IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, and

REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, INC.,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, and

KEVIN K. MCALEENAN, in his official capacity as Acting Secretary of Homeland Security,

Defendants.

Civil Action No. 18-cv-2473-RC

REPLY IN SUPPORT OF
PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT UNDER RULE 59(e)
AND FOR LEAVE TO AMEND UNDER RULE 15(a)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

DHS's opposition devotes only two pages to the merits of Plaintiffs' proposed Second Amended Complaint ("SAC"), likely because it recognizes that its operative recordkeeping policies are indefensible. The agency instead raises various procedural objections in the hopes of permanently evading judicial review of its facially-deficient policies. But each of those objections falls flat.

Starting with Plaintiffs' Rule 59(e) motion, longstanding D.C. Circuit precedent makes clear that (1) prior to dismissing a case with prejudice, courts have an affirmative obligation to apply the *Firestone* standard, which asks whether the allegation of other facts consistent with the challenged pleading could possibly cure its perceived deficiencies; (2) a court's failure to do so is, for Rule 59(e) purposes, clear error; and (3) such an objection cannot be easily "waived" or "conceded" (if at all). This precedent squarely refutes DHS's claim that Plaintiffs waived their post-judgment objection to dismissal of the First Amended Complaint ("FAC") with prejudice by not separately requesting, prior to judgment, that they be granted leave to amend and that any dismissal be without prejudice. Not a single case supports that proposition. Plaintiffs opposed DHS's motion to dismiss and asked that it be denied in its entirety—nothing more was required to preserve their Rule 59(e) challenge.

Equally misguided is DHS's claim that dismissal of Claim One of the FAC with prejudice was proper under the *Firestone* standard. In its dismissal order, the Court deemed Claim One, "as pled," to be overbroad because it challenged DHS's overall "records management program," rather than a discrete agency action relating to that program. But the

Court did not foreclose the possibility of Plaintiffs pleading a *narrower* claim that *did* challenge such action, and in fact recognized such a claim was possible. The proposed SAC does just that by directly challenging DHS's belatedly-disclosed recordkeeping guidelines and directives—a claim expressly authorized by *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991), and consistent with the "discrete agency action" test set forth in *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 66 (2004). DHS's contrary arguments rest largely on the fiction that an agency's "records management program" and its "recordkeeping guidelines and directives" are wholly unrelated things, but that view defies both law and reality.

DHS fares no better in opposing Plaintiffs' Rule 15(a) motion. In arguing undue delay, DHS does not claim it has been prejudiced by the timing of Plaintiffs' motion, which was filed a mere three months after DHS belatedly disclosed the recordkeeping policies forming the basis of the proposed SAC, and just 21 days after this Court's dismissal order. DHS nonetheless insists that Plaintiffs should have sought leave to amend immediately following the agency's untimely disclosure of its recordkeeping policies (which happened only after DHS stonewalled Plaintiffs for months by refusing to release those policies). But neither Rule 59(e) nor Rule 15(a) required Plaintiffs to move for leave prior to judgment, particularly given Plaintiffs' reasonable belief that Claim One of the FAC already encompassed a challenge to DHS's recordkeeping guidelines and directives. The case law makes clear that post-judgment leave-to-amend is proper in these circumstances.

Perhaps most troubling is DHS's futility argument, which reflects a deeply flawed understanding of the agency's legal obligation to issue adequate guidelines and directives

concerning the FRA's records-creation requirements. In DHS's view, the FRA only requires an agency to issue a policy summarily "incorporating by reference" pertinent FRA provisions, and it need not provide any additional guidance tailored to the agency's activities and functions. But that position disregards critical FRA provisions that impose mandatory duties regarding the content of an agency's recordkeeping guidelines and directives. DHS's patent misunderstanding of its FRA obligations confirms the pressing need for judicial intervention here.

As shown in the fallout from the family separation crisis, recordkeeping guidelines and directives are much more than bureaucratic make-work—they can and do have a real impact on human lives. That is particularly true for an agency like DHS, which apprehends and processes thousands of migrant persons every day. If DHS has its way, Plaintiffs' claims will be forever precluded, its woefully deficient recordkeeping policies will escape judicial review, and the agency will continue to operate under policies lacking required guidance on the FRA's records-creation obligations. Considering the record in this case, and DHS's recent history of egregious recordkeeping failures, justice requires that Plaintiffs be granted leave to amend and that this case promptly move forward.

ARGUMENT

I. Plaintiffs' Rule 59(e) Motion Should Be Granted

This Circuit has established a categorical rule for Rule 59(e) motions challenging a dismissal with prejudice: such a motion "should be granted unless 'the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" *Brink v. Cont'l Ins. Co.*, 787 F.3d 1120, 1128 (D.C. Cir. 2015) (quoting *Firestone v. Firestone*, 76 F.3d 1205,

1209 (D.C. Cir. 1996)). In other words, it is a *per se* "abuse of discretion" to deny a Rule 59(e) motion if "dismissal of the complaint with prejudice was erroneous." *Id.* DHS tries to muddy this clear rule, raising issues such as waiver and undue delay that are wholly immaterial to the analysis. Because the "high bar" for dismissal with prejudice is not met here, Plaintiffs' Rule 59(e) motion should be granted.

