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' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

Regulations

INTRODUCTION

In the guise of claims brought under the Administrative Procedure Act ("APA"), alleging supposed violations of the Federal Records Act ("FRA"), Plaintiffs in this case seek to pursue inquiries into an alleged scheme of "shadow diplomacy" that, by Plaintiffs' own description, has little, if anything, to do with recordkeeping failures. But Congress did not enact the FRA as a mechanism to combat "shadow diplomacy," or other alleged substantive government wrongdoing, and the claims that Plaintiffs assert are incompatible with the longstanding limitations on judicial review of alleged FRA violations, as recognized by the D.C. Circuit in *Armstrong v. Bush* ("*Armstrong I*"), 924 F.2d 282 (D.C. Cir. 1991). Despite Plaintiffs' protests to the contrary, both of the claims they have asserted here—one alleging a so-called "pattern and practice" of failing to create and maintain adequate documentation of Department activities ("Claim One"), and the other alleging a failure to establish "effective controls" over the creation and preservation of records ("Claim Two")—impermissibly focus on allegations that a small number of Department officials failed to follow FRA requirements when pursuing their allegedly nefarious goals. Neither of these claims succeeds in identifying deficiencies in an existing recordkeeping guideline or directive. Indeed, the Department's recordkeeping guidance comports with the FRA when it comes to the one requirement that Plaintiffs attempt to latch onto, concerning the use of electronic messaging for official purposes. Plaintiffs' claims therefore are barred under *Armstrong I* and fail to satisfy the APA's final agency action requirement. Accordingly, they should be dismissed.

ARGUMENT

I. CLAIM ONE SHOULD BE DISMISSED

A. Claim One Is an Impermissible Compliance-Based Claim

As explained in Defendants' opening brief, Plaintiffs' Claim One sets forth an impermissible compliance-based claim, precluded by *Armstrong I*. Def. Mem. in Support of Mot. to Dismiss ("Def. Mem.) [ECF 13-1] at 10-14. Claim One asserts that the Secretary and a handful of other Department employees have engaged in a "pattern and practice" of failing to create adequate records, contrary to official Department policy. Compl. ¶ 71. But the D.C. Circuit in *Armstrong I* carefully limited the scope of judicial review in the FRA context to allow just two narrow claims. First, the court allowed a challenge to "the adequacy of [an agency's] recordkeeping guidelines and directives." *Armstrong I*, 924 F.2d at 294. And second, if records turn out to be at risk despite existing guidelines and directives, the court allowed a challenge to an agency's failure to implement the administrative enforcement mechanisms that the FRA put in place. *Id*. at 296.

Beyond these limited claims, however, when it comes to agency personnel's day-to-day compliance with an agency's policies, the court backed away from judicial involvement. Eschewing the notion that courts should scrutinize agency employees' recordkeeping conduct, the D.C. Circuit expressly distinguished between written guidelines—akin to an agency's internal regulations—and the practices of agency personnel, making clear that only challenges to the former are permissible. *Compare id.* ("Courts review the adequacy and conformity of agency regulations and guidelines with statutory directives every day."), *with id*. (rejecting claim that "some NSC officials and staff are not complying with the guidelines"); *cf. Competitive Enter. Inst. v. U.S. Envt'l. Prot. Agency* ("*CEI*"), 67 F. Supp. 3d 23, 32 (D.D.C. 2014) ("*Armstrong I*

distinguished between reviewable challenges to an agency's record-keeping guidelines under the APA, and unreviewable challenges to the agency's day-to-day implementation of its guidelines"); *CREW v. DHS*, 387 F. Supp. 3d 33, 51 (D.D.C. 2019) (holding that alleged "deficiencies in compliance" were not reviewable). Because Claim One would require the Court to engage in the very type of scrutiny that *Armstrong I* rejected, it is precluded.

