IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, and

ANDREW WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency,

Defendants.

Civil Action No. 19-cv-2181-TJK

MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

It is a maxim of administrative law that agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015). So, when an agency adopts a legislative rule through the notice-and-comment procedures of the Administrative Procedure Act ("APA"), it must follow those same procedures when amending the rule—without exception. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (per curiam) ("[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked" and "may not alter [such a rule] without notice and comment.").

Disregarding this black-letter principle, Defendant Environmental Protection Agency ("EPA") hastily amended its Freedom of Information Act ("FOIA") regulations through a final rule issued in June 2019 (the "FOIA Rule" or "2019 FOIA Rule") without following the APA's notice-and-comment requirements, even the though the rule amends a prior legislative rule that EPA adopted through notice and comment. Not surprisingly, the FOIA Rule generated substantial backlash from the public, members of Congress, and dozens of good-government groups. It also spurred several lawsuits, including this one filed by Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW"), challenging the rule as both procedurally and substantively defective under the APA. EPA now moves to dismiss, and CREW both opposes EPA's motion and cross-moves for partial summary judgment.

CREW has standing to challenge the FOIA Rule. CREW is a frequent FOIA requester that depends on records obtained through FOIA to achieve its mission of promoting government

transparency, integrity, and accountability. It has dozens of FOIA requests pending with EPA, and intends to submit more. There is no dispute that EPA has already applied the FOIA Rule to CREW's FOIA requests, and will do so in the future. Moreover, the rule directly affects CREW's particularized interests as a frequent FOIA requester in several ways, including by purporting to authorize EPA to withhold information CREW is entitled to receive by law, requiring that all FOIA requests be submitted to EPA headquarters and prohibiting direct submission to EPA regional offices, and making other changes that will impair CREW's statutory right to "prompt[]" release of records responsive to its FOIA requests. This more than suffices to demonstrate standing. Indeed, if CREW does not have standing to challenge EPA's unlawful FOIA Rule, it is hard to imagine any plaintiff that would. And CREW's standing is particularly strong as to its notice-and-comment claim, since courts "relax the redressability and imminence requirements for a plaintiff claiming a procedural injury." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013). EPA's contrary arguments misstate both the nature of CREW's injury and the governing case law.

Turning to the merits, CREW has established that the FOIA Rule is both procedurally and substantively defective. As to the procedural defects, EPA was required to adopt the rule through notice and comment for two separate reasons. First, the rule extensively amends a prior legislative rule that EPA adopted through notice and comment and published in the Code of Federal Regulations. Second, the rule qualifies as legislative on its own terms, and thus was independently subject to notice-and-comment requirements. As to the substantive defects, the rule is contrary to law insofar as it purports to authorize EPA officials to "withhold . . . a portion

of a record on the basis of responsiveness," which is squarely prohibited by FOIA. EPA concedes that FOIA forbids such withholdings, but insists CREW is merely misreading the rule. Yet CREW's reading is based on the rule's plain language and is reinforced by several canons of construction. EPA's reading, by contrast, is supported only by the agency's *ipse dixit*.

In short, this case aptly illustrates why notice and comment exists. Had EPA followed that process in adopting the FOIA Rule, it could have solicited public comment on a proposed rule, considered the numerous objections raised by CREW and others, and duly addressed those concerns in a final rule. Instead, EPA rushed through a final rule with no opportunity for public input, provoking widespread backlash and several lawsuits. EPA now attempts to explain away the rule's flaws in litigation, but this comes too late. Even if EPA's *post hoc* rationalizations were sound (and they are not), the proper context to raise them would have been during the rulemaking process. Having opted to bypass that process, EPA's lawyers cannot save the rule by trying to rewrite it in litigation. The rule must be vacated. If EPA wants to amend its FOIA regulations, it must follow the same process it used to adopt those regulations in the first place: notice and comment.

For all these reasons, the Court should deny EPA's motion to dismiss and grant CREW's motion for partial summary judgment.

BACKGROUND

I. EPA's 2002 FOIA Rule

Prior to the 2019 FOIA Rule, EPA last amended its FOIA regulations by final rule issued November 5, 2002. *See* Revised FOIA Regulations, 67 Fed. Reg. 67,303 (Nov. 5, 2002)

(previously codified at 40 C.F.R. § 2 (2018)) ("2002 FOIA Rule"). In adopting the 2002 FOIA Rule, EPA followed the APA's notice-and-comment procedures, and expressly invoked the agency's rulemaking authority. *See* 67 Fed. Reg.

at 67,304; Revised FOIA Regulations, 65 Fed. Reg. 19,703 (April 12, 2000) (Proposed Rule).

Under the 2002 FOIA Rule, requesters could seek records from EPA headquarters in Washington, D.C., or, if appropriate, any of EPA's ten regional field offices. 40 C.F.R. §§ 2.101(a), 2.102(a) (2018). In general, the rule established that "the EPA office that has possession of that record is the office responsible for responding to you." *Id.* § 2.103(a).

Regarding the "[a]uthority to grant or deny requests," the 2002 FOIA Rule provided that the "head of an office, or that individual's designee, is authorized to grant or deny any request for a record of that office or other Agency records when appropriate." *Id.* § 2.103(b). The rule also authorized certain political appointees—namely, the "Deputy Administrator, Assistant Administrators, Regional Administrators, the General Counsel, the Inspector General, Associate Administrators, and heads of headquarters staff offices"—to issue "initial determinations" on FOIA requests. *Id.* § 2.104(h). But it restricted the personnel to whom this authority could be delegated, providing that "the authority to issue initial denials of requests for existing, located records . . . may be redelegated only to persons occupying positions not lower than division director or equivalent." *Id.*

II. Politicization of FOIA at EPA under the Trump Administration

Prior to the Trump Administration, political appointees at EPA were rarely involved in FOIA processes. That changed dramatically under the tenure of former EPA Administrator Scott

Pruitt. For instance, Mr. Pruitt personally instructed his staff not to respond to FOIA requests relating to his tenure at the agency until all Obama Administration requests had been cleared. First Am. Compl. ("FAC") ¶ 21. This politically-motivated decision was contrary to the "multitrack processing" approach required by EPA's FOIA regulations, under which requests are prioritized based on complexity, rather than date of receipt. *See* 40 C.F.R. § 2.104(c) (2019).

Mr. Pruitt also instituted a "political awareness review" policy, under which political appointees (rather than career officials) review and approve responses to "politically charged" FOIA requests prior to release. FAC ¶ 22. "Politically charged" requests included requests seeking communications with the Office of the Administrator or other senior EPA officials. *Id.* Mr. Pruitt resigned from EPA in July 2018, amid a flurry of ethics scandals. *Id.* ¶ 23.

On November 16, 2018, EPA's Chief of Staff, Ryan Jackson, issued a memorandum entitled "Awareness Notification Process for Select Freedom of Information Act Releases," *available at* https://bit.ly/2XXYhlD ("Jackson Memorandum") (cited in FAC ¶¶ 24-26). The memorandum set "forth the [FOIA] awareness notification process to be followed at the agency," and "supersede[d] any prior process, procedure, guidance, or instruction," seemingly including the political awareness review policy instituted by Mr. Pruitt. Jackson Memorandum at 1.

The Jackson Memorandum also made clear that EPA policy, at that time, dictated that career staff, not political appointees, were responsible for making FOIA determinations. It explained that the "awareness notification process is not an approval process." *Id.* It added that, "[c]onsistent with the agency's FOIA policy and procedures, FOIA staff, program staff and program managers will continue to determine whether information should be released or

withheld under FOIA's exemptions." *Id.* The memorandum included detailed procedures for notifying "agency senior leadership" of FOIA responses that "may be of particular interest to the press, the public and/or Congress." *Id.* at 1-3.

III. EPA's 2019 FOIA Rule

On June 26, 2019, EPA announced the FOIA Rule, with an effective date of July 26, 2019. *See* FOIA Regulations Update, 84 Fed. Reg. 30,028 (June 26, 2019) (codified at 40 C.F.R. § 2 (2019)). According to the rule summary, EPA was "tak[ing] final action to revise the Agency's regulations under [FOIA] . . . by updating the process by which the public may access information about EPA actions and activities." *Id.* The FOIA Rule expressly amends EPA's existing FOIA regulations, as adopted in the 2002 FOIA Rule and codified at 40 C.F.R. § 2. As outlined below, the FOIA Rule alters 40 C.F.R. § 2 in several ways to consolidate authority with EPA's political appointees and its National FOIA Office.

A. Requiring that All Requests be Submitted to EPA's National FOIA Office

The FOIA Rule requires that all FOIA requests be submitted to EPA's National FOIA Office in Washington, D.C. *See* 40 C.F.R. §§ 2.101, 2.102, 2.103(a) (2019); 84 Fed. Reg. at 30,032-33. Upon "receipt of a FOIA request," the "National FOIA Office will assign the request to an appropriate office within the Agency for processing." 84 Fed. Reg. at 30,033. "If a requester erroneously submits a FOIA request to an EPA program or regional office, the EPA will not consider the request received by the Agency." *Id.* at 30,030. This changed the prior regulations, which allowed requesters to submit requests to EPA headquarters or any appropriate

regional office, 40 C.F.R. §§ 2.101-103 (2018), and provided that generally "the EPA office that has possession of that record is the office responsible for responding to you," *id.* § 2.103(a).

