

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND  
ETHICS IN WASHINGTON,  
455 Massachusetts Avenue, NW,  
Washington, D.C. 20001,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND  
SECURITY,  
245 Murray Lane, SW,  
Washington, D.C. 20528, and

KIRSTJEN M. NIELSEN,  
in her official capacity as  
Secretary of Homeland Security,  
245 Murray Lane, SW,  
Washington, D.C. 20528,

Defendants.

Civil Action No. 18-cv-2473

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

1. This is an action for injunctive and declaratory relief under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.* Defendants U.S. Department of Homeland Security (“DHS”) and Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security, have violated the Federal Records Act (“FRA”), 44 U.S.C. §§ 2101, *et seq.*, by (1) failing to make and preserve records that adequately and properly document DHS’s functions, policies, decisions, procedures, and essential transactions, and that are designed to furnish the information necessary to protect the legal rights of persons directly affected by the agency’s activities; and (2) failing to maintain a sufficient records management program. Defendants’ FRA violations have deprived Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) of present and future access to

documents that CREW is entitled to receive by law, and that CREW needs for its organizational work.

2. DHS's ongoing records management deficiencies manifested acutely in its implementation of the so-called "zero tolerance" immigration enforcement and family separation policy ("Zero Tolerance Policy"). Indeed, rarely has a records management failure had such catastrophic consequences: DHS ripped thousands of children away from their parents, failed to make and preserve adequate documentation of individuals taken into its custody, and, consequently, has been unable to reunify each of the families it separated. To make matters worse, DHS falsely represented to the public its ability to track the thousands of parents and children harmed by its Zero Tolerance Policy. Equally troubling is the revelation, recently made by a former DHS official, that career DHS employees repeatedly raised concerns about the agency's records management deficiencies during the rollout of the Zero Tolerance Policy, but that political appointees simply ignored those concerns.

3. Recent reports by the DHS Office of Inspector General ("OIG"), National Archives and Records Administration ("NARA"), and U.S. Government Accountability Office ("GAO") indicate that the agency's records management deficiencies persist to this date. And while the Trump Administration has halted its family separation policy for the time being, it has made clear that it is actively exploring reinstating a new form of the policy. This serves only to confirm the urgent need for judicial relief requiring DHS to fix its woefully deficient records management practices, lest there be yet another man-made family separation crisis.

4. This suit therefore requests a declaratory judgment that Defendants have violated the FRA, and injunctive relief compelling their compliance with the FRA.

### **JURISDICTION AND VENUE**

5. This action arises under the APA, 5 U.S.C. § 701, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201. This Court has personal and subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States).

6. Venue lies in this district pursuant to 28 U.S.C. § 1391(e).

### **PARTIES**

7. Plaintiff CREW is a nonprofit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the right of citizens to be informed about the activities of government officials and to ensuring the integrity of government officials. To advance its mission, CREW uses a combination of research, litigation, advocacy, and public education to disseminate information to the public about public officials and their actions. CREW researches and reviews agency records created and preserved pursuant to the FRA and made available to the public pursuant to executive branch agency obligations imposed by statutes like the Freedom of Information Act (“FOIA”). CREW disseminates information in a variety of ways, including posting records it has received from its FOIA requests on its website, [www.citizensforethics.org](http://www.citizensforethics.org), and by writing and publishing reports and blog posts.

8. CREW has a significant interest in ensuring agency compliance with records responsibilities under the FRA. CREW’s efforts to ensure such compliance stem from, among other things, CREW’s mission to promote transparency in government activities and decision making, highlight industry influence over agency decisions, and combat ethics violations. For example, in July 2018, CREW sent a letter to the Archivist of the United States (the “Archivist”)

requesting that NARA investigate the potential destruction of records in violation of the FRA by DHS and the U.S. Department of Health and Human Services (“HHS”) in connection with their implementation of the Zero Tolerance Policy. And in February 2018, CREW filed suit against the Environmental Protection Agency, former Administrator Scott Pruitt, NARA, and the Archivist, alleging, among other things, that (1) EPA was violating the FRA by affirmatively electing not to create and preserve records adequately documenting the organization, functions, policies, decisions, procedures, and essential transactions of the agency, and (2) Administrator Pruitt was violating the FRA by knowingly and affirmatively refusing to create records of his own phone calls, meetings, and decisions.

