IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE Plaintiff, v. REX W. TILLERSON, in his official capacity as Secretary of State of the United States, and DAVID S. FERRIERO, in his official capacity as Archivist of the United States, Defendants.	Case No. 16-cv-02145 (TNM) ORAL HEARING REQUESTED

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Federal Records Act ("FRA") obligates an agency head and the Archivist of the United States to initiate action through the Attorney General to recover unlawfully removed federal records. Applicable case law holds that this obligation is non-discretionary. At the same time, the law permits a private litigant, such as Cause of Action Institute ("CoA Institute"), to file suit under the Administrative Procedure Act ("APA") to compel an agency head or the Archivist to fulfill their statutory obligations under the FRA, if those obligations are ignored.

In this case, the Secretary of State and the Archivist (collectively, "Defendants") have failed to perform their mandatory, non-discretionary obligations under the FRA to initiate action through the Attorney General for the recovery of former Secretary of State Colin Powell's work-related email records. During Secretary Powell's tenure at the Department of State ("State Department"), his work-related email records were maintained on a private email account hosted by AOL, Inc. ("AOL"). Secretary Powell never contemporaneously saved those records to any agency recordkeeping system, nor did he tender the electronic records or paper copies to the State Department upon his departure from the agency. As Secretary Powell's work-related emails remain outside the possession, custody, and control of the State Department, they constitute unlawfully removed records within the meaning of the FRA.

To date, Defendants have undertaken meagre recovery efforts that have proven entirely ineffectual. None of Secretary Powell's work-related email records have been recovered. And Defendants have not proven their fatal loss—the only exception in this case that would excuse their intransigence. Now is the time to involve the Attorney General, the highest law enforcement authority of the federal government, as contemplated and required by the FRA. But throughout these proceedings, which have now been pending for more than fifteen months, Defendants have

insisted that the matter is closed and requires no further action. CoA Institute is therefore entitled to judgment as a matter of law. Judicial intervention is required to compel Defendants to meet their statutory obligations to initiate action through the Attorney General for the recovery of Secretary Powell's work-related email records.

Pursuant to Local Rule 7(f), and to serve the interests of the Court in resolving this motion, CoA Institute respectfully requests an oral hearing on this motion.

LEGAL BACKGROUND

The FRA refers to the "collection of statutes and regulations that govern the creation, management, and disposal of records by federal agencies." *Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999); *see* 44 U.S.C. chs. 21, 29, 31, 33; 36 C.F.R. pts. 1220–39. Congress enacted the FRA to ensure the "[a]ccurate and complete documentation of the policies and transactions of the Federal Government" and the "[j]udicious preservation and disposal of records." 44 U.S.C. § 2902(1), (5); *see Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 36 (D.C. Cir. 1983) (The FRA "establish[es] a unified system for handling the 'life cycle' of federal records—covering their creation, maintenance and use, and eventually their disposal by either destruction or deposit for preservation.").

Among other things, the FRA requires an agency head to "establish and maintain an active, continuing program for the economical and efficient management of the records of [his] agency." 44 U.S.C. § 3102.[1] This entails establishing "safeguards against the removal or loss of records[.]"

[1] At all times relevant to this lawsuit, the FRA defined a "record" to include any material, "regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them[.]" 44 U.S.C. § 3301 (2000); 36 C.F.R. § 1220.18 (2000). The current statutory definition of a "record" is nearly identical to the one in force during Secretary Powell's tenure at the State Department. *See* 44 U.S.C. § 3301(a)(1)(A).

Id. § 3105.[2] To accomplish these goals, the Archivist—as the head of the National Archives and Records Administration ("NARA")—assists agencies in maintaining documentation of policies and transactions, as well as issuing standards, procedures, and guidelines with respect to records management. *Id.* § 2904.

The FRA further requires that "[t]he head of each Federal agency" promptly "notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency[.]" *Id.* § 3106(a). "Unlawful removal" is defined as "selling, donating, loaning, transferring, stealing, or otherwise allowing a record to leave the custody of a Federal agency without the permission of the Archivist[.]" 36 C.F.R. § 1230.3(b).

In addition to notification—and as relevant to this case—if an agency fails to recover alienated records through its own remedial recovery efforts, the agency head, with the assistance of the Archivist, "*shall* initiate action *through the Attorney General* for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed[.]" 44 U.S.C. § 3106(a) (emphasis added). If an agency head fails to satisfy this obligation, the Archivist must do so in his stead and "notify the Congress when such a request has been made." *Id.* §§ 2905(a), 3106(b).

As this Court has recognized, the obligation to initiate action through the Attorney General after remedial recovery measures have failed is *mandatory* and not subject to agency discretion. Mem. Op. at 3 (ECF No. 24) ("[T]he FRA directs specific rather than discretionary action[.]"). The D.C. Court of Appeals has now twice insisted that the obligation is mandatory, too. *See*

[2] The FRA prohibits the unauthorized alienation or destruction of records, 44 U.S.C. § 3314, and the unlawful removal of records from the custody and control of an agency. *Id.* §§ 2905(a), 3105–06. The FRA similarly prohibited unlawful alienation, destruction, and removal of federal records during Secretary Powell's tenure at the State Department. 44 U.S.C. §§ 3105–06 (2000).

