IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, and

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

Defendants.

Civil Action No. 19-cv-2181-KBJ

REPLY IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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This case aptly illustrates why we have notice-and-comment rulemaking. EPA hastily overhauled its FOIA regulations without public input, provoking widespread backlash from Congress, good government groups, and the press. Now, defending the FOIA Rule in litigation, EPA offers new details that appear nowhere in the rule itself, and insists that the outpouring of public criticism is based on "misunderstandings." That is false, as EPA's new information does nothing to cure the rule's facial flaws, including its unlawful invitation that employees "withhold . . . portion[s] of . . . record[s] on the basis of responsiveness." Nor does the new information do anything to undercut CREW's standing. What it does do is demonstrate just how necessary it was for this rule to have gone through notice and comment, so that the agency could have considered public input, responded accordingly, and, ultimately, adopted a better rule.

Try as EPA might, its actions cannot be minimized. The FOIA Rule applies to each of the thousands of FOIA requests EPA receives every year from thousands of requesters. And those requests yield critical information that is widely disseminated to, and utilized by, the public. EPA's decision to bypass public comment on such a rule is an affront to the APA's goals of promoting democratic participation, fairness, and informed agency decisionmaking.

ARGUMENT

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

A. CREW Has Standing to Assert Count One

1. CREW Has Demonstrated Injury-in-Fact

CREW explained that the FOIA Rule harms its interests as a frequent FOIA requester in three discrete ways. CREW Mot. at 15-22. EPA's attempts to refute CREW's injuries fall flat.

a. Authorization to Withhold Information to Which CREW is Entitled under FOIA

EPA first argues that the rule provision authorizing it "to . . . withhold . . . a portion of a record on the basis of responsiveness" causes no injury because it does not actually authorize statutorily-prohibited withholdings. Opp. at 4. But this argument merely disputes CREW's reading of the rule on the merits. That is improper because, "[f]or purposes of the standing inquiry," the Court must "assume [CREW] would succeed on the merits of [its] claim[s]." *Barker v. Conroy*, 921 F.3d 1118, 1124 (D.C. Cir. 2019).

EPA next insists that CREW has not shown "future injury" because there is no "substantial probability" that EPA will in fact invoke the FOIA Rule to unlawfully withhold portions of records. Opp. at 4-6. But this is merely a rehash of EPA's ripeness argument as to Count Three, which CREW refutes elsewhere, CREW Mot. at 39-41; *infra* Part II.B, and need not be separately parsed for standing purposes. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012) (ripeness incorporates Article III's requirement of "imminent" or "certainly impending" injury); *Venetian Casino Resort v. EEOC*, 409 F.3d 359, 366-67 (D.C. Cir. 2005) (deeming challenge ripe and then finding it unnecessary to "analyze standing separately" because it was "not an independent issue from ripeness") (citing cases). At any rate, CREW has shown future injury because it has pending FOIA requests with EPA and plans to submit more, and those requests are subject to all aspects of the FOIA Rule, including the challenged withholding provision. Rappaport Decl. ¶¶ 7-10; CREW Mot. at 15 (citing cases).

Equally unpersuasive is EPA's claim that CREW's injury conflicts with the "presumption" that agency officials act in good faith. Opp. at 5 (citing *Competitive Enter. Inst.*

v. EPA, 67 F. Supp. 3d 23 (D.D.C. 2014)). In *Competitive Enterprise*, the court invoked that presumption in rejecting a claim that required it to assume that agency officials deliberately acted "in contravention of their stated policies and guidance." 67 F. Supp. 3d at 33. Here we have precisely the opposite scenario: CREW's injury presumes that EPA officials will faithfully *follow* the plain text of the FOIA Rule in "withhold[ing] . . . portion[s] of . . . record[s] on the basis of responsiveness." 40 C.F.R. § 2.103(b) (2019). While such withholdings do conflict with Circuit precedent, there is no "presumption" that agency officials will, when faced with a potential conflict between a regulation and judicial precedent, follow the precedent.

b. Deprivation of Right to Submit FOIA Requests Directly to EPA Regional Offices

EPA next contends that CREW is not harmed by the FOIA Rule's deprivation of the right to submit requests directly to regional offices. Opp. at 6. EPA does not dispute that the agency has already applied this aspect of the rule to CREW's requests, Rappaport Decl. ¶¶ 9, 13, but claims the impact is "trivial," Opp. at 6. EPA is wrong. "[B]y prohibiting direct submission of FOIA requests to regional offices, the rule deprives CREW of a demonstrably faster avenue for obtaining records from regional offices that was available for years under EPA's prior regulations." Rappaport Decl. ¶ 18; *see id.* ¶ 16 (explaining that change introduces a new layer of delay as to regional office records). That impact is meaningful because CREW has submitted requests directly to regional offices in the past, has pending requests for regional office records, and has stated an unequivocal intent to submit more such requests. *Id.* ¶¶ 8-10. This easily passes the Article III threshold, which requires only an "identifiable trifle." CREW Mot. at 16-

17 (citing cases). EPA fails even to acknowledge the "identifiable trifle" standard, let alone explain why CREW does not meet it.