Plaintiffs seek to circumvent *Armstrong I* with the apparent aim of having the Court snuff out an alleged plot (one that, even in Plaintiffs' telling, has nothing to do with recordkeeping) carried out by a small number of Department officials. Their effort is made starkly manifest in their opposition brief, where they attempt to recast certain foreign policy efforts by those individuals as motivation driving a supposed unwritten agency recordkeeping "policy," and emphasize the purported role of the Secretary in the alleged "shadow diplomacy" that forms the backdrop of their challenge, *see* Pl. Opp. [ECF 17] at 1, 7, 10. Essentially, they argue that the Secretary and certain other Department officials most likely would have intentionally ignored "adequate documentation" requirements when engaging in their alleged shadowy activities, and that this alleged improper conduct, continuing over a period of time, amounts to a Department "policy." *E.g.*, *id.* at 15 ("Plaintiffs are challenging an agency policy—implemented by the agency head himself—of refusing to create records at all[.]"). But a practice that is followed only by certain Department employees, and only when they are engaged in allegedly nefarious activity that, by Plaintiffs' own telling, takes place outside regular channels, Compl. ¶ 5, cannot possibly be deemed a Department policy. Plaintiffs clearly do not challenge a Department recordkeeping guideline or directive, and their claim therefore is impermissible under *Armstrong*.

Plaintiffs' attempt to bolster their flawed theory by reference to other cases is of no avail. Plaintiffs mischaracterize the holdings of those cases and misunderstand the limitations posed by

APA review. First, Plaintiffs are flat-out wrong in suggesting that the court in *CEI* "recognized the viability under the APA of an alleged policy and practice claim of FRA violations." Pl. Opp. at 13. To the contrary, when the court in *CEI* considered "whether or not APA review is limited to an agency's official record-keeping policies, or whether review extends to unstated policies that guide an agency's actual decisions," it squarely rejected the viability of the latter claim as inconsistent with *Armstrong I*. *See CEI*, 67 F. Supp. 3d at 32-33. Distinguishing the Title VII and 42 U.S.C. § 1983 contexts, where unwritten practices can form the basis of a claim, the court in *CEI* concluded that the plaintiffs' assertion of a "pattern, practice, and ongoing policy" of destroying certain records was, by its nature, a veiled attack on discrete "substantive decisions to destroy or retain records"—in other words, a compliance-based claim precluded by the APA and *Armstrong I*. *See CEI*, 67 F. Supp. 3d at 33.

Plaintiffs also heavily rely on the Court's decision in *CREW v. Pruitt*, 319 F. Supp. 3d 252 (D.D.C. 2018), but their claim does not fit within *Pruitt*'s legal framework, nor are the factual circumstances here remotely similar to those deemed sufficient to state a claim in that case. Plaintiffs cite *Pruitt*'s observation that, unlike the administrative enforcement mechanism set forth in 4 U.S.C. § 3106 with respect to records removal or destruction, the FRA lacks an explicit administrative enforcement mechanism with respect to the records-creation requirement in 44 U.S.C. § 3101. Pl. Opp. at 12 (citing *Pruitt*, 319 F. Supp. 3d at 259). They suggest that *Pruitt* thus opened the door to records creation challenges as a third category of permissible FRA-related claims, beyond the two recognized in *Armstrong*. *See id.*

As an initial matter, any attempt to single out agencies' records creation for more stringent judicial review should be rejected altogether. Congress's choice to focus the FRA's administrative enforcement mechanism on records disposal rather than records creation surely was not intended

to invite a higher level of judicial scrutiny of agencies' records creation. Rather, Congress recognized that an agency's discretion is at its apex when it comes to determinations of what level of documentation is "adequate" in any given circumstance. *See* 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). After all, such determinations necessarily depend on how any particular event fits within an agency's broader decisionmaking process or mission, and likely implicate information that only those within the agency would know. Significantly, 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 v. Exec. Office of the President* ("*Armstrong II*"), 1 F.3d 1274, 1287 (D.C. Cir. 1993) (quoting *Armstrong I*, 924 F.2d at 288) (second emphasis added), suggesting that it too recognized that a demand that new records be created would be a significantly greater intrusion into agency discretion.