A. Plaintiffs Did Not Waive Any Post-Judgment Objection to Dismissal With Prejudice

There can be no doubt that Plaintiffs opposed dismissal with prejudice. In opposing DHS's motion to dismiss, Plaintiffs filed a 45-page brief vigorously disputing each asserted ground for dismissal, and requesting that DHS's motion be denied in full. *See* ECF No. 21. DHS nonetheless argues that Plaintiffs waived any objection to dismissal of Claim One with prejudice by not *separately* requesting that any dismissal, if granted, be *without* prejudice, and by not moving for leave to amend prior to judgment. DHS Opp. at 7-11 [ECF No. 27]. Tellingly, DHS does not cite a single case holding that Rule 59(e) requires a plaintiff to take such steps to preserve a post-judgment challenge to a with-prejudice dismissal. That is because there is no such requirement.

Indeed, DHS's argument is foreclosed by the Circuit's decision in *Rudder v. Williams*, 666 F.3d 790 (D.C. Cir. 2012). The plaintiffs there, in opposing the defendants' motion to dismiss, expressly *conceded* that some of their claims were time-barred and subject to dismissal. *Id.* at 793. Based on that concession, the district court dismissed those claims with prejudice. *Id.* Upon realizing their concession was erroneous, the plaintiffs sought reconsideration of the district court's dismissal (but did not seek leave to amend), and, once that motion was denied,

appealed. *Id.* The Circuit reversed. While the Circuit deemed dismissal *without* prejudice appropriate, it found that the "exacting standard" for dismissal *with* prejudice was "not met," notwithstanding the plaintiffs' concession that the claim should be dismissed. *Id.* at 794-95.

Rudder thus refutes DHS's position that a plaintiff can "waive" a post-judgment objection to a with-prejudice dismissal by failing to invoke certain magic words or failing to move for leave to amend prior to judgment. Indeed, the *Rudder* court granted post-judgment relief where the plaintiff not only failed to take such steps, but *expressly conceded* that dismissal was appropriate. Surely that means there is no waiver here, where Plaintiffs *opposed* dismissal on all grounds, without separately requesting that any dismissal, if granted, be without prejudice. *Rudder* shows that, for purposes of a Rule 59(e) motion challenging a with-prejudice dismissal, the district court has an affirmative obligation to assess whether "the allegation of other facts consistent with the challenged pleading could . . . possibly cure the deficiency" before it dismisses with prejudice—an obligation that persists even where the plaintiff could be deemed to have conceded the propriety of dismissal. *Id.* at 795.

The Circuit's other cases addressing post-judgment challenges to with-prejudice dismissals likewise show that Plaintiffs here were not required to separately request that any dismissal be without prejudice, or move for leave to amend, prior to judgment. *See Brink*, 787 F.3d at 1128-29 (holding that district court erred in denying Rule 59(e) motion challenging dismissal with prejudice, without examining whether the plaintiff requested dismissal without prejudice or moved for leave to amend prior to judgment); *accord Belizan v. Hershon*, 434 F.3d 579, 583-84 (D.C. Cir. 2006); *Firestone*, 76 F.3d at 1208-09. Although the plaintiffs in two of

these cases made informal requests for leave to amend prior to judgment, *see Belizan*, 434 F.3d at 581-83 (request at argument); *Firestone*, 76 F.3d at 1207-08 (request in briefing), in neither case did the Circuit deem that a relevant factor in its Rule 59(e) analysis, let alone suggest it was a *prerequisite* to obtaining Rule 59(e) relief from a with-prejudice dismissal. To the contrary, in *Belizan*, the Circuit granted Rule 59(e) relief despite finding that the plaintiff did *not* properly move for leave to amend under Rule 15(a) prior to judgment. *See* 434 F.3d at 582-84 (neither a "bare request in an opposition to a motion to dismiss," nor a "statement of . . . counsel at oral argument" constitutes a "motion within the contemplation of Rule 15(a)"). Even absent a proper Rule 15(a) motion, the Circuit found that the district court erred by failing to proactively evaluate, before dismissing with prejudice, whether the plaintiff could "allege additional facts that would cure the deficiencies in her complaint—the standard under *Firestone* for dismissal with prejudice." *Id.* at 584.[1]

DHS ignores this on-point precedent. It instead cites other cases for the general proposition that a plaintiff may not use a Rule 59(e) motion to raise new arguments that could have been raised prior to judgment. *See* DHS Opp. at 10-11. But none of these cases addressed challenges to with-prejudice dismissals, and each arose in circumstances markedly different than this case. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 & n.5 (2008) (motion filed after verdict and "almost 13 months after the stipulated motions deadline," merely sought to "relitigate

[1] Although informal requests for leave to amend made in an opposition brief or at argument do not satisfy Rule 15(a), DHS apparently believes such a request was necessary here to preserve a Rule 59(e) challenge to with-prejudice dismissal. *See* DHS Opp. at 7-11. Again, no case supports that proposition.