Judicial Watch, Inc. v. Kerry, 844 F.3d 952, 954 (D.C. Cir. 2016) [hereinafter *Judicial Watch*]; *id.* at 956 ("[W]hen records go missing, the *something* required by the statute is a referral to the Attorney General by the agency head and/or the Archivist. . . . [W]e never implied that where . . . initial efforts failed to recover all the missing records (or establish their fatal loss), the agency could simply ignore its referral duty. That reading [of the FRA] would . . . carve out enormous agency discretion from a supposedly mandatory rule."); *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991) [hereinafter *Armstrong I*] ("[T]he FRA enforcement provisions leave *no* discretion to determine which cases to pursue[.]"), *rev'd on other grounds sub nom. Armstrong v. Exec. Office of the President*, 90 F.3d 553 (D.C. Cir. 1996).

FACTS

During his tenure as Secretary of State (January 20, 2001 – January 26, 2005), Colin Powell used a personal email account to conduct official State Department business. Pl.'s Statement of Undisputed Material Facts ¶ 1 [hereinafter SUMF]. Although Secretary Powell's email account was hosted by AOL—a private internet and email service provider, SUMF ¶ 2—all work-related email records created or received on the account qualified as "federal records" under the FRA and should have been designated for permanent preservation. *Id.* ¶ 3; *see* Mem. Op. at 2 (citing 5 FAM 415.1 (Sept. 17, 2014)).

Yet Secretary Powell never contemporaneously saved copies of his work-related email to an official State Department record keeping system, and he failed to provide the State Department with either electronic or paper copies of his work-related email upon his departure from the agency. SUMF ¶¶ 4–5. Considered together, these acts constitute the unlawful removal of federal records in violation of the FRA and State Department policies. *Id.* ¶ 6.

Although Secretary Powell left office in January 2005, it was not until November 2014 that the State Department contacted Secretary Powell's representative, Peggy Cifrino, to request that Secretary Powell provide the State Department with copies of all federal records in his possession, custody, or control, including all "email sent or received on a personal email account[.]" *Id.* ¶ 7. Neither Ms. Cifrino nor Secretary Powell returned any federal records in response to the State Department's request. *Id.* ¶ 8.

Shortly thereafter, in March 2015, NARA contacted the State Department to express its "concern[] that Federal records [from Secretary Powell's tenure] may have been alienated from . . . official recordkeeping systems." *Id.* ¶ 9. NARA asked the State Department to "explore this matter" and report on its plan to "to retrieve the alienated records." *Id.* Over the course of the following year, the State Department and NARA exchanged multiple letters concerning the status of Secretary Powell's email records. *Id.* ¶¶ 10–14. Although NARA increasingly sought more aggressive recovery efforts, such as contacting AOL directly, *see, e.g.*, *id.* ¶ 14, the State Department ultimately sent only two more letters to Ms. Cifrino and never contacted AOL itself. *Id.* ¶¶ 12–17.

The State Department's "anemic" recovery efforts, *see* Mem. Op. at 2, appeared to come to a head on September 8, 2016, when then-Under Secretary for Management Patrick F. Kennedy testified before the U.S. House of Representatives Committee on Oversight and Government Reform ("OGR") that the State Department never directly contacted AOL, despite NARA's request to do so, because the agency believed it lacked the legal authority to "make a request for someone else's records[.]" SUMF ¶ 15. The next week, NARA clarified to the contrary "that, in accordance with the [FRA] at 44 U.S.C. [§] 3106, the [State] Department has authority to seek the

recovery of Federal records from outside parties." *Id.* ¶ 16.[3] NARA further advised that if AOL refused to grant the State Department access to Secretary Powell's account, the agency could "request that the Attorney General initiate action to recover the records" at issue. *Id.*

On September 26, 2016, the State Department wrote its last letter to Ms. Cifrino to request that Secretary Powell contact AOL. *Id.* ¶ 17. On September 28, 2016, Ms. Cifrino sent an email to the State Department stating that someone from AOL had informed her that someone else from AOL's "office" had called "Mr. Andrew Dockham," a staffer at OGR, "to advise him that there are no emails in the AOL system from General Powell's tenure as Secretary of State." *Id.* ¶ 18. Ms. Cifrino did not provide any evidence to support that such a call between AOL and OGR had, in fact, been made or to support the assertion that AOL did not possess and, by implication, could not recover Secretary Powell's work-related email records.[4] *Id.* ¶ 19.

By letter, dated November 6, 2016, the State Department reported to NARA that "Julie Jacobs, the General Counsel of AOL had informed Secretary Powell's office that the AOL General Counsel's office had advised [OGR] that there are no emails in the AOL system from former Secretary Powell's tenure as Secretary of State." *Id.* ¶ 20. NARA, for its part, had already been notified of Ms. Cifrino's September 28, 2016 email over a month earlier. *Id.* ¶ 21.

To date, the State Department has made no further effort at recovery beyond sending the three letters to Ms. Cifrino, and Defendants have failed to recover a single work-related email record from Secretary Powell's AOL account. *Id.* ¶ 22. Moreover, since the filing of this lawsuit, Defendants have represented to this Court that they consider the matter of Secretary Powell's

[3] The State Department has since clarified that it has the authority to directly contact AOL to recover Secretary Powell's work-related e-mail records. *See* Mem. Op. at 11 n.5.