EPA also incorrectly asserts that FOIA requests submitted after CREW's initial complaint, but before its First Amended Complaint ("FAC"), are immaterial to standing because jurisdiction must be assessed as of when CREW filed suit. Opp. at 7 & n.2. That argument is refuted by Circuit precedent "hold[ing] that a plaintiff may cure a standing defect under Article III through an amended pleading alleging facts that arose after filing the original complaint." *Scahill v. DC*, 909 F.3d 1177, 1184 (D.C. Cir. 2018). Consistent with *Scahill*, the FAC added facts that arose after the original complaint (and the FOIA Rule's effective date) regarding CREW's requests for regional office records. FAC ¶ 44. Moreover, several cases have found future injury based on a FOIA requester's stated *intent* to submit requests *after* filing suit. CREW Mot. at 15 (citing cases). One of those cases rejected EPA's precise argument, reasoning that while "'jurisdiction ordinarily depends on the facts as they exist when the complaint is filed,' when a plaintiff alleges a future injury, common sense dictates that a court can and should consider the activities of the plaintiff during and *after the time that the complaint is filed* in order to assess the likelihood of such a future injury." *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 262 (D.D.C. 2012) (emphasis added). EPA is simply wrong on the law.

c. Impairment of Statutory Right to "Prompt" Release of Records

EPA also tries in vain to challenge CREW's delay-based injuries. EPA disputes that the FOIA Rule's centralized-submission requirement will require "additional time to analyze and route" requests for regional office records, claiming that "requests were analyzed and frequently

routed to other offices" for processing under the prior FOIA regulations as well. Opp. at 8. Yet EPA offers no factual support for its bare assertion that requests to *regional* offices were "frequently routed" to other offices (and consequently delayed) under the prior FOIA regulations. It instead cites a directive that merely *authorized* EPA components to re-route requests for processing, where appropriate. *Id.* at 8. That directive sheds no light on the *frequency* with which requests to regional offices were deemed misdirected and re-routed. Thus, EPA fails to refute CREW's commonsense proposition that the FOIA Rule's addition of a *new* layer of processing for regional office requests—i.e., intake and routing by the National FOIA Office—will necessarily introduce delay into FOIA processing that did not exist under the prior regulations. CREW Mot. at 18. At minimum, this change creates a "'substantial risk' of future [delay-related] injury," *Attias v. Carefirst, Inc.*, 865 F.3d 620, 627 (D.C. Cir. 2017), and supports a "reasonabl[e] fear[]" of such injury, *In re Idaho Conservation League*, 811 F.3d 502, 509 (D.C. Cir. 2016); *see Frank LLP v. CFPB*, 288 F. Supp. 3d 46, 59 (D.D.C. 2017) (plaintiff "must show only a 'substantial risk' of future injury'—not certain harm").

EPA notably does not contest that the FOIA Rule will dramatically increase the National FOIA Office's intake workload by approximately *116%*, CREW Mot. at 19-20, but insists this will cause no delays in FOIA processing. It provides a declaration stating that in 2019, the National FOIA Office hired "five additional staff," which it vaguely asserts "expanded [its] capacity to perform, among other things, FOIA request intake-related work." Epp Decl. ¶ 5. But this cursory declaration provides no details on the National FOIA Office's staffing levels prior to February 2019, nor does it identify the number of new employees specifically designated to

handle "FOIA request intake-related work." So there is no meaningful way to assess whether the mere five new staff will suffice to meet the office's 116% workload increase, such that there will be no resulting delays in the agency's FOIA processing. The sheer size of the increase is enough to pose a "substantial risk" or "reasonable fear" of additional delay in EPA's FOIA processing.

EPA also misses the point in arguing that the National FOIA Office does not "process" all FOIA requests submitted to EPA Headquarters. Opp. at 9. Regardless of which EPA component ultimately processes the request, the FOIA Rule requires that the National FOIA Office conduct *initial intake* for *all* requests. Insofar as this will lead to bottlenecking with respect to all FOIA requests, it will delay overall processing times, because a request is processed only *after* the National FOIA Office completes its initial intake.

B. CREW is Entitled to Summary Judgment on Count One

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

a. EPA Misstates the Law on Legislative Rules

EPA argues at length that hornbook administrative law principles used to determine whether a rule is legislative are wholly irrelevant in the procedural rule context, and apply only in the interpretive rule context. Opp. at 12-15. EPA is, again, wrong on the law.

To begin, EPA's formalistic approach overlooks that the task of classifying a rule as legislative, procedural, or interpretive entails substantial overlap, as the categories are not neatly segregable. "[T]he labels of 'legislative' and 'non-binding' rules [cannot] neatly place particular agency actions within any particular category. Instead, the categories have 'fuzzy perimeters.'" *Batterton v. Marshall*, 648 F.2d 694, 702–03 (D.C. Cir. 1980). Thus, the Circuit has noted that

the "question whether a rule is substantive or procedural for the purposes of § 553(b) is functional, not formal," and has relied, just as CREW does here, on language from cases construing the *interpretive* rule exception in holding that a rule was not *procedural*. *Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999) (citing *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987)); *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 46 (D.D.C. 2018) (same) (citing *Mendoza v. Perez*, 754 F.3d, 1002, 1021 (D.C. Cir. 2014)). Rather than conflating distinct concepts, these cases reflect the overlap inherent in deciphering legislative, procedural, and interpretive rules.

