IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, *et al.*,	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 19-cv-01773-TNM
	)	
U.S. DEPARTMENT OF STATE, *et al.*,	)	
	)	
Defendants.	)	
	)	

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

With their motion for summary judgment, Plaintiffs submitted probative evidence, in the form of a sworn declaration from the former head of the State Department's Office of Language Services, establishing that Defendants violated the Federal Records Act ("FRA") when they failed to recover interpreter notes, seized by President Trump, documenting a meeting between himself and Russian President Putin. Plaintiffs established that interpreter notes taken during meetings between heads of state contain contextual details, and that interpreters and officials rely on these notes to establish a record of events—points on which Defendants' record was largely silent. Having no better explanation for their failure to recover this record, Defendants now seek to suppress Plaintiffs' evidence, all the while submitting their own extra-record evidence that attempts, unsuccessfully, to fill the gaps in their account.

Defendants' second bite at the apple fares no better than their first. The Court should consider Plaintiffs' evidence, as is standard in a failure-to-act case such as this. Taken as a whole, the full summary judgment record establishes that interpreter notes, like those at issue in this case, are relied upon to create a subsequent memorandum or to brief relevant government officials—uses to which the Hamburg Meeting Notes could have been put had the President not seized them at the conclusion of the meeting. As the Hamburg Meeting Notes contain details of a critical meeting between the President and a foreign head of state, they are a record subject to the preservation obligations of the FRA. Defendants, the Secretary of State and the Archivist of the United States, were therefore under a non-discretionary duty to undertake steps to recover the Hamburg Meeting Notes upon their alienation—steps they have failed, and indeed definitively refused, to take. Defendants' arguments—and their eleventh-hour justifications for their

inaction—do not support their claim that they should prevail. Accordingly, Plaintiffs are entitled to judgment as a matter of law, and Defendants are not.

ARGUMENT

I. The Court Should Decide This Case Based on the Complete Summary Judgment Record

With their summary judgment motion, Plaintiffs included a sworn declaration from Harry Obst, the seasoned former head of the State Department's Office of Language Services, in which Mr. Obst explained that interpreter notes created during sensitive head of state discussions are carefully maintained and used for the preparation of a Memorandum of Conversation ("MemCon") documenting the meeting. *See* Declaration of Harry Obst ("Obst Declaration" or "Obst Decl."), attached to Pls.' Mot. For Summ. J., Ex. B, ECF No. 18-3, ¶¶ 11–16. Based in part on Mr. Obst's submission, Plaintiffs explained in their summary judgment motion that interpreter notes are records that must be maintained at least until the Memorandum of Conversation is finalized. The "administrative record" Defendants submitted in this case, which consists almost entirely of declarations prepared for this litigation, is entirely devoid of any reference to the preparation of MemCons or similar documents. The Obst Declaration was submitted in order to explain why interpreter notes are "appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them" under the Federal Records Act, 44 U.S.C. § 3301(a)(1)(A), and to identify this glaring omission in Defendants' submission.

Because the Obst Declaration establishes that interpreter notes are "appropriate for preservation" because they serve a dual role—they both aid the interpreter in the performance of their functions at the meeting, and also inform the creation of post-meeting memoranda and

briefing materials—Plaintiffs have proven that the Hamburg Meeting Notes are "records" under the FRA and therefore are entitled to judgment. Defendants now seek to exclude the Obst Declaration, as well as the Washington Post article describing the underlying events at issue, on grounds that are entirely unavailing:

1. Defendants argue that the Court must disregard Mr. Obst's declaration, relying on inapposite cases to contend that the Court may only review *their* declarations. *See* Defs.' Reply, ECF No. 21, at 4–7. In their effort to suppress these facts, Defendants misstate the law. Specifically, "defendants confuse a challenge to final agency action and a challenge to an agency's *failure* to act." *Nat'l Law Ctr. on Homelessness & Poverty v. U.S. Dep't of Veterans Aff.*, 842 F. Supp. 2d 127, 130 (D.D.C. 2012). Indeed, courts regularly rely on supplemental factual material to effectuate judicial review where, as here, agencies are sued under section 706(1) of the Administrative Procedure Act ("APA") for a failure to act.[1]

"Because this case is about agency inaction . . . , rather than agency action, this case may not be resolved solely based on the administrative record." *W. Watersheds Project v. Pool*, 942 F. Supp. 2d 93, 100 (D.D.C. 2013). This principle reflects the common-sense understanding that, in such a case, "there is no final agency action to demarcate the limits of the record." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000). "Said another way, if an agency fails to act, there is no 'administrative record' for a federal court to review." *Nat'l Law Ctr. on Homelessness & Poverty*, 842 F. Supp. 2d at 130; *see also Kusuma Nio v. DHS*, 314 F. Supp. 3d

[1] Similarly, in a failure-to-act case such as this, the Court's consideration of Plaintiffs' submissions does not depend on any conclusions regarding the "presumption of regularity," contrary to Defendants' argument, *see* Defs.' Reply at 7–8, although it is unclear in any event how such a presumption could attach to a decisionmaking process that the Government repeatedly and emphatically insists *never happened*. *See* Defs.' Reply at 23 ("[N]either agency initiated a 'decisionmaking process.'").