Moreover, *Pruitt* itself is not to the contrary. Crucially, rather than allowing a broad challenge to the EPA's records-creation practices, this Court in *Pruitt* properly recognized that *any* claim alleging an FRA violation—including one focused on records creation—must be brought under the APA, which "only permits challenges to 'final agency action.'" *Pruitt*, 319 F. Supp. 3d at 260 (citing 5 U.S.C. § 704). Thus, such a challenge cannot be used to demand "judicial review of isolated acts allegedly in violation of § 3101," nor to invite "'pervasive oversight by federal courts over the manner . . . of agency compliance'" with the statute. *Id.* (quoting *Norton v. SUWA*, 542 U.S. at 67). The Court in *Pruitt* allowed the plaintiffs' FRA records creation claim to proceed

on the theory that the agency head had established an unwritten policy of "refus[ing]" to create records, contrary to § 3101. *Pruitt*, 319 F. Supp. 3d at 260. The plaintiffs there had alleged an agency-wide policy, emanating from and directed by the agency head at the time, "not to create a written record about major substantive matters," and instead to operate within a "culture of secrecy." *Id.* at 255. That unwritten policy was thus the "final agency action" for purposes of the plaintiffs' APA claim.

However, after the agency head left the agency, and the agency issued a new written policy that superseded all prior records policies, including any unwritten policy, the Court determined that any valid APA policy-based claim asserted by the plaintiffs was moot, and that the plaintiffs otherwise raised only impermissible compliance-based claims. *CREW v. Wheeler*, 352 F. Supp. 3d 1, 5 (D.D.C. 2019). Following *Pruitt*, in *CREW v. DHS*, the court similarly rejected the plaintiffs' attempt to raise a records creation claim because the plaintiffs did not "challenge a DHS policy, official or unofficial, setting agency-wide compliance with the FRA; instead, they challenge DHS's deficient compliance with § 3101 with regards to some of the records the agency creates." *CREW v. DHS*, 387 F. Supp. 3d at 53.

In the end, therefore, *Pruitt* did not meaningfully expand the scope of a permissible "guidelines" challenge under *Armstrong*. In particular, it did not recognize the viability of "a challenge to the wholesale failure to create certain categories of records," as Plaintiffs allege, in the absence of an agency policy directing that such records not be created. *See* Pl. Opp. at 13 (mischaracterizing *DHS* court's discussion of *Pruitt*). Rather, the Court in *Pruitt* simply recognized that, in the unique situation that the plaintiffs had originally alleged, involving one agency head's idiosyncratic practices and directives, the agency head might have established a recordkeeping guideline in the form of an unwritten *de facto* policy. *See DHS*, 387 F. Supp. 3d at 53 (indicating

that *Pruitt* would at most support a challenge to an agency "*policy*, official or unofficial, setting agency-wide compliance with the FRA" (emphasis added)).

Plaintiffs suggest that their claim resembles that in *Pruitt* because it "directly involv[es] the Secretary of State." Pl. Opp. at 14. But the complaint in *Pruitt* had included detailed assertions of the agency head's direct orchestration of allegedly sweeping measures designed to foster secrecy and establish a regime in which records would not be created, including his "verbal[] instruct[ions]" to agency staff "not to create a written record about major substantive matters," his alleged use of third party telephones, his refusal to use e-mail because it would create a record of his statements, and his commission of a soundproof "privacy booth" so that no one in his own agency could hear his activities. *See Pruitt*, 319 F. Supp. 3d at 260.

In stark contrast to the allegations in *Pruitt*, Plaintiffs here fail to assert any overarching Department recordkeeping policy adopted by the Secretary. Indeed, aside from a single vague and conclusory assertion, Compl. ¶ 72, Plaintiffs fail to identify *any* action by the Secretary in regard to records. Rather, after setting forth nearly twelve pages of assertions regarding the President, his personal attorney Rudy Giuliani, White House officials, and three Department employees (Ambassadors Volker, Taylor, and Sondland), with no mention of the Secretary at all, *id.* ¶¶ 36-63, the Complaint then proceeds to assert that the Secretary played a role in removing the former Ambassador to Ukraine, and that he, among others, listened to a July 25, 2019 telephone call between the President and President Zelenskyy, *id.* ¶¶ 64-65. In neither instance do Plaintiffs assert that the Secretary did anything whatsoever in connection with Department records or recordkeeping, placing their Complaint in direct contrast to that in *Pruitt*. Simply put, Plaintiffs' suggestion that the Secretary "participat[ed] . . . in an irregular or shadow diplomatic channel," Pl.