The FOIA Rule states this revision was designed to "minimize the number of misdirected requests sent to the Agency" and "to address" a provision of the 2007 FOIA amendments that "decreased the amount of time an agency may take to route a request to the appropriate component of the agency to ten-working days or less." 84 Fed. Reg. at 30,030. But the rule does not explain why precluding requesters from submitting FOIA requests to a relevant EPA regional office, and instead requiring them to submit all requests to the National FOIA Office, would minimize the number of misdirected requests or result in timelier processing of requests. In fact, the FOIA Rule is devoid of any analysis of whether requiring that all requests be submitted to the National FOIA Office would further the goals of efficiency or expediency in FOIA processing.

B. Authorizing Political Appointees to Issue Final FOIA Determinations

As to the "[a]uthority to issue final determinations," revised § 2.103(b) provides that the

> Administrator, Deputy Administrators, Assistant Administrators, Deputy Assistant Administrators, Regional Administrators, Deputy Regional Administrators, General Counsel, Deputy General Counsels, Regional Counsels, Deputy Regional Counsels, and Inspector General or those individuals' delegates, are authorized to make determinations required by 5 U.S.C. § 552(a)(6)(A), including to issue final determinations whether to release or withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA, and to issue 'no records' responses.

40 C.F.R. § 2.103(b) (2019); 84 Fed. Reg. at 30,033.

This changed the prior regulations, which provided that "[t]he head of an office, or that individual's designee, is authorized to grant or deny any request for a record of that office or other Agency records when appropriate," 40 C.F.R. § 2.103(b) (2018), and authorized the

following political appointees to issue "initial determinations" on FOIA requests: the "Deputy Administrator, Assistant Administrators, Regional Administrators, the General Counsel, the Inspector General, Associate Administrators, and heads of headquarters staff offices," *id.* § 2.104(h). The revised regulation expands this list of political appointees to include "Deputy Regional Administrators," "Deputy General Counsels," "Regional Counsels," and "Deputy Regional Counsels." 40 C.F.R. § 2.103(b) (2019); 84 Fed. Reg. at 30,033.

The FOIA Rule explains that this revision "eliminates a potential conflict in the existing regulations and ensures consistency of responses across the Agency. The previous regulations contained a potential inconsistency. EPA simplifies and consolidates section 2.103(b), which empowered the 'head of an office, or that individual's designee' to grant or deny requests, and section 2.104(h), which empowered division directors or equivalents authority to issue 'denials.'" 84 Fed. Reg. at 30,031. Yet the rule does not explain the agency's reasons for expanding the number of political appointees authorized to issue final FOIA determinations. It also fails to acknowledge that the rule departs from existing agency policy, under which only career staff would "determine whether information should be released or withheld under FOIA's exemptions." Jackson Memorandum at 1.

C. Removing Restrictions on Delegating Authority to Issue FOIA Determinations

As noted, revised § 2.103(b) authorizes certain political appointees and those "individuals' delegates" to issue final determinations on FOIA requests. 40 C.F.R. § 2.103(b) (2019); 84 Fed. Reg. at 30,033. Revised § 2.104(h), in turn, eliminates the former provision stating that "the authority to issue initial denials of requests for existing, located records . . . may

be redelegated only to persons occupying positions not lower than division director or equivalent." 40 C.F.R. § 2.104(h) (2018).

The FOIA Rule states this revision "clarifies the authorities, and delegation of the authority, because the term 'division director' is not easily interpreted across the Agency. The Agency does not intend to affect the Agency's use of delegation directives to set forth specific rules and limitations regarding who may be delegated FOIA decision making authority; it is not necessary to set forth such delegations, and limitations, in Agency regulations." 84 Fed. Reg. at 30,031. Yet the rule does not explain why EPA no longer believes it is "necessary" to include restrictions on delegations in its FOIA regulations, a clear reversal of the policy codified in the 2002 FOIA Rule. With the removal of this delegation restriction, any of the political appointees enumerated in § 2.103(b) can delegate authority to issue final FOIA determinations to *any* agency official, including other political appointees.

D. Authorizing EPA Officials to Withhold a "Portion of a Record on the Basis of Responsiveness"

Revised § 2.103(b) also purports to authorize EPA officials to "withhold . . . a portion of a record on the basis of responsiveness." 40 C.F.R. § 2.103(b) (2019); 84 Fed. Reg. at 30,033. The FOIA Rule does not explain why EPA added this language, which did not appear in the 2002 FOIA Rule. The new language is also directly contrary to D.C. Circuit precedent. *See AILA v. EOIR*, 830 F.3d 667, 677-79 (D.C. Cir. 2016) (holding that FOIA forbids agencies from withholding portions of responsive records on the basis of non-responsiveness).

E. No Notice and Comment

Even though the FOIA Rule expressly amends a prior rule that EPA codified in the Code of Federal Regulations, the agency adopted it as a final rule without advance notice and comment. The rule asserts that EPA bypassed the APA's rulemaking procedures pursuant to the statute's "good cause and procedural exceptions." 84 Fed. Reg. at 30,029. Pertinent here, the rule claims that the procedural exception applies insofar as the FOIA Rule merely "update[s] the EPA's rules to accurately reflect the Agency's organizational structure and implement statutorily directed changes, which are self-executing," and does "not change the substantive standards the Agency applies in implementing the FOIA to the extent they conform with the Act and the 2007, 2009, and 2016 Amendments." *Id.*

Despite the lack of a notice-and-comment period, the FOIA Rule has generated significant public backlash. To date, a bipartisan group of five members of Congress and over 50 organizations have submitted letters urging the agency not to adopt the FOIA Rule or, at minimum, to open the rule up to public comment before adopting it.[1] The rule has also received significant media coverage.[2]

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[1] *See* July 22, 2019 Letter from Sens. Leahy, Grassley, Feinstein, and Cornyn to EPA, *available at* https://bit.ly/2StVMS8; Press Release, Rep. Porter Sounds Alarm on Lack of Transparency in Trump Administration's New Regulation, July 9, 2019, *available at* https://bit.ly/2XTVcmA; Envtl. Integrity Project, et al., Concerns Over EPA's "FOIA Regulations Update" Final Rule, July 9, 2019, *available at* https://bit.ly/2GlNeI9; Reporters Committee for Freedom of the Press, et al., Proposed Revisions to the EPA's FOIA Regulations, July 9, 2019, *available at* https://bit.ly/30paegY; June 26, 2019 Letter from Soc'y of Envtl. Journalists to EPA, *available at* https://bit.ly/2JDDI5b (all cited in FAC ¶ 40 n.1).

IV. This Suit

CREW instituted this action on July 23, 2019, and filed the FAC on August 25, 2019. The FAC asserts four claims. Count One alleges that EPA promulgated the FOIA Rule without notice and comment in violation of the APA. FAC ¶¶ 48-53. Count Two alleges that the FOIA Rule is arbitrary and capricious in violation of the APA. *Id.* ¶¶ 54-56. Counts Three and Four assert alternative theories under, respectively, the APA and FOIA, challenging the FOIA Rule as contrary to law insofar as it purports to authorize EPA to withhold non-responsive "portion[s]" of responsive records. *Id.* ¶¶ 57-62. As relief, CREW asks the Court to declare the FOIA Rule unlawful and vacate it. *Id.* at 19.

EPA now moves to dismiss the FAC under Rules 12(b)(1) and 12(b)(6), and CREW cross-moves for partial summary judgment on Claims One, Three, and Four.

ARGUMENT

Typically, a court must grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). But when a party seeks summary judgment in an APA case, "the district judge sits as an appellate tribunal," and "[t]he 'entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001); *see also*

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[2] *See, e.g.*, Rebecca Beitsch, Environmental groups fight EPA's new FOIA rule, *The Hill*, July 8, 2019, *available at* https://bit.ly/32CWXU0; Gregory Wallace & Ellie Kaufman, EPA changes transparency rules, *CNN*, June 26, 2019, *available at* https://cnn.it/2xTdN2S; Meg Cunningham, EPA rule lets political officials block FOIA document requests, *Roll Call*, June 26, 2019, *available at* https://bit.ly/2JFNsMf; Julia Conley, Emulating the CIA, New Rule Would Let Trump's EPA Disregard FOIA Requests With Near Impunity, *Common Dreams*, June 25, 2019, *available at* https://bit.ly/2O3Wffl (all cited in FAC ¶ 40 n.2).

Marshall Cty. Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (APA complaint "presents no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action"). "In such a case, summary judgment merely serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Defs. of Wildlife v. Jewell*, 70 F. Supp. 3d 183, 190 (D.D.C. 2014), *aff'd*, 815 F.3d 1 (D.C. Cir. 2016).

