IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIAN SANCHEZ MORA, et al.,

Plaintiffs,

v.

U.S. CUSTOMS AND BORDER PROTECTION, et al.,

Defendants.

No. 1:24-cv-03136-BAH

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO RECONSIDER DISMISSAL OF FOIA CLAIM AGAINST DEFENDANT DEPARTMENT OF HOMELAND SECURITY

(ORAL ARGUMENT REQUESTED)

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I. INTRODUCTION

Plaintiffs Julian Sanchez Mora, Siobhan Waldron, Carlos Moctezuma García, Ali Ainab, Rafael Edgardo Flores Rodriguez, and Beatriz Ariadna Garcia Mixcoa (collectively, Plaintiffs) respectfully move for reconsideration of the decision of the U.S. District Court for the Northern District of California dismissing their claim under the Freedom of Information Act (FOIA) against Defendant U.S. Department of Homeland Security (DHS) in this putative class action. *See* Dkt. 59. Plaintiffs challenge two policies or practices of Defendants U.S. Customs and Border Protection (CBP) and DHS. First, they challenge CBP's systemic failure to timely make determinations on FOIA requests for individual records, which DHS—as CBP's parent agency—bears responsibility for both causing and not remedying, and second, they challenge Defendants' stated position that they do not have an affirmative obligation to comply with FOIA's statutory deadlines.[1] These policies or practices violate 5 U.S.C. § 552(a)(3)(A), (6)(A)-(B).

Reconsideration is warranted because the district court applied the wrong analysis. Instead of assessing whether Plaintiffs had demonstrated a pattern or practice claim against DHS for its role in CBP's systemic failure and its position regarding FOIA compliance—the claim that Plaintiffs actually allege against DHS—the court assessed Plaintiffs' FOIA claim as if it were a claim related to a specific FOIA request against DHS, i.e., assessing whether DHS had received individual FOIA requests from Plaintiffs and "improperly withheld" records. Dkt. 52 at 15-17. By analyzing Plaintiffs' FOIA claim against DHS as a claim related to a specific FOIA request,

[1] Unlike the plaintiffs in *Washington Lawyers Committee*, Plaintiffs here do not dispute the viability of FOIA as a mechanism for obtaining agency records and, thus, are not challenging the agency's policy or practice of funneling requests for individual records into the general FOIA pipeline. *Washington Lawyers' Comm. for C.R. & Urb. Affs. v. U.S. Dep't of Just.*, Civ. A. No. 23-1328 (BAH), 2024 WL 1050498, *2-3 (D.D.C. Mar. 10, 2024). In addition, that case names only the parent agency to the policy or practice claim but here Plaintiffs name both the parent and component agency. *See id*. Dkt. 1 at 3 (D.D.C. filed May 10, 2023).

the court committed legal error. As such, the cases and decentralization regulations on which the court relied are wholly inapposite.

In fact, DHS is a critical party to Plaintiffs' FOIA claim. In addition to the allegations against DHS in the amended complaint, DHS readily has acknowledged the pivotal role it has played in managing the FOIA operations of its component agencies. DHS plays a vital role in, *inter alia*, resource allocation, staffing, tactical assistance (including leveraging external processing contracts and allocation of FOIA staff from other components), and ongoing backlog reduction planning. DHS has even touted its role in previously working with CBP to reduce its backlog.

In addition, the district court erred by construing the term "agency" in 5 U.S.C. § 552(a)(4)(B) as applicable only to CBP, and not DHS. Congress employed this term throughout FOIA as referring to the entity with ultimate responsibility for enforcing the statute, which, in this case, is DHS. Indeed, review of the statute as a whole demonstrates that Congress did not limit the scope of § 552(a)(4)(B) to the particular agency that received the FOIA request.

If Plaintiffs' FOIA claim is not reinstated against DHS, Plaintiffs would have no remedy to address their specific policy or practice claims against DHS, which are based on Plaintiffs' allegations regarding the significant role that DHS plays in managing CBP's FOIA operations and DHS' position that it does not have an affirmative obligation to comply with the FOIA's deadlines. Plaintiffs should not be left without an adequate remedy against Defendant DHS. Thus, if the Court declines to reinstate Plaintiffs' policy or practice FOIA claim against DHS, the Court should reinstate Plaintiffs' claims under the Administrative Procedure Act (APA) against DHS, as, at that point, FOIA would not provide an adequate remedy.

