IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON; AMERICAN HISTORICAL ASSOCIATION; and SOCIETY FOR HISTORIANS OF AMERICAN FOREIGN RELATIONS, Plaintiffs, v. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION; DAVID S. FERRIERO, in his official capacity as Archivist of the United States; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; and MATTHEW T. ALBENCE, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement, Defendants.	Civil Action No. 20-cv-739-APM

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW"), the American Historical Association ("AHA"), and the Society for Historians of American Foreign Relations ("SHAFR") submit this memorandum in support of their motion for summary judgment in this suit against the National Archives and Records Administration ("NARA") and U.S. Immigration and Customs Enforcement ("ICE") under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq.*, and the Federal Records Act ("FRA"), 44 U.S.C. §§ 3301, *et seq.*

INTRODUCTION

Immigration detention in the United States has expanded dramatically over the past two decades, with the average detained population surging from under 2,000 in the 1980s to over 50,000 in 2019. Amid this unprecedented growth, a troubling pattern of abuse and mistreatment in our nation's immigration detention facilities has emerged. The issue has drawn widespread scrutiny from the media, Congress, government watchdogs, and human rights advocates. At the center of this controversy is ICE, the agency charged with overseeing nearly 200 immigration detention facilities across the country.

It was against this backdrop that ICE submitted a proposed records disposition schedule to NARA in 2015 (the "ICE Schedule"). ICE sought NARA's permission, as required by the FRA, to destroy several categories of "Detainee Records," including those documenting detainee deaths, claims of sexual assault and abuse, civil rights violations, inhumane solitary confinement practices, and violations of ICE detention standards. The proposed schedule generated intense backlash, with NARA receiving an unprecedented number of public comments (over 23,000) urging it to reject ICE's proposal. Commenters ranging from members of Congress, immigrant advocates, historians, archivists, and academic researchers raised a host of concerns, including

that the records provide essential evidence needed to evaluate our rapidly-expanding immigration detention system, both now and in the future. Despite these concerns, NARA ultimately approved a modified version of the ICE Schedule in December 2019, determining that the records slated for destruction lack "sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government" under the FRA, 44 U.S.C. § 3303a(a).

This suit challenges NARA's approval of the ICE Schedule as arbitrary, capricious, and contrary to law under the APA. Specifically, NARA's approval decision failed to sufficiently evaluate statutory criteria, disregarded the agency's own policies and precedent, failed to address significant and relevant public comments, failed to consider relevant factors, and otherwise failed to examine the relevant data and articulate a satisfactory explanation for NARA's action.

Chief among NARA's errors was its refusal to meaningfully assess the research and historical value of the ICE records in accordance with the FRA and its own policies. Although it was inundated with public comments stressing that the ICE records have high long-term research value for a multitude of reasons, NARA largely ignored those concerns. It instead issued a short-sighted explanation wholly divorced from social and historical context. NARA's decision paints a picture of an agency trying to remain neutral by not engaging with commenters' concerns and supporting evidence regarding ICE's disturbing history of detainee abuse and mistreatment, as well as the considerable public interest those actions have generated. But that was contrary to NARA's role.

As its own policies make clear, NARA's decision whether to approve the destruction of federal records requires "knowledge of and sensitivity to researchers' interests." NARA Directive 1441, Appraisal Policy of the National Archives and Records Administration, Sept. 20,

2007, https://bit.ly/2HM7YZQ. NARA must consider "the kinds and extent of current research use and to try to make inferences about anticipated use . . . by the public," the "significance of the functions and activities performed by the originating agency," and whether the records provide "evidence of Federal . . . decisions[] and actions relating to major social . . . issues" or "evidence of the significant effects of Federal programs and actions on individuals" and "communities." *Id.* Instead of providing a reasoned explanation for why these factors warranted approving destruction of the ICE records, NARA gave short shrift to commenters' concerns and summarily determined that the records have "little or no research value." Because NARA's decision was arbitrary, capricious, and contrary to law, it must be held unlawful and set aside under the APA.

BACKGROUND

I. The Growth of Immigration Detention in the United States and Origins of ICE

The U.S. immigration detention system as we know it is a relatively recent creation, and has "grown enormously in the last two decades." Administrative Record ("A.R.") 493. In the 1980s, for example, "fewer than 2,000 people were held in immigration detention nationwide." American Civil Liberties Union ("ACLU") Research Report, Justice-Free Zones: U.S. Immigration Detention under the Trump Administration, at 14, Apr. 30, 2020, https://bit.ly/3fDQ6zJ. But between FY 1995 and FY 2016, "the immigration detention system quadrupled in size—jumping from a detained population of 7,475 to 32,985 on average per day." *Id.* And in the first three years of the Trump Administration, the system entered a "new phase of unprecedented growth," reaching "an average of over 50,000 people [detained] in FY 2019." *Id.* "Today, the U.S. immigration detention system is the largest in the world." A.R. 493.

ICE is at the center of this surge in immigration detention. A relatively new agency, ICE was created in 2003 as a component of the Department of Homeland Security ("DHS"). Compl. ¶ 33. ICE merged the investigative and interior enforcement elements of the former U.S. Customs Service and the Immigration and Naturalization Service ("INS"), the latter of which had overseen immigration detention since 1933. *Id.* ICE's Enforcement and Removal Operations directorate ("ERO") manages all aspects of the immigration enforcement process, including identification and arrest, domestic transportation, detention, bond management, and supervised release. *Id.* ¶ 34. ERO oversees nearly 200 ICE detention facilities. *Id.*

Individuals in ICE detention are held in civil, not criminal, custody, which is "not supposed to be punitive." DHS Office of Inspector General ("OIG") Report, Concerns About ICE Detainee Treatment and Care at Four Detention Facilities, OIG-19-47, at 2, June 3, 2019, https://bit.ly/37L2k4Y. The purpose of ICE detention "is not to punish, but simply to secure appearance at immigration proceedings and transport for removal when applicable." A.R. 493. "Nevertheless, ICE detention facilities overwhelmingly consist of jails and jail-like facilities," many of which are operated by "private, for-profit prison companies" with "long and disturbing histor[ies] of abuse, neglect, and misconduct." *Id.*

As the detained population has surged over the past two decades, so too have cases of detainee mistreatment and abuse in ICE facilities. This is an issue of intense and ongoing public interest, with the DHS OIG, members of Congress, the media, whistleblowers, immigrant advocates, and researchers repeatedly sounding the alarm. *See, e.g.*, Compl. ¶¶ 36a-f (citing examples); A.R. 213-14 (comment of seven U.S. Senators); A.R. 492-501 (comment of ACLU and partner organizations); A.R. 347-52 (comment of LatinoJustice); A.R. 324-25 (comment of

The Constitution Project and partner organizations). The multitude of human and civil rights abuses documented in ICE detention have included inadequate medical care, sexual and physical assault and abuse, inhumane solitary confinement (or "segregation") practices, prolonged detention, and lack of basic sanitation and nutrition, among others. *See id.* ICE's abuses are so egregious that they have drawn international condemnation, with organizations such as the Inter-American Commission on Human Rights expressing "concern over deaths in U.S. immigration detention centers as well as abusive conditions of confinement." A.R. 494. Most recently, numerous reports of ICE abuse and neglect have emerged amid the ongoing COVID-19 pandemic.[1]

The Trump Administration has significantly exacerbated these problems. By making aggressive immigration enforcement a central policy priority, the administration has increased the number of detained individuals to record highs. Compl. ¶ 37. At the same time, it has weakened ICE detention standards by no longer requiring facilities to maintain certain health care accreditations, downgrading health assessment standards, and broadening allowable use-of-force techniques and solitary confinement practices. *Id.*

II. The Federal Records Act and Records Disposal Act

The FRA is a collection of statutes governing 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*. It ensures the "[a]ccurate and complete documentation of the policies and transactions of

[1] *See, e.g.*, Noah Lanard, Whistleblowers Say an ICE Detention Center Used Deceptive Tricks to Conceal COVID Outbreak, *Mother Jones*, July 21, 2020, https://bit.ly/32KkPYc; Alisa Reznick, 'You Can Either Be A Survivor Or Die': COVID-19 Cases Surge In ICE Detention, *NPR*, July 1, 2020, https://n.pr/32EGy3U.

the Federal Government." *Id.* § 2902. To that end, the FRA requires agencies to "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." *Id.* § 3101.

