IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY *et al.*, Defendants.	No. 18-cv-2473

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT UNDER RULE 59(e) AND FOR LEAVE TO AMEND UNDER RULE 15(a)

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INTRODUCTION

After full briefing and a hearing, the Court denied Plaintiffs' Motion for a Preliminary Injunction and dismissed with prejudice this case, in which Plaintiffs asserted violations of the Federal Records Act ("FRA") in three claims brought under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, against the U.S. Department of Homeland Security ("DHS"). Plaintiffs now seek to amend the Court's judgment under Rule 59(e), arguing that the Court clearly erred by dismissing their Claim One with prejudice. If the Court were to agree, Plaintiffs also seek leave to file a second amended complaint under Rule 15(a). Plaintiffs' proposed amendment would wholly re-write their Claim One, which originally asserted a broad programmatic challenge to DHS's records management program in its entirety, but would now, if their request is granted, argue that a specific DHS directive and instruction are deficient. Plaintiffs allege that these documents are deficient on the basis that they do not parrot language that is already present in the FRA and the regulations promulgated by the National Archives and Records Administration ("NARA"), language that, in any case, is already incorporated by reference in the DHS documents.

Plaintiffs' motion should be denied. Contrary to Plaintiffs' assertions, Rule 59(e) imposes a stringent standard for any amendment of the Court's judgment, which is not met when, as here, Plaintiffs were on notice that the Court could dismiss their claims with prejudice, yet they never argued that the Court should not do so. Indeed, Plaintiffs were also in possession of all information needed to raise their proposed new Claim One well before the Court's ruling—at the latest, when Defendants attached to their Motion to Dismiss the very directive and instruction Plaintiffs now seek to challenge—yet they never sought to amend their complaint to raise this new claim until after judgment was entered. Plaintiffs therefore have waived these arguments. At the very least, the Court's failure to address issues that Plaintiffs never raised certainly was not clear error. Nor

can it be deemed error to dismiss claims with prejudice when they fail for a reason—here, the lack of any discrete "agency action" as the subject of Plaintiffs' challenge—that cannot be cured simply by adding more details in the complaint's factual allegations. Dismissal with prejudice would never be appropriate if, as Plaintiffs appear to contend, the Court were required to consider the possibility that a plaintiff might raise an entirely new claim, under a new legal theory, whenever the original claim is dismissed. Instead, however, courts typically dismiss APA claims with prejudice when no agency action was identified, and the Court here was correct to do the same. Plaintiffs' attempt at another bite at the apple post-judgment should be denied.

Plaintiffs also fail to justify their request for leave to file a second amended complaint. To the contrary, their request should be rejected at the outset because of their undue delay in seeking such an amendment. Again, Plaintiffs were in possession of the DHS directive and instruction they seek to challenge well before the Court issued its ruling. Their decision not to seek to amend their complaint at that time was a tactical one, which does not excuse their belated request now.

Plaintiffs' request should also be denied on grounds of futility. The notion that DHS's documents are inadequate because they incorporate by reference, rather than copy, the language of the FRA and NARA regulations is untenable. By their own terms, DHS's directive and instruction do require DHS employees to comply with the FRA and NARA regulations. Plaintiffs' proposed new claim thus would be subject to dismissal with prejudice just as their old claims were.

BACKGROUND

Plaintiff CREW initially filed suit on October 26, 2018. [ECF 1.] On December 14, 2018, Plaintiffs CREW and RAICES filed a First Amended Complaint ("FAC") [ECF 7], which was the operative complaint throughout the remainder of proceedings in the case up to and including the Court's final judgment. Claim One of the FAC asserted that DHS "has failed to establish and

maintain a sufficient agency-wide records management program in compliance with the FRA and its implementing regulations." FAC ¶ 65. Claim Two asserted that "DHS has repeatedly failed, and continues to fail, to create records sufficient to link alien children with adult companions with whom they were apprehended at the border, including not only parents, but other adult family members and caretakers." *Id.* ¶ 74. Claim Three asserted that "DHS has failed to create adequate records documenting 'the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically' in connection with its implementation and rollback of the Zero Tolerance Policy." *Id.* ¶ 84. Although Plaintiffs sought preliminary relief, they did so only with respect to Claim Two. [ECF 14.]