[4] Upon learning of Ms. Cifrino's email, NARA General Counsel Gary Stern appeared surprised that after AOL allegedly contacted OGR, the Committee "[n]onetheless" sent a formal written request for AOL's cooperation in "search[ing]" for Secretary Powell's email. SUMF ¶ 21. The disposition of the OGR request is unknown. Mem. Op. at 5 n.2.

work-related email records closed and have no intention of making any further recovery efforts on their own or, alternatively, initiating action through the Attorney General for such recovery. *Id.* ¶ 24.

PROCEDURAL HISTORY

CoA Institute filed this lawsuit on October 26, 2016 against Defendants for failure to fulfill their statutory obligations to initiate action through the Attorney General to recover Secretary Powell's work-related email records and to compel Defendants to carry out their nondiscretionary obligations and notify Congress of the same. *See* Compl. ¶¶ 1, 60–72 (ECF No. 1).

On February 28, 2017, Defendants moved to dismiss the Complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject-matter jurisdiction. *See* Defs.' Mot. to Dismiss & Mem. in Supp. of Defs.' Mot. to Dismiss (ECF No. 16) [hereinafter MTD]. Defendants argued that CoA Institute lacked standing because it had "failed to establish that the relief requested . . . is likely to redress Plaintiff's injury." *Id.* at 1; *see* Defs.' Reply in Supp. of Defs.' Mot. to Dismiss at 2–5 (ECF No. 18) [hereinafter Reply].

CoA Institute opposed the motion to dismiss on the ground that Defendants had "misread the nature of their mandatory obligations under" the FRA, relied on "inadmissible hearsay," and failed to prove that "there are no federal records left to be recovered." Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss at 8–9 (ECF No. 17) [hereinafter Opp'n]. CoA Institute also argued that Defendants had improperly interpolated a "knowledge requirement" into the standard triggering the obligation to initiate a recovery action through the Attorney General under 44 U.S.C. § 3106(a). *See* Pl.'s Sur-reply in Opp'n to Defs.' Mot. to Dismiss at 5–6 (ECF No. 21) [hereinafter Sur-reply].

On December 21, 2017, the Court held a hearing on Defendants' motion to dismiss and then issued an order denying it on January 9, 2018. *See* Mem. Op. The Court determined that

CoA Institute had "carried its burden of showing a substantial likelihood that the requested relief will redress its injury." *Id.* at 2. Specifically, the Court pointed to Defendants' "anemic" efforts to recover Secretary Powell's work-related email records, *id.* at 2, 11–12; their "refusal to turn to the law enforcement authority of the Attorney General," *id.* at 12; and their unjustified discounting of successful recovery efforts in similar cases, including when "emails . . . had been deleted." *Id.* at 13. Defendants filed their Answer on February 2, 2018. *See* Answer (ECF No. 27).

STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgement as a matter of law." Fed. R. Civ. P. 56(a). "That can be the case when, for example, the parties agree about the facts—what happened—and the court accepts the movant's view of the legal implications of those facts[.]" *Johnson v. Perez*, 823 F.3d 701, 705 (D.C. Cir. 2016). Although a court should view all relevant "evidence in the light most favorable to the nonmoving party . . . and draw all reasonable inferences in his favor," it cannot reject "uncontroverted fact." *Id.* Indeed, "[i]t is not sufficient . . . for the nonmoving party to establish 'the mere existence of a scintilla of evidence in support of [its] position.'" *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 35 (D.D.C. 2000) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)) (original brackets omitted). "'There must be evidence on which [a] jury could reasonably find for the [nonmovant].'" *Id.* (same).

The APA provides that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1). Such review entails an examination of "(1) whether the agency has violated its statutory mandate by failing to act . . . , or (2) whether the agency's delay in acting has been unreasonable[.]" *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283–84 (D.C. Cir. 1981) (citing *Ass'n of Am. R.R.s v. Costle*, 562 F.2d 1310, 1321 (1977) and

Nader v. Fed. Commc'ns Comm'n, 520 F.2d 182, 206 (1975)). Judicial relief is available "only where the law makes 'a specific, unequivocal command,' and the requirement is for a 'precise definite act about which an official has no discretion whatever.'" *Skalka v. Kelly*, 246 F. Supp. 3d 147, 152 (D.C. Cir. 2017) (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004)). "The recovery provisions of the [FRA] fit that bill because they 'leave [the agency head and Archivist] *no* discretion to determine which cases to pursue." *Judicial Watch*, 844 F.3d at 954 (citing *Armstrong I*, 924 F.2d at 295); *see Armstrong v. Exec. Office of the President*, 810 F. Supp. 335 (D.D.C. 1993) [hereinafter *Armstrong v. EOP*] ("Injunctive relief under § 706(1) of the APA is appropriate [in the FRA context] where a reviewing court concludes that the 'defendant official has failed to discharge a duty that Congress intended him to perform.'"), *aff'd in part, rev'd in part*, 1 F.3d 1274 (D.C. Cir. 1993).