9. The FOIA requests CREW has filed also reflect CREW’s interest in DHS’s recordkeeping practices. Since January 2017, CREW has submitted 17 separate FOIA requests to DHS, many of which remain outstanding. Those outstanding FOIA requests include a request concerning DHS’s records management policies and practices, and a separate request concerning the agency’s implementation of the Zero Tolerance Policy. When DHS fails to adequately document its functions, policies, decisions, procedures, and essential transactions, CREW is harmed because its FOIA requests will yield fewer or no responsive documents.

10. CREW expects to continue filing FOIA requests with DHS and to have an ongoing interest in the agency’s compliance with executive branch ethics requirements and its recordkeeping responsibilities under the FRA.

11. Defendant DHS is an agency within the meaning of the APA, 5 U.S.C. § 701. Among DHS’s component agencies are U.S. Customs and Border Protection (“CBP”) and U.S.

Immigration and Customs Enforcement (“ICE”). DHS operates under the supervision and direction of the Secretary of Homeland Security.

12. Defendant Kirstjen M. Nielsen is the Secretary of Homeland Security and is sued in her official capacity only. As the Secretary of DHS, Ms. Nielsen has an obligation under the FRA to ensure adequate and proper documentation of agency decisions and activities, and to establish and maintain a records management program compliant with the FRA.

## **LEGAL FRAMEWORK**

### ***The Federal Records Act***

13. The FRA is a collection of statutes that govern the creation, management, and disposal of federal records. *See* 44 U.S.C. §§ 2101, *et seq.*; §§ 2901, *et seq.*; §§ 3101, *et seq.*; and §§ 3301, *et seq.* Among other things, the FRA ensures the “[a]ccurate and complete documentation of the policies and transactions of the Federal Government.” 44 U.S.C. § 2902.

14. Both the Archivist and the heads of the various executive departments and agencies share responsibility to ensure that an accurate and complete record of their policies and transactions is compiled. *See* 44 U.S.C. §§ 2901, *et seq.*; §§ 3101, *et seq.*

15. The Archivist must “provide guidance and assistance to Federal agencies” and has the responsibility “to promulgate standards, procedures, and guidelines with respect to records management and the conduct of records management studies.” 44 U.S.C. § 2904. NARA has promulgated regulations governing the creation and maintenance of federal records pursuant to this authority. *See* 36 C.F.R. § 1222.22, *et seq.*

16. The head of each executive branch agency “shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions,

procedures, and essential transactions of the agency 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.

17. NARA has promulgated regulations implementing the FRA's demands, which provide:

To meet their obligation for adequate and proper documentation, agencies must prescribe the creation and maintenance of records that:

- (a) Document the persons, places, things, or matters dealt with by the agency.
- (b) Facilitate action by agency officials and their successors in office.
- (c) Make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government.
- (d) Protect the financial, legal, and other rights of the Government and of persons directly affected by the Government's actions.
- (e) Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically.
- (f) Document important board, committee, or staff meetings.

36 C.F.R. § 1222.22.

18. Under the FRA, agencies also must "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency." 44 U.S.C. § 3102.

19. NARA regulations detail these obligations. Agencies "must develop recordkeeping requirements that identify . . . [t]he record series and systems that must be created and maintained to document program policies, procedures, functions, activities, and

transactions.” 36 C.F.R. § 1222.26. In addition, agencies “must implement a records maintenance program so that complete records are filed or otherwise identified and preserved, [and] records can be readily found when needed.” *Id.* § 1222.34. To meet these requirements, “[a]gency records maintenance programs must,” among other things:

- (a) Institute procedures for organizing and storing records; . . .
- (c) Assign responsibilities for maintenance of records in all formats within each agency component, including designation of the officials that are responsible for maintenance and disposition of electronic records and management of automated systems used for recordkeeping;
- (d) Institute reference and retrieval procedures and controls that:
  - (1) Facilitate the finding, charging out, and refiling of records, including safeguards against loss during transit; and
  - (2) Ensure that access to electronic records minimizes the risk of unauthorized additions, deletions, or alterations;
- (e) Issue appropriate instructions to all agency employees on handling and protecting records.