On March 20, 2019, Defendants moved to dismiss all three claims. [ECF 19.] In support of their motion, Defendants attached copies of two documents that set forth DHS's recordkeeping obligations: (1) DHS Directive No. 141-01, Revision 01 ("DHS Dir. No. 141-01"), issued on August 11, 2014, and (2) DHS Instruction No. 141-01-001 ("DHS Instr. No. 141-01-001"), issued on June 8, 2017. Declaration of Paul Johnson ("Johnson Decl.") & exs. A-B [ECF 19-2]. As Defendants explained, DHS Directive No. 141-01 requires all DHS employees to "[c]reate, receive, and maintain official records providing adequate and proper documentation in support of DHS activities." DHS Dir. No. 141-01(V)(A); *see also* DHS Instr. No. 141-01-001(V)(J)(1) (directing DHS employees to "[p]roperly identify, capture, retain, file, and dispose of or transfer records . . . in accordance with Title 44 U.S.C. Chapter 31; NARA regulations, 36 CFR Chapter XII, Subpart B; and DHS records policy"). Directive No. 141-01 further requires DHS employees to "[m]aintain records according to a designated DHS file plan, which allows for retrieval across the varied DHS missions." DHS Dir. No. 141-01(V)(D). In addition, it requires that employees

receive training, when hired and annually thereafter, "to ensure awareness of their responsibilities to maintain and safeguard DHS records." *Id.* 141-01(V)(E).

Defendants cited Directive No. 141-01 when arguing that, contrary to Plaintiffs' contention in Claim Three, DHS policy *does* require all DHS employees to "[c]reate, receive, and maintain official records providing adequate and proper documentation in support of DHS activities." DHS Dir. No. 141-01(V)(A). In regard to Claim One, Defendants pointed out that Plaintiffs' "agency-wide" challenge to DHS's records management program as a whole, asserting an array of deficiencies that had been identified in past NARA inspections, did not focus on a final agency action and therefore did not fall within the limits of the APA cause of action. Def. MTD Mem. at 38–39. Defendants also contrasted Plaintiffs' impossibly broad challenge in Claim One with the well-established authority in *Armstrong v. Bush* ("*Armstrong I*"), 924 F.2d 282, 292–93 (D.C. Cir. 1991), allowing judicial review of "the adequacy of an agency's recordkeeping guidelines." MTD Mem. at 38.

In opposing Defendants' Motion to Dismiss, Plaintiffs argued that Claim One of their FAC incorporated challenges to DHS guidelines and directives, including DHS Directive No. 141-01 and DHS Instruction No. 141-01-11. Pl. MTD Opp. [ECF 21] at 44. However, Plaintiffs did not move for leave to amend their complaint a second time in order to raise a challenge to either document, nor did they request an opportunity to do so in the event the Court dismissed the claims in their FAC.

In its decision granting Defendants' Motion to Dismiss, issued on May 24, 2019, the Court held that Plaintiffs lacked standing to assert Claim Three and that none of Plaintiffs' claims identified a final agency action as the subject of their challenge, as would be required to state a claim under the APA. Memorandum Opinion ("Mem. Op.") [ECF 25] at 3. In regard to Claim

One, the Court agreed that that claim was "far broader than a challenge to 'the adequacy of an agency's record-keeping guidelines' that the D.C. Circuit allowed in *Armstrong*," and that the claim "fail[ed] to identify a reviewable agency action." *Id.* at 31. Rather, the Court held that, "[b]y its own terms," Claim One was "nothing more than a 'broad programmatic attack,' and attempt to direct 'wholesale improvement of [DHS's] program by court decree,'" which was "exactly what the Supreme Court has repeatedly identified as impermissible." *Id.* at 32.

The Court also rejected Plaintiffs' attempt, in their opposition brief, to "recharacterize their claim by suggesting that the amended complaint's reference to DHS's inadequate records management program was really a reference to DHS's inadequate *recordkeeping guidelines and directives*." *Id.* The Court noted that "the amended complaint never mentions DHS's recordkeeping guidelines or directives" but that its allegations instead "clearly indicate that it is a challenge to the sufficiency of DHS's 'agency-wide records management program.'" *Id.* at 32–33 (quoting FAC ¶ 65). Emphasizing that Plaintiffs could not amend their complaint by their brief in opposition to Defendants' Motion to Dismiss, the Court granted Defendants' Motion with respect to Claim One. *Id.* at 33.

Plaintiffs filed the instant Motion to Alter or Amend Judgment under Rule 59(e) and for Leave to Amend under Rule 15(a) on June 14, 2019. [ECF 26.] Plaintiffs argue that the Court should amend its judgment with respect to Claim One because, they assert, the Court's dismissal of that claim with prejudice was "clearly erroneous." Pl. Mem. at 3. Plaintiffs also argue that the Court should grant them leave to file a second amended complaint that would replace their Claim One, as set forth in the FAC, with a different Claim One that would assert that DHS's "operative recordkeeping policies"—which they allege consist solely of Directive No. 141-01 and Instruction No. 141-01-001—fail to comply with the FRA. *See id.* at 7–11 & proposed Second Am. Compl.