During oral argument on the motion to dismiss in this case, opposing counsel repeatedly suggested that the appropriate standard under the APA on the merits was whether Defendants' failure to meet their obligations under the FRA was "arbitrary and capricious." Mot. to Dismiss Hr'g Tr. at 12:11–17 [hereinafter Hr'g Tr.]; *id.* at 16:02–05 ("[T]he question is really the arbitrary and capricious standard as to the agencies' determination."); *id.* at 30:14–19 ("There's an arbitrary and capricious standard. The agencies have determined that there's no reason to believe there's recoverable emails"). That position is incorrect, as it conflates the discretion an agency head (or the Archivist) may have in *conducting remedial efforts* to recover unlawfully removed records with the *non-discretionary* obligation to initiate action through the Attorney General *once those preliminary efforts, if any, have proven fruitless*. *See Armstrong I*, 924 F.2d at 296 n.12. This Court similarly has rejected Defendants' mistaken understanding of the mandatory nature of Section 3106 of the FRA. *See, e.g.*, Mem. Op. at 13 n.7. The applicable standard here, therefore,

is not arbitrary and capricious review, which would improperly "carve out enormous agency discretion from a supposedly mandatory rule," *Judicial Watch*, 844 F.3d at 956, but, as outlined above, whether mandatory agency action has been unlawfully withheld or unreasonably delayed.

On a related note, as this case does not entail arbitrary and capricious review of agency action, the Court need not wait for Defendants to compile an administrative record, as they have suggested. *See* Answer at 1 ("[T]he Court's review in this action is limited solely to the administrative record, rather than the allegations of the parties in their respective pleadings."). "[D]efendants confuse a challenge to final agency action and a challenge to an agency's *failure* to act." *Nat'l Law Ctr. on Homelessness & Poverty v. Dep't of Veteran Affairs*, 842 F. Supp. 2d 127, 130 (D.D.C. 2012) [hereinafter *NLCHP*]. Although judicial review under the APA is generally limited to "'the administrative record already in existence, not some new record made initially in the reviewing court,'" *Aguayo v. Harvey*, 476 F.3d 971, 976 (D.C. Cir. 2007) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1973)), "when it comes to agency *inaction* under 5 U.S.C. § 706(1), 'review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record.'" *NLCHP*, 842 F. Supp. 2d at 130 (citing *Friends of the Clearwater v. Dombeck*, 222 F. 3d 552, 560 (9th Cir. 2000)). In other words, when review is sought under Section 706(1)—as it is in this case—"there is *no* 'administrative record' for a federal court to review." *Id.* (emphasis added) (citing *Telecomms. Research & Action Ctr. v. Fed. Comm'cns Comm'n*, 750 F.2d 70, 79 (D.C. Cir. 1984)). The undisputed material facts supported by evidence in the parties' pleadings—which, in any case, consist entirely of State Department and NARA records—are therefore a proper basis of review.

ARGUMENT

The FRA "establishes one remedy for the improper removal of a 'record' from [an] agency. The head of the agency is *required* under 44 U.S.C. § 3106 to notify the Attorney General if he determines or 'has reason to believe' that records have been improperly removed from the agency." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148 (1980) (emphasis added). The Archivist "is *obligated* to assist in such situations." *Id.* (citing 44 U.S.C. § 2905) (emphasis added). Then, "[a]t the behest of [an agency head or the Archivist], the Attorney General may bring suit to recover the records." *Id.* "While nothing in [Section] 3106 prevents the agency from first attempting its own remedial measures (rather than immediately rushing to the Attorney General) . . . the statute '*requires* the agency head and Archivist to take enforcement action' through the Attorney General if those efforts are unsuccessful." *Judicial Watch*, 844 F.3d at 954 (citing *Armstrong I*, 924 F.2d at 295).

Given this obligatory enforcement mechanism, the D.C. Circuit has recognized that a private party—such as CoA Institute here—may file suit under the APA, 5 U.S.C. § 706(1), to compel an agency head or the Archivist to fulfill their statutory obligations to initiate action through the Attorney General for the recovery of unlawfully removed records. *Id.* ("[T]he [APA] permits a claim that an agency failed to take a *discrete* agency action that it is *required to take*."); *Armstrong I*, 924 F.2d at 295–97; *Citizens for Responsibility & Ethics in Wash. v. Dep't of Homeland Sec.*, 592 F. Supp. 2d 111, 122 (D.D.C. 2009). To prevail on such a claim, a plaintiff must demonstrate that (1) the records at issue were federal records subject to the FRA; (2) those records were unlawfully removed; (3) an agency head, or the Archivist, had actual or constructive knowledge of the unlawful removal; and (4) neither the agency head nor the Archivist initiated action through the Attorney General. *See* Opp'n at 11 (collecting cases). The agency head and the Archivist may only be excused from their statutory obligation to initiate action through the

Attorney General if they either (1) "recover all the missing records" or (2) "establish their fatal loss." *Judicial Watch*, 844 F.3d at 956.

As set forth below, CoA Institute has established each of these elements, whereas Defendants have failed to establish either full recovery or fatal loss of the records at issue. Judgment for CoA Institute is therefore proper as a matter of law.