*Id.*

### ***The Administrative Procedure Act***

20. The APA provides that a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

21. The term “agency action” includes “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13).

22. A court reviewing a claim under 5 U.S.C. § 702 “shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or

applicability of the terms of an agency action.” 5 U.S.C. § 706. The reviewing court shall “compel agency action unlawfully withheld or unreasonably delayed” and “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* §§ 706(1), (2)(A).

23. The APA authorizes judicial review of properly pleaded claims that an agency has violated its non-discretionary obligations under the FRA, including (1) the failure to make records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency, and (2) the failure to establish and maintain a records management program in compliance with the FRA and its implementing regulations. *See Armstrong v. Bush*, 924 F.2d 282, 291-94 (D.C. Cir. 1991); *CREW v. Pruitt*, 319 F. Supp. 3d 252, 257-58 (D.D.C. 2018).

#### **FACTS GIVING RISE TO PLAINTIFF’S CLAIM**

##### ***DHS’s Deficient Records Management Practices***

24. DHS and its component agencies have a history of failing to comply with their statutory records management obligations. On January 11, 2016, NARA issued an inspection report regarding DHS’s records management program that identified various “issues with the finalization of plans, policies, and procedures at the Department level that should be addressed by . . . senior managers.” NARA Records Management Inspection Report, DHS Records Management Program at 18 (Jan. 11, 2016), *available at* <https://www.archives.gov/files/records-mgmt/resources/dhs-2016-inspection.pdf>. Specifically, NARA found that “DHS records management policies, procedures, and strategic plans ha[d] been in draft form for several years” and needed to be “revised, approved, and issued.” *Id.* at ii. NARA further found that DHS



lacked a “Department-wide strategy for retention scheduling for email records,” and that “[c]urrent DHS email use and storage strategies do not allow for effective retention and retrieval of email.” *Id.* at ii-iii.

25. On July 16, 2018, NARA issued a highly critical inspection report regarding CBP’s records management system. NARA found that, “[i]n its current state, ***the records management program at CBP is substantially non-compliant with Federal statutes and regulations***, NARA policies, Office of Management and Budget (OMB) Circular A-130, and DHS Records and Information Management policies.” NARA Records Management Inspection Report, CBP Records Management Program at 2 (July 16, 2018), *available at* <https://www.archives.gov/files/records-mgmt/pdf/cbp-2018-inspection.pdf> (“July 2018 NARA Report”) (emphasis added). Specifically, NARA’s report identified the following deficiencies, among others:

- a. “CBP has not assigned records management responsibility to a person and office with appropriate authority within the agency to coordinate and oversee the creation and implementation of a comprehensive records management program.” July 2018 NARA Report at 3.
- b. Records management “directives establishing program objectives, responsibilities, and authorities for the creation, maintenance, and disposition of agency records are out of date or in draft form.” *Id.* at 3-4.
- c. The structure governing its records officers “is not adequately implemented throughout each program to ensure incorporation of recordkeeping requirements

and records maintenance, storage, and disposition practices into agency programs, processes, systems, and procedures.” *Id.* at 4.

- d. “CBP does not integrate records management and recordkeeping requirements into the design, development, and implementation of its electronic systems.” *Id.* at 5.
- e. “CBP does not require records management training for all CBP staff, and the [records management] training it offers does not meet records management training requirements” established by NARA regulations and directives. *Id.* at 6.
- f. CBP “does not conduct regular records management evaluations of agency components.” *Id.* at 7.
- g. “CBP does not identify or manage vital records in accordance with 36 CFR 1223.” *Id.*
- h. “CBP offices are not routinely conducting records inventories.” *Id.* at 8.
- i. “CBP has not established policies and procedures for handling and reporting unauthorized disposals of records to NARA.” *Id.*
- j. “CBP has not developed procedures to conduct exit briefings for departing employees or senior officials.” *Id.*
- k. “CBP has no strategic plan for records management.” *Id.* at 9-10.
- l. “Successful implementation of CBP plans for a Records Management Application and Electronic Records Management System are at risk of failure due to lack of basic records management fundamentals.” *Id.* at 10.