("proposed SAC") [ECF 26-2] ¶ 77.

ARGUMENT

I. PLAINTIFFS FAIL TO IDENTIFY A VALID BASIS TO ALTER THE COURT'S JUDGMENT

The parties agree that the Court dismissed Plaintiffs' claims, including Claim One, with prejudice. *See* Pl. Mem. at 3. Thus, in order for Plaintiffs to obtain leave to file their proposed second amended complaint under Rule 15(a), they must first succeed in altering the Court's judgment under Rule 59(e). *See Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam) ("After the district court dismissed the complaint with prejudice, [plaintiffs] could amend their complaint only by filing . . . a 59(e) motion to alter or amend a judgment combined with a Rule 15(a) motion requesting leave of court to amend their complaint."); *accord He Depu v. Yahoo! Inc.*, 334 F. Supp. 3d 315, 318 (D.D.C. 2018), *appeal filed*, No. 18-7161 (D.C. Cir.). Rule 59(e) motions to amend or alter a judgment "are aimed at reconsideration, not initial consideration" and thus provide only "a limited exception to the rule that judgments are to remain final." *Leidos, Inc. v. Hellenic Republic*, 881 F.3d 213, 217 (D.C. Cir. 2018). This means that, unlike the typical pre-judgment context where leave to amend is freely given, here Plaintiffs must satisfy the "more stringent standard" of Rule 59(e) before the Court can reach the question of whether leave to amend the complaint should be granted. *Ciralsky v. CIA*, 355 F.3d 661, 673 (D.C. Cir. 2004) ("[O]nce a final judgment has been entered, a court cannot permit an amendment unless the plaintiff 'first satisf[ies] Rule 59(e)'s more stringent standard' for setting aside that judgment." (second alteration in original) (quoting *Firestone*, 76 F.3d at 1208)).

"[T]he reconsideration or amendment of a judgment [under Rule 59(e)] is . . . an extraordinary measure." *Leidos, Inc.*, 881 F.3d at 217; *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001) (Rule 59(e) motions "are disfavored and relief from judgment is

granted only when the moving party establishes extraordinary circumstances."). "The strictness with which such motions are viewed is justified by the need to protect both the integrity of the adversarial process in which parties are expected to bring all arguments before the court, and the ability of the parties and others to rely on the finality of judgments." *U.S. Commodity Futures Trading Comm'n v. McGraw-Hill Cos.*, 403 F. Supp. 2d 34, 36 (D.D.C. 2005).

Crucially, a Rule 59(e) motion "is not available to a party who 'could have easily avoided the outcome, but instead elected not to act until after a final order had been entered.'" *Leidos, Inc*., 881 F.3d at 220 (quoting *Ciralsky*, 355 F.3d at 665). Such a motion "is not a second opportunity to present argument upon which the Court has already ruled, nor is it a means to bring before the Court theories or arguments that could have been advanced earlier." *W.C. & A.N. Miller Co. v. United States*, 173 F.R.D. 1, 3 (D.D.C. 1997), *aff'd sub nom. Hicks v. United States*, No. 99-5010, 1999 WL 414253 (D.C. Cir. May 17, 1999). Ultimately, "[a] Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Firestone*, 76 F.3d at 1208 (internal quotation omitted). Here, Plaintiffs assert that the Court's dismissal with prejudice was clear error. Pl. Mem. at 3. However, Plaintiffs can point to neither new law, nor new evidence, nor clear error, but are instead returning to the Court, seeking to raise a new claim that they could have raised prior to judgment. Rule 59(e) relief should accordingly be denied.

A. Plaintiffs Waived Any Objection to Dismissal With Prejudice By Failing to Raise Any Such Objection, and Failing to Request Leave to Amend, Prior to Judgment

Plaintiffs were unquestionably on notice that their claims were subject to dismissal with prejudice. "[D]ismissals of a complaint for failure to state a claim [under Rule 12(b)(6)] are, by default, adjudications on the merits and with prejudice." *Perry v. Int'l Brotherhood of Teamsters*,

