UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 19-2181 (KBJ)
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	(consolidated with 19-2198 and 19-3270)
Defendants.	)	

REPLY IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs have presented no persuasive arguments against dismissal of this action or for entering summary judgment in their favor. As discussed in Defendant's Motion to Dismiss the Complaint ("Motion") and below, Plaintiffs cannot meet their burden to establish the jurisdictional requirements of standing because, among other reasons, Plaintiffs cannot show any actual or imminent injury from the regulations at issue in this case, some of which were not substantively amended by the rulemaking Plaintiffs purport to challenge. Even if the Court reaches the merits, it should dismiss the complaint for failure to state a claim. Plaintiffs have failed to rebut Defendant's showing that each of Plaintiffs' claims is legally deficient. Indeed, throughout their opposition brief, Plaintiffs repeatedly ignore controlling Supreme Court and D.C. Circuit decisions that contradict their legal theories.[1] Plaintiffs' head-in-the-sand approach will neither cure the deficiencies in their case nor save their claims from dismissal. For the reasons discussed below and in Defendant's Motion, the Court should dismiss Plaintiffs' complaint and deny Plaintiffs' Cross-Motion for Partial Summary Judgment.

ARGUMENT

I. The Court Should Dismiss Claim One

Claim One of Plaintiffs' complaint alleges that EPA's *Freedom of Information Act Regulations Update* (the "Rule"), 84 Fed. Reg. 30028, violates the APA and the FOIA because it allegedly "centralize[s EPA's] FOIA processing activities at its Washington DC Headquarters[.]" Compl. ¶ 48. Plaintiffs have failed to rebut Defendant's showing that Claim One should be dismissed for lack of standing and failure to state a claim.

[1] Defendant reserves the right to seek leave to file a sur-reply should Plaintiffs address these decisions in their reply. Plaintiffs should not be permitted to defer stating their position on these controlling authorities until their final brief, thereby depriving Defendant of the opportunity to respond.

A. Plaintiffs Lack Standing to Challenge EPA's Changes to its FOIA Request Submission Procedures

1. Plaintiffs Have Not Plausibly Alleged That the Rule Will Delay EPA's Responses to Plaintiffs' FOIA Requests

A prudent plaintiff would have waited for the Rule to be implemented, observed its effects, and then filed suit only if the plaintiff suffered harm as a result of the Rule. But Plaintiffs here rushed to Court, bringing this litigation even before the Rule became effective, based on nothing more than Plaintiffs' speculation about potential future injuries. As a consequence of their haste, Plaintiffs confront "a significantly more rigorous burden to establish standing" because they claim only future injuries. *Chamber of Commerce v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011). Plaintiffs' showing is especially weak given that they contend only that the Rule will increase the "risk" that Plaintiffs might someday suffer injury – processing delays and political interference with their FOIA requests. Opp'n at 16, 43. "Although the D.C. Circuit has recognized that 'increases in risk can at times be 'injuries in fact' sufficient to confer standing,' the governing standard is not easily met." *Public Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 21 (D.D.C. 2018). The D.C. Circuit "has limited its jurisdiction over cases alleging the possibility of increased-risk-of-harm to those where the plaintiff can show '*both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account.'" *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015) (emphasis in original). And "the constitutional requirement of imminence . . . necessarily compels a very strict understanding of what increases in risk and overall risk levels can count as 'substantial.'" *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1296 (2007).

In their opposition, Plaintiffs barely even attempt to meet this standard. As to their contention that the Rule will increase the risk of processing delays, the gist of their argument is that EPA has, at times in the past, failed to meet the FOIA's statutory deadlines and Plaintiffs

"believe" that the Rule's changes to FOIA submission procedures "will further slow down EPA's processing of FOIA requests." Decl. of Edward Scher, ECF No. 11-1, ¶ 26; *see also* Opp'n at 8. But Plaintiffs' subjective belief that the Rule will cause processing delays is not a substitute for well-pled factual allegations plausibly suggesting (1) a substantially increased risk of delays and (2) a substantial probability of delays with that increase taken into account.

At bottom, Plaintiffs' belief that the Rule will increase the risk of processing delays is simply speculation, unsupported by factual allegations, that EPA might not devote adequate staff to handle its revised FOIA intake procedures. Opp'n at 13-15. But Plaintiffs offer no factual allegations or evidence to suggest that EPA staffing in its National FOIA Office ("NFO") is inadequate for that office's intake responsibilities. On the contrary, the only evidence before the Court on this point shows that in the lead-up to the effective date of the Rule, the NFO hired additional staff, which *expanded* its capacity to perform intake-related work. *See* Decl. of Timothy Epp ¶¶ 4-5. Plaintiffs' only response to this evidence is to label it a "minor staffing increase" which "proves nothing." Opp'n at 15. Of course, it is *Plaintiffs* who have the burden of proof on the issue of standing, not Defendant. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). And Plaintiffs cite no allegations or evidence plausibly suggesting that the NFO cannot manage its intake responsibilities, much less that the intake work will substantially increase the risk of processing delays for Plaintiffs' future requests.

Moreover, as discussed in Defendant's motion, Plaintiffs' speculation that the Rule will cause processing delays is based on Plaintiffs' mistaken belief that EPA centralized all *processing* of FOIA requests when, in fact, EPA only centralized the *intake* of requests. Mot. at 7-10. In their opposition, Plaintiffs do not dispute this point, but they try to minimize it as a "semantic difference." Opp'n at 14. Plaintiffs are wrong. FOIA processing includes searching for records,

reviewing potentially responsive records for responsiveness, and reviewing records for exempt material – work that can be extremely time-consuming, particularly where the volume of records is large. *See* Kaminer Decl., Ex. B, Tab 1 at 6–12 (providing that offices assigned to process a request "Determine Search Parameters," "Determine if Additional Responsive Records are in Other Agency Organizations," "Estimate Processing Fees," "Determine Response Time," "Collect and Review the Records," "Determine Which Records (or Portions) May Be Released," "Prepare Response Letter," "Finalize Processing Fees," "Obtain Approval from an Authorized Official to Release or Withhold Records," "Respond to Request," and "Finalize Actions"). In contrast, FOIA intake is more limited and involves the receipt of requests, an initial review to determine whether the request complies with statutory and regulatory requirements, decisions on expedited processing requests, and assignment of the request to an appropriate office for processing. *See id*. at 4–6 (providing that intake functions includes acknowledging incoming requests, determining the fee category, handling expedited processing requests, and assigning the request to the action office). The Rule recognized this distinction between intake and processing. *See* 84 Fed. Reg. at 30033 ("the National FOIA Office will assign the request to an appropriate office within the Agency for processing."). Accordingly, intake and processing are entirely different steps, and the fact the EPA centralized only intake contradicts Plaintiffs' speculation that the Rule may cause delays.

Another critical error in Plaintiffs' argument is their failure to distinguish between the NFO (which is an office within the EPA General Counsel's Office, *see* 84 Fed. Reg. at 30030), and EPA headquarters generally. *See* Opp'n at 13-15. For instance, Plaintiffs point to alleged processing delays at EPA headquarters, *id*. at 13-14, and insist that the Rule will "increas[e] the FOIA workload at Headquarters," *id*. at 14. But the increased responsibilities from the Rule's changes to intake procedures are only for the NFO, which is merely one office within headquarters. Offices

that perform most of the FOIA processing – various offices within headquarters and the regions – do not perform the duties associated with receiving incoming FOIA requests. 84 Fed. Reg. at 30031. Plaintiffs do not explain why expanding the NFO's intake responsibilities would impact other offices' processing capacities. Accordingly, Plaintiffs' speculations about potential future delays does not establish an injury-in-fact. *See Pub. Citizen*, 489 F.3d at 1294-96 (increased risk of car accidents due to agency regulation was too speculative and remote to support standing); *Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, 310 F. Supp. 2d 216, 228 (D.D.C. 2004) (despite "significant likelihood" that plaintiffs will face delays in accessing records, such future injury was not sufficiently imminent to support standing); *CREW v. Dept. of Ed.*, 538 F. Supp. 2d 24, 29-31 (D.D.C. 2008) (plaintiff's allegations of injury were too speculative to show standing where court would have had to accept a number of speculative inferences and determine whether agency would be unable to process plaintiff's FOIA request due to challenged conduct).

2. Plaintiffs Have Not Plausibly Alleged That the Rule Will Cause "Political Interference" in EPA's Responses to Plaintiffs' FOIA Requests

Plaintiffs fare no better with their belief that "[c]entralizing FOIA processing [sic] at EPA Headquarters increases the likelihood that FOIA determinations will be subject to improper political pressure[.]" Opp'n at 16. This alleged harm, too, is entirely speculative. Indeed, the D.C. Circuit last year rejected as "pure speculation" an analogous standing argument. In *Electronic Privacy Information Center v. DOC*, 928 F.3d 95 (D.C. Cir. 2019), the plaintiffs sought to challenge the government's intention to collect citizenship information during the 2020 census. The plaintiff organization argued that its members would be harmed if the government disclosed their citizenship information to third-parties, but the D.C. Circuit considered it "pure speculation to suggest that the Census Bureau will not comply with its legal obligations to ensure the privacy of respondents' data or that those legal obligations will be amended." *Id*. at 102 ("[s]peculation .

. . is ordinarily fatal to standing"). The plaintiffs' alleged injury was speculative because it "assum[ed] the independent violation of other laws by the Census Bureau." *Id*. at 104.

Likewise, here, Plaintiffs' theory of injury assumes that EPA officials will violate the FOIA by making "indefensible decisions" on FOIA requests for "political" reasons. Opp'n at 16; *see also* Scher Decl. ¶ 26 (describing "belie[f]" that centralization of FOIA intake will cause "political meddling"). As in *EPIC*, it is pure speculation for Plaintiffs to assume EPA officials will violate the FOIA. Plaintiffs' speculation is also contrary to the presumption "that government officials discharge their duties in good faith," a presumption the "D.C. Circuit requires[.]" *Competitive Enter. Inst. v. EPA*, 67 F. Supp. 3d 23, 33 (D.D.C. 2014) (citing *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008) ("We must presume an agency acts in good faith[.]")).

