct of current business' are provided." 5 FAM 422(2). Under the agency's regulations, those controls must ensure, *inter alia*, that "[i]mportant policies, decisions, and operations are adequately recorded." 5 FAM 422.1(a)(1). The regulations further define adequate documentation as, *inter alia*, records that are "complete to the extent necessary to . . . [f]acilitate the making of decisions and policies and the taking of action by the incumbents and their successors in office" and "[p]rovide appropriate documentary materials for research and other historical purposes." 5 FAM 422.2.

State Department regulations delegate to each individual employee the responsibility "[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. With respect to electronic records, agency

regulations impose on all agency personnel the "legal responsibility and a business obligation to ensure documentation of official duties is captured, preserved, managed, and protected in official government systems." 5 FAM 443.2(a). Agency employees are "discouraged from using a personal email account . . . to conduct official business," 5 FAM 443.4(a), but if they do they must copy their "official Government email account . . . during the original creation or transmission." *Id.* at 443.4(d)(2). Those employees who fail to do so at the time of the message's original creation or transmission must "forward a complete copy of work-related email (including any attachments) to his or her official Government email account no later than 20 days after the original creation or transmission." *Id.* at 443.4(d)(3).

FACTUAL BACKGROUND

As set forth in the complaint in this action, a complaint filed by a whistleblower with the Office of the Inspector General of the Intelligence Community on August 12, 2019, reporting an "urgent concern" that "the President of the United States is using the power of his office to solicit interference from a foreign country in the 2020 U.S. election" triggered a congressional investigation that culminated in impeachment proceedings against President Donald Trump. *See* Compl. ¶¶ 36, 48. As part of its impeachment inquiry, the House Permanent Select Committee on Intelligence (the "Committee") conducted interviews with a number of people knowledgeable about the events the Whistleblower Complaint describes, including certain State Department officials such as Ambassador Gordon Sondland, former Ambassador to Ukraine Marie Yovanovitch, and former Ambassador William Taylor, who was the top U.S. envoy to Ukraine. *Id.* ¶ 49.

That number has grown to include Deputy Assistant Secretary of State George Kent, who testified before the Committee on November 13, 2019; Ambassador Kurt Volker, former U.S.

special envoy to Ukraine who testified before the Committee on November 19, 2019; David Holmes, a political counselor at the U.S. Embassy in Ukraine, who testified before the Committee on November 15 and 21, 2019; Ambassador P. Michael McKinley, who served as a senior advisor to Secretary Pompeo and who was deposed by the Committee on October 16, 2019, and whose testimony was publicly released on November 4, 2019; Acting Assistant Secretary of State Philip Reeker, who was deposed by the Committee on October 26, 2019, and whose testimony was publicly released on November 26, 2019; Catherine M. Croft, a special State Department advisor for Ukraine, who testified before the Committee on October 30, 2019, and whose testimony was publicly released on November 11, 2019; Former State Department Special Adviser for Ukraine Christopher Anderson, who testified before the Committee on October 30, 2019, and whose testimony was released on November 11, 2019; Deputy Secretary of State John Sullivan, who testified before the Committee on October 30, 2019; and David Hale, Under Secretary of State for Political Affairs, who was deposed by the Committee on November 6, 2019, and whose testimony the Committee publicly released on November 18, 2019.[1] None of this evidence was available at the time Plaintiffs filed their complaint.

[1] The Committee has publicly released the transcripts of all of these officials' testimony and depositions; for convenience those documents can be accessed at https://www.justsecurity.org/67076/public-document-clearinghouse-ukraine-impeachment-inquiry/. As public records that are available online, the Court may take judicial notice of them in ruling on Defendants' Rule 12(b)(6) motion. *See* Fed. R. Evid. 201 (court may take judicial notice of an adjudicative fact where its accuracy cannot reasonably be questioned); *Johnson v. Comm'n on Presidential Debates*, 202 F. Supp. 3d 159, 167 (D.D.C. 2016) (in ruling on 12(b)(6) motion "a court may consider the complaint's factual allegations, documents attached to the complaint as exhibits or incorporated by reference, and matters about which the court may take judicial notice."); *Kaspersky Lab, Inc. v. DHS*, 909 F.3d 446, 464-65 (D.C. Cir. 2018) (in ruling on motion to dismiss court could take judicial notice of materials from congressional hearings and legislative materials).

This additional evidence reinforces and expands on the shadow diplomatic channel under the auspices of the State Department that Ambassador Taylor described in his testimony. The shadow diplomacy involved an "irregular" channel that a select few—including Ambassador Sondland, Special Envoy Volker, then-Secretary of Energy Rick Perry, and President Trump's personal lawyer Rudolph Giuliani—used to secretly pursue the President's personal and political agenda in Ukraine, rather than the "regular" diplomatic channel Ambassador Taylor and other State Department officials were using to pursue what they understood to be our national policy goals in Ukraine. Compl. ¶¶ 52, 56. Ambassador Taylor testified about his increasing concern that the regular and irregular channels "had diverged in their objectives." *Id.* ¶ 57. Ambassador Taylor understood Ukraine to be of "strategic importance . . . in our effort to create a whole, free Europe," which in the past the United States has advanced "with assistance funding, both civilian and military, and political support." *Id.* ¶ 66 (quoting Taylor Opening Statement at 15).

Ambassador Taylor also testified about his growing awareness that Mr. Giuliani, a non-governmental individual, was guiding the irregular policy channel. *Id.* ¶ 57. As part of this separate or shadow diplomacy, State Department officials like Ambassador Volker met separately with Mr. Giuliani to discuss Ukraine. *Id.* ¶ 58. Participants in the regular diplomatic channel were kept in the dark about the President's objectives in Ukraine. *Id.* ¶ 59.

The participants in the shadow diplomacy—Ambassadors Volker and Sondland and Mr. Giuliani—were aided by their use of an encrypted messenger application, WhatsApp. *Id.* ¶ 60. As the circumstances surrounding the State Department's acquisition of these messages make clear, they were not placed into a State Department recordkeeping system upon or even shortly after their creation. *Id.* ¶ 61.

