IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE Plaintiff v. MICHAEL R. POMPEO,[*] 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

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION TO DISMISS
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

[*] Michael R. Pompeo was sworn in as Secretary of State on April 26, 2018. He is automatically substituted as a Defendant under Federal Rule of Civil Procedure 25(d).

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INTRODUCTION

The Federal Records Act ("FRA") and attendant case law obligate agency heads and the Archivist to initiate action through the Attorney General to recover unlawfully removed federal records whenever any remedial recovery efforts fail and the fatal loss of the records cannot be established. The D.C. Circuit has twice reiterated that this obligation is mandatory and that the decision to comply is not subject to agency discretion. If an agency head or the Archivist fail to meet their statutory obligations, a private litigant—such as Plaintiff Cause of Action Institute ("CoA Institute")—may bring suit under the Administrative Procedure Act ("APA") to compel them to do so.

In this case, the Secretary of State and the Archivist (collectively, "Defendants") concede that they have not initiated any action through the Attorney General to recover work-related email records created or received by former Secretary of State Colin Powell on a private AOL email account. They also concede that they have failed to recover any of those records through their own efforts. Accordingly, on February 5, 2018, CoA Institute moved for summary judgment, arguing that it was entitled to judgment as a matter of law and a court order compelling Defendants to meet their obligations under the FRA to initiate action through the Attorney General for the recovery of those records. *See* Mem. in Support of Pl.'s Mot. for Summ. J. [hereinafter Pl.'s Mot.], ECF No. 28-1.

Defendants have failed to undermine any element of CoA Institute's motion for summary judgment. They instead offer new factual evidence to argue that "referral to the Attorney General" would be unlikely to "redress [CoA Institute's] claimed injury" because "any federal records that once resided on former Secretary Powell's account have been fatally lost." Defs.' Mem. of P. & A. in Support of Mot. to Dismiss as Moot or, in the Alternative, for Summ. J. at 11 [hereinafter

Def.'s Cross-Mot.], ECF Nos. 31 & 32.[1] Despite this Court's prior rejection of Defendants' misconstruction of the FRA, Defendants also repeat their flawed argument that they have met their statutory obligations and need not take any further action because there is no "reason to believe" that there are any records left to be recovered. *Id.* at 15–16; *see* Mem. Op. at 13 n.7, ECF No. 24.[2]

Defendants' arguments are unavailing. The evidence they offer in support of their mootness claim does not establish fatal loss. The record before the Court instead highlights Defendants' complete refusal to turn to the law enforcement authority of the federal government or to investigate the possibility of forensically recovering the records at issue. With respect to the applicable FRA standards, Defendants expressly ignore this Court's previous ruling and continue to rely upon a non-existent knowledge requirement that finds no purchase in the statutory text or the D.C. Circuit's FRA jurisprudence.

The Court should therefore deny Defendants' motion to dismiss and grant CoA Institute's motion for summary judgment.

[1] Defendants concede that "review is 'not limited to the record as it existed at any single point in time,'" Defs.' Cross-Mot. at 5 n.2 (citing Pl.'s Mot. at 10), but insist it is "limited to the materials that were before the agency." *Id.* Defendants are mistaken. When judicial review is sought under Section 706(1) of the APA—as it is here—"there is no 'administrative record' for a federal court to review." *Nat'l Law Ctr. on Homelessness & Poverty v. Dep't of Veteran Affairs*, 842 F. Supp. 2d 127, 130 (D.D.C. 2012) (citing *Telecomms. Research & Action Ctr. v. Fed. Commc'ns Comm'n*, 750 F. 2d 70, 79 (D.C. Cir. 1984)). Indeed, in some instances, discovery may be appropriate because there is no "discrete event [*i.e.*, agency action] resulting from a decision based upon some sort of administrative record, but . . . simply . . . after-the-event justifications . . . which may need to be explored" by the plaintiff and the court. *Id.* (citation omitted).

[2] The Court's opinion has been reported at *Cause of Action Institute v. Tillerson*, 285 F. Supp. 3d 201 (D.D.C. 2018). All cites herein are to the memorandum opinion.

ARGUMENT

I. The Court should deny Defendants' motion to dismiss because they have not established the fatal loss of Secretary Powell's work-related email records.