Plaintiffs' theory is not only speculative – it is also illogical. Plaintiffs believe that the Rule will cause "political interference" in "FOIA determinations" because EPA headquarters is "the location of the majority of EPA's political appointees." Opp'n at 16. But, as discussed, the Rule does not change the location of FOIA processing, during which the decisions about whether to release records are made. EPA regional offices will still process FOIA requests after assignment by the NFO. *See* 84 Fed. Reg. at 30033 (40 C.F.R. § 2.103(a)).

3. Plaintiffs' Additional Standing Arguments Fail

Plaintiffs raise some additional standing arguments, but none suggest that the EPA's centralization of FOIA request intake will cause any imminent injury. First, Plaintiffs briefly argue that centralization of intake "will deprive EcoRights of the connections it has made with regional staff over many years[.]" Opp'n at 9. But that argument is meaningless because FOIA processing will still occur within regional offices, so Plaintiffs may continue to utilize any alleged connections with regional staff that they believe may benefit them.

Next, Plaintiffs argue that "frequent FOIA requesters have a cognizable Article III interest

in an agency's FOIA rules and policies where they have pending FOIA requests likely to implicate the challenged policy, and intend to submit similar requests in the future." Opp'n at 8. But Plaintiffs have not shown that they have pending FOIA requests likely to implicate the challenged parts of the Rule – the only FOIA requests mentioned in the complaint were submitted before the Rule became effective and are already the subject of other lawsuits. Compl. ¶¶ 42-46. Also, the mere fact that Plaintiffs are frequent FOIA requesters does not relieve Plaintiffs of the requirement to show an actual or imminent injury.[2]

Plaintiffs also assert that they may sue on behalf of their alleged "members," but they fail to satisfy the requirements for associational standing. Opp'n at 10-11. Plaintiffs do not even allege that they are traditional membership organizations or their functional equivalents. *See Wash. Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 208 (D.D.C. 2007). In addition, Plaintiffs do not explain why their supposed members would have standing to sue, which is another requirement for associational standing. *See id*. For example, Plaintiffs do not claim that their supposed members intend to submit FOIA requests to EPA and that those member will somehow be harmed by the Rule's revised submission procedures. Instead, Plaintiffs cite to declarations merely describing the organizations' activities, but not claiming any harm to their supposed members. Opp'n at 11

[2] Plaintiffs' cited cases do not suggest otherwise, as each involved an alleged injury to the plaintiff. *See MuckRock, LLC v. CIA*, 300 F. Supp. 3d 108, 132 (D.D.C. 2018) (finding standing because the injury alleged was based on the failure to produce requested documents); *Gatore v. U.S. Dep't of Homeland Sec.*, 327 F. Supp. 3d 76, 90 (D.D.C. 2018) (finding standing to challenge alleged policy and practice of "never providing any part" of a particular type of record which plaintiff was allegedly entitled to receive); *Khine v. U.S. Dep't of Homeland Sec.*, 334 F. Supp. 3d 324, 330 (D.D.C. 2018) (finding standing to challenge alleged policy and practice of issuing FOIA response letters that violate FOIA); *CREW v. Cheney*, 593 F. Supp. 2d 194, 227 (D.D.C. 2009) (finding standing where there was "no question that the destruction of . . . records would cause [the plaintiff] injury when he seeks to use them in the future"); *CREW v. Exec. Office of the President*, 587 F. Supp. 2d 48, 61 (D.D.C. 2008) (finding plaintiff would be injured if deleted records were not restored because plaintiff would not be able to obtain the records). In contrast to these cases, Plaintiffs here have not shown that the Rule has caused or will cause them any injury.

(citing Scher Decl. ¶¶ 4-6; Beaman Decl. ¶¶ 4-7).

Lastly, Plaintiffs claim to have submitted FOIA requests directly to EPA regional offices in the past, but they do not identify any such request. Opp'n at 15; Scher Decl. ¶ 26 (saying only that EcoRights has formed relationships with regional staff). Plaintiffs' failure to show any interest in submitting requests directly to regional offices further undermines their assertion that they are injured by an inability to do so now (which is otherwise inadequate for the reasons discussed).

4. Plaintiffs Lack Standing to Assert a FOIA Claim

Plaintiffs do not dispute that they have not submitted any FOIA request that would be subject to the Rule. *See* Mot. at 11; Opp'n at 17. They nevertheless insist that they may bring a FOIA claim to challenge the Rule's centralization of FOIA intake. Opp'n at 17. Plaintiffs completely disregard the multiple cases cited in Defendant's Motion holding that submission of a FOIA request is a prerequisite to standing under the FOIA. *See* Mot. at 11. But ignoring those decisions will not save Plaintiffs' claim. Indeed, the requirement that a plaintiff must first make a request to have standing is strictly construed, and courts routinely dismiss FOIA claims for lack of standing where, for example, a FOIA request was submitted by someone other than the plaintiff. *See, e.g.*, *McDonnell v. United States*, 4 F.3d 1227, 1236-37 (3d Cir. 1993); *Three Forks Ranch Corp. v. Bureau of Land Mgmt.*, 358 F. Supp. 2d 1, 2-3 (D.D.C. 2005); *MAXXAM, Inc. v. FDIC*, 1999 U.S. Dist. LEXIS 23364, at *5-7 (D.D.C. Jan. 29, 1999); *SAE Prods. v. FBI*, 589 F. Supp. 2d 76, 80 (D.D.C. 2008). Each of these cases would have been wrongly decided if, as Plaintiffs believe, a plaintiff can sue under the FOIA without making a FOIA request.

McGehee v. CIA, 697 F.2d 1095 (D.C. Cir. 1983), the only opinion cited by Plaintiffs on this issue, does not suggest otherwise. Unlike here, the plaintiff in *McGehee* had made a request for records and was suing for access to those records. *Id*. at 1100. Moreover, the issue in *McGehee* was whether the agency's handling of referrals amounted to a withholding. *Id*. at 1110. Here,

Plaintiffs have not alleged that EPA's centralization of FOIA intake amounts to a withholding.

B. Claim One Also Fails Under Rule 12(b)(6)

Plaintiffs make no credible argument in defense of the sufficiency of the complaint's allegations regarding Claim One. Opp'n at 11-12. Plaintiffs' argument is simply that because Plaintiffs believe EPA's centralization of FOIA intake "will lead to further delay" and will "increase political interference," it is necessarily arbitrary and capricious. Opp'n at 10-11. But as discussed, the complaint does not plausibly allege that the Rule will lead to delays or political interference in FOIA decisionmaking. And even assuming the complaint had made such a showing, that still would not suggest the Rule is arbitrary or capricious. As discussed in Defendant's Motion, the mere existence of costs associated with an agency decision does not make that decision unlawful. Mot. at 13. Plaintiffs failed to respond to that point. Opp'n at 11-12.

Plaintiffs also reference a 2016 EPA report noting that "23 percent of respondents favored centralization within a core FOIA group at Headquarters." Scher Decl., Ex. 6 at ES-4. But that report addresses the level of support for centralizing EPA's "FOIA program" overall, not for centralizing just FOIA intake, which is all the Rule did. *See id*. at 39 (respondents were asked "whether they would be in favor of centralizing the FOIA program in a core FOIA group at Headquarters"). And even if the report were addressing the policy at issue here (it was not), staff support for a proposed policy does not bear on whether the decision to enact the policy was arbitrary or capricious, particularly not where a significant percentage of staff support the proposal. *Cf. Clinch Coal. v. Damon*, 316 F. Supp. 2d 364, 390 (W.D. Va. 2004) ("The fact that certain experts disagree with the agency's conclusions does not render the agency's decision arbitrary and capricious."). In short, nothing in Plaintiffs' complaint suggests it was unlawful for the EPA to make modest changes to its FOIA submission procedures.

Plaintiffs also ask the Court to deny Defendant's "motion to dismiss for failure to state a

claim and allow the issue be resolved on summary judgment after development of the record[.]" Opp'n at 12. But Plaintiffs' preference to have this case decided at summary judgment is not a reason to deny the motion to dismiss. If it were, every plaintiff in every lawsuit would take that position in response to a motion to dismiss. In other words, Rule 12(b)(6) may not be invoked only with a plaintiff's consent.

Lastly, Defendant's position that Claim One fails to state a claim is consistent with its position that summary judgment briefing on Claim One should be deferred until the motion to dismiss is resolved. Opp'n at 12. Defendant asked the Court to defer summary judgment briefing on Claim One in part because such briefing would require Defendant to prepare an administrative record. Mot. to Stay, ECF No. 35, at 7-9. Defendant's challenge the sufficiency of the allegations in the complaint through a Rule 12(b)(6) motion presents a separate question from whether the administrative record supports the agency's action.

II. The Court Should Dismiss Claim Two and Deny Plaintiffs' Summary Judgment Motion as to That Claim

A. Claim Two Is Barred by the Statute of Limitations

In Claim Two, Plaintiffs allege that the Rule violates the APA and the FOIA because it "allow[s] the Administrator to make initial determinations on FOIA requests and . . . bar[s] requesters from appealing those determinations[.]" Compl. ¶ 51. As explained in Defendants' Motion, Claim Two is barred by the applicable six-year statute of limitations because the regulations relating to the Administrator's FOIA authority were promulgated many years ago and were not substantively amended by the Rule. *See* Mot. at 16-17. Plaintiffs' only response is to dispute that the prior regulations recognized the Administrator's FOIA authority. Opp'n at 24. But that is plainly incorrect, for the reasons discussed in the next section. *See* Section II(B)(2) *infra*. The prior regulations acknowledged the Administrator's authority by (1) listing officials

who "are delegated" that authority by the Administrator and (2) expressly recognizing that "the Administrator" may make an "adverse determination . . . on an initial request[.]" *See id.* The minor changes in the phrasing of the regulations did not alter the Administrator's authority and did not restart the limitations period. *See* Mot. at 16-17.

Notably, Plaintiffs do not contend that the regulation providing that "[a]n adverse determination by the Administrator on an initial request will serve as the final action of the Agency" is new or was substantively amended by the Rule. 40 C.F.R. § 2.104(j)(2). Nor could they, as that language is still exactly the same as when it was promulgated in 2002. *Compare* 67 Fed. Reg. at 67310 (40 C.F.R. § 2.104(j)(3)) *with* 84 Fed. Reg. at 30035 (40 C.F.R. § 2.104(j)(2)). Because that regulation has been in place since 2002, Plaintiffs' challenge to it is untimely, and Plaintiffs do not attempt to show otherwise.

