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.	)	
	)	

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This case concerns Defendants' failure to carry out their duty under the Federal Records Act ("FRA") to recover and preserve records that are alienated from a federal agency's custody. Specifically at issue here is the failure of the Secretary of State and the Archivist of the United States to take nondiscretionary steps to recover meeting records created by a State Department employee during a July 7, 2017 meeting between President Trump and Russian Federation President Vladimir Putin at the G20 Summit in Hamburg, Germany. As alleged in the Complaint—and based on widely-publicized reports in January 2019—President Trump took possession of written notes documenting that meeting (the "Hamburg Meeting Records"), which had been created by an employee of the U.S. Department of State Office of Language Services serving in their official agency capacity.

In doing so, President Trump alienated federal record material in violation of the FRA. Yet the Secretary of State has failed to carry out his nondiscretionary duty to initiate legal action through the Attorney General to recover these records for proper processing and preservation in the State Department's files. Likewise, the Archivist has failed to fulfill his independent nondiscretionary duty to pursue recovery, including by referring the matter to the Attorney General. Because this inaction violates the FRA, Plaintiffs sue under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1), to compel unlawfully withheld agency action.

In seeking dismissal, Defendants stray well beyond the bounds of Rule 12(b)(6) by offering an alternate factual scenario that they claim is "at least as plausible as Plaintiffs'" allegations. Defs.' Mem. in Supp. of Mot. to Dismiss ("MTD") at 2, ECF No. 9-1. Under their theory, which depends on their own conjecture regarding the content of the meeting notes and the subjective intentions of the State Department employee, as well as the view that the President

has unfettered discretion to determine that certain documents are not subject to the FRA, neither the Secretary nor the Archivist had any duty to recover the Hamburg Meeting Records. Defendants' factual contentions, however, cannot defeat Plaintiffs' claims, and their arguments are in all other respects unavailing for the reasons set forth herein.

BACKGROUND

A. Statutory and Regulatory Background

The Federal Records Act ("FRA" or the "Act") governs the creation, management, and disposal by agencies of "records." *See generally* 44 U.S.C. Chapters 21, 29, 31, and 33.[1] The Act defines "records" as

> [1] all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and [2] preserved or appropriate for preservation by that agency or its legitimate successor 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[.]

Id. § 3301(a)(1)(A). The State Department has adopted a nearly identical definition of "Federal Records" in its Foreign Affairs Handbook:

> Federal records are all documentary materials . . . (1) made or received by an agency of the United States Government in pursuance of Federal law or in connection with the transaction of public business, and (2) preserved or appropriate for preservation as evidence of agency activities or because of the value of the information they contain.

U.S. Dep't of State, 5 Foreign Affairs Handbook 4 H-113, https://fam.state.gov/FAM/05FAH04/05FAH040110.html#H113. "Appropriate for preservation" is further defined to mean records that "constitute evidence of the organization, functions,

[1] Although Defendants take pains to explain the differences between the FRA and the Presidential Records Act ("PRA), *see* MTD at 5-6, Plaintiffs assert claims only under the FRA and APA.

policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the material." *Id.* State's definition specifically encompasses informal or draft documents "contain[ing] unique information, such as annotations or comments, that help explain the formulation or execution of agency policies, decisions, actions or responsibilities, and which were circulated or made available to employees other than the drafter for the purpose of approval, comment, action or to keep staff informed about agency business[.]" *Id.*

Conversely, "Non-record Material" is defined by the State Department as "[m]aterials that do not meet the statutory definition of records or that have been excluded from coverage by that definition." *Id.* State has defined "excluded materials" to include, in relevant part, "extra copies of documents kept only for reference[.]" *Id.*; *see* 44 U.S.C. § 3301(a)(1)(B) (likewise excluding "duplicate copies of records preserved only for convenience.").

The FRA imposes certain mandatory duties on agency heads and the Archivist. Among these is that each "shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, . . . and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. § 3101. Agency heads are further required to establish records management programs that provide "effective controls over the creation and over the maintenance and use of records," *id.* § 3102(1), and to "establish safeguards against the removal or loss of records the head of [the] agency determines to be necessary and required by regulations of the Archivist," *id.* § 3105.

Most pertinent here, where records are handled in a manner that contravenes the FRA's preservation mandate, such as where they are improperly removed from agency custody, the FRA obligates the relevant agency head to "notify the Archivist of any actual, impending, or

threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction[.]" *Id.* § 3106(a). The Act further commands in that circumstance that the agency head, as well as the Archivist, "shall initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or *has reason to believe* have been unlawfully removed from that agency, or from another Federal agency whose records have been transferred to the legal custody of that Federal agency." *Id.* (emphasis added).