Opp. at 14, is in no way equivalent to or evidence of establishing an agency-wide recordkeeping policy. *Cf. DHS*, 387 F. Supp. 3d at 53

Plaintiffs' allegations regarding other Department officials also fail to set forth a challenge to a recordkeeping policy. Try as they might, Plaintiffs cannot transform what they characterize as "efforts" by a small number of Department officials "to keep secret an irregular channel of shadow diplomacy," Pl. Opp. at 10, into a Department policy not to create records. Indeed, despite Plaintiffs' conclusory assertion that "Secretary Pompeo and other top State Department officials . . . have directed other State Department employees not to create and preserve records," Compl. ¶ 72, Plaintiffs identify no concrete instance of such a "direct[ion]." Rather, they cite Ambassador Taylor's testimony before the House that, on one occasion, "Ambassador Sondland said that he wanted to make sure no one was transcribing or monitoring [a telephone call] as they added President Zelenskyy to the call." Compl. ¶ 52. That single alleged off-the-cuff remark hardly qualifies as a statement of agency policy and simply cannot bear the weight that Plaintiffs seek to place upon it, particularly because Ambassador Taylor testified that he did memorialize the substance of the call at issue. Taylor statement, at 6 ("I wrote a memo for the record dated June 30 that summarized our conversation with President Zelenskyy."). Plaintiffs therefore fail to state a plausible challenge to a Department recordkeeping policy, even an unwritten one. *See Wheeler*, 352 F. Supp. 3d at 4-5 (recognizing that the plaintiffs' "conclusory statements" regarding the involvement of others at the agency in perpetuating the alleged informal policy they sought to challenge were insufficient to sustain their claim after the agency head's departure).

The distance between Plaintiffs' claim here and a permissible challenge to an agency's recordkeeping guideline or policy is also demonstrated by their requested remedy. As this Court recognized in *Wheeler*, and as was also recognized in *DHS*, the goal of an FRA claim properly

alleging an inadequate recordkeeping guideline, rather than isolated acts of noncompliance, is to set aside the inadequate guideline so that the agency might issue a new, FRA-compliant policy—an action that, by the time of the Court's decision in *Wheeler*, the defendant agency had already taken, thus rendering the plaintiffs' claim moot. *Wheeler*, 352 F. Supp. 3d at 6. The Court rejected the plaintiffs' position that a compliant policy was "not enough," as well as their request to "compel" the agency to "'make and preserve' a broad swath of records," or monitor the future conduct of agency personnel, as evidencing a focus on ongoing compliance, inconsistent with the APA. *See id.* at 5-6. In *DHS*, the records creation failures that the plaintiffs alleged similarly would have required the court to engage in ongoing oversight, "decid[ing] just how much detail is necessary for every form prepared by DHS," that "[t]he APA does not contemplate." *DHS*, 387 F. Supp. 3d at 51. Here, Plaintiffs seek the very relief that was deemed inappropriate in both *Wheeler* and *DHS*, Compl. ¶ 75 (seeking "an order compelling [the Department] to make and preserve as federal records all records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the State Department"), thus exposing their claim as a challenge to isolated acts of alleged noncompliance with FRA requirements, incompatible with the APA.

B. Plaintiffs Identify No Specific Deficiency That Could Be Evaluated By Reference To an Identified Standard

As explained in Defendants' opening brief, the Court should also reject Claim One because the FRA fails to set forth judicially manageable standards when it comes to the adequacy of an agency's records creation policy—particularly in the nebulous context suggested by Plaintiffs' claim, which is not tied to any specific need for documentation. *See* Def. Mem. at 16.[1] In response,

[1] Essentially, Plaintiffs assert that the Secretary and other Department officials should not fail to create records simply because they are, allegedly, engaging in nefarious shadow diplomacy.