B. Plaintiffs Lack Standing for Claim Two

1. Plaintiffs Do Not Face Any Imminent Injury

As to the authority of the Administrator to make FOIA determinations, Plaintiffs "believe that this [alleged] change *could* lead to interference with EcoRights' FOIA requests where they are considered 'politically charged.'" Scher Decl. ¶ 11 (emphasis added); *see also id*. ¶ 24 ("I am concerned that decisions on EcoRights' FOIA requests *could* be more politicized. . . . I am concerned that determinations on these requests *could* be subject to awareness review, political appointee determinations, and other political meddling with FOIA.") (emphasis added). But Plaintiffs' speculation about what "could" happen is plainly insufficient to show an imminent injury. *See Pub. Citizen*, 489 F.3d at 1294 ("[W]e have said many times before and reiterate today: *Allegations of possible future injury do not satisfy the requirements of Art[icle] III.*") (emphasis and alterations in original; citation omitted). Indeed, the D.C. Circuit rejected similar speculations about possible future harms in *Chamber of Commerce*. There, the court found declarations

warning what "could" occur because of the challenged government action to be "just the kind of declarations that we have previously rejected as insufficient to establish standing" because they indicate only what "'may' occur at some point in the future[.]" 642 F.3d at 201-02 (citing *Center for Biological Diversity v. DOI*, 563 F.3d 466, 478 (D.C. Cir. 2009); *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1384 (D.C. Cir. 1996)). Here, Plaintiffs' speculation is even more tenuous than in *Chamber of Commerce* because it wrongly assumes the head of a federal agency will interfere in government decisionmaking "for personal, reputational, and political reasons[.]" Opp'n at 25. The Court should not credit such baseless speculation. *See EPIC*, 928 F.3d at 102 ("it is pure speculation to suggest that the Census Bureau will not comply with its legal obligations"); *Comcast Corp.*, 526 F.3d at 769 n.2; *Competitive Enter. Inst.*, 67 F. Supp. 3d at 33.

Nor is there any injury arising from the fact that a FOIA determination by the Administrator will serve as the final decision by the agency. Plaintiffs argue that they use administrative appeals to press for the production of additional information. Opp'n at 25. But that argument does not apply where the appeal would be decided by the same individual who made the initial determination. In an instance where the Administrator decides a FOIA request, the head of the agency will have already made the decision, and the requester is not harmed simply because the Administrator does not make the decision a second time.

As explained in Defendant's Motion (at 14-15), even if Plaintiffs could show harm from the Administrator's authority to make FOIA determinations, that would not suggest that Plaintiffs themselves face any imminent injury because Plaintiffs have not shown the Administrator will decide any of *Plaintiffs'* requests, much less that he will do so imminently. *See Public Citizen*, 489 F.3d at 1293-98 (potential future harms are not imminent). Plaintiffs respond by claiming that there is a "substantial risk" the Administrator will exercise his FOIA authority because of the

"sensitive nature of the records [Plaintiffs] often seek[.]" Opp'n at 26. But the substantial risk standard is not met simply because a government official has the authority to act in a manner that a plaintiff believes may cause injury. In *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), the Supreme Court determined that there was not a substantial risk of injury where the challenged statute "at most *authorizes*—but does not *mandate* or *direct*—the [injury] that [the plaintiffs] fear," so the plaintiffs' "allegations [were] necessarily conjectural." *Id*. at 412 (emphasis in original). "Simply put," the plaintiffs in *Clapper* could "only speculate as to how the Attorney General and the Director of National Intelligence will exercise their discretion[.]" *Id*.; *see also id*. at 414 n.5 (no substantial risk of injury based on these facts). Likewise, here, Plaintiffs can only speculate about whether the Administrator will exercise his discretion to decide a FOIA request that Plaintiffs may someday submit. The fact that Plaintiffs' past requests are, in their view, "sensitive," Opp'n at 26, does not change this analysis, as EPA receives countless FOIA requests that might be considered "sensitive," and Plaintiffs have not shown that the Administrator has *ever* decided a sensitive request, or any other request for that matter. If Plaintiffs' claimed injury were more than mere speculation, one would expect Plaintiffs to be able to point to actual examples of the injury they claim, but they cannot. The alleged injury is not real, nor is it imminent.

2. Plaintiffs Have Not Shown Causation or Redressability

Even assuming Plaintiffs face an imminent injury from the Administrator's FOIA authority (they do not), they still cannot satisfy the causation and redressability requirements for standing. As explained in Defendant's Motion, the Administrator's authority is conferred not by the Rule, but by statute, and the authority was already recognized in EPA's regulations prior to the Rule. Mot. at 15-16. Therefore, any theoretical harm would not be caused by the Rule or be redressable by the relief Plaintiffs seek. *Id*. In their opposition, Plaintiffs dispute that EPA's prior regulations recognized the Administrator's FOIA authority. Opp'n at 22-24. They claim that the prior

regulations listed "the individuals with authority to issue initial determinations" and that the "Administrator is conspicuously absent from this list, where EPA must have considered giving the administrator this authority and declined to do so." *Id*. at 23. But even a cursory review of the prior regulations shows the error in Plaintiffs' reasoning. The pre-Rule version of the pertinent regulation is as follows:

> Initial denials of requests. The Deputy Administrator, Assistant Administrators, Regional Administrators, the General Counsel, the Inspector General, Associate Administrators, and heads of headquarters staff offices ***are delegated*** the authority to issue initial determinations. However, the authority to issue initial denials of requests for existing, located records (other than initial denials based solely on § 2.204(d)(1)) may be redelegated only to persons occupying positions not lower than division director or equivalent.

40 C.F.R. § 2.104(h) (2018) (emphasis added).

As is clear from the text, the regulation does not purport to identify "the individuals with authority to issue initial determinations," as Plaintiffs insist. Opp'n at 23. Rather, it expressly describes the officials who "are delegated" FOIA determination authority (and it also identifies limitations on redelegations of that authority). Obviously, a delegation of authority ***to*** someone requires a delegation ***by*** someone else. Here, the official who delegated the authority was the Administrator. *See* 67 Fed. Reg. 67303, 67307 (Nov. 5, 2002) (Administrator issued the 2002 regulations). In other words, the regulation was simply the publication in the Code of Federal Regulations of EPA's internal delegation of FOIA authority by the Administrator, which had been in place since 1983. *See* Second Decl. of Joan Kaminer, Ex. A (delegation 1-30); *id*. Ex. B (delegations manual explaining that delegations allow subordinate agency officials to carry out responsibilities on the Administrator's behalf); *see also Skokomish Indian Tribe v. GSA*, 587 F.2d 428, 431 (9th Cir. 1978) (recognizing that heads of federal agencies have "broad powers to delegate [their] authority"); 5 U.S.C. § 302 (recognizing authority of the "head of an agency" to

delegate authority to "subordinate officials").[3]

The Rule revised the regulatory language quoted above to clarify officials' FOIA authority. 84 Fed. Reg. at 30031. The revised regulation no longer describes the authority in terms of the officials who "are delegated" authority. Instead, it now enumerates the officials who "are authorized" to make FOIA determinations, as follows:

> Authority to issue final determinations. The Administrator, Deputy Administrators, Assistant Administrators, Deputy Assistant Administrators, Regional Administrators, Deputy Regional Administrators, General Counsel, Deputy General Counsels, Regional Counsels, Deputy Regional Counsels, and Inspector General or those individuals' delegates, ***are authorized to make determinations*** required by 5 U.S.C. 552(a)(6)(A) . . . .

40 C.F.R. § 2.103(b) (2019) (emphasis added).

Accordingly, there is a simple explanation for why the Administrator is named in the current version of Section 2.103(b), but not in the prior version of Section 2.104(h). The earlier regulations listed the officials who were delegated FOIA authority by the Administrator, and the revised regulations were rephrased to list the officials who have such authority.[4]

Another provision in the pre-Rule version of the regulations further demonstrates that the Administrator was authorized, before the Rule, to make FOIA determinations. That provision states that "[a]n adverse determination by the Administrator on an initial request will serve as the final action of the Agency[.]" 40 C.F.R. § 2.104(j)(3) (2018). Plaintiffs respond that the paragraph containing that provision is titled "Appeals of adverse determinations" and they claim that it relates to "an appeal decision by the Administrator[.]" Opp'n at 24. But the regulation expressly states that there could be an "adverse determination by the Administrator on an *initial* request," and

[3] EPA was not obligated to publish its delegation in the Code of Federal Regulations, *see Lonsdale v. United States*, 919 F.2d 1440, 1446 (10th Cir. 1990), but did so in the interest of transparency.

[4] Plaintiffs show their misunderstanding of agency rulemaking by referring to "EPA's grant of authority to the Administrator[.]" Opp'n at 20. The Rule was issued *by the Administrator*. *See* 84 Fed. Reg. at 30032. It does not grant authority from "EPA . . . to the Administrator."

thereby recognizes the Administrator's authority to make an *initial* determination. Moreover, the provision is listed as an "except[ion]" to the general rule that "the General Counsel or his/her designee will act on behalf of the Administrator on all appeals[.]" *Id.* § 2.104(j). Plaintiffs' reading of the regulation as referring to the Administrator's appellate authority cannot be understood as an exception to that rule. Furthermore, Plaintiffs elsewhere have interpreted this regulation as referring to the *initial* determination authority of the Administrator, not any appellate authority – indeed, that is the basis for their claim that EPA barred certain appeals. *See* Opp'n at 18 (stating that the provision "means . . . that EPA will not provide an appeal procedure . . . for FOIA determinations made by the Administrator"); Complaint ¶¶ 31, 51 (construing the provision as barring appeals of "initial determinations" by the Administrator).