old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment"); *Patton Boggs LLP v. Chevron Corp.*, 683 F.3d 397, 402-03 (D.C. Cir. 2012) (motion raised new legal theory that was indisputably available prior to judgment, and plaintiff did not argue that any of the established grounds for Rule 59(e) relief—"intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice"—applied); *GSS Grp. Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 811-12 (D.C. Cir. 2012) (same); *Slate v. Am. Broad. Companies, Inc.*, 12 F. Supp. 3d 30, 37 (D.D.C. 2013) (motion "merely regurgitated arguments raised previously in the dispositive motions"). By contrast, the Circuit's decisions in *Rudder*, *Brink*, *Belizan*, and *Firestone* directly address the situation at hand—i.e., how courts should evaluate post-judgment motions challenging with-prejudice dismissals. And those decisions, as noted, apply a categorical rule: it is clear error for a court to dismiss a complaint with prejudice unless the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency. *Brink*, 787 F.3d at 1128 (citing *Firestone*, 76 F.3d at 1208).

DHS fails to appreciate that the cases addressing with-prejudice dismissals are a unique category of Rule 59(e) decisions, as they are animated by the general policy disfavoring dismissal with prejudice. As the Circuit has explained, "[d]ismissal with prejudice is the exception, not the rule, in federal practice because it 'operates as a rejection of the plaintiff's claims on the merits and [ultimately] precludes further litigation of them.'" *Rudder*, 666 F.3d at 794 (quoting *Belizan*, 434 F.3d at 583). It is for that reason that "the 'standard for dismissing a

complaint with prejudice is high'" and "exacting." *Id.* Because DHS's waiver argument is incompatible with these principles, it should be rejected.[2]

B. The Court Clearly Erred in Dismissing Claim One With Prejudice

Plaintiffs' motion explained that the Court clearly erred in dismissing Claim One with prejudice for two independent reasons: (1) it failed altogether to apply the *Firestone* standard for dismissal with prejudice; and (2) *Firestone*'s "high bar," once applied, is not met here. Pls.' Mot. at 3-4 [ECF No. 26-1]. DHS's response to each point is unavailing.

1. Dismissing Claim One With Prejudice Without Conducting a *Firestone* Analysis Was Clear Error

DHS disputes that it is reversible error for a district court to dismiss a complaint with prejudice without first conducting a *Firestone* analysis, despite the Circuit's contrary holding in *Belizan*, 434 F.3d at 584. DHS Opp. at 14. DHS tries to distinguish *Belizan* by arguing that the district court there appeared to have erroneously believed that the Private Securities Litigation Reform Act ("PSLRA") required dismissal with prejudice. But that argument conflates two distinct aspects of *Belizan*'s analysis: the Circuit first determined that that PSLRA "does not mandate dismissal with prejudice," but then turned to the separate issue of *Firestone*, explaining that "[i]n its order, the district court neither adverted to *Firestone* nor undertook the inquiry *required by* that decision." *Id.* (emphasis added). Because "the district court . . . fail[ed] adequately to explain, with reference to the standard [the Circuit] set in *Firestone*, why it dismissed Belizan's complaint with prejudice," the Circuit "vacate[d] the order of dismissal and

[2] Insofar as DHS's "waiver" and "undue delay" arguments are deemed relevant to the Rule 59(e) analysis (and they are not), those arguments are addressed *infra* Part II.A.

remand[ed] the case for the district court to enter a new order either dismissing without prejudice or explaining its dismissal with prejudice in a manner consistent with this opinion." *Id.* Separate and apart from the PSLRA issue, then, *Belizan* makes clear that a *Firestone* analysis is unequivocally "required" before a district court dismisses a complaint with prejudice. The outright failure to conduct such an analysis is reversible error. *See City of Dover v. EPA*, 40 F. Supp. 3d 1, 5 (D.D.C. 2013) (in non-PSLRA case, granting Rule 59(e) motion where court found it previously "erred by not 'adequately explain[ing], in light of the standard set in *Firestone*,' why it dismissed with prejudice") (quoting *Belizan*, 434 F.3d at 580); *accord In re McCormick & Co., Inc., Pepper Prod. Mktg. & Sales Practices Litig.*, 275 F. Supp. 3d 218, 223 (D.D.C. 2017).[3]

2. The Allegation of Other Facts Consistent with Claim One of the FAC Could Cure its Perceived Deficiencies

Equally unpersuasive is DHS's argument that the "allegation of other facts consistent with" Claim One of the FAC "could not possibly cure" its perceived deficiencies. DHS Opp. at 11-15. According to DHS, Plaintiffs' proposed SAC is not "consistent with" Claim One of the FAC because while Claim One challenged DHS's "records management program," the proposed SAC pleads a purportedly "new legal theory" challenging DHS's "recordkeeping guidelines and directives" under *Armstrong*. That argument, however, misapprehends the close link between an

[3] Were the Court to reopen the judgment under Rule 59(e) based solely on its prior failure to apply the *Firestone* standard, it may convert the dismissal to one without prejudice and proceed directly to the Rule 15(a) motion, without separately assessing whether the *Firestone* standard warranted dismissal with prejudice. *See In re McCormick*, 275 F. Supp. 3d at 223 (proceeding as such).

agency's records management program and its recordkeeping policies under the FRA, the overlap between Claim One of the FAC and the proposed SAC, and the *Firestone* standard.