I. Secretary Powell unlawfully removed federal records from the State Department.

Defendants' obligations under the FRA only arise if (1) the records at issue—*i.e.*, Secretary Powell's work-related email records—are "federal records" as defined by the FRA, *see Armstrong v. EOP*, 810 F. Supp. at 340; and (2) the same records have been "unlawfully removed." *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 82 F. Supp. 3d 228, 236 (D.D.C. 2015) [hereinafter *CEI v. OSTP I*], *rev'd on other grounds*, 827 F.3d 145 (D.C. Cir. 2016). The record in this case demonstrates both elements.[5]

A. Secretary Powell's work-related email records are "federal records."

"Not all documents in an agency's possession [or under its control] qualify as 'records' under the FRA." *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 241 F. Supp. 3d 14, 17 (D.D.C. 2017). "Instead, 'records' includes any 'recorded information' 'made or received by a Federal agency under Federal law or in connection with the transaction of public business,'" which is "'preserved or appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operation, or other activities of the Government or because of the

[5] Defendants previously purported to "assume . . . that the [FRA] applies" to the records at issue, but without "conced[ing] that [they] have bene unlawfully removed or destroyed[.]" MTD at 5 n.2. At the same time, Defendants argued that they complied with the laws and regulations governing the unlawful removal of federal records. *See, e.g.*, Mem. Op. at 7 ("Defendants contend . . . they have 'engaged in remedial measure to recover any such records that might still exist, consistent with the administrative scheme of the FRA,' and 'Defendants no have no reason to believe that any federal records still exist in former Secretary Powell's private email account.'" (citations omitted)). That position is incoherent. Regardless, the record before the Court demonstrates that Secretary Powell's work-related email records are unlawfully removed federal records that have yet to be recovered.

informational value in them." *Id.* (citing 44 U.S.C. § 3301(a)(1)(A)); *see* 44 U.S.C. § 3301 (2000); 36 C.F.R. § 1220.18 (2000); *see Armstrong v. Exec. Office of the President*, 90 F.3d 553, 557 (D.C. Cir. 1996).

All of Secretary Powell's work-related email records qualify as "federal records" because they constitute "recorded information" that was "made or received" during the "transaction of public business" and would be "appropriate for preservation" insofar as they could reveal agency decision-making and policy development. SUMF ¶¶ 3, 6. Internal State Department policies and NARA-approved record disposition schedules confirm that almost all records created or received in connection with the Secretary of State are not only federal records but also must be preserved permanently.[6] *See* Compl. ¶ 7 (citing State Department memorandum explaining that "All records generated by Senior Officials belong to the Department of State"); *id.* ¶ 34 (citing State Department records disposition schedule for Secretary of State records); Compl. Ex. 2 (letter from State Department to Ms. Cifrino stating that "diverse Department records are subject to various disposition schedules, with most Secretary of State records retained permanently"); Compl. Ex. 6 at 5 & 5 nn.22–23. In addition, the State Department Foreign Affairs Manual specifies that "email sent or received as a Department official is not personal" but should be preserved consistent with the FRA. Compl. ¶ 30 (citing 5 FAM 415.1 (Sept. 17, 2014)); *see* Answer ¶ 30. In a 2014 agency-wide notice authored by then-Under-Secretary Kennedy, this longstanding State Department policy was clarified as follows:

> [All State Department employees, including senior officials] are responsible for creating records necessary to document our activities, in addition to the proper

[6] Under the NARA-approved records disposition schedule for Secretary of State records, all correspondence, briefing books, notes, agendas, memos, drafts, minutes, reports, talking points, and other such documentation relating to the Secretary's diplomatic activities, appearances, briefings, speeches, travel, telephone calls, scheduling, staff meetings, and other matters relating to the responsibilities of the Secretary of State must be preserved permanently. *See* Ex. 1 to Decl. of Lee A. Steven. The only records that may be deleted or destroyed after a set period of time are certain declined invitation and event files. *Id.*

> management and preservation of records. These responsibilities are applicable to all records made or received in the conduct of agency business, regardless of physical format or media, including email. . . . The only e-mails that are personal or non-record are those that do not relate to or affect the transaction of Government business. Departing employees are also reminded they may take with them only personal papers and non-record materials, subject to review by records officers to ensure compliance with federal records laws and regulations. All federal records generated by employees, including senior officials, belong to the Department of State.

Ex. 3 to Steven Decl. at 1–2.

In light of the above provisions, in May 2016, the State Department's Office of Inspector General concluded that Secretary Powell's use of a personal email account never obviated his recordkeeping obligations under the FRA and agency guidelines—obligations he failed to honor during his tenure and upon his departure from the agency with respect to his work-related email housed on his AOL account. SUMF ¶¶ 4–5; Compl. ¶¶ 35–37; Ex. 4 to Steven Decl. at 21–22 [hereinafter State OIG Report]; *see* Answer ¶¶ 36–37.