NARA and agency heads share responsibility to ensure that an accurate and complete record of agencies' policies and transactions is compiled and preserved. *See* 44 U.S.C. §§ 2901, *et seq.*; §§ 3101, *et seq.* NARA must "provide guidance and assistance to Federal agencies" and "promulgate standards, procedures, and guidelines with respect to records management and the conduct of records management studies." *Id.* § 2904. NARA must also "establish standards for the selective retention of records of continuing value, and assist Federal agencies in applying the standards to records in their custody." *Id.* § 2905(a).

The Records Disposal Act ("RDA") is the portion of the FRA governing the disposal of federal records. *See* 44 U.S.C. §§ 3301, *et. seq*. It establishes the "exclusive . . . procedures" by which federal records may be destroyed. *Id.* § 3314. The RDA requires an agency to get NARA's approval before disposing of any record. To get approval, an agency may submit to NARA a schedule of records it proposes to destroy on a specified timetable, *id.* § 3303(3), which NARA can approve only if it determines that the records "do not, or will not after the lapse of the period specified, have sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government," *id.* § 3303a(a).

Pursuant to its statutory duty to "establish standards for the selective retention of records of continuing value," 44 U.S.C. § 2905(a), NARA has issued policies and guidelines for

determining whether records have "sufficient . . . value" to warrant permanent retention under § 3303a(a)—a process NARA refers to as "appraisal." Chief among these is NARA's Appraisal Policy, which "sets out the strategic framework, objectives, and guidelines that [NARA] uses to determine whether Federal records have archival value," and "provides more specific guidelines for appraising certain categories of records." NARA Directive 1441, Appraisal Policy of the National Archives and Records Administration, § 1, Sept. 20, 2007, https://bit.ly/2HM7YZQ ("Appraisal Policy"). NARA has also issued guidelines with examples of record series "commonly appraised as permanent," which it instructs "[r]ecords officers [to] use . . . as guides to help identify permanent records." NARA, Examples of Series Commonly Appraised as Permanent, https://bit.ly/39VaIjO.

Before approving a records disposition schedule, NARA must publish a "notice in the Federal Register" of the proposed schedule and provide "an opportunity for interested persons to submit comment thereon." 44 U.S.C. § 3303a(a). According to NARA, such public comment is both "mandated by law" and "integral to the scheduling and appraisal process." A.R. 184. Once NARA approves a schedule, disposal of records pursuant to that schedule "shall be mandatory." 44 U.S.C. § 3303a(b). "If the Archivist errs in authorizing disposal, therefore, valuable federal records could be lost forever." *Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999).

Thus, under the statutory scheme, both the originating agency and NARA share responsibilities in establishing records disposition schedules: the agency "has the duties to preserve certain record information under § 3101 and to propose the disposal of records in conformity with the requirements of § 3303," while NARA "has the statutory responsibility to subject the [agency's] proposed disposal schedules to critical scrutiny to ascertain whether they

are in accord with the statutory standards of §§ 3101, 3303a." *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 68 (D.C. Cir. 1983).

III. ICE's Proposed Records Disposition Schedule and NARA's Approval Process

The origins of this case date back to October 2015, when ICE proposed to NARA the first iteration of its disposition schedule for "Detainee Records" (Schedule No. DAA-0567-2015-0013). A.R. 171, 646-54. That schedule proposed temporary retention periods for eleven categories of records, including detainee death review files, sexual abuse and assault files, weekly detention service monitor reports, Detention Reporting and Information Line ("DRIL Hotline") records, and detention segregation case files.[2] A.R. 647.

On June 20, 2017, a NARA appraiser recommended that NARA approve ICE's proposed schedule. A.R. 610-13. With no supporting analysis, the appraiser inexplicably found that "[r]ecords relating to incidents of sexual assault at ICE facilities" and "records of deaths of detainees in ICE custody" (including related findings of ICE officials' violations of detention standards) did "not document significant actions of Federal officials." A.R. 610-11. The appraiser further found that detainee death records, reports filed by Detention Service Monitors providing oversight of ICE's largest facilities, and records documenting detainees' placement in solitary confinement all had "little or no research value." A.R. 611-13.

On July 14, 2017, NARA invited public comment on the proposed ICE Schedule through a notice in the Federal Register. 82 Fed. Reg. 32,585. NARA received over 23,000 public comments, an "unprecedented number," objecting to the proposed schedule. A.R. 200. Those

[2] "Segregation" refers to the process of separating detainees from the general population for purported administrative, disciplinary, or protective reasons. A.R. 7.

comments included "three congressional letters with a total of 36 signatures (29 House members, 7 senators); a petition from the . . . ACLU . . . with 23,758 comments; a petition from UltraViolet with 1,475 signatures; written comments from 187 individuals and six organizations; and phone calls from seven individuals." *Id.*

The commenters "overwhelmingly asked NARA not to approve the disposition request entirely; not to approve the request to destroy records related to death, abuse, and detainee segregation; or to preserve all records on the pending record schedules." A.R. 154. "Many commenters stated that the records are needed for oversight, accountability, transparency, and program improvement; for identifying trends over time in abuse, death, or use of solitary confinement; for investigations of mismanagement at ICE; for use in designing safe and effective detention facilities; for sociologists and psychologists researching social problems; for crafting future legislation; for historical research into treatment of detainees and conditions of detention; and for understanding immigration and border security issues." *Id.* Other "commenters held that preservation of the records was necessary because of ongoing litigation, or to protect individuals' rights and ability to seek legal redress or to qualify for certain benefits." *Id.*

Following this first round of public comments, NARA worked with ICE on revising the schedule. On September 12, 2018, a NARA appraiser issued a memo recommending that NARA approve the schedule with some changes, A.R. 171-79, which ICE adopted effective October 25, 2018, A.R. 162.

On June 14, 2019, NARA published a consolidated reply to public comments on the proposed schedule. A.R. 153-61; 84 Fed. Reg. 29,247. NARA's reply purported to summarize

the public comments and how NARA and ICE revised the schedule in response. *Id.* NARA also invited, and received, a second round of comments. *Id.*

On December 11, 2019, the Archivist approved the proposed ICE Schedule. A.R. 10. Two days later, NARA issued a final consolidated reply to public comments. A.R. 14-24. NARA noted that it did not require ICE to revise the schedule following the second round of comments. A.R. 15. NARA added that "[a]ll comments received during the public comment period were considered and are now part of the administrative record." A.R. 14. NARA then "summarize[d] public comments submitted" and provided a "discussion of the proposed records schedule." *Id*.