Accumulating evidence, some of it available only after the filing of the complaint in this action, has exposed at least in part the role Secretary Pompeo has played in this shadow diplomacy. For example, Secretary Pompeo belatedly admitted he was on the July 25 call between Presidents Trump and Zelensky that triggered the Whistleblower Complaint (the "Zelensky Call"). *Id.* ¶ 64. Further, Secretary Pompeo was "in the loop" on the efforts of Mr. Giuliani and others to use the shadow diplomatic channel to advance the President's "scheme regarding Ukraine." U.S. House of Representatives, The Trump-Ukraine Impeachment Inquiry Report, Dec. 2019 ("House Impeachment Report"), 64, 119, 120, https://bit.ly/2SQPo82.

For example, following a phone conversation Ambassador Sondland had with President Zelensky during which he stressed the need for the Ukrainian president to make a public statement about corruption before a planned call with President Trump could move forward, Ambassador Sondland wrote to Secretary Pompeo and others about the call. *Id.* at 91. Ambassador Sondland pointed to this email chain as evidence that "'[e]veryone was in the loop.'" *Id.* (quoting Ambassador Sondland). *See also id.* at 95 (describing how Secretary Pompeo and others were "in the loop" on President Trump's "expectation that President Zelensky had to announce these specific investigations to secure an Oval Office meeting"). Moreover, as the House Impeachment Report notes, "Ambassador Sondland sought to 'break the logjam' on the security assistance and the White House meeting by coordinating a meeting between the two presidents [Trump and Zelensky] through Secretary of State Mike Pompeo." *Id.* at 127. Ambassador Taylor testified that when he expressed to Ambassador John Bolton his "serious concern about the withholding of military assistance to Ukraine while the Ukrainians were defending their country from Russian aggression," Ambassador Bolton advised him to "send a

first-person cable to Secretary Pompeo directly relaying my concerns." *Id.* at 128. Ambassador Taylor sent the suggested cable, but never heard back from Secretary Pompeo. *Id.* at 130.

The House Impeachment Report is based in part on depositions and testimony of a number of current and former State Department officials, but Secretary Pompeo refused to produce a single document in response to the Committee's subpoena. *Id.* at 142. This leaves unanswered the question of what agency documents were created and still exist.

The complaint alleges that events involving Ukraine are by no means the only instances of record-keeping failures involving foreign diplomacy during the Trump presidency. For example, Senior White House Advisor Jared Kushner earlier last year met in Saudi Arabia with Saudi Crown Prince Mohammed bin Salman and King Salman, reportedly to discuss Middle East peace efforts and Saudi investment in the region. Compl. ¶ 67 (citation omitted). Reportedly, U.S. embassy staff in Riyadh "were not read in on the details of Jared Kushner's trip . . . or the meetings he held with members of the country's Royal Court." *Id.* (citation omitted). The only State Department attendee was someone who focuses on Iran, leaving the U.S. embassy "largely . . . in the dark on the details of Kushner's schedule and his conversations with Saudi officials." *Id.* (citation omitted).

In sum, the Complaint details a pattern and policy of recordkeeping failures, specifically:

1. The abuse of recordkeeping systems to conceal the contents of the President's phone calls with certain foreign leaders. Compl. ¶¶ 40–43.

2. The "lock down" by the White House of all records of the Zelensky Call including, presumably, any records created by State Department employees who either listened in on the call or who were briefed on the contents of the call. *Id.* ¶ 40.

3. The clawback of records from executive agencies. *Id.* ¶ 43.

4. Pressure from the President to ensure that records do not become public. *Id.* ¶ 43.

5. The confiscation of State Department employee records. *Id.* ¶ 44.

6. The existence of an "irregular" or shadow diplomatic channel that was pursuing in secret a different goal than the "regular" diplomatic channel that other State Department officials were using. *Id.* ¶ 52. This irregular, informal channel included certain senior State Department officials and "operated mostly outside of official State Department channels." *Id.* ¶56.

7. Instructions by Ambassador Sondland, a senior State Department official, that other State Department employees should not transcribe a June 28, 2019 call with Zelensky. *Id.* ¶ 52.

8. Communications concerning State Department business using an unofficial encrypted messenger app, WhatsApp, that were not placed into a State Department recordkeeping system upon or even shortly after their creation. *Id.* ¶¶ 60–63.

ARGUMENT

I. Standard Of Review.

In resolving a Rule 12(b)(6) motion, a court must construe the complaint liberally, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor. *Hurd v. Dist. of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017). The court's review is limited to "the facts alleged in the complaint, any documents either attached or incorporated in the complaint and matters of which the court may take judicial notice." *Id.* at 678. *See also Johnson v. Comm'n on Presidential Debates*, 202 F. Supp. 3d 159, 167 (D.D.C. 2016) (citing *Abhe & Svoboda, Inc. v. Choa*, 508 F.3d 1052, 1059 (D.C. Cir. 2007)). This burden is not intended to be onerous; a count will survive so long as there is a "'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support the claim." *Bell Atl.*

Corp. v. Twombly, 550 U.S. 544, 563 n.8 (2007) (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

Under Fed. R. Evid. 201, a court can take judicial notice of "adjudicative facts," which include facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Rule 201 also sweeps in facts contained in public records of other proceedings, *Abhe*, 508 F.3d at 1059, *Covad Commc'ns Co. v. Bell Atlantic Co.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005), and "historical, political, or statistical facts, and any other fact that are verifiable with certainty." *Mintz v. FDIC*, 729 F. Supp. 2d 276, 278 n.2 (D.D.C. 2010).

II. Claim One Sets Forth a Valid, Judicially Reviewable Claim Under the Administrative Procedure Act For Violations by Defendants of Their Mandatory Duties Under the FRA to Create Records.

A. Claim One Is Judicially Reviewable.

Claim One of the complaint challenges as arbitrary, capricious, and contrary to law the Defendants' policy and practice of affirmatively electing not to create and preserve records adequately documenting the organization, functions, policies, decisions, procedures, and essential transactions of the State Department. Compl. ¶¶ 69-75. Brought under the Administrative Procedure Act ("APA"), Claim One flows in large part from Defendants' efforts to keep secret an irregular channel of shadow diplomacy that bypasses State Department recordkeeping systems and requirements, *id.* ¶¶ 5, 71, and includes directives by Secretary Pompeo and other top State Department officials to State Department employees not to create or preserve records as the FRA requires, *id.* ¶ 72, and Defendants' failure "to identify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel." *Id.* ¶ 73.

