UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. **U.S. ENVIRONMENTAL PROTECTION AGENCY**, et al., Defendants.	)	Civil Action No. 19-cv-2181 (TJK)

REPLY IN SUPPORT OF MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff's Cross-Motion for Partial Summary Judgment and Opposition to Defendants' Motion to Dismiss ("Opp'n") is long on rhetoric but short on substance. As discussed in detail herein, Plaintiff has presented no persuasive arguments against dismissal of this action or for entering summary judgment in Plaintiff's favor. The Court should dismiss the case and deny Plaintiff's Cross-Motion.

Plaintiff cannot meet its burden to establish the jurisdictional requirements of standing. Although Plaintiff offers various theories in an attempt to show standing, none of them cure the basic deficiency in this case, which is that Plaintiff has not suffered and is not likely to imminently suffer any injury-in-fact arising from the very modest regulatory changes at issue in this case. Counts Three and Four of the Amended Complaint are also unripe because they effectively seek an advisory opinion about the meaning of a regulation that has never been applied to Plaintiff, requires no action by Plaintiff, and threatens no imminent harm.

Even if the Court reaches the merits, it should dismiss the case for failure to state a claim. The minor regulatory changes at issue here plainly fall within the procedural exception to notice-and-comment rulemaking. In arguing otherwise, Plaintiff relies on doctrines developed to determine if an agency rule is *interpretive*, but those doctrines are inapplicable to the *procedural* exception, as another Court in this District has held. And Plaintiff makes no serious attempt to distinguish the numerous decisions cited in Defendants' Motion in which courts have found rules that are materially indistinguishable from those at issue here to be procedural. Plaintiff's claims alleging that the Rule authorizes EPA officials to withhold portions of records on grounds of responsiveness also fail to state a claim. The only sensible reading of the pertinent regulation is that it identifies the EPA officials who are delegated authority to release or withhold records in

accordance with the statute, such as by withholding portions of records under a FOIA exemption but not on the basis of responsiveness.

For these reasons, as discussed further below, the Court should dismiss the Amended Complaint and deny Plaintiff's Cross-Motion for Partial Summary Judgment.

ARGUMENT

I. The Court Should Dismiss Count One and Deny Plaintiff's Motion for Summary Judgment as to That Count

A. Plaintiff Lacks Standing to Bring Count One

1. Plaintiff Must Demonstrate an Injury-In-Fact

Plaintiff has failed to rebut Defendants' showing that Plaintiff lacks standing to bring Count One, which alleges that EPA violated the APA's procedural requirements when it issued *Freedom of Information Act Regulations Update* (the "Rule"). Mot. to Dismiss the First Am. Compl. ("Mot.") at 8-15. In its attempt to establish standing, Plaintiff argues that it satisfies a "relaxed" standard applicable to procedural rights cases. Opp'n at 13. It is well-settled, however, that "even if styled as a procedural rights case, Plaintiffs' burden to demonstrate a constitutionally sufficient injury is not, and cannot be, relaxed." *Delta Air Lines, Inc. v. Exp.-Import Bank*, 85 F. Supp. 3d 250, 264 (D.D.C. 2015). In other words, Plaintiff still "must demonstrate that the defendant caused the particularized injury, and not just the alleged procedural violation." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) ("the particular nature of a case does not—and cannot—eliminate any of the 'irreducible' elements of standing"); *see also Int'l Bhd. of Teamsters v. Transp. Sec. Admin.*, 429 F.3d 1130, 1135 (D.C. Cir. 2005) ("It is true that in a procedural rights case the burden to show imminence and redressability of injury may be lessened but the complainant must nonetheless show it has itself 'suffered personal and particularized injury.'"); *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("Unlike redressability . . . the

requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.").

Indeed, the only aspects of standing that are relaxed in procedural rights cases are those "for immediacy and redressability[.]" *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). Specifically, procedural rights plaintiffs "need not demonstrate that but for the procedural violation the agency action would have been different" or "that correcting the procedural violation would necessarily alter the final effect of the agency's action on the plaintiffs' interest." *Id*. As applied here, this means only that Plaintiff does not have to show that EPA would have issued a different Rule if Plaintiff had been allowed to submit comments, but Defendants have never suggested that Plaintiff must make such a showing. Therefore, the "relaxed" standard does not affect any of the issues in dispute in this case and certainly does not lessen Plaintiff's obligation to demonstrate injury.

2. Plaintiff Has Not Shown a Substantial Probability that EPA Will Improperly Withhold Information Imminently

Plaintiff has failed to demonstrate an injury to support standing. As an initial matter, Plaintiff's assertion that it has "concrete" and "particularized interests" in EPA's FOIA regulations because it is a frequent FOIA requester, Opp'n at 14-15, does not demonstrate an injury. The mere fact that Plaintiff is a frequent FOIA requester does not mean it has been or will be injured by any change to an agency's FOIA regulations.[1]

[1] Plaintiff's cited cases are not to the contrary. The challenged policies at issue in *National Security Counselors v. CIA*, 898 F. Supp. 2d 233, 243 (D.D.C. 2012) would have injured the plaintiffs because they involved, for example, a refusal to process certain FOIA requests. Plaintiff's other cited decisions are distinguishable for similar reasons. *See MuckRock, LLC v. CIA*, 300 F. Supp. 3d 108, 132 (D.D.C. 2018) (finding standing because the injury alleged was based on the failure to produce requested documents); *Gatore v. U.S. Dep't of Homeland Sec.*, 327 F. Supp. 3d 76, 90 (D.D.C. 2018) (finding standing to challenge alleged policy and practice of "never providing any part" of a particular type of record which plaintiff was allegedly entitled to receive); *Khine v. United States Dep't of Homeland Sec.*, 334 F. Supp. 3d 324, 330 (D.D.C. 2018) (finding standing

Plaintiff contends that the Rule causes injury in three ways. Opp'n at 15. First, Plaintiff argues that the "Rule purports to authorize EPA officials to withhold . . . non-responsive 'portions' of responsive records," Opp'n at 15-16, in violation of *American Immigration Lawyers Association v. Executive Office for Immigration Review ("AILA")*, 830 F.3d 667 (D.C. Cir. 2016). At the outset, Plaintiff's claim is based on a misreading of the Rule, which plainly does not authorize anyone to withhold a portion of a record on responsiveness grounds in violation of the FOIA. Mot. at 20-22. But even assuming it purported to do so, Plaintiff would lack standing to challenge it. Plaintiff does not allege that EPA has ever withheld from Plaintiff any portion of a record on responsiveness grounds. Instead, Plaintiff's supposed injury is based on its belief that EPA might do so at some point in the future. But as the D.C. Circuit has repeatedly held, a plaintiff "alleging only future injuries confronts a significantly more rigorous burden to establish standing." *Chamber of Commerce of the United States v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011); *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015) (the requirement to "show an imminent future injury . . . creates 'a significantly more rigorous burden to establish standing' than that on parties seeking redress for past injuries"). In this situation, "[t]o qualify for standing, the [plaintiff] must demonstrate that the alleged future injury is 'imminent.'" *Chamber of Commerce*, 642 F.3d at 200. "And to 'shift[] injury from 'conjectural' to 'imminent,'" the plaintiff "must show that there is a 'substantial . . . . probability' of injury." *Id*.