238, 242 (D.D.C. 2018) (in failure-to-act case, court considers summary judgment exhibits in addition to administrative record). *Cf. Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (acknowledging exception in failure-to-act cases) (quoting Stark & Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 Admin. L. Rev. 333, 345 (1984)); *Telecomms. Res. & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) ("It is obvious that the benefits of agency expertise and creation of a record will not be realized if the agency never takes action."). Indeed, given the pains to which Defendants go in insisting that there *was no agency decision*, *see* Defs.' Reply at 23, it is difficult to understand how their submission could be understood to reflect a comprehensive record of that decision (or non-decision, as they would have it).

Defendants do not cite a single failure-to-act case to support their argument, relying instead on cases involving pure challenges to final agency action that simply have no application here. They suggest that the administrative record alone is sufficient to resolve this case and thus the Court need not consider any other evidence. *Id.* at 6. That is not the standard in a failure-to-act case, as in such a case the Court should consider all evidence and determine whether Defendants have failed to carry out a mandatory legal duty. *See, e.g.*, *Kusuma Nio*, 314 F. Supp. 3d at 242. In any event, Defendants' contention that they submitted a complete administrative record cannot be reconciled with their submission and heavy reliance throughout their brief on three supplemental declarations, which they have not even sought to include in the administrative record.[2]

[2] Defendants' failure to include Mr. Shkeyrov's Declaration in the administrative record, *see* Defs.' Reply at 9 n.2, is particularly puzzling. As noted above, Defendants' administrative record consists almost entirely of declarations prepared for this litigation, meaning Defendants had the opportunity to submit their best evidence in support of their arguments. Nonetheless,

For similar reasons, the Court should also consider Mr. Obst's declaration on Count II of the Complaint, as it is well established that material outside the record should be considered as "background information in order to determine whether the agency considered all of the relevant factors." *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (quotations omitted); *see also Grace v. Whitaker*, 344 F. Supp. 3d 96, 113 (D.D.C. 2018) (Where there is an "unresolved factual issue" that the "administrative record, on its own, . . . is not sufficient to resolve," it is "appropriate to resort to extra-record information to enable judicial review to become effective.") (cleaned up). Mr. Obst's declaration, which explains a use of interpreter notes that the administrative record entirely fails to address, falls squarely within this category of outside materials. Through their new declarations, Defendants attempt to challenge some, but not all, of Mr. Obst's factual statements. For the reasons discussed below, Defendants' additional declarations fail to address much of Plaintiffs' evidence and ultimately do not show that the Hamburg Meeting Notes are not "records" under the FRA. But in any event, these new submissions do not support ignoring Mr. Obst's declaration altogether, as Defendants urge the Court to do.

2. Defendants next contend that the Court should disregard the contents of a newspaper article describing the events underlying this suit, which was incorporated by reference in the Complaint and also attached to Plaintiffs' summary judgment motion. Defs.' Reply at 6–7; *see* Declaration of Hannah Bloom, attached to Pls.' Mot. for Summ. J., Ex. A, ECF No. 18-2 (Greg Miller, *Trump Has Concealed Details of His Face-to-Face Encounters With Putin From Senior*

Defendants curiously declined to include in this record evidence from the sole declarant with first-hand knowledge of the events at issue.

Officials in Administration, Wash. Post, Jan. 13, 2019) ("Miller Article").[3] Defendants have never disputed the contents of the Miller Article, including details of the President's seizure of the notes in issue here, even now, in the declaration they have submitted from the State Department interpreter himself. *See* Declaration of Yuri Shkeyrov ("Shkeyrov Decl."), attached to Defs.' Reply, ECF No. 21-3. Defendants concede that they were aware of the Miller Article, and indeed, the administrative record shows that it was the Miller Article that triggered Defendants' inquiries into the handling of the Hamburg Meeting Notes. *See* Declaration of Laurence Brewer ("Brewer Decl."), NARA AR 0003, ECF No. 15-3, ¶ 10; *see also* Declaration of Timothy Kootz ("Kootz Decl."), State AR 0003, ECF No. 15-2, ¶ 9. Thus, the relevance of the article to this lawsuit is beyond question.

Defendants now assert that the Miller Article consists of "inadmissible hearsay." Defs.' Reply at 6–7. Defendants do not identify a single APA case supporting the notion that a hearsay objection forms a valid basis for excluding evidence from the summary judgment record. To the contrary, courts have held that hearsay evidence may properly be considered in APA cases. *See Kadi v. Geithner*, 42 F. Supp. 3d 1, 12–13 (D.D.C. 2012) (permitting use of hearsay evidence, including newspaper articles, to support agency's decision in APA challenge to global-terrorist designation). This sound principle stems from the fact that the "APA permits the agency's use of 'any oral or documentary evidence' so long as the evidence is not 'irrelevant, immaterial, or unduly repetitious evidence.'" *Al Haramain Islamic Found. v. U.S. Dep't of the Treasury*, 585 F. Supp. 2d 1233, 1258 (D. Or. 2008) (quoting 5 U.S.C. § 556(d)); *see also EchoStar Comms. Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002) (rejecting hearsay objection in challenge to