"The Archivist also plays a key role in the FRA's enforcement scheme," and where it "discovers that an FRA provision has been or is being breached, the Archivist must (1) inform the agency head of the violation and suggest corrections and (2) if ameliorative measures are not undertaken within a reasonable time, submit a written report to Congress and the President." *Armstrong v. Exec. Comm. of the President* ("*Armstrong II*"), 1 F.3d 1274, 1279 (D.D.C. 1993) (citing 44 U.S.C. § 2115(b)). Additionally, "should the Archivist become aware of any 'actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of [an] agency,' she must notify the agency head of the problem and assist the agency head in initiating an action through the Attorney General for the recovery of wrongfully removed records or for other legal redress." *Id.* (citing 44 U.S.C. § 2905(a)).

Where the agency head is, nevertheless, "recalcitrant in pursuing legal remedies," the FRA requires the Archivist to step in. The Archivist is "to (1) request the Attorney General to initiate action and (2) inform Congress that she made that request." *Id.* (citing 44 U.S.C. § 2905(a)); *see also* 44 U.S.C. § 3106(b) (providing that where agency heads fail to initiate recovery through the Attorney General "within a reasonable period of time after being notified of any such unlawful action . . . the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made"). The FRA also

obligates the Archivist to independently refer the matter to the Attorney General where there is reason to believe that the agency head has participated in the FRA violation. *Id.*

Where the agency head and the Archivist have "failed to initiate remedial action in a timely [manner], 'private litigants may sue under the APA to require them to do so.'" *CREW v. U.S. Dep't of Homeland Sec.*, 527 F. Supp. 2d 101, 110 (D.D.C. 2007). The availability of "judicial review of the agency head's and Archivist's failure to take enforcement action reinforces the FRA scheme by ensuring the administrative enforcement and congressional oversight provisions will operate as Congress intended." *Armstrong v. Bush* ("*Armstrong I*"), 924 F.2d 282, 295 (D.C. Cir. 1991).

B. Factual Background

President Trump has taken unusual measures to conceal the details of his meetings with foreign leaders, especially President Putin, not only from the public at large, but also from key members of his Administration, including officials at the State Department. *See* Compl. ¶¶ 21-23, ECF No. 1. These practices have resulted in the total absence of a "detailed record, even in classified files, of Trump's face-to-face interactions with the Russian leader at five locations over the past two years." *Id.* ¶ 24 (quoting Greg Miller, *Trump Has Concealed Details of His Face-to-Face Encounters With Putin From Senior Officials in Administration*, Wash. Post, Jan. 13, 2019, https://www.washingtonpost.com/world/national-security/trump-has-concealed-details-of-his-face-to-face-encounters-with-putin-from-senior-officials-in-administration/2019/01/12/65f6686c-1434-11e9-b6ad-9cfd62dbb0a8_story.html). The absence of any documentation of these meetings undermines the purpose of the FRA, not only by rendering the historical record incomplete, but also by making it more difficult for government officials, including those at the State Department, to carry out their official duties to conduct

diplomacy on behalf of the United States. *See id.* ¶ 29 (White House and State officials have sought information about the substance of Trump-Putin meetings).

This case deals specifically with a meeting between President Trump and President Putin on the sidelines of the G20 summit in Hamburg, Germany, on July 7, 2017. Also in attendance were then-Secretary of State Rex Tillerson and a State Department interpreter, who created a set of written notes during the course of that meeting. *Id.* ¶ 25. At the meeting's conclusion, President Trump took physical possession of the Hamburg Meeting Records from the State Department employee who created them, and instructed that employee not to discuss the contents of the meeting with other members of the Administration. *Id.*

Administration officials, seeking to understand what was discussed in order to perform their official duties, learned that there was no written record of the meeting—an extremely unusual occurrence—and only a cursory readout provided by then-Secretary Tillerson was available. *Id.* ¶ 29. News that the President had seized the Hamburg Meeting Records was not publicly known, however, until the incident was reported in a Washington Post article in January 2019.

Plaintiff American Oversight sent a letter to Secretary Pompeo on January 24, 2019, copying the Archivist, stating that President Trump's "reported removal of a State Department interpreter's notes may violate the Federal Records Act's prohibition on unlawful removal or destruction of federal records." *See id.* ¶ 31 (quoting Ex. A at 1, the "American Oversight Letter"). The American Oversight Letter stated that President Trump's seizure of the Hamburg Meeting Records violated the FRA and requested that Secretary Pompeo "notify the Archivist of 'any actual, impending, or threatened' unlawful removal, alteration, or destruction of federal records, and . . . initiate action to recover those records you have reason to believe were

unlawfully removed." *Id.* ¶ 32 (quoting American Oversight Letter at 2). Plaintiff Democracy Forward Foundation sent a letter on February 7, 2019, *see id.* ¶ 33 (citing Ex. B, the "Democracy Forward Letter"), which asserted that the President's decision to seize "the State-created Meeting Notes plainly violates the FRA and triggers a statutory requirement of mandatory corrective measures by the Secretary and the Archivist," Democracy Forward Letter at 2. Neither Plaintiff received a response to its letter.