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to challenge alleged policy and practice of issuing FOIA response letters that violate FOIA by, *inter alia*, providing insufficient information to allow a meaningful appeal); *CREW v. Cheney*, 593 F. Supp. 2d 194, 227 (D.D.C. 2009) (finding standing where there was "no question that the destruction of . . . records would cause [the plaintiff] injury when he seeks to use them in the future"); *CREW v. Exec. Office of the President*, 587 F. Supp. 2d 48, 61 (D.D.C. 2008) (finding plaintiff would be injured if deleted records were not restored because plaintiff would not be able to obtain the records). In contrast to these cases, here, Plaintiff has not shown that the Rule has caused or will cause it any injury.

Plaintiff has not come close to meeting the "substantial probability of injury" standard. There is not a single allegation anywhere in the Amended Complaint suggesting that EPA will withhold any portion of a record from Plaintiff on grounds of responsiveness, much less well-pled allegations plausibly suggesting there is a "substantial . . . probability" that EPA will do so "imminent[ly.]" *Id*. The most the Amended Complaint says on this issue is that the "Rule *purports to authorize* EPA officials to withhold information that CREW is entitled to receive by law, including non-responsive, non-exempt portions of records responsive to CREW's FOIA requests." Am. Compl. ¶ 46 (emphasis added). Plaintiff does not contend, nor could it, that the Rule *requires* EPA officials to withhold portions of records on grounds of responsiveness, only that it "purports to authorize" officials to do so. *Id*. But even if the Rule were misread to authorize officials to withhold nonresponsive portions of records as Plaintiff claims – a point with which EPA vigorously disagrees – that would not suggest officials will actually exercise that authority given the D.C. Circuit's clear prohibition in *AILA*.

Indeed, the inference that the Rule will cause EPA officials to withhold information in a manner that violates controlling D.C. Circuit authority – authority that EPA has expressly acknowledged – is implausible. To indulge Plaintiff's speculation "would require the Court to employ an assumption that federal government officials act[] in bad faith," but "[t]he D.C. Circuit requires courts to apply the opposite presumption, namely, that government officials discharge their duties in good faith." *Competitive Enter. Inst. v. EPA*, 67 F. Supp. 3d 23, 33 (D.D.C. 2014) (citing *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008) ("We must presume an agency acts in good faith[.]")). In short, Plaintiff has not shown a substantial probability that EPA officials will imminently violate binding legal obligations, particularly where Plaintiff does not

allege that EPA has ***ever*** invoked the Rule to withhold a nonresponsive portion of a record from Plaintiff, or from any other requester for that matter.

3. Plaintiff Has Not Alleged That the Rule Imposes any Compliance Burden

Plaintiff next argues that the Rule "affects" Plaintiff by requiring that all FOIA requests be submitted to EPA's National FOIA Office. Opp'n at 16. But the mere fact that a regulation "affects" a plaintiff does not imply that it *injures* the plaintiff. The latter is a prerequisite for standing. *See Silha v. ACT, Inc.*, 807 F.3d 169, 174-75 (7th Cir. 2015) (plaintiffs did not establish injury in fact where the challenged conduct "did not make Plaintiffs worse off"). Under Plaintiff's theory, Plaintiff would have standing to challenge even the most trivial changes to FOIA regulations so long as they applied to Plaintiff. The Court should reject Plaintiff's extremely broad theory of standing.

Plaintiff also vaguely suggests the Rule may impose some unspecified "burden" related to mailing FOIA requests to the National FOIA Office. *See* Opp'n at 17. But Plaintiff never explains what that burden might be and the Amended Complaint contains no allegations to suggest any such burden actually exists. If Plaintiff believes there is some burden associated with mailing FOIA requests to one address instead of another, it should have described that burden so that Defendants and the Court could evaluate Plaintiff's theory. Of course, Plaintiff could not do so because there is clearly no such burden.

Plaintiff's claim of burden rings especially hollow considering that it can identify only ***one*** FOIA request – from more than a decade ago – that Plaintiff sent to an EPA regional office before filing its complaint in this case. *See* Rappaport Decl. (Dkt. No. 14-2) ¶¶ 8-9 & Ex. 8 (FOIA request dated May 7, 2008). This is so even though Plaintiff acknowledges that it "frequently files" FOIA requests with EPA. *Id*. ¶ 4. Accordingly, even if there were some conceivable burden from the

requirement to mail FOIA requests to the National FOIA Office instead of regional offices (there is not), Plaintiff has not established that ***it*** has experienced or will imminently experience such burden.[2]

4. Plaintiff Has Not Plausibly Alleged That the Rule Will Cause Delays in Processing Plaintiff's FOIA Requests

Plaintiff's unsupported speculation that the Rule will create a "risk" of delays in the processing of Plaintiff's FOIA requests also does not confer standing. Opp'n at 17. To establish standing based on a risk of harm, Plaintiff must "demonstrate that due to the [Rule] there is 'both (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm [to Plaintiff] with that increase[d risk] taken into account." *Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 189 (D.D.C. 2015) (emphasis in original). Plaintiff has not met this standard. Regarding the requirement that mailed requests be sent to the National FOIA Office instead of regional offices, Plaintiff argues that the change will delay requests seeking records from regional offices because EPA "will require additional time to analyze and route requests[.]" Opp'n at 18. But, as noted above, at the time Plaintiff filed suit, it did not have ***any*** FOIA requests pending that sought records from regional offices. Plaintiff therefore cannot "demonstrate that it has pending claims that are likely to implicate" the challenged policy, as is necessary for standing. Opp'n at 15 (quoting *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 262).

[2] To be sure, after filing its initial complaint, Plaintiff submitted four FOIA requests to EPA regional offices, Rappaport Decl. ¶¶ 8-9; *see also* Am. Compl. ¶ 44, but it is well settled that "standing is assessed as of the time a suit commences[.]" *Chamber of Commerce*, 642 F.3d at 199; *Lujan*, 504 U.S. at 569 n.4. "[T]he party invoking the jurisdiction of the court cannot rely on events that unfolded after the filing of the complaint to establish its standing." *See Wilbur v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010) (internal quotations and citation omitted). For purposes of analyzing standing, therefore, the Court should disregard the FOIA requests Plaintiff sent after filing its complaint.