[3] Exhibit A-2 is a New York Times article that was also incorporated by reference in the Complaint. Plaintiffs do not rely on that article in their summary judgment briefing.

agency action). And indeed, rather than include a declaration from the State Department interpreter himself in the administrative record, Defendants themselves relied on hearsay statements as to the content of the interpreter notes in issue. *See* Declaration of Dr. Yun-Hyang Lee ("Lee Decl."), State AR 0008, ECF No. 15-2, ¶ 20; *see* also Pls.' Br., ECF No. 18-1, at 19 & 19 n.6.[4] Thus, as with their effort to suppress Mr. Obst's sworn statement while themselves relying on extra-record evidence, Defendants seek here to hold Plaintiffs to rules to which they have not themselves adhered. The Court should reject this effort, and consider all the evidence in the summary judgment record.

II. Plaintiffs Have Established That Defendants Failed to Take Legally Required Action and Are Entitled to Judgment as A Matter of Law on Their Section 706(1) Claim

As Defendants have now admitted that the Hamburg Meeting Notes were created by Mr. Shkeyrov, the State Department's interpreter, *see* Shkeyrov Decl. ¶ 5, and they have never disputed that President Trump seized them, the only question that remains is whether the Hamburg Meeting Notes are "appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them." 44 U.S.C. § 3301(a)(1)(A). In their attempt to persuade the Court that the Hamburg Meeting Notes do not constitute "records" under the FRA, Defendants pin their hopes on excluding the Obst Declaration from consideration, asking the Court instead to decide this case on Defendants' administrative record and, conveniently, Defendants' own extra-record declarations. But upon consideration of all the evidence, including Mr. Obst's declaration, Plaintiffs have shown that the record does not

[4] Only in their supplemental declarations—which Defendants have not sought to move into the administrative record—do Defendants proffer any direct evidence, however vague, as to the content of the Hamburg interpreter notes. *See* Shkeyrov Decl.

support Defendants' conclusion that the Hamburg Meeting Notes are not "records" within the meaning of the FRA, as they contain details that would augment the historical record and facilitate understanding and contextualization of this important meeting between world leaders, and could have served such a purpose had the President not seized them. Accordingly, the Hamburg Meeting Notes are records under the FRA whose preservation is required.

A. The Hamburg Notes Are "Records" Within the Meaning of the Federal Records Act

i. The Hamburg Meeting Notes are "appropriate for preservation" because they evidence important government activities

The Obst Declaration makes clear that, in meetings like the July 7, 2017 Hamburg meeting, "it is especially critical to ensure that a record of the meeting is prepared and maintained in the files of the State Department." Obst Decl. ¶ 16. Where no designated note taker is present, the interpreter will be "personally responsible for preparing the MemCon . . . rely[ing] principally on their interpreter notes to refresh their memory of the contents of the exchange" and preserving the notes until that task is complete. *Id.* ¶¶ 12–13. But even where the interpreter is not filling the role of note taker, their notes are nevertheless properly preserved for such period of time as may be necessary to "confirm the accuracy and completeness" of any post-meeting briefing memoranda, such as a MemCon, prepared by other officials. *See id.* ¶ 11.

Defendants now provide their own evidence showing that interpreters are called upon to "provide[] brief responses to requests . . . from note takers, authorized US officials or meeting participants . . . seeking a clarification about a specific detail from a meeting, such as a date, a figure or a proper name." Declaration of Thomas S. Ronkin ("Ronkin Decl."), ECF No. 21-2, ¶ 5. They do not dispute that an official or note taker could ask the interpreter for these details in order to aid preparation of a Memorandum of Conversation, nor do they dispute that the

interpreter may consult his or her notes to facilitate that effort. In other words, Defendants do not dispute—and, indeed, they confirm—Mr. Obst's sworn statement that interpreters may be called upon to assist in reconstructing discussions from the meeting, and that they may rely on their notes to do so.

Defendants nevertheless assert that Mr. Shkeyrov "did not play the role of note taker for that meeting or any other meeting and that his notes at that meeting . . . were isolated words and symbols, solely for his short-term temporary use while interpreting." Defs.' Reply at 11 (citing Shkeyrov Decl. ¶¶ 4–5). This statement does not undermine the Obst Declaration, which makes clear that interpreter notes serve a useful record-keeping function even where the interpreter is not tasked with drafting a memorandum memorializing the discussion because they can aid the interpreter in "confirm[ing] the accuracy and completeness" of post-meeting memoranda drafted by someone else. Obst. Decl. ¶ 11. Indeed, Defendants' claim fails to account for their own evidence from Mr. Ronkin, who confirms that interpreter notes are used in this manner, just as Mr. Obst averred. *See* Ronkin Decl. ¶ 5.