C. Proceedings in This Court

Plaintiffs—nonprofit organizations committed to promoting transparency and accountability in government—commenced this action on June 18, 2019 to "challenge[] the failure of Defendants to carry out their nondiscretionary duties under the FRA to recover State Department records created to document in-person meetings between President Donald J. Trump and Russian Federation President Vladimir Putin, which were unlawfully removed from the Department." *See* Compl. ¶¶ 2, 5. Plaintiffs seek an order compelling "Defendants to comply with their respective duties under the FRA and APA, including by referring the matter to the Attorney General for enforcement of the FRA and recovery of unlawfully alienated State Department meeting records[.]" *Id.* at 14. Defendants moved to dismiss the Complaint on September 20, 2019, *see* MTD. Plaintiffs now respond and oppose Defendants' motion to dismiss.

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) "is intended to test the legal sufficiency of the complaint." *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003). "To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to state a claim to relief that is plausible on

its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citation omitted). The complaint need not "include detailed factual allegations," *Menoken v. Lipnic*, 300 F. Supp. 3d 175, 183 (D.D.C. 2018), though it must offer more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A claim crosses from conceivable to plausible when it contains factual allegations that, if proved, would 'allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (quoting *Twombly*, 550 U.S. at 556).

At this phase, the Court must proceed "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)," *Twombly*, 550 U.S. at 555, and should therefore deny a motion to dismiss even "[i]f there are two alternative explanations, one advanced by [the] defendant and the other advanced by [the] plaintiff, both of which are plausible," *Banneker Ventures, LLC*, 798 F.3d at 1129 (internal quotation marks omitted). Finally, "[t]he standard for dismissing a complaint with prejudice is high: 'dismissal *with prejudice* is warranted only when a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" *Belizan v. Hershon*, 434 F.3d 579, 583 (D.C. Cir. 2006) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996)).

ARGUMENT

It is well established in this Circuit that judicial review is available for precisely the sort of action brought here—a challenge to the Defendants' failure to initiate an enforcement action to recover the unlawfully alienated Hamburg Meeting Records in violation of their

nondiscretionary duties under the FRA. *See* Compl. ¶¶ 48-51. The D.C. Circuit has held that the APA provides a cause of action to enforce the recovery provisions of the FRA. Specifically, the APA "permits a claim 'that an agency failed to take a *discrete* agency action that it is *required to take*.'" *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 954 (D.C. Cir. 2016) (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004)). And, "[t]he recovery provisions of the Federal Records Act fit that bill because they 'leave [the agency head and Archivist] *no* discretion to determine which cases to pursue.'" *Id.* (quoting *Armstrong I*, 924 F.2d at 295). Thus, courts may consider private suits "alleging that the agency head or Archivist improperly refused to seek initiation of an enforcement action by the Attorney General." *CREW v. Pruitt*, 319 F. Supp. 3d 252, 258 (D.D.C. 2018).

Furthermore, Plaintiffs' factual allegations, which must be accepted as true, establish a more than plausible claim for relief. As the Complaint alleges, the Hamburg Meeting Records were prepared by a State Department employee in their official capacity concerning a meeting between the two presidents on behalf of their nations; were seized by President Trump from the State employee; and neither the Secretary of State nor the Archivist have sought to recover them despite being aware or on notice of the seizure. Thus, Plaintiffs have adequately alleged each element of a claim under the APA and FRA.

I. Plaintiffs Have Pleaded Facts Sufficient to State a Claim that Defendants Have Violated Their Nondiscretionary Duties Under 44 U.S.C. § 3106

A. Plaintiffs Have Plausibly Alleged that the Interpreter Notes Are "Records" Within the Meaning of the Federal Records Act

Plaintiffs have plausibly alleged that the Hamburg Meeting Records are federal records within the meaning of the FRA. As described above, recorded information qualifies as a "record" subject to the FRA where it is both (i) "made or received by a Federal agency under Federal law

or in connection with the transaction of public business" and (ii) "preserved or appropriate for preservation by that agency . . . 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[.]" 44 U.S.C. § 3301(a)(1)(A). Here, Plaintiffs have alleged that the Hamburg Meeting Records at issue were created (*i.e.*, made) by an employee within the State Department's Office of Language Services (*i.e.*, by a federal agency), who was engaged in the performance of official State Department business during the July 7, 2017 meeting (*i.e.*, in connection with the transaction of public business) when the Hamburg Meeting Records were created (*i.e.*, evidencing activities of the U.S. Government or containing information of value). *See* Compl. ¶¶ 25, 28.