In response, Defendants argue that *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) ("*Armstrong I*"), precludes this claim because it does not fall within what they allege are the only two permissible claims that decision recognizes: (1) claims challenging the adequacy of an agency's recordkeeping guidelines and directives, and (2) claims seeking judicial review of the refusal of an agency head or the Archivist to seek the initiation of enforcement action by the Attorney General. Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss ("Ds' Mem."), 10-12. Defendants' truncated interpretation of *Armstrong I* finds no support in its language or reasoning. Further, Defendants miscast Plaintiffs' claim as a non-viable compliance-based claim, Ds' Mem. at 10, ignoring that Plaintiffs are raising a policy and practice claim based on Defendants' repeated refusal to create records of key agency actions and decisions.

While the *Armstrong I* court had no occasion to address the viability of a "refusal-to-create-records" claim brought under the APA because the plaintiffs there asserted no such theory, its analytical framework reinforces that Claim One is judicially reviewable. The court in *Armstrong I* started from the presumption that FRA claims are judicially reviewable, a presumption that can be overcome only expressly by statute or impliedly by "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administration action involved." *Armstrong I*, 924 F.2d at 290 (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984)). Applying this analytical framework, *Armstrong I* rejected the government's argument that Congress intended to preclude review under the FRA of all but an action brought by the Attorney General to prevent the removal or destruction of records, 924 F.2d at 291, and concluded that the challenge before it to the guidelines and instructions of the National Security

Council ("NSC")[2] was subject to judicial review. *Id.* at 292. Significantly, in reaching this decision, *Armstrong I* focused on the congressional intent behind the FRA, including in relevant part the "congressional intent *to ensure that agencies adequately document their policies and decisions*." 924 F.2d at 292 (emphasis added).

That focus compels the same result here, as Plaintiffs seek judicial review of a claim that Defendants have engaged in a policy and practice of affirmatively electing not to create and preserve records. Such a claim is not expressly precluded by the FRA, and Defendants do not argue as much. Nor it is impliedly precluded. To the contrary, recognizing judicial review of the kind of claim Plaintiffs have brought advances, not thwarts, "the FRA statutory scheme designed to implement that intent." *Id.* at 293. Moreover, as in *Armstrong I*, the FRA provides no alternative remedy for the claim at issue. The FRA limits its administrative enforcement mechanism to claims of improper document removal or destruction, 44 U.S.C. § 3106, but provides no corresponding enforcement mechanism for an agency's refusal to create documents.

This absence, as this Court recognized in *CREW v. Pruitt*, means there is no "'clear and convincing evidence' that Congress intended to preclude judicial review of a practice of refusing to create records." 319 F. Supp. 3d 252, 259 (D.D.C. 2018) (citation omitted). Not only is the presumption of judicial review not overcome by either language or legislative history, but "[p]ermitting judicial review also comports with longstanding precedents concerning APA review generally." *Id.* Here, as in *Pruitt*, judicial review of claims brought by Plaintiffs ensures the availability of records that are "critical to their missions" and "serves as a necessary 'check' on the Archivist's supervision of [the State Department's] practices here." *Id.* at 259-60.

[2] In *Armstrong I*, the court presumed the NSC was an agency, a presumption it later reversed in *Armstrong v. EOP*, 90 F.3d 553, 557 (D.C. Cir. 1996).

Defendants attempt to draw support for their flawed interpretation of *Armstrong I* from two district court cases: *Competitive Enter. Inst. v. EPA*, 67 F. Supp. 3d 23 (D.D.C. 20014) ("*CEI*"), and *CREW v. Dep't of Homeland Sec.*, 387 F. Supp. 3d 33 (D.D.C. 2019) ("*CREW v. DHS*"). Neither of these cases' rationale applies here. *CEI* involved a claim that the EPA routinely destroyed text messages in violation of the FRA. The court construed the claim as alleging a failure by EPA to take remedial action by notifying the Archivist of the document destruction—a claim that was subject to review under *Armstrong I*, but only to the extent it sought to enforce the FRA's enforcement mechanism. *CEI*, 67 F. Supp. 3d at 33, 34. Importantly, the court in *CEI* recognized the viability under the APA of an alleged policy and practice claim of FRA violations, *id.* at 32, but dismissed the claim before it because in substance it "constitute[d] a challenge to EPA's records disposal decisions." *Id.* at 33. Here, by contrast, Plaintiffs do not raise a document destruction claim under the guise of a challenge to a recordkeeping policy that can fairly be addressed through the FRA's administrative enforcement mechanism. Instead, Plaintiffs challenge Defendants' policy and practice of failing to create records in the first place for which the FRA provides no enforcement mechanism.

Similarly, *CREW v. DHS* provides no basis to dismiss the claim here that the State Department, with the direct involvement of Secretary Pompeo, has a policy and practice of refusing to create records. This is precisely the kind of "unofficial, *de facto* policy of refusing to create records," 387 F. Supp. 3d at 53, that this Court in *Pruitt* acknowledged is subject to review. In contrast, while the court in *CREW v. DHS* found no review for what it characterized as a challenge to the agency's "deficient compliance. . .with regards to some of the records the agency creates," it recognized that a challenge to the wholesale failure to create certain categories of records—the claim brought here and in *Pruitt*—is subject to judicial review. *Id.*

Unable to distinguish the D.C. Circuit's ruling in *Armstrong I*, Defendants resort to misstating the nature of Plaintiffs' claims as "compliance-based" and involving "the details of records management" that Congress intended to leave "to the discretion of individual agency heads." Ds' Mem. at 10, 11. To the contrary, as the opening sentence of the complaint makes clear, Plaintiffs challenge "*the policy and practice*" of the Defendants "of failing to document State Department policies, decisions, and essential transactions as the FRA requires." Compl. ¶ 1 (emphasis added). The complaint spells out the then-known factual details behind this policy and practice including, most prominently, the participation by Secretary Pompeo—the official on whom the FRA places primary recordkeeping responsibility at the State Department—and other State Department officials in "an 'irregular' or shadow diplomatic channel that was pursuing in secret a different goal than the 'regular' diplomatic channel" used by those State Department officials charged with carrying out official U.S. foreign policy. *Id.* ¶ 52. The challenged conduct is a far cry from a compliance-based claim that specific documents by specific individuals in specific instances were neither created nor preserved. Resolving the claim Plaintiffs actually have made—not the claim Defendant wish they were facing—will require the Court to examine a broad policy and practice to affirmatively not create records, not whether specific "'scraps of paper . . . constitute 'records' under [agency] guidelines.'" Ds' Mem. at 11 (quoting *Armstrong I*, 924 F.2d at 293-94).