247 F. Supp. 3d 1, 9 (D.D.C. 2017); *see* Fed. R. Civ. P. 41(b). And Defendant expressly requested that the Court dismiss Plaintiffs' claims pursuant to Rule 12(b)(6), and that it dismiss Plaintiffs' claims with prejudice. *See* Def. Mot. to Dismiss [ECF 19]; Proposed Order [ECF 19-7]. Moreover, Defendants' arguments in support of dismissing Claim One (as well as Claims Two and Three) under Rule 12(b)(6)—focusing on Plaintiffs' failure to identify a "final agency action" as the subject of their APA challenge—did not suggest that Claim One was factually deficient, such that it could be made sufficiently plausible by asserting more or better facts in an amended complaint. Instead, Defendants argued that the claim itself—specifically, the very *object* of the claim—was legally defective. *See, e.g.*, Def. Mem. at 38 ("[B]y its own terms Count 1 seeks to challenge DHS's entire 'agency-wide' records management program . . . . Such a claim is far broader than a challenge to the 'adequacy of an agency's record-keeping guidelines' that the D.C. Circuit allowed in *Armstrong*.").

In addition, Plaintiffs should easily have identified the new claim they now seek to raise—challenging certain aspects of DHS's recordkeeping policy, set forth in Directive No. 141-01, and its accompanying Instruction No. 141-01-001—well before the Court's final judgment. Indeed, the D.C. Circuit's well-established decision in *Armstrong* put Plaintiffs on notice of the availability of challenges to specific alleged deficiencies in agency recordkeeping guidelines and provided a clear example of exactly the kind of claim that Plaintiffs might have brought. *See Armstrong I*, 924 F.2d at 293 (describing "plaintiffs' APA claim that the NSC's recordkeeping guidelines and directives do not adequately describe the material that must be retained as 'records' under the FRA"). Even if the Court were to credit Plaintiffs' dubious assertion that they were initially prevented from raising any such challenge because they did not have DHS Directive No. 141-01 or Instruction No. 141-01-001 in hand, Plaintiffs still should have identified their new claim, at the

latest, when Defendants filed their Motion to Dismiss on March 20, 2019, attaching those documents to the Motion. *See* Johnson Decl. exs. A & B.

Yet Plaintiffs failed to argue, at any point during proceedings on Defendants' Motion to Dismiss, that dismissal with prejudice would be improper. *See, e.g.*, Pl. MTD Opp. Nor did Plaintiffs request an opportunity to amend their complaint again in order to raise a challenge to DHS's recordkeeping directive and instruction. While Plaintiffs attempt to explain why they did not raise such a challenge in the FAC, they also acknowledge in the instant motion that Defendants attached DHS recordkeeping policies to their Motion to Dismiss. Pl. Mem. at 6–7. They clearly could have sought to amend their complaint at that point, yet they do not explain why they did not seek to amend once those policies were on the docket, before further briefing, a hearing, and the Court's judgment took place.

Despite the absence of any explanation in Plaintiffs' current motion, the record of proceedings suggests that Plaintiffs made an affirmative choice *not* to seek leave to amend their complaint a second time, nor to seek to reserve the possibility of amending it in the future. Instead, they chose to press the argument that their Claim One, as set forth in their First Amended Complaint, did challenge DHS's recordkeeping guidelines and directives, even as they also made clear that they intended the original Claim One to mount a broad challenge to the agency's records management program as a whole, including the deficiencies identified by NARA. *See* Pl. MTD Opp. at 43–44.

Plaintiffs' strategy failed. The Court correctly observed that Plaintiffs' First Amended Complaint "never mentions DHS's recordkeeping guidelines or directives." Mem. Op. at 32–33. Rather, Claim One of the First Amended Complaint referenced a host of other alleged defects in DHS's records management program as a whole. *See* FAC ¶¶ 23–25, 65. The Court therefore

properly rejected Plaintiffs' argument, observing that Claim One "[b]y its own terms" was nothing more than a "broad programmatic attack," very different from the discrete challenge at issue in *Armstrong*, and that Plaintiffs could not amend their complaint through briefing in opposition to a motion to dismiss. *Id.* (citing *Woytowicz v. George Washington Univ.*, 327 F. Supp. 3d 105, 121 (D.D.C. 2018)).