26. Based on these findings, NARA concluded that CBP's records management program "lacks numerous basic elements of a compliant records management program as prescribed in 36 CFR Chapter XII, Subchapter B." July 2018 NARA Report at 11. NARA added that it "will require careful strategic planning" for the program "to become effective and compliant in the many areas where it is currently underdeveloped," noting that "[p]rogram plans and studies to institute [records management] throughout the agency have been formulated since 2015, but limited progress has been made to date." *Id.* NARA recommended that CBP leadership "begin with developing and implementing a strategic plan for the overall records management program," and "foster a culture that includes records management in the regular and routine practices of all program functions within the CBP." *Id.*

***DHS's Records Management Failures With Respect To Alien Families  
Apprehended At The Border***

27. DHS's culture of non-compliance with its FRA obligations has manifested acutely in its implementation of the Zero Tolerance Policy.

28. The Trump Administration announced the Zero Tolerance Policy in April 2018, without advance notice to agency officials or pre-planning by those officials. Under the policy, all adults entering the United States illegally would be subject to criminal prosecution; if accompanied by a minor child, the child would be separated from the adult.

29. The Zero Tolerance Policy fundamentally changed DHS's approach to immigration enforcement. Under prior policy, when CBP apprehended an alien family unit attempting to enter the United States illegally, it usually placed the adult in civil immigration proceedings without referring the adult for criminal prosecution. CBP only separated apprehended parents from children in limited circumstances, such as where the adult had a

criminal history or outstanding warrant, or if CBP could not determine whether the adult was the child's parent or legal guardian.

30. CBP, ICE, and the Office of Refugee Resettlement of the U.S. Department of Health and Human Services ("HHS") all play critical roles in implementing the Zero Tolerance Policy. CBP's Office of Field Operations ("OFO") inspects foreign visitors and goods entering at established ports of entry, and CBP's U.S. Border Patrol apprehends individuals who enter the United States illegally between ports of entry. CBP transfers adult aliens in its custody to ICE, which detains certain aliens with pending immigration proceedings and deports aliens who receive final removal orders. Children apprehended at the border who are separated from their parents are held in DHS custody until they can be transferred to HHS.

31. The fallout from the Zero Tolerance Policy was catastrophic, resulting in thousands of children being ripped from their parents. Following massive public outcry, President Trump halted the family separations by an Executive Order issued June 20, 2018. *See* Exec. Order No. 13841, 83 Fed. Reg. 29,435 (June 25, 2018). That order did not address reunification of the over 2,000 children the government had separated from their parents. *See id.*

32. Three days later, on June 23, 2018, DHS issued a "Fact Sheet" outlining the government's efforts to "ensure that those adults who are subject to removal are reunited with their children for the purposes of removal." DHS Fact Sheet: Zero-Tolerance Prosecution and Family Reunification, *available at* <https://bit.ly/2K6QRpm>. The fact sheet stated that "[m]inors come into HHS custody with information provided by DHS regarding how they illegally entered the country and whether or not they were with a parent or adult and, to the extent possible, the

parent(s) or guardian(s) information and location. There is a central database which HHS and DHS can access and update when a parent(s) or minor(s) location information changes.” *Id.*

33. By order dated June 26, 2018, the U.S. District Court for the Southern District of California entered a preliminary injunction requiring DHS and HHS to reunify a certified class of migrant parents and their separated children within 30 days (an order that still has not been fulfilled to this day). *Ms. L. v. ICE*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018). In so holding, the court noted that DHS’s “practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children after the parents are returned to immigration custody following completion of their criminal sentence.” *Id.* at 1144.

