IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, and

REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, INC.,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, and

KIRSTJEN M. NIELSEN, in her official capacity as Secretary of Homeland Security,

Defendants.

Civil Action No. 18-cv-2473-RC

COMBINED REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

It is striking what DHS does not dispute in its brief. It does not dispute that the agency systematically separated families without creating records properly documenting those separations prior to the June 2018 preliminary injunction in *Ms. L*. It does not dispute that these recordkeeping failures debilitated the government's court-ordered family reunification efforts. It does not dispute that DHS falsely assured the public in June 2018 that it had a "central database" to track family separations (a statement that remains on its website) when, in reality, it never did. It does not dispute that DHS *still* fails to create records documenting separations of children from *non-parental* family members who often possess knowledge or documentation helpful to the child's immigration cases, and indeed disclaims any legal obligation to create such records. It does not dispute that it continues to forcibly separate children—often infants and toddlers—who lack the knowledge or communicational skills necessary to protect their own interests in removal proceedings. And it does not dispute that when DHS fails to create proper contemporaneous records documenting child separations, an irretrievable loss of records is likely because the agency cannot readily piece together that information after the fact.

Despite this troubling backdrop, DHS seeks to assess this case in a vacuum. It urges the Court to disregard the above facts, as well Plaintiffs' substantial evidentiary showing, and focus instead on cursory statements made by Department of Justice ("DOJ") attorneys in *Ms. L* status reports, which insist that DHS's prior recordkeeping problems are now fixed. But these status reports are insufficient to refute the sworn testimony and reports, of RAICES and others, describing firsthand accounts of DHS's ongoing recordkeeping failures—evidence bolstered by DHS's undisputed history of such failures.

Another theme of DHS's brief is that these issues are being worked out in *Ms. L*. But this case is both different and broader than *Ms. L*. It concerns different legal obligations under a different statute, and extends beyond the class definition in *Ms. L*, reaching not just parental separations, but also non-parental family separations. DHS cannot disregard its Federal Records Act ("FRA") obligations because a different case concerning different claims and different parties has some overlap with issues presented here.

None of DHS's arguments opposing a preliminary injunction are persuasive. The Administrative Procedure Act ("APA") plainly authorizes Plaintiffs' challenge to DHS's aggregate practice of failing to create records adequately documenting child separations. DHS's cries of "pervasive judicial oversight" are not only unfounded, but even if true, would bear only on the form of relief granted by the Court, not the existence of a claim. Reinforcing Plaintiffs' likelihood of success, DHS submits with its brief the agency's current records management policies, which are, tellingly, facially non-compliant with the FRA. That likely explains the compelling evidence, largely unaddressed by DHS, of ongoing recordkeeping failures relating to child separations. Moreover, despite DHS's attempts to minimize its obligations, the FRA's mandatory requirement to create records sufficient to "protect legal rights" does indeed include records needed to protect the constitutional due process rights of *non-parental* family members, as well as migrants' due process rights to full and fair immigration proceedings.

DHS's efforts to refute Plaintiffs' showing of irreparable harm fall short. There was no unreasonable delay in Plaintiffs' motion, which Plaintiffs filed amid a rapidly evolving legal and factual landscape that saw major developments in January and February 2019. DHS also vastly overstates the standard for organizational injury to RAICES, claiming that the injury must be so

incapacitating that it prevents RAICES from providing *any* legal services. That is definitively not the law of this Circuit. DHS similarly overstates the standard for redressability, and in any event ignores that there is a mandatory right of access to immigration records of the type at issue here. DHS's challenge to CREW's injury likewise distorts the law, misreading a line of cases finding standing in the FRA context where, as here, the plaintiff shows it frequently submits FOIA requests to the agency at issue and plans to do so in the future.

DHS fares no better on its motion to dismiss. Regarding Plaintiffs' claim for failure to create records documenting child separations, DHS conflates the standards for a preliminary injunction and a motion to dismiss, overlooking that the complaint easily states a plausible claim to relief. DHS also misconstrues Plaintiffs' claim challenging DHS's deficient records management policies and directives, which is squarely authorized by *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991), and is in fact likely to succeed given the facially-deficient records management policies DHS has now provided. DHS also fails to justify dismissal of Plaintiffs' claim challenging its failure to document agency policies and decisions, ignoring that the claim asserts a pattern or practice of ongoing violations.

ARGUMENT

I. Plaintiffs' Motion for a Preliminary Injunction Should be Granted

A. There is No Heightened Burden for So-Called Mandatory Preliminary Injunctions in this Circuit

DHS contends that the burden for obtaining a preliminary injunction is "significantly heightened" when a plaintiff seeks a so-called "mandatory injunction" that "would change the status quo rather than merely preserving it." DHS Mem. 16-17. But that is not the law of this

Circuit. As noted in Plaintiffs' motion (at 20 n.5), the D.C. Circuit has squarely "rejected any distinction between a mandatory and prohibitory injunction" and does not impose a "higher burden of persuasion" on movants seeking mandatory injunctions. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016). In so ruling, the *Newby* court dismissed the precise arguments DHS raises here. *See id.*; Brief of Appellee-Intervenor Kansas Sec. of State, *League of Women Voters of U.S. v. Newby*, No. 16-5196 (D.C. Cir. filed Aug. 3, 2016), 2016 WL 4137700, *15-17 (arguing, unsuccessfully, that heightened burden applies to "[m]andatory preliminary injunctions" because "they seek relief beyond maintaining the *status quo pendente lite*, and will only be ordered when the law and facts clearly favor the moving party").

While "[t]here was a time when courts . . . tried to draw . . . a line between mandatory and prohibitory injunctions," that "time is long gone." *United States v. W. Elec. Co.*, 46 F.3d 1198, 1206 (D.C. Cir. 1995). "To the extent that mandatory and prohibitory represent semantic opposites, any rule based upon them is ridiculously easy to circumvent," for "[t]he 'mandatory' injunction has not yet been devised that could not be stated in 'prohibitory' terms." *Id.*; *accord United Food & Comm. Workers v. Sw. Ohio Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998).

Although *Newby* is controlling authority and is cited in Plaintiffs' motion, DHS fails to address it. *See* DHS Mem. 16-17. And DHS's own authority does it no good. DHS cites a line of district court cases that either predate *Newby*, or postdate *Newby* but do not acknowledge the decision. *See id*. To the extent there is a conflict, *Newby* of course controls. Nor is DHS's position supported by the two D.C. Circuit cases it cites. The 50-year-old decision in *Dorfmann v. Boozer*, 414 F.2d 1168 (D.C. Cir. 1969), merely made the general observation that preliminary injunctions should be granted "sparingly" and only when the four traditional factors are

satisfied—it did not hold that a higher standard applies to mandatory preliminary injunctions. *Id.* at 1173. And while the court in *Archdiocese of Washington v. WMATA*, 897 F.3d 314 (D.C. Cir. 2018), noted that the plaintiff did not meet the "demanding" standard for a mandatory preliminary injunction in the introduction of its decision, *id.* at 319, it proceeded to apply the traditional four factors, not any heightened standard, *see id.* at 321.

Equally misplaced is DHS's suggestion that Plaintiffs' requested injunction is improper because it overlaps with the "ultimate relief" sought on Claim Two of the First Amended Complaint. DHS Mem. 16-17. This Court has rejected similar arguments in granting preliminary injunctions motions. *See Ramirez v. ICE*, 310 F. Supp. 3d 7, 31 (D.D.C. 2018) (Contreras, J.) (deeming it immaterial that "Plaintiffs' request for a preliminary injunction overlaps substantially with the complete relief requested in this case"); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 155 (D.D.C. 2018) (Contreras, J.) (same).

B. Plaintiffs Are Likely to Succeed on their APA Claim Challenging DHS's Failure to Create Records Adequately Documenting Child Separations

1. The APA Authorizes Plaintiffs' Claim

DHS acknowledges that, per *Armstrong*, 924 F.2d at 291-94, the APA authorizes challenges to an agency's failure to adopt "adequate recordkeeping guidelines and directives" in violation of the FRA. DHS Mem. 18. But it claims the APA does *not* authorize challenges to an agency's actions, in the aggregate, of refusing to create certain records in violation of 44 U.S.C. § 3101 and its implementing regulation, 36 C.F.R. § 1222.22. DHS Mem. 18-21. DHS's argument rests on a clear misinterpretation of Judge Boasberg's decisions in *CREW v. Pruitt*, 319

F. Supp. 3d 252 (D.D.C. 2018) ("*CREW v. EPA I*"), and *CREW v. Wheeler*, 352 F. Supp. 3d 1, 5 (D.D.C. 2019) ("*CREW v. EPA II*").

a. *CREW v. EPA I*

In *CREW v. EPA I*, CREW sued the Environmental Protection Agency ("EPA") and its then-Administrator Scott Pruitt for violating the APA and FRA by engaging in practices designed to shield Pruitt's actions from public scrutiny. 319 F. Supp. 3d at 255. Pertinent here, CREW's complaint asserted two distinct FRA claims: "Count I charge[d] Pruitt and the EPA with violating the FRA's requirement to create and preserve records, and Count II allege[d] that the Agency lack[ed] a proper records-management policy." *Id.* There was no dispute that *Armstrong* permitted the APA theory asserted in Count II. *Id.* at 260. But the parties disputed the availability of APA relief for Count I. CREW asserted that the APA authorized a claim against "Pruitt and the EPA [for] engag[ing] in a practice [of] violating § 3101" by failing to "'make and preserve" certain records. *Id.* at 258. EPA "rejoin[ed] that *Armstrong* specifically bars claims that they are refusing to maintain records, as opposed to claims challenging the adequacy of their guidelines." *Id.*

The court sided with CREW, denying EPA's motion to dismiss as to both Counts I and II. *Id.* at 258-61. Regarding Count I, Judge Boasberg held that while the *Armstrong* court did not address whether the APA authorizes claims for failure-to-create records in violation of § 3101, its analysis supported such a claim. Applying that analysis, Judge Boasberg found no "'clear and convincing evidence' that Congress intended to preclude judicial review of a practice of refusing to create records," and that "[p]ermitting judicial review . . . comports with longstanding precedents concerning APA review generally." *Id.* at 259. The court thus concluded that the

APA allows plaintiffs to challenge an agency's "actions, in the aggregate, of refusing to create certain records" in violation of § 3101. *Id.* at 260; *see also id.* (agency's policy or practice of failing to "'make . . . records' in accordance with the FRA is reviewable'").