The State Department's remedial recovery efforts also indicate that the agency understood Secretary Powell's work-related email records to qualify as "federal records." *See, e.g.*, Compl. Ex. 2 at 1 ("[W]e ask that should [Secretary Powell] be aware or become aware in the future of a federal record, such as an email sent or received on a personal email account while serving as Secretary of State, that a copy of this record be made available to the Department."); Compl. Ex. 3 ("I am writing regarding the Department's November 12, 2014 request that former Secretary of State Colin Powell provide it with any federal records in his possession, such as an email sent or received on a personal email account while serving as Secretary of State[.]"). NARA similarly recognized that Secretary Powell's work-related email records were "federal records," even if maintained on a private email account. *See, e.g.*, Compl. Ex. 5 at 3; Compl. Ex. 9; Ex. 2 to Decl. of Ryan P. Mulvey at 2 (ECF No. 17-1) ("Please confirm that the Department is following up with

the internet service provider of former Secretary Powell with regard to whether it is still possible to receive the email records that may still be present on their servers."). Defendants' efforts to contact Secretary Powell—and, indeed, other former Secretaries of State—would make little sense if work-related emails maintained on a private email account did not qualify as "federal records."

B. Secretary Powell "unlawfully removed" his work-related email records.

In addition to being "federal records," Secretary Powell's work-related email records were "unlawfully removed" within the meaning of the FRA. *See, e.g.*, *CEI v. OSTP I*, 82 F. Supp. 3d at 236. Unlawful removal is defined as "selling, donating, loaning, transferring, stealing, or *otherwise allowing a record to leave the custody of a Federal agency* without the permission of the Archivist[.]" 36 C.F.R. § 1230.3(b) (emphasis added); *see* 36 C.F.R. § 1228.100(a) (2000) ("The Archivist of the United States and heads of Federal agencies are responsible for preventing the alienation or unauthorized destruction of records, including all forms of mutilation. Records may not be removed from the legal custody of Federal agencies or destroyed without regard to the provisions of agency records schedules (SF 115 approved by NARA or the General Records issued by NARA)."); Compl. ¶ 20. With respect to email records, "[a]lthough a record may reside on an unofficial email account, it has not been 'removed' for purposes of the FRA as long as a copy also exists on an official account," at least unless "there is some independent reason why the document should not appear on an unofficial account, such as the presence of classified information." *CEI v. OSTP I*, 82 F. Supp. 3d at 236 & 236 n.8.

The record in this case demonstrates that the treatment and disposition of Secretary Powell's work-related email records meet the definition of unlawful removal. *See* SUMF ¶¶ 3–6. During his tenure at the agency, Secretary Powell never contemporaneously saved electronic or paper copies of his email correspondence to an official recordkeeping system, nor did he return those records (in either paper or electronic form) to the custody of the State Department upon his

departure from office. SUMF ¶ 4; State OIG Report at 21 ("[Secretary Powell's] representative advised the Department that Secretary Powell 'did not retain [his] emails or make printed copies.' Secretary Powell also stated that neither he nor his representatives took any specific measures to preserve Federal records in his email account."). In doing so, Secretary Powell blocked control of and access to the records by their proper owner and custodian, the State Department. Put differently, Secretary Powell, without authorization, prevented the State Department from exercising possession, custody, or control of the records at issue. Such an act constitutes unlawful removal. 36 C.F.R. § 1230.3(b); *see United States v. Rosner*, 352 F. Supp. 915, 919 (S.D.N.Y. 1972) (purpose of 18 U.S.C. § 2071(b), which criminalizes unlawful removal, concealment, or destruction of federal records, "is to prevent any conduct which deprives the Government of the use of its documents, be it by concealment, destruction, or removal"); *id.* at 921 ("[T]he essence of the offense charged in such prosecutions has not been larceny, for which Section 641 was available, but the rendering of information unavailable to the Government."); *see also United States v. Poindexter*, 725 F. Supp. 13, 20 (D.D.C. 1989) ("The obvious purpose of [18 U.S.C. § 2071] is to prohibit the impairment of sensitive government documents by those officials who have access to and control over them, and no court has ever held to the contrary.").

Accordingly, when he left the State Department and failed to turn over his work-related email, Secretary Powell violated the FRA by unlawfully removing federal records from agency possession, custody, and control. SUMF ¶ 5; State OIG Report at 22 ("At a minimum, Secretary Powell should have surrendered all emails sent from or received in his personal account that related to Department business. Because he did not do so at the time that he departed government service or any time thereafter, Secretary Powell did not comply with Department policies that were implemented in accordance with the [FRA]."). Just as Defendants' remedial recovery efforts

reveal that they understood Secretary Powell's work-related email records to qualify as "federal records," so do their efforts reveal a recognition that the records were "unlawfully removed." *See* SUMF ¶ 11.

II. Defendants are statutorily required to recover Secretary Powell's work-related email records and to initiate action through the Attorney General for their recovery.

Although Defendants' obligations under Section 3106 have already been set forth, they bear repeating. As recently articulated by the D.C. Court of Appeals:

> [W]hen records go missing, the *something* required by the [FRA] is a referral to the Attorney General by the agency head and or/the Archivist. Indeed, . . . the statute "*requires* the agency head and Archivist to take enforcement action" through the Attorney General whenever they become aware of records being unlawfully removed or destroyed. . . . [T]hose mandatory enforcement provisions "leave *no* discretion [for the agency] to determine which cases to pursue." While . . . an agency might reasonably attempt to recover its records before running to the Attorney General, . . . where those initial efforts fail[] to recover all the missing records (or establish their fatal loss), the agency [cannot] simply ignore its referral duty. . . . [T]he statute [rests] on a belief that marshalling the law enforcement authority of the United States [is] a key weapon in assuring record preservation and recovery.