Even if Plaintiff had a request seeking records from a regional office pending when it filed suit, it still would lack standing. Plaintiff's belief that EPA "will require additional time to analyze and route requests," Opp'n at 18, ignores the fact that requests were analyzed and frequently routed to other offices under EPA's prior regulations as well. EPA's *Procedures for Responding to Freedom of Information Act Requests* that has been in effect since before the Rule instructs that "[t]he receiving FOIA Office will determine where responsive records are most likely located in the Agency" and "[w]hen a request is received at an Agency FOIA Office and all responsive records are determined to be located in another Region or Headquarters, the receiving FOIA Office will assign the request in FOIAonline to the appropriate FOIA Office for processing." Kaminer Decl., Ex. A at 5. Indeed, as the Rule explains, EPA centralized FOIA intake in the National FOIA office in part "to minimize the number of misdirected requests sent to the agency." 84 Fed. Reg. 30028, 30030. Accordingly, given that EPA has always had to analyze and potentially route requests, Plaintiff has failed to show that the centralization of intake has "substantially increased" the risk of processing delays or that there is a "substantial probability" of such delays arising therefrom. *Food & Water Watch*, 79 F. Supp. 3d at 189.

Plaintiff fares no better by claiming that the centralized-submission requirement will increase the National FOIA Office's workload and thereby cause delays in FOIA processing. Opp'n at 19. That argument rests on the unsupported assumption that the National FOIA Office did not reallocate staff responsibilities or increase staffing to account for the additional intake responsibilities. Plaintiff has presented no evidence and made no allegation to suggest that EPA has not adjusted staffing. Instead, Plaintiff claims only that there is "no indication" that EPA did so. Opp'n at 20. But "[t]he absence of evidence is not evidence." *Thompson v. Sullivan*, 987 F.2d 1482, 1491 (10th Cir. 1993). Because it is Plaintiff's burden to establish standing, *see Spokeo,*

Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016), that absence counts against Plaintiff, not Defendants. Nevertheless, Defendants have submitted a declaration by the head of the National FOIA Office, which explains that in the lead-up to the effective date of the Rule, that office hired additional staff, which expanded its capacity to perform intake-related work. *See* Decl. of Timothy Epp ¶¶ 4-5.

Plaintiff's belief that the National FOIA Office might not be able to handle the additional intake responsibilities is further premised on yet another false assumption – that the National FOIA Office "already faces a substantial FOIA backlog and . . . routinely fails to timely respond to CREW's FOIA requests[.]" Opp'n at 20 n.5. Plaintiff has erroneously conflated the National FOIA Office and EPA headquarters generally, but they are not the same. The National FOIA Office does not perform FOIA processing for every FOIA request handled by headquarters, as Plaintiff incorrectly assumes. Rather, at headquarters, FOIA requests are assigned to "the Program . . . Office believed to most likely house the majority of responsive records." Kaminer Decl., Ex. A at 6. Those offices, as well as other program offices that may have responsive records, are "responsible for identifying, collecting and reviewing records within the scope of the request," *id*. at 6, 9. Thus, what Plaintiff asserts to be "common sense" – that "staff at EPA's National FOIA Office will have to devote more time to their increased FOIA workload that they could have otherwise spent on processing pending FOIA requests" – is yet another example of Plaintiff misunderstanding the relevant facts.

Plaintiff also insists, implausibly, that the Rule's clarification of individuals with authority to respond to FOIA requests will somehow cause processing delays. Opp'n at 21-22. Notably, Plaintiff's theory presented in its brief is not what Plaintiff articulated in its Amended Complaint. In the complaint, Plaintiff's theory was that the Rule expanded the *types* of FOIA determinations

that political appointees were authorized to make. Specifically, Plaintiff claimed that under the prior regulations, political appointees "only had authority to issue 'initial determinations' on FOIA requests, not final determinations" but that the Rule authorizes them "to issue final determinations[.]" Am. Compl. ¶ 33; *see also id.* ¶¶ 18, 35 (alleging that the Rule "reflects a change in existing regulation and policy, under which only career staff would issue final determinations"). That alleged expansion of authority is what Plaintiffs claimed would cause processing delays. *See id.* ¶ 46 (alleging that there is a risk of "further delays" because the Rule "empower[s]" "political appointees . . . to issue final determinations"). But Defendants' Motion explained that Plaintiff had misread the pertinent regulations and that the Rule did not change the types of FOIA determinations that EPA officials are authorized to make. Mot. at 13 (explaining that the change in terminology from "initial determinations" to "final determinations" did not change the character of the determinations being made). Plaintiff did not respond to that argument and no longer contends that there is any difference between "initial determinations" and "final determinations." Plaintiff therefore concedes that the theory it presented to the Court in its initial complaint and amended complaint was erroneous. Plaintiff also thereby concedes that the authority of several senior EPA officials to make FOIA determinations has been in place for many years and is not the result of the Rule.

Having abandoned its initial theory, Plaintiff now resorts to arguing that the Rule will cause processing delays because it lists four additional positions that are authorized to issue FOIA determinations and that were not specifically listed in the prior version of the regulations, namely, Deputy Regional Administrators, Deputy General Counsels, Regional Counsels, and Deputy Regional Counsels. Opp'n at 22. But although the prior regulations did not specifically list those positions, those regulations did authorize the "head of an office, *or that individual's designee* . . .

to grant or deny" FOIA records requests. 40 C.F.R. § 2.103(b) (2018) (emphasis added). Accordingly, office heads were expressly permitted to designate other individuals to make FOIA determinations. Similarly, the prior regulations permitted EPA to redelegate FOIA decisionmaking authority to positions beyond those specified in the regulations. *See* 40 C.F.R. § 2.104(h) (2018). And, in fact, EPA officials have for years redelegated FOIA determination authority to various other officials beyond those specified in Section 2.104(h). *See* Kaminer Decl., Ex. B (redelegations); *see also id*, Ex. C at 2 (at EPA, "redelegated authority may be exercised by any official in the chain of command down to the official to whom it has been specifically delegated or redelegated."). Accordingly, Plaintiff has failed to show that the Rule caused any relevant change in FOIA determination authority, much less a change that has "substantially increased" the risk of processing delays. *Food & Water Watch*, 79 F. Supp. 3d at 189.

Moreover, Plaintiff's argument is premised on the belief that "[p]olitical-appointee review delays EPA's FOIA processing times." Am. Compl. ¶ 26. Plaintiff might be surprised to learn that almost none of the EPA personnel currently occupying the positions of Deputy Regional Administrator, Deputy General Counsel, Regional Counsel, or Deputy Regional Counsel are political appointees. Of the 34 such positions across the agency, all but two are currently staffed by career, non-political personnel. *See* Declaration of Rhonda Jones ¶¶ 10-11. Therefore, even if Plaintiff had shown that the Rule expanded FOIA determination authority to these 34 personnel, which Plaintiff has not shown, that would not suggest a substantially increased risk of delays, under Plaintiff's own theory.[3]

[3] Plaintiff also argues in passing that the Rule "eliminat[es] a provision forbidding delegation to personnel below the level of 'division director or equivalent.'" Opp'n at 22. Plaintiff's one sentence argument fails to show that this aspect of the Rule substantially increased the risk of processing delays, particularly given that EPA's delegation from the Administrator still maintains that same limitation on redelegations. *See* Kaminer Decl., Ex. E.