Despite this clear holding, DHS construes *CREW v. EPA I* as only permitting challenges to an agency's "failure *to establish 'policies and regulations* regarding what records an agency must create'" under the FRA, and not challenges to an agency's aggregate practice of failing to *create records*. DHS Mem. 18-19 (emphasis added). That is plainly incorrect. As outlined above, Count I in *CREW v. EPA I*—as well as the court's ruling deeming that claim legally sufficient—focused on the failure to create records, not the failure to adopt an adequate records policy. Indeed, CREW asserted a *separate* claim challenging EPA's failure to adopt an adequate records policy, Count II, which all parties recognized *Armstrong* permitted. Count I was a distinct claim that, as even DHS acknowledges, "extend[ed]" *Armstrong*'s reasoning to a different context, DHS Mem. 18, i.e., to an agency's failure to create records required by the FRA. If, as DHS contends, Count I merely challenged the failure to establish an adequate records policy, it would have been duplicative of Count II, fit comfortably within *Armstrong*, and required no separate analysis. That was not the case.[1]

To be sure, Judge Boasberg cabined his ruling in one respect, but that poses no barrier to Plaintiffs' claim here. He explained that due to the APA's "final agency action" requirement, *see* 5 U.S.C. § 704, and attendant limitations on judicial oversight of agency compliance with broad statutory mandates, plaintiffs "may not demand judicial review of *isolated acts* allegedly

[1] Even if DHS's reading of *CREW v. EPA I* were correct, Plaintiffs would still likely succeed on their claim because DHS's recordkeeping policies are indeed deficient. *See infra* Part I.B.2.

in violation of § 3101," and are instead limited to challenging an agency's "actions, *in the aggregate*, of refusing to create certain records." *CREW v. EPA I*, 319 F. Supp. 3d at 260 (emphasis added). Plaintiffs' claim here plainly falls into the latter category. Indeed, Plaintiffs are not seeking judicial review of, for example, DHS's failure to create adequate records with respect to a particular separated family; they are instead focused on DHS's aggregate practice of failing to create certain types of records documenting child separations. *See* Pls.' Mem. 22-28. These are not "isolated" acts—they are systematic, recurring ones.

b. *CREW v. EPA II*

Following Pruitt's resignation and EPA's adoption of a revised recordkeeping policy, Judge Boasberg dismissed Counts I and II on mootness grounds. *CREW v. EPA II*, 352 F. Supp. 3d at 5. The court reaffirmed its prior holding that the APA authorizes suits challenging an "agency's aggregate practice or policy" of failing to create records. *Id.* at 6. But, in the court's view, Count I's allegations of deficient recordkeeping were tied exclusively to Pruitt, and therefore became moot once he resigned. *Id.* at 8-10. This conclusion was "buttresse[d]," the court found, by the "scope of available relief." *Id.* at 10. Had CREW "prevailed on Count I and demonstrated that Pruitt and his staff maintained a recordkeeping practice or policy that was out of step with the FRA, the Court possibly could have required a reversal of this course," such as by "order[ing] him and his staff to follow the FRA." *Id.* But with Pruitt gone, such relief was "no longer possible." *Id.*

Expounding further on remedy, the court noted that given Pruitt's departure, the most it could do was order "EPA to promulgate a revised policy to correct the informal and deficient policy that existed under Pruitt." *Id.* But the agency had already done that, having adopted a

new policy in response to CREW's lawsuit. *Id.* The court also opined that, in Pruitt's absence, it was unable to order EPA to make and preserve "a broad swath of records," because that would lead to "pervasive oversight of [the] agency's compliance with the FRA." *Id.* at 11.

DHS asserts that *CREW v. EPA II* supports its position that the APA does not authorize Plaintiffs' failure-to-create records claim. DHS Mem. 19-20. But this argument conflates the question of whether a cause of action exists with questions of remedy and mootness. As noted, both *CREW v. EPA* decisions clearly recognize an APA cause of action challenging an "agency's aggregate practice or policy" of failing to create certain records. Although the court ultimately deemed CREW's claim as moot in light of intervening factual developments, that ruling had no bearing on the threshold legal question of whether an APA claim exists. If DHS's position were correct, Judge Boasberg would have outright dismissed CREW's claim as legally deficient in *CREW v. EPA I*. But he did the opposite, sustaining the claim against EPA's first motion to dismiss. The court's subsequent dismissal on mootness grounds was not an adjudication on the legal merits of CREW's APA claim. *See Baltimore v. Pruitt*, 293 F. Supp. 3d 1, 4 (D.D.C. 2017) (dismissal for mootness not "an adjudication on the merits").

Insofar as this Court deems the question of remedy relevant to whether the APA provides a cause of action, it should note that the purported mootness issues present in *CREW v. EPA II* are wholly absent here. In *CREW v. EPA II*, the alleged sole perpetrator of the FRA violations had left the agency, and the agency changed its records management policies in response to CREW's claims, effectively granting part of CREW's requested relief. Here, by contrast, the alleged recordkeeping failures are systematic and not tied to any one DHS official, they are ongoing, and DHS has taken no remedial action in response to Plaintiffs' claims. *See* Pls.' Mem.

22-28. To the contrary, as explained *infra* Part I.B.2, the records management policies DHS has submitted here are—in contrast to the revised policies in *CREW v. EPA II*—facially *non-compliant* with the FRA, confirming the ongoing need for judicial intervention.

Moreover, even if the Court were to conclude that Plaintiffs' requested injunctive relief calls for improper judicial oversight of DHS's compliance with the FRA, that would not compel wholesale rejection of Plaintiffs' APA claim. It would instead bear on the scope of relief granted. The Court could very well fashion a different preliminary injunction redressing Plaintiffs' injuries that it *does* deem within its authority. *See Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 383-394 (D.D.C. 2017) (recognizing that district courts have discretion to fashion appropriate injunctive relief in APA actions). For example, the Court could order DHS to adopt a records management policy mandating the creation of records adequately documenting child separations, rather than directly ordering creation of the records themselves. *See CREW v. EPA II*, 352 F. Supp. 3d at 10 (recognizing court's authority to order agency to (1) promulgate revised policy mandating record creation in compliance with FRA, (2) notify agency personnel of the revised policy, and (3) require personnel to undergo records-management training). DHS does not dispute the Court's authority to grant such relief.

Finally, DHS argues in a footnote that Plaintiffs' request for APA relief ignores the ongoing proceedings in *Ms. L*. DHS Mem. 20 n.10. But there are critical differences between *Ms. L* and this case. For starters, *Ms. L* only concerns parent-child separations, and does not encompass DHS's recordkeeping measures as to non-parental separations, a major focus of this case. *See infra* Part I.B.3.b. Moreover, whereas *Ms. L* is a class action on behalf of a discrete class of migrant families alleging constitutional violations, this case challenges DHS's agency-

wide recordkeeping practices under the FRA. DHS cannot simply disregard its FRA obligations because a different case concerning different claims, different legal obligations, and different parties has some overlap with issues presented here. In any event, DHS fails to explain why Plaintiffs' requested injunctive relief cannot be integrated with its remedial efforts in *Ms. L.* *See infra* Part I.D. The APA plainly authorizes Claim Two of the First Amended Complaint.

2. The Records Management Policies DHS Has Provided with its Opposition are Facially Non-Compliant with the FRA

With its opposition, DHS has submitted its current records management policies. *See* Declaration of Paul Johnson ("Johnson Decl."), Exs. A-B [ECF No. 19-2]. Critically, these policies are facially non-compliant with the FRA, as neither outlines the records-creation requirements of 44 U.S.C. § 3101 or 36 C.F.R. 1222.22—i.e., the requirements Plaintiffs assert DHS is systematically violating here. The closest they come is a generic statement that DHS employees should "[c]reate, receive, and maintain official records providing adequate and proper documentation in support of DHS activities," followed by a citation to the FRA provision defining a "record," 44 U.S.C. § 3301. *Id.* Ex. A at 4. The policies provide no instructions on, or even a reference to, the FRA's requirements to create records sufficient to (1) "[p]rotect the . . . legal . . . rights . . .of persons directly affected by the Government's actions"; (2) "[d]ocument the persons" and "matters dealt with by the agency"; (3) "[m]ake possible a proper scrutiny by the Congress or other duly authorized agencies of the Government"; (4) "[f]acilitate action by agency officials and their successors in office"; and (5) "[d]ocument the formulation and execution of basic policies and decisions and the taking of necessary actions." 36 C.F.R.

§ 1222.22(a)-(e); *see CREW v. EPA I*, 319 F. Supp. 3d at 261 (sustaining CREW's challenge to EPA's records management policy because it omitted any reference to § 1222.22).

To be sure, Plaintiffs have only moved for a preliminary injunction as to Claim Two, and not Claim One, which directly challenges DHS's deficient records management policy. But the agency's official recordkeeping policies are relevant to Plaintiffs' likelihood of success on Claim Two insofar as the policies—which were in effect during Zero Tolerance and remain in effect, *see* Johnson Decl ¶ 2 Ex. A (issued Aug. 2014), Ex. B (issued June 2017)—lack critical safeguards necessary to prevent systematic violations of § 3101 and § 1222.22.