34. On September 27, 2018, the DHS OIG issued a report titled *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, OIG-18-84, available at <https://bit.ly/2NhATFE> (“OIG Report”). This report reveals numerous records management failings by DHS, which, in turn, complicated the agency’s ability to provide OIG with “accurate, complete, reliable data on family separations and reunifications, raising concerns about the accuracy of its reporting.” OIG Report at 9. Specifically, OIG made the following findings, among others:

- a. DHS lacks complete and adequate records documenting basic details concerning alien family separations and reunifications. Specifically, “OIG requested a list of every alien child separated from an adult since April 19, 2018, as well as basic information about each child, including the child’s date of birth; the child’s date

of apprehension, separation, and (if applicable) reunification; and the location(s) in which the child was held while in DHS custody. It took DHS many weeks to provide the requested data, indicating that the Department does not maintain the data in a readily accessible format. Moreover, the data DHS eventually supplied was incomplete and inconsistent, raising questions about its reliability.” *Id.* at 11.

- b. Relatedly, OIG found no evidence that the purported “central database” with location information for separated parents and minors, which DHS described in the June 2018 fact sheet discussed above, actually exists. *Id.* at 10. “The OIG team asked several ICE employees, including those involved with DHS’ reunification efforts at ICE Headquarters, if they knew of such a database, and they did not.” *Id.* And “when the OIG team asked ICE for information that should have been accessible to ICE via the central database (*e.g.*, information on the current location of separated children), ICE did not have ready access to the information. Instead, ICE had to request the information from HHS. DHS has since acknowledged to the OIG that there is no ‘direct electronic interface’ between DHS and HHS tracking systems.” *Id.* at 11.
- c. CBP officials stated that they “could not feasibly identify children who were separated before” “April 19, 2018,” *id.* at 11 n.23, indicating that the agency failed altogether to create records documenting that information.
- d. CBP does not have an adequate, uniform system for creating or retrieving records of unaccompanied alien minors apprehended at the border. *Id.* at 10. Rather than following a standardized intake procedure for such minors, CBP officers

“manually enter information into a Microsoft Word document, which they then send to HHS as an email attachment. Each step of this manual process is vulnerable to human error, increasing the risk that a child could become lost in the system.” *Id.*

- e. ICE does not have an adequate, uniform system for creating or retrieving records of detainees in its custody who have been separated from a child. *Id.* at 9-10.

Although CBP enters “family separation data into certain fields within its own system, those particular fields are not visible in ICE’s system. As a result, ICE officers at the Port Isabel Detention Center stated that when processing detainees for removal, officials initially treated separated adults the same as other detainees and made no additional effort to identify and reunite families prior to removal. Eventually, in early June 2018, Port Isabel officials began taking manual steps—such as interviewing detainees—to identify adults separated from their children.” *Id.* at 10.

- f. CBP does not create adequate records of its transmissions to HHS of information regarding alien minors transferred from DHS to HHS custody. *Id.* at 10 n.21.

CBP told the OIG “it does not store that data and therefore could not provide it to the OIG team.” *Id.*

35. In October 2018, GAO released a report titled *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border*, GAO-19-163, available at <https://www.gao.gov/assets/700/694918.pdf> (“GAO Report”). Like the OIG Report, the GAO

Report identified several records management deficiencies concerning DHS's implementation of the Zero Tolerance Policy, including the following:

- a. "Border Patrol officials told us that information on whether a child had been separated is not automatically included in the referral form sent to [HHS]. Rather, agents may indicate a separation in the referral notes sent electronically to [HHS], but they are not required to do so, according to Border Patrol officials. Therefore, while the changes to the system may make it easier for Border Patrol to identify children separated from their parents, [HHS] officials stated [HHS] may not receive information through this mechanism to help it identify or track separated children." GAO Report at 17.
- b. "As of August 2018, OFO officials stated that while OFO has access to [HHS's Unaccompanied Alien Children ("UAC")] Portal, not all field staff input referrals directly in the UAC Portal. Rather, OFO officials typically email the referral request to [HHS]." *Id.*
- c. "Border Patrol issued guidance on July 5, 2018, directing its agents to use [a] new [check box] indicator for separated children in the UAC Portal and provide the parent's alien number in the UAC Portal when making referrals to [HHS] as of July 6, 2018. . . . However, [HHS] officials . . . said that DHS components with access to the UAC Portal are not yet utilizing the new check box consistently and the [HHS] Intakes Team completes the box based on information in DHS's referral email, if DHS has not entered the information." *Id.* at 18.