II. BACKGROUND

The FOIA requires that an agency make a determination on a FOIA request within 20 business days. 5 U.S.C. § 552(a)(6)(A)(i). In the case of "unusual circumstances," with a limited exception not relevant here, an agency may extend its response time by no more than 10 working days, provided it sends the requestor "written notice." 5 U.S.C. § 552(a)(6)(B)(i). CBP has a policy or practice of failing to make a determination within this statutory timeframe, even when acting on straightforward FOIA requests for an individual's immigration or travel records.

A. Importance of CBP Records

CBP maintains records of, *inter alia,* individuals' history of international travel to and from the United States.[2] These records also include information relating to apprehensions, detentions, or inspections of an individual by CBP agents, as well as expedited removal orders, voluntary returns, withdrawn applications for admission, and expulsions. *Id.*

Attorneys file CBP FOIA requests to obtain records necessary to understand and advise their clients about their eligibility for immigration benefits, to defend against removal, and to assess the availability of post-conviction relief.[3] Individuals also need CBP records to pursue immigration benefits or relief, to defend against removal, or to demonstrate residence in the United States.[4] The only way to obtain a copy of an individual's CBP records is to submit a FOIA request. This is true even for individuals in removal proceedings, as FOIA is the primary

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[2] *See* U.S. Customs & Border Prot., *Request Records Through the Freedom of Information Act*, https://www.cbp.gov/site-policy-notices/foia/records (last updated Oct. 4, 2024).

[3] *See, e.g.*, Dkt. 9-1 ¶¶ 4-5; Dkt. 9-2 ¶ 7; Dkt. 9-3 ¶¶ 8-9; Dkt. 9-6 ¶ 5; Dkt. 9-7 ¶¶ 4–5; Dkt. 9-8 ¶ 6; Dkt. 9-9 ¶ 4; Dkt. 9-10 ¶ 5; Dkt. 9-11 ¶ 3; Dkt. 9-12 ¶ 5; Dkt. 9-13 ¶ 3; Dkt. 9-14 ¶¶ 3, 6; Dkt. 9-15 ¶¶ 3, 8; Dkt. 9-16 ¶ 3; Dkt. 9-17 ¶¶ 8, 9; Dkt. 9-18 ¶ 3; Dkt. 9-19 ¶ 4; Dkt. 9-20 ¶ 3; Dkt. 9-21 ¶ 3; *see also* Dkt. 42 ¶ 2.

[4] *See, e.g.*, Dkt. 9-5 ¶¶ 4, 6.

mechanism for accessing immigration case file information, and discovery is not available.[5] Immigration attorneys regularly file FOIA requests with CBP to obtain the history of a client's travel to and from the United States, to determine whether the client has ever been apprehended, detained, or inspected by CBP, or otherwise interacted with CBP agents. CBP's website encourages that such requests be made through the FOIA SecureRelease Portal.[6]

Without CBP records, attorneys often cannot fully assess a client's eligibility for immigration relief, including whether they are eligible to naturalize or acquire citizenship. For example, generally, under 8 U.S.C. § 1255(a), noncitizens must demonstrate they were "inspected and admitted or paroled into the United States" in order to adjust to lawful permanent resident status. CBP records are often the only source to demonstrate whether a person was "inspected," "admitted," or "paroled" into the country. Likewise, CBP records often indicate the person's arrival date to the United States, which is critical to calculating the one-year filing deadline for an asylum application.[7] Furthermore, other forms of immigration relief and eligibility to naturalize or acquire U.S. citizenship through a parent require proof of residence/physical presence in the United States for certain lengths of time.[8]

CBP records also are critical to defending against deportation.[9] Delays in receipt of CBP records may require attorneys to postpone filing for immigration benefits, delay challenging expedited removal orders, or force them to seek to continue immigration hearings, which may

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5 *See Nightingale v. USCIS*, 507 F. Supp. 3d 1193, 1199 (N.D. Cal. 2019); *see also, e.g.*, Dkt. 9-12 ¶ 5; Dkt. 9-16 ¶ 5; Dkt. 9-17 ¶ 7.

6 *See* U.S. Customs & Border Prot., *Request Records Through the Freedom of Information Act*, https://www.cbp.gov/site-policy-notices/foia/records (last updated Oct. 4, 2024).

7 *See* 8 U.S.C. § 1158(a)(2)(B); *see also* Dkt. 9-3 ¶ 8; Dkt. 9-15 ¶ 10.

8 8 U.S.C. § 1229b(a)(2), (b)(1)(A); 1427(a)-(c), 1433(a)(2); Dkt. 9-5 ¶ 6; Dkt. 9-10 ¶ 5.