As approved by NARA, the final ICE Schedule requires destruction of six categories of records—all of which NARA deemed to have "little or no research value," A.R. 11—per the retention periods specified below:

1. **Detainee Sexual Abuse and Assault Files (25-year retention period).** These are "[r]ecords documenting the reporting and investigation of sexual abuse or assault allegations between detainees as well as by employees, contractors, or volunteers against detainees," including without limitation "police reports; summaries of medical exam results; supporting memos and video (if any); evidentiary materials pertaining to the allegation; and investigation outcomes." A.R. 3. They must be destroyed 25 years after "the end of the fiscal year in which the case is closed." *Id.*
2. **ERO Detainee Death Review Files (20-year retention period).** These are "[r]ecords documenting [ERO] reporting of detainee deaths that occur in ICE custody, including detention facilities, medical facilities, or in transit to or from any

such facility," including without limitation "correspondence; medical reports; investigative reports; detainee's detention and medical files; death certificates; toxicology reports; and autopsy reports." A.R. 3. They must be destroyed 20 years after "the end of the fiscal year in which the case is closed." A.R. 4.

3. **Detainee Segregation Reports (7-year retention period).** These are "[r]eports documenting the placement of detainees in segregated housing" —i.e., solitary confinement—"including reasons for segregation placement, compliance with applicable detention standards, alternative arrangements explored, and assessment of the best course of action." A.R. 7. "Segregation may be administrative, disciplinary, protective actions, or self-requested by the detainee." *Id.* These records must be destroyed seven years after the end of the "fiscal year in which the detainee is released from segregation." A.R. 8.
4. **Detention Monitoring Reports (3-year retention period).** These are weekly reports "documenting on-site monitoring of detention facilities" filed by Detention Service Monitors "for appropriate and timely resolution of problems and concerns that may arise daily during facility operations," including non-compliance with ICE detention standards. A.R. 6. They must be destroyed three years after "the end of the calendar year in which the report is issued." *Id.*
5. **DRIL Hotline Records (7-year retention period).** These are records documenting calls to the DRIL Hotline, "a toll-free service providing a direct channel for individuals in ICE custody, the public, non-governmental organizations, faith-based organizations, academic institutions, attorneys, and advocacy groups to communicate

directly with ICE to answer questions and resolve concerns." A.R. 7. They "include, but are not limited to, communications in any form (phone, etc.), correspondence, and supporting documentation." *Id.* They must be destroyed seven years after the "end of the calendar year in which the call is received." *Id.*

6. **Detainee Escape Reports (7-year retention period).** These are "[r]eports documenting details of successful detainee escapes from ICE custody or detention facilities," which are "are generated from field offices and submitted to the ICE Detention Standards Compliance Unit." A.R. 6. They must be destroyed seven years after the "end of the fiscal year in which the report is issued." A.R. 6-7.

IV. This Lawsuit

Plaintiffs filed this suit against NARA and ICE on March 16, 2020. The complaint asserts a single claim under the APA, 5 U.S.C. § 706(2)(A), alleging that NARA's approval of the ICE Schedule was arbitrary, capricious, and contrary to law. Compl. ¶¶ 84-88. Plaintiffs seek an order vacating NARA's approval decision and declaring it unlawful, and enjoining ICE from destroying any records pursuant to the schedule. *Id.*, Prayer for Relief, ¶¶ 1-4. Plaintiffs now move for summary judgment.

ARGUMENT

I. Plaintiffs Have Standing

Plaintiffs, two historian associations and a government watchdog group, have standing to challenge NARA's approval of the ICE Schedule. To establish Article III standing, a plaintiff must show "a concrete and particularized injury that is actual or imminent, traceable to the challenged act, and redressable by the court." *Abigail All. for Better Access to Developmental*

Drugs v. Eschenbach, 469 F.3d 129, 132 (D.C. Cir. 2006). The AHA and SHAFR can demonstrate "associational standing" on behalf of their members by showing that (1) "at least one member would have standing under Article III to sue in his or her own right," (2) "the interests it seeks to protect are germane to its purposes," and (3) "neither the claim asserted nor the relief requested requires that an individual member participate in the lawsuit." *NRDC v. EPA*, 489 F.3d 1364, 1370 (D.C. Cir. 2007).

The AHA and SHAFR readily meet these requirements. Plaintiffs have submitted sworn declarations identifying individual AHA and SHAFR members who would plainly have standing to sue in their own right. Declaration of Kristina Shull ("Shull Decl.") ¶¶ 1-17; Declaration of Brianna Nofil ("Nofil Decl.") ¶¶ 1-16; Declaration of James Grossman ("Grossman Decl.") ¶¶ 7a-7e; Declaration of Kristin L. Hoganson ("Hoganson Decl.") ¶¶ 7a-7c. These members are immigration historians who routinely seek, through Freedom of Information Act ("FOIA") requests and NARA's collections, immigration detention records of the type slated for destruction under the ICE Schedule. Shull Decl. ¶¶ 4-9; Nofil Decl. ¶¶ 4-8; Grossman Decl. ¶ 7; Hoganson Decl. ¶ 7. They have utilized these records in their research, scholarship, and teaching, and intend to seek and use ICE records, including those scheduled for destruction, in the future. Shull Decl. ¶¶ 4-12; Nofil Decl. ¶¶ 4-11; Grossman Decl. ¶ 7; Hoganson Decl. ¶ 7. They also frequently seek such records many decades after their creation—far beyond the ICE Schedule's temporary retention periods. Shull Decl. ¶ 11; Nofil Decl. ¶ 10; Grossman Decl. ¶ 7; Hoganson Decl. ¶ 7. Thus, destruction of records pursuant to the ICE Schedule will irreparably harm these AHA and SHAFR members by depriving them of access to the types of records on

which they routinely rely. Shull Decl. ¶¶ 13-17; Nofil Decl. ¶¶ 12-16; Grossman Decl. ¶¶ 7-8; Hoganson Decl. ¶¶ 7-8.

Courts have uniformly held that similarly-situated historians and researchers have Article III standing to challenge records destruction in violation of the APA and FRA. *See, e.g.*, *Pub. Citizen v. Carlin*, 2 F. Supp. 2d 1, 6 (D.D.C. 1997) ("historians" and "researchers" had standing to bring APA challenge to NARA records disposition schedule where they had previously sought the types of records scheduled for destruction through FOIA requests and NARA's collections, and intended to do so in the future), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999) (reaching merits without questioning district court's standing ruling); *Green v. NARA*, 992 F. Supp. 811, 819 (E.D. Va. 1998) (plaintiff had standing to challenge NARA records destruction decision because it was "inescapable that this plaintiff, as a researcher and scholar, suffers an actual injury if an agency disposes of documents relevant to her research and scholarly endeavors"); *accord CREW v. SEC*, 858 F. Supp. 2d 51, 57-61 (D.D.C. 2012); *CREW v. Cheney*, 593 F. Supp. 2d 194, 227 (D.D.C. 2009); *CREW v. EOP*, 587 F. Supp. 2d 48, 60–61 (D.D.C. 2008); *Judicial Watch, Inc. v. FBI*, 2019 WL 4194501, at *7 (D.D.C. Sept. 4, 2019); *see also Webster*, 720 F.2d at 57 (private researchers are within "zone of interests" of FRA's disposal provisions because "Congress intended, expected, and positively desired private researchers . . . to have access to the documentary history of the federal government").