Defendants do not appear to dispute these allegations (nor can they on a motion to dismiss), but argue instead that they are entitled to dismissal because the Hamburg Meeting Records could not possibly constitute "records" under the FRA for three reasons: *first,* according to Defendants' admittedly conjectural "alternative possibility" about the content of the Hamburg Meeting Records, they do not document government business, but merely contain isolated words and phrases, MTD at 15; *second*, the State Department employee who created the Hamburg Meeting Records had no affirmative job-related duty to do so, and the absence of such a record-creation duty purportedly precluded the FRA's preservation requirements from attaching to any resulting work product, *id.* at 14; and *third*, the President's swift alienation of the Hamburg Meeting Records prior to their possible circulation prevented the FRA from ever attaching to them, *id.* at 14-15. But, as set forth more fully below, these arguments are unavailing because Defendants seek (i) to persuade the Court of its "alternative possibility" at a point in the litigation where facts alleged in the Complaint are assumed to be true; (ii) to impose a crabbed and

antithetical reading of the FRA that would have it apply only where record creation is specifically required by a federal employee's job description; and (iii) to have the Court adopt an understanding of the FRA that would countermand Congressional intent and create a perverse incentive for federal agencies to swiftly alienate or destroy documents to keep them beyond the ambit of the FRA.

i. Defendants' Factual Speculation Is Not Properly Considered on a Motion To Dismiss

Defendants suggest, in an admittedly conjectural "alternative possibility" about the content of the Hamburg Meeting Records, that it is possible the notes are devoid of substantive content and do not "document" the meeting but rather only contain isolated words and phrases. MTD at 15. That kind of hypothesizing, of course, cannot sustain a motion to dismiss. Rather, the Court must proceed "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555.

And dismissal is inappropriate here even if "there are two alternative explanations, one advanced by [the] defendant and the other advanced by [the] plaintiff, both of which are plausible." *Banneker Ventures, LLC*, 798 F.3d at 1129 (internal quotation marks omitted); *see also Competitive Enter. Inst. v. U.S. Envtl. Prot. Agency* ("*CEI*"), 67 F. Supp. 3d 23, 34 (D.D.C. 2014) (rejecting agency's hypothetical argument that alienated agency records might have been properly preserved in a different format because that "argument essentially requires [the plaintiff] to prove the merits of its claim on a motion to dismiss," and thus "require[s] more demanding scrutiny than is warranted at this stage in the proceedings"). Here, Plaintiffs have plausibly alleged that the Hamburg Meeting Records documented the July 7, 2017 meeting and

accordingly are subject to the FRA. *See* Compl. ¶¶ 25, 28. Nothing more is required at this stage.[2]

ii. State Department Office of Language Services Employees Are Capable of Creating Records Covered by the FRA

Defendants further contend that the Hamburg Meeting Records could not be records subject to the FRA because the Complaint does not allege "that interpreters have any responsibility for creating records of meetings where they are serving as interpreters." MTD at 14. But this objection finds no support in the text of the FRA. To the contrary, the Act merely requires showing that a recording of information was "made . . . by a Federal agency . . . in connection with the transaction of public business." 44 U.S.C. § 3301(a)(1)(A). And the Complaint alleges that the Hamburg Meeting Records were created in the course of the State Department employee's performance of their official agency duties. The Act's understanding of federal records is not so crabbed so as to apply only where record creation is specifically listed as part of a federal employee's job duties. Defendants offer no support for the contrary view.

[2] Moreover, it is far from clear that an action seeking recovery of federal records would not lie even if Defendants' alternative factual scenario were true. It is certainly plausible that a record consistent with Defendants' description would still contain "evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government" or otherwise be appropriate for preservation "because of the informational value of data" contained therein. 44 U.S.C. § 3301(a)(1)(A). In *Armstrong II*, the D.C. Circuit held that what the government called mere "extra copies" of federal records were themselves subject to the FRA because they could contain relatively minor additional information such as recipient lists, date stamps, and read receipts. 1 F.3d at 1284. Here, too, even details that may seem inconsequential on first blush warrant greater consideration—rather than the dismissive treatment afforded them in Defendants' brief—given the importance of the subject matter at hand. In any event, this premature fact question only underscores the need for briefing based on the record adduced at summary judgment—not based on hypothetical scenarios posited by Defendants in a motion to dismiss.

iii. The President Does Not Have Unfettered Discretion to Alienate Records under the FRA

Last, Defendants argue that the Hamburg Meeting Records cannot be records within the meaning of the FRA because NARA's guidelines required "rough notes" to be preserved as federal records only if they consist of recorded information that has been "'circulated or made available' to other agency employees 'for official purposes.'" MTD at 14-15 (quoting 36 C.F.R. § 1222.12(c)). This definition is supplied as part of a provision governing the circumstances in which so-called "working files" are records covered by the FRA. The thrust of this provision is to ensure that such non-final documents are indeed preserved as FRA "records" whenever they contain unique information regarding the transaction of government business. Defendants seek to take advantage of NARA's exclusion of materials that were not "circulated" from its definition of covered "working files." But "working files" are simply one type of covered record. The FRA itself reaches a far more expansive universe of recorded information: all such information "made or received by a Federal agency . . . in connection with the transaction of public business . . . [and] 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).