9 *See, e.g.*, Dkt. 9-1 ¶ 9; Dkt. 9-19 ¶ 11; Dkt. 9-18 ¶¶ 3, 7; Dkt. 9-20 ¶¶ 3,4; Dkt. 9-21 ¶ 6.

delay their clients' immigration cases or receipt of lawful status.[10] Noncitizens also are disadvantaged if their attorneys do not have the paperwork from their previous CBP encounters—information that may be necessary to, *inter alia*, challenge the validity of a prior CBP-issued removal order, or file a damages claim based on tortious conduct by CBP officers.[11]

Given that years may have passed between an individual's entry and when their need for CBP records arises, the individual may have lost the relevant paperwork (if they were given any) or forgotten the details of their travel history. In such cases, filing a FOIA request with CBP is the only mechanism to obtain this crucial information.[12]

B. CBP Processing Time and Backlog

CBP has a FOIA backlog that contributes to—and also reflects—its failure to comply with the statutory time period for processing FOIA requests. DHS defines a backlog in the FOIA context as "[t]he number of requests or administrative appeals that are pending at an agency at the end of the fiscal year that are beyond the statutory time period for a response." Fiscal Year (FY) 2023 DHS FOIA Report.[13] Notably, CBP's FOIA backlog has increased over twenty-fold in the past six years. The backlog significantly decreased to 1,172 in FY 2016 and 1,008 in FY 2017, following settlement of an earlier class action challenge to CBP's delays in FOIA processing. FY 2016 DHS Report at 17, 19; FY 2017 DHS Report at 16, 19; *Brown v. CBP*, 132 F. Supp. 3d 1170, 1171 (N.D. Cal. 2015). At the end of FY 2023, however, CBP's backlog

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10 *See, e.g.*, Dkt. 9-2 ¶ 8; Dkt. 9-18 ¶ 7; Dkt. 9-10 ¶¶ 8-9; Dkt. 9-13 ¶ 7.

11 *See, e.g.*,, Dkt. 9-3 ¶ 7; Dkt. 9-6 ¶ 9; Dkt. 9-8 ¶ 7; Dkt. 9-19 ¶ 8; Dkt. 9-15 ¶ 11.

12 *See, e.g.*, Dkt. 9-2 ¶ 6; Dkt. 9-12 ¶ 5; Dkt. 9-16 ¶ 6a; Dkt. 9-9 ¶ 6; Dkt. 9-10 ¶ 6.

13 DHS, *Fiscal Year 2023 Freedom of Information Report to the Attorney General of the United States and the Director of the Office of Government Information Services* 6 (Mar. 2024), https://www.dhs.gov/sites/default/files/2024-03/23_0325_fy23-FOIA_Annual_Report.pdf. Hereinafter, references to DHS FOIA Reports are to Freedom of Information Reports to the Attorney General of the United States and the Director of the Office of Government Information Services, which are available by fiscal year at https://www.dhs.gov/foia-annual-reports.

consisted of 21,444 requests, the second highest of all DHS component agencies. FY 2023 DHS FOIA Report at 28.

CBP and DHS have failed to allocate sufficient financial or staffing resources to CBP's FOIA operations despite the significant growth in the number of FOIA requests and persistent backlogs. *See* Dkt. 42 ¶¶ 7-8, 36-38. For example, in FY 2021, CBP received 108,177 FOIA requests and had 71 full-time FOIA personnel. FY 2021 DHS FOIA Report at 15, 27. By FY 2023, the number of FOIA requests increased by 33.55% (144,474), but the number of full-time personnel only increased by 5.63% (75). *See* FY 2023 DHS FOIA Report at 13, 25.

As CBP's parent agency, DHS must ensure CBP's compliance with the FOIA, including by allocating sufficient financial and staffing resources. Dkt. 42 ¶¶ 8, 25, 30, 38, 81, 91, 108. DHS is aware of CBP's backlog. *Id*. ¶¶ 5, 8, 29, 31. In fact, DHS introduced the processing system CBP now employs—Secure Release—purportedly "to process records faster." *Id*. ¶ 6.

C. Procedural History

This case commenced in the U.S. District Court for the Northern District of California as a putative nationwide class action under the FOIA, 5 U.S.C. § 552, *et seq*. *See* Dkt. 1. Plaintiffs are three individuals and three attorneys whose FOIA requests for their own or their clients' immigration records were pending before CBP for more than 30 business days at the time the First Amended Complaint was filed on August 2, 2024. *See* Dkt. 42 ¶¶ 18-23. Plaintiffs seek declaratory and injunctive relief on behalf of themselves and a proposed class of similarly situated individuals.[14] Dkt. 42 ¶¶ 12, 67-76, Prayer for Relief ¶¶ 3-8.