As noted above, Rule 59(e) "may not be used to . . . raise arguments or present evidence that could have been raised prior to the entry of judgment." *Slate v. Am. Broad. Cos.*, 12 F. Supp. 3d 30, 34 (D.D.C. 2013) (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)), nor is it a vehicle to "present a new legal theory that was available prior to judgment," *id.* (quoting *Patton Boggs LLP v. Chevron Corp.*, 683 F.3d 397, 403 (D.C. Cir. 2012)). Here, Defendants' Motion to Dismiss filing clearly indicated that dismissal with prejudice was warranted, but Plaintiffs failed to ask for dismissal without prejudice so that they could amend Claim One in the way they now propose. Now that Plaintiffs have lost on the broader claim that they decided, at the time, to pursue for tactical reasons, it is too late for them to plead the narrower claim for the first time. *See GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 812 (D.C. Cir. 2012) ("GSS Group could have made all three of the arguments identified above in its opposition to the Port Authority's motion to dismiss, but elected not to do so. The arguments therefore are waived [for purposes of Rule 59(e)]." (citation omitted)); *see also, e.g.*, *Iweala v. Operational Techs. Servs., Inc.*, 634 F. Supp. 2d 73, 80 (D.D.C. 2009) ("It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." (internal quotation omitted)); Wright & Miller, Federal Practice & Procedure § 1489 ("[A] judgment generally will be set aside only to accommodate some new matter that could not have been asserted during the

trial, which means that relief will not be available in many instances in which leave to amend would be granted in the prejudgment situation.").

Plaintiffs' failure to argue that any dismissal should be without prejudice, or that any defect in their pleading could be cured by amending their complaint, distinguishes this case from *Firestone*, 76 F.3d 1205, in which the plaintiffs' opposition to the motion to dismiss "asked the court to grant them leave to amend in the event that the complaint failed to comply with the federal rules." *Id.* at 1208. The Court did not err in failing to address an argument that Plaintiffs easily could have made, but never did.

B. The Court Did Not Clearly Err in Dismissing Claim One With Prejudice Because No Additional Factual Allegations Could Cure the Deficiencies That the Court Identified

Apart from Plaintiffs' waiver of any dispute with respect to the Court's dismissal with prejudice, the dismissal with, rather than without, prejudice was not clear error. Dismissal with prejudice is appropriate where the "allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Firestone*, 76 F.3d at 1209 (internal quotation omitted). The Court recently faced such a situation in *He Depu*, where it rejected a Rule 59(e) motion and held that dismissal with prejudice was proper. *He Depu*, 334 F. Supp. 3d at 319–20. In that case, the plaintiffs had claimed that a settlement agreement that the defendants had entered into with different plaintiffs in another lawsuit had created a charitable trust, but the Court had dismissed that claim, holding that the plain language of the agreement, as a matter of law, did not create a charitable trust. *Id.* at 319. Post-judgment, the plaintiffs sought to add allegations that it was not simply the language of the agreement, but the conduct of the defendants in making certain payments, that had created a trust. *See id.* at 320. However, the Court explained that these allegations amounted to offering a new legal theory, rather than "other facts consistent with" the FAC that would "cure" factual deficiencies, and that courts do not have to determine that there are

no viable unpled legal theories in order to dismiss with prejudice. *Id.* at 320–21.

Similar to the situation in *He Depu*, dismissal with prejudice is certainly appropriate when, as here, the Court has held that, as a matter of law, the claim at issue is impermissible under the APA because it amounts to a "broad programmatic attack" rather than a challenge to a discrete agency action. *See* Mem. Op. at 32. Such a conclusion is a quintessential "adjudication on the merits," Fed. R. Civ. P. 41(b), that justifies dismissal with prejudice because no additional *facts* could possibly transform DHS's records management program—the subject of Plaintiffs' Claim One—into a discrete agency action that could appropriately be challenged under the APA. Indeed, Plaintiffs cite no instance where a court dismissed an APA claim based on the conclusion that the claim impermissibly mounted a "broad programmatic attack," yet granted leave to amend. To the contrary, other courts—including the district court in the case that became *Norton v. SUWA*, the Supreme Court's hallmark decision regarding the APA's discrete agency action requirement—have consistently dismissed claims with prejudice when the dismissal was because the subject of a plaintiff's challenge was not a discrete "agency action." *E.g.*, *Ctr. for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 16 (D.D.C. 2017) (dismissing with prejudice a challenge to a Department of Interior internal review process that did not qualify as a "discrete" agency action); *In re Dep't of Veterans Affairs (VA) Data Theft Litig.*, No. MDL 1796, 2007 WL 7621261, at *7 (D.D.C. Nov. 16, 2007) ("The plaintiffs' broad allegations that the VA 'failed to ensure' that its 'processes, policies, and procedures were adequately implemented' do not state a challenge to discrete agency action. Accordingly, plaintiffs' APA claims will be dismissed with prejudice." (citations omitted)); Mem. Decision & Order of Dec. 22, 2000 [ECF 178], at 19, *SUWA v. Babbitt*, No. 2:99-cv-852 (D. Utah) (dismissing with prejudice the claims that were ultimately addressed by the Supreme Court *sub nom Norton v. SUWA*, 542 U.S. 55 (2004), which affirmed the district

court's dismissal on the basis that the claims did not challenge the agency's failure to undertake a discrete agency action but instead mounted a broad programmatic attack on the agency's activities).[1]