3. Plaintiffs Have Sufficiently Demonstrated that DHS has an Aggregate Practice of Failing to Create Records in Violation of § 3101 and § 1222.22.

DHS does not dispute that the FRA imposes a non-discretionary duty to create certain records. *See* 44 U.S.C. § 3101; 36 C.F.R. § 1222.22. Nor does DHS contest that it violated this mandatory duty by systematically failing to create records documenting family separations prior to the June 2018 *Ms. L* order, and that it continues to not create records documenting *non-parental* separations. *See* Pls.' Mem. 22-23. Against this backdrop, DHS advances two main arguments: (1) with respect to parent-child separations, it has fixed its prior recordkeeping deficiencies; and (2) with respect to non-parental separations, it has no obligation to create records documenting such separations. *See* DHS Mem. 21-25. It is wrong on both counts.

a. Failure to Create Records Sufficient to Protect Parental Due Process Rights in Violation of § 1222.22(d)

DHS does not dispute that the failure to create records explaining the grounds for separating a parent from a child, or records sufficient to link them after separation, implicates

familial due process rights, and thus violates the FRA's requirement to create records to "[p]rotect the . . . legal . . . rights" of migrant parents and children "directly affected by [DHS's] actions." 36 C.F.R. § 1222.22(d); *see* DHS Mem. 22-23.[2] DHS insists, however, that its prior recordkeeping failures have been fully remediated. DHS Mem. 22-23. The record evidence shows otherwise. *See* Pls.' Mem. 17-19, 23-24.

Plaintiffs have provided sworn declarations from RAICES attorneys attesting that DHS still routinely fails to adequately document—or document at all—the reasons for parental separations. *See* Declaration of Kathrine Russell [ECF No. 14-20] ("Russell Decl.") ¶¶ 5, 8-11, 15-16; Declaration of Bianca Aguilera [ECF No. 14-18] ("Aguilera Decl.") ¶¶ 7, 16. These accounts are consistent with recent congressional testimony and reports by other immigrant-rights groups,[3] as well as reports by the HHS OIG and HHS officials, *see* Pls.' Ex. 4 at 11-12

[2] DHS further recognizes that the Due Process Clause provides "judicially manageable standards" for purposes of APA review of § 1222.22(d) violations. DHS Mem. 22. It bears noting, though, that establishing a § 1222.22(d) violation does not require Plaintiffs to show that the failure to create records *itself* violates due process. Rather, under the FRA's plain text, Plaintiffs need only show a failure to create records "designed to furnish the information necessary to protect" due process rights. 44 U.S.C. § 3101. The provisions are, in other words, prophylactic measures designed to safeguard, rather than merely codify, legal rights.

[3] *See* Statement of Jennifer Podkul, Kids in Need of Defense, U.S. House Comm. on Energy & Commerce, at 7 (Feb. 7, 2019), *available at* https://bit.ly/2EpZjeT (noting "current policies and practices . . . require no justification or documentation" for child separations, and that the organization "continues to see cases in which neither [HHS] nor the attorney are notified that DHS separated a child from a parent," as well as "several recent cases, post-[Zero Tolerance], of children separated from their parents for unknown reasons"); Texas Civil Rights Project, *The Real National Emergency: Zero Tolerance & the Continuing Horrors of Family Separation at the Border*, at 10-15 (Feb. 2019), *available at* https://bit.ly/2STfyd7 (reporting several separations based on unsupported claims of criminal history, and other separations lacking any documented justification); Statement of Lee Gelernt, ACLU, U.S. House Comm. on Energy & Commerce, at 11 (Feb. 7, 2019), *available at* https://bit.ly/2HSvaqD ("[T]he government is

(Jan. 2019 HHS OIG Report) (finding that DHS provided HHS "[i]ncomplete or inaccurate information about the reason[s] for separation[s]" occurring between July 1 and November 7, 2018); Pls.' Ex. 11 at 4 (Feb. 2019 article) (noting reports by "HHS officials and immigration attorneys" that DHS personnel still "regularly fail" to "flag [child] separation[s] in each case file and provide a reason for the separation").

DHS's only response is to point to a December 2018 status report filed by DOJ attorneys in *Ms. L*, which "indicate[s] that, as of April 2018, CBP *is* recording reasons for separation." DHS Mem. 23. DHS does not explain why the bare assurance of DOJ counsel in a status report should override the more recent sworn testimony and firsthand accounts outlined above, which describe recordkeeping failures well ***after*** April 2018 (i.e., when the government claims it fixed the problem). The Court need not blindly accept the government's representations, particularly in the face of substantial countervailing evidence.

This Court held as much in *Aracely*, 319 F. Supp. 3d at 110. There, in granting a preliminary injunction, the Court found that an ICE official's "self-serving" and conclusory declaration denying the existence of an unlawful agency policy was "not sufficient to discredit [the] Plaintiffs' substantial volume of [contrary] evidence." *Id.* at 148. Even though the plaintiffs did not have direct evidence "of the alleged policy, they . . . supplied sufficient circumstantial evidence to suggest that they are likely to establish the existence of [the] policy as the litigation progresses," *id.*—including statements by government officials, news articles quoting government sources, and sworn testimony and reports by "immigration lawyers" and

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unilaterally declaring parents unfit or a danger, without stating precisely what standard it is applying" and "without showing what evidence it is using to try to justify a separation.").

"nongovernmental organizations," as well as the plaintiffs themselves, *id.* at 145-48. So too here. As in *Aracely*, Plaintiffs are at an informational disadvantage compared to DHS, which naturally possesses more knowledge about its own records systems. But Plaintiffs have "supplied sufficient circumstantial evidence" to refute DHS's blanket denials, and to demonstrate a likelihood of success at the preliminary injunction stage. Indeed here, DHS has not even offered a sworn declaration as in *Aracely*; it merely points to a status report filed by DOJ counsel in a different case. That is plainly insufficient to defeat Plaintiffs' evidentiary showing.

DHS also speculates that the lack of clarity regarding the reasons for certain parental separations may be attributable not to recordkeeping failures, but rather to DHS's policy-based decisions not to inform the parents of those reasons. DHS Mem. 23 n.12. But that theory does not withstand scrutiny, as it does not explain the evidence, cited above, showing that DHS is routinely unable to supply *HHS* with the reasons for parental separations. The more likely explanation is that DHS is systematically failing to record the reasons for separations.

Equally specious is DHS's claim that it has fully remediated its prior systematic failure to create records sufficient to link separated parents and children. DHS Mem. 22-23. DHS points to congressional testimony by the Government Accountability Office ("GAO") noting that DHS changed its data systems between April and August 2018 to "help notate in their records when children are separated from parents." *Id.* at 22 (quoting Pls.' Ex. 8 at 9). Yet the same GAO testimony notes that DHS components are "not yet utilizing" the new recordkeeping measures "consistently," and that while DHS agents "may indicate a separation in the referral notes sent electronically to" HHS, they "are not required to do so." Pls.' Ex. 8 at 9-10. Given DHS's undisputed history of recordkeeping failures in this area, these findings raise serious questions as

to whether DHS continues to systematically fail to create records linking separated parents and children. The totality of the evidence indicates that these deficiencies remain.

b. Failure to Create Records Sufficient to Protect Non-Parental Familial Due Process Rights in Violation of § 1222.22(d)

With respect to separations of children from non-parental familial adults, DHS remarkably does not contest that, as a matter of practice, it does *not* create records documenting such separations, and indeed disputes it has any legal obligation to do so. DHS Mem. 21, 23-24. Nor does it dispute that those separations are ongoing. *See id.*[4]

Contrary to DHS's suggestion, *see* DHS Mem. 23, familial due process rights are implicated by non-parental family separations. "Many courts have recognized [due process] liberty interests in familial relationships other than strictly parental ones." *Trujillo v. Bd. of Cty. Comm'rs of Santa Fe Cty.*, 768 F.2d 1186, 1188 (10th Cir. 1985); *see, e.g.*, *id.* at 1189 (sister had "constitutionally protected interests in [her] relationship with [her] . . . brother"); *Patel v. Searles*, 305 F.3d 130, 136 (2d Cir. 2002) ("[T]he relationships at issue in this case—those between [plaintiff] and his father, *siblings*, wife, and children—receive the greatest degree of [constitutional] protection because they are among the most intimate of relationships") (emphasis added); *Rivera v. Marcus*, 696 F.2d 1016, 1024-25 (2d Cir. 1982) (half-sister had liberty interest

[4] In a February 2019 report, the Texas Civil Rights Project noted it had interviewed 234 migrants affected by "non-parental/legal guardian family separations." Texas Civil Rights Project, *The Real National Emergency: Zero Tolerance & the Continuing Horrors of Family Separation at the Border*, at 15 (Feb. 2019), *available at* https://bit.ly/2STfyd7. "The majority were siblings who traveled together due to violence and insecurity in their home countries." *Id.* Others included "grandparents" and "[a]unts and uncles" who were the separated child's "only caretaker," and who took "the arduous journey with the child because the parents are either under threat of violence or have died due to violence in their home region." *Id.*

in preserving familial and custodial relationship with half-brother and half-sister); *Suasnavas v. Stover*, 196 Fed. App'x 647, 657 (10th Cir. 2006) (recognizing a "clearly established constitutional right . . . of familial association . . . between grandparents and grandchildren"); *see also Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality) (zoning ordinance could not prohibit grandmother from living with her grandsons, who were cousins). Thus, DHS's mandatory duty to create records sufficient to "[p]rotect the . . . legal . . . rights" of migrants directly affected by its actions, 36 C.F.R. § 1222.22(d), includes an obligation to create records adequately documenting separations of migrant children from *non-parental* familial adults, in order to protect their familial due process rights. This requires DHS to, at minimum, create records sufficient to link separated family members so that they may be eventually reunited or connected for other purposes.