Accordingly, EPA's regulations have long recognized the Administrator's authority to make FOIA determinations and that such determination would serve as the final decision of the agency, without requiring an administrative appeal. Further, the Administrator's authority is conferred by statute. *See* Section II(C) *infra*. Therefore, even assuming Plaintiffs could show they are harmed by these regulations, which they cannot, their challenge to the Rule would fail for lack of causation and redressability.[5]

C. Claim Two Fails to State a Claim

Claim two also fails under Rule 12(b)(6). First, Plaintiffs fail to show any statutory basis

[5] Plaintiffs discuss a 2018 agency memorandum that allows specified officials in offices that need to be aware of significant record releases (*i.e.*, the offices responsible for public affairs, congressional and intergovernmental relations, and records management) the opportunity to review documents that are scheduled to be released to the public. Opp'n at 23. The memorandum clarifies that it is "not an approval process," meaning that the specified officials will not decide whether to release records; rather, "FOIA staff, program staff, and program managers" will do that. Scher Decl., Ex. 8, at 1. The fact that FOIA staff, in the ordinary course, decide whether to release information does not suggest they are the only individuals with authority to do so. The individuals with such authority are described in EPA's regulations and internal delegations.

for their belief that the Administrator lacks authority to decide FOIA requests in the first instance. Their only textual argument is that "Congress' decision to task the Administrator with deciding FOIA appeals is clear indication that it did not intend to vest the Administrator with initial determination authority." Opp'n at 20. Plaintiffs are referring to a provision in the FOIA stating that in the case of an adverse determination, the agency shall notify the requester of, among other things, "the right of such person to appeal to the head of the agency[.]" 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa). But nothing in that provision suggests Congress intended to prohibit agency heads from making determinations on initial FOIA requests. Such a prohibition would be inconsistent with the fact that all agency authority resides, in the first instance, in agency heads and only extends to subordinates through delegations of authority by the agency head. *See* Nou, Jennifer, *Subdelegating Powers*, 117 Colum. L. Rev. 473, 475 (2017) ("politically-appointed agency heads—say, the Administrator of the Environmental Protection Agency (EPA) . . .—are the main arbiters of delegated authority [from Congress]. In reality, however, much of that power is subdelegated within the agency. Agency heads, that is, take authority granted from Congress or the President and further redelegate it to their subordinates."). It is inconceivable that Congress would upend ordinary administrative practice by mere implication, particularly where Congress conferred FOIA decisionmaking authority on "[e]ach agency" without limitation, 5 U.S.C. § 552(a)(6). The statutory text, therefore, refutes Plaintiffs' position.

Plaintiffs' remaining arguments merely express Plaintiffs' own policy preferences, and do not describe what the law is. In particular, Plaintiffs claim "Congress intended to avoid the type of politicization of FOIA that EPA's grant of authority to the Administrator, a political appointee, creates." Opp'n at 20. By this logic, *all* political appointees would be prohibited from making FOIA determinations, yet there is not even a hint of such a limitation in the FOIA, and Plaintiffs

do not indicate to which career EPA employee(s) they believe Congress assigned FOIA authority. Moreover, adopting Plaintiffs' interpretation would raise serious constitutional questions regarding whether Congress can vest Executive power in a career civil servant and thereby preclude oversight by politically-accountable leadership in the Executive Branch.

Plaintiffs greatly understate the scope of political appointee authority within federal agencies when they suggest that decisions "reserved for a political appointee" are those involving "discretionary, political decisions." Opp'n at 20. Political appointment is not synonymous with political influence, and political appointees across the federal government oversee even the most significant governmental functions. Plaintiffs also insist that there is "no defensible reason for the Administrator, who lacks any expertise in resolving FOIA requests, to make FOIA determinations." Opp'n at 20. But the fact that an agency head has a particular authority does not mean he or she will personally execute that authority on a routine basis. *See* Nou, 117 Colum. L. Rev. at 475 ("Agency heads . . . take authority granted from Congress or the President and further redelegate it to their subordinates."). In the ordinary course, the EPA Administrator relies on subordinates to handle EPA's FOIA responsibilities, but he nonetheless retains the authority to perform this agency function, if he determines it is appropriate to do so. In other words, the regulations merely publish the Administrator's internal delegation of authority – they do not purport to identify the individuals who will handle the agency's day-to-day FOIA activities.

Next, Defendant has never argued that the Administrator "has some sort of inherent authority to make FOIA determinations," as Plaintiffs contend. Opp'n at 21. Defendant's position is that Congress conferred authority to make FOIA determinations on "[e]ach agency," 5 U.S.C. § 552(a)(6), and a grant of authority to an "agency" is a grant to the agency head, *see* Mot. at 17. Plaintiffs, on the other hand, apparently believe Congress granted FOIA authority to someone other

than agency heads but they never explain *who* Congress granted the authority to and they never cite any statutory language identifying the grantee. Absent an express limitation, a grant of authority to an "agency" must be understood as conferring authority on the head of that agency. *See In re Alappat*, 33 F.3d 1526, 1579 (Fed. Cir. 1994) (Plager, J. concurring) (explaining that Congress delegates functions to "Executive Branch agencies – or more accurately, to the officials who head the agencies"); *Pyne v. Comm'r ex rel. United States*, 1999 U.S. Dist. LEXIS 1059, at *5-6 (D. Haw. Jan. 6, 1999) ("heads of agencies. . . have the final authority in the agency").[6]

Plaintiffs also raise a few arguments regarding their challenge to EPA's regulation providing that a FOIA determination by the Administrator will serve as the final decision by the agency, but none of those arguments has merit. Opp'n at 18-19. First, EPA did not "eliminate a right [to appeal.]" Opp'n at 18. The right at issue here is the right of a FOIA requester who receives an adverse determination to obtain a final decision by the agency. Mot. at 18-19. EPA expressly preserves that right by providing that an "adverse determination by the Administrator on an initial request will serve as the final action of the Agency." 40 C.F.R. § 2.104(j)(2). Plaintiffs also argue that EPA's regulation is inconsistent with FOIA's administrative exhaustion requirement that a requester appeal an adverse determination before filing suit in federal court. Opp'n at 19. But an "exhaustion requirement may be waived by the agency[.]" *Cutler v. Hayes*, 818 F.2d 879, 891 (D.C. Cir. 1987). Moreover, all the principles of exhaustion are met where the Administrator makes a final determination on a FOIA request. In that situation, the agency has

[6] Notably, in 2016, Congress specifically directed "the head of each agency" to "issue regulations on procedures for the disclosure of records under [the FOIA]" in accordance with Congress's statutory amendments. P. L. 114-185, § 3, 130 Stat. 544. It would be incongruous to conclude that Congress, despite instructing agency heads to formulate the procedures governing FOIA disclosures, nevertheless wanted to prohibit agency heads from making initial FOIA determinations, as Plaintiffs contend.

had "an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990). And a decision by the agency's top official will have "obviate[d] unnecessary judicial review" because there would be no need to "correct mistakes made at lower levels." *See id*. ("The exhaustion requirement also allows the top managers of an agency to correct mistakes made at lower levels and thereby obviates unnecessary judicial review."). Plaintiffs also misunderstand the significance of the legislative history cited in Defendant's Motion. *See* Opp'n at 21-22. The relevant point from that history is that the purpose of an administrative appeal is to enable the requester to obtain a final agency decision before proceeding to federal court. Mot. at 18-19. That purpose is fully satisfied if the most senior agency official decides a FOIA request. Also, EPA is not prevented from "ever providing a legally compliant FOIA determination for Administrator determinations[.]" Opp'n at 18. If the Administrator were ever to make a determination, EPA could notify the requester of the administrative appeal process and explain why that process was satisfied by the Administrator's determination.

Lastly, Plaintiffs argue that EPA violated the APA because it allegedly failed to acknowledge a change in policy. Opp'n at 22-24. But as discussed above, EPA did not change its policy. *See supra* at 10-11, 14-16. On the contrary, EPA's pre-Rule regulations already recognized the Administrator's authority over FOIA matters and already stated that a decision by the Administrator will serve as the final decision of the agency. *See id*.

III. The Court Should Dismiss Claim Three

Plaintiffs do not oppose dismissal of Claim Three, Opp'n at 26, which is time-barred for the reasons discussed in Defendant's Motion (at 19-20).

IV. The Court Should Dismiss Claim Four and Deny Plaintiffs' Summary Judgment Motion as to That Claim

A. Plaintiffs Are Not Injured By the Regulation in Question Even if It Is Misread in the Manner Plaintiffs Suggest

Plaintiffs argue that they have standing to challenge the regulation at 40 C.F.R. § 2.103(b) because they believe there is a substantial risk that EPA will withhold portions of responsive documents on grounds of nonresponsiveness. Opp'n at 31. Plaintiffs believe the risk is substantial because they claim that "withholding allegedly nonresponsive portions of responsive records has been EPA's longstanding practice." *Id*. But the only examples Plaintiffs cite occurred *before* the decision in *American Immigration Lawyers Association v. EOIR*, 830 F.3d 667 (D.C. Cir. 2016), and thus *before* there was any binding authority prohibiting federal agencies from withholding portions of records as nonresponsive. *See id*. at 677 (explaining that the question presented was one "of first impression"); *see also* Opp'n at 31-32 (citing *PEER v. EPA*, 288 F. Supp. 3d 15, 20 (D.D.C. 2017) (documents withheld soon after the complaint was filed in 2014); *Se. Legal Found., Inc. v. EPA*, 181 F. Supp. 3d 1063, 1068 (N.D. Ga. 2016) (EPA's FOIA response was complete by February 2012); *Shurtleff v. EPA*, 2012 U.S. Dist. LEXIS 157027, *10-11 (D.D.C. Sep. 25, 2012) (EPA issued its FOIA responses in 2010 and 2011)). Plaintiffs have not cited any instance in which EPA withheld a portion of a record on grounds of responsiveness since the *AILA* court spoke to the issue in 2016. Accordingly, the outdated examples Plaintiffs cite do not suggest that EPA will withhold a portion of a record from Plaintiffs on grounds of responsiveness. *See Cause of Action Inst. v. DOJ*, 2020 U.S. Dist. LEXIS 60501, *23-28 (D.D.C. Apr. 6, 2020) (plaintiff lacked standing to challenge agency policy that allegedly violated *AILA* because the possibility of a future unlawful withholding was speculative; "while plaintiff has asserted that agencies have withheld information as non-responsive in prior cases, it has not demonstrated that the agency has been withholding information that it should be disclosing because of [the policy], and that the agency will continue to do so").