Defendants' attempt to pigeonhole the Hamburg Meeting Records into the category of "working files" ignores the facts present here. First, the concept of the records category of "working files" assumes a final product that itself constitutes a federal record and adequately documents the relevant government activity; it has no place where, as here, the supposed "rough note" is the *only* writing describing a government activity. And second, it would be especially problematic to conclude that the Hamburg Meeting Records are not records under the FRA only because President Trump intervened to prevent their circulation. As Plaintiffs allege, "President

Trump took possession of written notes documenting the meeting . . . from the State Department official who created them, and further instructed that same official to not discuss the contents of the meeting with other members of the Administration." Compl. ¶ 25. Thus, the Complaint plainly alleges that the Hamburg Meeting Records were alienated before they could have possibly been circulated, as Defendants readily acknowledge. *See* MTD at 15.[3]

Defendants appear to assert that by swiftly alienating the Hamburg Meeting Records before they could be circulated, the President assured that they could not be deemed federal records under the FRA. MTD at 15. Such an interpretation would countermand Congress's intent in enacting the FRA. Indeed, the statute is clear that what is important is not how the document is treated or the subjective motivation of the creator of the record, but rather its content: that the document is "appropriate for preservation by that agency . . . 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). Once that definition is met, and the "record" label attaches, "[o]nly one FRA provision exists that would even arguably sanction a . . . federal record[] shedding that appellation at a later point"—*i.e.*, the provision governing "extra copies of documents preserved only for convenience of reference," which are not considered "records." *See Armstrong II*, 1 F. 3d at 1284 (quoting 44 U.S.C. § 3301).

Defendants' contention would effectively give the President, or the heads of agencies, unilateral authority to deem a document non-record material. But in enacting the FRA,

[3] That "officials from both the White House and State Department sought information about the substance of the meeting" suggests that the Hamburg Meeting Records would have found a receptive audience among relevant government officials, even if they contained something less than a full meeting summary. *See* Compl. ¶ 29.

"Congress did not intend to grant [the agency] … a blank check for records disposal." *Armstrong II*, 1 F.3d at 1278-79 (quoting *Am. Friends Serv. Comm. v. Webster*, 720 F. 2d 29, 62 (D.C. Cir. 1983)). Indeed, "the FRA requires the agency to procure the approval of the Archivist before disposing of any record." *Id.* at 1279. It cannot be, then, that something falls outside of the FRA's scope simply because it was prematurely alienated or destroyed; to allow such a result would defeat the statute's purpose entirely by creating a perverse incentive for federal agencies to swiftly alienate or destroy documents. *See Am. Friends Serv. Comm.*, 720 F.2d 29 at 41 ("Congress was certainly aware that agencies, left to themselves, have a built-in incentive to dispose of records relating to [their] 'mistakes[.]'").

B. Plaintiffs Plausibly Allege that the Alienation of the Hamburg Meeting Records Violated the Strict Procedures for Alienation Set Forth in the FRA

A record subject to the FRA may not "be 'alienated or destroyed' except pursuant to the disposal provisions of the FRA." *Armstrong I*, 924 F.2d at 285 (quoting 44 U.S.C. § 3314). Specifically, "[u]pon the request of an agency head, the Archivist may authorize the disposal of records that are no longer needed by the agency and that do not have 'sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government[.]'" *Id.* (quoting 44 U.S.C. § 3303a). There is no separate mechanism by which a qualifying "record" can be alienated or destroyed under the FRA. Accordingly, the alienation of the Hamburg Meeting Records constitutes an FRA violation that triggers the recovery and referral duties set forth in the Act.

Despite Defendants' protests, nothing in the FRA permits the unfettered *ad hoc* alienation of records simply because they document matters of foreign relations. *See* MTD at 16-17. Officials and employees of federal agencies, including the State Department, but also, for example, the Departments of Defense, Justice, and Homeland Security, routinely handle

extremely sensitive national security materials—including diplomatic communiques—under the rubric of the FRA without incident. Indeed, the alleged alienation of records reflecting communications of former Secretaries of State—many of which would naturally bear on highly sensitive diplomatic matters—has been held to be actionable under the FRA's recovery provisions. *See Judicial Watch, Inc.* 844 F.3d at 956; *see also Cause of Action Inst. v. Tillerson*, 285 F. Supp. 3d 201, 208-09 (D.D.C. 2018) (McFadden, J.) (denying motion to dismiss FRA recovery action for lack of standing, noting that "Defendants' refusal to turn to the law enforcement authority of the Attorney General is particularly striking in the context of a statute with explicitly mandatory language"). Simply put, Defendants' argument that matters of foreign policy are beyond the reach of the FRA finds no legal support.

In a further attempt to establish that the Hamburg Meeting Records are not covered by the FRA, Defendants argue that preservation of those records would somehow force the President to choose between controlling the content of meetings with foreign leaders and obtaining translation services from State Department interpreters. MTD at 16-17. But that is a false choice. The President and the Secretary of State may, subject to any applicable legal requirements, determine the circumstances in which these records are disseminated within the Executive Branch.[4] But the FRA does not permit anyone—not even the President—to bypass its requirements for the maintenance and preservation of federal records.