1. To begin, the FRA and its implementing regulations make clear that an agency's recordkeeping guidelines and directives are central components of, and thus closely intertwined with, its records management program. The statute requires agencies to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency," and further specifies that this "program . . . shall provide for effective controls over the creation and over the maintenance and use of records in the conduct of current business," as well as "compliance with" various sections of the FRA, including § 3101, the records-creation provision. 44 U.S.C. §§ 3102(1), (4). Implementing this statutory directive, National Archives and Records Administration ("NARA") regulations direct agencies to adopt "recordkeeping requirements"—or, in the words of *Armstrong*, 924 F.2d at 297, "recordkeeping guidelines and directives"—designed to ensure agency-wide FRA compliance. *See* 36 C.F.R. §§ 1222.22-34 (Agency Recordkeeping Requirements).

Claim One of the FAC reflected the interrelationship between an agency's records management program and its recordkeeping guidelines and directives. In challenging DHS's records management program, Claim One alleged DHS was violating § 3102 and implementing regulations that require agencies to, among other things, "develop recordkeeping requirements that identify . . . [t]he record series and systems that must be created and maintained to document program policies, procedures, functions, activities, and transactions," and "[i]ssue appropriate instructions to all agency employees on handling and protecting records." FAC ¶¶ 63-65 (citing

44 U.S.C. § 3102 and 36 C.F.R. §§ 1222.26, 1222.34). Claim One also expressly incorporated allegations, *id.* ¶ 65, that DHS and its component agencies had failed to adopt "[r]ecords management 'directives establishing . . . responsibilities . . . for the creation . . . of agency records," *id.* ¶ 24.b, and provide FRA-mandated "records management training," *id.* ¶ 24.e, as well as allegations describing how DHS's records management failures manifested during its disastrous implementation of Zero Tolerance, *id.* ¶¶ 36-49. And the FAC explicitly invoked *Armstrong* in support of its challenge to DHS's records management program, *id.* ¶ 22, further demonstrating that Plaintiffs' claim encompassed a challenge to DHS's recordkeeping guidelines and directives.

The proposed SAC alleges "other facts consistent with" Claim One of the FAC. *Firestone*, 76 F.3d at 1209. Those "other facts" concern deficiencies in DHS's belatedly-disclosed recordkeeping policies, which are central components of the records management program challenged in the FAC. *See* Pls.' Mot., Ex. 1 (Proposed SAC) ¶¶ 74-83 [ECF No. 26-2]. Like the FAC, the proposed SAC asserts violations of FRA provisions that impose specific requirements as to the content of an agency's recordkeeping guidelines and directives. *See id.* (citing 4 U.S.C. § 3102 and various provisions of 36 C.F.R. § 1222). It also points to recordkeeping failures identified by NARA and manifested during Zero Tolerance as proof of DHS's deficient recordkeeping guidelines and directives, *see id.* ¶¶ 31-61, as the FAC did in raising a broader challenge to DHS's overall records management program. And, like the FAC, the proposed SAC explicitly invokes *Armstrong* as a legal basis for APA relief. *See id.* ¶¶ 24-25.

Thus, as DHS itself acknowledges, Plaintiffs' proposed claim is not wholly *distinct* from Claim One of the FAC, but rather is a "narrower" version of that claim, DHS Opp. at 10, 13, that pleads new and critical facts in challenging DHS's deficient recordkeeping policies. Despite being narrower, the proposed claim substantially overlaps with Claim One of the FAC and the two claims are therefore "consistent" for *Firestone* purposes.

2. Contrary to DHS's assertions (Opp. at 11-15), the reasoning of the Court's dismissal order did not foreclose the possibility of Plaintiffs pleading a viable, narrower claim consistent with Claim One of the FAC; it in fact indicates the opposite. The Court held that Claim One ran afoul of the *SUWA* test for agency action because, "as pled," it was a "broad programmatic attack" against DHS's records management program that did not challenge a "particular 'agency action' that causes harm," and thus was not cognizable under the APA. Mem. Op. at 3, 32 [ECF No. 25]. The Court also acknowledged that, per *Armstrong*, the APA does allow claims challenging an agency's recordkeeping guidelines and directives, but found that the FAC did not explicitly plead such a claim. *Id.* at 32-33. Nothing in the Court's analysis, however, suggests that Plaintiffs could not re-plead a narrower claim consistent with Claim One of the FAC that *does* challenge a "particular 'agency action'" relating to DHS's records management program.

