UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	:		
Plaintiffs,	:	Civil Action No.:	18-2473 (RC)
v.	:	Re Document No.:	26
U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,	:		
Defendants.	:		

MEMORANDUM OPINION AND ORDER

GRANTING PLAINTIFFS' MOTION TO ALTER JUDGMENT AND FOR LEAVE TO AMEND

Plaintiffs filed this case challenging the recordkeeping practices of the Department of Homeland Security under the Federal Records Act ("FRA") on October 26, 2018. *See* Compl., ECF No. 1. After filing an amended complaint on December 14, 2018, *see* Am. Compl., ECF No. 7., Plaintiffs moved for a preliminary injunction, *see* Mot. Prelim. Inj., ECF No. 14, and Defendants moved to dismiss, *see* Mot. Dismiss, ECF No. 19. The Court denied Plaintiffs' motion and granted the motion to dismiss in its entirety on May 24, 2019. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.* ("*CREW*"), No. 18-2473 (RC), 2019 WL 2248527 (D.D.C. May 24, 2019). Pursuant to Fed. R. Civ. P. 41, the dismissal operated as a dismissal with prejudice of Plaintiffs' claims, and thus of their case. *See* Fed. R. Civ. P. 41(b). Plaintiffs have now moved to alter the judgment and for leave to amend their complaint, arguing that the Court improperly dismissed their first claim with prejudice. *See* Pls.' Mem. Supp. Mot. Alter 1, ECF No. 26-1. Finding the standard for both motions met, the Court agrees and grants the motion.

First, the Court finds that relief from judgment is warranted under Fed. R. Civ. P. 59(e). Rule 59 provides that a party may file a motion to alter or amend a judgment "no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). Motions under Rule 59(e) are "disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances." *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001) (citing *Anyanwutaku v. Moore*, 151 F.3d 1053, 1057 (D.C. Cir. 1998)). However, one circumstance where the D.C. Circuit has found Rule 59(e) relief to be warranted is when dismissal of a complaint with prejudice was improper and the plaintiffs seek leave to amend. *See, e.g.*, *Firestone v. Firestone*, 76 F.3d 1205, 1208–09 (D.C. Cir. 1996). In such a circumstance, the plaintiffs may 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." *Brink v. Continental Ins. Co.*, 787 F.3d 1120, 1128 (D.C. Cir. 2015). And the Circuit has explained that:

> [D]enial of the Rule 59(e) motion in that situation is an abuse of discretion if the dismissal of the complaint with prejudice was erroneous; that is, the Rule 59(e) motion should be granted unless "the allegations of other facts consistent with the challenged pleading could not possibly cure the deficiency."
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> *Id.* (quoting *Firestone*, 76 F.3d at 1209).

Here, Plaintiffs argue that they are exactly in the situation described in *Firestone*. Plaintiffs' first claim was that DHS generally "violat[ed] the FRA and its implementing regulations, Am. Compl. ¶ 66, by "fail[ing] to establish and maintain a sufficient agency-wide records management program," *id.* ¶ 65. The Court dismissed the claim with prejudice in its May 24, 2019 opinion. *See CREW*, 2019 WL 2248527 at *15–16. In their motion, Plaintiffs represent that this dismissal was in error for two reasons: first, they contend that the Court committed clear error by failing to "explain, with reference to the standard [the Circuit] set in

Firestone, why it dismissed [Plaintiffs'] complaint with prejudice." Pls.' Mem. Supp. 3 (quoting *Belizan v. Hershon*, 424 F.3d 579, 584 (D.C. Cir. 2006)). And second, they argue that dismissal with prejudice was in error because Plaintiffs are able to allege other facts that will allow them to cure the deficiency in their claim found by the Court. *See id.* at 4 (quoting *Brink*, 787 F.3d at 1128)). In their reply, Plaintiffs further argue that leave to amend should be granted for an amendment that merely states an alternative theory of recovery. *See* Pls.' Reply 14–15, ECF No. 29.