Defendants move to dismiss this case "as moot" because they believe "the evidence shows that any federal records that once resided on former Secretary Powell's AOL account have been fatally lost." Defs.' Cross-Mot. at 10, 11. Consequently, "referral to the Attorney General would plainly be 'pointless.'" *Id.* at 11–12 (citation omitted).

Defendants bear the burden of proving the facts necessary to sustain their motion on mootness grounds, and "[i]t is a heavy burden." *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998) (citations omitted). In a matter involving recovery of unlawfully removed federal records, the Court "must be wary of relying solely on the agencies' self-assessment" concerning the recoverability of records and it should ensure that "there are no more 'imaginable' avenues for the Attorney General to pursue." *Judicial Watch, Inc. v. Tillerson*, Nos. 15-785 & 15-1068, 2017 WL 5198161, at *6 (D.D.C. Nov. 9, 2017) [hereinafter *Tillerson*] (citation omitted); *see also id.* ("Although the D.C. Circuit [in *Judicial Watch*] did not define precisely how Defendants might "establish . . . fatal loss," it left little doubt that the hurdle was high.").

An agency's claim of fatal loss must be set against the understanding that the FRA "rest[s] 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, Inc. v. Kerry*, 844 F.3d 952, 956 (D.C. Cir. 2016) [hereinafter *Judicial Watch*]; *see* Mem. Op. at 2 (reiterating the same); *id.* at 12–13 ("Defendants' refusal to turn to the law enforcement authority of the Attorney General is particularly striking in the context of a statute with explicitly mandatory language."); *see also*

Tillerson, 2017 WL 5198161, at *6 ("Ordinarily . . . referral to the Attorney General will be the remedy for unrecovered records.").

At this point, the parties only disagree about whether Defendants' recent efforts to contact Secretary Powell and AOL/Oath are sufficient to prove fatal loss. They are not. As discussed below, Defendants have not established the fatal loss of Secretary Powell's work-related email records, and they have failed to demonstrate that the Attorney General "could not shake loose a few more emails." *Judicial Watch*, 844 F.3d at 955. Moreover, Defendants' attempt to invoke the Attorney General's prosecutorial discretion is without moment. *See infra* pp. 12–13.

A. Defendants cannot prevail on their mootness claim unless they affirmatively establish that the unlawfully removed records cannot be recovered.

The FRA imposes a non-discretionary obligation on agency heads and the Archivist to recover unlawfully removed federal records. 44 U.S.C. §§ 2905(a), 3106. If they are unable to do so through their own efforts, they must initiate action through the Attorney General. *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991); *Judicial Watch*, 844 F.3d at 954–56; *Tillerson*, 2017 WL 5198161, at *3. This Court has recognized and embraced that standard. Mem. Op. at 2–3. As the D.C. Circuit has repeatedly emphasized, an agency head and the Archivist have "*no* discretion to determine which cases to pursue[.]" *Judicial Watch*, 844 F.3d at 954 (citing *Armstrong*, 924 F.2d at 295).

Although there is nothing that "prevents [an] 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[.]" *Id.* (citing *Armstrong*, 924 F. 2d at 295, 296 n.12). To reach any other result "would flip *Armstrong* on its head and carve out enormous agency discretion from a supposedly mandatory rule." *Id.* at 956. The sole exception to this rule is when an agency head

or the Archivist can affirmatively establish the "fatal loss" of the unlawfully alienated records. *Id.*; *see id.* ("[T]he case might well also be moot if a referral were pointless (e.g., because no imaginable enforcement action by the Attorney General could lead to recovery of the missing emails)[.]").

Defendants therefore bear the burden of establishing by a preponderance of the evidence that CoA Institute's requested relief—*i.e.*, an order requiring Defendants to comply with their FRA obligation to initiate action through the Attorney General—could not redress CoA Institute's ongoing injury because of the "fatal loss" of Secretary Powell's work-related email records. *See Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987); *see also Nichols*, 142 F.3d at 459 ("The burden of establishing mootness rests on the party that raises the issue. It is a heavy burden.").

B. Defendants' supplemental efforts to contact Secretary Powell and AOL do not establish the fatal loss of the records at issue.