And Mr. Shkeyrov asserts only that he is "not aware of any request by anyone at the State Department or elsewhere in the Executive Branch to use" his notes from that meeting "to prepare a Memorandum of Conversation." Shkeyrov Decl. ¶ 5. But again, this fails to account for the fact that the notes would have served—had the President not seized them—as an aid to help the interpreter who created them recount the contents of the meeting to someone else preparing a memorandum.[5] Defendants do not dispute that interpreter notes may serve such a purpose, which

[5] That Mr. Shkeyrov's notes would have served as a useful memory aid to him cannot be reasonably disputed. *See* Shkeyrov Decl. ¶ 4 (describing notes as something created for the purpose of "helping [him] remember specific details" while interpreting).

Plaintiffs have shown happens for high-level meetings, Obst Decl. ¶¶ 11, 16, and indeed provide supporting evidence of this use. *See* Ronkin Decl. ¶ 5. Such a process could well have unfolded here had the President not seized Mr. Shkeyrov's notes and instructed him not to discuss the contents of the meeting. *See* Miller Article (describing national security officials seeking information from Mr. Shkeyrov after the Hamburg meeting).[6]

Moreover, contrary to Defendants' assertions, "appropriate for preservation" as used in the FRA is not an especially onerous standard. Pursuant to the statute's plain terms, a record is appropriate for preservation not only "because of the informational value" it contains, but also if it "evidence[s] . . . the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government." 44 U.S.C. § 3301(a)(1)(A). Accordingly, even notes that contain contextual material such as dates, names, or the order in which parties spoke at a meeting, can constitute a record under the FRA—especially where, as here, the records pertain to matters of great historical importance. *See Armstrong v. Exec. Off. of the President, Off. of Admin.* ("*Armstrong II*"), 1 F.3d 1274, 1284 (D.C. Cir. 1993).

In *Armstrong II*, the D.C. Circuit considered whether the government could, consistent with its preservation obligations under the FRA, "convert only *part* of the electronic records to

[6] Defendants overstate the purpose for which Plaintiffs rely on the Miller Article. *See* Defs.' Reply at 11 n.4. Plaintiffs do not assert that the Miller Article evidences an affirmative request from then-National Security Advisor H.R. McMaster, or other national security officials, to Mr. Shkeyrov for his *notes*. Rather, the Miller Article shows that top national security officials were actively seeking out information from Mr. Shkeyrov, which suggests that any recorded information—even "jottings"—would have been welcome to these officials. *See* Pls.' Br. at 17 n.5. And Plaintiffs do not dispute that Mr. Tillerson was available to debrief national security officials, but, especially because his public account of events was "at odds with the only detail that other administration officials were able to get from the interpreter," Miller Article, a contemporaneous writing like the Hamburg Meeting Notes would have surely been examined had it not been alienated. At a minimum, Mr. Shkeyrov might have looked to them in answering the questions the Miller Article confirms he was receiving. *See* Ronkin Decl. ¶ 5; *see also* Obst Decl. ¶ 11.

paper and then manage only the partial paper records," destroying the electronic versions of the records. *Id.* The court reasoned that the electronic communications systems holding the documents at issue "contain[ed] preservable records" and that only if the electronic records met the FRA exception for "extra copies" would it be permissible for the government to destroy them without running afoul of the FRA. In finding that the electronic records did not fit within the FRA's preservation exception for "extra copies," the court focused on the fact that the electronic versions would contain "important information present in the e-mail system, such as who sent a document, who received it, and when that person received it," which would not be preserved through the paper copies alone. *Id.*

If the "metadata" at issue in *Armstrong II* were records under the FRA, then that compels the conclusion that the Hamburg Meeting Notes—which undisputedly would at the very least have contained contextual details regarding the meeting roughly analogous to metadata—are also records. Defendants argue that "[n]othing in *Armstrong II* suggests that such metadata, isolated from substantive information about a government activity and never circulated within an agency, qualifies as a federal record." Defs.' Reply at 14. But *Armstrong II* does not focus on the proximity of the electronic metadata to other, substantive information that would have appeared in the printed record. Rather, the court noted that the historical record would be "of quite limited utility to researchers and investigators" where it contains "[t]exts alone" and is bereft of metadata. *See Armstrong II*, 1 F.3d at 1285. Defendants would have that case stand for the proposition that, where a narrative description of a meeting is not created, a writing potentially documenting key details, like the Hamburg Meeting Notes, may be alienated. *See* Defs.' Reply at 14. In fact, *Armstrong II* supports the opposite conclusion.

Even if Defendants are correct, and *Armstrong II* requires the preservation of contextual details *only* where they will not be viewed "isolated from substantive information about a government activity," Defs.' Reply at 14, such a rule does not counsel in Defendants' favor here. Nothing in *Armstrong II* suggests that the context necessary to make metadata-type information valuable enough to warrant preservation needs to be apparent from *the same document* in which it is embedded. The same logic should apply here. Had the President not seized the notes, they could have proven useful to officials within the government who were actively seeking more information about the contents of the meeting, *see* Miller Article, and who would be able to pair it with interviews with the interpreter or existing government records to form a more complete understanding of the U.S.-Russian relationship. As both Mr. Ronkin and Mr. Obst make clear, this is a role interpreter notes have long played. *See* Ronkin Decl. ¶ 5 (confirming that interpreters will sometimes respond "to requests in person or by telephone emanating from note takers, authorized US officials or meeting participants . . . seeking a clarification about a specific detail from a meeting, such as a date, a figure or a proper name"); *see also* Obst Decl. ¶ 11.