Judicial Watch, 844 F.3d at 956 (internal citations omitted).

Upon learning of the unlawful removal of Secretary Powell's work-related email records, Defendants were obliged to attempt their recovery. Although Defendants did make such an attempt, feeble as it may have been, the ultimate result of their efforts was failure: Defendants have not recovered a single federal record at issue. The only—and required—avenue left for them is to initiate action through the Attorney General for the recovery of the unlawfully removed records. Rather than follow the clear directions of the statute, however, Defendants have chosen to ignore their statutory mandate and forego initiating an enforcement action through the Attorney General. That is not a path they may take.

A. Defendants have actual and constructive knowledge of the unlawful removal of Secretary Powell's work-related email records.

Before the obligation to initiate an enforcement action through the Attorney General attaches, the FRA requires the agency and the Archivist to be "aware of records being unlawfully removed or destroyed." *Id.*; 44 U.S.C. § 3106(a) ("An agency head shall initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed[.]");[7] *see Citizens for Responsibility & Ethics in Wash.*, 592 F. Supp. 2d at 122. The record in this case demonstrates that the State Department had the requisite knowledge by, at the latest, November 12, 2014, when it wrote to Secretary Powell's personal representative, Ms. Cifrino, to request Secretary Powell's assistance in accessing his work-related email records. SUMF ¶ 7. NARA, on the other hand, had reason to suspect unlawful removal no later than March 3, 2015, when it wrote to the State Department to express "concern[] that Federal records may have been alienated from . . . official record keeping systems." SUMF ¶ 9. The State Department's subsequent contact with Ms. Cifrino, as well as its ongoing correspondence with NARA, reinforces both Defendants' actual knowledge of unlawful removal. *See* SUMF ¶¶ 10–17. If Defendants' remedial recovery efforts left any doubt as to the matter of knowledge, CoA Institute provided Defendants with notice of the alienation of Secretary Powell's work-related email records prior to the commencement of this action. Compl. ¶ 8 (describing October 12, 2016 notice); *id.* ¶ 56; Answer ¶¶ 8, 56, 66.

B. Defendants have failed to initiate an enforcement action through the Attorney General for the recovery of Secretary Powell's work-related email records.

A private cause of action arises under the APA whenever an agency head or the Archivist is aware of unlawful removal of records, fails to recover the lost records or establish their fatal

[7] This "reason to believe" records have been *removed* must not be conflated, as Defendants have attempted to do, with a "reason to believe" records could be *recovered*. *See* Mem Op. at 13 n.7 (rejecting Defendants' attempts).

loss, and yet "'refus[es] to seek the initiation of an enforcement action by the Attorney General.'" *Competitive Enter. Inst. v. Envtl. Prot. Agency*, 67 F. Supp. 3d 23, 33–34 (D.D.C. 2014) (citing *Armstrong I*, 924 F.2d at 295). Although an agency may undertake preliminary efforts to recover its records, once those measure prove fruitless, it is required to fulfill its obligations under Section 3106 by initiating an enforcement action through the Attorney General.

The parties agree that Defendants undertook some efforts to recover Secretary Powell's work-related email records. *See* SUMF ¶¶ 7–14, 16–20. The parties also agree that Defendants' efforts have failed and that they have not recovered a single federal record at issue. SUMF ¶ 22. This is precisely the point at which Defendants became obliged to initiate action through the Attorney General. *See Judicial Watch*, 844 F.3d at 956 ("While [the D.C. Circuit] recognized that sometimes an agency might reasonably attempt to recover its records before running to the Attorney General, [it] never implied that where those initial efforts failed . . . the agency could simply ignore its referral duty." (citing *Armstrong I*, 924 F.2d at 296 n.12)). Yet Defendants incorrectly determined that it was appropriate to ignore their FRA obligations and do nothing further. *See, e.g.*, Hr'g Tr. 13:18–20 ("It's an agency's determination about what they've done and what more needs to be done, which here is nothing else in the agencies' minds."); Reply at 10 (Defendants "gathered relevant evidence . . . and based on that evidence, [they] now have no 'reason to believe' that any records unlawfully removed by former Secretary Powell on his private email account remain to be recovered."). As a result, Defendants have intentionally neglected their mandatory obligations under the FRA to initiate action through the Attorney General and have stated explicitly that they intend to do nothing further. SUMF ¶¶ 23–24; Decl. of Laurence Brewer ¶ 17 (ECF No. 18-1) ("NARA believes that [the State Department] has acted appropriately

in attempting to recover Secretary Powell's emails and considers the issue resolved. From NARA's perspective, there is nothing further to be done on this matter.").

C. Defendants must initiate an enforcement action through the Attorney General because they have neither recovered all of the records at issue nor established their fatal loss.