As noted, DHS does not dispute that it systematically fails to create such records. And the uncontroverted evidence confirms as much. For instance, the Aguilera Declaration describes a case in which RAICES represents a six-year-old child who DHS separated from his adult brother in December 2018. Aguilera Decl. ¶ 9. DHS created no records documenting that the child was apprehended with his brother or otherwise linking the brothers—RAICES only later learned of the older brother through independent investigation. *Id.* This recordkeeping failure made RAICES's efforts to represent the child more difficult. *Id.*

Indeed, DHS's efforts to fix its deficient recordkeeping concerning family separations have, to date, focused exclusively on parental separations. That is likely because DHS's remedial efforts are driven not by any proactive attempt to comply with the FRA or other laws, but rather by the ongoing *Ms. L* litigation, which excludes non-parental family separations. Yet

DHS's recordkeeping duties extend beyond the issues presented in *Ms. L*. The agency's failure to appreciate that fact only underscores the need for judicial relief in this case, which focuses on DHS's systematic FRA violations relating to child separations.

It is not hard to imagine a crisis, like the one following the *Ms. L* injunction, precipitated by DHS's failure to create records documenting non-parental family separations. Assume, for example, that a class of separated non-parental family members sued DHS alleging violations of their familial due process rights, and secured an injunction requiring classwide relief. DHS's ongoing recordkeeping failures would likely complicate, if not preclude, the ability to identify and provide relief to class members, just as it did in *Ms. L*. The FRA, and its obligation to create records "necessary to protect the legal . . . rights . . . of persons directly affected by the agency's activities," 44 U.S.C. § 3101, prevents precisely this scenario.

DHS offers up a red herring concerning the Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), Pub. L. No. 110-457, 122 Stat. 5044 (2008), asserting that the statute reflects Congress's intent to separate migrant children from adults who are not parents or legal guardians. DHS Mem. 24. Even accepting that as true, Plaintiffs' requested relief would not prevent DHS from taking such action; it would merely require DHS to create records documenting those separations. Requiring DHS to create records poses no conflict with the TVPRA. To the contrary, DHS's systematic failure to create records has *impeded* HHS's efforts to implement the TVPRA. *See* Pls.' Mem. 27-28 (citing evidence that DHS's recordkeeping deficiencies have complicated HHS's efforts to determine potential sponsors to whom Unaccompanied Children may be released under the TVPRA). And while DHS insists

that non-parental separations implicate no "rights" protected by the TVPRA, they do implicate constitutional due process rights, as explained above.

c. Failure to Create Records Sufficient to Protect Immigration-Related Due Process Rights in Violation of § 1222.22(d)

DHS disputes that its recordkeeping failures also violate § 1222.22(d) by failing to protect migrants' rights in connection with their immigration proceedings, contending Plaintiffs "do not identify the source or scope" of these rights. DHS Mem. 23. As indicated in Plaintiffs' motion, the source is once again the Fifth Amendment's Due Process Clause, as well as statutes designed to safeguard due process rights. *See* Pls.' Mem. 25 (citing *Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018)). Specifically, "[t]he Fifth Amendment guarantees due process in deportation proceedings," and, "[a]s a result, an alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf." *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000); *see* 8 U.S.C. § 1229a(4)(B) ("[T]he alien shall have a reasonable opportunity . . . to present evidence on the alien's own behalf. . ."); *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1034 (9th Cir. 2004) (recognizing due process right to "full and fair presentation" of evidence supporting asylum claim). This right may be violated by denial of access to critical government records in removal proceedings. *See Dent v. Holder*, 627 F.3d 365, 372-75 (9th Cir. 2010) (migrant was "denied an opportunity to fully and fairly litigate his removal and his defensive citizenship claim" where government refused to provide him all documents in his "Alien File").

RAICES's declarations explain that DHS's systematic failure to create records documenting child separations impedes the ability of migrants and their counsel to collect and

present supporting evidence in immigration proceedings, particularly where the migrants are young, vulnerable children who lack the documentation, knowledge, or communicational skills necessary to adequately defend their own interests. *See* Aguilera Decl. ¶¶ 8-9, 13; Russell Decl. ¶¶ 5-6; Pls.' Mem. 25-26. These recordkeeping failures, in turn, implicate migrants' due process right to fully and fairly litigate their immigration cases in violation of § 1222.22(d).

In addition, "[f]reedom . . . from government custody, detention, or other forms of physical restraint . . . lies at the heart of the liberty that [the Due Process] Clause protects," and this protection "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 690, 693 (2001). Insofar as DHS's recordkeeping failures have needlessly prolonged the detention of separated adults and children, *see* Russell Decl. ¶¶ 5-7; Aguilera Decl. ¶¶ 10-12, they further implicate migrants' due process rights in violation of § 1222.22(d).

DHS also argues that Plaintiffs do not specify what "records they believe would be sufficient to protect" migrants' rights in connection with their immigration proceedings. DHS Mem. 23. One need only look to Plaintiffs' requested injunction to answer that question. *See* Pls.' Mem. 4.[5]

d. Failure to Create Records in Violation of §§ 1222.22(a), (b), & (c)

DHS fails altogether to address Plaintiffs' asserted violations of § 1222.22(a), which mandates the creation of records that "[d]ocument the persons" and "matters dealt with by the

[5] DHS further disputes that Plaintiffs would have any right of access to the records that they claim DHS is obligated to create. DHS Mem. 23-24 & n.13. That argument is refuted in Plaintiffs' discussion of redressability and causation. *See infra* Part I.C.3.b.

agency." Pls.' Mem. 28. Nor does DHS address the merits of Plaintiffs' asserted violations of 36 C.F.R §§ 1222.22(b) and (c), which require creation of records that "[f]acilitate action by agency officials and their successors in office" and "[m]ake possible a proper scrutiny by the Congress or other duly authorized agencies of the Government." Pls.' Mem. 26-28. Instead, DHS summarily disputes Plaintiffs' standing to raise those violations in a footnote. DHS Mem. 21 n.11. DHS's cursory argument, lacking any supporting legal analysis, disregards longstanding D.C. Circuit precedent holding that both "'private parties whose rights may have been affected by government actions'" and "private researchers . . . who make extensive use of government documents," are "within the zone of interests of the records creation and management provisions of the . . . FRA," including § 3101. *Armstrong*, 924 F.2d at 288. Because §§ 1222.22(b) and (c) merely implement § 3101, Plaintiffs may assert violations of those provisions, just as they may assert direct violations of § 3101.

For all these reasons, Plaintiffs have sufficiently demonstrated, at this stage of the proceedings, that they are likely to succeed on their claim challenging DHS's systematic failure to create records adequately documenting child separations in violation of § 3101.

C. Plaintiffs Have Established Both Irreparable Harm and Standing

1. Plaintiffs Did Not Unreasonably Delay in Seeking a Preliminary Injunction

DHS's claim of unreasonable delay is meritless. *See* DHS Mem. 26-29. The D.C. Circuit has made clear that "a delay in filing is not a proper basis for denial of a preliminary injunction." *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011). "Although federal courts have at times bolstered their denials of preliminary injunctions by referring to the late hour of a

filing, those cases in no way stand for the proposition that a late filing, on its own, is a permissible basis for denying a preliminary injunction." *Id.* At most, an "unexplained" delay may be one factor weighing against irreparable harm, but not when the delay is justified. *Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 244-45 & n.9 (D.D.C. 2014). And "'tardiness is not particularly probative in the context of ongoing, worsening injuries' because 'the magnitude of the potential harm becomes apparent gradually, undermining any inference that the plaintiff was sleeping on its rights.'" *Id.* at 245 (quoting *Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014)). Indeed, where the full scope and nature of the injurious conduct is not immediately apparent, "waiting to file for preliminary relief until a credible case for irreparable harm can be made is prudent rather than dilatory." *Arc of Cal.*, 757 F.3d at 991; *see also Kansas Health Care Ass'n v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1544 (10th Cir. 1994) ("We are reluctant to criticize plaintiffs for awaiting specific and concrete documentation" before seeking a preliminary injunction, because "[w]ithout such documentation, they run the risk of having their claimed injury be deemed speculative.").

Consistent with this caselaw, this Court has repeatedly rejected claims of delay in granting preliminary injunction motions. *E.g.*, *Aracely*, 319 F. Supp. 3d at 155-56; *Ramirez*, 310 F. Supp. 3d at 31-32. *Aracely* again is instructive. There, asylum seekers alleged they were irreparably harmed by ICE's "unwritten, unlawful parole policy aimed at deterring immigration." *Aracely*, 319 F. Supp. at 145. The Court rejected DHS's argument that the plaintiffs' claim of irreparable harm was undermined by a four-month delay between their filing of the suit and moving for a preliminary injunction, reasoning that the delay was attributable to the "rapidly

changing legal landscape governing the rights of asylum seekers," which had "dictated multiple rounds of additional briefing and amendments to Plaintiffs' complaint." *Id.* at 155-56.