- d. “Border Patrol agents and CBP officers provide packets of information to [HHS] when unaccompanied children are transferred to [HHS] custody that includes information about separation from a parent; however, [HHS] officials told us that [HHS] rarely receives some of the forms in the packets to which CBP officials referred. In addition, the forms themselves do not contain specific fields to indicate such a separation.” *Id.* at 18-19.
- e. There is “no single database with easily extractable, reliable information on family separations,” and thus agency officials must use an amalgam of “three methods to determine which children in [HHS’s] custody as of June 26, 2018, had been separated from parents at the border,” each of which poses completeness and reliability concerns. *Id.* at 23-25.

36. On October 25, 2018, the Washington Post published an article by Scott Shuchart—who served as a senior adviser at DHS’s Office for Civil Rights and Civil Liberties from 2010 to July 2018—providing a detailed, insider account of DHS’s implementation of the Zero Tolerance Policy. *See* Scott Shuchart, Careless cruelty: Civil servants said separating families was illegal. The administration ignored us, *Wash. Post.*, Oct. 25, 2018, available at <https://wapo.st/2yAjNy1>. Of particular relevance here, Shuchart revealed that career DHS employees repeatedly raised concerns about the agency’s records management deficiencies during the rollout of the Zero Tolerance Policy, but that political appointees ignored those concerns. Specifically, Shuchart stated:

- a. “[M]y colleagues and I were pushing for record-keeping, communication and other policies that Trump appointees ignored.” *Id.*

- b. Career employees “noticed early that CBP and ICE weren’t providing HHS with proper records to allow families to be reunited or pursue their immigration cases jointly. . . . [W]e tried to ring the alarm that the legal, strategic and human dimensions of the policy hadn’t been thought through, needed fast improvement and posed a massive liability for the government.” *Id.*
  - c. “Every attempt to raise civil rights concerns led nowhere. . . . Civil servants advanced recommendations for mitigating the worst of the harm,” including “improving record-keeping,” and “giving separated parents and children better information,” all to no avail. *Id.*
  - d. Career employees asked agency leadership if “officials in Washington directed agents to record family members’ names and information, so they could later be reunited?” and were told blithely “I think we sent an email.” *Id.* Agency leadership ignored requests to see the purported email. *Id.*
37. As of the date of this filing, hundreds of children remain separated from their parents or guardians as a result of the Zero Tolerance Policy.
38. The Trump Administration and the President himself have confirmed that they are actively exploring reinstating a form of the family separation policy, which, like the first family separation policy, could be implemented at any moment without advance notice to agency officials or the public. The Administration reportedly favors a “binary choice” proposal, under

which parents would be forced to choose between relinquishing their children to foster care or remaining detained together as a family.<sup>1</sup>

39. On information and belief, the records management deficiencies at DHS described above persist to this date and have not been adequately remedied.

## PLAINTIFF'S CLAIMS FOR RELIEF

### CLAIM ONE

**(For a Declaratory Judgment that Defendants' Failure to Adequately and Properly Document DHS's Functions, Policies, Decisions, Procedures, and Essential Transactions Is Arbitrary, Capricious, and Contrary to the FRA, and For an Order Compelling Defendants' Compliance with the FRA)**

40. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

41. The FRA directs that agencies "shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency 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.

42. Implementing NARA regulations specify that agency officials must, among other things, create and maintain records that (1) "[d]ocument the persons" or "matters dealt with by the agency"; (2) "[m]ake possible a proper scrutiny by the Congress or other duly authorized

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<sup>1</sup> See Kathryn Krawczyk, Trump officials zero in on 'voluntary' family separations to 'maximize deterrence' of migrants, *The Week*, Oct. 23, 2018, available at <https://bit.ly/2yuelNi>; Miriam Jordan, et al., Trump's Plans to Deter Migrants Could Mean New 'Voluntary' Family Separation, *N.Y. Times*, Oct. 22, 2018, available at <https://nyti.ms/2Cz0xUt>; Philip Rucker, Trump says he is considering a new family separation policy at U.S.-Mexico border, *Wash. Post*, Oct. 13, 2018, available at <https://wapo.st/2q9RbXL>; Ted Hesson, Trump administration considers family separation option as border arrests soar, *Politico*, Oct. 12, 2018, available at <https://politi.co/2PBAJe8>.

agencies of the Government”; (3) “[p]rotect the financial, legal, and other rights of the Government and of persons directly affected by the Government’s actions”; and (4) “[d]ocument the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically.” 36 C.F.R. § 1222.22.