Moreover, Circuit precedent shows that courts should consider whether a rule possesses the "hallmarks of a legislative rule," separate and apart from examining whether it meets the particularized criteria for procedural and interpretive rules. The Circuit did just that in *Mendoza*, where it held that "*[b]eyond our conclusion* that the [agency actions] do not fall within" either the procedural or interpretive rule exceptions, "we are convinced [they] were subject to the notice and comment requirements because they possess all the hallmarks of a legislative rule"—namely, they "are *necessarily legislative rules* because they 'effect[] a [substantive] change in existing law or policy,' and 'effectively amend[] a prior legislative rule.'" 754 F.3d at 1024 (quoting *Nat'l Family Planning Ass'n v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992), and *Am. Mining Cong. v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)) (emphasis added). *Mendoza* thus

directly refutes EPA's position that *American Mining* and *National Family* are only relevant to determining whether a rule is interpretive. Opp. at 13-14.[1]

It was, therefore, wholly appropriate for CREW to point out that the FOIA Rule exhibits all the "hallmarks of a legislative rule," including that it expressly amends a prior legislative rule adopted through notice and comment, that EPA invoked its delegated legislative authority in adopting the rule, and that EPA published the rule in the Code of Federal Regulations. CREW Mot. at 26-30. Whether EPA calls the FOIA Rule procedural, interpretive, or a policy statement, the fact that it possesses all the indicia of a legislative rule is plainly material to the analysis.

EPA's reliance on *Ranger v. FCC*, 294 F.2d 240 (D.C. Cir. 1961), is unavailing. That nearly 60-year-old decision pre-dates the seminal cases establishing the criteria for legislative rules, including, most pertinent here, those holding that a rule amending a legislative rule is necessarily legislative. CREW Mot. at 26 (citing cases). Nor is it clear that the rule challenged in *Ranger* amended a prior rule that qualified as legislative.

EPA also misstates CREW's reliance on *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015). CREW did not cite *Perez* for the proposition that "an agency that chooses to follow notice-and-comment rulemaking when first promulgating a rule, *whether or not required to by the APA*, is forever committed to follow the same procedures for any future amendments of that rule." Opp. at 15 (emphasis added). Rather, CREW's position is that when an agency promulgates an initial rule through notice-and-comment procedures *because the rule is*

[1] *Mendoza* likewise refutes *Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 105 n.18 (D.D.C. 2013), insofar as that case deemed *American Mining* "inapposite" outside the interpretive rule context.

legislative (and notice and comment is thus required), it must follow those same procedures when amending the rule. That is because "an amendment to a legislative rule" is itself "legislative" and "notice and comment rulemaking must be followed." *Nat'l Family*, 979 F.2d at 235. *Perez* recognized this concept in the inverse—namely, "[b]ecause an agency is *not* required to use notice-and-comment procedures to issue an initial interpretive rule, it is also *not* required to use those procedures when it amends or repeals that interpretive rule." 575 U.S. at 101 (emphasis added). That holding is fully consistent with CREW's position regarding amendments of *legislative* rules, EPA's obfuscation notwithstanding.

Sierra Club v. EPA, 873 F.3d 946 (D.C. Cir. 2017), is inapposite. Unlike the plaintiff there, CREW is not claiming that EPA's 2002 FOIA Rule was legislative *solely* "because it was promulgated with notice and comment," and that this was a "decision to embrace additional process" which "convert[ed]" the 2002 rule "into a legislative rule." *Id.* at 63. Rather, CREW's position is that the 2002 rule qualifies as legislative under the Circuit's well-established criteria for legislative rules. CREW Mot. at 26-29. Thus, EPA's promulgation of the 2002 rule through notice and comment was not a gratuitous "decision to embrace additional process" as in *Sierra Club*, *id.*, but rather a mandatory obligation under the APA.

b. The FOIA Rule Amends a Legislative Rule

Even though the 2019 FOIA Rule comprehensively revises and replaces the entirety of the 2002 FOIA Rule in the Code of Federal Regulations, CREW Mot. at 26, EPA claims it does not "amend" any legislative rule codified in the 2002 rule, Opp. at 15-16. It argues that CREW errs in defining the 2002 Rule as a single rule because "the 2002 Rule was actually a collection

of many different rules . . . each of which must be individually classified as either legislative or not." *Id.* But no precedent supports EPA's approach of parsing individual *provisions* of the 2002 rule to determine which qualify as legislative "rules," and then determine whether the 2019 rule amends any of those specific provisions. To the contrary, the Circuit has recognized that when an agency adopts various regulatory provisions or changes as an integrated whole—such as when EPA adopted a single set of comprehensive and interrelated changes in the 2002 rule—those provisions should be viewed cohesively. *See Mendoza*, 754 F.3d at 1020 (holding that new rule made "numerous alterations" to regulatory process that "*in the aggregate* . . . are substantive changes constituting new agency action," and that those changes "must stand or fall together" because "they outline a single compensation package and set of procedures") (emphasis added); *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 900 F.2d 369, 377 n.12 (D.C. Cir. 1990) (declining to "identify which individual Rules" promulgated as part of a comprehensive regulatory change qualified as legislative, where agency "promulgated the . . . Rules as an integrated whole" and "identifying the combination of procedures that best reconciles the needs of the agency and the rights of . . . defendants involves discretionary lawmaking powers delegated" to the agency), *vacated as moot*, 933 F.2d 1043 (D.C. Cir. 1991). That approach is consistent with language EPA used in adopting the 2002 rule, which makes clear that the rule was intended to be a "comprehensive revision" to EPA's FOIA regulations, Revised FOIA Regulations, 65 Fed. Reg. 19,703 (April 12, 2000), rather than a collection of separate rules as EPA now asserts. Thus, the operative question here is whether the 2002 rule, when viewed in its entirety rather than by reference to its individual components, qualifies as legislative. It does.