So too here. DHS's family separation and attendant recordkeeping practices are part of a "rapidly changing" factual and legal landscape that Plaintiffs have been diligently monitoring, and Plaintiffs promptly moved for a preliminary injunction upon determining they could demonstrate a strong and credible case for immediate injunctive relief. Specifically, Plaintiffs filed suit on October 26, 2018, amended their complaint based on intervening events and to add RAICES as a co-plaintiff on December 14, 2018, and moved for a preliminary injunction less than three months later on March 8, 2019. In these few months, there were numerous pivotal developments, including the following:

- On January 17, 2019, the HHS OIG issued its report revealing that child separations are ongoing at an alarming rate, despite the Trump Administration's supposed cessation of the practice (except in limited circumstances) in June 2018. Pls.' Ex. 4 at 21. The report disclosed that DHS separated at least 218 children between June 26, 2018 and December 26, 2018, *id.*, and that DHS routinely fails to provide reasons for these separations, *id.* at 11. The report also relayed significant new details on how DHS's recordkeeping failures have impeded the government's court-ordered family reunification efforts, *id.* at 5-7, 19; HHS's child placement decisions, *id.* at 12; and the HHS OIG's investigation, *id.* at 13. These findings were so momentous that the *Ms. L* court specifically ordered the government to file a response to the report. *See* Order, *Ms. L. v. ICE*, No. 3:18-cv-428, ECF No. 345 (S.D. Cal. filed Jan. 25, 2019). Given its central relevance to this case, Plaintiffs' motion relies extensively on the report. *See generally* Pls.' Mem.

- On February 1, 2019, the government filed two sworn declarations by HHS officials in *Ms. L* responding to the HHS OIG report, confirming certain findings in the report, and shedding further light on DHS's recordkeeping failures. *See* Pls.' Exs. 6, 10. Plaintiffs' motion repeatedly invokes these declarations. *See* Pls.' Mem. 12, 14, 17, 19, 22, 23, 27.
- On February 7, 2019, the House Committee on Energy and Commerce held a hearing on "Examining the Failures of the Trump Administration's Inhumane Family Separation Policy." *See* https://bit.ly/2RZ3oit. Plaintiffs' motion relies extensively on testimony from that hearing. *See* Pls.' Mem. 17 & n.4, 18, 23-24, 37; Pls.' Exs. 8, 13, 14, 15.
- On February 20, 2019, the government filed a status report in *Ms. L* revealing that the number of newly-separated children had risen to 245 as of January 31, 2019, Pls.' Ex. 9 at 11, a fact repeatedly highlighted in Plaintiffs' motion. *See* Pls.' Mem. 1, 15, 23.
- On February 21, 2019, a news article relayed reports by "HHS officials and immigration attorneys" that DHS agents still "regularly fail" to "flag [child] separation[s] in each case file and provide a reason for the separation," Pls.' Ex. 11, a central issue in this case and one that is highlighted in Plaintiffs' motion. *See* Pls.' Mem. 19, 24.
- On February 26, 2019, the House Committee on the Judiciary held a hearing on "Oversight of the Trump Administration's Family Separation Policy." *See* https://bit.ly/2E9ipo3. Plaintiffs' motion relies on testimony from that hearing. *See* Pls.' Mem. 27 & n.6; Pls. Ex. 12.

Thus, given the rapidly changing landscape that culminated in several key developments in January and February 2019, Plaintiffs' decision to move for a preliminary injunction in March

2019—when the record for immediate injunctive relief had become clear and compelling—was "prudent rather than dilatory." *Arc of Cal.*, 757 F.3d at 991.[6]

DHS's contrary arguments are not only unavailing, but reflect a flawed analytical approach. DHS closely parses some, but not all, of the recent sources cited above, disregarding statements that are damaging to DHS and cherry-picking others that it deems supportive. *See* DHS Mem. 26-29. DHS's efforts to spin this evidence in a favorable light do not undercut the significance of the new information outlined above to Plaintiffs' claims, or otherwise undermine Plaintiffs' showing of irreparable harm.[7]

DHS's cases are readily distinguishable. *See id*. at 26. In *Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, "the plaintiffs delayed thirty-six days before filing for preliminary injunctive relief" and then "moved to extend consideration by th[e] Court to ninety-five days, at least, by moving to continue the pending hearing." 48 F. Supp. 3d 87, 90 (D.D.C. 2014). The Court held that the plaintiffs' dilatory conduct showed a lack of urgency, and denied the motion on that basis alone. *Id.* at 90-91. Unlike this case, there was no indication in *Open Top* that the plaintiffs' delay was attributable to any developments in a rapidly evolving legal and factual landscape. Nor have Plaintiffs here moved for a "ninety-five day" continuance of the hearing on their motion. To the contrary, Plaintiffs asked that their motion be heard within the expedited

[6] Proceedings in this case were also delayed by a 35-day partial government shutdown between December 21, 2018 and January 25, 2019. *See* ECF Nos. 11, 12.

[7] As part of its flawed analysis, DHS points to specific instances of recordkeeping failures highlighted in Plaintiffs' motion, and asserts that Plaintiffs either do not or could not seek judicial review of those failures. *See* DHS Mem. 28-29. DHS misses the point. Plaintiffs highlight these instances not to seek judicial review of them, but rather as proof, or manifestations, of DHS's systematic practice of failing to create certain records.

21-day period set out in Local Civil Rule 65.1(d), *see* ECF No. 14, and only agreed to a later date at the request of DHS counsel, *see* ECF No. 15. In any event, the *Open Top* court's denial of a preliminary injunction based solely on the concerns of delay was likely reversible error. *See Gordon*, 632 F.3d at 724.

Newdow v. Bush, 355 F. Supp. 2d 265 (D.D.C. 2005), is even further afield. There, the plaintiff claimed he would be irreparably harmed by the inclusion of prayers at the January 2005 presidential inauguration. *Id.* at 268. Although such prayers were customary practice "for almost seventy years," *id.*, and the plaintiff had his ticket to the inauguration by mid-November 2004, he waited until just a month before the inauguration to move for a preliminary injunction, *id.* at 292. The court noted the delay was "unexcused" and that it "dictate[d] caution" in considering injunctive relief, but it was hardly a dispositive factor in the court's analysis. *See id.* Here, by contrast, any delay is not "unexcused," but rather justified by key intervening factual developments between the filing of Plaintiffs' complaint and motion for a preliminary injunction.

2. DHS's Alleged Remedial Measures Do Not Undercut Plaintiffs' Irreparable Harm

DHS next insists there is no need for a preliminary injunction because of its alleged remedial steps to fix its recordkeeping deficiencies, which the *Ms. L* court is overseeing. DHS Mem. 29-30. Of course, that ignores DHS's undisputed and ongoing failure to create records documenting *non-parental* family separations. That is not the subject of *Ms. L* or any other litigation, nor has DHS taken any proactive steps to address those issues. DHS instead disclaims any legal obligation to create those records. *See supra* Part I.B.3.b. With respect to these continuing FRA violations, there is most certainly an imminent need for injunctive relief.

As for parental separations, DHS wishes to analyze this case in a vacuum, ignoring altogether its history of recordkeeping failures concerning parent-child separations leading up to the *Ms. L* court's June 2018 preliminary injunction. *See* Pls.' Mem at. 22-23 (outlining past violations). DHS tellingly does not dispute this history, but deems it immaterial. DHS is wrong. Although injunctions are "designed to alleviate future harm, . . . past harm remains a relevant consideration, as it underscores" the defendant's "ability to harm" the plaintiff. *Bell Helicopter Textron Inc. v. Airbus Helicopters*, 78 F. Supp. 3d 253, 274-75 (D.D.C. 2015) (internal citation omitted); *see also Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (irreparable harm may be shown by "proof that the harm has occurred in the past ***and*** is likely to occur again") (emphasis added); *12 Percent Logistics, Inc. v. Unified Carrier Registration Plan Bd.*, 289 F. Supp. 3d 73, 80 (D.D.C. 2018) (past harm relevant). Thus, Plaintiffs' claim of ongoing irreparable harm must be viewed in the context of DHS's uncontroverted history of systematic recordkeeping failures and resulting harms. *See* Pls.' Mem. 29-41 (outlining both past and ongoing harms).

Against that essential backdrop, Plaintiffs' evidence of DHS's ongoing systematic failure to create records adequately documenting parent-child separations amply supports a finding of present irreparable harm. *See id.* at 23-24; *supra* Part I.B.3.a (outlining evidence). This evidence post-dates and contradicts the government's self-serving assurances, made in DOJ status reports in *Ms. L*, that DHS has implemented remedial measures to fix its recordkeeping deficiencies. *See id.* And as previously noted, the fact that the *Ms. L* court is overseeing similar issues in a different context does not excuse DHS from complying with its FRA obligations, for which it has shown an utter disregard. *See id.*; *supra* Part I.B.2 (explaining that DHS's current

recordkeeping policies are facially non-compliant with the FRA). DHS's incomplete and dubious remedial measures do not undercut Plaintiffs' showing of irreparable harm.

3. RAICES Has Demonstrated Irreparable Harm and Standing

a. RAICES Has Shown Irreparable Organizational Injury

DHS's tries in vain to dispute RAICES's organizational injury. *See* DHS Mem. 30-32. Because DHS muddies the waters, the governing legal standard bears repeating: an organization can demonstrate an "injury for purposes both of standing and irreparable harm" by showing that the defendant's actions (1) "have 'perceptibly impaired' the [organization's] programs," and (2) "directly conflict with the organization's mission." *Newby*, 838 F.3d at 8-9. Measured against that standard, DHS's arguments fall flat.

1. DHS makes no attempt to distinguish the cases finding organizational injury where the challenged conduct "unquestionably ma[d]e it more difficult for" the plaintiff "to accomplish [its] primary mission," including by denying the plaintiff access to information needed to fulfill that mission. Pls.' Mem. 34-35 (citing cases). DHS instead conjures up a more demanding standard, asserting "it is not enough to show that some aspects of" RAICES's "activities are more difficult"; rather, the injury must, in DHS's view, be so debilitating that it wholly precludes RAICES from "providing legal services to alien children." DHS Mem. 31; *see also id.* (arguing that RAICES has not shown a "'direct conflict' with [its] mission to provide legal services" because it "continues to" provide those services).