Just as in *He Depu*, Plaintiffs seek to amend their complaint to offer a new legal theory—i.e., a claim that would be narrower than their original broad programmatic attack, instead focusing on DHS's recordkeeping guidelines and directives. But as in *He Depu*, a post-judgment change in legal theory does not mean that the Court's earlier dismissal with prejudice was erroneous. Nor does the Court's observation, in its decision, that the FAC "never mentions DHS's recordkeeping guidelines or directives" change the outcome. The Court made this observation to distinguish *Armstrong*—which involved a claim that the National Security Council's recordkeeping guidelines and directives were inadequate—from Claim One, and in order to reject Plaintiffs' attempt to recharacterize Claim One as a challenge to DHS's "inadequate recordkeeping guidelines and directives." Mem. Op. at 32. Thus, again like *He Depu*, the problem was not that Plaintiffs' allegations in Claim One were *factually* deficient, such that Claim One could be "cured" by alleging additional facts, but that Claim One, by its own terms, was not the *type* of claim—in other words, that it did not invoke the *legal* theory—that the D.C. Circuit said in *Armstrong* would be permissible. Indeed, the court in *He Depu* rejected a similar attempt to use the court's observations

[1] In contrast to decisions based on the lack of a discrete "agency action," courts have dismissed claims without prejudice when there was a potential "agency action" but it was not yet "final," as required for a claim under 5 U.S.C. § 706(2). *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1128 n.3 (D.C. Cir. 1997) (district court dismissed claims without prejudice where plaintiff had failed to exhaust administrative remedies, and "hence, there was no final agency action to review"); *COMPTEL v. FCC*, 910 F. Supp. 2d 100, 109 (D.D.C. 2012) (where an administrative review processed remained pending, district court denied without prejudice cross-summary judgment motions "and stayed the case until final agency action was completed"). Because finality was not the issue here, such cases are inapposite.

about the legal deficiencies of the complaint against it. *He Depu*, 334 F. Supp. 3d at 321 n.8 ("the amended allegations must be consistent with plaintiffs' pleadings, not with issues noted by the Court.").

Plaintiffs rely on *Belizan v. Hershon*, 434 F.3d 579, 584 (D.C. Cir. 2006), for the notion that the Court committed clear error by failing to explain why its dismissal was with prejudice. Pl. Mem. at 3–4. However, *Belizan* announces no such categorical rule, and the case is easily distinguishable from the situation here. The complaint at issue in *Belizan* asserted claims under the Private Securities Litigation Reform Act ("PSLRA"), which imposes heightened pleading requirements, and the district court had dismissed those claims based on the insufficiency of the complaint's allegations. *Belizan*, 434 F.3d at 581. The D.C. Circuit held that the district court erred in concluding that the PSLRA *required* dismissal with prejudice, and that, as in *Firestone*, it was possible that "the allegation of other facts consistent with the challenged pleading could . . . cure the [pleading] deficiency" that the court had identified. *See id.* at 583–84 (quoting *Firestone*, 76 F.3d at 1209). The court therefore remanded for the district court either to explain why dismissal with prejudice was appropriate or to allow amendment of the complaint. *See id.* at 584.

Similarly, in *Brink v. Cont'l Ins.. Co.*, 787 F.3d 1120 (D.C. Cir. 2015), also cited by Plaintiffs, the district court had dismissed the plaintiffs' claims under the Americans with Disabilities Act ("ADA") because "their allegations were insufficient . . . to meet their burden of demonstrating that their injuries substantially limited a major life activity and thus qualified them as disabled under the ADA." *Id.* at 1124 (internal quotation omitted). The D.C. Circuit held that the district court erred in denying the plaintiffs' motions under Rules 59(e) and 15(a) because it was "at least 'plausible'" that the additional facts they sought to assert in an amended complaint

could establish that they were disabled, and that their proposed accommodation was reasonable. *Id.* at 1129.

As discussed above, the situation here is different from either *Belizan* or *Brink* because the Court's dismissal was not based on pleading deficiencies but instead on Plaintiffs' failure to challenge a discrete agency action. *Cf. He Depu*, 334 F. Supp. 3d at 320 (distinguishing *Belizan* as limited to dismissals "based on a complaint's omission of 'certain essential facts'"). The Court's explanation of the basis for its dismissal was thus also sufficient for purposes of understanding why the dismissal should be with prejudice. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (recognizing that "futility" may be "apparent or declared"). The Court did not err in failing to explain further.