A "party may file a motion for summary judgment at any time until 30 days after the close of all discovery," unless otherwise specified by local rule or court order. Fed. R. Civ. P. 56(b). In APA cases, a party may move for summary judgment prior to the agency designating an administrative record where, as here, the disputed issues are pure questions of law and can be resolved based on judicially-noticeable documents cited by both parties. *See State v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1116 (N.D. Cal. 2017); *PETA v. USDA*, 194 F. Supp. 3d 404, 409 (E.D.N.C. 2016), *aff'd*, 861 F.3d 502 (4th Cir. 2017); *see also Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 266 (D.C. Cir. 2001) (administrative record is not necessary to evaluate claims challenging facial validity of agency rule). CREW's motion is particularly timely given that EPA has moved to dismiss three claims on the merits under Rule 12(b)(6), and thus effectively moved for summary judgment on those claims. *See Marshall Cty.*, 988 F.2d at 1226 (because "the sufficiency of the complaint is the question on the merits" in APA cases, "there is no real distinction in this context between the question presented on a

12(b)(6) motion and a motion for summary judgment"). Insofar as EPA has moved for judgment as a matter of law on Counts One, Three, and Four, CREW is entitled to do the same.[3]

I. EPA Violated the APA by Promulgating the FOIA Rule Without Notice and Comment (Count One)

A. CREW Has Standing to Assert Count One

Count One alleges that EPA violated the APA by promulgating the FOIA Rule without notice and comment. FAC ¶¶ 48-53. While acknowledging that CREW is a "frequent FOIA requester" with several FOIA requests pending before the agency, EPA disputes CREW's standing to assert a procedural challenge to the FOIA Rule. EPA Mot. at 5, 8-15. But EPA misstates the scope of CREW's claimed injury, and overlooks the "relaxed" requirements for standing in "procedural rights" cases, which CREW readily satisfies.

"To establish constitutional standing," a plaintiff "must have [1] suffered or be imminently threatened with a concrete and particularized injury in fact that [2] is fairly traceable to the challenged action of the defendant and [3] likely to be redressed by a favorable judicial decision." *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014). But the "requirements for standing differ where, as here, plaintiffs seek to enforce procedural (rather than substantive) rights," such as the right to notice-and-comment rulemaking under the APA. *Id.* To be sure,

[3] EPA does not move to dismiss Count Two, the arbitrary and capricious claim, under Rule 12(b)(6), likely because it recognizes that the administrative record is necessary to evaluate the merits of that claim. *See Farrell v. Tillerson*, 315 F. Supp. 3d 47, 69 (D.D.C. 2018). For the same reason, CREW does not move for summary judgment on Count Two at this time. But nothing prevents the Court from rendering partial judgment on Counts One, Three, and Four at this stage of the case, and doing so would serve the interest of judicial efficiency by saving the Court from having to address the same issues twice.

Article III requires that any plaintiff—including one alleging a procedural injury—establish that "the agency action threatens their concrete interest," which must be more than "'a mere general interest in the alleged procedural violation common to all members of the public.'" *Id.*; *see also id.* at 1013 (plaintiffs "need to show the agency action affects their concrete interests in a personal way"); *Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1262 (D.C. Cir. 2004) ("[I]n cases involving alleged procedural errors, 'the plaintiff must show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff.'"). But once the Article III "threshold is satisfied" in a procedural rights case, "the normal standards for immediacy and redressability are relaxed." *Mendoza*, 754 F.3d at 1010 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). "For purposes of the standing inquiry," the Court must "assume [CREW] would succeed on the merits of [its] claim[s]." *Barker v. Conroy*, 921 F.3d 1118, 1124 (D.C. Cir. 2019).

1. The FOIA Rule Affects CREW's Concrete Interests as a Frequent FOIA Requester of EPA Records

To begin, there is no dispute that CREW has "concrete" and "particularized" interests in EPA's FOIA regulations that are not shared generally by "all members of the public." As explained in the accompanying declaration of CREW's Assistant Director and Chief Counsel, Adam Rappaport, CREW frequently files FOIA requests with EPA to further its "core mission" of "promoting government transparency and accountability," it "disseminates the documents it receives through FOIA requests on its website, www.citizensforethics.org, and social media," and it "uses the documents as the basis for reports, complaints, litigation, blog posts, and other publications widely disseminated to the public." Declaration of Adam J. Rappaport ("Rappaport

Decl.") ¶ 4. "Since 2017, CREW has submitted at least 22 FOIA requests to EPA, 18 of which are still pending," and it "plans to continue submitting" similar requests in the future. *Id.* ¶¶ 7, 10. Several of CREW's "pending FOIA requests implicate politically-sensitive issues, the Office of the Administrator, and other high-level EPA officials." *Id.* ¶ 7. CREW has also submitted FOIA requests directly to EPA's regional offices, both before and after the FOIA Rule went into effect on July 26, 2019. *Id.* ¶¶ 8-9.

Courts routinely hold that frequent FOIA requesters, including CREW specifically, have a cognizable Article III interest in an agency's FOIA rules and policies where they have pending FOIA requests likely to implicate the challenged policy, and intend to submit similar requests in the future. *See Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 262 (D.D.C. 2012) ("[W]here a FOIA requester challenges an alleged ongoing policy or practice and can demonstrate that it has pending claims that are likely to implicate that policy or practice, future injury is satisfied."); *accord Muckrock, LLC v. CIA*, 300 F. Supp. 3d 108, 134 (D.D.C. 2018); *Gatore v. DHS*, 327 F. Supp. 3d 76, 90-94 (D.D.C. 2018); *Khine v. DHS*, 334 F. Supp. 3d 324, 332 (D.D.C. 2018); *CREW v. Cheney*, 593 F. Supp. 2d 194, 227 (D.D.C. 2009); *CREW v. EOP*, 587 F. Supp. 2d 48, 60-61 (D.D.C. 2008).

The FOIA Rule, moreover, "affects" and "threatens" CREW's "particularized interest[s]" as a frequent FOIA requester in several ways, each of which suffices to confer standing.

1. As alleged in Counts Three and Four of the FAC, the FOIA Rule purports to authorize EPA officials to withhold information that CREW is entitled to receive under FOIA—namely, non-responsive "portions" of responsive records. *See* FAC ¶¶ 57-62; Rappaport Decl. ¶ 12; 40

C.F.R. § 2.103(b) (2019) (authorizing specified political appointees "to . . . withhold . . . a portion of a record on the basis of responsiveness"). FOIA prohibits such withholdings, *see AILA*, 830 F.3d at 677-79, a point EPA concedes, *see* EPA Mot. at 20. Although EPA disputes CREW's interpretation of the rule, CREW's reading must be accepted as true for standing purposes. *See Barker*, 921 F.3d at 1124. This aspect of the FOIA Rule thus causes cognizable harm to CREW under the "informational injury" doctrine, which provides that "a denial of access to information" qualifies as an "'injury in fact' . . . where a statute (on the claimants' reading) requires that the information 'be publicly disclosed' and there 'is no reason to doubt their claim that the information would help them.'" *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040-41 (D.C. Cir. 2016). Put differently, insofar as the FOIA Rule is contrary to the FOIA's statutory disclosure requirements, it impedes CREW's informational rights under that statute and, in turn, inflicts an Article III injury.

2. The FOIA Rule also affects CREW's interests by denying it the ability to submit FOIA requests directly to EPA regional offices and instead requiring that *all* requests be submitted to EPA's National FOIA Office. *See* 40 C.F.R. §§ 2.101, 2.102, 2.103(a) (2019). Indeed, EPA has already applied this aspect of the rule to CREW's pending FOIA requests to EPA regional offices, and has stated it will do so in the future. *See* Rappaport Decl. ¶¶ 9, 13. So the injury is not merely theoretical; it has already been inflicted.[4] This easily passes Article III's threshold, which demands no more than an "identifiable trifle." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) ("We have allowed

[4] EPA is therefore mistaken when it claims CREW asserts no "actual injury." EPA Mot. at 10.

important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $ 5 fine and costs, and a $ 1.50 poll tax."); *see Chevron Nat. Gas v. FERC*, 199 F. App'x 2, 4 (D.C. Cir. 2006) ("[E]ven . . . rather insignificant burdens are an 'identifiable trifle' constituting Article III injury.").

EPA disputes that CREW can establish any injury concerning FOIA requests to regional offices, because it "has not alleged that it *ever* submitted a FOIA request to a regional office" before filing this suit, and "has not shown any intention to seek records from regional offices" in the future. EPA Mot. at 12. EPA is wrong on both counts. CREW submitted FOIA requests to EPA's regional offices both before and after filing this suit. *See* Rappaport Decl. ¶¶ 8-9, Exs. 8-12 (CREW FOIA requests to EPA regional offices). One of those requests dates as far back as 2008, well before CREW filed this case. *Id.* Ex. 8. The Rappaport Declaration also states unequivocally that CREW "plans to continue submitting FOIA requests seeking records from EPA's regional offices regarding, among other things, any ongoing efforts to minimize the role of regional offices in handling FOIA requests and to centralize FOIA administration at EPA's National FOIA Office, and the regional offices' reactions to such efforts." *Id.* ¶ 10. Under EPA's own logic, as well as the case law, this suffices to establish future injury. *See* EPA Mot. at 12; *Gatore*, 327 F. Supp. 3d at 92-94 (citing cases).