Plaintiffs assert that such standards exist, citing 36 C.F.R. § 1222.22. Pl. Opp. at 17. However, as Defendants have explained, the Department already requires that Department employees create adequate records in accord with § 1222.22. 5 Foreign Affairs Manual ("FAM") 422.1, 422.2, *available at* https://fam.state.gov. Moreover, even as Plaintiffs cite § 1222.22 as providing the required "meaningful standards," they fail to identify any subsection of § 1222.22 as providing the standard particularly at issue here, nor do they explain how that standard might be applied, or how they would expect a court to evaluate their vague assertion that the Department's records creation policy is inadequate. Pl. Opp. at 16 (citing *Pruitt*, 319 F. Supp. 3d at 260, which did not reach a stage where the Court had to identify an applicable standard to evaluate the plaintiffs' claim). In the absence of any specific alleged deficiency, Plaintiffs' claim would require the Court, rather than applying a specific, meaningful standard from the FRA to the Department's recordkeeping guidelines, to review the recordkeeping practices of various Department personnel in a multitude of different contexts in order to determine whether "adequate" documentation is actually occurring. Such an endeavor exceeds the permissible scope of APA review and goes beyond anything contemplated by *Armstrong I*. *See* Def. Mem. at 15-16.

Rather than identifying a meaningful standard to apply, Plaintiffs simply revert to describing an impermissible compliance-based claim. They assert that, notwithstanding the Department's official policy requiring adherence to § 1222.22, the Secretary has "implemented" a different agency policy "of refusing to create records at all," when it comes to those Department

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Plaintiffs would presumably have these officials create the same records that would be created in the course of regular, non-shadow diplomacy, in accord with the Department's existing recordkeeping policies. The gravamen of Plaintiffs' claim is simply that Department officials who are already failing to act appropriately in other ways might also be failing to comply with associated recordkeeping requirements. In other words, theirs is a challenge to imagined specific acts of noncompliance, not to an agency-wide recordkeeping policy.

officials engaged in the supposed "shadow diplomacy" that Plaintiffs describe—without any non-conclusory allegation that the Secretary did anything whatsoever in connection with Department records or recordkeeping. Pl. Opp. at 15. Again, to the extent any claim is discernible, it boils down to the assertion that those Department officials have failed to comply either with § 1222.22 or with the Department's official policy—a claim impermissible under *Armstrong*.

C. Plaintiffs' Factual Assertions Fail To Support a Claim of Inadequacy in Any Department Recordkeeping Policy

As discussed in Defendants' opening brief and above, Plaintiffs' factual assertions, focused on alleged "shadow diplomacy" and House impeachment testimony, have very little to do with the FRA's recordkeeping requirements, much less with a supposedly inadequate recordkeeping policy. Def. Mem. at 17-21. Indeed, Plaintiffs concede that, rather than detailing an allegedly defective recordkeeping guideline, or even an unwritten recordkeeping policy, their assertions are intended to "provide[] context and motivation" that, they assert, "bolsters the plausibility" of their allegations. Pl. Opp. at 21 (acknowledging that "the Whistleblower Complaint"—which forms the primary backdrop for Plaintiffs' claims—"does not evidence the challenged policy and practice"). However, Plaintiffs' descriptions of certain officials "carr[ying] out a policy of shadow diplomacy" instead simply make clear, once again, that at most their claims have to do with alleged diplomatic practices (not a policy) of a small number of Department officials that are not directly related to recordkeeping at all. *See id.*

Plaintiffs urge the Court to apply the "policy-or-practice" framework that courts have applied in Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, cases when evaluating their factual assertions. Pl. Opp. at 19. However, that framework specifically relates to the private right of action established in the FOIA statute. *See Am. Ctr. for Law & Justice v. U.S. Dep't of State*, 249 F. Supp. 3d 275, 280–81 (D.D.C. 2017) (explaining that FOIA's right of action "vests courts

with broad equitable authority" that includes the power to enjoin an agency "policy or practice" that "will impair the [plaintiff's] lawful access" to information through future FOIA requests (internal quotation omitted)). Here, in contrast, Plaintiffs bring suit under the APA, and their claim is thus constrained by the APA's "final agency action" limitation. Plaintiffs identify no instance where a court has imported FOIA's policy-or-practice rubric into the APA context, or deemed an ongoing "informal practice" the equivalent of a final agency action.