[4] Plaintiffs recognize the possibility that the government could assert exemptions under the Freedom of Information Act to withhold the Hamburg Meeting Notes in part or in full in response to a FOIA request. Litigating their applicability in this action would be premature, as by failing to take required steps to recover the Hamburg Meeting Notes, Defendants have short-circuited the FOIA process including its judicial review provisions. Plaintiffs do not seek public disclosure of the Hamburg Meeting Records through this litigation.

Defendants obliquely refer to a series of cases establishing that the "Constitution vests 'plenary and exclusive power' in the President to act 'as the sole organ of the Federal government' in many areas of international relations." MTD at 17 (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936)). This is not challenged—or even implicated—by the Complaint, however, nor would it be imperiled by application of the FRA to the Hamburg Meeting Records.[5] To the contrary, preservation of State Department-created records will ensure that relevant officials within the Administration, like those who reportedly sought a readout on the July 7, 2017 meeting, *see* Compl. ¶ 29, can, with appropriate permission, obtain the information necessary for the United States to "speak . . . with one voice." *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) (quoting *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 424 (2003)).

C. Plaintiffs Plausibly Allege That Defendants Had Reason to Believe the President Unlawfully Removed the Hamburg Meeting Records

Defendants next seek to evade their statutory responsibilities by arguing that Defendants did not know of the FRA violations at issue here, a claim that is contradicted by the widely publicized and highly scrutinized nature of the allegations underlying this case. Next, they advance the novel argument that, notwithstanding the statutory language and D.C. Circuit's

[5] In a now-pending case that seeks direct relief against the President and the Executive Office of the President under the FRA and PRA, Judge Jackson ordered the President to preserve, among other things, "all records reflecting . . . meetings, phone calls, and other communications with foreign leaders[.]" *See* Minute Order, *CREW v. Trump*, No. 19-cv-01333 (ABJ) (D.D.C. Oct. 3, 2019). The order followed representations from the defendants that they would agree to preserve such records, suggesting that even record-preservation claims lodged directly against the President do not, contrary to Defendants' current protestations, imperil his ability to conduct foreign affairs. *See id.*

cases, the § 3106 mandatory recovery duties do not kick in unless an agency head finds that an FRA violation has occurred. Neither of these arguments withstands scrutiny.

i. Defendants Knew of or Had Reason to Believe the Meeting Records Were Unlawfully Removed

The FRA does not permit an agency head to bury his head in the sand. The Act imposes on agency heads, such as Defendant Secretary Pompeo, a nondiscretionary duty to "initiate action through the Attorney General for the recovery of records the head of the Federal agency *knows or has reason to believe have been unlawfully removed* from that agency[.]" 44 U.S.C. § 3106(a) (emphasis added). It strains credulity to suggest that Defendants are freed from their obligation to seek help from the Attorney General in recovering the Hamburg Meeting Records because Secretary Pompeo was unaware of the events underlying the violation. *See* MTD at 17-18. Courts are, of course, free to use their common sense in evaluating whether an agency head knew, or had reason to believe, that an unlawful alienation occurred. *See CEI*, 67 F. Supp. 3d at 34 (holding that a plaintiff "adequately alleged that EPA failed to notify the Archivist" despite the lack of a formal finding of a violation because "it is implausible that EPA Administrators would not have suspected the destruction of *any* federal records with the removal of over 5,000 agency text messages").

Plausibly alleging that Secretary Pompeo knew or had reason to believe the records were unlawfully removed is at least as easily accomplished here as it was in *CEI* given that Secretary Pompeo's predecessor, Secretary Tillerson, actually attended the July 7, 2017 meeting and so had firsthand knowledge of the facts underlying the alienation and a corresponding duty to seek recovery and preservation of the Hamburg Meeting Records. Compl. ¶ 30.[6] Moreover, the

[6] Nothing in the FRA suggests, and Defendants do not argue, that the departure of an agency head clears the violation, or frees the incoming agency head from duties triggered by

alienation of the Hamburg Meeting Records was widely reported in the press. *See* Compl. ¶ 23 (citing Miller, *supra* at 5; Peter Baker, *Trump and Putin Have Met Five Times. What Was Said Is a Mystery.*, N.Y. Times, Jan. 15, 2019, https://www.nytimes.com/2019/01/15/us/politics/trump-putin-meetings.html).[7] And members of Congress have written both to President Trump and Secretary Pompeo expressing concerns regarding whether the FRA has been complied with as concerns notes documenting the Trump-Putin meetings and requesting that remedial measures be undertaken.[8] Between Secretary Tillerson's firsthand knowledge, a widely read and compelling press report, and repeated congressional inquiries, Plaintiffs have more than plausibly alleged that the Secretary of State knew of or had reason to believe the records had been unlawfully removed.