3. Finally, there is a substantial risk that the cumulative effect of two aspects of the FOIA Rule—i.e., centralizing submission of all FOIA requests at the National FOIA Office, *see* 40 C.F.R. §§ 2.101, 2.102, 2.103(a) (2019), and expanding the number of political appointees authorized to make FOIA determinations and removing restrictions on their delegation of that

authority, *see id.* § 2.103(b)—will needlessly cause further delays in the agency's handling of CREW's pending and future FOIA requests. This, in turn, impedes CREW's statutory right under FOIA to "promptly" obtain non-exempt records from the agency. *See* 5 U.S.C. § 552(a)(3)(A); *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) ("future injury" satisfies Article III when plaintiff shows "a substantial risk that the harm will occur").

In evaluating the risk of delay, it bears emphasizing that even before adopting the FOIA Rule, EPA routinely failed to timely respond to CREW's FOIA requests. Rappaport Decl. ¶ 15 (citing several examples of requests to which EPA failed to respond within FOIA's statutory deadlines). It is against this backdrop that the risk and magnitude of further delay must be assessed. *See Dep't of Commerce*, 139 S. Ct. at 2566 (considering "historical[]" experience in evaluating future injury).

To begin, the FOIA Rule centralizes the *submission* of FOIA requests with EPA headquarters, while leaving the *processing* of requests decentralized with appropriate agency components. Rappaport Decl. ¶ 16. This change will necessarily introduce further delay in EPA's FOIA processing of requests seeking records from regional offices, as the agency will require additional time to analyze and route requests for processing. *Id.* As one member of Congress recently noted in criticizing the FOIA Rule, "[c]entralized processing" can potentially streamline FOIA administration, but the FOIA Rule's adoption of "[c]entralized submissions with . . . decentralized processing increases delays as FOIA request[s] are routed to the appropriate office or branch." Oct. 31, 2019 Letter from Rep. Katie Porter to EPA, at 2, *available at* https://bit.ly/34nOLXO.

The centralized-submission requirement will also significantly increase the National FOIA Office's overall workload and is, in turn, virtually certain to increase delays in FOIA processing. Rappaport Decl. ¶ 17. EPA's own data shows that, even before the FOIA Rule went into effect, EPA headquarters had a much larger FOIA workload and slower processing rates than the agency's regional offices. *See* EPA FOIA Annual Report for FY 2018 §§ V, XII, VII, *available at* https://bit.ly/2Lz5h1J ("EPA 2018 FOIA Report") (reporting that 2,772 of the agency's total 3,730 outstanding FOIA requests at the end of FY 2018 were pending with EPA headquarters; that EPA headquarters had 2,360 backlogged requests, while the largest backlog at any regional office was 128 requests; and that the average response times were significantly longer at EPA headquarters than at any regional office in most instances); Rappaport Decl. ¶ 17. EPA acknowledges as much in its brief. *See* EPA Mot. at 11 n.1 (EPA "headquarters handles far more FOIA requests than the regional offices.").

EPA's FOIA data further shows that, for both FY 2017 and 2018, EPA headquarters received approximately 3,600 requests, compared to approximately 7,800 total requests received by each of the regional offices combined. *See* EPA FOIA Annual Report for FY 2017 § V, *available at* https://bit.ly/376HePt (headquarters received 3,619 requests, while regional offices received a combined total of 7,899); EPA 2018 FOIA Report § V (headquarters received 3,655 requests, while regional offices received a combined total of 7,779); Rappaport Decl. ¶ 17. Treating those numbers as a baseline for future years, EPA's National FOIA Office can reasonably estimate facing, as a result of the FOIA Rule's centralized-submission requirement, 7,800 *additional* requests per year for which that office will now have "intake" responsibilities,

which entails accepting the request, initially reviewing it, and assigning it to a component for processing. Rappaport Decl. ¶ 17. That is a *116%* increase. *Id.* Yet there is no indication, in the FOIA Rule or elsewhere, that EPA's National FOIA Office has expanded its staff to handle this increased workload. *Id.* This despite the fact that EPA headquarters already faces a substantial backlog and slower processing rates than the regional offices, and that EPA career staff have long cited lack of adequate staffing and resources in opposing efforts to centralize FOIA administration at headquarters. *See* Evaluation of EPA's FOIA Program, Final Report, at 39, 41-42, 46, Feb. 12, 2016, *available at* https://bit.ly/2ygSOHz; Rappaport Decl. ¶ 17.

Thus, mandating that all FOIA requests be submitted to the National FOIA Office will add yet another layer of delay in FOIA administration at EPA, both for requests seeking records from EPA headquarters *and* the regional offices. Rappaport Decl. ¶ 18. And by prohibiting direct submission of FOIA requests to regional offices, the rule deprives CREW of a demonstrably faster avenue for obtaining records from regional offices that was available for years under EPA's prior regulations. *Id.*[5]

[5] Contrary to EPA's assertions, *see* EPA Mot. at 11-12, CREW fully appreciates that the FOIA Rule centralizes the *intake*, not processing, of FOIA requests at the National FOIA Office. But as outlined above, increasing the National FOIA Office's FOIA *intake* responsibilities by approximately 116%—with no accompanying increase in staffing or resources, when that office already faces a substantial FOIA backlog, and when it already routinely fails to timely respond to CREW's FOIA requests—is reasonably certain to cause further delays in the agency's FOIA *processing*. That is based not on "speculation," *id.* at 12, but EPA's own FOIA statistics and CREW's firsthand experience. It is also common sense: staff at EPA's National FOIA Office will have to devote more time to their increased FOIA intake workload that they could have otherwise spent on processing pending FOIA requests.

The FOIA Rule's expansion of the number of political appointees authorized to make FOIA determinations, and elimination of restrictions on delegating that authority, are also likely to add delay. In CREW's experience, EPA's response times to CREW's FOIA requests—particularly under current agency leadership—are slower when the request implicates politically-sensitive issues or the agency's political appointees. Rappaport Decl. ¶ 19. This delay is partly attributable to the involvement of political appointees in processing the request, which adds an additional layer of internal review before responsive records may be released. *Id.* In other words, it is CREW's experience that the more political appointees are involved in processing a FOIA request, the slower EPA's response time is. *Id.* This view is borne out by publicly-available data showing that between January 20 and December 29, 2017, only 16.6% of FOIA requests routed to the Office of the Administrator were closed, in sharp contrast to the 78.76% closure rate for all other requests made to EPA during the same period. *See* Andrew Bergman, EPA Drags Its Feet with Records Requests Aimed at Scott Pruitt's Office, *Project on Gov't Oversight*, Feb. 25, 2018, *available at* https://bit.ly/2GnYnbE; Rappaport Decl. ¶ 19; *see also* June 11, 2018 Letter from Rep. Elijah E. Cummings to EPA, at 1, *available at* https://bit.ly/31boU3z ("EPA's front office is now responding more slowly" to FOIA requests, "according to EPA's own data and independent sources."). It is also consistent with CREW's general experience—with agencies throughout the federal government—that the involvement of political appointees in making FOIA determinations frequently causes unreasonable delay. Rappaport Decl. ¶ 19; *see* July 22, 2019 Letter from Sens. Leahy, Grassley, Feinstein, and Cornyn to EPA, at 1, *available at* https://bit.ly/2StVMS8 (observing that "the involvement of

political appointees [in] making [FOIA] determinations can add unnecessary delays to the [FOIA] review process, potentially violating FOIA's statutory deadlines.").

EPA insists that the FOIA Rule does not actually change political appointees' authority to make FOIA determinations, but only "clarifies" their "pre-existing authorities." EPA Mot. at 12-13. That is false. The FOIA Rule does more than "clarify"—it significantly *expands* the list of political appointees authorized to issue FOIA determinations to include "Deputy Regional Administrators," "Deputy General Counsels," "Regional Counsels," and "Deputy Regional Counsels." 40 C.F.R. § 2.103(b) (2019). EPA's prior FOIA regulations did not authorize these officials to issue FOIA determinations. *See* 40 C.F.R. § 2.104(h) (2018). The FOIA Rule also gives political appointees *carte blanche* to delegate their FOIA authority to anyone at the agency (including other political appointees) by eliminating a provision forbidding delegation to personnel below the level of "division director or equivalent." *Id.*

Taken together, the provisions discussed above pose a near-certain risk of unreasonably delaying EPA's response times to CREW's pending and future FOIA requests. Rappaport Decl. ¶ 20. This is yet another cognizable injury to CREW. *See Muckrock*, 300 F. Supp. 3d at 134-35 ("unreasonable delay" resulting from challenged FOIA policy qualifies as Article III injury); *EPIC v. DOJ*, 416 F. Supp. 2d 30, 40 (D.D.C. 2006) ("loss of . . . value" of timely obtaining records "constitutes a cognizable harm").

For all these reasons, the FOIA Rule materially affects CREW's interests as a frequent FOIA requester in several respects, each of which suffices to establish Article III injury.