Defendants further claim that "Plaintiffs have not shown that Mr. Shkeyrov's notes in fact contained any such [metadata-type] information in the first place." Defs.' Reply at 14. But there is no dispute that the Hamburg Meeting Notes, at the very least, would have contained contextual details that could serve a similar purpose to the metadata at issue in *Armstrong II*. Defendants have conceded that interpreters "may utilize a pen and paper to jot down symbols or words" or "phrases" to aid their interpreting. Lee Decl., ¶¶ 13–14, 17. And Mr. Shkeyrov concedes that he indeed made such "jottings" and "scribblings" at the July 7, 2017 Hamburg meeting in order to aid his recollection of "specific details" of the meeting's dialogue. *See* Shkeyrov Decl. ¶ 5. Defendants do not deny that the notes contained such information, although

they certainly could have if it were true. Especially in the context of a head-of-state meeting, this information is sufficient to confer record status on the Hamburg Meeting Notes.

ii. NARA's regulation governing "working files" does not free Defendants from their preservation obligations under the FRA

Defendants also continue to press their argument that the Hamburg Meeting Notes are exempt from the FRA's preservation requirement because they do not meet the National Archives and Records Administration's ("NARA") definition of "working files," which stipulates that even "[w]orking files, such as preliminary drafts and rough notes, and other similar materials, are records" that must be preserved if:

> (1) They were circulated or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, follow-up, or to communicate with agency staff about agency business; and
>
> (2) They contain unique information, such as substantive annotations or comments that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities.

36 C.F.R. § 1222.12(c). Defendants contend the Hamburg Meeting Notes do not need to be preserved according to this regulation "because they are not used for any purpose other than to aid the short-term memories of the interpreters who make them, and they are not circulated within the Department for any official purpose." Defs.' Reply at 15 (citing Lee Decl. ¶¶ 14–20; Declaration of Marina Gross, State AR 0038, ECF No. 15-2, ¶¶ 4–6).

As Plaintiffs have explained, however, "working files" are records, and NARA's regulation clarifying the circumstances under which they no longer need to be preserved "assumes a final product that itself constitutes a federal record and adequately documents the relevant government activity." Pls.' Br. at 17. Because the government does not even suggest that the Hamburg Meeting Notes were incorporated into a final document, the NARA regulation does not apply to relieve the attendant preservation obligation. *Id.* This is all the more clear when

one considers that NARA's General Records Schedule defines "intermediary records" as "[r]ecords . . . created or used in the process of creating a subsequent record" and instructs that such records must be maintained until "verification of successful creation of the final document or file, or when no longer needed for business use, whichever is later." *See* NARA, General Records Schedule 5.2: Transitory and Intermediary Records 84 (July 2017), available at https://archives.gov/files/records-mgmt/grs/grs05-2.pdf.

Even accepting that NARA's regulation does apply, Plaintiffs have demonstrated that the Hamburg Meeting Records "contain unique information . . . that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities," 36 C.F.R. § 1222.12(c), because they can be used to assist in the creation of a document memorializing the meeting where they were recorded. *See* Obst Decl. ¶¶ 11–16. To serve that function, however, the notes must have a chance to be circulated or used in the subsequent creation of a summary document, even if used as a memory-recall device for Mr. Shkeyrov to assist a colleague in understanding the Hamburg meeting, as he was, in fact, called to do. *See* Miller Article (noting that national security officials sought details of the Hamburg meeting from Mr. Shkeyrov). Defendants contend that the Hamburg Meeting Notes were not circulated and so are exempt from NARA's regulation governing the preservation of "working files." *See* Defs.' Reply at 15. But if the Hamburg Meeting Notes were not circulated, it is only because they were seized by the President before any such circulation could have taken place.[7]

[7] Defendants contend that the Obst Declaration does not suggest that his notes would have been "circulated to anyone else for review or use, even for the purpose of preparing a MemCon" and that this purported omission amounts to a concession by Plaintiffs "that interpreters' notes do not satisfy the criteria for records under 36 C.F.R. § 1222.12(c)." Defs.' Reply at 15 n.6. Such a claim can only be made by ignoring key portions of the Obst Declaration. In particular, Mr. Obst averred that, where he was not personally tasked with drafting a MemCon, he and his notes would have remained available to other officials in their

Applying the NARA regulation in a manner that would permit alienation of a document that otherwise qualifies as a record simply because it was quickly seized would create perverse incentives of a kind Congress clearly did not intend in passing the FRA. *See Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 41 (D.C. Cir. 1983) ("Congress was certainly aware that agencies, left to themselves, have a built-in incentive to dispose of records relating to [their] 'mistakes[.]'").[8]

Thus, the narrow exemption from preservation NARA created for "working files" that are made superfluous by a later-created document does not apply here to shield Defendants from their obligation to preserve the Hamburg Meeting Notes.