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events occurring prior to his or her arrival. Thus, Secretary Pompeo cannot claim ignorance of the violation simply because his predecessor was the one who attended the July 7, 2017 meeting.

[7] Plaintiffs also brought the issue of the unlawful alienation directly to the attention of both Secretary Pompeo and Archivist Ferriero through letters sent on January 24, 2019 and February 7, 2019, respectively. *See* Compl., Exs. A & B. These letters further preclude Defendants from arguing that they were unaware of the facts giving rise to the FRA violation, but Plaintiff does not rely on the letters alone. As explained above, Defendants had actual and constructive knowledge of the unlawful alienation since the Hamburg Meeting Records were seized directly from a State Department employee following a meeting attended by then-Secretary Tillerson.

[8] *See, e.g.*, Letter from Robert Menendez, U.S. Sen., to Mike Pompeo, Sec'y of State, *Re: Trump-Putin Meeting Notes* (June 28, 2019), https://www.foreign.senate.gov/imo/media/doc/06-28-19%20RM%20letter%20to%20Pompeo%20re%20Osaka%20meeting%20records.pdf; Letter from Robert Menendez & Jack Reed, U.S. Sens., to President Trump, *Re: Trump-Putin Meeting Notes* (Jan. 16, 2019), https://www.foreign.senate.gov/imo/media/doc/01-16-19%20RM%20Reed%20Letter%20to%20Trump%20re%20Putin%20Notes.pdf; Letter from Robert Menendez & Jeanne Shaheen, U.S. Sens., to Mike Pompeo, Sec'y of State, *Re: Trump-Putin Meeting Notes* (Aug. 24, 2018), https://www.foreign.senate.gov/imo/media/doc/08-24-18%20RM%20Shaheen%20letter%20re%20Helsinki%20notes.pdf.

ii. Defendants' Argument That a Finding of Violation is Required is Unsupported by the Statute or Cases

Despite the plain language of the statute, Defendants argue that the mandatory § 3106 duties only take effect upon "an agency finding that an FRA violation occurred." MTD at 19.[9] Requiring a finding of a violation to trigger the mandatory § 3106 duties is inconsistent with the text and purpose of the statute and with the D.C. Circuit's approach to the FRA's recovery provisions. The statute is clear that the duty takes effect whenever the agency head "knows or *has reason to believe*" that records have been unlawfully removed from the agency. 44 U.S.C. § 3106(a) (emphasis added). Allowing an agency head to avoid his or her duty simply by declining to find that a violation has occurred would render the statute's mandatory duty effectively discretionary. Such an approach would be entirely contrary to the D.C. Circuit's reasoning in *Judicial Watch v. Kerry*, where it rejected a similar argument because adopting it would "flip *Armstrong* on its head and carve out enormous agency discretion from a supposedly mandatory rule." 844 F.3d at 956. And indeed, there is no indication that such a finding was ever made by the Secretary of State in other contexts in which the issue has arisen. And the absurdity of such a rule is especially clear here, where the then-Secretary of State was present for the relevant events; the events have been reported on in the media; and they have been the subject of repeated congressional inquiries. In short, the Defendants should not be permitted to hide from their mandatory duties behind a veil of ignorance.

[9] Although Defendants accurately quote the language of § 3106(a), they nevertheless contend that "an agency finding that an FRA violation occurred" is required. MTD at 19. Even if they argued that actual knowledge (but something short of an agency finding) were required, that would be equally unavailing as inconsistent with § 3106(a) and its requirement that the agency have "reason to believe" that unlawful alienation of records has occurred.

For their novel proposition that a finding of a violation is required to trigger the FRA's mandatory recovery duty, Defendants rely on dicta from an unpublished district court case, *Price v. U.S. Dep't of Just.*, No. 18-cv-1339, 2019 WL 2526439 (D.D.C June 19, 2019). There, the pro se prisoner plaintiff alleged that the Attorney General was required to undertake legal action to recover records pertaining to child pornography investigations and prosecutions, including the ones pertaining to the plaintiff himself. *Price*, 2019 WL 2526439, at *2-*3. The district court there rejected the plaintiff's motion for a temporary restraining order and preliminary injunctive relief because the plaintiff had not proffered evidence that demonstrated a substantial likelihood of success on his claim that the Department of Justice had violated the FRA in its handling of these materials. *Id.*, 2019 WL 2526439, at *7-*11. Then, in a discussion the district court acknowledged was not essential to the decision, it "explore[d] a further reason why Price's theory of relief may not hold up." *Id.*, 2019 WL 2526439, at *11. Analogizing to a different FRA provision with different language, 44 U.S.C. § 2115, the district court posited that the mandatory duty to initiate a recovery action under § 3106 does not attach unless the agency head has actual knowledge that records are being unlawfully removed or destroyed. *Id.*, 2019 WL 2526439, at *13.