B. Count One Fails to State a Claim

1. Plaintiff's Proposed Standard is Inapplicable

Count One also fails on the merits. Defendants' Motion demonstrated that the provisions of the Rule at issue in this case are "rules of agency organization, procedure, or practice" and therefore are exempt from notice-and-comment requirements under the APA's procedural exception. Mot. at 15-19. In response, Plaintiff argues, first, that the Rule is legislative because it supposedly "amends a prior legislative rule," specifically, EPA's 2002 revisions to its FOIA regulations (the "2002 Rule"). Opp'n at 26. Plaintiff cites a four-factor test described in *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993) to argue that a rule is legislative if it "effectively amends a prior legislative rule." Opp'n at 27. Plaintiff's argument is meritless, for multiple reasons.

First, Plaintiff erroneously seeks to apply to the procedural exception doctrines developed to distinguish interpretative rules from legislative rules, a wholly unrelated issue. Opp'n at 26-27. Interpretive rules are "issued by an agency to advise the public of the agency's construction of the statutes and the rules which it administers." *Steinhorst Assocs. v. Preston*, 572 F. Supp. 2d 112, 119 (D.D.C. 2008). "If the rule merely restates duties or reminds parties of those already contained in existing regulations, rather than spelling out new obligations, it may be considered interpretative and not subject to the requirements of APA § 553." *Id*. at 119-20. Situations sometimes arise where an agency announces a new rule in, for example, the form of an agency manual or statement and the question becomes whether that rule is, in effect, an amendment of an existing legislative rule. *See, e.g.*, *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 234-37 (D.C. Cir. 1992). In those situations, courts consider whether the new rule is consistent or inconsistent with the existing legislative rule. *Id*. at 235. If inconsistent, the rule "is in reality not an 'interpretation' of the governing statute but rather a substantive amendment of the regulations."

Id. at 236. Accordingly, the *American Mining* test that Plaintiff seeks to apply here is to determine whether a particular agency rule is or is not interpretive. *See Steinhorst*, 572 F. Supp. 2d at 120 ("[T]he D.C. Circuit set forth a test comprised of four criteria for determining *whether a rule is legislative or interpretative*.") (emphasis added). That test does not determine whether a rule is *procedural*, which is the question in this case. *See Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 105 n.18 (D.D.C. 2013) (finding arguments based on the "four-factor test in *American Mining* . . . inapposite" to determining whether the procedural exception applies because that decision "addressed the distinction between legislative rules, on the one hand, and 'interpretive rules' and 'general statements of policy' on the other").

Second, Plaintiff's argument incorrectly assumes that the APA's procedural exception applies differently to amendments of existing rules than to the formulation of new rules. It does not. The APA defines "rule making" as "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Therefore, the procedural exception applies to any formulation, amendment, or repeal of any "rule[] of agency organization, procedure, or practice[.]" 5 U.S.C. § 553(b)(3)(A). This also means that if a given rule is determined to be procedural under Section 553(b)(3)(A), it necessarily did not amend a prior legislative rule. A particular rule cannot be legislative in one moment and procedural the next.

Plaintiff cites no cases, and Defendants are aware of none, in which a court found that a "rule[] of agency organization, procedure, or practice" was not subject to the procedural exception, either because it amended an existing regulation or for any other reason. On the contrary, the D.C. Circuit has rejected the argument that an "amendment to [] regulations required a formal rulemaking procedure" where the amendment "involved . . . a procedural change[.]" *Ranger v. FCC*, 294 F.2d 240, 243-44 (D.C. Cir. 1961). And the cases cited by Plaintiff do not advance its

argument. The "single issue" in *American Mining* was whether certain agency policy letters were "interpretative rules under the [APA.]" 995 F.2d at 1107. Likewise, the court in *National Family Planning* considered only whether agency directives were "exempt from notice and comment rulemaking as an interpretative rule." 979 F.2d at 229. *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) and *Association of Flight Attendants-CWA v. Huerta*, 785 F.3d 710 (D.C. Cir. 2015) did not discuss the procedural exception at all, and the court in *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir.) expressly found that the rules at issue in that case were *not* procedural because they had substantive impact on the public. *Id*. at 1023-24.

Plaintiff also cites *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015), another case about interpretive rules, but that decision supports Defendants' position, not Plaintiff's. In *Perez*, the Supreme Court rejected a D.C. Circuit doctrine holding that "if an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish' under the APA 'without notice and comment.'" *Id*. at 1205. The Supreme Court held that that doctrine was "contrary to the clear text of the APA's rulemaking provisions," which contains a "categorical" exception to the notice-and-comment requirement for interpretive rules. *Id*. at 1206. Likewise, the procedural exception is also categorical and exempts any covered rule from the APA's notice and comment requirement.

Ignoring this core holding of *Perez*, Plaintiff instead quotes a portion of the Court's opinion referring to the APA "mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Id*. But Plaintiff has taken that statement out of context. As is evident by the Court's reasoning, the Court meant only that the APA sets forth the same rulemaking procedures for amendments of rules as for the initial formulation of rules. Indeed, as authority, the Court cited *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502,

515 (2009) for the proposition that "the APA 'make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." And the Court explained that the import of the statement quoted by Plaintiff is the following: "Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule." *Id*. Nothing in the *Perez* decision supports Plaintiff's view that an agency that chooses to follow notice-and-comment rulemaking when first promulgating a rule, whether or not required to by the APA, is forever committed to follow the same procedures for any future amendments of that rule. In fact, the reverse is true. *See Sierra Club v. EPA*, 873 F.3d 946, 952–53 (D.C. Cir. 2017) ("Even if . . . full APA procedures were used in the release of the 2010 Guidance . . . an agency's decision to embrace additional process cannot convert a guidance document into a legislative rule. . . . That doesn't transform them into legislative rules."). Plaintiff's "theory, if adopted, would discourage agencies from pursuing the very public engagement [i]t seek[s]." *Id*.

2. The Rule Does Not Amend a Legislative Rule

Even if Plaintiff's proposed standard – considering whether the rule that was amended was legislative – were somehow applicable to the procedural exception, Plaintiff has misapplied that standard here. Plaintiff argues that the 2019 Rule amends "the 2002 FOIA Rule," and that the relevant question is "whether the 2002 FOIA Rule was legislative." Opp'n at 26-27. There are multiple problems with that argument. Plaintiff's first error is its attempt to define the 2002 Rule *in its entirety* as legislative, when in fact the 2002 Rule was actually a collection of many different rules, *see* 65 Fed. Reg. 19703 (proposing a "comprehensive revision" to EPA's existing FOIA regulations and "to add new provisions" thereto); 67 Fed. Reg. 67303 (final rule containing revised regulations), each of which must be individually classified as either legislative or not. For

example, in *National Association of Manufacturers v. Department of Labor*, 1996 U.S. Dist. LEXIS 10478, *46 (D.D.C. July 22, 1996), the "plaintiff challenge[d] several provisions of [a] Final Rule as violative of the notice and comment provision of the APA." *Id*. at *32; *see also id*. at *7-16. The court first determined "which, if any, of the challenged regulations are interpretative or procedural rules." *Id*. at *33. Then, only "for those regulations that [were] neither interpretive nor procedural, the court . . . consider[ed] whether defendant gave adequate notice and opportunity for comment." *Id*. Accordingly, Plaintiff's arguments concerning whether the 2002 Rule *overall* should be considered legislative, Opp'n at 27-29, do not address whether the particular rules at issue here are legislative.