[14] The proposed class consists of: "All persons who filed, or will file, FOIA requests with CBP for an individual's records which have been pending, or will be pending, with CBP for more than 30 business days without a determination." Dkt. 42 ¶ 68.

Plaintiffs allege: first, that CBP has a nationwide pattern or practice[15] of failing to make records promptly available and of delaying determinations on FOIA requests for individual records, *id.* ¶¶ 1, 27-29, 35, 37, 41, 80, 83, 90, 94-99, 103, 106-07; second, that DHS bears responsibility for this systemic failure, *id.* ¶¶ 8, 30, 38, 81, 91, 108; and third, that CBP and DHS have a policy that they are not affirmatively obligated to comply with the FOIA's statutory deadlines, *see id*. ¶¶ 1, 10, 37, 39-40, 82, 93, 105. Accordingly, Plaintiffs allege that Defendants' actions (1) violate the FOIA's statutory timeframe and mandate to make records promptly available (Count III); (2) constitute an unlawful withholding of agency action under the APA, 5 U.S.C. § 706(1) (Count I); and (3) are arbitrary and capricious, not in accordance with law, short of a statutory right, and/or fail to observe procedure required by law under the APA, 5 U.S.C. § 706 (2)(A), (C), (D) (Count II). Dkt. 42 ¶¶ 77-110.

Following briefing on Defendants' Motion to Transfer or Dismiss, Judge Thompson transferred the case to this Court after ruling that jurisdiction and venue were proper in this District, dismissing Plaintiffs' FOIA claim against DHS, and dismissing Plaintiffs' APA claims on the basis that the FOIA provides an adequate remedy. *See* Dkt. 59.

D. History of DHS as a Defendant to Immigration FOIA Class Actions

1. *Brown v. CBP*

In 2015, five immigration attorneys and thirteen noncitizens filed a similar class action against Defendants CBP and DHS for a pattern or practice of failing to timely respond to FOIA

[15] Because this action was commenced within the Ninth Circuit, Plaintiffs pled a "pattern or practice" consistent with Ninth Circuit law. *See Hajro v. USCIS*, 811 F.3d 1086, 1103 (9th Cir. 2016). The D.C. Circuit uses the term "policy or practice." *See Judicial Watch v. DHS*, 895 F.3d 770, 777 (D.C. Cir. 2018). However, it is a distinction without a difference as both circuits define the claim as one that "will impair the party's lawful access to information in the future." *See Hajro*, 811 F.3d at 1103 (quotingting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988)); *Judicial Watch*, 895 F.3d at 777 (same).

requests. *See Brown v. CBP*, 132 F. Supp. 3d 1170 (N.D. Cal. 2015). At the time, CBP's FOIA backlog was 34,307. FY 2014 DHS Report at 16. After filing, Defendants filed a motion to dismiss, which stated their policy position that neither 5 U.S.C. § 552(a)(6)(A)(i) nor (a)(6)(B)(i) imposes an affirmative obligation or requires the agency to make a determination within the 20- or 30-business-day statutory timeframes, respectively.[16] In denying the motion to dismiss in *Brown*, the court found that the plaintiffs had "describe[d] a longstanding and pervasive practice of unreasonable delay in CBP's response to FOIA requests" and that plaintiffs alleged an "actionable violation of FOIA." *Brown*, 132 F. Supp. 3d at 1172, 1174.

During the course of litigation, CBP's backlog shrunk from 34,307 at the close of FY 2014, down to 3,187 as of June 24, 2016. Exh. A, *Brown v. CBP* Settlement Agreement at 2-3. In settling the case, Defendants represented that "[c]urrently, Defendant CBP generally is able to respond to most non-complex FOIA requests [for an individual's records] within 20 days." Dkt. 42 ¶ 32; *see also* Exh. A at 3. Both DHS and CBP also avowed that they "are committed to continuing their efforts to timely process FOIA requests filed with Defendant CBP." Exh. A at 6. In the immediate aftermath of the settlement, CBP maintained a significantly decreased backlog of 1,172 and 1,008 requests in FY 2016 and FY 2017, respectively. *See* Dkt. 42 ¶ 7, 29, 32. However, DHS and CBP have abandoned that commitment and CBP's backlog subsequently