This alternate reasoning in *Price*—to the questionable extent it even supports Defendants' view that a finding of violation is required—is both inapposite and incorrect.[10] Unlike here, the *Price* decision was based on consideration of the evidence proffered in support of a motion for a temporary restraining order and preliminary injunctive relief. Indeed, the

[10] Defendants also cite *CREW v. Pruitt* as support for their proposition that "[t]he finding of a violation is thus a condition precedent to" the FRA's nondiscretionary duty to act. *See* MTD at 18 (quoting 319 F. Supp. 3d at 261). But *Pruitt* is even less persuasive here insofar as it deals only with 44 U.S.C. § 2115's enforcement provision, and does not even purport to apply that provision by analogy to § 3106 as *Price* strains to do. *Pruitt*, 319 F. Supp. 3d at 261-262.

district court rejected the government's arguments that the complaint did not plausibly allege a valid claim for relief, but agreed that the plaintiff's "*evidence* . . . comes up short." *Id.*, 2019 WL 2526439, at *7 (noting that complaint "chart[s] a reasonably coherent path to relief"). And this argument elides textual differences between two provisions of the FRA. *Compare* 44 U.S.C. § 2115 (duties triggered "[w]hen the Archivist *finds*" a violation has occurred) (emphasis added) *with id.* § 3106 (referral required for recovery of records agency head "knows or has reason to believe" have been unlawfully removed). The D.C. Circuit has "repeatedly held that where different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings." *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240 (D.C. Cir. 2007) (citing cases) (internal quotation marks and punctuation omitted).

Defendants next argue that the very fact that the President alienated the Hamburg Meeting Records directly from the State Department official who created them, and potentially in view of then-Secretary Tillerson, and yet was not stopped from doing so suggests that no violation occurred. *See* MTD at 20-21. But this circular argument proves too much. The very purpose of § 3106 is to impose a mandatory duty on agency heads, and the APA affords plaintiffs a remedy to compel that action when it is unlawfully withheld. It is no defense to say that Defendants would have carried out their duty if they had thought they needed to. Moreover, Defendants here again pile factual inferences regarding individuals' subjective states of mind atop the well pleaded allegations in the Complaint. This they cannot do on a motion to dismiss.

Finally, Plaintiffs were not required to plead, and need not prove, "that the interpreter . . . willfully violated State Department policy during the July 7, 2017 meeting." MTD at 21. The good or bad faith or subjective motivations of State Department employees are irrelevant. All that is required at this point is for Plaintiffs to have plausibly alleged that the Hamburg Meeting

Records are federal records, Compl. ¶ 42; that they were alienated in a manner inconsistent with the FRA, *id.* ¶ 44; that Defendants had reason to believe this unlawful removal had occurred, *id.* ¶¶ 45, 50; and that Defendants failed to take appropriate action within a reasonable period of time to recover the Hamburg Meeting Records, including by initiating a recovery action through the Attorney General, *id.* ¶¶ 48, 50. Plaintiffs have, accordingly, stated a claim under the APA for which relief may be granted. 5 U.S.C. § 706(1).

D. Plaintiffs Have Shown That Archivist Ferriero Has, Likewise, Failed to Carry Out Nondiscretionary Duties Under the FRA

For substantially the same reasons, Plaintiffs have plausibly alleged that the Archivist was also required to initiate a recovery action. While the duty to act in the first instance falls to the head of the agency from which records were unlawfully alienated, the FRA further obligates the Archivist to spring into action by "request[ing] the Attorney General… initiate" a recovery action when (i) it has notified the agency head that an FRA violation has occurred and the agency head fails to act within a reasonable period of time, 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). Here, the agency head has failed to initiate action for recovery of the Hamburg Meeting Records within a reasonable period of time, Compl. ¶ 36, and Archivist Ferriero has also failed to initiate an enforcement action through the Attorney General. *Id.* ¶ 37. Thus, Plaintiffs have also stated a claim that Defendants NARA and Ferriero have unlawfully withheld agency action that they were required to take.

II. Plaintiff Has Adequately Pleaded That Defendants Have Failed to Take Action They Are Required to Undertake

Plaintiffs further challenge Defendants' decision not to initiate a recovery action through the Attorney General as "arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law." 5 U.S.C. § 706(2). Insofar as Defendants contend—as they vaguely hint they may have done—that the Secretary of State and Archivist have affirmatively decided not to initiate a recovery action—because, *e.g.*, they have concluded that no FRA violation occurred, *see* MTD at 20, 23—those findings constitute final agency action that are contrary to law and subject to review under APA § 706(2).

In other words, where, as here, the agency head decides not to take a required action within a prescribed time period, he has rendered a final and binding decision that is reviewable under APA § 706(2). *See Amador Cty. v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011) (finding no-action approval constituted final agency action where Secretary of Interior had a fixed period of time within which to make a decision on an Indian gaming compact). Because the FRA requires that Defendants initiate recovery actions within a reasonable time, to the extent they have decided not to do so, that decision is reviewable final agency action.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss in its entirety.

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Respectfully submitted,

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