EPA cites a single district court case that parsed individual provisions of a final rule and evaluated whether they were legislative, interpretive, or procedural. *Nat'l Ass'n of Mfrs. v. Dep't of Labor*, 1996 WL 420868, at *12 (D.D.C. July 22, 1996). Even assuming this was appropriate in that case (which it does not appear either party disputed), the case is inapposite because it did not concern a single rule that, like the 2002 rule, "comprehensive[ly] revis[ed]" and replaced the agency's regulations on a given subject. 65 Fed. Reg. at 19,703. As noted, it is not appropriate to individually parse the provisions of such rules, as they must "stand or fall together."

2. The FOIA Rule Does Not Fit the "Narrow" Procedural Rule Exception

Even were the Court to disregard the principles EPA asserts (incorrectly) are irrelevant to the procedural rule analysis, and apply only those principles EPA concedes *are* relevant, the FOIA Rule still is not procedural. EPA does not and cannot dispute that "[p]rocedural rules 'do not themselves alter the rights or interests of parties,'" and that "the distinction between substantive and procedural rules is one of degree depending upon whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA." *Mendoza*, 754 F.3d at 1023. "Those policies are 'to serve the need for public participation in agency decisionmaking and to ensure the agency has all pertinent information before it when making a decision.'" *Id.* These interests must be "balance[ed]" against the "agency's competing interest in 'retain[ing] latitude in organizing [its] internal operations,'" which the agency carries the burden of articulating. *Chamber*, 174 F.3d at 211. In the end, "[t]he exception for procedural rules is narrowly construed, and cannot be applied 'where the agency action trenches on substantial private rights and interests.'" *Mendoza*, 754 F.3d at 1023.

The FOIA Rule plainly "alters" and "trenches on" the "rights or interests" of FOIA requesters in several ways, CREW Mot. at 30-32, which largely track CREW's Article III injuries, *supra* Part I.A.1.[2] First, the rule allows EPA to "withhold . . . a portion of a record on the basis of responsiveness," contrary to FOIA requesters' statutory rights. *Supra* Part I.A.1.a. EPA's only response is to dispute CREW's reading of the FOIA Rule, Opp. at 18, which CREW refutes *infra* Part II.A. If CREW's reading prevails, the rule is indisputably not procedural.

Second, the rule deprives FOIA requesters of the right to submit requests directly to EPA's regional offices. *Supra* Part I.A.1.b. The Circuit deemed an analogous rule-change legislative, not procedural, in *Nat'l Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932 (D.C. Cir. 1982). There, an agency rule eliminated Medicare claimants' right to seek reimbursement directly from the agency's Secretary, and required them to submit their claims to regional intermediaries. *Id.* at 949-50. The rule did not alter claimants' right to *seek* reimbursement; it just changed the agency personnel to whom the claims could be *submitted*. In deeming the rule non-procedural, the Circuit reasoned that it "substantially affect[ed] the rights and interests" of Medicare claimants because "for sixteen years" those claimants "had the option of choosing to deal with the Secretary or with an intermediary," and the rule "foreclosed that option." *Id.* at 949; *see James V. Hurson Assocs. v. Glickman*, 229 F.3d 277, 282 (D.C. Cir. 2000) (noting that "crucial element" of rule in *Schweiker* was that it "change[d] the agency personnel . . . responsible for reviewing" requests).

[2] The main difference is that for standing purposes, the Court must focus on the FOIA Rule's effect on CREW specifically, whereas for purposes of the procedural rule exception, the Court looks at the rule's effect on the rights or interests of private parties generally.

So too here. By eliminating FOIA requesters' right to submit requests directly to EPA regional offices, the FOIA Rule forecloses an avenue for submitting requests that was available for over *40 years* under EPA's prior regulations, *see* 41 Fed. Reg. 36,902, 36,903 (Sept. 1, 1976), much like the rule in *Schweiker* foreclosed an option that was available for 16 years. In addition to departing from decades of agency practice, the change is meaningful because it deprives FOIA requesters of a "demonstrably faster avenue for obtaining records from regional offices." *Supra* Part I.A.1.b; *see Schweiker*, 690 F.2d at 949 (exception "does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated"). Also like the rule in *Schweiker*, the FOIA Rule changes the agency personnel responsible for initial intake and review of FOIA requests for regional office records, transferring that responsibility from regional offices to the National FOIA Office (and thereby increasing that office's workload by approximately 116%). The rule thus "substantially affect[s] private parties and resolves important issues without the beneficial input that those parties could provide." *Id.* at 950.[3]

[3] *Schweiker* also distinguished *Guardian Fed. Savings & Loan Ass'n v. Fed. Savings & Loan Insurance Corp.*, 589 F.2d 658 (D.C. Cir. 1978), on which EPA relies, EPA Mot. at 18. In *Guardian*, the court deemed a rule non-procedural where it required that private auditors, rather than the agency, perform certain audits of financial institutions. 589 F.2d at 661, 665-66. But the plaintiffs in *Guardian* "never had the freedom to choose who audited them," and "[t]hus, no right was eliminated by the" rule. *Schweiker*, 690 F.2d at 950 n.103. Moreover, the "rule in *Guardian* merely stated that the Secretary would not perform the required audit, it did not designate who would perform it." *Id.* The rule in *Schweiker*, meanwhile, "did more than foreclose [claimants] from dealing directly with the Secretary, it created regions and designated regional intermediaries, actions that further affected [claimants], and which involved issues on which [claimant] input would have been valuable." *Id.* Each of these rationales likewise serve to distinguish this case from *Guardian*: the FOIA Rule eliminates a right that FOIA requesters had for decades; it expressly transferred the intake responsibilities for regional office FOIA requests to the National FOIA Office; and it made various *other* changes that, as discussed *infra*, plainly could have benefited from the input of the agency's frequent FOIA requesters.