Defendants also attempt to reduce this claim to a "theory . . . that certain Department employees are intentionally acting in violation of written Department guidance," which they characterize as "the kind of compliance-based challenge that *Armstrong* prohibits." Ds' Mem. at 12. But here, as in *Pruitt*, Plaintiffs are challenging a policy and policy directly involving the Secretary of State who the FRA charges with ensuring that the agency compiles an accurate and

complete record of its policies and transactions. *See* 44 U.S.C. §§ 2902, 3101. As such, he is far more than a "certain Department employee[]," and like then-EPA Administrator Scott Pruitt, his actions make this claim judicially reviewable.

As this Court found in *CREW v. Pruitt*, "[a]n agency policy—formal or otherwise—that refuses to 'make . . . records' in accordance with the FRA is reviewable." 319 F. Supp. 3d at 260 (citations omitted). Defendants' efforts to distinguish or explain away this conclusion carry no weight. First, Defendants argue that the claim at issue in *Pruitt* differed in nature from the one present here because it focused on the requirement that agencies document substantive decisions and oral commitments, while the claim here focuses on the *adequacy* of that documentation. Ds' Mem. at 16. This is simply false. Here, as in *Pruitt*, Plaintiffs are challenging an agency policy—implemented by the agency head himself—of refusing to create records at all, based in part on the same regulatory requirement at issue in *Pruitt*, 36 C.F.R. § 1222.22. Both *Pruitt* and this case focus on the failure to create records, not on the adequacy of existing records an agency already has created. Nor are Plaintiffs asking this Court to decide "the level of detail required for a particular record." Ds' Mem. at 16. Plaintiffs are challenging Defendants' failure to take actions in the aggregate that the FRA mandates with respect to records creation, a claim that falls well within the scope of judicial review authorized by the APA. *See Pruitt*, 319 F. Supp. 3d at 260 (defining agency action subject to review under the APA as, *inter alia*, "the denial of or failure to take any of [the actions listed in the APA]").

Second, Defendants argue that this case differs from *Pruitt* because here Plaintiffs challenge isolated acts of noncompliance that are not subject to judicial review. Ds' Mem. at 14, 21. As explained above, however, the complaint raises a policy and practice claim that rests not on isolated actions of the Defendants, but a sweeping and deliberate effort to pursue shadow, off-

the-books diplomacy that bypasses State Department recordkeeping systems and requirements. And while, as Defendants point out, this Court ultimately dismissed the claim in *Pruitt* as moot, that dismissal stemmed from the fact that the "gravamen" of CREW's claim was the conduct of Scott Pruitt, who no longer served as the Administrator of EPA. *CREW v. Wheeler*, 352 F. Supp. 3d 1, 9 (D.D.C. 2019). In the absence of "any allegation to support an inference that this policy or practice would continue, or exist apart from, the actions of Pruitt," the Court concluded the claim was moot. *Id.* By contrast, the policy at issue here continues and exists with the active participation of Secretary Pompeo.

Third, Defendants argue that Claim One is not judicially reviewable because the FRA provides no judicially manageable standards to apply. Ds' Mem. at 14-17. This argument, however, rests on Defendants' mischaracterization of Claim One as challenging isolated, compliance-based acts in violation of the FRA and seeking the court's intervention to decide "the details of records management." Ds' Mem. at 15. While such details, which are not at issue here, may be left to "agency personnel" to decide, courts may under the APA review a policy and practice of outright refusing to create records of substantive decisions. *Pruitt*, 319 F. Supp. 3d at 260 (quoting *Armstrong I*, 924 F.2d at 293-94). That is because the "FRA clearly provides sufficiently detailed standards . . . regarding what records an agency must *create*" in order to enable judicial review. *Id.* (emphasis added).

Despite the clarity of this holding in *Pruitt*, Defendants argue that the review this Court recognized in *Pruitt* encompasses only claims that agencies have failed to document "substantive decisions and commitments reached orally," which Defendants claim, based on their reading of 36 C.F.R. § 1222.22, do not call for a court to determine the adequacy of a particular record. Ds' Mem. at 16 (quoting *Pruitt*, 319 F. Supp. 3d at 261). The language on which Defendants rely,

however, comes from the Court's analysis of the separate challenge in *Pruitt* to the EPA's recordkeeping program and guidance, *not* to the plaintiff's challenge to the failure to create records by Pruitt and others. Defendants are equally incorrect in their assertion that the regulation at issue in *Pruitt* "contains no discretionary language, such as 'adequate.'" Ds' Mem. at 16. In fact, 36 C.F.R. § 1222.22 expressly details how agencies meet "their obligation for *adequate* and proper documentation." *Id.* (emphasis added). Specifically, to meet their obligation for adequate and proper documentation, agencies must prescribe the creation and maintenance of records that:

(a) Document the persons, places, things, or matters dealt with by the agency.
(b) Facilitate action by agency officials and their successors in office.
(c) Make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government.
(d) Protect the financial, legal, and other rights of the Government and of persons directly affected by the Government's actions.
(e) Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically.
(f) Document important board, committee, or staff meetings.

36 C.F.R. § 1222.22.

If accepted, Defendants' arguments against judicial review would render the FRA a dead letter for all challenges but those to recordkeeping guidance and a failure to invoke the statute's limited enforcement scheme for threatened document destruction or unlawful removal. In other words, an agency could ignore with impunity its obligation to create records in the first place, leaving an enormous hole in the historical record. The only comfort Defendants offer is that government officials are presumed to "discharge their duties in good faith." Ds' Mem. at 13 (quoting *CEI* , 67 F. Supp. 3d at 33; *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008)). Such a presumption has no place here where, unlike *CEI*, Plaintiffs have specifically alleged that the conduct at issue was focused on avoiding compliance with the FRA. *Cf. CEI*, 67

F. Supp. 3d at 33 (court declined to depart from presumption of good faith where the plaintiff had failed to "allege[] any specific incidents in which EPA Administrators purposefully evaded agency duties under FRA").