Indeed, the only APA case they cite in support of their FOIA analogy, *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168 (S.D. Cal. 2019), rejected the notion that mere "disparate agency practices or conduct" could be challenged under the APA. *Id.* at 1207. The court recognized that, in order for an agency action to be "final" for purposes of an APA claim, the action must "amount to a definitive statement of the agency's position" or have "a direct and immediate effect on the day-to-day operations of the subject party." *See id.* at 1206 (internal quotation omitted). Before the court was able to conclude that the plaintiffs in that case had satisfied that requirement, and identified a final agency action, it reviewed detailed factual allegations that, the court concluded, suggested that the agency had established an unwritten policy of reducing the flow of asylum seekers across the U.S.-Mexico border by turning asylum seekers back to Mexico. *See id.*

The court's decision in *Al Otro*, although it did not address an FRA claim governed by *Armstrong*, is thus in line with the Court's decision in *Pruitt*, discussed above. But neither case supports the existence of a "policy" here, for the reasons already described—to wit, the level of factual support that Plaintiffs have set forth in their Complaint is nowhere near the level relied upon in those decisions. Plaintiffs' "shadow diplomacy" theory does not suggest an agency-wide Department policy of any kind, much less one related to recordkeeping. Instead, by its very nature as supposedly nefarious conduct carried out by a small number of Department officials in pursuit

of a specific goal, Plaintiffs' theory merely suggests, if anything, acts of noncompliance by those officials.

Aside from the "shadow diplomacy" theory that is the focus of their Complaint, Plaintiffs reference two other apparently unrelated factual assertions, neither of which suggests the existence of a Department policy of failing to create records of Department activities. First, Plaintiffs point to the President's alleged "seizure . . . of a State Department interpreter's notes." Pl. Opp. at 22. Plaintiffs fail to explain, however, how such an action by the President has anything to do with the Department's recordkeeping guidance.[2]

Second, Plaintiffs introduce new factual assertions in their opposition brief, regarding an alleged meeting between Secretary Pompeo and Russian Foreign Minister Sergey Lavrov. Pl. Opp. at 18. Because these allegations are not included in Plaintiffs' Complaint, they may not be considered. *Kingman Park Civic Ass'n v. Gray*, 27 F. Supp. 3d 142, 168 (D.D.C. 2014) ("[P]laintiff failed to include these allegations in [its] complaint, and plaintiff may not amend [its] complaint by the briefs in opposition to a motion to dismiss." (internal quotation omitted)). Nevertheless, as with the assertions in their Complaint, Plaintiffs' contentions that the Department "made no announcement of the meeting" and did not mention it in a briefing fail to support their alleged challenge to a Department recordkeeping policy—not least because the FRA does not require agencies to provide contemporaneous reports of their activities in public announcements or briefings. Such questions are entirely separate from how an agency documents its activities internally, which is the FRA's focus. Nothing in Plaintiffs' new assertions bolsters their allegation

[2] The Department has recently filed a motion for summary judgment in the case referenced by Plaintiffs specifically focusing on this alleged incident, explaining that the so-called "notes" of Department interpreters are not Department "records" within the meaning of the FRA. *See* Def. S.J. Mot. [ECF 16], *Democracy Forward Found. v. Pompeo*, Civ. No. 19-1773 (D.D.C. filed Mar. 13, 2020). The President's alleged action thus does not implicate the FRA at all.

of an unwritten Department policy that is directly contrary to the Department's actual written policy. *See CEI*, 67 F. Supp. 3d at 33 (rejecting plaintiff's attempt to "cast[] its claim as a challenge to an illusory record-keeping policy").

Significantly, the single aspect of Plaintiffs' claim that appears at all related to the FRA—the alleged use by certain officials of "private phones and an encrypted messenger app to conduct official business," Pl. Opp. at 21 (citing Compl. ¶ 5, 60-61)—is squarely addressed in the Department's official policy, which properly covers records in any format, including electronic. *See* 5 FAM 415.1, 441. As Defendants have explained, the Department also has in place policies addressing the use of e-mail and other electronic messaging. Def. Mem. at 5-7, 19-20. Consistent with the FRA, these policies require that work-related electronic messages sent through non-Government accounts must be copied or forwarded to official Government accounts within twenty days. See 5 FAM 443.4(b), (d); July 2019 All Diplomatic and Consular Posts Collective cable ("ALDAC"), at 2 [ECF 13-5]; May 2018 ALDAC, at 1 [ECF 13-4]; February 2018 ALDAC, at 2 [ECF 13-3].[3]