Plaintiff also points to specific provisions of the 2002 Rule that Plaintiff claims were legislative because they allegedly effectuated a change in existing law or policy. Opp'n at 28-29 (listing various such provisions and arguing that "the provisions establishing criteria FOIA requesters must satisfy to obtain records or expedited processing . . . are definitely legislative"). But even assuming that is true, it is entirely irrelevant because ***none*** of those provisions are at issue in this case. *Id*. The rules at issue in this case are those concerning the locations to which FOIA requests may be sent and the positions with authority to make FOIA determinations. To the extent there may have been other rules addressed by the 2002 rulemaking that could be considered legislative, that has no bearing whatsoever on whether the rules at issue here are legislative.

Lastly, Plaintiff erroneously suggests that the rules at issue in this case were promulgated "in the first instance" through the 2002 Rule. Opp'n at 26. They were not. Earlier versions of those rules existed prior to 2002, *see* 40 C.F.R. § 2.106 (2001) (locations to which FOIA requests may be sent); *id*. § 2.113 (2001) (positions with authority to make FOIA determinations), and in fact they have existed since the time that EPA first promulgated FOIA regulations in 1976, *see* 41

Fed. Reg. 36902, at 36903, 36905. Accordingly, the legislative or non-legislative character of the 2002 Rule simply has no relevance to whether those rules are "rules of agency organization, procedure, or practice[.]" 5 U.S.C. § 553(b)(3)(A).

3. The Challenged Provisions of the Rule are Procedural Because They Do Not Alter Rights or Make Substantive Value Judgments

In deciding whether a rule is procedural, this Circuit has employed two overlapping questions: whether it "alter[s] the rights or interests of the parties," *James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000), and whether it "encodes a substantive value judgement," *Public Citizen v. Department of State*, 276 F.3d 634, 640 (D.C. Cir. 2002). As discussed in Defendants' Motion, the rules at issue here plainly are procedural under this standard. Indeed, the Motion cited several decisions holding that rules which are materially indistinguishable from those at issue here were procedural. Mot. at 16-19.

Plaintiff has no credible response to those decisions. First, Plaintiff (partially) applies the test from *American Mining*, arguing that the 2019 Rule is legislative because EPA invoked its delegated authority in adopting it and published it in the Code of Federal Regulations. Opp'n at 30. But as discussed above, the purpose of the *American Mining* test is to determine whether a rule is *interpretive*, not procedural. *Am. Mining*, 995 F.2d at 1112; *Nat'l Sec. Counselors*, 931 F. Supp. 2d at 105 n.18. Even if the *American Mining* test were applicable here, which it is not, the D.C. Circuit does not take "publication in the Code of Federal Regulations, or its absence, as anything more than a snippet of evidence of agency intent." *Health Ins. Ass'n of America, Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) (holding that in the case before it "the snippet is not enough."). Accordingly, the fact that the rules at issue here were published in the Code of Federal Regulations does not make them substantive.

Next, Plaintiff claims that the Rule alters the rights of FOIA requesters because it allegedly authorizes EPA to withhold portions of records on grounds of responsiveness. Opp'n at 30. As Defendants explained in their Motion and herein, the Rule does not and cannot do what Plaintiff claims, nor would EPA interpret it in that way. *See* Mot. at 20-22; *infra* Section III(A).

Plaintiff also insists that the Rule creates a "new substantive burden" because it allegedly "risk[s] unreasonably delaying EPA's FOIA processing[.]" Opp'n at 31. Not only has Plaintiff failed to plead facts plausibly suggesting the Rule will increase the risk of delay, *see supra* Section I(A)(4), but Plaintiff seems to be applying the now-discarded legal standard considering "whether a given procedure has a substantial impact on parties[.]" *Public Citizen*, 276 F.3d at 640 (explaining that the D.C. Circuit has shifted away from that standard). The law is now that "an otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties." *James V. Hurson Associates*, 229 F.3d at 281. Accordingly, Plaintiff's unsubstantiated theory that the Rule will cause delay, even if it were true, would not make the Rule legislative. *See Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1055 (D.C. Cir. 1987) ("So long as the standard of review remains unchanged, the focus and timing of review are matters for agency discretion, falling well within § 553's procedural exemption.").

Plaintiff fares no better by referencing the supposed "public backlash generated by the rule." Opp'n at 31. If Plaintiff is suggesting this alleged backlash can retroactively transform a procedural rule into a legislative one, Plaintiff is wrong. Nothing in the APA itself or in the decisions interpreting the procedural exception support that view. On the contrary, the Supreme Court has cautioned that a court may not "impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good" and has disapproved of such a "judge-made procedural right." *Perez*, 135 S. Ct. at 1207. Also, Plaintiff

cites to dicta in *Electronic Privacy Information Center v. Department of Homeland Security*, 653 F.3d 1, 6 (D.C. Cir. 2011), but that case does not suggest that an agency must follow notice-and-comment rulemaking simply because there may be some public interest in a rule. In any event, the public response to the Rule to which Plaintiff refers is based largely on misunderstandings of what the Rule actually does, as this case vividly illustrates. *See supra* at 9-10 (discussing Plaintiff's incorrect belief that the Rule authorizes political appointees to make different types of determinations than before); *infra* at 20-22 (discussing Plaintiff's incorrect belief that the Rule authorizes EPA to withhold portions of records on grounds of responsiveness).

For these reasons, the procedural exception applies to the challenged provisions of the Rule and EPA was not required to undertake notice and comment rulemaking. The Court should dismiss Count One and deny Plaintiff's summary judgment motion as to this claim.

II. The Court Should Dismiss Count Two for Lack of Standing

Count Two of the Amended Complaint alleges that the provisions of the Rule that Plaintiff challenges are arbitrary and capricious under the APA. Am. Compl. ¶¶ 54-56. As discussed in the Motion and above, Plaintiff failed to plausibly allege that it has suffered any actual or imminent injury as a result of the very modest changes the Rule makes to EPA's FOIA regulations. *See* Mot. at 8-15, 19-20; Section I(A) *supra*. For the same reasons, Plaintiff lacks standing to challenge those changes in Count Two.