2. CREW Easily Satisfies the "Relaxed" Standard for Causation and Redressability in Procedural Rights Cases

As noted, once Article III's threshold is met in a procedural rights case, the "normal standards for immediacy and redressability are relaxed." *Mendoza*, 754 F.3d at 1010. Under this "relaxed" standard, a plaintiff "need not show the agency action would have been different had it been consummated in a procedurally valid manner—the courts will assume this portion of the causal link." *Id.* at 1010, 1013. "Nor need they establish that correcting the procedural violation would necessarily alter the final effect of the agency's action on the plaintiffs' interest." *Id.* at 1010. "Rather, if the plaintiffs can 'demonstrate a causal relationship between the final agency action and the alleged injuries,' the court will 'assume[] the causal relationship between the procedural defect and the final agency action.'" *Id.*; *see id.* at 1013 (alternatively framing inquiry as "plaintiffs simply need to show the agency action affects their concrete interests in a personal way").

CREW easily meets this standard. Each of the injuries outlined above flow directly from specific provisions of the FOIA Rule—namely, the rule's purported authorization to withhold non-responsive portions of responsive records, its requirement that all requests be submitted to the National FOIA Office, its expansion of the political appointees authorized to issue FOIA determinations, and its removal of restrictions on delegations of that authority. Because CREW has "demonstrate[d] a causal relationship between the final agency action and the alleged injuries," the Court must "assume the relationship between the procedural defect and the final agency action." *Id.* at 1010.

EPA offers a one-paragraph argument disputing causation and redressability, again asserting that the FOIA Rule only "clarifies" pre-existing FOIA determination authority, and thus makes no change that could have injured CREW. EPA Mot. at 14-15. As explained *supra* Part I.A.1, that claim is demonstrably false. It also concerns just one of several injuries forming the basis for CREW's standing, and thus would not be dispositive in any event.

Insofar as EPA is asserting that CREW's standing is based on actions predating the FOIA Rule, it again misses the mark. While the FAC does highlight instances of delay relating to political-appointee review that predate the FOIA Rule, CREW does not predicate its Article III injury on those pre-rule actions; it merely points to them as support for the proposition that political-appointee review has historically delayed EPA's FOIA response times, and that there is an ongoing pattern of delay in FOIA administration at EPA. This "historical" experience supports the delay-based aspect of CREW's injury, *see Dep't of Commerce*, 139 S. Ct. at 2566, as it indicates that the new provisions of the FOIA Rule—which *expand* the number of political appointees authorized to issue FOIA determinations and allow them to delegate that authority with impunity—are likely to *exacerbate* the delay in EPA's FOIA processing. *See Nat'l Treasury Employees Union v. Whipple*, 636 F. Supp. 2d 63, 73 (D.D.C. 2009) ("Causation does not require that the 'challenged action must be the sole or proximate cause of the harm suffered, or even that the action must constitute a but-for cause of the injury," but only "whether 'the agency's actions materially increase[d] the probability of injury.'"); *Pietrangelo v. Refresh Club, Inc.*, 2019 WL 2357379, at *5 (D.D.C. June 4, 2019) (same).

B. CREW is Entitled to Summary Judgment on Count One Because the FOIA Rule is a Legislative Rule to which the APA's Notice-and-Comment Requirements Apply

EPA violated the APA by adopting the FOIA Rule without notice and comment. "An agency is generally required by the APA to publish notice of proposed rulemaking in the Federal Register and to accept and consider public comments on its proposal." *Mendoza*, 754 F.3d at 1020 (citing 5 U.S.C. § 553). "The APA exempts from these procedural requirements: (1) interpretative rules; (2) general statements of policy; and (3) rules of agency organization, procedure, or practice." *Id.* at 1020-21. The Circuit "has generally referred to the category of rules to which the notice and comment requirements do apply as 'legislative rules,' or, sometimes, 'substantive rules.'" *Id.* at 1021.

At issue here is the exception for rules of agency "organization, procedure, or practice," also known as "procedural rules."[6] "In general, a procedural rule 'does not itself alter the rights or interests of parties"—i.e., it "does 'not impose new substantive burdens.'" *EPIC v. DHS*, 653 F.3d 1, 5 (D.C. Cir. 2011). Although there is an extensive body of caselaw outlining "the distinction between substantive and procedural rules," ultimately the "distinction . . . is 'one of degree' depending upon 'whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA." *Id.* "Those policies . . . are to serve 'the need for public participation in agency decisionmaking,' and to ensure the agency

[6] EPA also invoked the APA's "good cause" exception as to some aspects of the FOIA Rule, but it concedes that this exception does not apply to any of the rule provisions challenged in this suit. *See* EPA Mot. at 19 n.3.

has all pertinent information before it when making a decision." *Id.* at 6. "In order to further these policies, the exception for procedural rules 'must be narrowly construed.'" *Id.*

While there is some gray area in deciphering whether a rule is legislative or procedural, a few bright-line principles guide the analysis. Pertinent here, agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez*, 135 S. Ct. at 1206; *Clean Air Council*, 862 F.3d at 9. A corollary of this principle is that "an amendment to a legislative rule" is itself "legislative" and "notice and comment rulemaking must be followed." *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992); *see also Clean Air Council*, 862 F.3d at 9 ("an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked" and "may not alter [such a rule] without notice and comment."); *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 718 (D.C. Cir. 2015) (same).

1. The FOIA Rule is Legislative Because It Expressly Amends a Prior Legislative Rule

For starters, there is no dispute that the 2019 FOIA Rule "amends" or "revises" the 2002 FOIA Rule. The 2019 rule repeatedly states as much. *See*, *e.g.*, 84 Fed. Reg. at 30,028 (EPA "takes final action to revise the Agency's regulations under the Freedom of Information Act."); *id.* at 30,029 ("This action revises the Agency's FOIA regulations . . ."); *id.* at 30,032 (declaring that EPA "amends 40 CFR part 2, as follows: . . ."). As codified, the 2019 FOIA Rule replaces the 2002 FOIA Rule in the Code of Federal Regulations. *Compare* 40 C.F.R. § 2 (2018), *with* 40 C.F.R. § 2 (2019).

The question, then, is whether the 2002 FOIA Rule was legislative. It plainly was. "To determine whether a rule is legislative," courts "ask whether the agency 'intended' to speak with the force of law" in "exercise of [its] 'delegated legislative power' from Congress." *Guedes v. ATF*, 920 F.3d 1, 17-18 (D.C. Cir. 2019). The Circuit considers several factors, including "whether the agency has published the rule in the Code of Federal Regulations, . . . whether the agency has explicitly invoked its general legislative authority, or whether the rule effectively amends a prior legislative rule." *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). "If the answer to any of these questions is affirmative, we have a legislative . . . rule." *Id.* Other pertinent factors in distinguishing legislative from procedural rules are whether the rule "effects a [substantive] change in existing law or policy," "trenches on substantial private rights and interests," or "alters the substantive criteria" on which the agency relies to make determinations affecting members of the public. *Mendoza*, 754 F.3d at 1023-24; *James V. Hurson Assocs. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000).

The 2002 FOIA Rule has all the hallmarks of a legislative rule. In adopting the rule, EPA followed the APA's notice-and-comment procedures, explicitly invoked its delegated legislative authority, amended the agency's existing FOIA regulations, and, ultimately, published the final rule in the Code of Federal Regulations. *See* 65 Fed. Reg. at 19,703 (Proposed Rule) ("EPA is proposing this rule under the authority of 5 U.S.C. 301, 552[7] (as amended), and 553."), and 19,705 (listing various statutes as authority for regulation, including 5 U.S.C. § 552); 67 Fed.

[7] Section 552, the FOIA, includes several provisions delegating legislative rulemaking authority to agencies. *See* 5 U.S.C. §§ 552(a)(1), (a)(2), (a)(4)(A), (a)(6)(B)(iv), (a)(6)(D), (a)(6)(E).

Reg. at 67,305, 67,307 (Final Rule) (same); 40 C.F.R. § 2 (2018) (listing "5 U.S.C. § 552" among the sources of authority for regulation). Under the law of this Circuit, each of these factors is sufficient to deem the rule legislative, *see Clean Air Council*, 862 F.3d at 9; *Am. Min. Cong.*, 995 F.2d at 1112, as they reflect an unequivocal intent by EPA to "exercise . . . [its] 'delegated legislative power' from Congress," *Guedes*, 920 F.3d at 17-18.

But there is more: the 2002 rule also made several changes that "alter[ed] the rights or interests of" FOIA requesters, "alter[ed] the substantive criteria by which" EPA evaluated FOIA requests, and otherwise "effect[ed] a [substantive] change in existing law or policy." *Mendoza*, 754 F.3d at 1023-24; *James*, 229 F.3d at 281. Specifically, the rule:

- altered the standard for determining whether a FOIA request "reasonably describe[s] the records" sought and thus would be accepted for processing by EPA, *see* 67 Fed. Reg. at 67,304, 67,308; 40 C.F.R. § 2.102(c) (2018);
- changed several provisions governing when a requester is deemed to have exhausted administrative remedies and may seek judicial review, 67 Fed. Reg. at 67,305, 67,309; 40 C.F.R. § 2.104 (2018);
- defined EPA's obligation to proactively disclose certain types of records under FOIA to only cover records "created by EPA . . . on or after November 1, 1996" (over a commenter's objection that the language was legally erroneous), *see* 67 Fed. Reg. at 67,304, 67,308; 40 C.F.R. § 2.101(c) (2018);

- adopted "criteria" for determining whether a requester had shown a "compelling need" sufficient to obtain expedited processing of a FOIA request, 67 Fed. Reg. at 67,305, 67,309; 40 C.F.R. § 2.104(e) (2018); and
- adopted a new standard for determining whether to refer a request to another agency, 67 Fed. Reg. at 67,305, 67,308; 40 C.F.R. § 2.104 (2018).