The remaining two requirements for associational standing are also met: preservation of the ICE records is indisputably germane to the purposes of both the AHA and SHAFR. *See* Grossman Decl. ¶¶ 2, 4, 6-8; Hoganson Decl. ¶¶ 2, 4, 6-8. Nor is there any need for individual members to participate in this suit. *See Friends of Animals v. Ross*, 396 F. Supp. 3d 1, 9 (D.D.C.

2019) (no need for "individual members to participate" in APA case where district court merely reviews "administrative record 'as an appellate tribunal'"). Thus, the AHA and SHAFR have associational standing.

CREW likewise passes Article III's threshold. To further its mission of promoting government transparency and accountability, CREW frequently files FOIA requests with ICE and other agencies. Declaration of Adam J. Rappaport ¶ 4. CREW currently has several FOIA requests pending with ICE, including for records slated for destruction under the ICE Schedule, and it intends to submit similar requests in the future. *Id.* ¶¶ 6-7. If ICE destroys records pursuant to the ICE Schedule, CREW's current and future FOIA requests will yield fewer or no records, directly impeding CREW's interests. *Id.* ¶ 8. This suffices to demonstrate Article III standing in the FRA context, as judges of this Court have repeatedly held. *E.g.*, *CREW v. SEC*, 858 F. Supp. 2d at 57-61; *CREW v. Cheney*, 593 F. Supp. 2d at 227-28; *CREW v. EOP*, 587 F. Supp. 2d at 60–61; *Judicial Watch*, 2019 WL 4194501, at *7.

II. Plaintiffs are Entitled to Summary Judgment on their APA Claim

A. Legal Standards

1. The Arbitrary-and-Capricious Standard of Review

In APA cases, "summary judgment 'serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.'" *Friends of Animals*, 396 F. Supp. 3d at 7. Thus, "the district judge sits as an appellate tribunal" and the "'entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001).

Under the APA, courts must "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The APA's arbitrary-and-capricious standard requires that agency [actions] be reasonable and reasonably explained." *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 343-44 (D.C. Cir. 2019). Agency action "is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* A reviewing court must, in turn, "'consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.*; *see also Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015).

It is arbitrary and capricious for an agency to "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). If an agency wishes to "depart from . . . official policies," it "must at a minimum acknowledge the change and offer a reasoned explanation for it." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017); *see also id.* at 923 n.3 (agency must "supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored"). Relatedly, it is "well settled that an agency, even one that enjoys broad discretion, must adhere to voluntarily adopted, binding policies that limit

its discretion," *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987), and its failure to do so can render its action arbitrary and capricious, *see Damus v. Nielsen*, 313 F. Supp. 3d 317, 337 (D.D.C. 2018) (citing cases).

In the notice-and-comment context, an agency acts arbitrarily and capriciously "if it fails to respond to 'significant points' and consider 'all relevant factors' raised by the public comments." *Carlson*, 938 F.3d at 344. An agency must "respond to comments 'that can be thought to challenge a fundamental premise' underlying the proposed agency decision," and its response "must be sufficient to enable the courts 'to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'" *Id.*

2. APA Review in Records Disposal Act Cases

NARA's approval of an agency's records disposition schedule—including its underlying determination that records lack "sufficient . . . value to warrant their continued preservation" under the RDA, 44 U.S.C. § 3303a(a)—is final agency action reviewable under the APA's arbitrary-and-capricious standard. *See Webster*, 720 F.2d at 38-46; *Pub. Citizen*, 2 F. Supp. 2d at 9; *Green*, 992 F. Supp. at 818. Such judicial review fulfills "an important need by ensuring that" NARA and the proposing agency do "not overlook" private parties' "interests when applying the statutory standards on records disposal and preservation." *Webster*, 720 F.2d at 45.

Through its Appraisal Policy and other official guidance, NARA "has announced additional criteria, based on the statutory standards, for appraising records of permanent value." *Id.* at 43; *see* Appraisal Policy § 1 ("This policy sets out the strategic framework, objectives, and guidelines that [NARA] uses to determine whether Federal records have archival value" under 44 U.S.C. § 3303a). In *Webster*, the Circuit made clear that NARA's appraisal policies provide

sufficient "specifications against which a court may analyze [NARA's] decision on disposal schedules" under the APA. 720 F.2d at 43 & n.19 (discussing predecessor version of Appraisal Policy set forth in "Records Management Handbook"). As the court explained, the fact that Congress explicitly "required [NARA] to establish standards for disposal" (*see* 44 U.S.C. § 2905(a)) reflects its intent to create enforceable "limit[ations on] [NARA's] discretion" over appraisal decisions "in individual cases." *Id.* at 43 n.18.

B. NARA's Approval of the ICE Schedule was Arbitrary, Capricious, and Contrary to Law

NARA set forth its reasoning for approving the ICE Schedule in its consolidated replies to public comments issued on December 13, 2019 (A.R. 14-24) and June 14, 2019 (A.R. 153-61), and in its September 12, 2018 appraisal memo (A.R. 171-79) (collectively, the "Approval Decision"). That decision was arbitrary and capricious for seven independent reasons: (1) it failed to sufficiently evaluate the research value of the ICE records in accordance with the RDA and NARA's Appraisal Policy; (2) it failed to address significant and relevant public comments; (3) it disregarded that historical predecessors of the ICE records are archived in NARA's permanent collections; (4) it failed to sufficiently consider the research value of primary source material; (5) its explanation for approving destruction of the ERO detainee death review files was deficient for several reasons; (6) it disregarded NARA appraisal policies on "periodic reports" in approving destruction of ICE's detention monitoring reports; and (7) it provided no assessment of the volume of records at issue or the cost considerations for long-term maintenance, despite citing "resource considerations" as a basis for approving the ICE Schedule.

1. NARA Failed to Sufficiently Evaluate the Research Value of the ICE Records in Accordance with the RDA and NARA's Appraisal Policy

Per its Appraisal Policy, NARA's determination of whether records have "sufficient . . . research . . . value to warrant their continued preservation," 44 U.S.C. § 3303a(a), requires "knowledge of and sensitivity to researchers' interests," and a "willingness to acknowledge and understand comments and suggestions from diverse perspectives." Appraisal Policy § 1. Thus, "it is important to consider" the "future research potential of records . . . in making appraisal decisions," and "[i]t is necessary to consider the kinds and extent of current research use and to try to make inferences about anticipated use . . . by the public." *Id.*, App. 1. The "significance of the functions and activities performed by the originating agency . . . and the business context within which the records are created are [also] important considerations for the appraiser." *Id.* Applying these concepts, "NARA will identify for permanent retention records" providing "evidence of Federal . . . decisions[] and actions relating to major social . . . issues," as well as "evidence of the significant effects of Federal programs and actions on individuals" and "communities." *Id.* § 8.