Days before this filing, it was reported that the Secretary Pompeo met with Russian Foreign Minister Sergey Lavrov during the Munich Security Conference. David M. Herszenhorn, State Department keeps quiet as Pompeo meets Lavrov in Munich, *Politico*, Feb. 15, 2020, https://www.politico.eu/article/state-department-keeps-quiet-as-pompeo-meets-lavrov-in-munich/. The State Department made no announcement of the meeting and no mention of it was included in a briefing—discussing U.S. efforts at the security conference—by a senior administration official. *Id.* Russian journalists, however, were reportedly aware of the meeting and permitted to write about it afterward. *Id.* One "journalist traveling with [Foreign Minister] Lavrov said the U.S. side had requested that there be no press conference or joint statements." *Id.* The presumption of good faith called for under *CEI* cannot be read in such a way that government officials are given carte blanche to intentionally disregard their obligations under the FRA; the presumption must be seen as rebuttable. Plaintiffs have alleged a number of specific incidents in which Secretary Pompeo and other State Department officials have "purposefully evaded agency duties under [the] FRA," and a number of additional instances of purposeful evasion have come to light since the filing of the Complaint. *CEI*, 67 F. Supp. 3d at 33. Because of these incidents, the State Department is no longer entitled to any presumption that it is acting in good faith.

B. Claim One Plausibly Alleges A Policy And Practice Of Violating The FRA's Record Creation Obligations.

Despite the low pleading bar to survive a Rule 12(b)(6) motion to dismiss, Defendants argue Plaintiffs have not met it here, pointing to selective facts they believe fail to demonstrate

an FRA violation. Ds' Mem. at 17-18. But Defendants miss the forest for the trees: the complaint details not only the then-publicly available facts concerning Defendants' policy and practice of refusing to create records of essential State Department transactions and decisions, but also provides details about the backdrop to this conduct to explain not only what Defendants are doing, but why. Properly construed, the complaint sets forth Defendants' actions, "*in the aggregate*, of refusing to create certain records," *Pruitt*, 319 F. Supp. 3d at 260 (citation omitted) (emphasis added), *i.e.*, a policy and practice of evading the FRA's record creation obligations.

Freedom of Information Act ("FOIA") litigation provides a useful corollary for policy and practice claims and the pleading burden a plaintiff bears. In the FOIA context, this Court has held that "[t]o state a policy-or-practice claim, a plaintiff must plausibly allege 'that the agency has adopted, endorsed, or implemented some policy or practice that constitutes on ongoing 'failure to abide by the terms of the FOIA.'" *Am. Ctr. for Law & Justice v. U.S. Dep't of Justice*, 249 F. Supp. 3d 275, 283 (D.D.C. 2017) (citations omitted). Further, the "policy or practice may be 'informal, rather than articulated in regulations or an official statement of policy.'" *Id.* at 281 (quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988)). *See also Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 778 (D.C. Cir. 2018) ("The fact that the practice at issue is informal, rather than crystalized in regulation or an official statement of policy is irrelevant.]" (quotation omitted)). A plaintiff alleging a policy or practice claim must demonstrate a "persistent failure" to adhere to a statute's requirements. 249 F. Supp. 3d at 780. *See also Al Otro Lado, Inc. v. McAllenan*, 394 F. Supp. 3d 1168, 1208 (S.D. Cal. 2019) (holding that § 706(2) of the APA permits a properly pled policy and practice claim tied to "unwritten" policies).

At the pleading stage, a plaintiff asserting a policy or practice claim need only put forth "'a plausible, more than nebulous assertion of the existence of an ongoing pattern or practice.'" *Khine v. U.S. Dep't of Homeland Sec.*, 334 F. Supp. 3d 324, 332 (D.D.C. 2018) (quoting *MuckRock, LLC v. CIA*, 300 F. Supp. 3d 108, 130 (D.D.C. 2018) (internal quotation omitted)).[3] A plaintiff must plead facts that "advance [its] allegation from being possible to plausible." *Scudder v. CIA*, 281 F. Supp. 3d 124, 127 (D.D.C. 2017). The plaintiff in *Khine* satisfied this burden by pleading "'specific instances of conduct by [DHS] that [Plaintiffs] claim[] are manifestations of the alleged [policy-or-practice] at issue.'" 334 F. Supp. 3d at 332 (quoting *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 260-61 (D.D.C. 2012)); *accord Al Otro Lado*, 394 F. Supp. 3d at 1208. In *Scudder*, by contrast, the facts in the complaint supported the opposite inference that the agency was not engaging in the challenged conduct, making the policy or practice claim "merely possible and not plausible." 281 F. Supp. 3d at 129.

The complaint here meets the pleading requirements for a policy and policy claim. Plaintiffs identify the challenged policy and practice as including, *inter alia*, the failure of Secretary Pompeo and the State Department "to document State Department policies, decisions, and essential transactions," Compl. ¶ 1, by carrying out a "shadow diplomacy" "through a secret, alternative channel." *Id.* ¶ 4. This "irregular" and off-the-books channel was guided by the President's personal attorney Mr. Giuliani, who is not a State Department official, and focused on conducting a secret foreign policy with the Ukraine. *Id.* ¶¶ 57, 66 (describing how the "side channels" and "quid pro quos, corruption, and interference in elections" hinder U.S. interests in

[3] The Court made this statement in the context of evaluating the plaintiff's standing but, as the Court in *MuckRock* recognized, the government's challenge there to the plaintiff's standing failed when it was "properly recast as the contention that Muckrock has failed to make a plausible allegation that the CIA employs a 'per se' policy pertaining to FOIA requests for emails." 300 F. Supp. 3d at 130.

Ukraine). This policy and practice also included the efforts of Ambassador Sondland and former Special Envoy Kurt Volker, at the direction of the President and Mr. Giuliani and with Secretary Pompeo's knowledge, to "conduct[] foreign policy in Ukraine using a secret and irregular channel that bypasses State Department recordkeeping systems and requirements." *Id.* ¶ 5. *See also id.* ¶ 56. As an example, for a call with Ukrainian President Zelensky, Ambassador Sondland directed that no one take notes. *Id.* ¶¶ 5, 52. Further, high level State Department officials "used private phones and an encrypted messenger app to conduct official business without ensuring that copies of those messages are saved and preserved in a State Department recordkeeping system." *Id.* ¶¶ 5, 60-61. Taken as a whole, these facts establish the existence of an unlawful policy and practice is at least "plausible," and demonstrate a "persistent" failure by State Department officials, including Secretary Pompeo, to comply with their obligation under the FRA to create records of essential transactions and decisions.