These changes cannot fairly be characterized as merely "procedural," particularly in light of the Circuit's admonition that "[t]he exception for procedural rules is narrowly construed, and cannot be applied 'where the agency action trenches on substantial private rights and interests.'" *Mendoza*, 754 F.3d at 1023. That is especially true with respect to the provisions establishing criteria FOIA requesters must satisfy to obtain records or expedited processing, as such provisions are definitively legislative. *See id.* at 1024 (holding that rule was legislative, not procedural, where it "set the bar for what employers must do to obtain approval" from the agency and thus "substantially affect[ed] [their] rights and interests").

Another indicator that the 2002 FOIA Rule is legislative is its repeated recognition that it is designed to "implement[]" FOIA's statutory requirements. 67 Fed. Reg. at 67,303, 67,304, 67,306. Rules that "'endeavor[] to implement" a statute are "legislative." *Mendoza*, 754 F.3d at 1023. Given that the "language actually used by the agency" is "[c]entral to the analysis" of whether a rule is legislative, this factor deserves considerable weight. *Guedes*, 920 F.3d at 18.

In short, the 2019 FOIA Rule expressly amends the 2002 FOIA Rule, which itself was a legislative rule EPA adopted through notice and comment and published in the Code of Federal

Regulations. EPA was therefore required to follow the same process in adopting the 2019 rule. Because it did not, the 2019 rule is procedurally defective and must be vacated.[8]

2. Even Standing Alone, the FOIA Rule is Legislative

Even setting aside that it amends a prior legislative rule, the 2019 FOIA Rule qualifies as legislative on its own terms. Like the 2002 rule, the 2019 rule has many of the indicia of a legislative rule, including that EPA explicitly invoked its delegated legislative authority in adopting it, and published it in the Code of Federal Regulations. *See* 84 Fed. Reg. at 30,032 (listing 5 U.S.C. § 552 among the sources of authority for the rule); 40 C.F.R. § 2 (2019) (same). The presence of both factors here serves to distinguish this case from those cited by EPA. *See* EPA Mot. at 15-19 (citing cases).

The FOIA Rule also "alter[s] the rights or interests of" FOIA requesters, "alter[s] the substantive criteria by which" EPA decides whether to withhold information under FOIA, and otherwise "effects a [substantive] change in existing law or policy" in several respects. *Mendoza*, 754 F.3d at 1023-24; *James*, 229 F.3d at 281. As explained *infra* Part II.A, the rule purports to authorize EPA to "withhold . . . a portion of a record on the basis of responsiveness," which is plainly contrary to FOIA. This change directly impedes the statutory rights of FOIA requesters, and reflects a substantive change in agency policy, as the 2002 FOIA Rule included no such provision. And by purporting to give EPA a new ground on which it may withhold information (i.e., "non-responsiveness"), the rule alters the criteria EPA considers in deciding

[8] EPA's motion fails altogether to address the issue of whether the FOIA Rule qualifies as a legislative rule based on its amendment of a prior legislative rule, even though CREW clearly articulated that theory in the FAC. *See* FAC ¶ 51.

what information to release in response to FOIA requests. Such a change is in no way "procedural." *See Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 169 (2d Cir. 2013) (rejecting claim that agency orders fit procedural rule exception where, prior to the orders, "no statute or regulation specifically conferred that authority on the" agency, and there were "serious questions as to whether" orders were prohibited by statute). Once again, this aspect of the rule distinguishes this case from those cited by EPA, *see* EPA Mot. at 15-19, none of which involved changes to the substantive standards an agency used to evaluate requests, applications, or other submissions from members of the public.

Similarly, the FOIA Rule provisions that risk unreasonably delaying EPA's FOIA processing—i.e., those mandating submission of all FOIA requests to EPA headquarters and expanding the authority of political appointees to issue FOIA determinations—bear directly on FOIA requesters' statutory right to "prompt[]" access to records. 5 U.S.C. § 552(a)(3)(A). This, by itself, is a "substantive burden" indicative of a legislative rule. But "regardless whether this is a 'new substantive burden,' the change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking." *EPIC*, 653 F.3d at 6 (internal citation omitted). This conclusion is reinforced by the considerable public backlash generated by the rule. *See supra* nn. 1-2 (describing backlash); *EPIC*, 653 F.3d at 6 (deeming rule legislative, not procedural, where it generated "much public concern and media coverage . . . focused upon issues" that "would have been the subject of many comments had the [agency] seen fit to solicit" them); *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 46 (D.D.C. 2018) (same).

EPA insists that the FOIA Rule cannot be legislative because it does not "encode a substantive value judgment." EPA Mot. at 15-18 & n.2. While the Circuit has sometimes referred to that as a relevant factor in distinguishing between legislative and procedural rules, it has never deemed it a *necessary* condition. To the contrary, in several cases the Circuit deemed a rule legislative, and not procedural, without any inquiry into whether it encoded a "value judgment." *E.g.*, *Mendoza*, 754 F.3d at 1023-25; *EPIC*, 653 F.3d at 5-7. Regardless of whether that particular factor is present here, several other relevant factors all point in the direction of the FOIA Rule being legislative.

Accordingly, the Court should grant CREW summary judgment on Claim One, and deny EPA's motion to dismiss that claim.

II. CREW Has Standing to Challenge the FOIA Rule as Arbitrary and Capricious (Count Two)

Count Two alleges that the FOIA Rule is arbitrary and capricious under the APA. *See* FAC ¶¶ 54-56. EPA moves to dismiss this claim for lack of standing, incorporating by reference the same standing arguments it asserts as to Count One. EPA Mot. at 19-20. CREW, in turn, incorporates it response to those arguments. *See supra* Part I.A. And while the "relaxed" standard for causation and redressability in procedural rights cases does not apply to Count Two, the normal test is readily satisfied. Indeed, there is an unbroken causal link between CREW's injuries—deprivation of information to which it is entitled under FOIA, deprivation of the ability to submit FOIA requests directly to EPA regional offices, and impairment of its statutory right to "prompt" release of records responsive to its FOIA requests—and the FOIA Rule. At minimum, the rule "materially increase[s] the probability of injury,'" which is enough to show causation.

Nat'l Treasury Emps. Union, 636 F. Supp. 2d at 73. And granting CREW's requested relief—vacatur of the FOIA Rule—would redress its injuries. CREW has standing to assert Count Two.

III. The FOIA Rule is Contrary to Law Insofar as it Purports to Authorize EPA to Withhold a "Portion of a Record on the Basis of Responsiveness" (Count Three)

A. CREW is Entitled to Summary Judgment on Count Three

Count Three alleges that the FOIA Rule is, on its face, contrary to law insofar as it purports to authorize EPA officials to "withhold . . . a portion of a record on the basis of responsiveness." FAC ¶¶ 57-60 (quoting 40 C.F.R. § 2.103(b) (2019)). EPA concedes that "FOIA does not authorize agencies to 'redact particular information within the responsive record on the basis that the information is non-responsive.'" EPA Mot. at 20 (quoting *AILA*, 830 F.3d at 677). But it insists that § 2.103 does not actually authorize such withholdings, and that CREW is simply "misreading" the rule. *Id.* at 20-22. Yet CREW's reading is based on the rule's plain text and is reinforced by several canons of construction; EPA's reading is supported by neither.

In *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019), the Supreme Court expounded at length on the proper framework for interpreting agency regulations, as well as the limited circumstances under which a court may defer to "agencies' reasonable readings of genuinely ambiguous regulations" under the doctrine of *Auer* deference. *See Auer v. Robbins*, 519 U.S. 452 (1997). The Court made clear that the first, and potentially only, step is to discern the regulation's plain meaning, for "[i]f uncertainty does not exist, . . . [t]he regulation then just means what it means—and the court must give it effect, as the court would any law." *Kisor*, 139 S. Ct. 2415. This requires the Court to "exhaust all the 'traditional tools' of construction," meaning it "must 'carefully consider[]' the text, structure, history, and purpose of a regulation." *Id.* That a

regulation is difficult to decipher, moreover, does not necessarily make it ambiguous, for "hard interpretive conundrums, even relating to complex rules, can often be solved" using normal tools of construction. *Id.*

Section 2.103(b) of the 2019 FOIA Rule reads, in full, as follows:

> (b) Authority to issue final determinations. The Administrator, Deputy Administrators, Assistant Administrators, Deputy Assistant Administrators, Regional Administrators, Deputy Regional Administrators, General Counsel, Deputy General Counsels, Regional Counsels, Deputy Regional Counsels, and Inspector General or those individuals' delegates, are authorized to make determinations required by 5 U.S.C. 552(a)(6)(A) [of the FOIA], including *to issue final determinations whether to release or withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA*, and to issue "no records" responses.