Accordingly, Plaintiffs fail to identify clear error in the Court's dismissal with prejudice and their Rule 59(e) motion should be denied.

II. PLAINTIFFS' REQUEST FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT SHOULD BE DENIED

Because Plaintiffs fail to justify an alteration or amendment under Rule 59(e) of the Court's judgment, with respect to Claim One, their motion under Rule 15(a) for leave to file a second amended complaint should be denied as moot. *See Ciralsky*, 355 F.3d at 673. Moreover, even if the Court were to grant Plaintiffs' Rule 59(e) motion, it should reject Plaintiffs' motion for leave to file a second amended complaint on grounds of futility and undue delay. Although leave to amend should be freely granted "when justice so requires," Fed. R. Civ. P. 15(a)(2), justice does not require that leave be granted when, among other things, (1) Plaintiffs have engaged in undue delay; or (2) amendment would be futile. *See Foman*, 371 U.S. at 182. Here, leave to amend should be denied on each of these two bases.

A. Plaintiffs' Undue Delay Warrants Denial of Their Request to Amend

Plaintiffs' request should be denied at the outset due to their undue delay in seeking to file a second amended complaint. Courts frequently "have refused to allow a postjudgment amendment when the moving party had an opportunity to assert the amendment during trial but waited until after judgment before requesting leave." Wright & Miller, Federal Practice & Procedure § 1489; *see also, e.g.*, *Niedermeier*, 153 F. Supp. 2d at 30 ("Plaintiff cannot now establish that the Court's decision granting the motion to dismiss based upon the record before it was manifestly unjust where she took no action to amend her pleadings or to introduce this new evidence until after the Court dismissed this case."); *In re Gen. Motors Corp., Anti-Lock Brake Prod. Liab. Litig.*, 174 F.R.D. 444, 447 n.2 (E.D. Mo. 1997) ("Plaintiffs cannot avoid the consequences of their tactical decisions by attempting to use Rule 15(a) post-judgment, but, rather, plaintiffs must anticipate the possibility of losing, and act accordingly" (internal quotation omitted)), *aff'd sub nom. Briehl v. Gen. Motors Corp.*, 172 F.3d 623 (8th Cir. 1999); *Barrett v. Tallon*, 30 F.3d 1296, 1301 (10th Cir. 1994) (similar); *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 677 (9th Cir. 1993) (similar).

Plaintiffs attempt to forestall an undue delay argument by suggesting that DHS does not post copies of its recordkeeping policies on its website and that CREW submitted Freedom of Information Act ("FOIA") requests seeking copies of such polices but had not received a response to their request from the agency before they filed suit. Pl. Mem. at 5 & ex.2. As discussed above, that explanation fails to address developments in the case after Plaintiffs filed their First Amended Complaint and, indeed, is wholly insufficient to justify Plaintiffs' failure to seek to amend their complaint once Defendants attached DHS's directive and instruction to the first brief that Defendants filed in this action, on March 20, 2019. To the contrary, given the plain language of

Armstrong, which specifically focused on challenges to agency recordkeeping guidelines and directives, not to mention the Supreme Court's decision in *Norton v. SUWA*, which clearly forbids broad programmatic attacks of the type that Plaintiffs sought to press in their original Claim One, there could have been no reason other than a tactical choice not to seek leave to amend their complaint at that point. Yet Plaintiffs chose not to seek leave to amend at any time before this case was dismissed.[2] Plaintiffs have no excuse for waiting until after the Court's judgment to do so. Their attempt to re-write their Claim One at this point therefore should be rejected based on undue delay.

B. Plaintiffs' Proposed New Claim Would Fail as a Matter of Law, so Their Requested Amendment Would Be Futile

Plaintiffs' request to amend should also be denied on grounds of futility. Amendment is properly denied as futile where "the proposed claim would not survive a motion to dismiss." *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996); *see also* Wright & Miller, Federal Practice & Procedure § 1489 ("[T]he fact that the amended pleading offered by the movant will not cure the defects in the original pleading that resulted in the judgment of dismissal may be a valid reason both for denying a motion to amend under Rule 15(a) and for refusing to reopen the judgment under Rule 60(b).").

Here, Plaintiffs' proposed second amended complaint would be subject to dismissal for the same reasons explained in Defendants' prior briefing discussing the DHS directive and instruction.