B. The President's Seizure of the Hamburg Meeting Notes Violates the FRA

Defendants once more assert that the President's seizure of the Hamburg Meeting Notes does not violate the FRA because the seized notes were not "records" subject to the FRA. *See* Defs.' Reply at 17. Plaintiffs, of course, disagree and refer the Court back to their discussion of

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preparation of post-meeting memoranda. *See* Obst Decl. ¶ 11. Moreover, Mr. Obst described how his notes, or the MemCon they were incorporated into, would ultimately be turned in to the Secretary of State's office for appropriate distribution. *Id.* ¶ 14. Thus, Plaintiffs presented several ways in which the information recorded in an interpreter's meeting notes might be circulated.

[8] Defendants are quite right that Plaintiffs do not challenge NARA's regulation and so their passing discussion of *Chevron* deference is misplaced. Defs.' Reply at 16–17. Nor is deference of any sort due to Defendants' litigation position on the meaning of its regulations. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019). Plaintiffs have explained why the NARA regulation has no relevance where, as here, the writing that has been removed provides the only documentation of important government business, a point that Defendants never directly address. *See* Pls.' Br. at 16–18. Moreover, Plaintiffs' proposed application of 36 C.F.R. § 1222.12(c) to the facts of this case avoids tension with the FRA's general duty to preserve "records"; it is Defendants' suggestion that the immediate seizure of a document permits evasion of the FRA's obligations that invites conflict between NARA's regulation and the FRA. Such a result should be avoided. *See Sec'y of Lab., Mine Safety & Health Admin. v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990) (noting that courts should prefer interpretations of regulations that are reasonable and avoid creating conflict with the statute).

the record status of the Hamburg Meeting Notes. *See* Pls.' Br. at 20–21; *supra* 8–12. Defendants now further claim that "Plaintiffs offer no admissible evidence whatsoever showing that the President took the notes in the first place." Defs.' Reply at 17. But the Defendants have never disputed that the President seized the notes, and so the Court should treat the fact as conceded. In addition to the Miller Article, which the Court may and should consider, *see supra* 5–6, Defendants' complete silence on the question of the President's seizure of the Hamburg Meeting Notes is particularly striking considering that they have now provided a declaration from Mr. Shkeyrov, the interpreter who created the notes and from whom they were seized by the President. *See generally* Shkeyrov Decl. Especially given their conscious omission of facts uniquely within their possession, the Court should consider the Miller Article to establish the President's seizure of the Hamburg Meeting Notes.

C. The Secretary Knew or Had Reason to Believe That the Hamburg Meeting Notes Were Unlawfully Removed from the Department

Plaintiffs have amply demonstrated that Defendants knew or had reason to believe that the Hamburg Meeting Records were unlawfully alienated from the Department and so were obligated to initiate a recovery action under the FRA. 44 U.S.C. § 3106(a). First, Secretary Tillerson was present at the July 2017 Hamburg meeting, *see* Miller Article, and so would have had first-hand, personal knowledge of the events giving rise to the unlawful alienation on which he, or his successor Secretary Pompeo, should be expected to act. *See Competitive Enter. Inst. v. EPA*, 67 F. Supp. 3d 23, 34 (D.D.C. 2014) (finding it reasonable to infer from the available context, including the scope of the violation, that the agency head was aware of unlawful alienation and so mandatory recovery duties were triggered). Second, Defendants themselves submitted declarations attesting to the fact that officials from both NARA and the State Department discussed President Trump's alienation of the Hamburg Meeting Records and that

they were prompted by the Miller Article to do so. *See* Brewer Decl. ¶ 10; *see also* Kootz Decl. ¶ 9.

In response, Defendants first argue that Mr. Kootz "has reason to believe that interpreters' notes *do not* qualify as federal records and that, as a result, any removal of interpreters' notes from the Department would *not* be an unlawful removal of federal records triggering obligations under § 3106(a)." Defs.' Reply at 18. But Mr. Kootz's judgment was based on the general practice of interpreters at the Department and in the abstract as opposed to the circumstances here, a meeting between heads of state and one where the President excluded traditional note-taking staffers from the meeting. *See* Kootz Decl. ¶ 9. Indeed, it does not even appear that Mr. Kootz consulted with the actual author of the alienated notes, Mr. Shkeyrov, though he would have been best positioned to advise the Department as to the Hamburg Meeting Notes' content. *Id.* There was simply no need to conduct the inquiry in the abstract.

Defendants further argue that they did not possess the requisite knowledge because "knowing that the President took the notes is not the same as knowing that an unlawful removal of federal records had occurred." Defs.' Reply at 18–19. But this merely states the incorrect legal conclusion they reached and makes another pass at their earlier argument, for which they relied on *Price v. U.S. Dep't of Just.*, No. 18-cv-1339, 2019 WL 2526439 (D.D.C. June 19, 2019), to suggest that "the FRA's mandatory recovery provision is not triggered unless and until an agency head makes a specific finding that a violation has occurred." *See* Pls.' Br. at 23 (citing Defs.' Br., ECF No. 16-1, at 16). As Plaintiffs have previously explained, *Price*, which draws an inapt analogy between section 3106 and section 2115 of the FRA, should not guide the Court. *Id.* And because the Hamburg Meeting Notes are plainly "records" within the meaning of the FRA, *see*

supra 8–12, Defendants possessed the requisite knowledge to trigger their nondiscretionary duty to act under the FRA.