In arguing to the contrary, Defendants ignore these facts and focus instead on factual allegations they claim "have nothing to do with the FRA," such as the Whistleblower Complaint discussed in the complaint. Ds' Mem. at 17. But while the Whistleblower Complaint itself does not evidence the challenged policy and practice, it provides context and motivation that, in turn, bolsters the plausibility of Plaintiffs' allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("[D]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."). With the direct participation and direction of Secretary Pompeo, State Department officials carried out a policy of shadow diplomacy that foreclosed compliance with the FRA. The Whistleblower Complaint explains *why* they did so with respect to Ukraine: to enlist President Zelensky's assistance in digging up and spreading dirt on a political rival of the President.

Similarly, Defendants discount as evidence of a policy and practice the seizure by President Trump of a State Department interpreter's notes following the President's bilateral meeting with Russian President Vladimir Putin. But one court ruled recently that these allegations were sufficient to state a claim under the FRA, denying Secretary Pompeo's motion to dismiss. *Democracy Forward Foundation, et al. v. Pompeo, et al.*, Civil No. 19-1773, Minute Order (D.D.C. Dec. 11, 2019). Standing alone this one instance may not constitute a policy and practice but, when considered in light of the many other instances the complaint outlines, this incident is another data point that reinforces the plausibility of Plaintiffs' claim.

Finally, Defendants attempt to counter the complaint's factual assertions concerning the widespread use of encrypted messaging applications with references to State Department recordkeeping policies that authorize the use "in certain circumstances" "of messaging applications that allow archiving content." Ds' Mem. at 19. Among those policies are various extra-pleading materials accompanying Defendants' opposition, including a sworn declaration and several "supplement[al]" recordkeeping directives. *See* Declaration of Eric F. Stein [ECF No. 13-2], Exs. A-C. As a threshold matter, this Court cannot properly consider these materials in ruling on Defendants' Rule 12(b)(6) motion. *See Hurd*, 864 F.3d at 686-87 ("When a moving party introduces 'matters outside the pleadings' in support of a motion to dismiss, Rule 12(d) requires the district court either to ignore that evidence in deciding the motion under Rule 12(b)(6), or to convert the motion into one for summary judgment," the latter of which requires "notice of the court's intention to convert the motion and a reasonable opportunity to discover and present relevant evidence."); *CREW v. Pruitt*, 319 F. Supp. 3d at 261 (refusing to consider agency's extra-pleading submissions in ruling on motion to dismiss in FRA case). Contrary to Defendants' assertions, Ds' Mem. at 5 n.2, Plaintiffs' complaint does not "incorporate" or even

mention these "supplement[al]" directives. Nor does it appear that they were publicly available before Defendants filed their motion, rendering it inappropriate to take judicial notice of them. *Cf. CREW v. Trump*, 924 F.3d 602, 607 (D.C. Cir. 2019) (deeming judicial notice of memo appropriate where, among other things, it was "publicly available on the National Archives' website").

Even if the Court were to consider Defendants' non-public policies, however, their mere existence provides no defense to allegations of widespread non-compliance resulting in the failure to create records of essential State Department decisions and transactions.

For all these reasons, the Court should deny Defendants' motion to dismiss Claim One.

III. Claim Two Plausibly Alleges An *Armstrong*-based APA Claim Challenging Defendants' Lack Of Effective FRA Controls.

Claim Two alleges that Defendants have violated the FRA by failing to establish "effective controls over the agency's records" program in the face of "evidence of widespread non-compliance . . . with recordkeeping requirements, particularly with respect to the use of private phones and email accounts and encrypted messenger apps." Compl. ¶¶ 77-78. In moving to dismiss Claim Two, Defendants mischaracterize both the scope of APA review under *Armstrong I* and the nature of Plaintiffs' claim. Defendants also prematurely seek dismissal before an adequate factual record concerning their recordkeeping guidelines and directives can be developed, contrary to the Circuit's guidance in *Armstrong I*.

A. Scope Of APA Review Under *Armstrong I*.

The FRA mandates that agencies "shall establish and maintain" a records management program that "shall," in turn, "provide for . . . . effective controls over the creation and over the maintenance and use of records in the conduct of current business," as well as "compliance with"

the FRA's substantive requirements. 44 U.S.C. § 3102. The statute further directs that agencies "shall establish safeguards against the removal or loss of records." *Id.* at § 3105.

The D.C. Circuit construed these FRA provisions in *Armstrong I*, where the plaintiffs sued the NSC and other components of the Executive Office of the President ("EOP"), seeking a declaration that electronic documents stored in NSC's computer system were records subject to the FRA, and an injunction prohibiting their destruction. *Armstrong I*, 924 F.2d at 284. Pertinent here, the plaintiffs also alleged that the "NSC's recordkeeping guidelines and directives are inadequate because they fail to provide NSC staff with sufficient guidance about what material constitutes 'records.'" *Id.* at 291.

In *Armstrong I*, the Circuit held "that the district court was authorized to hear plaintiffs' APA claim that the NSC's recordkeeping guidelines and directives do not adequately describe the material that must be retained as 'records' under the FRA." *Id.* at 293. The court rejected the government's arguments that the FRA impliedly precluded judicial review, and that the issue was committed to agency discretion by law. *See Armstrong I*, 924 F.2d at 291-94 (holding that §§ 3102 and 3105 provided "sufficient law to apply to law in evaluating the adequacy of [agencies' recordkeeping] guidelines and directives"). But because the court deemed "the present record . . . inadequate to determine the reasonableness of the [NSC's recordkeeping] guidelines," it "remand[ed] for further proceedings on the merits of the adequacy of the guidelines." *Id.* at 296. The D.C. Circuit then provided detailed instructions for the district court on remand, explaining that it must allow the parties to develop a factual record containing the "total 'guidance' given to [agency] staff regarding their recordkeeping responsibilities," including both formal written policies and any "informal, supplementary guidance." *Id.* at 296-97; *see Armstrong v. EOP*, 1 F.3d 1274, 1280 (D.C. Cir. 1993) ("*Armstrong II*"), 1 F.3d at 1280 (noting

that *Armstrong I* "remanded the case to allow for supplementation of the record as to the precise guidance—written and oral—that the defendant agencies had given employees").