Third, the FOIA Rule impairs requesters' statutory right to "prompt[]" access to records. *Supra* Part I.A.1.c. EPA disputes that CREW has shown any risk of delay, which CREW refutes above. *Id.* EPA also accuses CREW of relying on a "now-discarded legal standard" asking whether a rule "has a substantial impact on parties." Opp. at 18. That is incorrect. While a rule's "substantial impact" is not, standing alone, dispositive to the procedural rule analysis, such considerations are relevant insofar as courts must examine whether the "change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking." *EPIC v. DHS*, 653 F.3d 1, 6 (D.C. Cir. 2011); *see Mendoza*, 754 F.3d 1024 (deeming rule legislative, not procedural, where it "substantively affect[ed] the regulated public"). Here, the risk of delay in EPA's FOIA processing is not a mere incidental inconvenience, but an impairment of a core statutory right under FOIA to prompt access to agency records, which is a material "substantive [e]ffect."

Relatedly, a critical aspect of the procedural rule analysis, which EPA altogether ignores, is the value of public participation gauged in light of the size of the affected population, as well as the insight that population could offer if the agency followed notice and comment. *See, e.g.*, *Chamber*, 174 F.3d at 212 (rule not procedural where it would "affect the safety practices of thousands of employers" and thus "[t]he value of ensuring that the [agency] is well-informed and responsive to public comments before it adopts a policy is . . . considerable"); *EPIC*, 653 F.3d at 6 (rule not procedural due partly to its "direct[] and significant[]" effect "upon so many members of the public," as evidenced by "much public concern and media coverage" generated by the rule); *Schweiker*, 690 F.2d at 950 (rule not procedural where it made changes that "could have

benefited from" the "viewpoint" of Medicare claimants, who "had been dealing with the various [Medicare] intermediaries and working with the Medicare system for years" and thus would likely "be able to provide the Secretary with valuable information concerning the most efficacious manner" to achieve rule's objectives).

The FOIA Rule applies to every person who submits a FOIA request to the agency. For context, the agency received more than 11,000 requests in 2018 alone, EPA FOIA Annual Report for 2018 § V, *available at* https://bit.ly/2NbibSO, from well over 1,000 requesters, EPA FOIA Requests Pending by Month, *available at* https://bit.ly/2T8sxXp. Given the sheer number of requests and requesters affected by the FOIA Rule, "[t]he value of ensuring that the [EPA] is well-informed and responsive to public comments before it adopts" the rule is "considerable." *Chamber*, 174 F.3d at 212. The rule also makes several changes—including those challenged by CREW—that certainly "could have benefitted" from the viewpoint of EPA's frequent FOIA requesters, many of whom have been dealing with the agency for years on FOIA matters and thus likely could have provided valuable insight on the most "efficacious manner" for the agency to achieve its objectives. *Schweiker*, 690 F.2d at 950. "The other side of the balance, moreover, is empty." *Chamber*, 174 F.3d at 212. Indeed, EPA offers no concrete facts demonstrating that its "need for 'latitude in organizing [its] internal operations" is so great that it outweighs the value of opening up the rule for public input.

Finally, although EPA concedes that the FOIA Rule has generated considerable public backlash, it deems that irrelevant to the procedural rule analysis. Opp. at 18-19. But the case law holds otherwise. For instance, in *EPIC*, the Circuit pointed to the fact that there was "much

public concern and media coverage" relevant to the challenged rule—"which no doubt would have been the subject of many comments had the [agency] seen fit to solicit" them—as proof that the rule "substantively affect[ed] the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking." 653 F.3d at 6. EPA incorrectly dismisses this language as "dicta," Opp. at 18-19, even though it appears in the middle of a paragraph where the court explains why the rule was not procedural and concludes with the following sentence: "*For these reasons*, the [agency action] . . . has the hallmark of a substantive rule and, therefore, unless the rule comes within some other exception, it should have been the subject of notice and comment." *Id.* (emphasis added). Judge Bates, moreover, treated this language as binding in *Jafarzadeh*, when he deemed media coverage of issues relating to the challenged rule pertinent to the procedural rule analysis. 321 F. Supp. 3d at 46-47 (citing *EPIC*, 653 F.3d at 6). CREW is not claiming that public outcry "retroactively transform[s]" the FOIA Rule into a legislative rule, Opp. at 18, but rather that it is *proof* of genuine public interest, which "implicate[s] the policy interests animating notice-and-comment rulemaking." *EPIC*, 653 F.3d at 6.[4]

II. Insofar as the FOIA Rule Allows EPA to Withhold a "Portion of a Record on the Basis of Responsiveness," it is Contrary to Law (Count Three)

A. CREW is Entitled to Summary Judgment on Count Three

On its face, the FOIA Rule unlawfully allows EPA to "withhold . . . a portion of a record on the basis of responsiveness." 40 C.F.R. § 2.103(b) (2019). Having failed initially to offer any reasoned basis for its convoluted reading of this provision, EPA now resorts to a tool of

[4] EPA incorporates by reference its argument that CREW lacks standing to assert Count Two of the FAC. Opp. at 19. CREW does the same for its response. CREW Mot. at 32-33.

construction—the distributive canon—first advanced by CREW. *See* EPA Mot. at 20-22 (no mention of canon); CREW Mot. at 35-36 (invoking canon). But it does so to no avail.