After CoA Institute filed its motion for summary judgment, Defendants undertook several additional steps related to Secretary Powell's work-related email records. On February 26, 2018, Department of State Legal Adviser Jennifer Newstead wrote to Secretary Powell requesting written confirmation of his inability to access or retrieve the work-related email records that he removed from the Department of State. *See* Ex. M to Decl. of Joshua L. Dorosin, ECF No. 32-2. Secretary Powell responded by letter, dated March 7, 2018, reiterating what his personal representative, Peggy Cifrino, had previously reported to the government. *See* Ex. N to Dorosin Decl. In response to a March 5, 2018 communication from Ms. Newstead, *see* Ex. P to Dorosin Decl., representatives of AOL (now, "Oath, Inc.") provided details concerning their own efforts to search for Secretary Powell's work-related email, as well as their estimation of the technological possibility of recovering the records from AOL databases. *See* Exs. Q & R to Dorosin Decl. None of Defendants' efforts establish fatal loss.

1. Secretary Powell's representations do not establish fatal loss.

Defendants argue that action through the Attorney General "would plainly be pointless," in part, because "Secretary Powell no longer has (or knows where to find) any of the computers or devices that he used to access" his AOL account. Defs.' Cross-Mot. at 11–12. But Secretary Powell's personal knowledge as to the recoverability of his work-related email records, or his retention of any electronic devices, is irrelevant to the question of fatal loss for at least two reasons. First, this Court has long known that Secretary Powell no longer has access to his AOL account or the devices he used during his tenure at the State Department. *See* Mem. Op. at 3–4; *see also* Compl. Exs. 3 & 8, ECF Nos. 1-3 & 1-8. Second, this Court already has recognized that the government has the ability to recover records, through forensic or compulsory means, even when they are "believed" to be irrecoverable, as was the case with Secretary of State Hillary Clinton. *See* Mem. Op. at 13 ("[A]ction by the Attorney General has yielded fruit before, even when the emails at issue had been deleted."); *see also* Ex. 1 to Defs.' [First] Mot. to Dismiss at 19–20, ECF No. 16-1 (discussing recovery of Clinton email records).

With specific regard to Secretary Powell's failure to retain the physical devices with which he accessed his AOL account, federal records would only theoretically be recoverable from Secretary Powell's laptop computer—assuming it still existed—if he had stored them on his hard drive. *See* Ex. R to Dorosin Decl. ("Users could store email indefinitely in a Personal Filing Cabinet on the user's hard drive or by manually moving the email to a personal network folder."). Yet CoA Institute has never suggested that recovery efforts should be limited to a forensic search of Secretary Powell's hard drive, as opposed to AOL databases and servers. Neither has the Court. *See* Mem. Op. at 12–13 (discussing the possible use of grand-jury subpoenas, interviews, voluntary or compulsory searches, and other investigatory "avenues").

It also bears noting that Defendants reverted to insisting on obtaining "written permission" from Secretary Powell to collect "information regarding any personal email accounts [he] held during [his] tenure and the current status of those accounts." Ex. M. to Dorosin Decl. In fact, Defendants never needed "written permission" to contact AOL, and they admitted as much before this Court. *See* Mem. Op. at 11 & 11 n.5. Their renewed insistence on limiting their recovery efforts without Secretary Powell's "authorization" casts doubt on the adequacy of those efforts.

2. The AOL/Oath correspondence does not establish fatal loss.

When it denied Defendants' first motion to dismiss, the Court emphasized Defendants' "lack of effort" in reaching out to AOL and their failure to evaluate whether "forensic techniques" would be able to recover any email records that had been deleted from AOL servers. *Id.* at 11. Although Defendants have now contacted AOL directly, the responses received from the company do not establish the fatal loss of Secretary Powell's work-related email records.

AOL's March 22, 2018 letter indicated that the company conducted a "thorough search of all mail storage databases," including the "active mailbox database and short-term temporary storage for accounts that are in an inactive or closed state." Ex. Q to Dorosin Decl. It also asserted that "it is not technologically possible to recover any of the data being sought as it has been several years since the email content was removed from the Oath network of databases." *Id.* AOL's claim about the technological impossibility of recovering the records at issue, however, is insufficient: the company never explained why the mere deletion of records from its database network would rule out recovery through other means. Indeed, this Court explicitly indicated its interest in the possibility of the Attorney General recovering records through forensic means, *see* Mem. Op. at 12–13, but Defendants have not provided *any* evidence that the physical servers on which AOL's databases are housed have been destroyed (or replaced) or could not be subject to forensic investigation by the Attorney General, or by AOL under compulsory process.