Following the *Armstrong I* remand, "the parties developed an extensive record, including a Joint Statement of Facts." *Armstrong II*, 1 F.3d at 1280. Based on this record, the Circuit in *Armstrong II* ruled that "NSC guidelines for managing electronic documents do not comport with Federal Records Act . . . requirements," because the guidelines called for preserving electronic records by merely printing "on-screen information," which "did not result in 'papering' all federal records material." *Id.* at 1277, 1282. The Circuit further held that NSC's "records management practices were arbitrary and capricious in failing to provide for supervision or auditing of employees' electronic recordkeeping practices by knowledgeable records management personnel," and that the agency "must undertake some periodic review of their employees' electronic recordkeeping practices." *Id.* at 1287-88.

B. Application Of *Armstrong I* Framework Here.

Claim Two fits comfortably within the *Armstrong I* framework. It alleges that Defendants violated §§ 3102 and 3105 of the FRA by failing to establish "effective controls over the agency's records" program in the face of "evidence of widespread non-compliance . . . with recordkeeping requirements, particularly with respect to the use of private phones and email accounts and encrypted messenger apps." Compl. ¶¶ 77-78. As outlined above, this includes evidence of a "shadow diplomacy channel" that was effectuated through personal phones and email addresses and encrypted messenger apps, and that bypassed the State Department's recordkeeping systems. *Id.* ¶¶ 60, 62. Participants in this effort included a mix of individuals from both within and outside the State Department, including Mr. Giuliani, Ambassador Sondland, and Special Envoy Volker. *Id.* ¶ 56. Although they "operated mostly outside of official State Department channels," these individuals performed official State Department

business and did so with the authorization and knowledge of Secretary Pompeo. *Id.* ¶¶ 5, 56, 72; *see id.* ¶ 65 (quoting Mr. Giuliani's statements that he was acting at the State Department's behest).

Defendants' existing recordkeeping policies fail altogether to address this situation—*i.e.*, agency and non-agency officials conducting official State Department business surreptitiously through private and encrypted methods of communication. The agency's policies instead include only a generic instruction to "create and preserve records that properly and adequately document the organization, functions, policies, decisions, procedures, and essential transactions of the Department." Compl. ¶ 78 (quoting 5 FAM 422.3). Despite this lack of relevant recordkeeping guidance, and despite Defendants' knowledge of the ongoing shadow diplomacy campaign, Defendants failed to implement any controls specifically designed to ensure the creation and maintenance of records documenting those foreign policy activities. And Plaintiffs further allege that this lack of controls was no accident; it was by design. Specifically, it was intended "to keep secret the shadow diplomacy being conducted in furtherance of the President's personal and political interests." *Id.* ¶ 71. While the agency passively received at least some of these records after the fact as a result of congressional subpoenas to individual current and former State Department officials, there is hardly any assurance that this is a comprehensive set, particularly since the agency had no system in place for creating, maintaining, and preserving these records *Id.* ¶ 61. Thus, there are plausible grounds for inferring that Defendants' "lack of effective [FRA] controls. . .has resulted in the absence of records explaining or documenting key functions, policies, decisions, procedures, and essential transactions of the State Department." *Id.* ¶ 78.[4]

[4] There is, moreover, every reason to believe that similar FRA violations will persist absent the State Department's implementation of effective controls. As recently as February 2020, Mr. Giuliani told the press that he "is planning on 'ramping up'" his State-Department-backed

This case is analogous to *CREW v. EOP*, 587 F. Supp. 2d 48 (D.D.C. 2008), where the court held that CREW adequately pleaded an APA claim challenging EOP's recordkeeping guidelines and directives on the ground that the defendants lacked effective controls to ensure preservation of certain emails. Like Defendants here, the defendants there were allegedly "aware that . . . no adequate system [was] in place to ensure the preservation of" the records, yet "refus[ed] to take corrective action." *Id.* at 54. The court held that *Armstrong I* authorized CREW's claim. *Id.* at 56-58. This Court should reach the same conclusion.

Armstrong I further demonstrates that dismissal of Claim Two would be premature. As noted, *Armstrong I* requires the district court to develop an "adequate" factual record before "determin[ing] whether the [agency's] guidelines are arbitrary or capricious"—specifically, the record must contain "the total 'guidance' given to [agency] staff regarding their recordkeeping responsibilities," including any "informal, supplementary guidance." *Armstrong I*, 924 F.2d at 297; *see also Armstrong II*, 1 F.3d at 1280. In other words, judicial review must be based on more than just the recordkeeping policies Defendants opt to selectively disclose in litigation; it must also include any internal "informal, supplementary" guidance provided to agency personnel, including how "[Defendants] respond to questions about whether particular documents or types of documents constitute records that must be maintained." *Armstrong I*, 924 F.2d at 297. Other relevant considerations include "any additional guidance provided in staff meetings in which recordkeeping responsibilities were discussed" and whether [Defendants] consistently advise[d] their staff that particular types of documents . . . are or are not records." *Id.* Because Plaintiffs have pleaded a plausible FRA violation under *Armstrong I*, the next step must

"investigations into Joe and Hunter Biden." Asawin Suebsaeng & Erin Banco, Giuliani & Co. Plot New Biden Probes as Trump's Ukraine Team Lies in Ruin, *Daily Beast*, Feb. 6, 2020, https://bit.ly/3bhJd5q.

be to allow the parties to develop the necessary factual record to evaluate the adequacy of Defendants' "total" recordkeeping guidance. *See CREW v. EOP*, 587 F. Supp. 2d at 58 (deeming dismissal "premature" after finding that APA authorized FRA claim).[5]

Defendants' arguments to the contrary are unavailing. They first assert that Claim Two raises an improper "compliance-based" challenge that *Armstrong I* forbids. Ds' Mem. at 21. As discussed *supra*, that is incorrect. Claim Two does not seek judicial review of discrete recordkeeping failures. It instead challenges Defendants' failure to adopt effective FRA policies and controls regarding the obligation to create and maintain records documenting official agency business conducted through private and encrypted methods of communication, including by non-agency officials. Again, *Armstrong I* squarely authorizes such claims. As this Circuit explained, "allowing judicial review of [agency] guidelines will [not] 'unduly interfere with agency functioning'" because "even if a court may review the adequacy of an agency's guidelines, agency personnel will implement the guidelines on a daily basis." *Armstrong I*, 924 F.2d at 293.