NARA's Approval Decision reveals no meaningful application of these appraisal principles to the ICE records, let alone any "reasoned explanation" for why they warranted approving destruction of the records. This is despite the fact that NARA was inundated with an "unprecedented number" of public comments—from historians, researchers, archivists, and others—stressing that the ICE detention records have substantial long-term research value for a host of reasons. *See* A.R. 200, 154; *infra* Part II.B.2. NARA largely ignored those concerns, and issued a decision wholly divorced from the social and historical context surrounding ICE's

controversial detention practices. Rather than showing the requisite "sensitivity to researchers' interests," Appraisal Policy § 1, NARA's decision reflects, at best, an attitude of indifference.

a. NARA's failure to sufficiently evaluate the research value of the ICE records manifested throughout its decisionmaking process. Most notably, in its final consolidated reply to public comments, NARA summarized at length commenters' concerns that "sufficient records will not be available for historical and human rights research," A.R. 15-17, but then provided a response devoid of any serious attempt to grapple with researchers' interests. Instead of engaging in a reasoned analysis of the pertinent appraisal policies outlined above, NARA recited some general appraisal principles and summarily determined that "the anticipated research use" of the ICE detention records "will be more contemporary rather than many years into the future." A.R. 17; *see also* A.R. 11 (concluding records have "little or no research value"). But merely "[n]odding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking." *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020); *see Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055-57 (D.C. Cir. 1986) (agency must provide more than "conclusory statements" to prove it "consider[ed] [the relevant] priorities"; merely "[s]tating that a factor was considered . . . is not a substitute for considering it").

Under its Appraisal Policy, NARA should have analyzed "the kinds and extent of current research use" of the ICE records by individuals engaged in historical and human rights research, and "tr[ied] to make inferences about anticipated use" based on how historians have utilized comparable immigration detention records in the past. *See* Appraisal Policy, App. 1. NARA's Approval Decision includes no such analysis, even though it received significant public comments on these points, *infra* Part II.B.2, and has itself recognized (outside of this case) that

comparable immigration detention records archived in its permanent collections are "considered priceless by historians, social scientists, and genealogists," *infra* Part II.B.3. NARA should have also considered the unique "significance" of the immigration enforcement "functions and activities performed by" ICE, the "business context within which the records are created," the fact that ICE is a relatively new federal agency at the center of a historically unprecedented surge in immigration detention, the "major social . . . issues" implicated by the agency's widely-condemned detention practices, and the substantial public interest generated by those practices. *See* Appraisal Policy, App. 1. Again, NARA addressed none of these critical points in its Approval Decision, despite receiving numerous comments raising them. *See infra* Part II.B.2. By failing to consider "relevant factors" and "important aspect[s] of the problem," *State Farm*, 463 U.S. at 43, and by disregarding its own appraisal policies, *Fox*, 556 U.S. at 515, NARA acted arbitrarily and capriciously. *See Webster*, 720 F.2d at 65-66 & n.61 (records disposal decision was arbitrary and capricious where it "reflect[ed] an insensitivity to research needs").

NARA repeatedly stressed that records appraised as temporary could be requested through FOIA, and that destruction of requested records would be forbidden while a FOIA request is pending. *E.g.*, A.R. 17. But this does nothing to address the long-term interests of historians and researchers, including Plaintiffs' members, who frequently seek records many decades after their creation—far beyond the temporary retention periods in the ICE Schedule. *See* Shull Decl. ¶ 11; Nofil Decl. ¶ 10; Grossman Decl. ¶ 7; Hoganson Decl. ¶ 7. Historians cannot obtain records through FOIA that have already been destroyed. NARA's failure to appreciate that point once again reflects its lack of "knowledge of and sensitivity to researchers' interests." Appraisal Policy § 1; *see also Webster*, 720 F.2d at 65-66 & n.61.

b. In addition to its overall failure to properly assess the research value of all records slated for destruction under the ICE Schedule, NARA separately erred in evaluating two specific categories of records: detainee segregation reports and DRIL Hotline records. A.R. 17. NARA characterized both categories as merely "involving decisions of lower-level federal officials about operational matters." *Id.* But this conclusion runs counter to substantial evidence before the agency showing that detainee segregation reports include valuable proof of ICE's recurring use of inhumane and abusive solitary confinement practices. *See, e.g.*, A.R. 80-82, 324-25, 350, 499-500. For instance, commenter Jenny Patino submitted an analysis by the Center for American Progress reporting that ICE has a policy or practice of "[p]lacing LGBT people in solitary confinement for their own protection" in violation of ICE's own detention standards and United Nations prohibitions on torture, and citing ICE data showing that "1 in 8 transgender people detained in FY 2017 were placed in solitary confinement." A.R. 80-82. Segregation reports, Patino explained, have "historical value . . . in terms of broader accountability and understanding [insofar] as they document the uses of solitary confinement in ICE detention." A.R. 80. Patino added that "[b]ecause of their essential long term historical value in documenting these violations and the treatment of detainees, especially those who are uniquely vulnerable due to disability or LGBTQ status in this dark period of our national history, it is vital that these records be given a permanent disposition." A.R. 80.

Similarly, the ACLU and partner organizations commented that segregation reports provide "a unique source of information about a governmental practice that has received widespread condemnation and is likely to change significantly in the coming decades." A.R. 499. Although ICE has implemented policies to limit and monitor the use of segregation with

the goal of preventing abuse, it remains to be seen "whether the monitoring process is working as contemplated." A.R. 499-500. And, critically, detainee segregation reports "may be the only source of agency records available to answer this question." A.R. 500. Their destruction could therefore "deprive future historians of information about how these practices did (or did not) change at a time of increasing public pressure." *Id.*; *see also* A.R. 350 (comment of LatinoJustice discussing ICE's history of abusive segregation practices, including allegedly "forcing 62,000 immigrant detainees to [either] work for $1/day" or be placed in "solitary confinement"); A.R. 324-25 (comment of The Constitution Project citing "[n]umerous recent lawsuits, news articles and human rights reports . . . alleg[ing] unlawful, inhumane, or excessive use of solitary confinement" by ICE).[3]

NARA wholly disregarded these concerns in finding that detainee segregation reports have "little or no research value" and merely document "decisions of lower-level federal officials about operational matters." A.R. 11, 17. In so proceeding, NARA "failed to consider an important aspect of the problem, offered an explanation for its decision that [ran] counter to the evidence before the agency," and made "a clear error of judgment." *State Farm*, 463 U.S. at 43.

NARA's characterization of the DRIL Hotline records was similarly flawed. In its first consolidated reply to public comments, NARA described these records as documenting complaints of "sexual or physical assault or abuse; serious or unresolved problems in detention;

[3] The DHS OIG has also repeatedly cited ICE for abusive segregation practices. *See, e.g.*, DHS OIG Report, Concerns about ICE Detainee Treatment and Care at Detention Facilities, OIG-18-32, at 1, Dec. 11, 2017, https://bit.ly/2wzaoZr; DHS OIG Report, Concerns About ICE Detainee Treatment and Care at Four Detention Facilities, OIG-19-47, at 1, June 3, 2019, https://bit.ly/37L2k4Y.

[and] reports of victims of human trafficking;" as well as how ICE telephone operators "assist[ed] with resolution" of those complaints. A.R. 160. That description cannot in good conscience be squared with NARA's ultimate conclusion that the records only document "decisions of lower-level federal officials about operational matters." A.R. 17. For NARA to say records documenting claims of sexual and physical violence against individuals in ICE custody merely concern "operational matters" plainly runs "counter to the evidence before the agency" and reflects "a clear error of judgment." *State Farm*, 463 U.S. at 43.

2. NARA Failed to Address Significant and Relevant Public Comments

As noted, an agency "must respond" to "significant" and "relevant" public comments—*i.e.*, "comments 'that can be thought to challenge a fundamental premise' underlying the proposed agency decision." *Carlson*, 938 F.3d at 344. And the agency's response "must be sufficient to enable the courts 'to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'" *Id.* The administrative record reveals several instances where NARA fell short of these obligations.