AOL's second communication—an email, dated March 28, 2018—is similarly inconclusive. Although the company alludes to "network storage settings" and other limitations, the precise terms of service governing those settings and limitations are not provided, *see* Ex. R to Dorosin Decl., despite Defendants previously directing the Court to AOL's current customer service agreement. *See* Defs.' [First] Mot. to Dismiss at 7 n.3; *see also* Pl.'s Opp'n to Mot. to Dismiss at 17, ECF No. 17. More importantly, the March 28, 2018 email fails to connect AOL's default network storage settings, and its "automatic deletion" of older or sent email records, with the question of recoverability, either through forensic or less invasive means. It also fails to connect AOL's default settings to Secretary Powell's account in any way, or to provide any detail concerning "how AOL went about researching the question" of recoverability or whether "Secretary Powell's emails have been permanently erased [as opposed to] merely deleted." Mem. Op. at 11 n.6. Contrary to Defendants' characterization of this new evidence, AOL has *not* "specifically explained why 'a more thorough search for Secretary Powell's account, or the servicers on which it was stored,' will not lead to the recovery of any additional emails." Defs.' Cross-Mot. at 12 (citation omitted).

3. Defendants cannot otherwise justify their refusal to invoke the significant law enforcement authority of the Attorney General.

Notwithstanding AOL's limited representations and its incomplete explanation of the alleged technological limitations of recovering Secretary Powell's work-related email records, the Court has previously questioned whether the company's evaluation is controlling. *See id.* ("Assuming that the AOL General Counsel's office really did say that no pertinent emails remained in the AOL system, and even assuming that AOL believed that fact to be true, Plaintiff would still have standing."). This concern persists: Defendants rely solely on the representations of Secretary Powell and AOL to ignore their FRA obligations and justify their refusal to "enlist[]

the Attorney General's coercive power," even to certify that the federal records once housed on AOL's servers are truly and fatally lost. Mem. Op. at 12 (citing *Judicial Watch*, 844 F.3d at 955).

When they discuss enforcement capabilities and the possibility of forensic recovery, Defendants appear to be torn between affirming the precedential value of *Judicial Watch* and *Tillerson* and arguing that those cases are distinguishable. For example, Defendants claim that, "[w]ith respect to AOL's servers, even in the Clinton investigation, while the FBI 'obtained and forensically searched' certain *private* servers and devices, it relied upon grand jury subpoenas to assess whether commercial service providers, like AOL, might still maintain Secretary Clinton's emails." Defs.' Cross-Mot. at 13 (citations omitted).

Although Defendants try to create a meaningful distinction between the "private" servers owned by Secretary Clinton and the "commercial" servers maintained by BlackBerry and AT&T, upon closer examination, that distinction falls apart. When it issued grand jury subpoenas to BlackBerry-maker Research in Motion, Cingular, AT&T, and an "unnamed third-party service provider," the Federal Bureau of Investigation ("FBI") sought to recover data that had been created or received on a mobile phone device. That data would not have been saved to a physical server in the same way as an email sent or received from a computer. *See Tillerson*, 2017 WL 5198161, at *7 ("The [FBI] deemed [the commercial service providers'] responses [were] consistent with its understanding of Blackberry devices, which 'pulled' information off servers rather than storing it on a separate 'cloud' server.").

The FBI's decision not to pursue forensic recovery also must be understood in the context of its extensive investigatory efforts. *See id.* at *9 ("If the FBI believes its investigation has provided no factual basis to search those servers, the Court deems it unimaginable that the Attorney General would nevertheless chart that course."); *see also* Mem. Op. at 9 ("[T]he district court

reached [its] conclusion [on mootness] only after the Government submitted supplementary affidavits that 'the FBI . . . exhausted all imaginable investigative avenues[.]'"). In other words, the Clinton FRA matter was "no ordinary case" precisely because the "Government had already deployed the law-enforcement authority of the United States." *Tillerson*, 2017 WL 5198161, at *6. In this case, by contrast, *no* law enforcement authority has intervened, whether it be the Attorney General (as required by the FRA), the FBI, or another federal agency.