Plaintiffs have done just that. In the proposed SAC, Plaintiffs have pled additional facts, based on DHS's belatedly-disclosed recordkeeping policies, that support a plausible APA claim under *Armstrong* challenging "particular 'agency action'" relating to the agency's records management program. Because this shows that the perceived deficiencies with Claim One were indeed curable, and given that the Court's dismissal order expressly acknowledged the

availability of APA relief under *Armstrong*, dismissal with prejudice was error. *Cf. City of Dover*, 40 F. Supp. 3d at 5-7 (granting Rule 59(e) relief from with-prejudice dismissal where dismissal order itself "recognized possibly viable alternative claims").

3. DHS cites a few cases where district courts dismissed APA claims with prejudice for failing to satisfy the *SUWA* test. *See* DHS Opp. at 12-13. But these cases are immaterial here, as none of them evaluated the propriety of with-prejudice dismissal under the *Firestone* standard. *See Ctr. for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11 (D.D.C. 2017) (not applying *Firestone* or even specifying whether dismissal was with or without prejudice); *In re VA Data Theft Litig.*, 2007 WL 7621261 (D.D.C. Nov. 16, 2007) (dismissing with prejudice without explanation or applying *Firestone*); *SUWA v. Babbitt*, 2000 WL 33914094 (D. Utah Dec. 22, 2000) (same). Nor did any of the cases purport to recognize any categorical rule that dismissal for failure to satisfy the *SUWA* test must be with prejudice. That is because there is no such rule.

4. DHS relies extensively on another district court decision, *He Depu v. Yahoo! Inc.*, 334 F. Supp. 3d 315 (D.D.C. 2018), that is both readily distinguishable and wrong on the law. *See* DHS Opp. at 11-14. In *He Depu*, the court dismissed with prejudice a complaint alleging that a settlement agreement gave rise to a "charitable trust," because the court found the terms of the agreement did not establish a trust as a matter of law. 334 F. Supp. 3d at 317. The plaintiffs then moved for relief under Rules 59(e) and 15(a), and submitted a proposed amended complaint alleging that the parties' conduct, rather than the terms of the settlement agreement, provided an "independent basis for the existence of a charitable trust." *Id.* at 320. The court denied that motion, reasoning that the original complaint "was centrally predicated on alleging that the

language in the [settlement agreement] created a charitable trust," and that the proposed amended complaint did not allege "other facts consistent with" the dismissed complaint, but rather offered "the same facts and a new legal theory" focused on the parties' conduct rather than the terms of the agreement. *Id.* Because "the Court's rejection of the possibility that the [settlement agreement] established any trust [was] inextricable from, and fatal to the premise of, plaintiffs' trust claims," the Court deemed dismissal with prejudice appropriate under *Firestone*. *Id.*

In contrast to *He Depu*, this Court's reasons for dismissing Claim One were not "inextricable from, and fatal to the premise of" *any* claim challenging *any aspect* of DHS's records management program. As noted, the Court deemed Claim One overbroad, not unfixable. It did not foreclose the possibility of Plaintiffs narrowing the claim to explicitly challenge the discrete "agency action" of DHS's recordkeeping guidelines and directives under *Armstrong*, which is precisely what the proposed SAC does. Further distinguishing this case from *He Depu*, Plaintiffs' proposed SAC does not assert a "new legal theory" based on "the same facts" as Claim One of the FAC. It instead alleges new *facts* based on DHS's belatedly-disclosed recordkeeping policies in a claim that is consistent with (albeit narrower than) both the legal theory and factual allegations that supported Claim One.

Even if DHS were correct that the proposed SAC merely asserts a new "legal theory," that would not warrant denying Rule 59(e) relief. To the contrary, the Supreme Court has held that it is error to deny a "motion to vacate the judgment in order to allow amendment of the complaint," where "the amendment would . . . do[] no more than state an alternative theory for recovery." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Laber v. Harvey*, 438 F.3d 404,

428 (4th Cir. 2006) (granting post-judgment leave to amend where "proposed complaint does not put any new facts at issue but merely states an 'alternative theory' for recovery" (quoting *Foman*, 371 U.S. at 182)); *Adams v. Gould Inc.*, 739 F.2d 858, 868 (3d Cir. 1984) (same); *Carson v. Polley*, 689 F.2d 562, 585 (5th Cir. 1982) (same); *City of Dover*, 40 F. Supp. 3d at 6 (following *Foman* and granting Rule 59(e) motion where Court's own dismissal order "suggest[ed] an alternative legal theory based on the facts pled," and "plaintiffs should have been permitted to test that theory" given that "[c]ourts routinely permit (under Rule 15(a)(2)) plaintiffs to assert alternative legal theories based on the same facts giving rise to the complaint"). Insofar as *He Depu* held otherwise, it was wrongly decided.[4]

5. Finally, it bears emphasizing the "possibly preclusive effect of this Court's judgment" if it denies Rule 59(e) relief. *City of Dover*, 40 F. Supp. 3d at 6. Plaintiffs' proposed claim could potentially "be characterized as arising out of the same transaction or occurrence as [P]laintiffs' [dismissed] claims, and as a result, if this Court's dismissal with prejudice were to stand, [P]laintiffs could be precluded from asserting the [proposed] claim[] in a new action." *Id.* Such a result would be incompatible with "the preference expressed in the Federal Rules of Civil