That is not the law of this Circuit. In *Newby*, the challenged action merely posed "new obstacles" that "unquestionably ma[d]e it more difficult" for plaintiffs to register voters; it did not wholly prevent plaintiffs from registering any voter. 838 F.3d at 9. In *Action Alliance of*

Senior Citizens of Greater Philadelphia v. Heckler, "the challenged regulations" merely "den[ied]" the plaintiffs "access to information and avenues of redress they wish to use in their routine information-dispensing, counseling, and referral activities"; they did not categorically preclude the plaintiffs from engaging in those activities. 789 F.2d 931, 937-38 (D.C. Cir. 1986). In *Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, the challenged "pattern of discrimination" merely made the plaintiff's "overall task more difficult" by potentially "increas[ing] the number of people in need of counseling," and "reduc[ing] the effectiveness of any given level of outreach efforts"; it did not defeat the plaintiff's ability to perform those tasks. 28 F.3d 1268, 1276 (D.C. Cir. 1994). And in *Open Communities Alliance v. Carson*, the challenged action merely "frustrate[d]" the plaintiff's provision of services "to assist [housing] voucher holders gain access to greater opportunity"; it did not preclude those efforts altogether. 286 F. Supp. 3d 148, 178 (D.D.C. 2017). The court there also explicitly rejected an argument, echoing DHS's position here, that the injury was insufficient because it did not "threaten[] the very existence of [the plaintiff's] business," noting that was not the applicable standard. *Id.* In short, an organizational injury need not be nearly as debilitating as DHS claims.

The single case DHS cites, *National Fair Housing Alliance v. Carson*, 330 F. Supp. 3d 14 (D.D.C. 2018), did not hold otherwise. There, the court found no organizational injury largely because it determined that the challenged rule-change did not actually hurt the plaintiffs. *See id.* at 44-50. Specifically, it left several "key portions" of a rule in place, and provided "new, more detailed definitions that actually *aid[ed]*" the plaintiffs' missions, rather than "*imped[ing]*" them, *id.* at 45-46. "Thus, to the extent the plaintiffs argue[d] they have been deprived of any benefit conferred by" the prior version of the regulation, the court held they were "mistaken because the

provision[s] continue[d] to be active." *Id.* at 46. It followed that the rule-change did not "perceptibly impair" the plaintiffs' missions. *Id.* The court noted that this "conclusion [was] bolstered by examination of the plaintiffs' descriptions of their daily operations," which did not show any "inhibition" attributable to the rule change. *Id.* at 47-48.

By contrast, the challenged conduct here has indisputably harmed RAICES and certainly not "aid[ed]" it in any way. As explained in Plaintiffs' motion, DHS's practice of separating migrant children without creating records adequately documenting the circumstances and reasons for those separations has significantly impaired, and continues to impair, RAICES's ability to provide effective legal services to migrant families in myriad ways. *See* Pls.' Mem. 30-33 (outlining harms). This case is nothing like *National Fair Housing Alliance*.

2. DHS also contends that RAICES insufficiently describes the resources it has expended to "counteract" its FRA violations. DHS Mem. 30. As a threshold matter, DHS's argument incorrectly assumes that resource diversion is a freestanding requirement of organizational injury. In *Newby*, the Circuit rejected a similar argument—that the plaintiff's resource "expenditures [were] too speculative"—noting that it "misses the point." 838 F.3d at 9. That is because the determinative harm, for organizational injury purposes, was impairment of the plaintiffs' "efforts to register voters"; the resource "expenditures were merely a symptom of that programmatic injury." *Id.*; *see also Fair Employment Council*, 28 F.3d at 1276-77 (finding organizational injury despite deeming resource expenditures insufficient). But regardless of whether it is deemed a freestanding requirement or merely further proof of programmatic injury, RAICES's declarations amply demonstrate that the organization has diverted resources directly in response to DHS's recordkeeping failures.

To begin, the Ryan Declaration explains that DHS's FRA violations have required RAICES to undertake its own organization-wide initiatives to fill DHS's recordkeeping void. *See* Declaration of Jonathan Ryan [ECF No. 14-19] ("Ryan Decl.") ¶¶ 10-12. This includes two new tools to help migrants "match" separated family members—"the National Families Together Hotline and Separated Parents Intake database"—that RAICES launched in July 2018, at the height of the family separation and reunification crisis. *Id.* "Between July 2018 and [March 8, 2019], RAICES had "received over 1350 calls to the National Families Together Hotline, and inquiries on over 600 separated parents through the Separated Parents Intake database." *Id.* ¶ 11. "To run and maintain these new resources, RAICES diverted its staff away from their existing work so that they could create new systems, train volunteers, and maintain data." *Id.*

RAICES has also adopted new policies and procedures attributable to DHS's recordkeeping failures, including requiring staff to independently track family separation information in a dedicated spreadsheet, and to make efforts to locate and communicate with separated parents. *Id.* ¶ 12. "These separate procedures require [RAICES's] staff to devote substantial time to locating and communicating with the parent, which impacts their available time to represent and provide legal services to other clients." *Id.* Critically, these extensive organization-wide efforts would not have been necessary if DHS had complied with the FRA and created proper records in the first place. *Id.* ¶ 11.

The Russell Declaration further explains that DHS's "failure to adequately document the reasons for separations, particularly separations based on alleged parental criminal history," has required RAICES "to use additional resources to counteract that harm." Russell Decl. ¶ 15. In such cases, "RAICES must determine, among other things, whether DHS's finding has any basis

and, if so, the circumstances of the alleged criminal offense," in order to "either contest the finding or determine whether it is severe enough to warrant parental separation." *Id.* The more poorly-documented a "criminal history finding" is, the more "time and effort" RAICES must expend "investigating the issue." *Id.*; *see also id.* ¶ 16 (describing example case).

The Aguilera Declaration adds that when DHS fails to create records linking a child RAICES represents to the adult with whom they entered the country, RAICES is forced to expend its own time and resources to "independently track down the separated adult to gather relevant information," which it "must do . . . quickly to ensure adequate legal services and advice are provided to the child." Aguilera Decl. ¶ 13; *see also id.* ¶ 9 (describing example case). DHS's recordkeeping failures have also delayed HHS's release of Unaccompanied Children and, consequently, "substantially more children have faced removal proceedings while they are still in HHS custody." *Id.* ¶¶ 10-12. "This has, in turn, increased RAICES's workload, and required it to reallocate resources accordingly." *Id.* ¶ 12.

DHS addresses none of the above testimony, and instead selectively quotes other portions of RAICES's declarations that it deems insufficiently detailed. *See* DHS Mem. 30. Those efforts fall far short of defeating RAICES's substantial proof of organizational injury.[8]

[8] DHS vaguely asserts that the "increase in the numbers of detained" Unaccompanied Children is "an independent cause that is not clearly tied to any DHS recordkeeping policy. DHS Mem. 30. But DHS disregards statements in the Aguilera Declaration explaining the factual predicate for that causal link. *See* Aguilera Decl. ¶¶ 10-12. In any event, this is but one of several claims of resource diversion outlined in RAICES's declarations—DHS does not and cannot dispute the causal link between its recordkeeping failures and these other resource expenditures.

3. DHS also disputes that RAICES's organizational injury is irreparable, *see* DHS Mem. 32, but fails to contest either ground for irreparability set forth in Plaintiffs' motion, *see* Pls.' Mem. 35-36. DHS instead makes the curious argument that RAICES's diversion of resources qualifies as "economic loss," which, by itself, is not irreparable. DHS Mem. 32. But DHS is conflating two distinct concepts: organizational injury and economic injury. They are not the same: the organizational injury doctrine focuses not on financial loss, but on "obstacles [that] unquestionably make it more difficult for the [organization] to accomplish [its] primary mission." *Newby*, 838 F.3d at 9; *see Open Cmtys. All.*, 286 F. Supp. 3d at 178 (deeming economic loss analysis "inapposite" in organizational injury context).

Even if RAICES's injury could be characterized as economic (and it cannot), it would still be irreparable because there is no damages remedy in APA or FRA actions. *See* 5 U.S.C. § 702. As even DHS's caselaw recognizes, financial loss may indeed be irreparable where, as here, it is "unrecoverable." *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015); *Texas Children's Hosp.*, 76 F. Supp. 3d at 242.

Further, DHS elsewhere appears to acknowledge that Plaintiffs' injuries are irreparable. In moving to dismiss Claim Three, DHS argues that *past* violations of § 1222.22(e) "cannot be redressed by injunctive relief because . . . DHS could not retroactively document the 'formulation and execution of policies and decisions' that have already been formulated and executed." DHS Mem. 41. DHS thus forthrightly recognizes that if it fails to create particular records in violation of § 1222.22 in the first instance, an irretrievable loss of records is likely because they cannot be "retroactively" created. Plaintiffs make that exact argument in claiming irreparable harm. *See* Pls.' Mem. 35-36.