D. Archivist Ferriero Has Also Failed to Carry Out a Nondiscretionary Duty Under the FRA

The FRA obligates the Archivist to "request the Attorney General . . . initiate" a recovery action when (i) the agency head is aware that an alienation has occurred and the agency head fails to act within a reasonable period of time to recover the record, or (ii) where the agency head "is participating in, or believed to be participating in any such unlawful action." 44 U.S.C. § 3106(b). Defendants argue these conditions were not met either because the Hamburg Meeting Notes were not records or because there has not been either "'notifi[cation]' of an unlawful action," "passage of a 'reasonable period of time' for the Secretary to take action himself," or evidence "that the Archivist believe[s] that the Secretary is 'participating' in the unlawful action." Defs.' Reply at 20–21 (citing 44 U.S.C. § 3106(b)).

As Plaintiffs explain above and in their opening brief, the Hamburg Meeting Notes are "records" within the meaning of the FRA and so the President's alienation of those records outside the method carefully set forth in the Act is unlawful. *See* Pls.' Br. at 20–21; *supra* 8–12. Moreover, a representative from NARA conferred with a representative from the State Department in January 2019, *see* Kootz Decl. ¶ 9; Brewer Decl. ¶ 10, meaning that for more than a year, NARA has both been independently aware of the facts giving rise to the violation and that the State Department was likewise aware but declined to act. Nothing more is required to trigger the Archivist's independent duty to act "[i]n any case in which *the head of a Federal agency does not initiate an action* for such recovery or other redress *within a reasonable period of time after being notified* of any such" alienation. 44 U.S.C. § 3106(b) (emphasis added).

In its opening brief, Plaintiffs explained that the "Archivist's duty is triggered when *the agency head* fails to take action despite being aware of the alienation," Pls.' Br. at 25 (citing 44 U.S.C. § 3106(b)), and not, as Defendants had urged, only after "the Archivist is first notified by the agency head of an actual, impending, or threatened unlawful removal of federal records from the agency's custody." Defs.' Br. at 18. Such a contorted reading of the FRA would destroy the role Congress plainly envisioned NARA would play in scenarios such as this, where the agency is unable or unwilling to initiate a recovery action for a record known by all to have been alienated. *See Armstrong II*, 1 F.3d at 1278–79 ("Congress did not intend to grant [the agency] … a blank check for records disposal.") (quoting *Am. Friends Serv. Comm.,* 720 F.2d at 62); *Am. Friends Serv. Comm.*, 720 F.2d at 41 ("Congress was certainly aware that agencies, left to themselves, have a built-in incentive to dispose of records relating to [their] 'mistakes[.]'"). Defendants malign this as an "alternate interpretation" of 44 U.S.C. § 3106(b), Defs.' Reply at 20 n.7, but far from "alternate," it is the only one on offer that leaves the statute intact.

III. The Court Should Grant Judgment for Plaintiffs on Count II of the Complaint

A. Defendants' Determination That the Hamburg Meeting Notes Are Not Subject to Section 3106 Is Reviewable Final Agency Action

As explained in Plaintiffs' opening brief, *see* Pls. Br. at 27–31, Defendants' conclusive determination that they would not act to recover the Hamburg Meeting Notes was reviewable final agency action. It satisfied the two-factor test articulated in *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997), because it reflected the consummation of the agencies' decisionmaking process, and because it determined the legal status of the interpreter notes:

First, the decision was the clear end-point of the agencies' decisionmaking process. By their own account, Defendants took no further action after Messrs. Kootz and Brewer determined that the Hamburg Meeting Notes were not records under the FRA. Indeed, their determinations

foreclosed any such further action by the Executive Branch. In Mr. Brewer's words, which echo the words of section 3106: "NARA determined that any removal or seizure of the interpreter's notes *would not qualify as an unlawful removal or destruction of records contemplated by the FRA*." Brewer Decl. ¶ 11 (emphasis added); *see also* Kootz Decl. ¶ 10. Their decision was "unambiguous and devoid of any suggestion that it might be subject to subsequent revision." *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990).

Defendants do not suggest that their decision was subject to revision. And they concede that Defendants undertook "inquiries" that culminated in "conclusions." Defs.' Reply at 23. Instead, they assert, somewhat curiously, that the "inquiries" and the "conclusions" that resulted therefrom were not "decisionmaking process[es]," *id.*, even though these inquiries and conclusions were undertaken and reached by Mr. Brewer, the *Chief Records Officer for the United States Government* and Mr. Kootz, the *Agency Records Officer of the Department of State*. If these two officials' inquiries were incapable of resulting in final agency decisions as to the Hamburg Meeting Notes, it is unclear whose could have.