Moreover, Plaintiffs completely ignore the Supreme Court and D.C. Circuit decisions that Defendant cited in support of its standing argument on this claim. *See* Mot. at 21; Opp'n at 31-32. Those decisions foreclose Plaintiffs' standing argument. As noted above, under the Supreme Court's decision in *Clapper*, a substantial risk of injury does not exist where the challenged statute "at most *authorizes*—but does not *mandate* or *direct*—the [injury] that [the plaintiffs] fear[.]" 568 U.S. at 412 (emphasis in original); *see also id*. at 414 n.5. Here, there is no dispute that 40 C.F.R. § 2.103(b) does not *mandate* EPA to withhold portions of records on grounds of responsiveness (the only question is whether the regulation *permits* it), so there is not a substantial risk of injury, even under Plaintiffs' reading of the regulation. And under the D.C. Circuit's decision in *Comcast*, courts "must presume an agency acts in good faith." 526 F.3d at 769 n.2. Plaintiffs' theory of injury employs the opposite presumption – that EPA officials will violate their legal obligations under the FOIA as determined by the D.C. Circuit in *AILA*. Again, Plaintiffs did not even attempt to distinguish these controlling decisions.

Plaintiffs also express "concern[] that this provision has a high potential for abuse" because they believe "EPA could label embarrassing or damaging information in responsive records non-responsive . . . even though that information is in fact responsive." Scher Decl. ¶ 28; Opp'n at 9. Not only is that far-fetched concern completely unfounded, but it is not actually a challenge to the Rule because the Rule does not authorize anyone to do that. Rather, the Rule permits the withholding of responsive records only "under one or more exemptions under the FOIA." 40 C.F.R. § 2.103(b). Plaintiffs' misplaced concern, therefore, is that officials might violate the Rule, not that officials might follow it, but that is not a challenge to the Rule.

B. Claim Four Is Unripe

At a minimum, the Court should dismiss Claim Four as unripe. The very reason the "ripeness doctrine exists [is] to prevent the courts from wasting [their] resources by prematurely

entangling [them]selves in abstract disagreements," such as that presented by this claim. *Nat'l Treasury Emp. Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996). Plaintiffs ask the Court to interpret a regulation that requires no action by Plaintiffs and which does not threaten any imminent harm. Plaintiffs' insistence that the Court spend its judicial resources adjudicating this claim is especially perplexing considering that EPA disclaims the authority that Plaintiffs contend the regulation grants. There is no realistic scenario in which EPA, after achieving dismissal of Plaintiffs' claim, would reverse course and begin withholding nonresponsive portions of records in violation of D.C. Circuit authority. But even if that were to occur, Plaintiffs would have an adequate remedy under the FOIA. *See Cause of Action*, 2020 U.S. Dist. LEXIS 60501, at *27-28 (declining to "take up the lawfulness of the [post-*AILA*] policy as a general matter" because to do so would amount to "issuing an advisory opinion").

Nevertheless, Plaintiffs insist that the claim is ripe for adjudication because it is purely legal. Opp'n at 33. But Plaintiffs ignore the Supreme Court decision cited in Defendant's Motion which rejected just such an argument. In *National Park Hospital Association v. Department of Interior*, 538 U.S. 803 (2003), as here, the plaintiff brought "a facial challenge to the regulation[.]" *Id*. at 807. "Although the question presented" was "a purely legal one," the Court nevertheless held that it was not fit for review and that "judicial resolution of the question presented [] should await a concrete dispute[.]" *Id*. at 812. The Court also made clear that its holding applied broadly: "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [APA] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Id*. at 808. Plaintiffs have no response to this decision, and their own-cited authority agrees that "even purely legal issues

may be unfit for review[.]" *Nat'l Assoc. of Home Builders v. U.S. Army Corps of Eng's*, 417 F.3d 1272, 1282 (D.C. Cir. 2005).

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

Notably, Defendant is not arguing that this claim is unfit for review "merely because the application of the disputed rule remains within the agency's discretion." Opp'n at 33 (quoting *National Treasury Employees Union v. Chertoff*, 452 F.3d 839, 854 (D.C. Cir. 2006)). Defendant does not claim to have "discretion" to withhold a nonresponsive portion of a responsive record.

Also, *National Treasury* explained that a "purely legal claim may be less fit for judicial resolution when it is clear that a later as-applied challenge will present the court with a richer and more informative factual record," 452 F.3d at 855, which is true here for the reasons discussed above. Lastly, the plaintiffs in *National Treasury* were suffering an injury that was "entirely independent of any injury that might occur if the [defendant] eventually exercises its discretion to vitiate an agreement." *Id*. at 854. Here, in contrast, Plaintiffs will suffer no injury unless and until Defendant withholds a nonresponsive portion of a responsive record.

As to hardship, Plaintiffs do not claim that they will suffer any hardship without immediate judicial review. Opp'n at 33-34. To the extent that their arguments concerning whether there is an adequate alternative remedy are relevant to the hardship analysis, *id*. at 34, Plaintiffs' argument fails. Plaintiffs again ignore binding authority holding that the "burden of having to file another suit" under the FOIA is "hardly the type of hardship which warrants immediate consideration of an issue presented in abstract form." *Webb*, 696 F.2d at 106-08; *see also Nw. Coal. for Alts. to Pesticides v. EPA*, 254 F. Supp. 2d 125, 133 (D.D.C. 2003) (applying *Webb* and finding challenge to FOIA regulation unripe where only hardship was having to file another lawsuit); *Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998) (party did not suffer hardship where the "result of postponement [of judicial review] is the burden of participating in further administrative and judicial proceedings").[7]

C. Plaintiffs Have An Adequate Alternative Remedy

[7] The Court should decline Plaintiffs' invitation to skip the hardship analysis. Opp'n at 33. So long as there are "doubts about the fitness of the issue for judicial resolution," courts "will 'balance the institutional interests in postponing review against the hardship to the parties that will result from delay.'" *Nat'l Ass'n of Home Builders*, 440 F.3d at 465. This balancing is the "typical[]" approach taken by the D.C. Circuit when evaluating ripeness. *TRT Telecomms. Corp. v. FCC*, 876 F.2d 134, 141 (D.C. Cir. 1989).

The APA component of Claim Four should be dismissed for the additional reason that Plaintiffs have an adequate alternative remedy if EPA ever withholds a portion of a responsive record on grounds of nonresponsiveness. *See* 5 U.S.C. § 704. If that occurs, Plaintiffs can avail themselves of the mechanism Congress has already established precisely for this purpose – Plaintiffs can file an ordinary FOIA action seeking disclosure of records allegedly improperly withheld. *See* 5 U.S.C. § 552(a)(4)(B).

A FOIA action easily qualifies as an "other adequate remedy" precluding APA review. 5 U.S.C. § 704. In *Citizens for Responsibility & Ethics in Washington v. Department of Justice ("CREW")*, 846 F.3d 1235 (D.C. Cir. 2017), the plaintiff sought to enforce FOIA's affirmative disclosure provision that require agencies to make certain records available electronically to the public. *Id*. at 1240. Instead of filing suit under the FOIA, however, the plaintiff brought an APA claim. *Id*. at 1241. Even though FOIA could not provide the plaintiff with all the relief sought, the D.C. Circuit had "little doubt that FOIA offers an 'adequate remedy' within the meaning of section 704, as it exhibits all of the indicators [the D.C. Circuit has] found to signify Congressional intent [to preclude APA review.]" *Id*. at 1245. Specifically, "FOIA contains an express private right of action and provides that review in such cases shall be '*de novo*'." *Id.* "[I]n FOIA Congress established 'a carefully balanced scheme of public rights and agency obligations designed to foster greater access to agency records than existed prior to its enactment.'" *Id.* "The creation of both agency obligations and a mechanism for judicial enforcement in the same legislation suggests that FOIA itself strikes the balance between statutory duties and judicial enforcement that Congress desired." *Id*. Therefore, the D.C. Circuit held that "FOIA offers CREW precisely the kind of 'special and adequate review procedure[]' that Congress immunized from 'duplic[ative]' APA review." *Id*. at 1245-46.

Notwithstanding *CREW*, Plaintiffs insist that FOIA does not provide an adequate remedy because they would have to file another lawsuit, which would cause delay. Opp'n at 34. But that does not mean relief under FOIA is inadequate. *See CREW*, 846 F.3d at 1245 ("'the alternative remedy need not provide relief identical to relief under the APA' in order to have preclusive effect"). In *CREW*, the "[s]ignificant[]" fact was that the plaintiff "itself [could] gain access to all the records it seeks" under FOIA. *Id*. at 1246. Likewise, here, Plaintiffs can gain access to any records they may later seek by bringing suit under FOIA, if there is ever an improper withholding. By waiting until there has been an improper withholding before filing suit, Plaintiffs must do no more than what every other putative FOIA plaintiff must do. *See* 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989). The FOIA judicial review mechanism reflects Congress's determination about what constitutes an adequate remedial scheme.

Plaintiffs cite *Judicial Watch, Inc. v. DHS*, 895 F.3d 770 (D.C. Cir. 2018), but that decision did not involve an APA claim and did not consider when a remedy may be considered an adequate alternative to the APA. Rather, the "only question [] before the court [was] whether the complaint adequately alleged a 'policy or practice' claim under FOIA" "by alleging prolonged, unexplained delays in producing non-exempt records[.]" *Id*. at 774, 780. Nothing remotely similar has been alleged here.

D. Claim Four Fails to State a Claim

Defendant's Motion explained that Plaintiffs had misread 40 C.F.R. § 2.103(b), which does not authorize anyone to withhold portions of responsive records on grounds of nonresponsiveness. Mot. at 26-29. To summarize, that regulation lists "final determinations" that individuals are authorized to perform, namely, "to release . . . a record," "to release . . . a portion of a record," to "withhold a record," or to "withhold . . . a portion of a record." 40 C.F.R. § 2.103(b). It then lists the potential reasons for a final determination: "responsiveness" or "one or more exemptions under

the FOIA." *Id*. Defendant explained that the most natural reading of the regulation is that each of the listed reasons for a final determination does not necessarily apply to every type of final determination. Mot. at 26-29. In particular, the "responsiveness" reason does not apply to a decision to "withhold a portion of a record." *Id*.

In other words, the regulation should be read distributively. "Where a sentence contains several antecedents and several consequents," courts should "read them distributively and apply the words to the subjects which, by context, they seem most properly to relate." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 214 (2012) ("Distributive phrasing applies each expression to its appropriate referent."); *id*. at 214-16 (describing cases that applied the principle).