[4] In support of its position that a plaintiff may not seek leave to amend post-judgment to assert a new legal theory, *He Depu* relied exclusively on *Strumsky v. Wash. Post Co.*, 922 F. Supp. 2d 96, 106 (D.D.C. 2013). *Strumsky* proclaimed, without citing any authority, that "it cannot be the case that courts may dismiss with prejudice only when the allegation of any other legal theory consistent with the challenged pleading could not possibly cure the deficiency. This would require courts to essentially conduct legal research on behalf of plaintiffs and to potentially rewrite or contemplate the revision of their claims for them." *Id.* at 106. Setting aside the merits of this rationale, it is not implicated here because the legal theory advanced in the proposed SAC (an *Armstrong*-based APA claim) was most certainly on the Court's radar—it was the focus of extensive briefing and argument prior to judgment, and the Court's dismissal order explicitly recognized the availability of such a theory.

Procedure . . . for resolving disputes on their merits." *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 550 (2010); *see also Foman*, 371 U.S. at 182 ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."). These concerns, in addition to those outlined above, weigh heavily in favor of granting Plaintiffs' Rule 59(e) motion.[5]

II. Plaintiffs' Rule 15(a) Motion Should Be Granted

DHS contends that leave to amend should be denied on the grounds of undue delay and futility. DHS Opp. at 15-19. Both contentions are meritless.

A. Plaintiffs Did Not Unduly Delay in Moving for Leave to Amend

Plaintiffs promptly moved for leave to amend on June 14, 2019, just three months after DHS belatedly disclosed its recordkeeping policies on March 20, and 21 days after this Court's May 24 dismissal order. In arguing undue delay, DHS does not contest that it stonewalled Plaintiffs for months by ignoring repeated requests for its recordkeeping policies, including a pending FOIA request to which DHS has failed to respond to this day. DHS Opp. at 16-17. DHS instead insists that Plaintiffs should have moved for leave to amend immediately after DHS disclosed its recordkeeping policies in March. *Id.* But that argument distorts both Rule 15(a)'s liberal amendment standard and the record in this case.

[5] To be clear, Plaintiffs do not concede that dismissal of Claim One with prejudice, if left unaltered, would have preclusive effect as to the claim alleged in the proposed SAC, but merely note that it is a possibility. While DHS asserts that Plaintiffs' proposed claim is not "consistent with" Claim One of the FAC for *Firestone* purposes, the agency is silent on whether it believes the claims arise out of the same transaction or occurrence for purposes of claim preclusion. Presumably the agency would argue just that if Plaintiffs were to file the proposed SAC as a new action.

For starters, "[c]onsideration of whether delay is undue . . . should generally take into account . . . the possibility of any resulting prejudice" to the opposing party. *Atchinson v. District of Columbia*, 73 F.3d 418, 426 (D.C. Cir. 1996); *see In re Vitamins Antitrust Litig.*, 217 F.R.D. 30, 32 (D.D.C. 2003) ("[U]ndue prejudice is the touchstone for the denial of leave to amend."). Here, DHS makes no claim of prejudice, nor could it. This case is still in its infancy, DHS has not yet filed an answer, no discovery has been taken, and this is Plaintiffs' first request for leave to amend. It is a perfectly appropriate stage in the litigation for Plaintiffs to amend their complaint. That the case is in a post-judgment posture does not caution otherwise, as courts routinely grant post-judgment motions for leave to amend. *E.g.*, *Foman*, 371 U.S. at 182; *Firestone*, 76 F.3d at 1209-10; *Laber*, 438 F.3d at 428; *U.S. ex rel. Customs Fraud Investigations, LLC. v. Victaulic Co.*, 839 F.3d 242, 249-52 (3d Cir. 2016). The utter lack of prejudice to DHS precludes a finding of undue delay.

Plaintiffs also had good reason for not moving for leave to amend until after this Court's dismissal order—namely, they reasonably believed that Claim One of the FAC, as pled, encompassed a challenge to DHS's recordkeeping guidelines and directives. Plaintiffs made that position clear in both their briefing and at oral argument, *see, e.g.*, Pls.' MTD Opp. at 11-12, 43-44 [ECF No. 21]; April 26, 2019 Hr'g Tr. at 42:9-45:15 [ECF No. 23], and the Court gave no indication that it held a contrary view prior to its dismissal order. That position was also objectively reasonable since, as explained above, an agency's recordkeeping guidelines and