Again, the recovery efforts in this case, as compared to the State Department and the Department of Justice's efforts in the case of Secretary Clinton, are worth highlighting. Here, Defendants undertook only limited efforts that relied solely on the voluntary compliance of Secretary Powell and AOL/Oath:

- Between March 2015 and September 2016, the State Department thrice wrote to Secretary Powell's representative, Peggy Cifrino, to inquire whether Secretary Powell had any federal records in his possession or whether he (or AOL) could otherwise recover them. *See* Pl.'s Statement of Undisputed Material Facts ¶¶ 7, 12, 17, ECF No. 28-2.
- Prior to the Court's denial of Defendants' first motion to dismiss, the State Department never contacted AOL directly. *See* Mem. Op. at 11 (Strikingly, "[Defendants] have never once contacted AOL themselves, despite their admitted statutory authority to do so.").
- On February 26, 2018, the State Department wrote to Secretary Powell (as opposed to his representative) to confirm whether he had possession of any federal records and to obtain his "written permission" to seek further information from AOL. *See* Dorosin Decl. Ex. M.
- On March 5, 2018, the State Department finally contacted AOL. *See* Dorosin Decl. Ex. P.

Thus, the five letters sent by the State Department to Ms. Cifrino, Secretary Powell, and AOL's General Counsel, Julie Jacobs, represent the *entirety* of Defendants' remedial recovery efforts in this matter.

By contrast, with respect to Secretary Clinton's email, the federal government undertook extensive remedial recovery efforts that went beyond seeking voluntary compliance:

- The State Department first sent "various letters to [Secretary Clinton's] counsel . . . asking the former secretary to provide copies of her work-related emails." *Judicial Watch*, 844 F.3d at 954; *see also Tillerson*, 2017 WL 5198161, at *5
- The FBI—a law enforcement agency—took custody of Secretary Clinton's private servers, as well as a "thumb drive," external hard drives, and multiple devices, and then forensically searched them as part of its concurrent investigation into the potential unlawful sharing of classified information. *Judicial Watch*, 844 F.3d at 954; *Tillerson*, 2017 WL 5198161, at *2; *id.* at *5 (FBI obtained and forensically searched two servers, three external hard drives for creating back-ups, two Blackberry devices, and three iPads).
- The FBI's forensic efforts led to the recovery of thousands of email records that Secretary Clinton had previously deleted and that would never have been recovered but for those forensic efforts. *Judicial Watch*, 844 F.3d at 954; *Tillerson*, 2017 WL 5198161, at *5.
- The FBI conducted interviews in an attempt to glean information from those "individuals who had the most frequent work-related communications with Secretary Clinton[.]" *Tillerson*, 2017 WL 5198161, at *7.
- Turning to legal process, the FBI obtained "search warrants" to review the contents of computers belonging to Secretary Clinton's colleagues, such as Huma Abedin. *Id.*

- Finally, the FBI "used grand-jury subpoenas" to determine "whether [commercial] service providers might still maintain Clinton's emails." *Id.*

See also Mem. Op. at 9–10 (discussing the foregoing recovery efforts).

Defendants may not be required to "shake every tree in every forest, without knowing whether they are fruit trees," Defs.' Cross-Mot. at 14 (citing *Tillerson*, 2017 WL 5198161, at *11), but they must at least admit that there *is* a forest and there *are* trees that the FRA requires them to ask the Attorney General to shake. *See* Mem. Op. at 12–13 ("The Defendants' refusal to turn to the law enforcement authority of the Attorney General is particularly striking in the context of a statute with explicitly mandatory language."). It is such action that Defendants refuse to take and to which CoA Institute is entitled.

C. Defendants' obligation to initiate action under 44 U.S.C. § 3106 cannot be avoided under the doctrine of prosecutorial discretion.

Defendants lastly argue that the Court should grant their motion to dismiss because "[n]othing in the FRA dictates what the Attorney General should or should not do upon receiving a referral from an agency or NARA."[3] Defs.' Cross-Mot. at 14. Defendants do not attempt to explain why the Attorney General's prosecutorial discretion should bear on the mootness question before the Court, let alone the question of their failure to meet their obligations under the FRA. The Attorney General has not been involved in any of Defendants' remedial recovery efforts and, in any event, is not a party to this proceeding.