Plaintiffs concede that the regulation is phrased at least in part distributively. *See* Opp'n at 28-29. Thus, Plaintiffs agree with the basic premise underlying Defendant's argument – that each *reason* for a final determination does not apply to each *type* of determination. *Id*. at 34. The question, then, is how to determine which reasons pair with which types of final determinations. As Plaintiffs' own-cited authority explains, courts consider "context" to determine how the words "seem most properly to relate." *Encino Motorcars*, 138 S. Ct. at 1141. That is the approach Plaintiffs used when they concluded that the listed reasons for a final determination do not modify the language regarding the release of records. Opp'n at 28 (reasoning that "EPA is only required to provide a basis for withholding records; EPA can release records for any reason or no reason."). In other words, Plaintiffs looked to what the law requires and, on that basis, attempted to determine which reasons logically apply to which types of final determinations.

By the same logic, the "responsiveness" reason does not modify the language authorizing officials to "withhold . . . a portion of a record." The law of this Circuit is clear that the FOIA does

not authorize agencies to "redact particular information within the responsive record on the basis that the information is non-responsive." *AILA*, 830 F.3d at 677. *AILA*, decided in 2016, was the law in 2019 when the Rule was promulgated. It would be incongruous to read the clause as authorizing EPA to do something that is expressly forbidden by binding D.C. Circuit authority, where most FOIA cases are brought. The only reasonable reading is that the regulation authorizes EPA to withhold "a portion of a record" "under one or more exemptions under the FOIA" but not on the basis of responsiveness. Entire records, on the other hand, may be withheld "on the basis of responsiveness." This reading also accords with the portion of the regulatory text explaining that the final determinations listed are those "required by" the FOIA. 40 C.F.R. § 2.103(b) (citing 5 U.S.C. § 552(a)(6)(A)). A determination to withhold a nonresponsive portion of a record is not "required by," or even permitted by, the FOIA.[8]

Although Plaintiffs concede, as they must, that the regulation is distributive, they nevertheless insist that both of the listed reasons for a final determination apply to both the withholding of a record and the withholding of a portion of a record. Opp'n at 28. Plaintiffs' reasoning is unpersuasive. First, Plaintiffs argue that their reading accords with canons of construction providing that "modifiers and qualifying phrases attach to the terms that are nearest." *Id*. at 29. Plaintiffs rely on those canons only to argue that the phrase "on the basis of responsiveness or under one or more exemptions" modifies the phrase "withhold a record or a portion of a record" but does not modify "release . . . a record." *Id*. But that does not answer the question in dispute. Plaintiffs do not explain why those canons would suggest that the phrase "on

[8] Plaintiffs failed to respond to this latter point – that Defendant's interpretation accords with the regulatory text explaining that the final determinations listed are those "required by" the FOIA. *See* Mot. at 27 (raising this argument); *see also Encino Motorcars*, 138 S. Ct. at 1141 (courts consider "context" to determine how the words "seem most properly to relate").

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

Plaintiffs also rely on the distributive canon but, again, Plaintiffs do so only to disconnect the phrase "release . . . a record" from the "on the basis of" clause. Opp'n at 29. Plaintiffs do not explain why the distributive canon would suggest that the phrase "on the basis of responsiveness" modifies the phrase "withhold . . . a portion of a record." As discussed above, applying the distributive canon to determine which words "most properly . . . relate," *Encino Motorcars*, 138 S. Ct. at 1141, leads to the contrary conclusion – that the phrase "on the basis of responsiveness" does not modify the phrase "withhold . . . a portion of a record."

Next, Plaintiffs do not dispute that the Rule itself gives no indication that EPA intended to confer authority on officials to withhold portions of records on grounds of nonresponsiveness, contrary to D.C. Circuit precedent. Mot. at 28; Opp'n at 29. Plaintiffs offer no relevant response, and their speculation that EPA was not aware of the *AILA* decision when it issued the Rule is unfounded and implausible. Opp'n at 29-30. EPA manages a massive FOIA program, employs several attorneys and other professionals with expertise in FOIA, and is obviously well aware of

significant judicial decisions that define EPA's legal obligations under the FOIA.

Contrary to Plaintiffs' argument, EPA's interpretation of its own regulation is entitled to deference. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019) ("Want to know what a rule means? Ask its author."). EPA's interpretation is its official position as expressed, not only in its legal briefs in this and related matters, but also in an internal agency manual and a letter by the EPA Administrator. Mot. at 28-29.[9] Plaintiffs do not address the manual or letter in their discussion of the deference owed to EPA's interpretation. Opp'n at 30. Elsewhere, they argue that the letter by the EPA Administrator is dated four months after the Rule, but they do not explain why that should matter. *Id*. at 32. As to the manual, Plaintiffs argue that it does not affirmatively "say that nonresponsive portions of responsive records must be produced." *Id*. Although it does not use those precise words, the manual is clear that "[p]ortions of the record will be withheld from the requester *if covered by either one or multiple FOIA exemptions*" and "[t]he portions of the record that are not redacted are released to the requester." Kaminer Decl., Ex. B at 10 (emphasis added). Moreover, Plaintiffs point to no language in the manual authorizing officials to withhold portions of responsive records on responsiveness grounds. If EPA believed itself to have that authority, one would certainly expect its FOIA procedures manual to at least mention it.

Plaintiffs next argue, in summary form, that EPA's interpretation of its regulation is not entitled to deference because the regulation allegedly does not "implicate EPA's 'substantive expertise.'" Opp'n at 30. But the concept of substantive expertise is much broader than Plaintiff

[9] These materials qualify as authoritative sources of the agency's interpretation of its own regulations. *Belt v. EmCare, Inc.*, 444 F.3d 403, 415 (5th Cir. 2006) (applying *Auer* deference to agency position expressed in agency handbook); *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 780 (2d Cir. 2002) (according "controlling weight" to a policy letter drafted by the Department of Education's Office of Special Education Programs regarding a Department of Education regulation).

suggests. Both "historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court[.]" *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153 (1991). EPA obviously has historical familiarity with its regulation, having drafted it last year. *See Kisor*, 139 S. Ct. at 2412 (noting that "[t]he agency that 'wrote the regulation' will often have direct insight into what that rule was intended to mean" and that this is especially true where little time has passed between "the rule's issuance and its interpretation"). And EPA has developed expertise relating to FOIA by handling thousands of FOIA requests each year. *See* Opp'n at 13-14 (discussing EPA's extensive FOIA program). Accordingly, unlike situations where the subject matter of a regulation is "distan[t] from the agency's ordinary' duties or 'fall[s] within the scope of another agency's authority," *Kisor*, 139 S. Ct. at 2417, EPA plainly has sufficient expertise pertaining to the regulation at issue here to warrant deference. *See id*. (requiring only that "the agency's interpretation must in some way implicate its substantive expertise"). Nor is EPA's interpretation a "post-hoc litigation position," as Plaintiffs contend. Opp'n at 30. It is fully consistent with EPA's FOIA policy that has been in place since long before this litigation began. *See* Kaminer Decl., Ex. B at 10.[10] Accordingly, deference is due to EPA's interpretation.

Lastly, Plaintiffs do not dispute that, at minimum, the Court should accord EPA's interpretation "a measure of deference proportional to the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." Mot. at 29 (quoting *Christopher v.*

[10] Plaintiffs again insist that EPA has a "longstanding practice of redacting allegedly non-responsive portions of responsive records." Opp'n at 30. But as discussed above, the only examples of this supposed practice date to *before* the *AILA* decision and *before* the Rule. *See supra* at 21. They are hardly relevant to understanding what EPA's practice is since *AILA* or what the Rule means.

SmithKline Beecham Corp., 567 U.S. 142, 159 (2012)).

V. The Court Should Dismiss Claim Five and Deny Plaintiffs' Summary Judgment Motion as to That Claim

A. Plaintiffs Lack Standing to Bring Claim Five

1. Plaintiffs Must Demonstrate an Injury-In-Fact

Plaintiffs have failed to rebut Defendant's showing that Plaintiffs lack standing to bring Claim Five, which alleges that EPA violated the APA's procedural requirements when it issued the Rule. In their attempt to establish standing, Plaintiffs argue that they satisfy a "relaxed" standard applicable to procedural rights cases. Opp'n at 43. It is well-settled, however, that "even if styled as a procedural rights case, Plaintiffs' burden to demonstrate a constitutionally sufficient injury is not, and cannot be, relaxed." *Delta Air Lines, Inc. v. Exp.-Import Bank*, 85 F. Supp. 3d 250, 264 (D.D.C. 2015). Plaintiffs still "must demonstrate that the defendant caused the particularized injury, and not just the alleged procedural violation." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996); *see also Int'l Bhd. of Teamsters v. Transp. Sec. Admin.*, 429 F.3d 1130, 1135 (D.C. Cir. 2005) ("It is true that in a procedural rights case the burden to show imminence and redressability of injury may be lessened but the complainant must nonetheless show it has itself 'suffered personal and particularized injury.'").

In other words, Plaintiffs must show, *inter alia*, that the alleged procedural violation resulted "in injury to their concrete, particularized interest." *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005); *see also id*. at 1160 (plaintiffs lacked standing where they "failed to show that the alleged procedural violation caused actual injury to [plaintiffs'] concrete interests"). "This test, while different in some sense from the typical standing inquiry, requires both that a concrete injury exist and that the injury is caused by the alleged procedural defect." *Tex. All. for Home Care Servs. v. Sebelius*, 811 F. Supp. 2d 76, 95 (D.D.C. 2011).

The only aspects of standing that are relaxed in procedural rights cases are those "for immediacy and redressability[.]" *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014). Specifically, procedural rights plaintiffs "need not demonstrate that but for the procedural violation the agency action would have been different" or "that correcting the procedural violation would necessarily alter the final effect of the agency's action on the plaintiffs' interest." *Id*. As applied here, this means only that Plaintiffs do not have to show that EPA would have issued a different Rule if Plaintiffs had been allowed to submit comments. *See Ctr. for Law & Educ.*, 396 F.3d at 1160 ("Appellants need not demonstrate that, but for the procedural defect, the final outcome of the rulemaking process would have been different[.]"). "There is no doubt," however, "that a plaintiff that is able to establish that an agency failed to comply with the notice and comment procedures of the APA would, nonetheless, have no recourse in an Article III court absent a showing that it suffered or will suffer a concrete injury as a result of policy produced through the allegedly flawed process." *California v. Trump*, 2020 U.S. Dist. LEXIS 58154, *21-22 (D.D.C. Apr. 2, 2020).