III. The Court Should Dismiss Count Three and Deny Plaintiff's Motion for Summary Judgment as to That Count

A. Count Three Fails to State a Claim

In Count Three, Plaintiff alleges that the Rule violates the APA "[i]nsofar as . . . [it] . . . purports to authorize agency officials to 'withhold . . . a portion of a record on the basis of responsiveness.'" Am. Compl. ¶ 59. Defendants' Motion explained that Plaintiff had misread the

Rule, which does not authorize anyone to do so. Mot. at 20-22. The regulation lists "final determinations" that individuals are authorized to perform, namely, "to release . . . a record," "to release . . . a portion of a record," to "withhold a record," or to "withhold . . . a portion of a record." 40 C.F.R. § 2.103(b). It then lists the potential reasons for a final determination: "responsiveness" or "one or more exemptions under the FOIA." *Id*. Defendants explained that the most natural reading of the regulation is that each of the listed reasons for a final determination does not necessarily apply to every type of final determination. Mot. at 20-21. In particular, the "responsiveness" reason does not apply to a decision to "withhold a portion of a record." *Id*.

In other words, the regulation should be read distributively. "Where 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); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 214 (2012) ("Distributive phrasing applies each expression to its appropriate referent."); *id*. at 214-16 (describing cases that applied the principle).

Plaintiff concedes that the regulation is phrased at least in part distributively. *See* Opp'n at 35-36. Thus, Plaintiff agrees with the basic premise underlying Defendants' argument – that each *reason* for a final determination does not apply to each *type* of determination. *Id*. at 34. The question, then, is how to determine which reasons pair with which types of final determinations. As Plaintiff's own-cited authority explains, courts consider "context" to determine how the words "seem most properly to relate." *Encino Motorcars*, 138 S. Ct. at 1141. That is the approach Plaintiff used when it concluded that the listed reasons for a final determination do not modify "the language regarding the 'release' of records." Opp'n at 34 (reasoning that "neither the FOIA nor EPA's regulations require an agency to articulate a 'basis' for releasing records"). In other words,

Plaintiff looked to what the law requires and, on that basis, attempted to determine which reasons logically apply to which types of final determinations.

By the same logic, the "responsiveness" reason does not modify the language authorizing officials to "withhold . . . a portion of a record." Mot. at 20-21. The law of this Circuit is clear that the FOIA does not authorize agencies to "redact particular information within the responsive record on the basis that the information is non-responsive." *AILA*, 830 F.3d at 677. *AILA*, decided in 2016, was the law in 2019 when the Rule was promulgated. It would be incongruous to read the clause as authorizing EPA to do something that is expressly forbidden by binding D.C. Circuit authority, where most FOIA cases are brought. The only reasonable reading is that 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. Entire records, on the other hand, may be withheld "on the basis of responsiveness." This reading also accords with the portion of the regulatory text explaining that the final determinations listed are those "required by" the FOIA. 40 C.F.R. § 2.103(b) (citing 5 U.S.C. § 552(a)(6)(A)). A determination to withhold a nonresponsive portion of a record is not "required by," or even permitted by, the FOIA.

Although Plaintiff concedes, as it must, that the regulation is distributive, it nevertheless insists that both of the listed reasons for a final determination apply to both the withholding of a record and the withholding of a portion of a record. Opp'n at 34-36. Plaintiff's reasoning is unpersuasive. First, Plaintiff argues that its reading accords with canons of construction providing that "modifiers and qualifying phrases attach to the terms that are nearest." *Id*. at 35. Plaintiff relies on those canons only to argue that the phrase "on the basis of responsiveness or under one or more exemptions" modifies the phrase "withhold a record or a portion of a record" but does not modify "release . . . a record." *Id*. But that does not answer the question in dispute. Plaintiff does

not explain why those canons would suggest that the phrase "on the basis of responsiveness" modifies the entire phrase "withhold a record or a portion of record" instead of just the phrase "withhold a record." In any event, Plaintiff has misapplied these canons. Each of the listed final determinations all share the same word "record." *See* 40 C.F.R. § 2.103(b) (final determinations are to "release . . . a *record*," to "release . . . a portion of a *record*," to "withhold a *record*," and to "withhold . . . a portion of a *record*") (emphasis added). The word "record" that is shared by each final determination is immediately adjacent to the "on the basis of" clause, meaning that each final determination is equidistant from the "on the basis of" clause. And yet both sides agree that the "on the basis of" clause does *not* modify each type of final determination. These canons therefore do not elucidate the regulation's meaning, much less compel Plaintiff's interpretation.

Plaintiff also relies on the distributive canon but, again, Plaintiff does so only to disconnect the phrase "release . . . a record" from the "on the basis of" clause. Opp'n at 35-36. Plaintiff does not explain why the distributive canon would suggest that the phrase "on the basis of responsiveness" modifies the phrase "withhold . . . a portion of a record." As discussed above, applying the distributive canon to determine which words "most properly . . . relate," *Encino Motorcars*, 138 S. Ct. at 1141, leads to the contrary conclusion – that the phrase "on the basis of responsiveness" does not modify the phrase "withhold . . . a portion of a record."

Contrary to Plaintiff's argument, EPA's interpretation of its own regulation is entitled to deference. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019) ("Want to know what a rule means? Ask its author."). EPA's interpretation is its official position as expressed, not only in its legal briefs in this and related matters, but also in internal agency manuals and correspondence by the EPA Administrator. For instance, EPA's *Procedures for Responding to Freedom of Information Act Requests*, which is currently in effect, includes instructions to "determine which records (or

portions) may be released." Kaminer Decl., Ex. A at 10. The Procedures explain that where there is a "Partial Grant/Partial Denial," "[p]ortions of the record will be withheld from the requester *if covered by either one or multiple FOIA exemptions*" and "[t]he portions of the record that are not redacted are released to the requester." *Id*. (emphasis added). Nothing in the Procedures suggests EPA may withhold a portion of a record because it is nonresponsive. EPA's position was also stated in an official letter from Administrator Andrew R. Wheeler in response to a request for briefings by a U.S. Senate subcommittee. Kaminer Decl., Ex. D. There, Administrator Wheeler expressly confirmed that "EPA's updated regulation does not authorize the Agency to withhold a portion of a record as not responsive in violation of the statute or applicable case law." *Id*. at 2. These materials qualify as authoritative sources of the agency's interpretation of its own regulations. *Belt v. EmCare, Inc.*, 444 F.3d 403, 415 (5th Cir. 2006) (applying *Auer* deference to agency position expressed in agency handbook); *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 780 (2d Cir. 2002) (according "controlling weight" to a policy letter drafted by the Department of Education's Office of Special Education Programs regarding a Department of Education regulation).