To begin, there is no dispute that the clause at issue consists of two parts—the first describes the FOIA determinations the agency can make ("release or withhold a record or a portion of a record"), and the second describes the potential bases for those determinations ("on the basis of responsiveness or under one or more exemptions under the FOIA"). Where the parties differ is the extent to which the second part modifies the first. CREW's position is that the second part only modifies the first part insofar as it describes the "withhold[ing]" of records, because neither FOIA nor EPA's regulations contemplate, let alone require, an agency to provide a "basis" for "releas[ing]" a record, but do require a "basis" for withholding a record, whether in full or in part. CREW Mot. at 34-36. This reading accords with the distributive canon. *Id.* (citing *Encino Motorcars v. Navarro*, 138 S. Ct. 1134, 1141 (2018)).

EPA's invokes the same canon, but claims "context" dictates that the phrase "on the basis of responsiveness" does *not* apply to "withhold . . . a portion of a record" because such a reading is contrary to *AILA v. EOIR*, 830 F.3d 667 (D.C. Cir. 2016). Opp. at 21. In essence, EPA invokes the distributive canon to give the rule a savings construction so that it does not conflict with case law construing FOIA. But that is not the function of the canon. While the canon does entail matching antecedents and consequents based on "context," this refers to "*statutory* context"—i.e., the surrounding text and structure of the *statute*. *Encino*, 138 S. Ct. at 1141 (emphasis added). CREW's reading accords with this understanding because FOIA's "statutory context," standing alone, unambiguously forecloses any notion that an agency must provide a

"basis" for *releasing* records. CREW Mot. at 34-36. By contrast, the statute is not so clear as to whether an agency may withhold "portions" of records on the basis of responsiveness. Indeed, just a few years ago in *AILA*, the government vigorously *defended* that practice, urging that "[t]he practice of redacting non-responsive materials from documents produced in response to FOIA requests has been approved by courts" both in and outside the D.C. Circuit, and is consistent with FOIA's plain language. Brief of Appellees, *AILA v. EOIR*, No. 15-5201, 2015 WL 7860873, *39-46 (D.C. Cir. Dec. 3, 2015) (citing cases). Although the D.C. Circuit rejected that argument, EPA is only bound by that ruling in this Circuit and could continue taking that position in other circuits. At any rate, the critical point is that the distributive canon is simply not a mechanism for harmonizing a challenged regulatory provision with conflicting judicial precedent. That stretches the canon beyond recognition.

Once EPA's erroneous gloss on the distributive canon is set aside, its interpretation falls apart. There is no principled basis for picking and choosing which portions of the clause "on the basis of responsiveness or under one or more exemptions under the FOIA" apply to the two enumerated types of withholdings ("a record or a portion of a record"). The prefatory phrase "on the basis of" signals the beginning of a list of two "bas[e]s" on which the agency can withhold records (responsiveness or an applicable FOIA exemption), which indicates the entire "on the basis of" clause should be read cohesively, not selectively disconnected as EPA urges. When read this way, the *entire* "on the basis of" clause modifies *both* types of listed withholdings because, again, all "withhold[ings]" of records under FOIA require a "basis," while "release[s]" do not. The soundness of this reading is reinforced by the fact that the "withhold[ing]" clause is

the nearest reasonable referent for the "on the basis of" clause. CREW Mot. at 35.[5]

EPA's interpretation also leads to redundancies that CREW's reading avoids. *See Rimini St. v. Oracle USA*, 139 S. Ct. 873, 881 (2019). In EPA's view, the first part of the clause contemplates four types of FOIA determinations: "to release . . . a record"; to "release . . . a portion of a record"; to "withhold a record"; and to "withhold . . . a portion of a record." Opp. at 20. But *releasing* a portion of a record is functionally identical to *withholding* a portion, because if only a portion is released, another portion is necessarily withheld. These are not distinct determinations, but opposite sides of the same coin. CREW's reading avoids this redundancy by recognizing that the rule sets forth only *two* overarching types of determinations: to release a record, or to withhold a record (either in full or in part). CREW Mot. at 36.

Equally unpersuasive is EPA's resort to *Auer* deference. Opp. at 22-24. For starters, EPA disregards the first hurdle of that doctrine: "the possibility of deference can arise only if a regulation is *genuinely* ambiguous . . . even after a court has resorted to all the standard tools of interpretation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (emphasis added). "[E]xhaust[ing] all the 'traditional tools' of construction" will "resolve many seeming ambiguities out of the box, without resort to *Auer* deference." *Id.* As noted, tools of construction yield a clear, unambiguous meaning of the FOIA Rule. That alone precludes *Auer*

[5] EPA disputes the applicability of the nearest reasonable referent canon on the ground that "[e]ach of the listed final determinations all share the same word 'record,'" and thus each type of determination should be deemed "equidistant from the 'on the basis of' clause." Opp. at 22. That is a non-sequitur. The relevant question is which "*type* of determination" is closest to the "on the basis of" clause. The answer is the determination to "withhold a record or a portion of a record." The fact that each of the listed determinations includes the word "record" is immaterial.