4. DHS next contends that irreparable harm to RAICES's clients is irrelevant, invoking the third-party standing doctrine. *See* DHS Mem. 32. DHS misconstrues Plaintiffs' argument. RAICES is not seeking to litigate claims on behalf of third-party clients. It merely asserts that the undisputed and irreparable harm those clients have suffered, and will suffer, due to DHS's recordkeeping failures bolsters a finding of irreparable harm here, "because the interests of RAICES and its clients are so closely intertwined." *See* Pls.' Mem. 36-38. DHS fails to address the caselaw supporting that argument.[9]

b. RAICES Has Shown Causation and Redressability

DHS summarily disputes, in a footnote, RAICES's ability to demonstrate causation and redressability. DHS Mem. 31 n.14. Once again, DHS's cursory argument falls short. To establish causation and redressability, a plaintiff need only show a "a causal connection between the injury and the defendant's conduct," and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Am. Soc'y For Prevention of Cruelty to Animals v. Ringling Bros.*, 317 F.3d 334, 338 (D.C. Cir. 2003). But the plaintiff "need not show that a favorable decision will relieve his *every* injury," or that it is "*certain*, ultimately, to receive" its desired result. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982); *see also Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (finding redressability where "risk of catastrophic harm" could be "reduced to some extent if petitioners received the relief they seek"). Redressability is satisfied so long as the "relief sought would constitute a necessary first

[9] At minimum, the irreparable harm to RAICES's clients bears on the public interest prong of the preliminary injunction test. *See Libbie Rehabiliation Ctr., Inc. v. Shalala*, 26 F. Supp. 2d 128, 132 (D.D.C. 1998) (considering harm to third parties under public interest prong).

step on a path that could ultimately lead to relief fully redressing the injury." *Tel. & Data Sys. v. FEC*, 19 F.3d 42, 47 (D.C. Cir. 1994); *Power Co. of Am., L.P. v. FERC*, 245 F.3d 839, 842 (D.C. Cir. 2001); *City of Duluth v. Nat'l Indian Gaming Comm'n*, 7 F. Supp. 3d 30, 41 (D.D.C. 2013).

RAICES easily satisfies this standard. RAICES's declarations detail the causal link between its organizational injury and DHS's systematic failure to create records adequately documenting child separations. *See* Pls.' Mem. 29-36. The requested injunction would likely redress that injury, because it would require creation of the very records that RAICES requires for its organizational work, and that are necessary to prevent RAICES from having to use its own resources to pick up the slack left by DHS's recordkeeping failures. *See id.*

In disputing redressability, DHS contends that RAICES has not shown that an "injunction requiring DHS to *create* certain records would in turn allow RAICES to *access* those records and obtain personal identifying information about . . . non-parent adults." DHS Mem. 31 n.14. But that argument overstates the redressability standard. As noted, redressability does not require RAICES to show that it is "*certain*, ultimately" that the requested relief "will relieve [its] *every* injury," *Larson*, 456 U.S. at 243 n.15, and is instead satisfied where it would at least "reduce[]" the "risk of catastrophic harm . . . to some extent," *Massachusetts*, 549 U.S. at 526, or be a "necessary first step on a path that could ultimately lead to relief fully redressing the injury," *Tel. & Data Sys.*, 19 F.3d at 47. Certainly, ordering DHS to create certain records is at least a "necessary first step" to ensure RAICES's eventual access to those records, particularly since there will likely be an *irretrievable* loss of records if DHS fails to create them in the first instance. *See* Pls.' Mem. 35-36; DHS Mem. 41.

At any rate, even under DHS's rationale, RAICES prevails. That is because there is a mandatory right of access to immigration records under 8 U.S.C. § 1229a(c)(2)(B) and the Due Process Clause. Under the statute, migrants facing removal proceedings (and their counsel), "shall have access to the alien's visa or other entry document, if any, *and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States*." 8 U.S.C. § 1229a(c)(2)(B) (emphasis added). Courts have deemed this statute a "mandatory access law," requiring DHS to promptly produce a migrant's entire "Alien File" or "A-file" to him or her, even without a specific request for the file. *Dent*, 627 F.3d at 372-75. The *Dent* court further held that the government's refusal to turn over the plaintiff's A-file in that case violated due process because it denied him the "opportunity to fully and fairly litigate his removal and his defensive citizenship claim," and rejected arguments that the plaintiff needed to submit a FOIA request. *Id.* at 374.

The A-file is comprehensive: it "contains *all* the individual's official record material such as naturalization certificates; various forms (and attachments, e.g., photographs); applications and petitions for benefits under the immigration and nationality laws, reports of investigations; statements; reports; correspondence; and memoranda on each individual for whom [DHS] has created a record under the Immigration and Nationality Act." *Id.* at 372 (emphasis added); *see also* DHS Privacy Act Assessment for CIS System, at 2 (April 7, 2017), *available at* https://bit.ly/2HYGdOX ("An A-File is the series of records that [DHS] maintains on individuals under the purview of the INA and relevant regulations, which documents the history of their interaction with DHS as required by law."). Thus, insofar as Plaintiffs' requested injunction would require DHS to create "official records" documenting migrant family separations, those

records would necessarily be part of an affected migrant's A-file and hence accessible via § 1229a(c)(2)(B). Moreover, unlike FOIA, § 1229a(c)(2)(B) does not contain exemptions that would allow DHS to redact identifying information for separated family members listed in the migrant's A-file records. It only allows DHS to withhold material "considered by the Attorney General to be confidential," which is inapplicable here.[10] So long as DHS complies with its obligations under § 1229a(c)(2)(B), RAICES will be able access the records it is urging DHS to create. DHS's redressability argument thus lacks merit.[11]

4. CREW Has Demonstrated Irreparable Harm and Standing

DHS fares no better in disputing CREW's showing of irreparable harm and standing. It first contends that CREW's injury is not the type of harm that the FRA is designed to prevent. DHS Mem. 33-34. But that argument cannot be squared with the Circuit's longstanding recognition that "private researchers . . . who make extensive use of government documents" are "within the zone of interests of the records creation and management provisions of the . . . FRA," including § 3101. *Armstrong*, 924 F.2d at 288. In *Armstrong*, the court explained that the FRA's "statutory language and legislative history . . . indicate[s] that one of the reasons that Congress mandated the creation and preservation of federal . . . records was to ensure that private

[10] Contrary to DHS's suggestion, DHS Mem. 24 n.13, the A-File routinely includes identifying information on third parties. *See* DHS Privacy Act Assessment for CIS System, at 2, 10 (April 7, 2017), *available at* https://bit.ly/2HYGdOX (A-File may contain information on third-party U.S. citizens or the migrant's parents).

[11] DHS further disputes that the "identifying information" RAICES seeks "would actually yield information crucial to a child's representation." DHS Mem. 31 n.14. RAICES has explained in detail why such information is critical to its representational efforts, *see* Pls.' Mem. 30-33, and DHS fails to refute that explanation.

researchers . . . would have access to the documentary history of the federal government." *Id.* at 287. Given "CREW's mission to promote transparency in government activities and decision making," and to "protect[] the right of citizens to be informed about" those activities, as well as its routine use of FOIA requests to further its mission, Declaration of Noah D. Bookbinder [ECF No. 14-21] ("Bookbinder Decl.") ¶¶ 2-3, 8-9, it plainly fits within *Armstrong*'s "private researcher" rationale. Relatedly, CREW's injury implicates its rights and interests not only under the FRA, but under FOIA, given its status as a frequent FOIA requester that has pending FOIA requests with DHS and intends to submit future requests. *See id.* ¶¶ 8-9, 11-20; Pls.' Mem. 38-42. Judges of this court have routinely upheld CREW's standing in FRA cases. *See* Pls.' Mem. 38.

CREW's injury is not undercut, and if anything is reinforced, by *EPIC v. Presidential Advisory Commission on Election Integrity*, 878 F.3d 371 (D.C. Cir. 2017). There, the Circuit held that EPIC lacked an informational injury under § 208 of the E-Government Act, "a 'Privacy Provision[]'" designed to ensure "'sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government.'" *Id.* at 378. The court reasoned that "the provision is intended to protect individuals—in the present context, voters—by requiring an agency to fully consider their privacy before collecting their personal information." Because "EPIC is not a voter," it was "not the type of plaintiff the Congress had in mind." *Id.* Nor was "EPIC's asserted harm—an inability to 'ensure public oversight of record systems'—the kind the Congress had in mind." *Id.*

The FRA reflects very different goals. With the FRA, "Congress intended, expected, and positively desired private researchers . . . to have access to the documentary history of the federal

government." *Armstrong*, 924 F.2d at 287-88. CREW is therefore precisely the type of plaintiff, asserting precisely the type of harm, that "Congress had in mind." *EPIC*, 878 F.3d at 378.

Employing a hyper-granular analysis, DHS argues that CREW's interests do not correspond to each of the asserted violations of 36 C.F.R. § 1222.22(d) alleged in Claim Two. DHS Mem. 33-34. That argument fails for several reasons. First, DHS overlooks that § 1222.22 and its various subsections merely implement § 3101's records-creation provisions. Given *Armstrong*'s holding that researchers like CREW are within § 3101's zone of interests, DHS's parsing of § 1222.22's individual subsections is improper. Second, DHS is flatly wrong when it claims that CREW has no interest in the agency's systematic failure to create records sufficient to "[p]rotect . . . legal[] and other rights" of the migrant families forcibly separated by DHS, in violation of § 1222.22(d). Simply put, the Trump Administration's family separation crisis is one of the most egregious human rights abuses ever perpetrated by the United States government, and has garnered massive public interest and backlash. To say that a group like CREW, with its mission of shedding light on significant government actions and policies, has no interest in this issue (and related violations of § 1222.22(d)) is patently false. Third, while DHS focuses exclusively on Plaintiffs' asserted violations of § 1222.22(d), it overlooks that Plaintiffs also challenge the same recordkeeping failures under §§ 1222.22(a), (b), and (c). *See* FAC ¶ 74; Pls.' Mem. 22-28. Again, given CREW's core mission of promoting government transparency, it indisputably has strong interests in these provisions that are firmly in line with the congressional intent underlying the FRA.