directives are necessarily central components of its overall records management program.[6] While the Court did ultimately reject Plaintiffs' position, that does not mean Plaintiffs acted without diligence, in bad faith, or in any other manner egregious enough to warrant denial of leave to amend, merely because their motion came after dismissal. *See Runnion ex rel. Runnion v. Girl Scouts*, 786 F.3d 510, 523 & n.3 (7th Cir. 2015) ("[A] plaintiff who receives a Rule 12(b)(6) motion and who has good reason to think the complaint is sufficient may . . . choose to stand on the complaint and insist on a decision without losing the benefit of the well-established liberal standard for amendment with leave of court under Rule 15(a)(2)," and a district court thus may not require "plaintiffs to propose amendments before the court rules on a Rule 12(b)(6) motion on pain of forfeiture of the right to amend."); *Victaulic*, 839 F.3d at 250 (reversing district court's denial of post-dismissal leave to amend and noting that, "in the context of a typical Rule 12(b)(6) motion, a plaintiff is unlikely to know whether his complaint is actually deficient—and in need of revision—until after the District Court has ruled"); *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015) ("Without the benefit of a ruling [on the pleadings], many a plaintiff will not see the necessity of amendment or be in a position to weigh the practicality and possible means of curing specific deficiencies."). To the contrary, Plaintiffs' "diligence in filing [their] motion to amend" just 21 days after this Court's dismissal order "dispels any inference of bad faith." *Laber*, 438 F.3d at 428.

[6] The reasonableness of Plaintiffs' position that is bolstered by the fact that Plaintiff CREW had, in a separate suit, challenged the adequacy of an agency's "records management program," Compl. ¶¶ 62-66, *CREW v. Pruitt*, 18-cv-406 (D.D.C.) [ECF No. 1], and the court construed that claim as challenging the "[a]gency's current recordkeeping policy" in accordance with *Armstrong*, *see CREW v. Pruitt*, 319 F. Supp. 3d 252, 260-61 (D.D.C. 2018).

Nor is this a case where Plaintiffs failed altogether to "introduce" new "facts" or "evidence until after the Court dismissed this case." *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 30 (D.D.C. 2001); *see* DHS Opp. at 16 (citing *Niedermeier* and similar cases). As explained above, Plaintiffs *did* repeatedly raise the pertinent new facts regarding DHS's belatedly-disclosed recordkeeping policies with the Court prior to judgment, just not in the form of a motion for leave to amend. Again, this refutes any inference of bad faith.

Further undermining a finding of undue delay is the relatively short period between filing of the initial complaint and the proposed SAC: eight months. "[D]elay of less than a year from the filing of an initial complaint to the filing of an amended complaint is rarely, if ever, sufficient to become undue." *Victaulic*, 839 F.3d at 252; *see also Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006) (noting that "only one appellate court uncovered in our research has approved of denial of leave to amend based on a delay of less than one year," and holding that "a period of eleven months from commencement of an action to the filing of a motion for leave to amend is not, on its face, so excessive as to be presumptively unreasonable") (citing cases). And this case's timeline was prolonged for months due to *DHS's* numerous requests for extensions of time, including one based on a government shutdown. *See* ECF Nos. 10, 13. Moreover, Plaintiffs had no means to obtain DHS's recordkeeping policies until the agency unilaterally disclosed them in March 2019, and Plaintiffs moved for leave to amend just three months after that critical disclosure. *See Runnion*, 786 F.3d at 529 ("We cannot expect . . . a plaintiff to plead information she could not access without discovery.").

For all these reasons, the record comes nowhere close to showing undue delay.

B. The Proposed Amendment Would Not Be Futile

DHS makes only a half-hearted attempt at arguing futility, disregarding both the governing law and key aspects of the proposed SAC.

The agency first contends that the proposed SAC would not survive a motion to dismiss because DHS's recordkeeping policies "incorporate by reference both the FRA and NARA regulations, so they cannot be deemed deficient." DHS Opp. at 18. That argument reflects a deeply flawed understanding of the law. An agency does not satisfy its FRA obligation to establish recordkeeping guidelines and directives merely by issuing a policy pointing employees to various provisions of the U.S. Code and Code of Federal Regulations and expecting them to figure it out for themselves. That would render much of 44 U.S.C. § 3102 and 36 C.F.R. § 1222 meaningless. As detailed in the proposed SAC, those provisions impose mandatory, non-discretionary duties on agencies regarding the ***content*** of their recordkeeping guidelines and directives. *See* Pls.' Mot. at 11-13. Among other things, an agency's recordkeeping policies:

- "***shall*** provide for . . . compliance with" various FRA provisions and implementing regulations, including the records-creation requirements set forth in 44 U.S.C. § 3101 and 36 C.F.R. § 1222.22. 44 U.S.C. § 3102(4) (emphasis added).

- "***must*** . . . [i]dentify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel in the course of their official duties." 36 C.F.R. § 1222.24(a)(1) (emphasis added).

- "***must*** . . . identify . . . [t]he record series and systems that must be created and maintained to document program policies, procedures, functions, activities, and transactions." 36 C.F.R. § 1222.26(a) (emphasis added).

- "***must*** . . . identif[y] information and documentation that must be included in" the agency's "record series and systems." 36 C.F.R. § 1222.28(a) (emphasis added).

- "***must***" include "[p]olicies and procedures for maintaining the documentation of phone calls, meetings, instant messages, and electronic mail exchanges that include substantive information about agency policies and activities." 36 C.F.R. § 1222.28(d) (emphasis added).