deference. Even were the rule ambiguous, EPA's reading would not "come within the zone of ambiguity . . . identified after employing all its interpretive tools," and thus would still be ineligible for deference. *Id.* at 2416. EPA also erroneously claims its "substantive expertise" in FOIA entitles it to deference, but deference is unavailable for "interpretive issues" that fall just as well "into a judge's bailiwick." *Id.* at 2417. Here, the challenged provision concerns the release and withholding of records under FOIA—an issue with which courts are intimately familiar. EPA thus has "no comparative expertise" warranting deference. *Id.*

B. Count Three is Ripe

It is the law of this Circuit that "a purely legal claim in the context of a facial challenge, such as [CREW's] claim, is presumptively reviewable." CREW Mot. at 39 (citing cases). EPA offers nothing to overcome this presumption.

EPA starts by, once again, disputing that it will invoke the rule to unlawfully withhold portions of records. Opp. at 25. But as CREW explained, the Circuit has repeatedly held that "a purely legal challenge to final agency action is not unfit for review merely because the application of the disputed rule remains within the agency's discretion." CREW Mot. at 39 (citing cases). EPA has no response to this authority.

Meanwhile, the cases EPA cites are readily distinguishable because resolution of the legal issues presented in those case required further factual development. Opp. at 25-27. In *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803 (2003), the plaintiff challenged a regulation deeming the Contract Disputes Act inapplicable to concession contracts. *Id.* at 804-05. The Court ruled that the case was unripe because "further factual development would

'significantly advance our ability to deal with the legal issues presented.'" *Id.* at 812. Specifically, both parties' positions regarding the applicability of the Contract Disputes Act depended to some extent on the *type* of concession contract at issue, and thus the Court deemed it necessary to "await a concrete dispute about a particular concession contract." *Id.* So too in *Webb v. HHS*, 696 F.2d 101 (D.C. Cir. 1982), where the plaintiff challenged a FOIA regulation relating to New Drug Applications ("NDAs"). *Id.* at 103. The Circuit deemed the case unripe because the "validity of applying [the regulation] to a FOIA request will vary depending on what information is actually contained in the NDA file," and "the amount of information released pursuant to [the regulation] will vary depending on the stage to which the NDA has progressed and the extent to which the information has already been made available to the public." *Id.* at 106-07; *see Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 95 (D.C. Cir. 1986) (distinguishing *Webb* in deeming facial challenge to FOIA regulation ripe, noting that "the challenge to the FDA rule at issue [in *Webb*] was uniquely fact-based").

Here, by contrast, no further factual development is necessary. No matter what types of records are at issue, *any* determination to "withhold . . . a portion of a record on the basis of responsiveness" pursuant to the FOIA Rule's plain language would categorically be unlawful. EPA vaguely asserts that the Court's analysis could be informed by "pertinent FOIA determinations or agency statements or interpretations concerning the regulation," Opp. at 26, but fails to explain why these would meaningfully "advance [the Court's] ability to deal with the legal issues presented," *Nat'l Park Hospitality Ass'n*, 538 U.S. at 812. Nor could it. "No further factual development is necessary to evaluate [CREW's] challenge" because EPA's "action

necessarily stands or falls" based on the text of the FOIA Rule and EPA's "statutory . . . authority under" FOIA. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1281 (D.C. Cir. 2005); *see also Better Gov't*, 780 F.2d at 95 ("facial challenge" to FOIA regulations was ripe where it raised "purely legal issues" regarding the regulations' "alleged facial inconsistency with the legal mandate of FOIA," the "resolution of which would not be measurably enhanced by factual illustration"); *Payne Enters. v. United States*, 837 F.2d 486, 492 (D.C. Cir. 1988) (challenge to FOIA policy was ripe where it "present[ed] a concrete legal dispute" and "no further factual development [was] essential to clarify the issues," and rejecting "the Government's claim that the case does not present purely legal issues because each request is different and may implicate different concerns").[6]

EPA fares no better on the hardship prong. First, EPA disregards *en banc* D.C. Circuit authority holding that hardship is immaterial if the case is deemed fit for review. CREW Mot. at 40 (citing *Cohen v. United States*, 650 F.3d 717, 735 (D.C. Cir. 2011) (en banc)). EPA also insists that the burden of filing another suit does not qualify as "hardship," Opp. at 27, but that

[6] EPA selectively quotes a passage from *Nat'l Park Hospitality* stating that a "regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [APA] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." 538 U.S. at 808 (quoting *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891 (1990)). Yet EPA omits the very next sentence of that quote, which states that "substantive rule[s]" are a "major exception" to these principles, and that "[s]uch agency action is 'ripe' for review at once." *Id.* Moreover, the Circuit has noted that the quoted passage from *Lujan* concerned a challenge that impermissibly sought "'wholesale revision" of an agency's "permitting framework," rather than a challenge to a "specific agency action." *Nat'l Ass'n of Home Builders*, 417 F.3d at 1283. That rationale does not apply here, where CREW challenges a particular provision of a binding substantive rule that is currently in effect and applicable to all FOIA requests pending before EPA, including CREW's requests.