While the Court is not entirely persuaded by Plaintiffs' arguments, it nonetheless grants the motion. The Court does not read *Firestone*, nor *Belizan*, to impose a "categorical rule" that courts must always specifically explain why dismissal for failure to state a claim is with or without prejudice, *see* Defs.' Opp'n 14, ECF No. 27. And the Court's opinion made clear that it found Plaintiffs' legal theory itself deficient: the Court explained that "Plaintiffs . . . [were] challenging the entirety of DHS's records management under the FRA, a claim that the Court simply cannot consider under the APA" because it does not challenge a reviewable agency action. *CREW*, 2019 WL 2248527 at *16. Such a claim could not be salvaged by alleging consistent additional facts.

However, the Court does agree that, in this particular circumstance, it was error to dismiss Plaintiffs' entire *case* with prejudice. In its opinion, the Court identified Plaintiffs' attempt at recharacterizing their claim through a different legal theory raised in their opposition brief, and noted the inappropriateness of attempting to correct a pleading defect in that fashion. *See id.* (noting that Plaintiffs "attempt[ed] to recharacterize their claim" in preliminary injunction briefing). Plaintiffs now seek to effect the correction, through an amendment that "would . . . do[] no more than state an alternative theory for recovery," *Foman v. Davis*, 371 U.S. 178, 182

(1962), a situation where the Supreme Court has strongly suggested that leave to amend should be granted, *see id.* And perhaps more importantly, where the Court itself identified the pleading defect and "suggest[ed] an alternative legal theory based on the facts pled," it was error to dismiss with prejudice Plaintiffs' entire case. *City of Dover v. EPA*, 40 F. Supp. 3d 1, 6 (D.D.C. 2013).

Second, the Court finds that leave to amend should be granted pursuant to Fed. R. Civ. P. 15(a)(2). Courts are to "freely give leave when justice so requires," *id.*, and the Court finds no reason to disallow the amendment here. Plaintiffs' proposed amended complaint brings a claim for DHS's failure to implement FRA-compliant regulations and guidelines. *See* Proposed Second Am. Compl. ¶¶ 74–83, ECF No. 26-2. Defendants argue that the amended complaint fails as a matter of law and that the requested amendment would be futile, because DHS's regulations are in compliance with the FRA. *See* Defs.' Opp'n 17–19. But the Court is unable to make such a determination here—certainly not on the basis of the three-paragraph argument presented by Defendants. At this stage, the Court is satisfied that Plaintiffs' proposed amended complaint states the type of claim recognized in *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991). The Court leaves for another day, and potentially another round of briefing, a ruling on whether Plaintiffs' specific claim is viable.[1]

Neither does Plaintiffs' delay in bringing this motion to amend warrant a denial of the motion. The Court is sensitive to Plaintiffs' argument that they could not bring their

[1] In a footnote to their opposition, Defendants represent that they have other arguments that would support dismissal, including that Plaintiffs' proposed recordkeeping claim is "overly broad" and fails to state a claim under the FRA. *See* Defs.' Opp'n 19 n.3. But the Court need not determine whether Plaintiffs' claim would survive a motion to dismiss in piecemeal fashion. The appropriate manner for Defendants to bring those arguments would be to file such a motion in response to the amended complaint.

recordkeeping claim at the outset of this case because DHS "stonewalled Plaintiffs for months by ignoring repeated requests for its recordkeeping policies." Pls.' Reply 16. Although Defendants characterize this justification as "dubious," Defs.' Opp'n 8, they do not refute it. And while it is true that Plaintiffs could have filed a motion to amend after Defendants filed their motion to dismiss, but prior to the Court issuing its opinion, this case has proceeded at an unusually fast pace as a result of the need to address Plaintiffs' motion for a preliminary injunction. Not much time has passed since the filing of the complaint, and even less time has passed since Defendants finally produced the policies at issue. The Court therefore does not find any undue delay on Plaintiffs' part. In any event, the Court does not find that granting leave to amend would prejudice Defendants in any way, which further militates in favor of granting leave to amend.

Accordingly, Plaintiffs' motion to alter the judgment and for leave to amend (ECF No. 26) is **GRANTED**.

SO ORDERED.

Dated: July 22, 2019

RUDOLPH CONTRERAS
United States District Judge