[3] Defendants state that, "[a]t most, a court could direct NARA or an agency to make a *request*" to initiate further recovery action through the Attorney General. Defs.' Cross-Mot. at 14 (emphasis added); *see id.* at 5 (describing the relief a private litigant may obtain under the FRA, including an order "to compel the agency or NARA to request the Attorney General to initiate action to recover removed records"). This approach is unfaithful to the text of the FRA. Whereas the Archivist may be obliged to "*request* the Attorney General to initiate" an action for the recovery of records, 44 U.S.C. § 3106(b) (emphasis added), an agency head, "*shall initiate* action through the Attorney General." *Id.* § 3106(a) (emphasis added).

In *Judicial Watch* and *Armstrong*, the D.C. Circuit expressly reserved any judgement or opinion on whether "the Attorney General's action or inaction in response to a referral [under Section 3106] would be reviewable." *Judicial Watch*, 844 F.3d at 957 (citation omitted); *see Armstrong*, 924 F.2d at 295 n.11 ("Because the Attorney General is not a defendant in this case, we do not decide whether the Attorney General's decision not to initiate an enforcement action at the request of the Archivist or an agency head is immune from judicial review under 5 U.S.C. § 701(a)(2)."). Thus, despite Defendants' reliance on various precedents concerning the reviewability of prosecutorial decisions, none of them are relevant here.

II. The Court should grant CoA Institute's motion for summary judgment because Defendants have failed to satisfy their non-discretionary statutory obligations and misread the nature of those obligations.

In addition to arguing that this case is moot, Defendants argue that they are entitled to summary judgment because they have satisfied all of their FRA obligations. Defs.' Cross-Mot. at 15–16. Defendants' argument, however, is premised on the erroneous proposition that the absence of any "reason to believe" that federal records are left to be recovered can abrogate the non-discretionary obligation to initiate action through the Attorney General when remedial recovery efforts fail. *Id.* This Court previously rejected that position, Mem. Op. at 13 & 13 n.7, and Defendants even admit as much. Defs.' Cross-Mot. at 16 ("[W]e recognize that this Court has rejected the government's argument that agencies are only required to initiate action if they have '"reason to believe"' federal records can be recovered[.]"); *see generally* Reply in Support of Defs.' Mot. to Dismiss at 6, ECF No. 18. This Court should once again reject Defendants' proposed "reason to believe" standard as inconsistent with the unambiguous language of the FRA. *See, e.g., LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) ("[T]he *same* issue presented a second time in the *same* case in the *same court* should lead to the *same result*."); *id.* ("The Supreme Court has instructed the lower courts to be 'loathe' to reconsider issues already decided

'in the absence of extraordinary circumstances, such as where the initial decision was "clearly erroneous [or] would work a manifest injustice."'" (citations omitted)).

Defendants argue that they "have no reason to believe that there are any federal records from former Secretary Powell's private email account left to be recovered, and under those circumstances, the FRA should not be interpreted to mandate an open-ended FBI investigation or other similar measure." Defs.' Cross-Mot. at 15; *see also id.* ("Where, as here, an agency has obtained voluntary compliance . . . such that the agency does not have reason to believe that more records can be recovered, the agency has satisfied its obligations."). Yet, as "extraordinary" as Defendants may think the rule to be, *see* Defs.' Cross-Mot. at 15, the language of the FRA could not be any clearer:

> The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal . . . of records . . . and 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* from that agency[.]

44 U.S.C. § 3106(a) (emphasis added); *see id.* §§ 2905(a), 3106(b).

In other words, as this Court has recognized, the FRA does not condition the initiation of action through the Attorney General under Section 3106 on an agency head or the Archivist having "reason to believe" that federal records can be "recovered" but rather on whether they have "reason to believe" records have been unlawfully removed. Mem. Op. at 13 n.7; *see also* Pl.'s Mot. at 9–10 ("[Defendants'] 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*."). To reiterate, the FRA's only "knowledge"

requirement, as it were, is that an agency head or the Archivist "know[] or ha[ve] reason to believe" that federal records, "have been unlawfully removed." 44 U.S.C. § 3106(a).