It is this "concrete injury as a result of the [Rule]" that is missing here. *Id*. at *22. For the reasons discussed above and in Defendant's Motion, Plaintiffs have not alleged any injury resulting from EPA's regulations that Plaintiffs challenge in Claims One through Four, *i.e.*, those pertaining to EPA's revised FOIA submission procedures, identifying the Administrator as an official with authority to make FOIA determinations, stating that his decision on FOIA requests is the final decision of the agency, and listing of the types of FOIA determinations that officials may make. Because Plaintiffs are not harmed by these regulations, there is also no harm from any lack of opportunity to comment on them. *See id*. at *22 ("the plaintiff must establish a connection between th[e] substantive decision and his 'particularized injury'"). Moreover, as discussed above,

certain of these regulations were not substantively amended by the Rule. Plaintiffs obviously are not harmed by the lack of opportunity to comment on a regulation that was not affected by the rulemaking. Accordingly, the regulations that Plaintiffs substantively challenge in Claims One through Four do not give Plaintiffs standing to raise a procedural APA claim.

In addition to those regulations, Plaintiffs argue that they are "harmed by EPA's failure to provide a comment opportunity for its regulations addressing aggregation of certain requests, the schedule of fees applicable to the processing of requests, expedited processing of requests, and multi-track processing." Opp'n at 44. Plaintiffs do not even attempt to show harm relating to two of these categories – aggregation and multi-track processing – thereby conceding that they lack standing to challenge EPA's procedures concerning those regulations. As to EPA's regulations concerning expedited processing of requests, the Rule made only non-substantive style changes, all of which are shown below, with deletions in strikeout text and additions in bold text:

> (~~e~~**f**) *Expedited processing.* (1) **EPA will take** requests or appeals ~~will be taken~~out of order and ~~given~~**give** expedited treatment whenever EPA determines that such requests or appeals involve a compelling need, as follows:
>
> (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
>
> (ii) An urgency to inform the public about an actual or alleged Federal government activity, if the information is requested by a person primarily engaged in disseminating information to the public.
>
> (2) **Requesters must make** a request for expedited processing ~~must be made~~ at the time of the initial request for records or at the time of appeal.
>
> (3) If ~~you are seeking~~**the requester seeks** expedited processing, ~~you~~**the requester** must submit a statement, certified to be true and correct to the best of ~~your~~**therequester's** knowledge and belief, explaining in detail the basis for the request. For example, if ~~you fit~~**the requester fits** within the category described in paragraph (~~e~~**f**)(1)(ii) of this section and ~~are~~**is** not a full-time member of the news media, ~~you~~**the requester** must establish that ~~you~~**they** are a person whose primary professional activity or occupation is information dissemination, although it need not be ~~your~~**therequester's** sole occupation. If ~~you fit~~**the requester fits** within the category described in paragraph (~~e~~**f**)(1)(ii) of this section, ~~you~~**the requester** must also establish a particular urgency to inform the public about the government

> activity involved in the request, beyond the public's right to know about government activity generally.
>
> (4) Within 10 calendar days from the date of ~~your~~**the** request for expedited processing, the ~~head of the Headquarters FOI Staff or Regional FOI~~**Chief FOIA** Officer**, or the Chief FOIA Officer's delegates**, will decide whether to grant ~~your~~**the** request and will notify ~~you~~**the requester** of the decision. If ~~your~~**the Agency grants the** request for expedited ~~treatment is granted~~**processing, the Agency will give** the request ~~will be given~~ priority and will ~~be processed~~**process the request** as soon as practicable. If ~~your~~**the Agency denies the** request for expedited processing ~~is denied~~**, the Agency will act on** any appeal of that decision ~~will be acted on~~expeditiously.

Compare 84 Fed. Reg. at 30034 (40 C.F.R. § 2.104(f)) *with* 40 C.F.R. § 2.104(e) (2018).

Of course, Plaintiffs are not harmed by these non-substantive edits, and Plaintiffs do not even try to argue otherwise. Instead, Plaintiffs contend that they are harmed because, if they had the opportunity to submit comments as part of EPA's rulemaking, they "would have requested that EPA, *inter alia*, provide additional categories of requests that would qualify for expedited processing." *Id*. But such a comment would have been far outside the scope of the rulemaking, which was limited to the non-substantive edits shown above, such as changing from passive to active voice. It is well settled that agencies are not required to address comments outside the scope of the rulemaking. *See National Mining Ass'n v. MSHA*, 116 F.3d 520, 549 (D.C. Cir. 1997); *Safari Club Int'l v. Salazar*, 852 F. Supp. 2d 102, 117 (D.D.C. 2012) (agency was not required to respond to alternative proposals because they were outside of the scope of the rulemaking); *Sherley v. Sebelius*, 776 F. Supp. 2d 1, 22 (D.D.C. 2011). Nothing in the Rule suggests EPA was considering whether to add new categories of requests that would qualify for expedited processing. Accordingly, had EPA solicited public comments on its stylistic revisions and had Plaintiffs submitted their proposal, EPA would not have been required to respond, let alone adopt Plaintiffs' proposal. If a plaintiff could establish standing simply by asserting that it would have submitted an off-topic proposal to the agency that, if adopted, would benefit the plaintiff, standing could exist

in every case challenging a lack of notice and comment.

Plaintiffs also argue that they would have submitted comments asking EPA not to adopt regulations allowing it to seek certain fees in instances where EPA has failed to meet FOIA's statutory deadline. Opp'n at 44-45; *see also* Scher Decl. ¶ 23. But such comments would have been pointless because EPA lacked discretion over whether to adopt those regulations. Specifically, Congress amended the FOIA statute in 2016 to describe the circumstances in which agencies may charge search and duplication fees. *See* FOIA Improvement Act of 2016 ("2016 Act"), 114 P.L. 185, 130 Stat. 538. Congress provided that agencies shall not assesses fees if the agency has failed to comply with statutory deadlines, subject to various exceptions. *See id.*; *see also* 5 U.S.C. § 552(a)(4)(A)(viii). For example, if the agency determines that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, the agency may charge search fees, if the agency has provided timely notice to the requester and discussed with the requester how to limit the scope of the request. 5 U.S.C. § 552(a)(4)(A)(viii)(II)(BB). In the 2016 Act, Congress expressly stated that "the head of each agency . . . shall review the regulations of such agency and shall issue regulations on procedures for the disclosure of records under section 552 of title 5, United States Code, in accordance with the amendments made by [the 2016 Act]." P. L. 114-185, § 3, 130 Stat. 544. In accordance with Congress's instruction, EPA, through the Rule, amended its regulations to incorporate the new statutory language. *See* 84 Fed. Reg. at 30030-31 (describing these changes); *id*. at 30036 (40 C.F.R. § 2.107(d)(6) (incorporating statutory language). Plaintiffs' belief that EPA could have decided not to adopt these changes is belied by Congress's express instruction that the Administrator "shall issue regulations . . . in accordance with the amendments[.]" P. L. 114-185, § 3, 130 Stat. 544. Furthermore, the 2016 Act, including the amendments made by it, became effective "on the date of enactment" and "apply

to any request for records under [the FOIA] made after the date of enactment of this Act." 114 P.L. 185, § 6, 130 Stat. 538. The statutory provisions, therefore, were effective even before EPA incorporated those provisions into its regulations. Accordingly, Plaintiffs were not harmed by the absence of an opportunity to comment on regulations that EPA was required to implement and that merely incorporated self-executing statutory provisions. Any objection Plaintiffs may have to the substance of those regulations is, in substance, an objection to the statute, not the regulations.

B. Claim Five Fails to State a Claim

1. The FOIA Did Not Require Notice-And-Comment Rulemaking Here

Claim Five also fails on the merits. Defendant's Motion demonstrated that EPA was not required to engage in notice-and-comment rulemaking because the challenged regulations were either not substantively amended by the Rule or were subject to the APA's procedural or good cause exceptions. Mot. at 32-37. In response, Plaintiffs argue, first, that the FOIA imposes its own notice-and-comment requirement on agencies for any "changes addressing aggregation of certain FOIA requests, the schedule of fees applicable to the processing of requests, expedited processing of requests for records, and multitrack processing." Opp'n at 35-39. Plaintiffs are mistaken. As explained in Defendant's Motion, the plain language of the FOIA only requires, or in some cases permits, agencies to promulgate regulations, pursuant to notice and receipt of public comment, pertaining to certain subjects. Mot. at 37-39; *see also* 5 U.S.C. § 552(a)(6)(E)(i); *id*. § 552(a)(4)(A)(i); *id*. § 552(a)(6)(B)(iv); *id*. § 552(a)(6)(D)(i). But once those regulations are promulgated, the FOIA does not further require that any future amendments to those regulations must also follow notice and comment rulemaking. *See id*.

In their opposition, Plaintiffs do not explain how the text of the FOIA supports their position. Instead, they repeatedly distort the statutory language to try to conform it to their argument. For example, Plaintiffs incorrectly claim that "FOIA explicitly provides that agencies

may only promulgate regulations on certain topics through notice and comment rulemaking." Opp'n at 36. But that is not what the statute says. Instead, the statute provides, for example, that "[e]ach agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records[.]" 5 U.S.C. § 552(a)(6)(E)(i). That is an instruction to agencies to establish regulations providing for expedited processing. *See* H.R. Rep. No. 104-795 at 26 (1996) ("The agencies are directed to establish rules and regulations for processing requests for expedited access."). The statute certainly does not "explicitly provide[]," as Plaintiffs claim, that agencies "may only promulgate regulations" concerning expedited processing "through notice and comment rulemaking." Opp'n at 36. Plaintiffs again mischaracterize the statutory language when they claim that "FOIA requires that regulations affecting these categories of action only be adopted following notice and comment rulemaking[.]" Opp'n at 37. Again, that is not what the statute says. Had Congress wanted to require agencies to follow notice and comment rulemaking any time the agency issues a regulation that "affects" these subjects, it easily could have said so.[11]

None of Plaintiffs' cited authorities supports their view that agencies must follow notice-and-comment rulemaking for any change that "addresses" the topics of aggregation, fees, expedited processing, or multi-track processing. Plaintiffs cite two decisions that merely quote the statutory language in the context of discussing unrelated issues and which contain no relevant discussion or holding. *See Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 n.1 (9th

[11] Notably, Congress did not state that agencies must follow notice-and-comment rulemaking when it instructed them to issue regulations in accordance with the 2016 Act, which included amendments concerning fees. *See* P. L. 114-185, § 3, 130 Stat. 544 (requiring "the head of each agency" to "issue regulations" without specifying any notice-and-comment requirement). If Congress wanted agencies to follow notice-and-comment rulemaking for any amendments to regulations concerning fees, it would have said so in this legislation.