Defendants fall back again on the argument that their decisions are not reviewable because they were not accompanied by some requisite formality, Defs.' Reply at 23–24, though it is unclear what sort of formality Defendants would require. In reprising this argument, however, Defendants once again ignore a controlling Supreme Court decision rejecting this assertion in terms that could not be clearer: "The bite in the phrase 'final action' . . . is not in the word 'action,' *which is meant to cover comprehensively every manner in which an agency may exercise its power*." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (emphasis

added) (citations omitted); *see* Pls.' Br. at 30. Defendants, unable to square this circle, again fail to address *American Trucking* at all, instead citing older and inapposite cases.[9]

Second, Defendants' decision determined legal rights and obligations with respect to the Hamburg Meeting Notes. Absent judicial intervention, it absolved the Secretary and Archivist of any duty under section 3106 to recover the Hamburg Meeting Notes; the Attorney General of any duty to respond to a referral made under section 3106; and the President of any consequences for a violation of the Federal Records Act. Moreover, it ensured that the Hamburg Meeting Notes would remain alienated from the State Department, and thus the public, including Plaintiffs, would be denied a legal right to request them under the Freedom of Information Act.[10] *Cf. Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 617–18 (D.C. Cir. 2006) (FOIA requester suffered cognizable injury-in-fact "because he did not get what the statute entitled him to receive"); *Cause of Action Inst. v. Tillerson*, 285 F. Supp. 3d 201, 209 (D.D.C. 2018) (McFadden, J.) (in section 3106 suit, finding Plaintiff had standing based on FOIA request and substantial likelihood further efforts would result in records being returned to agency custody).

[9] Defendants again quote a line from *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19–20 (D.C. Cir. 2006), Defs.' Reply at 23, but do not address Plaintiffs' (and, indeed, the D.C. Circuit's) explanation of why the budget request in issue there does not satisfy *Bennett v. Spear*: because a budget request is precisely that—a request—and has no effect on legal rights or obligations. *See Fund for Animals*, 460 F.3d at 20. That case is readily distinguished from Defendants' decision here.

[10] Defendants do not address the point of what would have happened if the Chief Records Officer of the United States or the Agency Records Officer of the State Department had instead concluded that the Hamburg Meeting Notes *were* records subject to the FRA. There can be little doubt that such a determination would have had triggered section 3106 recovery duties on the part of the Secretary and Archivist. Thus, the opposite determination—that they *were not* records—should be considered equally final for purposes of the *Bennett v. Spear* test. *See U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1814–15 (2016).

Defendants attempt to distinguish the present case because "interpreters' notes were not federal records prior to these inquiries." Defs.' Reply at 25. The point is unpersuasive for two reasons. First, Defendants do not identify any specific prior agency determination that interpreter notes, either categorically or with respect to the Hamburg Meeting Notes, are not federal records, so the argument fails on its own terms. Second, and more fundamentally, it cannot be and is not the case that an agency's decision on a particular matter only counts as final agency action if it reverses a previous agency position. To the contrary, it is well-settled that the application of a preexisting rule to a particular matter renders the underlying determination subject to challenge. *See Indep. Cmty. Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999) (citing, *inter alia*, *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958)). Ultimately, by their own words, Defendants made a final, conclusive decision as to the status of the Hamburg Meeting Notes, and they now have no compelling answer as to why their decision should be shielded from judicial review.[11]

B. Defendants' Decision Should be Set Aside

For the reasons discussed in Plaintiffs' cross-motion for summary judgment, and above, Defendants' decision was arbitrary and capricious and contrary to law, and should be set aside pursuant to 5 U.S.C. § 706(2). The decision was contrary to law for the same reasons that judgment is warranted for Plaintiffs on Count I—because the Hamburg Meeting Notes are indeed federal records that trigger the Secretary's and Archivist's section 3106 recovery obligations. Moreover, their decision was arbitrary and capricious because the record continues

[11] Defendants also appear to reprise their motion to dismiss argument that Plaintiffs did not adequately allege final agency action in the Complaint. *See* Defs.' Reply at 22. The Court has already correctly rejected this argument and Defendants offer no sound reason to reconsider that decision now.

to be devoid of any indication that Messrs. Kootz and Brewer considered whether the Hamburg Meeting Notes needed to be preserved in order to ensure that a complete and accurate memorialization of the Trump-Putin conversation could be created. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious when record indicates agency has "entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency").

Accordingly, the Court should set aside Defendants' decision and remand the matter to the agencies to engage in a decisionmaking process that comports with the requirements of the APA and FRA and that properly considers all relevant factors.

CONCLUSION

For the foregoing reasons, Plaintiffs' respectfully request that the Court deny Defendants' Motion for Summary Judgment and grant Plaintiffs' Cross-Motion for Summary Judgment.

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Respectfully submitted,

/s/ Nitin Shah

John E. Bies (D.C. Bar No. 483730)
Daniel A. McGrath (D.C. Bar No. 1531723)
AMERICAN OVERSIGHT
1030 15th Street NW, B255
Washington, D.C. 20005
(202) 869-5246
john.bies@americanoversight.org
daniel.mcgrath@americanoversight.org

Nitin Shah (D.C. Bar No. 156035)
Benjamin Seel (D.C. Bar No. 1035286)
DEMOCRACY FORWARD FOUNDATION
1333 H Street NW
Washington, D.C. 20005
(202) 448-9090
nshah@democracyforward.org
bseel@democracyforward.org

Counsel for Plaintiffs