40 C.F.R. § 2.103(b) (2019) (emphasis added). On its face, then, the rule plainly authorizes the enumerated EPA officials to "withhold . . . a portion of a record on the basis of responsiveness." *Id.* (emphasis added).

The surrounding text and overall structure of the clause reinforce that understanding. The clause consists of two parts: the first part describes actions the agency can take ("release or withhold a record or a portion of a record") and the second part describes the potential bases for the agency's action ("on the basis of responsiveness or under one or more exemptions under the FOIA"). The most natural reading of this language is that the entire "on the basis of" clause modifies the immediately preceding language regarding "withhold[ing]" records, but *not* the language regarding the "release" of records. That reading makes sense because neither FOIA nor EPA's regulations require an agency to articulate a "basis" for *releasing* records, but do require such a "basis" for *withholding* records. Indeed, FOIA's "plain language" establishes a

"strong presumption in favor of disclosure [that] places the burden on the agency to justify the withholding of any requested documents," or "the redaction of . . . information in a particular document." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). It would therefore be incongruous to read the clause as authorizing EPA to "release" records "on the basis of responsiveness or under one or more exemptions under the FOIA"—a point EPA concedes. EPA Mot. at 21. The only reasonable reading is that the clause authorizes EPA to (1) "release . . . a record," and (2) "withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA."

CREW's reading accords with two related canons of construction: the "nearest reasonable referent canon" and the "rule of the last antecedent." *Grecian Magnesite Mining & Shipping Co. v. IRS*, 926 F.3d 819, 824 (D.C. Cir. 2019). "Labels aside, the point" of both canons "is the same: ordinarily, and within reason, modifiers and qualifying phrases attach to the terms that are nearest." *Id.* Here, the phrase "withhold a record or a portion of a record" immediately precedes the "on the basis of" qualifying phrase, and thus is the "nearest referent" to which that qualifier could attach. It is also a "reasonable" referent because, as noted, FOIA mandates that agencies provide a "basis" for all withholdings, but not for the release of records.

CREW's reading also accords with the "distributive canon." "The distributive canon . . . recognizes that sometimes '[w]here a sentence contains several antecedents and several consequents,' courts should 'read them distributively and apply the words to the subjects which, by context, they seem most properly to relate.'" *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018). This canon "has the most force when the [provision] allows for one-to-one

matching," and "when an ordinary, disjunctive reading is linguistically impossible." *Id.* (citing *Huidekoper's Lessee v. Douglass*, 3 Cranch 1, 67, 2 L.Ed. 347 (1805) (Marshall, C.J.) (applying distributive canon where purely disjunctive reading "would involve a contradiction in terms")).

Here, the clause at issue uses the term "or" several times. *See* 40 C.F.R. § 2.103(b) (2019) ("issue final determinations whether to release ***or*** withhold a record ***or*** a portion of a record on the basis of responsiveness ***or*** under one or more exemptions under the FOIA") (emphasis added). A purely disjunctive reading—under which the word "or" is read as connecting *all* of the clause's antecedents and consequents, *see Encino*, 138 S. Ct. at 1141—is not coherent because, as noted, it would result in the verb "release" applying to the phrase "a record on the basis of responsiveness or under one or more exemptions under the FOIA." Applying the distributive canon, though, the clause does logically permit one-to-one matching of antecedents and consequents, namely if it is read as authorizing EPA to (1) "release . . . a record," or (2) "withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA." This interpretation sensibly construes the clause's "several antecedents" and "consequents . . . distributively and appl[ies] the words to the subjects which, by context, they seem most properly to relate." *Encino*, 138 S. Ct. at 1141.

In contrast to CREW's reading, EPA's reading is based not on any "tool of construction," but the agency's mere *ipse dixit*. The agency summarily proclaims that "the most natural reading of the regulation is that the listed reasons for a final determination . . . do not necessarily apply to each type of final determination . . . . Instead, the regulation authorizes EPA to withhold 'a portion of a record' 'under one or more exemptions under the FOIA' but not on the basis of

responsiveness." EPA Mot. at 20-21. That reading may be a convenient litigating position for EPA, but it is flatly contradicted by the regulation's plain text and canons of construction. EPA is simply trying to rewrite the rule to save it from invalidation.

EPA also insists that its reading is reinforced by language in the FOIA Rule's preamble. EPA Mot. at 20. But a rule's "preamble cannot . . . be used to contradict [its] text." *Texas Children's Hosp. v. Azar*, 315 F. Supp. 3d 322, 334 (D.D.C. 2018) (citing *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 569-70 (D.C. Cir. 2002)). In any event, the preamble language EPA cites is fully consistent with CREW's reading. It merely states that § 2.103(b) "clarifies" that certain officials "have the authority to respond to FOIA requests" in order to "eliminate[] a potential conflict in the existing regulations and ensure[] consistency of responses across the Agency." Nothing in that explanation undermines CREW's plain-language reading of § 2.103(b) as purporting to authorize EPA to withhold "a portion of a record on the basis of responsiveness." Nor is it necessary, as EPA seems to suggest, for the preamble to state an affirmative intent to authorize withholdings contrary to FOIA.

As a last-ditch effort, EPA offers a one-sentence argument invoking *Auer* deference. *See* EPA Mot. at 21-22. But as the Supreme Court recently explained in *Kisor*, that doctrine is "cabined . . . in varied and critical ways." 139 S. Ct. at 2418. The Court identified at least five conditions for *Auer* deference to apply: (1) "[f]irst and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous, . . . [a]nd before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction"; (2) even "[i]f genuine ambiguity remains, moreover, the agency's reading must still be 'reasonable'"; (3)

"the regulatory interpretation must be one actually made by the agency"—i.e., "it must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views"; (4) "the agency's interpretation must in some way implicate its substantive expertise"; and (5) the "agency's reading . . . must reflect 'fair and considered judgment,'" and not "merely [a] 'convenient litigating position.'" *Id.* at 2415-18.

Suffice it to say, EPA's one-sentence argument fails to meaningfully grapple with the numerous requirements outlined in *Kisor*. That is not surprising, as they are plainly not met here. For starters, § 2.103(b) is not "genuinely ambiguous" because, as demonstrated above, "traditional tools of construction" confirm that CREW's interpretation is the only reasonable reading of the regulation. EPA's reading, meanwhile, is purely results-driven and lacks any reasoned basis. Nor has EPA shown that its reading reflects the agency's "authoritative" or "official" position. And EPA's interpretation of its FOIA regulations does not implicate its "substantive expertise." EPA's area of expertise of course, is the protection of human health and the environment. *See* EPA, Our Mission, *available at* https://bit.ly/2O9WKkH. The FOIA regulations do not concern those issues; they concern the agency's handling of FOIA requests. Neither EPA nor any other agency has specialized expertise in FOIA warranting deference. *See Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997) ("[W]e will not defer to an agency's view of FOIA's meaning" because "[n]o one federal agency administers FOIA," and "[o]ne agency's interpretation of FOIA is therefore no more deserving of judicial respect than the interpretation of any other agency."). Finally, EPA's reading appears to be nothing more than a "convenient litigating position" seeking to defend a facially indefensible rule. None of the

conditions for *Auer* deference are met here. Because § 2.103(b) of the FOIA Rule is plainly contrary to FOIA, it should be vacated.

B. Count Three is Ripe

Even though Count Three raises a purely legal, facial challenge to the FOIA Rule, EPA asserts it is not ripe. EPA Mot. at 22-25. EPA is wrong. "The ripeness doctrine has two components: . . . [1] 'the fitness of the issues for judicial review and [2] the hardship to the parties of withholding court consideration.'" *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1281 (D.C. Cir. 2005). As to the fitness prong, the Circuit has "often observed that a purely legal claim in the context of a facial challenge, such as [CREW's] claim, is 'presumptively reviewable.'" *Id.*; *see Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1035, 1041 (D.C. Cir. 1991) ("In light of the wholly legal and facial nature of the present challenge, we cannot agree that our ability to review the agency's decision would be increased by delay.").

EPA offers nothing to overcome this presumption of reviewability. It contends that CREW's claim is "speculative" because it "presume[s]" EPA will invoke the rule to unlawfully withhold non-responsive portions of responsive records. EPA Mot. at 24. But "a purely legal challenge to final agency action is not unfit for review merely because the application of the disputed rule remains within the agency's discretion." *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 854 (D.C. Cir. 2006) (citing *Nat'l Ass'n of Home Builders*, 417 F.3d at 1282). Nor would the issues benefit from a more "concrete" setting because, whether addressed in this case or a future one relating to a particular FOIA request, the inquiry will turn on a single legal

question: does the FOIA Rule confer authority on EPA exceeding what is permitted by statute? Because "[n]o further factual development is necessary to evaluate [CREW's] challenge," which depends solely on whether the rule exceeds EPA's "statutory . . . authority under" FOIA, there is "no reason . . . to 'wait for [the] rule to be applied to see what its effect will be.'" *Nat'l Ass'n of Home Builders*, 417 F.3d at 1282.