DHS also tries to distinguish the FRA cases holding that CREW had standing, claiming that in those cases, CREW had pending FOIA requests for the very material implicated by the

FRA violations. *See* DHS Mem. 34-35. DHS again misses the mark. For starters, those cases did not hold that it was *necessary* for CREW to have a pending FOIA request seeking the exact records implicated by the FRA claim; they instead recognize that where, as here, a party has several pending FOIA requests with the agency, and makes clear it intends to submit future requests that will likely be implicated by the FRA violations, it has shown injury. *See CREW v. EOP*, 587 F. Supp. 2d 48, 60–61 (D.D.C. 2008) (finding injury where "CREW and the Archive each allege that they have FOIA requests for e-mails currently pending with the [agencies] and intend to file future requests for e-mails"); *accord Public Citizen v. Carlin*, 2 F. Supp. 2d 1, 6 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999); *CREW v. Cheney*, 593 F. Supp. 2d 194, 227 (D.D.C. 2009); *see also* Bookbinder Decl. ¶¶ 11-20.

In any event, CREW does have a pending FOIA request that it submitted in October 2018—to which DHS has yet to respond—seeking various categories of documents relating to DHS's child separation practices, including documents identifying the number and locations of minors DHS separated as part of Zero Tolerance. *See* Bookbinder Decl. ¶¶ 12-14. Contrary to DHS's assertions, DHS Mem. 35, this request does indeed overlap with Plaintiffs' FRA claim, which alleges a systematic failure to create records documenting child separations. *See* Pls.' Mem. 22-28. To the extent that DHS fails to create such records, CREW will be harmed because its FOIA request will yield fewer records, or will yield records omitting information that the agency is legally required to document under the FRA. *See* Pls.' Mem. 41. This more than suffices to show cognizable injury to CREW.

D. The Balance of Equities and Public Interest Favor a Preliminary Injunction

DHS's arguments on the remaining preliminary injunction factors are unavailing. Lacking any supporting evidence, DHS makes the conclusory claim that Plaintiffs' requested injunction—merely requiring DHS to create records documenting its ongoing separations of migrant families—would "plainly burden" DHS. DHS Mem. 35. Such bare assertions are hardly persuasive evidence. *See Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558-59 (9th Cir. 1990) (granting preliminary injunction and rejecting government's claim that "informing all aliens of the right to apply for asylum is 'potentially' burdensome because it will foster frivolous claims," where it had "not pointed to any evidence" supporting "this supposition"). Similarly, DHS speculates that the requested injunction may conflict with its ongoing efforts in *Ms. L*, DHS Mem. 35-36, but does not identify any actual conflict between those efforts and Plaintiffs' requested relied here. And DHS's argument, yet again, overlooks that this case encompasses a broader set of family separations and legal issues than *Ms. L*. *See supra* Part I.B.1.b. Finally, any alleged administrative hassles arising from DHS's remedial efforts as to family separations are "self-inflicted" because they are the "result of defendants' own decision to adopt a zero-tolerance policy for immigrant families without specifying any basic procedure or plan to facilitate subsequent reunification." *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 123 (D.D.C. 2018). The balance of equities and public interest weigh decidedly in Plaintiffs' favor.

II. DHS's Motion to Dismiss Should be Denied

A. Claim Two States an APA Claim Challenging an Aggregate Practice of Failing to Create Records Adequately Documenting Child Separations

In moving to dismiss Plaintiffs' Claim Two, DHS merely incorporates its arguments opposing Plaintiffs' preliminary injunction motion. DHS Mem. 36. But those arguments do not fully overlap "because of the different standards employed when reviewing a motion for preliminary injunction—'likelihood of success on the merits'—and when reviewing a [Rule 12(b)(6)] motion to dismiss—'plausibility.'" *Advance Am. v. Fed. Deposit Ins. Corp.*, 257 F. Supp. 3d 56, 64 (D.D.C. 2017). In contrast to the "likelihood of success" standard, "[t]he plausibility requirement is not a probability requirement." *Id.* "Instead, factual allegations need only 'be enough to raise a right to relief above the speculative level.'" *Id.*

Measured against the proper standard, Claim Two easily survives DHS's motion to dismiss. For the reasons already explained, Plaintiffs have both standing and a cause of action under the APA. *See* Pls.' Mem. 21-22; 28-42; *supra* Parts I.B.1, I.C.3-4.[12] As for the "plausibility" of Plaintiffs' allegations, Plaintiffs' complaint pleads detailed factual content to support a plausible inference that DHS is violating § 3101 of the FRA by systematically failing to create records documenting child separations. *See* FAC ¶¶ 36-49, 71-80. Those well-pleaded allegations include facts, sourced from various government reports and officials, documenting DHS's widely-reported recordkeeping failures and ongoing child separation practices. *See* FAC ¶¶ 36-49. Thus, even if the Court were to conclude that Plaintiffs have not demonstrated a

[12] Plaintiffs incorporate their standing and APA arguments with respect to DHS's motion to dismiss Claims One and Three, as well.

likelihood of success on Claim Two for preliminary injunction purposes (which they have), it would be premature to dismiss that claim because it readily satisfies Rule 12(b)(6)'s less demanding "plausibility" threshold. *See Toxco Inc. v. Chu*, 724 F. Supp. 2d 16, 32 (D.D.C. 2010) (finding plaintiff stated a claim but did not show a likelihood of success).

B. Claim One States an APA Claim for Failure to Establish an FRA-Compliant Records Management Program

DHS fundamentally misconstrues Claim One. *See* DHS Mem. 38-40. Claim One does not challenge particular instances of recordkeeping failures; it instead challenges the adequacy of DHS's overall "records management program"—i.e., the agency's recordkeeping guidelines and directives. *See* FAC ¶¶ 62-70; *see also id.* ¶ 22 (citing *Armstrong*, 924 F.2d at 291-94). The claim is therefore squarely authorized by *Armstrong*'s holding that "the APA authorize[s] judicial review of [an agency's] recordkeeping guidelines and directives." 924 F.2d at 292. In so ruling, the *Armstrong* court explained that the FRA "mandates that the head of each agency 'shall establish and maintain' ***a records management program***," and that the statute further dictates "several specific requirements" for that program, "including the requirement that each agency head shall . . . develop a program that is consistent with the Archivist's regulations." *Id.* (citing 44 U.S.C. § 3102) (emphasis added). The court thus found the "FRA provides sufficient law to apply in evaluating the adequacy of [an agency's] guidelines and directives." *Id.*[13]

[13] *Armstrong* also provides detailed instructions on what the factual record should include in order "for the district court to determine whether the [agency's] recordkeeping guidelines and directives satisfy the [agency's] statutory obligations to 'make and preserve records' documenting the 'functions, policies, decisions, procedures, and essential transactions' of the" agency. *Id.* (quoting 44 U.S.C. § 3101).

Applying *Armstrong*'s teachings, Claim One plainly states a plausible claim to relief. The First Amended Complaint pleads detailed factual content—including allegations of systematic FRA violations relating to the family separation crisis, and other recordkeeping failures identified by the National Archives and Records Administration ("NARA")—supporting a plausible, if not compelling, inference that DHS has inadequate recordkeeping guidelines and directives, in violation of the FRA. *See* FAC ¶¶ 23-25, 36-49, 62-70. Contrary to DHS's assertions, DHS Mem. 38-39, Claim One does not seek judicial review of the specific recordkeeping failures identified by NARA or those relating to family separations; rather, it points to these instances as mere manifestations of DHS's woefully deficient records management program. *See supra* n.7 (refuting similar misunderstanding).

Of course, the Court need not speculate about the plausibility of Claim One because DHS has provided its operative records management policies. *See* Johnson Decl. Exs. A-B. As explained *supra* Part I.B.2, these policies are facially non-compliant with the FRA because they lack any specific guidance on the records-creation requirements of 44 U.S.C. § 3101 or 36 C.F.R. 1222.22. In *CREW v. EPA I*, Judge Boasberg denied dismissal of CREW's claim challenging EPA's records management policy after determining that the policy omitted any reference to § 1222.22. 319 F. Supp. 3d at 261. This Court should do the same.[14]

[14] DHS also insists that Count One be "dismissed on prudential grounds," so that NARA's inspection process can play out. DHS. Mem. 39-40. But there is no basis for taking that extraordinary step because, as noted, Plaintiffs' claims do not actually seek judicial review of the deficiencies identified by NARA. Nor does there appear to be any ongoing NARA inspection of *DHS* at large—the July 2018 inspection report only concerns CBP, and there is no indication of an ongoing inspection relating to NARA's January 2016 inspection report of DHS. *See* FAC ¶¶ 23-25.

C. Claim Three States an APA Claim for Failure to Create Records of Agency Policy and Decisions

Finally, DHS asserts that Claim Three fails to allege "ongoing . . . injury." DHS Mem. 40-41. That is incorrect. The claim alleges that DHS has an ongoing "agency culture of resisting memorializing policy decisions and guidance into written records" in violation of § 1222.22(e). FAC ¶ 43. As manifestations of this culture, Plaintiffs identify specific instances where "CBP's policymakers rebuked prior efforts by its own policy office and the Office for Civil Rights and Civil Liberties to issue employees meaningful guidance on completing screening forms for UCs," as well as "official policy guidance concerning the classification of same-sex couples." *Id.* Plaintiffs further allege that during Zero Tolerance, "DHS leadership did not issue written, formalized guidance to agency employees providing detailed instructions on how to implement" the policy"; rather, "Border Patrol Sector Chiefs worked out these details on an *ad hoc* basis, through conversations and conference calls." *Id.* ¶ 42. These sort of "pattern or practice" allegations suffice, at the motion to dismiss stage, to state a plausible claim for injunctive relief. *See Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 260-61 (D.D.C. 2012). And that plausibility is enhanced by the facial inadequacy of DHS's records management policies, which fail even to mention, let alone mandate compliance with, § 1222.22(e).

CONCLUSION

The Court should grant Plaintiffs' motion for a preliminary injunction, and deny DHS's motion to dismiss.

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Respectfully Submitted,

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