misstates the harm to CREW. It is not merely the burden of filing a new suit—it is the resulting impairment of CREW's statutory right under FOIA to "prompt" access to requested records, CREW Mot. at 41, which the Circuit has deemed sufficient to show hardship, *see Payne*, 837 F.2d at 494 (practices that had effect of delaying release of information in response to FOIA requests caused hardship to "frequent FOIA requester" plaintiffs). As Judge Brown Jackson explained in rejecting a similar ripeness challenge, "it is crystal clear that an agency's practice of illegally enforcing an administrative policy at the outset, and then forcing a FOIA requester to bring individual lawsuits in the context of each FOIA request, causes 'unreasonable delay[] in disclosing non-exempt documents [that] violate[s] the intent and purpose of the FOIA.'" *Muckrock v. CIA*, 300 F. Supp. 3d 108, 134-35 (D.D.C. 2018) (quoting *Payne*, 837 F.2d at 494).

III. Alternatively, if the Court Determines that FOIA Authorizes the Relief Sought in Count Three, CREW is Entitled to Summary Judgment on Count Four

As previously explained, there is a two-step framework for analyzing whether FOIA provides an "adequate alternative remedy" preclusive of APA relief—the court first asks whether FOIA authorizes the requested APA relief, and then, only if there is a gap between FOIA and APA relief, considers whether the more-limited FOIA remedy is "adequate." CREW Mot. at 42.

On the first step, EPA has no response to CREW's position that FOIA authorizes "relief materially identical" to CREW's APA claim—i.e., "a facial challenge to an agency regulation as contrary to FOIA," and "appropriate declaratory and 'prospective injunctive relief' forbidding its application.'" CREW Mot. at 42-43. Rather than responding to this point, EPA again disputes CREW's reading of the rule on the merits, which CREW refutes *supra* Part II.A. It also contends that CREW has failed to plead a FOIA "policy or practice" claim under *Payne* because

it has not pointed to specific unlawful withholdings. Opp. at 31. But such a showing is necessary only when the "practice at issue is informal, rather than articulated in regulations or an official statement of policy," and thus there is a need for "evidence[]" of an ongoing "policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA." *Payne*, 837 F.2d at 491. No such "evidence" is required where, as here, the plaintiff challenges a formal agency regulation as facially unlawful under FOIA, as there is no dispute that the agency has, in fact, adopted an unlawful policy. In any event, EPA's position is merely a rehash of its ripeness argument, which is refuted *supra* Part II.B.[7]

Without any supporting analysis, EPA appears to assume that FOIA does *not* authorize prospective facial challenges to agency regulations, and only permits such challenges after a regulation has been invoked to withhold records in response to a particular FOIA request. Opp. at 28-30. If that were true, then FOIA would not be an "adequate" remedy. CREW Mot. at 43-45. Indeed, the case law makes clear that "individual FOIA lawsuits concerning an agency's treatment of particular requests do not provide *any* remedy, let alone an *adequate* one" that could serve as a substitute for prospective injunctive relief. *Muckrock*, 300 F. Supp. 3d at 134-35 (citing cases). That is because forcing a plaintiff to await a particular improper withholding before challenging an unlawful FOIA policy *by itself* "causes 'unreasonable delay[] in disclosing

[7] EPA also overlooks that CREW's claim is grounded not just in *Payne*, but more generally in the Court's "equitable authority under FOIA, 5 U.S.C. § 552(a)(4)(B)." FAC ¶ 62. That authority is "broad" since "Congress did not intend 'to limit the inherent powers of an equity court' in FOIA cases." *CREW v. DOJ*, 846 F.3d 1235, 1242 (D.C. Cir. 2017). While *Payne* is an illustration of the "wide latitude courts possess to fashion remedies under FOIA, including the power to issue prospective injunctive relief," *id.*, it does not delineate the outer limits of that authority.

non-exempt documents [that] violate[s] the intent and purpose of the FOIA.'" *Id.* at 134 (quoting *Payne*, 837 F.2d at 494); *see also Judicial Watch, Inc. v. DHS*, 895 F.3d 770, 780 (D.C. Cir. 2018) ("[f]iling a lawsuit hardly ensures 'prompt[] availab[ility]'" of records under FOIA). Thus, if the Court construes FOIA as not authorizing prospective injunctive relief challenging the FOIA Rule as facially unlawful, FOIA is not an adequate alternative to APA relief.

CREW v. DOJ, 846 F.3d 1235 (D.C. Cir. 2017), is not to the contrary. There, CREW sought prospective injunctive relief under the APA requiring the agency to proactively disclose to the public—without a "specific prior [FOIA] request"—records subject to FOIA's "reading-room" provision. *Id.* at 1241. The court held that FOIA authorized such an injunction, except that the injunction could only require disclosure of records "to CREW, not . . . the public" at large. *Id.* The court went on to deem this an "adequate" alternative to APA relief, because "FOIA ma[de] available all the [prospective] relief sought by CREW except disclosure to the public," and "CREW itself can gain access to all the records it seeks." *Id.* at 1244, 1246.

Here, by contrast, EPA claims that FOIA does *not* authorize the prospective relief CREW seeks under the APA, and only permits CREW to challenge the FOIA Rule in the context of a particular unlawful withholding. That would result in a significant discrepancy as to the *timing* of available relief under FOIA as opposed to the APA. That was not the case in *CREW*, where FOIA authorized all prospective relief sought by CREW except disclosure to the public.

CONCLUSION

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

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Respectfully Submitted,

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