Once a court has "determined that an issue is clearly fit for review, there is no need to consider 'the hardship to the parties of withholding court consideration.'" *Cohen v. United States*, 650 F.3d 717, 735 (D.C. Cir. 2011) (en banc). Thus, particularly "in the context of APA challenges," a "lack of hardship cannot tip the balance against judicial review, is largely irrelevant, and is not an independent requirement divorced from the consideration of the institutional interests of the court and agency."[9] *Id.* (internal citations and quotation marks omitted); *see also Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 493 (D.C. Cir. 1988) (deeming hardship prong irrelevant after holding that challenge to unlawful FOIA policy was fit for review). Since the fitness prong is plainly met in this case, the ripeness analysis ends there.

Even if hardship were relevant, it too would weigh in favor of immediate review. EPA claims that any unlawful withholdings "can be remedied by filing a lawsuit if and when this happens in the context of a specific FOIA request." EPA Mot. at 23. But the law of this Circuit "disposes of any suggestion that Congress intended the repeated filing of lawsuits to be a practical requirement for obtaining records from an agency flaunting" FOIA. *Judicial Watch,*

[9] Insofar as a panel of the Circuit suggested a contrary view over 30 years ago in *Webb v.HHS*, 696 F.2d 101, 106 (D.C. Cir. 1982) (quoted in EPA Mot. at 23), it has been superseded by the Circuit's en banc decision in *Cohen*.

Inc. v. DHS, 895 F.3d 770, 780 (D.C. Cir. 2018). After all, "[f]iling a lawsuit hardly ensures 'prompt[] availab[ility]'" of records as required by FOIA, "not to mention the chilling effect that litigation costs can have on members of the public much less the burden imposed on the courts." *Id.* (quoting 5 U.S.C. § 552(a)(3)(A)). Moreover, by EPA's logic, a party could *never* raise a facial challenge to a FOIA regulation that purports to authorize unlawful withholdings, and could only assert such challenges on a case-by-case basis. "The practical consequence of" such a "ripeness argument" would be a "judicially created exemption for" suits challenging FOIA regulations. *Cohen*, 650 F.3d at 736. "But Congress has not made that call," and courts "are in no position to usurp that choice on the basis of ripeness." *Id.* Count Three is ripe.

For all these reasons, the Court should grant CREW summary judgment on Count Three and deny EPA's motion to dismiss that claim.

IV. If the Court Determines that FOIA Authorizes the Relief Sought in Count Three, CREW Alternatively Seeks Such Relief in Count Four and is Entitled to Summary Judgment on that Claim

Counts Three and Four plead alternative theories challenging the same unlawful aspect of the FOIA Rule—i.e., § 2.103(b)'s purported authorization to withhold a "portion of a record on the basis of non-responsiveness." *See* FAC ¶¶ 57-62. The only difference is that Count Three seeks relief under the APA, while Count Four seeks relief under FOIA. *See id.*; *see also* Fed. R. Civ. P. 8(d)(2), (e)(2) (plaintiffs may plead alternative theories of relief). EPA moves to dismiss both claims. In a Kafkaesque line of reasoning, EPA first argues that CREW's APA claim fails because FOIA provides an "adequate alternative remedy," but then, in the next breath, asserts

that CREW's alternative FOIA claim fails as well. *See* EPA Mot. at 25-28; *see also* 5 U.S.C. § 704 (precluding APA relief if plaintiff has "other adequate remedy").

In evaluating this issue, the Court should follow the two-step analytical approach of *CREW v. DOJ*, 846 F.3d 1235, 1241-46 (D.C. Cir. 2017). Under that approach, the Court must "begin by considering whether CREW may obtain the relief it wants under FOIA." *Id.* at 1241. If it can, then the path is clear: CREW must proceed under Count Four instead of Count Three, and, for the reasons outlined *supra* Part III, is entitled to summary judgment on that claim. "But if . . . FOIA does not provide the relief [CREW] seeks," then the Court must proceed to "consider whether . . . FOIA nonetheless offers an adequate remedy." *Id.*

On the first question, there are strong grounds for finding that FOIA does authorize relief materially identical to CREW's requested APA relief (i.e., an order declaring the challenged rule provision unlawful and setting it aside). "FOIA section 552(a)(4)(B) vests courts with broad equitable authority," which goes well "beyond [ordering] the simple release of extant records." *Id.* at 1241-42. "This circuit's case law reflects the wide latitude courts possess to fashion remedies under FOIA, including the power to issue prospective injunctive relief." *Id.* Thus, FOIA authorizes plaintiffs to "challenge an agency's 'policy or practice' where it 'will impair the party's lawful access to information in the future." *Id.* at 1242 (quoting *Newport Aeronautical Sales v. Air Force*, 684 F.3d 160, 164 (D.C. Cir. 2012)). FOIA also allows courts to issue "prospective injunction[s] with an affirmative duty to disclose . . . subject records to a plaintiff." *Id.* at 1242, 1246. It stands to reason that FOIA likewise allows a plaintiff to raise a facial

challenge to an agency regulation as contrary to FOIA, and seek appropriate declaratory and "prospective injunctive relief" forbidding its application.

EPA does not explicitly dispute the availability of such relief under FOIA. It instead asserts that Count Four fails on the merits for the same reason as Count Three—namely, because it rests on a "misreading" of § 2.103(b). EPA Mot. at 27. That argument is thoroughly debunked *supra* Part III.A. EPA also contends that Count Four fails because it rests on "speculation" that the unlawful aspect of the rule will be applied to CREW. EPA Mot. at 27-28. But this, too, is merely a rehash of the ripeness argument refuted *supra* Part III.B.

If, however, the Court finds a "gap" between CREW's requested APA relief and "the relief FOIA affords," then it must consider whether the more-limited FOIA remedy is an "adequate" alternative to APA relief. *CREW*, 846 F.3d at 1244. "In evaluating the availability and adequacy of alternative remedies, . . . the court must give the APA 'a hospitable interpretation such that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review.'" *Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009). Although "§ 704 was not intended to provide additional judicial remedies 'where the Congress has provided special and adequate review procedures,'" it "'should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action.'" *El Rio Santa Cruz Neighborhood Health Ctr. v. HHS*, 396 F.3d 1265, 1270 (D.C. Cir. 2005) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 903-04 (1988)). Thus, "[a]n alternative remedy will not be adequate under § 704 if the remedy offers only 'doubtful and limited relief.'" *Garcia*, 563 F.3d at 522. Nor is an alternative remedy adequate where it

imposes a process that is "arduous, expensive, and long" and does not aid in resolving the underlying legal question. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815-16 (2016). While courts have deemed FOIA to provide an adequate alternative to APA relief in some contexts, none of those cases involved a facial challenge to a formal agency regulation. *See* EPA Mot. at 25-26 (citing cases).

EPA claims that FOIA provides an adequate alternative remedy because it allows CREW to challenge particular unlawful withholdings on a case-by-case basis. EPA Mot. at 26. As explained above, FOIA authorizes relief far broader than that, and EPA does not explicitly argue otherwise. But assuming the Court were to find that FOIA, unlike the APA, does *not* permit facial challenges to agency regulations and instead requires CREW to await a particular unlawful withholding before bringing suit, that would hardly be an "adequate" alternative to APA relief. Indeed, relief deeming a single withholding unlawful is far narrower than relief outright invalidating an agency regulation. The former relief would only apply in one case, whereas the latter would permanently halt the unlawful practice. The former relief would also require CREW to be wrongfully denied information to which it is entitled under FOIA *before* bringing suit, whereas the latter would allow CREW to bring a facial challenge prior to the rule's application. That is a critical distinction because forcing CREW to wait for the rule's application, and judicial review thereof, would needlessly compound the deprivation of its statutory right to "prompt[]" access to records. 5 U.S.C. § 552(a)(3)(A); *see also Judicial Watch*, 895 F.3d at 780 ("[f]iling a lawsuit hardly ensures 'prompt[] availab[ility]'" of records as required by FOIA, "not to mention the chilling effect that litigation costs can have on members of the public much less the burden

imposed on the courts"). Insofar as such a process would be burdensome, time consuming, and do nothing to aid judicial review of the purely legal question raised by CREW's claim, it would not be an adequate alternative to APA relief. *See Hawkes*, 136 S. Ct. at 1815 (requiring "landowner to apply for a permit and then seek judicial review in the event of an unfavorable decision" was not "adequate alternative" to pre-enforcement APA relief because "the permitting process can be arduous, expensive, and long," and would not develop issues that would aid judicial review).

CONCLUSION

The Court should deny EPA's motion to dismiss and grant CREW's motion for partial summary judgment.

Date: November 15, 2019

Respectfully Submitted,

/s/ Nikhel Sus
NIKHEL S. SUS
(D.C. Bar No. 1017937)
Citizens for Responsibility and Ethics in Washington
1101 K St. NW, Suite 201
Washington, D.C. 20005
Telephone: (202) 408-5565
Fax: (202) 588-5020
nsus@citizensforethics.org

Counsel for Plaintiff