Defendants do not cite to a single statutory or judicial authority that contradicts the clear meaning of Section 3106 or otherwise justifies a reinterpretation of the statute in favor of some new judicially-created exception for a case such as this. Indeed, the absence of the sort of standard proposed by Defendants comports with the non-discretionary obligations imposed by the FRA, and this Court has recognized and described the relevant statutory provisions as containing "explicitly mandatory language." Mem. Op. at 13 (citing *Armstrong*, 924 F.2d at 295–96). Defendants' argument simply "ignores the language of the FRA," *id.* at 13 n.7, and now ignores the previous ruling of this Court. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) ("'[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" (citation omitted)).

Finally, Defendants misread and ignore relevant precedents, arguing that CoA Institute relies "upon the D.C. Circuit's decision in *Judicial Watch* for the proposition that an agency has no discretion whatsoever in deciding whether to refer a case to the Attorney General." Defs.' Cross-Mot. at 15 (citing Pl.'s Mot. at 9).[4] But once again, the "explicitly mandatory language" of

[4] Defendants do not explain their distinction between Section 3106's "referral duty," the standard for establishing fatal loss, and a court's consideration of mootness rather than the merits. *See* Defs.' Cross-Mot. at 16. Although the D.C. Circuit in *Judicial Watch* declined the government's invitation to "reach the merits," 844 F.3d at 956–57, it was clear there was *no* discretion in choosing to initiate action through the Attorney General after the failure of remedial recovery efforts. *Id.* at 956 ("While we recognized that sometimes an agency might reasonably attempt to recover its records before running to the Attorney General . . . we never implied that where those initial efforts failed to recover all the missing records (or establish their fatal loss), the agency could simply ignore its referral duty."). On remand, the district court had no qualms in reiterating the obligatory nature of the duty imposed by Section 3106. *Tillerson*, 2017 WL 5198161, at *3 ("[T]he Court of Appeals affirmed that 'an agency might reasonably attempt to recover its records before running to the Attorney General,' [but] . . . [t]he agency must initiate the referral process . . . if 'those initial efforts failed to recover or the missing records (or establish their fatal loss).'").

the FRA speaks for itself, and *Judicial Watch* merely reinforces what was established by the D.C. Circuit thirty years earlier in *Armstrong v. Bush*, namely, that Section 3106 imposes a non-discretionary obligation. *See* Mem. Op. at 13 n. 7 (citing *Armstrong*, 924 F.2d at 295, 296 n.12); *see also Armstrong*, 924 F.3d at 295 ("[I]nitiating action through the Attorney General is mandatory" and "leave[s] *no* discretion to determine which cases to pursue[.]"); *id.* at 295–96 ("[O]nce the agency head becomes aware of '*any* actual . . . removal . . . or destruction of records,' the agency head 'with the assistance of the Archivist *shall* initiate action through the Attorney General.'"). CoA Institute does not rely on some precedential outlier or a standard conjured from thin air to compel an "extraordinary" rule; it seeks to compel Defendants to satisfy non-discretionary obligations imposed by Congress and expressly recognized by both appellate and district courts in this jurisdiction.

Defendants' refusal to accept the requirements of the FRA's text, the established case law in the D.C. Circuit, and the law of this case is not a legitimate basis to grant their cross-motion for summary judgment. CoA Institute brought suit to require the Secretary of State and the Archivist to fulfill their statutory obligations to initiate action through the Attorney General for the recovery of Secretary Powell's work-related email records. *See Judicial Watch*, 844 F.3d at 954. Defendants' remedial recovery efforts have failed, and they have not established the fatal loss of the records at issue. Defendants must now go to the Attorney General, which is capable of "marshalling the law enforcement authority of the United States . . . in assuring record . . . recovery." *Id.* at 956; *see Armstrong*, 924 F.2d at 295. Because they refuse to do so, CoA Institute is entitled to summary judgment as a matter of law. *See* Pl.'s Mot. at 17–22.

CONCLUSION

For the foregoing reasons, and those set forth in CoA Institute's Memorandum in Support of Plaintiff's Motion for Summary Judgment, CoA Institute respectfully requests that the Court deny Defendants' Motion to Dismiss and grant CoA Institute's Motion for Summary Judgment.

Dated: May 3, 2018

Respectfully submitted,

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