First, NARA failed to respond to several significant and relevant comments discussing the anticipated historical value of the ICE records. For example, a letter signed by 28 members of Congress stressed that "the relatively recent government restructuring of our immigration agencies, the increased centrality of immigration in American public debate, and strong congressional attention to this issue indicate that the treatment of immigrants will be of high historical and research value to future scholars and legislators interested in understanding our country's actions during this moment in time." A.R. 485-86 & n.9 (citing Appraisal Policy). NARA's Approval Decision did not address these concerns. And even where NARA attempted

to respond to similar comments, it failed to actually address the points raised. For instance, NARA's final consolidated reply quoted a comment by Andrew Harman stating that the ICE records are needed "to complete the historical record" given the "growing media coverage of the mistreatment of detainees by ICE in detention facilities," which "several historians have shown . . . fit any rational definition of concentration camps." A.R. 22. NARA's response failed to address this point, focusing instead on a separate issue regarding whether the prospect of future legislation warranted continued preservation of the ICE records. A.R. 22-23; *see also* A.R. 21-22 (quoting similar comment regarding the ICE records' "potential to shed light on a major political, social and cultural controversy of our time," but failing to address that concern in its response). Because these comments all challenged the "fundamental premise" that the ICE records have "little or no research value," A.R. 11, NARA's deficient responses to them were arbitrary and capricious. *See Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 449 (D.C. Cir. 2012) (agency acted arbitrarily and capriciously by summarizing public comments but then failing to respond to points raised).

Second, as discussed above, NARA failed to address several comments describing the research and historical value of detainee segregation reports. *See supra* Part II.B.1; A.R. 80-82, 324-25, 350, 499-500. Those comments persuasively challenged, with supporting evidence, the "fundamental premise" that detainee segregation reports have "little or no research value." A.R. 11. Yet NARA ignored them.

Third, NARA failed to address a particularly significant and relevant submission by two Durham University research professors, Dr. Sarah M. Hughes and Dr. Lauren L. Martin. *See* A.R. 86-102. Echoing Plaintiffs' concerns here, the professors highlighted the "research value

for social scientists and legal scholars" of records "documenting patterns of behavior, human rights concerns and abuse in [ICE] detention." A.R. 90. They explained that the records covered by the ICE Schedule have allowed them to "identify key incidents and, most importantly, wide variation in reporting, record-keeping, and monitoring." *Id.* They added that the records "are already used in research and are essential to research on U.S. immigration detention facilities" and that destroying them would therefore "have a demonstrable and negative impact upon academic research in this field." *Id.* With their comment, the professors submitted a research paper entitled "Countermapping Detention" that relies on the ICE records slated for destruction in order to "visualis[e] patterns of abuse," and contribute to "methodological and theoretical debates in political geography, migration studies, and interdisciplinary research on camps, detention, and borders." A.R. 90-102. This is precisely the type of relevant, unique, and well-informed comment that NARA was obligated to address. It did not.

Fourth, NARA failed to respond to comments attesting to the research utility of having certain accumulations of records compiled in a single place. *See* A.R. 111 (comment of the Archivists Round Table of Metropolitan New York ("ART") noting that while "NARA states that 'most if not all' . . . of the records accumulated in the ERO Death Review files are already scheduled elsewhere," this "fragmentation of documentary evidence will place undue and unnecessary burden on the researcher to find and compile information from various places"); *id.* (making similar observation regarding DRIL Hotline records, which "could have a high research value as a complete data set"); A.R. 496 (comment of ACLU noting that death review files are a "high-value accumulation of hard-to-find documentary material" that are "compiled from many different sources that would not otherwise be stored in a single place"). These comments echo

NARA's Appraisal Policy, which provides that "NARA may decide to retain records that contain information available elsewhere *in the case of records that are more complete or more easily accessible than the alternative source*." Appraisal Policy, App. 1 (emphasis added). Here again, NARA quoted ART's comments without actually responding to the points raised, *see* A.R. 18-19, 21-22, rendering its action arbitrary and capricious, *see Duncan*, 681 F.3d at 449.

Fifth, NARA profoundly misinterpreted comments comparing the historical significance of ICE detention to the internment of Japanese-Americans during World War II, stating that "[w]hile ICE detains aliens on the basis of immigration status, Japanese internment involved the detention of U.S. citizens on the basis of ethnicity or national origin." A.R. 18. NARA missed the point entirely: commenters analogized ICE detention to historical examples of internment and concentration camps based not on similarities in the *basis* for detention, but in the punitive *conditions* of that detention and the fact that they involved governmental mistreatment of marginalized populations. *See, e.g.*, A.R. 53 (comment asserting that both Japanese-American internees and ICE detainees "suffered human rights abuses *while in the custody of the U.S. government*") (emphasis added); A.R. 33 (comment comparing ICE detention conditions to concentration camps); A.R. 463 (same); A.R. 47 (same); A.R. 286 (comment of Professor Satsuki Ina, a former detainee in a "World War II prison camp," comparing internment to ICE detention and urging NARA not to allow ICE "to delete the truth of how ICE has conducted their official business"); *see also* A.R. 349 (comment of LatinoJustice noting that ICE's disregard for "human rights of undocumented immigrants . . . has had a disparate impact on Latinos in particular"). By focusing on the basis for detention rather than the government's mistreatment of detainees, NARA arbitrarily and capriciously "misinterpreted the concerns raised by the

comments." *Duncan*, 681 F.3d at 449. And insofar as NARA deemed the citizenship status of the detainees a dispositive factor, it disregarded that records documenting human rights abuses committed by federal officials provide valuable "evidence of Federal . . . actions relating to major social . . . issues" and "evidence of the significant effects of Federal programs and actions on individuals" and "communities," Appraisal Policy, App. 1, regardless of whether the victims of that abuse are U.S. citizens or non-citizens.[4]

3. NARA Disregarded that Historical Predecessors of the ICE Records are Archived in NARA's Permanent Collections

Another relevant point NARA ignored is that immigration records strikingly similar to the ICE records are permanently archived in NARA's Record Group 85, Records of the Immigration and Naturalization Service. *See* NARA, Record Group 85 (1787-1993), https://bit.ly/2TkHghK. Record Group 85 includes records documenting INS's enforcement of the Chinese Exclusion Acts, records of World War I and II internment camps, and local case files from INS district offices concerning individual immigrant detainees. *See id.* Much like the ICE records, the Record Group 85 records include "[d]aily activity reports of immigrant inspectors," records of immigrants' "detainment," and "[i]mmigration investigation case files." *Id.* Outside of this case, NARA has acknowledged that immigration records in Record Group 85 are "now considered priceless by historians, social scientists, and genealogists," even though they were

[4] NARA's reasoning was also factually inaccurate to the extent it suggests that Japanese internment *only* "involved the detention of U.S. citizens." A.R. 18. Approximately one-third of internees were non-citizens. *See* National Park Service, A Brief History of Japanese American Relocation During World War II, https://bit.ly/32GDDI3; NARA, Japanese-American Internment During World War II, https://bit.ly/30yh19R.

erroneously "thought by some [in government] to have little or no future value fifty years ago." NARA San Francisco, Record Group 85, https://bit.ly/2TN7Ij9.