43. Despite these unambiguous requirements, Defendants have repeatedly failed to make and preserve records that (1) adequately and properly document DHS’s functions, policies, decisions, procedures, and essential transactions, and (2) are designed to furnish the information necessary to protect the legal rights of persons directly affected by the agency’s activities.

44. Defendants’ actions are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), insofar as they violate FRA and its implementing regulations.

45. Defendants have “unlawfully withheld” agency action, 5 U.S.C. § 706(1), by failing to take actions required by FRA and its implementing regulations.

46. Defendants’ unlawful actions have deprived Plaintiff of present and future access to important agency documents that would shed light on DHS’s functions, policies, decisions, procedures, and essential transactions.

47. Plaintiff is therefore entitled to a declaratory judgment that Defendants are in violation of their legal obligations under the FRA, 44 U.S.C. § 3101, and implementing NARA regulations, 36 C.F.R. § 1222.22, and an order compelling them to comply with those obligations.

## CLAIM TWO

### **(For a Declaratory Judgment that Defendants Have Failed to Establish and Maintain an FRA-Compliant Records Management Program, and for an Order Compelling Defendants to Establish and Maintain Such a Program)**

48. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

49. The FRA directs that agencies “shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency.” 44 U.S.C. § 3102.

50. Implementing NARA regulations specify that agencies “must develop recordkeeping requirements that identify . . . [t]he record series and systems that must be created and maintained to document program policies, procedures, functions, activities, and transactions,” 36 C.F.R. § 1222.26, and “implement a records maintenance program so that complete records are filed or otherwise identified and preserved, [and] records can be readily found when needed,” *id.* § 1222.34. An agency’s records management program must, among other things, “[i]nstitute reference and retrieval procedures and controls that . . . [f]acilitate the finding . . . of records”; “[a]ssign responsibilities for maintenance of records in all formats within each agency component”; and “[i]ssue appropriate instructions to all agency employees on handling and protecting records.” *Id.* § 1222.34.

51. Despite these unambiguous requirements, Defendants have failed to establish and maintain a sufficient records management program in compliance with the FRA and its implementing regulations.

52. Defendants' actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), insofar as they violate FRA and its implementing regulations.

53. Defendants have "unlawfully withheld" agency action, 5 U.S.C. § 706(1), by failing to take actions required by FRA and its implementing regulations.

54. Defendants' unlawful actions have deprived Plaintiff of present and future access to important agency documents that would shed light on DHS's functions, policies, decisions, procedures, and essential transactions.

55. Plaintiff is therefore entitled to a declaratory judgment that Defendants are in violation of their legal obligations under the FRA, 44 U.S.C. § 3102, and implementing NARA regulations, 36 C.F.R. §§ 1222.26, 1222.34, and an order compelling them to comply with those obligations.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Declare that Defendants have failed to make and preserve records that (1) adequately and properly document DHS's functions, policies, decisions, procedures, and essential transactions, and (2) are designed to furnish the information necessary to protect the legal rights of persons directly affected by the agency's activities.

2. Issue injunctive relief compelling Defendants to make and preserve records that (1) adequately and properly document DHS's functions, policies, decisions, procedures, and essential transactions, and (2) are designed to furnish the information necessary to protect the legal rights of persons directly affected by the agency's activities.

3. Declare that Defendants have failed to establish and maintain a sufficient records management program in compliance with the FRA.
4. Issue injunctive relief compelling Defendants to establish and maintain a sufficient records management program in compliance with the FRA.
5. Award Plaintiff its costs and reasonable attorneys' fees in this action; and
6. Grant such other and further relief as the Court may deem just and proper.

Date: October 26, 2018

Respectfully Submitted,

/s/ Nikhel Sus

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