[2] Not only did Plaintiffs fail to file a Rule 15(a) motion for leave to amend prior to the Court's judgment, but Plaintiffs also failed even to request leave to amend in their briefing or at oral argument. Of course, even if they had made a written or oral request, the absence of a motion would still qualify as undue delay because "a request for leave to amend must be submitted in the form of a written motion, and . . . must state with particularity the grounds for seeking the order and state the relief sought." *Trudel v. SunTrust Bank*, No. 18-7068, 2019 WL 2261090, at *3 (D.C. Cir. May 28, 2019) (quoting *Benoit v. USDA*, 608 F.3d 17, 21 (D.C. Cir. 2010)).

Plaintiffs' proposed new Claim One seeks to suggest that the DHS directive and instruction are deficient because they do not contain the precise language set forth in certain NARA regulations. *See* proposed SAC ¶ 77. However, nothing in the FRA requires each agency to issue guidelines and directives that simply parrot the precise language of the FRA itself and NARA's implementing regulations in their entirety. And this is not a situation like that in *Armstrong*, where changes in technology introduced a new question about whether the agency's definition covered all required records. *See Armstrong I*, 924 F.2d at 284.

The DHS directive and instruction incorporate by reference both the FRA and NARA regulations, so they cannot be deemed deficient (let alone arbitrary and capricious, *see* Pl. Mem. at 11) simply by failing to include specific language that is already in those other provisions. DHS Directive No. 141-01 cites among its governing authorities Title 44, Chapter 31 of the U.S. Code as well as the NARA regulations. DHS Dir. No. 141-01(III)(A)–(B). Based on those authorities, it requires all DHS employees to "[c]reate, receive, and maintain official records providing adequate and proper documentation in support of DHS activities." *Id.* 141-01(V)(A). DHS Instr. No. 141-01-001 directs all DHS employees to "[p]roperly identify, capture, [and] retain" records "in accordance with Title 44 U.S.C. Chapter 31" and "NARA regulations, 36 CFR Chapter XII, Subpart B." DHS Instr. No. 141-01-001(V)(J)(1). These policies clearly incorporate by reference the provisions referenced in Plaintiffs' proposed Second Amended Complaint ¶ 77—specifically, 44 U.S.C. § 3101 (which is in Title 44 U.S.C. Chapter 31) and 36 C.F.R. §§ 1222.22, .24, .26, and .28 (which are in 36 CFR Chapter XII, Subpart B)—and direct DHS employees to comply fully with those provisions.

Plaintiffs also seek to include in their revised Claim One allegations that DHS has failed to establish any other policies, guidance, or training in order to implement the statutory and

regulatory provisions regarding records creation. Such allegations are speculative. Again, DHS's directive and instruction incorporate by reference the relevant provisions identified in Plaintiffs' proposed Second Amended Complaint ¶ 80—specifically, 36 C.F.R. §§ 1220.34 and 1222.24. Moreover, DHS's directive expressly assigns responsibility for records management, including training, to certain DHS officers, including a Chief Information Officer, who is tasked with establishing training "throughout the Department," and a Chief Human Capital Officer, who is tasked with facilitating annual training. *See* DHS Dir. No. 141-01(IV)(B)–(C). The directive also makes clear that each DHS component separately complies with FRA requirements, led by a Chief Records Officer specific to that component. *Id.* 141-01(IV)(E).[3]

The DHS directive and instruction therefore are in full compliance with the FRA and NARA regulations, and Plaintiffs' attempt to assert otherwise would be subject to dismissal under Rule 12(b)(6). Accordingly, leave to amend should also be denied as futile.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion.

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Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
MARCIA BERMAN

[3] While the reasons set forth above establish that Plaintiffs' request to file a second amended complaint is futile, additional factors also would support dismissal of a second amended complaint. For one thing, Plaintiffs' revised Claim One is again overly broad in that it purports to challenge DHS's "total guidance given to agency employees regarding their recordkeeping responsibilities, both formal and informal," with respect to the FRA's "records-creation requirements." Proposed SAC at 30 (Prayer for Relief). Thus, as with the FAC, Plaintiffs' claims would again ostensibly extend to each and every DHS component, including the U.S. Coast Guard, the Federal Emergency Management Agency, the U.S. Secret Service, and the Transportation Security Administration, in addition to U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement, even though none of Plaintiffs' factual allegations plausibly state a claim regarding such components' recordkeeping guidelines or directives. Should the Court grant Plaintiffs' motion, Defendants reserve the right to elaborate on this and other arguments in support of dismissal.

Assistant Director, Federal Programs Branch

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