Tellingly, Plaintiffs fail to identify any deficiencies in these policies. Instead, they assert that the Court should ignore the Department's ALDACs that are attached to Defendants' opening brief because they are not yet publicly available on the Department's website. However, Plaintiffs do not challenge the authenticity of the ALDACs. Moreover, although the Complaint does not mention the ALDACs, "a document need not be mentioned by name to be considered 'referred to' or 'incorporated by reference' into the complaint." *Strumsky v. Washington Post Co.*, 842 F. Supp. 2d 215, 217-18 (D.D.C. 2012) (citations omitted); *see also Long v. Safeway, Inc.*, 842 F. Supp. 2d

[3] The February 2018, May 2018, and July 2019 ALDACs are attached as Exhibits A, B, and C, respectively, to the Declaration of Eric F. Stein, attached to Defendants' opening brief. *See* Def. Mem. at 4-8 & nn.2 & 4.

141, 144-45 (D.D.C. 2012), *aff'd*, 483 Fed. App'x. 576 (D.C. Cir. 2012). Plaintiffs' Complaint clearly recognizes the FAM as containing the Department's official records policy and incorporates it by reference. Compl. ¶¶ 26-28. The Complaint thus also necessarily incorporates by reference any updates or revisions that are themselves effectively incorporated into the FAM. The May 2018 ALDAC, which clarifies and elaborates on the February 2018 ALDAC, is expressly referenced and thus essentially incorporated into the FAM. *See* 5 FAM 440 (stating that the May 2018 ALDAC supersedes any inconsistent provisions in the FAM, and that the FAM will be revised to include the ALDAC's provisions). The July 2019 ALDAC in turn updates those earlier issuances and thus similarly is effectively incorporated in the FAM. *See* July 2019 ALDAC, at 1. The Court therefore can evaluate these materials on a motion to dismiss without converting it to one for summary judgment. *Demissie v. Starbucks Corp. Office & Headquarters*, 19 F. Supp. 3d 321, 324 (D.D.C. 2014) ("In ruling on a motion to dismiss, the Court may consider not only the facts alleged in the complaint, but also documents attached to or incorporated by reference in the complaint and documents attached to a motion to dismiss for which no party contests authenticity."). In the face of such FRA-compliant written guidance, Plaintiffs' attempt to suggest that some Department officials have "motivation" to violate the FRA, Pl. Opp. at 21, does not support a claim of an inadequate recordkeeping policy. If anything, Plaintiffs' theory suggests that those employees might commit unreviewable "isolated acts of noncompliance," *Pruitt*, 319 F. Supp. 3d at 260. Claim One therefore should be dismissed.

II. CLAIM TWO SHOULD ALSO BE DISMISSED

As explained in Defendants' opening brief, Plaintiffs' Claim Two should also be dismissed because their assertion that the Department has failed to establish "effective controls" to ensure employees' compliance with the FRA does not identify any particular defect in a Department

recordkeeping guideline but instead, like Claim One, is simply a disguised allegation that employees are not complying with the FRA—precisely the kind of compliance-based challenge that is precluded under *Armstrong*. Def. Mem. at 21-22. Plaintiffs' opposition brief merely reinforces the impermissible nature of their claim. In contrast to the challenge to recordkeeping guidelines that was allowed in *Armstrong*—focused on whether agency guidelines appropriately included electronic records, *Armstrong I*, 924 F.2d at 291, 293—Plaintiffs focus on an alleged lack of compliance with the FRA by a small group of Department officials. Pl. Opp. at 25.

Plaintiffs' attempt to cast Claim Two as a challenge to a recordkeeping guideline, rather than alleged non-compliance, borders on the absurd. Under Plaintiffs' theory, even though Department guidelines indisputably require adequate documentation of Department activities, *see id*. at 26 (citing 5 FAM 422.3), they are defective because they fail to *specifically* ensure that those recordkeeping requirements would be followed even by Department employees who are allegedly engaging in nefarious "shadow diplomacy" activities. *Id.* (faulting recordkeeping "controls" because they did not "ensure the creation and maintenance of records documenting" the "ongoing shadow diplomacy campaign" that Plaintiffs allege). Plaintiffs go so far as to assert that this supposed omission in the Department's official written guidance was "no accident," but instead was intentionally designed to hide certain Department officials' conduct—in effect, to help the alleged "shadow" diplomacy that those officials allegedly undertook be more shadowy. *See id.* These suggestions make no more sense than a claim purporting to challenge a company's accounting guideline as inadequate—or intentionally designed to hide embezzlement—because a company employee allegedly embezzled funds. Nothing in the FRA suggests that agency recordkeeping guidelines could be deemed to have ineffective "controls" simply because certain employees might intentionally choose not to abide by those guidelines while engaging in other