Equally unpersuasive is Defendants' assertion that Claim Two fails because it "relies solely on alleged 'systematic noncompliance' by Department employees to support the notion that the Department's controls over adequate documentation are ineffective," rather than identifying a facial "flaw" in the agency's recordkeeping policies. Ds' Mem. at 21-22. Defendants miss the point. The "flaw" in Defendants' recordkeeping policies is the utter *lack* of

[5] As discussed *supra*, Defendants have submitted various extra-pleading materials with their opposition. Although Defendants do not explicitly rely on these extra-pleading materials in moving to dismiss Claim Two, *see* Ds' Mem. at 21-23, Plaintiffs, out of an abundance of caution, urge the Court to disregard the materials in ruling on Defendants' Rule 12(b)(6) motion. *See Hurd*, 864 F.3d at 686. Moreover, even if the Court were to consider these supplemental directives, they would not undermine the viability of Claim Two, as they too lack effective controls regarding the obligation to create and maintain records documenting official agency business conducted through private and encrypted methods of communication, including by non-agency officials.

meaningful controls with respect to a particular type of records that Defendants knew were not being created or maintained in official State Department systems. This is not a situation in which the agency had adopted detailed recordkeeping controls directly addressing the situation at hand that agency personnel simply disregarded. Rather, Defendants issued only generic recordkeeping guidance, became aware of widespread recordkeeping failures in connection with the shadow diplomacy campaign that existing recordkeeping guidance did *not* sufficiently address, and, despite that awareness, implemented no controls or guidelines to address this known problem. The *Armstrong I* framework permits review in these circumstances.

To be sure, the shortcomings of Defendants' recordkeeping policies manifested in connection with the shadow diplomacy campaign and its related policy and practice of recordkeeping failures. But, contrary to Defendants' assertions, nothing in the FRA or the case law prevents Plaintiffs from pointing to these discrete recordkeeping failures as *proof* of the overall inadequacy of Defendants' recordkeeping guidelines and directives. Such failures are, instead, persuasive evidence that Defendants' recordkeeping policies are lacking. Neither law nor logic supports Defendants' position.

Defendants also fail to appreciate the continuing nature of their FRA obligations. It is not enough for agencies to simply establish facially valid, generic recordkeeping policies and hope for the best. Rather, agencies "shall establish *and maintain*" a program that "shall," in turn, "provide for . . . . effective controls over the creation and over the maintenance and use of records in the conduct of current business." 44 U.S.C. § 3102 (emphasis added). The continuing obligation to "maintain" a records management system "with effective controls" includes a duty to correct known and recurring recordkeeping failures, through appropriate "controls," as they arise. An agency plainly violates this obligation where, as alleged here, it adopts a policy and

practice of refusing to create certain records or, at a minimum, willfully disregards such recordkeeping failures without taking any corrective measures.

Judicial Watch, Inc. v. FBI, No. 18-cv-2316 RC, 2019 U.S. Dist. LEXIS 149967 (D.D.C. Sept. 4, 2019), did not conclude otherwise. There, the court held that the APA authorized a claim challenging the FBI's recordkeeping policy on the ground that it failed to "provide effective controls over the maintenance of electronic messages, excluding emails." *Id.* at *15 (D.D.C. Sept. 4, 2019). Like Claim Two here, the plaintiff's claim there did "not challenge the systemic noncompliance of FBI employees"; rather, "[i]t solely challenge[d] Defendant's failure to provide effective controls over the maintenance of" certain records. *Id.* While the court found that the APA authorized such a claim, it went on to hold that the complaint failed to plausibly allege "particular deficiencies" with the FBI's policy. *Id.* at *26. But it granted leave to amend based on statements in the plaintiff's opposition brief that did suggest actionable deficiencies, including the policy's "failure to distinguish between transitory and nontransitory records or even nonrecords for non-email electronic communications." *Id.* (internal quotations omitted).

Here, Claim Two does identify "particular deficiencies" with Defendants' recordkeeping policies—namely, those policies lack any guidance regarding the obligation to create and maintain records documenting official agency business conducted through private and encrypted methods of communication, including by non-agency officials. Because, as noted, this problem was known at the highest levels of the agency, the failure to implement corrective guidance constitutes an actionable failure to "maintain . . . effective controls over the creation and maintenance" of records within the meaning of 44 U.S.C. § 3102. Nothing in *Judicial Watch* suggests otherwise.

Finally, Defendants insist that Claim Two is implausible because their recordkeeping guidelines are, in fact, adequate. Ds' Mem.at 23. But, again, any ruling on the adequacy of Defendants' guidelines would be premature, because the parties have not yet had the opportunity to compile a factual record containing "the total 'guidance' given to [agency] staff regarding their recordkeeping responsibilities," including any "informal, supplementary guidance." *Armstrong I*, 924 F.2d at 297. At any rate, none of the recordkeeping provisions Defendants cite concern the *particular* FRA obligation at issue here—*i.e.*, the obligation to create and maintain records documenting official agency business conducted through private and encrypted methods of communication, including by non-agency officials. *See* Ds' Mem. at 23 (citing 5 FAM 414.4(b) & 415.4(b) (outlining general responsibilities of "bureau records coordinators" and "post records coordinators"); 5 FAM 422.1 (generically describing the objectives of imposing "controls" on records creation and incorporating by reference the entire Records Management Handbook, 5 FAH-4)). In addition, the guidelines Defendants have submitted with their Motion to Dismiss indicate, on their face, that additional guidance exists that has not been produced. *See, e.g.*, Stein Decl., Ex. B ("For specific question on this topic, please contact Ask-OCS-L@state.gov.").

For all these reasons, the Court should deny Defendants' Motion to Dismiss as to Claim Two.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss.

Respectfully submitted,

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Dated: February 18, 2020