Plaintiff argues that EPA's interpretation of its regulation is not entitled to deference because the regulation does not relate to the protection of human health and the environment and therefore allegedly does not implicate EPA's "substantive expertise." Opp'n at 38. But the concept of substantive expertise is much broader than Plaintiff suggests. Both "historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court[.]" *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153 (1991). EPA obviously has historical familiarity with its regulation, having drafted it just months ago. *See*

Kisor, 139 S. Ct. at 2412 (noting that "[t]he agency that 'wrote the regulation' will often have direct insight into what that rule was intended to mean" and that this is especially true where little time has passed between "the rule's issuance and its interpretation"). And EPA has developed expertise relating to FOIA by handling thousands of FOIA requests each year. *See* Opp'n at 19 (discussing EPA's extensive FOIA program). Accordingly, unlike situations where the subject matter of a regulation is "distan[t] from the agency's ordinary' duties or 'fall[s] within the scope of another agency's authority," *Kisor*, 139 S. Ct. at 2417, EPA plainly has sufficient expertise pertaining to the regulation at issue here to warrant deference. *See id*. (requiring only that "the agency's interpretation must in some way implicate its substantive expertise"). Nor is EPA's interpretation a "convenient litigating position," as Plaintiff contends. It is fully consistent with EPA's FOIA policy that has been in place since long before this litigation began. *See* Kaminer Decl., Ex. A at 10. Accordingly, deference is due to EPA's interpretation.

Even if the Court does not apply heightened deference under *Kisor* and *Auer v. Robbins*, 519 U.S. 452 (1997), it should still accord EPA's interpretation "a measure of deference proportional to the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012). For the reasons discussed above, EPA has provided a sound and convincing interpretation of its own regulation. The Court should adopt that interpretation.

B. Count Three is Unripe

At a minimum, the Court should dismiss Count Three as unripe. The very reason why the "ripeness doctrine exists [is] to prevent the courts from wasting [their] resources by prematurely entangling [them]selves in abstract disagreements," such as that presented by this claim. *Nat'l*

Treasury Emp. Union v. United States, 101 F.3d 1423, 1431 (D.C. Cir. 1996). Plaintiff asks the Court to interpret a regulation that requires no action by Plaintiff and which does not threaten any imminent harm. Plaintiff's insistence that the Court spend its judicial resources adjudicating this claim is especially perplexing considering that EPA disclaims the authority that Plaintiff contends the regulation grants. There is no realistic scenario in which EPA, after achieving dismissal of Plaintiff's claim, would reverse course and begin withholding nonresponsive portions of records in violation of D.C. Circuit authority. But even if that were to occur, Plaintiff would have an adequate remedy under FOIA.

Nevertheless, Plaintiff insists that the claim is ripe for adjudication because it is purely legal. Opp'n at 39. But Plaintiff entirely ignores the Supreme Court decision cited in Defendants' Motion which rejected just such an argument. In *National Park Hospital Association v. Department of Interior*, 538 U.S. 803 (2003), as here, the plaintiff brought "a facial challenge to the regulation[.]" *Id*. at 807. "Although the question presented" was "a purely legal one," the Court nevertheless held that it was not fit for review and that "judicial resolution of the question presented [] should await a concrete dispute[.]" *Id*. at 812. The Court also made clear that its holding applied broadly: "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [APA] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Id*. at 808. Plaintiff has no response to this decision.

The decisions cited by Plaintiff are not to the contrary. Indeed, the court in *National Association of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005) agreed that "even purely legal issues may be unfit for review[.]" *Id*. at 1282. Similarly, in *National*

Treasury Employees Union v. Chertoff, 452 F.3d 839 (D.C. Cir. 2006), the court explained that a "purely legal claim may be less fit for judicial resolution when it is clear that a later as-applied challenge will present the court with a richer and more informative factual record." *Id*. at 855. The court went on to find one of the plaintiff's claims to be unfit for review even though it presented a "purely legal question[.]" *Id*. And the decision in *Mountain State Telephone & Telegraph Company v. FCC*, 939 F.2d 1035 (D.C. Cir. 1991) was based on the court according "heavy weight" to Congress's views concerning the timing of challenges specifically to FCC regulations, which are not relevant here. *Id*. at 1041.

In this case, it is appropriate to defer judicial review until such time as the issue may arise in the concrete setting of a particular FOIA determination. Doing so should avoid the need for judicial review altogether, because EPA agrees that the FOIA does not permit it to withhold portions of responsive records on grounds of responsiveness. The "court's interest in avoiding unnecessary adjudication" therefore makes this case unfit for review. *City of Houston v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1430-31 (D.C. Cir. 1994). And even if Plaintiff were to eventually file another claim, factual development during the interim, such as any pertinent FOIA determinations or agency statements or interpretations concerning the regulation, would inform the Court's decisionmaking. *See Webb v. HHS*, 696 F.2d 101, 107 (D.C. Cir. 1982) (finding challenge to FOIA regulation unripe because if the regulation "were challenged in the context of a particularized FOIA request, a court would be able to determine what documents, if any, should have been released, but were not, because of [the regulation]"); *id*. at 106 ("[I]n the absence of a particularized FOIA request, the validity of [the FOIA regulation] is not ripe for judicial review."). In short, going forward either EPA will withhold portions of records on grounds of responsiveness or it will not. If the former, such withholdings could be relevant to a court's interpretation of the

regulation. If the latter, adjudication will be unnecessary. Either way, this case is unfit for review now.

As to hardship, Plaintiff argues that the burden of filing another lawsuit in the event of an unlawful withholding is too great. Opp'n at 40. But Plaintiff again simply ignores binding authority cited in Defendants' Motion, which rejected that argument. In *Webb*, the D.C. Circuit ruled that a challenge to a FOIA regulation was unripe and it specifically held that the "burden of having to file another suit" under the FOIA was "hardly the type of hardship which warrants immediate consideration of an issue presented in abstract form." 696 F.2d at 106-08; *see also Nw. Coal. for Alts. to Pesticides v. EPA*, 254 F. Supp. 2d 125, 133 (D.D.C. 2003) (applying *Webb* and finding challenge to FOIA regulation unripe where only hardship was having to file another lawsuit); *Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998) (party did not suffer hardship where the "result of postponement [of judicial review] is the burden of participating in further administrative and judicial proceedings"). The one decision cited by Plaintiff on this issue, *Judicial Watch, Inc. v. DHS*, 895 F.3d 770 (D.C. Cir. 2018), does not suggest otherwise. In that case, the "only question [] before the court [was] whether the complaint adequately alleged a 'policy or practice' claim under FOIA." *Id*. at 774. The decision says nothing about the ripeness doctrine. *See generally id*.[4]

For these reasons, Count Three is unripe and should be dismissed, and the Court should deny Plaintiff's summary judgment motion as to this count as well.

[4] The Court should decline Plaintiff's invitation to skip the hardship analysis. Opp'n at 40. So long as there are "doubts about the fitness of the issue for judicial resolution," courts "will 'balance the institutional interests in postponing review against the hardship to the parties that will result from delay.'" *Nat'l Ass'n of Home Builders v. United States Army Corps of Eng'rs*, 440 F.3d 459, 465 (D.C. Cir. 2006). This balancing is the "typical[]" approach taken by the D.C. Circuit when evaluating ripeness. *TRT Telecomms. Corp. v. FCC*, 876 F.2d 134, 141 (D.C. Cir. 1989).