Cir. 2005); *ACLU v. DOJ*, 880 F.3d 473, 480 n.4 (9th Cir. 2018). Similarly, the law review articles cited by Plaintiffs contain nothing supporting Plaintiffs' interpretation. Opp'n at 36.

Next, in *Hajro v. U.S.C.I.S.*, 832 F. Supp. 2d 1095 (N.D. Cal. 2011), USCIS had "established 'Track 3' of its multi-track process for processing FOIA requests" by publishing a notice in the Federal Register, but it did not issue any regulations describing the new track. *Id*. at 1115, 1117-18; *see also* 72 Fed. Reg. 9017 (Feb. 28, 2007). The court's ruling that notice and comment rulemaking were required for the "adoption" of a new track does not suggest that such procedures are required for any change to a regulation regarding multi-track processing. 832 F. Supp. 2d at 1118. Indeed, the court in *Hajro* read the FOIA as "direct[ing] agencies to promulgate regulations" on certain subjects, *id*. at 1115, which is consistent with Defendant's understanding.

Plaintiffs observe that Defendant "has referred to its action as promulgating regulations," Opp'n at 38, but the relevant question is not whether the Rule promulgated regulations. The question is whether the FOIA imposes a continuing requirement on agencies to follow notice and comment rulemaking any time the agency amends an existing regulation addressing aggregation, fees, expedited processing, or multi-track processing. For the reasons discussed above, it does not. Also, Plaintiffs' position that there is "no exception" to the notice-and-comment requirement for amendments to these regulations regardless of how immaterial the amendment may be, *id*. at 39, would lead to absurd results. Mot. at 39. Plaintiffs do not even attempt to explain why Congress would have wanted agencies to solicit public comments on, for example, stylistic changes.

2. The Rule Does Not Amend a Legislative Rule

Plaintiffs argue, in cursory manner, that EPA was required to follow notice and comment rulemaking because the Rule allegedly amends EPA's 2002 revisions to its FOIA regulations, which were promulgated pursuant to notice and comment. Opp'n at 39. Plaintiffs cite, without any analysis, two decisions: *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017), which did

not discuss the exceptions to notice and comment rulemaking at all, and *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015), which supports Defendant's position, not Plaintiffs'. In *Perez*, the Supreme Court rejected a D.C. Circuit doctrine holding that "if an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish' under the APA 'without notice and comment.'" *Id*. at 1205. The Supreme Court held that that doctrine was "contrary to the clear text of the APA's rulemaking provisions," which contains a "categorical" exception to the notice-and-comment requirement for interpretive rules. *Id*. at 1206. Likewise, the procedural and good cause exceptions are also categorical and exempt any covered rule from the APA's notice and comment requirement. *See* 5 U.S.C. § 553(b)(3)(A).

To the extent Plaintiffs may be relying on language in *Perez* referring to the APA "mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance" 135 S. Ct. at 1206, their reliance is misplaced. As is evident by the *Perez* Court's reasoning, the Court meant only that the APA sets forth the same rulemaking procedures for amendments of rules as for the initial formulation of rules. Indeed, as authority, the Court cited *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) for the proposition that "the APA 'make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." And the Court explained that the import of its statement is the following: "Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule." *Id*. Nothing in the *Perez* decision supports Plaintiffs' view that an agency that chooses to follow notice-and-comment rulemaking when first promulgating a rule, whether or not required to by the APA, is forever committed to follow the same procedures for any future

amendments of that rule, no matter how non-substantive. In fact, the reverse is true. *See Sierra Club v. EPA*, 873 F.3d 946, 952–53 (D.C. Cir. 2017) ("Even if . . . full APA procedures were used in the release of the 2010 Guidance . . . an agency's decision to embrace additional process cannot convert a guidance document into a legislative rule.").

In addition, Plaintiffs' argument incorrectly assumes that the APA's exceptions to notice-and-comment rulemaking apply differently to amendments of existing rules than to the formulation of new rules. They do not. *See* 5 U.S.C. § 551(5) (defining "rule making" to include "amending . . . a rule"); *Ranger v. FCC*, 294 F.2d 240, 243-44 (D.C. Cir. 1961) (rejecting argument that an "amendment to [] regulations required a formal rulemaking procedure" where the amendment "involved . . . a procedural change").

3. The Procedural and Good Cause Exceptions Apply

Defendant's Motion cited several decisions, including D.C. Circuit decisions, holding that rules which are materially indistinguishable from those at issue here were procedural. Mot. at 33-36. Plaintiffs, however, ignore those decisions and do not attempt to distinguish them. Instead, Plaintiffs argue, first, that the Rule's changes are not procedural because they affect "substantive rights." Opp'n at 41. Specifically, Plaintiffs claim that the Rule eliminates the appeal process for determinations made by the Administrator, *id*., but that argument ignores that the Rule did not amend even one word of that regulation, *see supra* at 11, so notice and comment were not required, Mot. at 32-33. And Plaintiffs' belief that the Rule will cause "political interference" is pure speculation, *see supra* at 5-6. Plaintiffs also complain that EPA will not consider a request received if it is not submitted in accordance with EPA's requirements. Opp'n at 41. But EPA's submission procedures have never been merely advisory, and its intention to enforce its regulations does not alter Plaintiffs' rights or interests. On the contrary, Plaintiffs may still submit FOIA requests, and those requests will be determined according to the same standards as before.

Nor do the Rule's changes encode a substantive value judgment, as Plaintiffs claim. Opp'n at 41. Plaintiffs insist that the Rule will lead to processing delays. Opp'n at 42. Not only have Plaintiffs failed to plead facts plausibly suggesting the Rule will cause delays, *see supra* at 2-5, but Plaintiffs seem to be applying the now-discarded legal standard considering "whether a given procedure has a substantial impact on parties[.]" *Public Citizen v. Department of State*, 276 F.3d 634, 640 (D.C. Cir. 2002) (explaining that the D.C. Circuit has shifted away from that standard). The law is now that "an otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties." *James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000). Accordingly, Plaintiffs' unsubstantiated theory that the Rule will cause delays, even if it were true, would not make the Rule substantive. Because the Rule "applies to all FOIA requests, making no distinction between requests on the basis of subject matter, it clearly encodes no 'substantive value judgment.'" *Public Citizen*, 276 F.3d at 641.

W.C. v. Heckler, 629 F. Supp. 791 (W.D. Wash. 1985), cited by Plaintiffs, is not even remotely similar to this case. In *W.C.*, the agency created a program to review decisions of ALJs with high rates of granting social security disability benefits. *Id*. at 793-94. The review program reflected "a dramatic change in policy" that "severely limited the Secretary's discretion not to evaluate or review decisions by targeted ALJs." *Id*. at 798. The court concluded that the program "was not a procedural rule because the ultimate purpose of the program was to change the outcome of agency decisions." *Id*. "Because the program focused on high allowance ALJs, the anticipated type of change was a reduction in the number of allowances." *Id*. at 799. In contrast, here, no impact on the outcome of FOIA decisions will occur through the rules for which EPA invoked the procedural exception, *i.e.*, rules pertaining to FOIA submission procedures and a listing of the

officials with authority to make FOIA determinations.

Plaintiffs also argue that the Rule is not procedural because it is published in the Code of Federal Regulations and supposedly amends a prior legislative rule. Opp'n at 42-43. But Plaintiffs are applying a test to determine whether a rule is *interpretive*, not procedural. *See Steinhorst Assocs. v. Preston*, 572 F. Supp. 2d 112, 120 (D.D.C. 2008) ("[T]he D.C. Circuit set forth a test comprised of four criteria for determining *whether a rule is legislative or interpretative*.") (emphasis added); *Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 105 n.18 (D.D.C. 2013) (finding arguments based on the "four-factor test in *American Mining* . . . inapposite" to determining whether the procedural exception applies). Even if Plaintiffs' test were applicable here, which it is not, the D.C. Circuit does not take "publication in the Code of Federal Regulations, or its absence, as anything more than a snippet of evidence of agency intent." *Health Ins. Ass'n of America, Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994). Plaintiffs are also wrong to contend that the Rule amended EPA's 2002 FOIA rule, which Plaintiffs describe as "a prior legislative rule." Opp'n at 43. Plaintiffs' error is their attempt to define the 2002 rule *in its entirety* as legislative, when in fact the 2002 rule was actually a collection of many different rules, *see* 65 Fed. Reg. 19703 (proposing a "comprehensive revision" to EPA's existing FOIA regulations and "to add new provisions" thereto); 67 Fed. Reg. 67303 (final rule containing revised regulations), each of which must be individually classified as either legislative or not. *See, e.g., National Association of Manufacturers v. Department of Labor*, 1996 U.S. Dist. LEXIS 10478, at *7-16, *33, *46 (D.D.C. July 22, 1996) (considering various provisions of a rulemaking independently to consider which were procedural rules). To the extent there may have been specific provisions of the 2002 rulemaking that were legislative, that has no bearing whatsoever on whether the different provisions at issue here are legislative.

Lastly, Plaintiffs do not disagree with Defendant's position that the good cause exception applies where, as here, an agency makes changes to its regulations to reflect self-executing statutory provisions and for minor ministerial changes. Mot. at 36-37. Therefore, Plaintiffs' only argument regarding the Rule's changes to regulations regarding aggregation, fees, expedited processing, or multi-track processing is that notice-and-comment rulemaking was required by the FOIA, which is incorrect for the reasons discussed above.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' complaint and deny Plaintiffs' Cross-Motion for Partial Summary Judgment.

Respectfully submitted,

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