inappropriate conduct. But that is the entirety of Plaintiffs' allegation here. Plaintiffs' claim necessarily fails because they plainly do not challenge a recordkeeping guideline. Instead, they merely wish to complain about the alleged conduct of certain Department officials, for reasons that appear to have little, if anything, genuinely to do with recordkeeping. At the very least, their challenge is an impermissible compliance-based claim.

Plaintiffs' attempt to analogize this claim to those considered in *CREW v. EOP*, 587 F. Supp. 2d 48 (D.D.C. 20008), is misguided. The claims permitted by the court in that case were those expressly authorized by *Armstrong I*—in particular, a challenge alleging agency failures to take action pursuant to 44 U.S.C. § 3106, and a challenge to "existing recordkeeping guidelines"—not the compliance-based claim that Plaintiffs raise here. *See EOP*, 587 F. Supp. 2d at 56-57. Moreover, the "controls" at issue in that case were automated electronic controls that would ensure preservation of White House e-mail. *See id.* at 53-54. Nothing in *EOP* supports the viability of a claim like Plaintiffs', which identifies no similar defect that could inadvertently lead to a loss of records, but asserts a supposed "lack of effective controls" simply as a means of circumventing the bar on compliance-based claims in order to pursue an impermissible challenge involving an alleged intentional lack of compliance by a small number of agency officials. *See* Pl. Opp. at 28 (faulting Department for failing to "implement . . . controls or guidelines to address" what they characterize as "this known problem," consisting of "recordkeeping failures in connection with the shadow diplomacy campaign").

Plaintiffs' contention that their claim is consistent with *Judicial Watch, Inc. v. FBI*, No. 18-2316, 2019 WL 4194501, at *9 (D.D.C. Sept. 4, 2019), is also flawed. Plaintiffs argue that, as the court in *Judicial Watch* required, they have identified "particular deficiencies" in the Department's recordkeeping policies, suggesting that those policies "lack any guidance" regarding

the creation and maintenance of records "documenting official agency business conducted through private and encrypted methods of communication, including by non-agency officials." Pl. Opp. at 30. As Defendants have explained, however, the Department *has* issued guidance regarding the use of electronic messaging that comports with the FRA. Plaintiffs identify no inadequacies in that guidance, nor do they identify anything inadequate in the system of oversight otherwise described in the Department's Foreign Affairs Manual, *see* Def. Mem. at 23 (citing 5 FAM 414.4(b), 415.4(b), 422.1; 5 FAH-4). Rather, Plaintiffs simply ask the Court to allow a fishing expedition into the "total 'guidance'" that Defendants provide to Department personnel, apparently in order to try to substantiate their unfounded speculation that recordkeeping violations have occurred during the conduct of the shadow diplomacy that they allege, and then uncover the reasons for any such failures. *See* Pl. Opp. at 31.[4] But such an investigation is far beyond anything that the court in *Armstrong* permitted. Absent an identified inadequacy in an existing recordkeeping guideline or directive, Plaintiffs fail to justify their request. Instead, the Court should dismiss Claim Two as presenting an impermissible compliance-based claim.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' opening brief, the Court should dismiss Plaintiffs' claims in their entirety, with prejudice.

Dated: March 20, 2020

Respectfully submitted,

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

[4] Plaintiffs' suggestion that "additional guidance exists that has not been produced" is based solely on the inclusion in the May 2018 ALDAC of a contact e-mail address, to which any questions might be addressed. *See* Pl. Opp. at 31. Plaintiffs merely speculate that anyone ever sent an inquiry to this e-mail address, and that any response might have any bearing on "effective controls" with respect to "shadow diplomacy." Such speculation does not warrant allowing this case to proceed.

/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