The connection between the ICE records at issue here and the INS records in Record Group 85 should have been readily apparent to NARA, but even if it was not, commenters flagged it. *E.g.*, A.R. 201 (comment of archivist association Reclaim the Records, noting that "NARA permanently keeps all sorts of records for other Internment camps in American history, even the seemingly-mundane records about their day-to-day operation."). The administrative record also indicates that NARA staff appreciated there was at least some connection between ICE and INS records. *See, e.g.*, A.R. 147 (letter from NARA Chief Records Officer clarifying that "ICE . . . is not using legacy . . . INS . . . records schedules for disposition of" the records covered by the ICE schedule); A.R. 271 (email from NARA appraiser confirming ICE was not using legacy INS records schedules). Yet NARA's Approval Decision reflects no awareness of the connection between the ICE records and permanent INS records, nor any consideration of the extent to which that connection was material to the agency's appraisal analysis.

In failing to consider the relevance of Record Group 85 (or indeed any of NARA's prior pertinent appraisal decisions), NARA arbitrarily and capriciously disregarded a "relevant factor," *State Farm*, 463 U.S. at 43, and departed from prior agency practice without explanation, *see ABM Onsite Servs.-W., Inc. v. NLRB*, 849 F.3d 1137, 1142 (D.C. Cir. 2017) ("[A]n agency's unexplained departure from precedent is arbitrary and capricious."). NARA also ignored its Appraisal Policy, which requires consideration of whether records being appraised are "related to other permanent records," and states that "[r]ecords that are chronological continuations of records already in the National Archives are likely to warrant permanent retention, particularly"

where, as here, "the older segments of the records are subject to high reference use." Appraisal Policy, App. 1. NARA's Approval Decision reflects no consideration or even awareness of this policy guideline, reinforcing that its decision was arbitrary and capricious.

4. NARA Failed to Sufficiently Consider the Research Value of Primary Source Material

A recurring theme of NARA's Approval Decision was that records documenting, or qualifying as, primary sources need not be retained permanently because similar information is captured in secondary summaries or other downstream records prepared by ICE officials scheduled for permanent or "long-term temporary" retention. But NARA's reasoning overlooks that primary source material often has distinct research and historical value that secondary summaries lack. As the D.C. Circuit once explained in deeming NARA's approval of a records disposition schedule arbitrary and capricious, NARA's "assumption that [agency] summaries are always sufficient to maintain all information" fails to appreciate that "[i]n certain cases that invoke substantial public or historical interest, it will be valuable for researchers to examine primary source material instead of relying on secondary source summaries," and that in "some cases, summaries cannot be trusted to address all important research issues that may arise, especially when the summaries are prepared with the [agency's] objectives in mind." *Webster*, 720 F.2d at 66 n.61; *see also id.* at 65 (NARA and proposing agency acted arbitrarily and capriciously by failing to explain how "summaries" of "original documents" slated for

destruction "account[ed] in some reasonable fashion for historical research interests," and "not just the [agency's] immediate, operational needs").

NARA committed this error in approving destruction of several categories of ICE records. For instance, NARA approved destruction of sexual abuse and assault files, ERO detainee death review files, detention monitoring reports, and detainee escape reports partly because "significant events" from those records would also be documented in downstream reports lodged in ICE's "Significant Event Notification System [("SEN")], a long-term temporary record whose master file is already scheduled . . . for a 75-year retention period." A.R. 20, 21, 157-60, 172-75, 177. Yet NARA failed to consider that "SEN's primary purpose" is not to maintain complete records sufficient to serve the long-term interests of historians and researchers, but rather to serve *ICE's* immediate operational needs of "disseminat[ing] information to relevant management and interdivisional personnel about events to allow them to respond by allocating appropriate resources and facilitating appropriate responses to significant events." DHS Privacy Impact Assessment for SEN System, July 26, 2010, https://bit.ly/2uEOzHx. NARA's failure to address this disconnect was arbitrary and capricious. *See Webster*, 720 F.2d at 65-66 & n.61. NARA likewise erred in failing to consider that the SEN records' temporary retention period of 75 years is insufficient to meet the needs of immigration historians, including Plaintiffs' members, who routinely rely on source material dating back well over 100 years. *See, e.g.*, Nofil Decl. ¶¶ 5, 10; Hoganson Decl. ¶ 7a.

In rejecting commenters' concerns about the insufficiency of SEN records to meet long-term research needs, NARA explained that its Appraisal Policy deems "documentation of high-level federal decision-making more archivally significant" than first-hand accounts of detainees

and, conversely, does not value "'information that came straight from the detainees' over records not 'filtered' by the agency." A.R. 22. Rather, NARA reasoned that "complaints that proceed through agency processes are more, not less, likely to meet criteria for permanent retention because they reflect more thorough investigation and assessment." *Id.* But NARA cited no provision in its Appraisal Policy or any other appraisal guidance actually supporting this reasoning, and thus failed to "articulate a satisfactory explanation for its action." *State Farm*, 463 U.S. at 43. Meanwhile, the Appraisal Policy does clearly require NARA to exercise "sensitivity to researchers' interests." Appraisal Policy § 1. NARA showed no such "sensitivity" when it summarily dismissed commenters' concerns about the research value of the ICE records as primary source material, with no analysis of whether the SEN records would sufficiently serve researchers' interests. *See Webster*, 720 F.2d at 65-66 & n.61.

Similarly, NARA approved destruction of the DRIL Hotline records because "documentation of significant incidents will be captured in records [scheduled elsewhere] specific to the type of allegation being made." A.R. 160, 178. But here again, NARA disregarded the long-term research interests in the DRIL Hotline records that would not be served by downstream "documentation of significant incidents." ART commented that the DRIL Hotline records "could have a high research value as a complete data set" because even though "some of the reporting in the DRIL records may be documented in other places, as a body of records the[y] could be useful for studying detention practices, including the percentage of

individuals detained versus monitored, and how such decisions were made." A.R. 21, 111.[5] Indeed, if maintained "as a complete data set," the records could enable assessments of the DRIL Hotline itself, by allowing researchers to identify the number and nature of complaints ICE received through the DRIL Hotline, and how ICE acted on those complaints. That sort of analysis could not be conducted—or, at least, would be significantly impeded—using only the downstream "documentation of significant incidents . . . in records specific to the type of allegation being made." A.R. 160, 178. NARA's failure to consider these points (as well as its failure to respond to the public comments raising them, *see supra* Part II.B.2) was arbitrary and capricious.

5. NARA's Explanation for Approving Destruction of the ERO Detainee Death Review Files was Deficient for Several Reasons

When a detainee dies in ICE custody, ERO is the "first office that investigates [the] death," after which ICE's Office of Professional Responsibility ("OPR") "conducts its own investigation and analysis." A.R. 12. As part of these responsibilities, both ERO and OPR "create and maintain Death Review Files." A.R. 157. "While the ERO Death Review File is a comprehensive accumulation of all source documentation related to the individual and his or her

[5] *See also* Shull Decl. ¶ 8 (citing report on sexual assault in ICE detention that relied on DRIL Hotline records); American Immigration Council, FOIA Request to ICE, at 7, 14-16, Feb. 18, 2020, https://bit.ly/32zba4N (noting that data from DRIL Hotline records have provided "valuable information related to the incidence of sexual and physical abuse in immigration detention, grievances regarding lack of access to legal counsel and basic immigration case information, and may also provide important insight regarding challenges faced by parents separated from their minor children by immigration officials") (citing sources).

encounters with immigration agencies, the OPR Death Review is a focused examination and analysis of the circumstances surrounding the death." A.R. 175.