The Defendants is this case may be excused from not initiating an enforcement action through the Attorney General only if "they either recover all the missing emails or 'establish their fatal loss.'" *Judicial Watch, Inc. v. Tillerson*, Nos. 15-785/15-1068, 2017 WL 5198161, at *1 (D.D.C. Nov. 9, 2017); *see Judicial Watch*, 844 F.3d at 956 ("[W]e never implied that where . . . initial efforts failed to recover all the missing records (or establish their fatal loss), the agency could simply ignore its referral duty. That reading [of the FRA] would . . . carve out enormous agency discretion from a supposedly mandatory rule."); *id.* at 955 ("Absent a showing that the requested enforcement action could not shake loose a few more emails, the case is not moot."). That is, Defendants cannot be excused from their failure to meet their Section 3106 obligations unless they prove complete recovery of all records at issue or that they cannot, in fact, recover them. The burden of proof required to establish the fatal loss of the records lies with Defendants, and the standard of such proof is "high": a court "must be wary of relying solely on the agencies' self-assessment" and should ensure that "there are no more 'imaginable' avenues for the Attorney General to pursue." *Tillerson*, 2017 WL 5198161, at *6 (citing *Judicial Watch*, 844 F.3d at 956).

There is no dispute that Defendants have failed to recover a single work-related email record from Secretary Powell's AOL account, let alone *all* such records. SUMF ¶ 22. There also is nothing in the record to establish the fatal loss of the records at issue. Defendants' only attempt to prove fatal loss is the triple-hearsay statement that Ms. Cifrino reported that an individual from AOL—presumably, Julie Jacobs, AOL's General Counsel—told her that *someone else* from AOL had contacted a congressional staffer at OGR to inform *him* that there "are no emails in the AOL

system from General Powell's tenure as Secretary of State." SUMF ¶¶ 18–20. The reliability (and admissibility)[8] of Ms. Cifrino's representation, however, and the exact nature of the conversation that allegedly took place between representatives of OGR and AOL, is in serious doubt, as Defendants have been unable to explain why OGR sent a formal request to AOL seeking its cooperation in searching for Secretary Powell's email *after* it reportedly was told that no email records remained in AOL's system. SUMF ¶ 21.

More importantly, the alleged absence of Secretary Powell's email from AOL's system, as such, does not prove fatal loss. There is no evidence, for example, that AOL could not search its backup systems and recover Secretary Powell's email from its archives. Alternatively, there is no evidence to cast doubt on the ability of the federal government, with the full force of its law enforcement authority and expertise, to recover Secretary Powell's email through legal process and forensic means, and even Defendants admit that such recovery is possible. *See* Hr'g Tr. at 11:05 ("[Missing email records] can be found, Your Honor, when they are on private servers that can be confiscated and forensically searched."). Beyond forensic recovery of deleted emails, there may be yet further means, such as contacting and searching email records of Secretary Powell's correspondents. *See* Mem. Op. at 13 ("[E]ven if AOL processes have erased Secretary Powell's emails on the AOL servers, a thorough investigation undertaken by the Attorney General might well yield fruit via other avenues.").

As this Court has observed, Defendants have ignored the fact that "the FRA is premised on leveraging the significant 'law enforcement authority of the United States [as] a key weapon in assuring record preservation and recovery.'" *Id.* at 2 (citing *Judicial Watch*, 844 F.3d at 956). For

[8] To the extent that Defendants wish to rely on Ms. Cifrino's email reporting the alleged conversation between AOL and OGR for the truth of the proposition that no emails exist in AOL's systems, CoA Institute repeats and incorporates by reference herein its prior arguments against admissibility of that evidence on the basis of the hearsay rule. *See* Opp'n 17–22; Sur-reply at 1–5.

example, Defendants discount the "proven" capacity of law enforcement investigations to "reveal[] even deleted emails," as was done in the case of Secretary Hillary Clinton, *id.*, or, more recently, to recover text messages, such as those created and received by Federal Bureau of Investigation ("FBI") employees Lisa Page and Peter Strzok. *See* Avery Anapol, *DOJ office says it has found missing text messages of FBI officials,* The Hill, Jan. 25, 2018, http://bit.ly/2s7Ds83 ("'The [Office of the Inspector General] has been investigating this matter, and, this week, succeeded in using forensic tools to recover text messages from FBI devices[.]'" (citing letter from Inspector General Michael Horowitz)).

Given the complete absence of evidence concerning the recoverability of Secretary Powell's work-related email records and Defendants' "lack of effort" to date, *see* Mem. Op. at 11, Defendants cannot prove fatal loss and have no excuse for their failure to initiate action through the Attorney General for the recovery of the unlawfully removed records at issue.

CONCLUSION

Defendants have ignored their obligations under the FRA to initiate an enforcement action through the Attorney General to recover unlawfully removed federal records. Defendants have proffered no evidence to show that the involvement of the Attorney General, exercising the full law enforcement authority of the Federal Government, could not result in the recovery of Secretary Powell's work-related email records, or at least some of them. Absent a showing that Secretary Powell's work-related email records are fatally lost—a showing that has not and cannot be supported with any evidence in the record—Defendants must be compelled to comply with their statutory obligations.

For the foregoing reasons, CoA Institute respectfully requests that the Court enter judgment in its favor and order Defendants to initiate an enforcement action through the Attorney General

for the recovery of Secretary Powell's work-related email records. CoA Institute also requests that the Court require Defendants to certify their compliance with that order by providing evidence of their initiation of an enforcement action.

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Respectfully submitted,

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