DHS, tellingly, does not dispute that its recordkeeping guidelines and directives lack any of these legally-mandated features. *See* Pls.' Mot. at 7-13. It instead contends that the FRA does not require agencies to "parrot language" from the statute and implementing regulations. DHS Opp. at 18. But Plaintiffs are not claiming that DHS needs to merely "parrot" statutory and regulatory language—the agency must instead *formulate its own recordkeeping guidelines and directives*, tailored to the agency's activities and functions, that satisfy the explicit FRA requirements outlined above. *See CREW*, 319 F. Supp. 3d at 261 (upholding APA claim challenging agency's recordkeeping policy that did "not mention any mandate to create records for 'substantive decisions and commitments reached orally' as required by NARA" (quoting 36 C.F.R. § 1222.22)); *cf. Armstrong*, 924 F.2d at 293 (holding that "the FRA provides sufficient law to apply in evaluating the adequacy of [an agency's] guidelines and directives" because it "contain[s] several specific requirements, including the requirement that each agency head shall . . . develop a program that is consistent with the Archivist's regulations"). If DHS's position were correct, the agency in *Armstrong* could have avoided nearly a decade of protracted litigation by adopting a policy summarily incorporating the entire FRA by reference. That is plainly not the law. DHS's flagrant misconception of its FRA obligations confirms the need for judicial intervention in this case.

DHS also argues that the proposed SAC is "speculative" insofar as it alleges that DHS lacks any policies, guidance, or training concerning the FRA's records-creation requirements

other than the official recordkeeping policies DHS belatedly disclosed in this suit. DHS Opp. at 18-19. The allegations to which DHS appears to be referring allege, "[o]n information and belief," that "Directive 141-01 and Instruction 141-01-001 are the only formal policies designed to implement the FRA's recordkeeping requirements currently in effect at DHS"; "DHS fails to provide any informal or supplementary guidance to agency employees including adequate guidance on the FRA records-creation requirements outlined above"; and "DHS's records management training, provided pursuant to 36 C.F.R. § 1220.34(f) and § 1222.24(b), fails to include adequate guidance on the FRA records-creation requirements outlined above." Pls.' Mot., Ex. 1 (Proposed SAC) ¶¶ 78-80. These allegations are rendered plausible by other allegations outlining DHS's well-documented history of overall recordkeeping failures and specific failures in connection with child separations. *See id.* ¶¶ 31-61. And DHS does not claim that it does, in fact, have any other policies, guidance, or training designed to implement the FRA's records-creation requirements. Given that this information is solely in DHS's possession and no discovery has yet taken place, the proposed allegations readily pass the Rule 12(b)(6) threshold. *See Runnion*, 786 F.3d at 528. ("[P]laintiffs' 'pleading burden should be commensurate with the amount of information available to them.'").

Finally, DHS asserts in a footnote that the proposed SAC is "overly broad" insofar as it challenges the "total guidance given to agency employees regarding . . . the FRA's records-creation requirements." DHS Opp. at 19 n.3. DHS's real problem is not with Plaintiffs' claim, but the Circuit's decision in *Armstrong*, which expressly instructed the district court to develop a factual record containing the "***total 'guidance'*** given to [agency] staff regarding their

recordkeeping responsibilities"—including any "informal, supplementary guidance"—prior to ruling on whether "the [agency's] recordkeeping guidelines and directives satisfy the [agency's] statutory obligations." 924 F.2d at 297 (emphasis added); *see also Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1280 (D.C. Cir. 1993) (noting that first *Armstrong* decision "remanded the case to allow for supplementation of the record as to the precise guidance—written and oral—that the defendant agencies had given employees"). Whether DHS likes it or not, *Armstrong* remains the law of this Circuit. *See* Pls.' Mot. at 11 & n.5. DHS also contends that the proposed claim is overbroad insofar as it sweeps in other DHS components' recordkeeping policies. But that argument is a red herring: the proposed SAC only seeks judicial review of *DHS's* recordkeeping guidelines and directives, not those of its component agencies.

CONCLUSION

The Court should alter or amend its May 24, 2019 Order dismissing Claim One of the FAC with prejudice to a dismissal without prejudice, and grant Plaintiffs leave to file the proposed SAC.

Date: July 17, 2019

Respectfully Submitted,

/s/ Nikhel Sus
NIKHEL S. SUS
(D.C. Bar No. 1017937)
ANNE L. WEISMANN
(D.C. Bar. No. 298190)
Citizens for Responsibility and Ethics in Washington
1101 K St. NW, Suite 201
Washington, D.C. 20005
Telephone: (202) 408-5565
Fax: (202) 588-5020
nsus@citizensforethics.org
aweismann@citizensforethics.org

MANOJ GOVINDAIAH
Refugee and Immigrant Center for Education and Legal Services
802 Kentucky Ave.
San Antonio, TX 78201
Telephone: (210) 787-3745
Fax: (210) 787-3745
manoj.govindaiah@raicestexas.org

Counsel for Plaintiffs