"At the beginning of its process, ERO asks the facility where the death occurred to supply all records the facility has on the detainee who died," and "incorporates . . . everything the facility sends" into "its death review file." A.R. 157-58. ERO's death review file "typically includes the death certificate; a memorandum of issue ERO creates for the Executive Associate Director of ERO summarizing findings; background on the detainee and his or her arrest; the removal order statement; consular notification information; the autopsy exam report; the toxicology report; ERO's corrective action plan based on the OPR report; a copy of the Significant Incident Report (SIR) from the [SEN] System; and correspondence between ERO and the facility where the detainee died." A.R. 158. The file may also include "a copy of the detainee's medical file," an "ICE Health Service Corps incident report, and the detainee's telephone call history." *Id.*

In approving destruction of the ERO death review files, NARA reasoned that it had separately appraised the OPR death review files for permanent retention, and that preserving both files "would be unnecessarily duplicative." A.R. 19. NARA "determined that the OPR death review files are the most informative, because they include a higher level analysis of the event by ICE investigators," whereas the ERO death review files consist of "materials gathered from disparate sources that are . . . mostly temporary records." *Id.*

NARA's explanation was deficient in several respects. For starters, NARA failed to consider that there is substantial public and research interest in *any* records concerning individuals who die in ICE custody, regardless of whether the records "relate[] to the detainee's

death." A.R. 158. That is because the records, even if initially lacking archival value, take on new significance as a result of the extraordinary event of an individual's death in ICE custody. Once that extraordinary event has occurred, there is considerable interest in the "comprehensive accumulation of all source documentation related to the individual and his or her encounters with immigration agencies" compiled in the ERO file. A.R. 175; *see* A.R. 496 (comment of ACLU noting that detention death "investigation files have received widespread attention from the media and are recognized as a uniquely important resource by human and civil rights defenders, immigrants' rights advocates and journalists").

NARA also failed to consider that the ERO file possesses research value that the OPR file lacks. By accessing the ERO file's "comprehensive accumulation of . . . source documentation" relating to the deceased individual, researchers can independently evaluate "the complete picture of the events surrounding the deaths of individuals in Federal custody," A.R. 111 (comment of ART), rather than just the results of OPR's "focused examination," A.R. 175. And since records in the ERO death review file are "mostly" scheduled elsewhere as "temporary records," A.R. 19, destroying the ERO file would result in an irretrievable loss of information that would impede future efforts by historians and researchers to fully examine the circumstances of a detainee's death. NARA's failure to address these points was arbitrary and capricious. *See Webster*, 720 F.2d at 65-66 & n.61 ("[T]he APA requires . . . [a] reasoned justification explaining why" underlying "source material" and "investigative data" should "be destroyed under the preservation standard of § 3101 and the disposal standard of § 3303a" that "account[s] in some reasonable fashion for historical research interests").

As noted *supra* Part II.B.2, NARA also disregarded comments attesting to the research utility in having all the source documentation accumulated in the ERO death review file compiled in one place. *See* A.R. 111 (ART comment); A.R. 496 (ACLU comment). NARA's failure to address these concerns is yet another example of its "insensitivity to research needs." *Webster*, 720 F.2d at 65-66 & n.61.

Finally, NARA disregarded that some particularly valuable contents of the ERO death file are not captured in either the OPR death file or seemingly any other permanent record, including both "ERO's corrective action plan based on the OPR report," and "correspondence between ERO and the facility where the detainee died." A.R. 157-58. These records could shed light on issues of considerable long-term research value, including what programmatic "corrective" actions, if any, ERO took in response to OPR's death review, and how ERO handled the initial death investigation before OPR conducted its own review. NARA's failure to consider these "relevant factors" in approving destruction of the ERO death review files was arbitrary and capricious. *State Farm*, 463 U.S. at 43.

6. NARA Disregarded its Appraisal Policies on "Periodic Reports" in Approving Destruction of ICE's Detention Monitoring Reports

In approving destruction of ICE's detention monitoring reports, A.R. 6, NARA disregarded its relevant appraisal guidance on "periodic reports" without acknowledgment or explanation. That guidance lists, as a type of record "normally appraised by NARA for permanent" retention, "periodic reports prepared by the agency, or by private organizations or individuals under contract to the agency or in receipt of a grant from the agency." NARA, Examples of Series Commonly Appraised as Permanent, https://bit.ly/39VaIjO. "Regional

reports prepared by field offices and forwarded to the agency's headquarters are frequently permanent because they contain information on ethnic, social, economic, or other aspects of specific localities." *Id.*

ICE's detention monitoring reports readily fit NARA's criteria for periodic reports. The ICE Schedule itself describes the records as "*periodic reports* on detention operations," A.R. 11 (emphasis added), and further specifies they are "weekly reports" filed with ERO at ICE Headquarters documenting "on-site monitoring of detention facilities for appropriate and timely resolution of problems and concerns," A.R. 6. The reports are prepared by Detention Service Monitors, who "support oversight of ICE's largest facilities, soliciting feedback from local and regional staff." A.R. 159. Monitors are placed in "52 [ICE] detention facilities" and serve the "program goals" of "monitor[ing] compliance with applicable detention standards, enabl[ing] 'on the spot' resolution of facility issues, ensure regular inspection checks, and enhance collaboration with ERO field offices and facility staff to address concerns." DHS OIG Report, ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements, OIG-18-67, at 14, June. 26, 2018, https://bit.ly/2D3GJuV; *see also* DHS OIG, ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards, OIG-19-18, at 8, Jan. 29, 2019, https://bit.ly/306cLOs ("[F]rom October 2015 to June 2018 various inspections and [Detention Service Monitors] found 14,003 deficiencies at . . . 106 [ICE] contract facilities," including "deficiencies . . . that jeopardize the safety and rights of detainees, such as failing to notify ICE about sexual assaults and failing to forward allegations regarding misconduct of facility staff to ICE ERO").

NARA's outright failure to consider its appraisal guidelines on periodic reports in approving destruction of the detention monitoring reports was arbitrary and capricious. *See Fox*, 556 U.S. at 515 (arbitrary and capricious for agency to "simply disregard rules that are still on the books"); *Perdue*, 873 F.3d at 923 n.3 (agency must "supply a reasoned analysis indicating that prior policies and standards are . . . not casually ignored").

7. NARA Failed to Provide any Assessment of Volume or Cost Issues Associated with Permanent Retention, Despite Citing "Resource Considerations" as a Basis for Approving the ICE Schedule

NARA cited "resource considerations" as grounds for approving destruction of the ICE records. A.R. 17. Yet nowhere in NARA's Approval Decision did it provide any assessment of either the potential volume of ICE records at issue or the costs associated with permanent retention. Although NARA's Appraisal Policy only calls for such considerations in "marginal" cases, *see* Appraisal Policy, App. 1, once NARA decided to cite "resource considerations" as a basis for its decision, it undertook an obligation under the APA to provide a "reasoned explanation" for that decision by "examin[ing] the relevant data and articulat[ing] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43. Because NARA failed to provide any underlying assessment of volume or cost issues in support of its conclusion that "resource considerations" weighed in favor of approving the ICE Schedule, that conclusion lacked a reasoned foundation and was therefore arbitrary and capricious.

CONCLUSION

The Court should grant Plaintiffs' motion for summary judgment.

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Respectfully Submitted,

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