C. Plaintiff Has An Adequate Alternative Remedy

Count Three should be dismissed for the additional reason that Plaintiff has an adequate alternative remedy if EPA ever withholds a portion of a record on grounds of responsiveness. *See* 5 U.S.C. § 704. If that occurs, Plaintiff can avail itself of the mechanism Congress has already established precisely for this purpose – Plaintiff can simply file an ordinary FOIA action seeking disclosure of records allegedly improperly withheld. *See* 5 U.S.C. § 552(a)(4)(B).

A FOIA action easily qualifies as an "other adequate remedy" precluding APA review. 5 U.S.C. § 704. Plaintiff knows this already, having litigated – and lost – a very similar issue in the D.C. Circuit. In *Citizens for Responsibility & Ethics in Washington v. Department of Justice ("CREW")*, 846 F.3d 1235 (D.C. Cir. 2017), Plaintiff sought to enforce FOIA's affirmative disclosure provision that require agencies to make certain records available electronically to the public. *Id*. at 1240. Instead of filing suit under the FOIA, however, Plaintiff brought an APA claim. *Id*. at 1241. Plaintiff sought various forms of relief, including an order requiring the agency to make records available to the public, relief which was not available through FOIA. *Id*. at 1241-44.

Even though FOIA could not provide Plaintiff will all the relief sought, the D.C. Circuit had "little doubt that FOIA offers an 'adequate remedy' within the meaning of section 704, as it exhibits all of the indicators [the D.C. Circuit has] found to signify Congressional intent [to preclude APA review.]" *Id*. at 1245. Specifically, "FOIA contains an express private right of action and provides that review in such cases shall be '*de novo*'." *Id*. "[I]n FOIA Congress established 'a carefully balanced scheme of public rights and agency obligations designed to foster greater access to agency records than existed prior to its enactment.'" *Id*. "The creation of both agency obligations and a mechanism for judicial enforcement in the same legislation suggests that

FOIA itself strikes the balance between statutory duties and judicial enforcement that Congress desired." *Id*. Therefore, the D.C. Circuit held that "FOIA offers CREW precisely the kind of 'special and adequate review procedure[]' that Congress immunized from 'duplic[ative]' APA review." *Id*. at 1245-46.

Notwithstanding the decision in *CREW*, Plaintiff insists that FOIA does not provide an adequate remedy here, but none of its arguments are persuasive. First, Plaintiff argues that a FOIA action would not be adequate if it does not authorize courts to invalidate agency regulations. Opp'n at 44. But the D.C. Circuit in *CREW* rejected a similar argument. There, as noted, Plaintiff sought disclosure of records to it and broader relief enforcing FOIA's affirmative disclosure provision and requiring the agency to make records available to the public generally. 846 F.3d at 1244. The fact that Plaintiff could not obtain the broader programmatic relief did not make the FOIA remedy inadequate. The "[s]ignificant[]" fact was that "CREW itself [could] gain access to all the records it seeks" under FOIA. *Id*. at 1246. Likewise, here, Plaintiff can gain access to any records it may later seek by bringing suit under FOIA, if there is ever an improper withholding.

Next, Plaintiff argues that the FOIA remedy is inadequate because it would require Plaintiff to wait until after it has been wrongfully denied information before bringing suit. Opp'n at 44. The question is not whether Plaintiff can obtain precisely the same relief under FOIA as it seeks under the APA but rather whether the relief under FOIA is "adequate." *See CREW*, 846 F.3d at 1245 ("'the alternative remedy need not provide relief identical to relief under the APA' in order to have preclusive effect"; "an alternative remedy need offer only relief of 'the same genre' to 'preclude APA review.'"). By waiting until there has been an improper withholding before filing suit, Plaintiff must do no more than what every other putative FOIA plaintiff must do. *See* 5 U.S.C. § 552(a)(4)(B); *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) ("Under

[the FOIA], federal jurisdiction is dependent on a showing that an agency has (1) improperly (2) withheld (3) agency records."). The FOIA judicial review mechanism reflects Congress's determination about what constitutes an adequate remedial scheme. Moreover, to the extent that Plaintiff suggests it will have to file a series of lawsuits "on a case-by-case basis" to challenge an "unlawful practice," it offers nothing to support its assumption. Opp'n at 44. Indeed, Plaintiff has not alleged that EPA has ***ever*** invoked the Rule to withhold a nonresponsive portion of a responsive record from Plaintiff or from any other requester, much less that there is any "practice" of doing so.

Next, Plaintiff cites *Judicial Watch*, but that decision did not involve an APA claim and did not consider when a remedy may be considered an adequate alternative to the APA. Rather, the issue in that case was whether the plaintiff had stated a plausible FOIA policy or practice claim "by alleging prolonged, unexplained delays in producing non-exempt records[.]" 895 F.3d at 780. As discussed, nothing remotely similar has been alleged here. *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016) is also far afield from this case. There, the alternative remedy would have required the plaintiff first to spend more than $100,000 to undertake various assessments, surveys, and inventories in order to prepare a permit application. *Id*. at 1815-16. Nothing like that would be required to file an ordinary FOIA action, which Plaintiff routinely does.

Because Plaintiff plainly has an adequate remedy for any improper withholding that theoretically could occur in the future, the Court should dismiss Count Three and deny Plaintiff's summary judgment motion as to that count.

IV. The Court Should Dismiss Count Four and Deny Plaintiff's Motion for Summary Judgment as to That Count

The fact that there is an adequate remedy under the FOIA for any future withholding does not mean that Plaintiff's FOIA pattern or practice claim, as alleged in Count Four, succeeds. *See CREW*, 846 F.3d at 1246 ("[O]ur determination that FOIA is the proper vehicle for CREW's claim is entirely distinct from the question whether CREW is entitled to relief."). Even assuming the Court has jurisdiction over such claim, *Tax Analysts*, 492 U.S. at 142, the claim fails because it hinges on a flatly erroneous interpretation of the Rule as authorizing EPA to withhold portions of records on grounds of responsiveness. As already discussed, the Rule does not so authorize EPA. *See* Mot. at 20-22; *supra* Section III(A). Nor has Plaintiff alleged any facts "establishing that the agency has adopted, endorsed, or implemented some policy or practice that constitutes an ongoing 'failure to abide by the terms of the FOIA.'" *Muttitt v. Dep't of State*, 926 F. Supp. 2d 284, 293 (D.D.C. 2013).

Lastly, there is nothing "Kafkaesque" about the conclusion that FOIA provides an adequate alternative remedy even though Plaintiff's FOIA policy or practice claim fails. Opp'n at 41-42. An adequate remedy under 5 U.S.C. § 704 does not mean a remedy of Plaintiff's choosing. The adequate FOIA remedy here is an ordinary FOIA action to compel disclosure of records under 5 U.S.C. § 552(a)(4)(B). Although such a claim may become available if there is ever an improper withholding, a FOIA policy or practice claim is nevertheless unavailable for the reasons discussed above. And, of course, Plaintiff could always file a policy or practice claim if the facts supported such a claim, which they do not here.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss the Amended Complaint and deny Plaintiff's Cross-Motion for Summary Judgment.

Respectfully submitted,

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