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[16] *See* Dfs.' Mem. In Supp. of Mot. to Dismiss Pls.' First Am. Compl. at 4, *Brown v. CBP*, 132 F. Supp. 3d 1170 (N.D. Cal. 2015) (No. 3:15-cv-01181, Dkt. 26) ("The provision is clear that the 20-day timeline — and an agency's failure to meet the timeline — simply sets forth a condition that must be met before a court may exercise or retain jurisdiction over the underlying FOIA claim."); *id.* at 7 (stating that Plaintiffs' position requiring compliance with the FOIA "would place agencies in an impossible position"); Reply in Supp. of Mot. to Dismiss Pls.' First Am. Compl. at 10, *Brown v. CBP*, 132 F. Supp. 3d 1170 (N.D. Cal. 2015) (No. 3:15-cv-01181, Dkt. 29) (disputing Plaintiffs' contention that the FOIA's 20-day timeline is a "mandate," stating "the FOIA timeline places considerable discretion with the agency to determine when it needs more time to respond to requests"); *see also* Dkt. 42 ¶¶ 1, 10, 37, 39-40, 82, 93, 105.

increased such that, at the close of FY 2023, it stands at 21,444. *Id*. ¶¶ 7, 29, 33.

2. *Nightingale v. USCIS*

In 2019, plaintiff immigration attorneys and individuals filed a similar nationwide putative class action against DHS and two of its other component immigration agencies, U.S. Citizenship and Immigration Services (USCIS) and U.S Immigration and Customs Enforcement (ICE). *See Nightingale v. USCIS*, 507 F. Supp. 3d 1193 (N.D. Cal. 2020). The complaint alleged a pattern or practice of failing to timely respond to FOIA requests for immigration case files (known as A-Files). *Id*. at 1195-96. At the time of filing, USCIS' FOIA backlog was 41,329 and ICE's FOIA backlog was approximately 18,000. Compl. ¶¶ 23, 30, *Nightingale v. USCIS*, No. 3:19-cv-03512 (N.D. Cal. 2020), Dkt. 1.

Following class certification briefing, the district court certified two nationwide classes of individuals who had filed or will file A-File FOIA requests that have been or will have been pending for more than 30 business days. *Nightingale v. USCIS*, 333 F.R.D. 449, 456, 463 (N.D. Cal. 2019). The parties then engaged in discovery, which established that DHS's FOIA Program is responsible for the coordination, direction, and oversight of its component agencies with respect to FOIA processing. *See* Exh. B, Rule 30(b)(6) Deposition of DHS witness James V.M.L. Holzer at 21:3–10; Exh. C, Statement of James V.M.L. Holzer at Congressional Subcommittee Hearing (Oct. 17, 2019) at 6-7.[17]

After discovery and summary judgment briefing, the district court concluded that, "through evidence of chronic delay and backlogs," plaintiffs had established a pattern or practice of unreasonable delay warranting declaratory and permanent injunctive relief. *Nightingale*, 507

[17] Exhibits B-E were filed in support of the plaintiffs' successful motion for summary judgment or the defendants' cross-motion in *Nightingale*.

F. Supp. 3d at 1201-02, 1207, 1211.[18] The court expressly found that "DHS ultimately shares responsibility with its component agencies for the chronic failure to comply with the FOIA statute." *Id*. at 1204. With the benefit of discovery and summary judgment briefing, the court found:

> Defendants argue that plaintiffs cannot show that DHS has been engaging in its own independent pattern or practice of FOIA violations because, by design, DHS components have their own FOIA offices and DHS headquarters generally is not involved in the direct processing of FOIA requests received by its components. Nonsense. DHS is responsible for providing oversight of its components' FOIA programs.

Nightingale, 507 F. Supp. 3d at 1204 n.10 (citations omitted).

Since the district court issued its permanent injunction, Defendant DHS along with co-defendant component agencies in that case, USCIS and ICE, largely have substantially complied with the permanent injunction, with the most recent reporting period indicating a 98.59% compliance rate. *See* Dfs.' Sixteenth Compliance Report, *Nightingale v. USCIS*, No. 3:19-cv-03512-WHO, Dkt. 178 (filed Dec. 12, 2024).

III. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 54(b), district courts have "inherent power to reconsider an interlocutory order 'as justice requires.'" *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011); *see also Lin v. Dist. of Columbia*, 47 F.4th 828, 838-39 (D.C. Cir. 2022); *Cobell v. Jewell*, 802 F.3d 12, 25 (D.C. Cir. 2015). "Under this standard, 'district courts retain broad discretion to reconsider earlier orders and may elect to grant a motion for reconsideration if there are good reasons for doing so.'" *Hurd v. Dist. of*

[18] The court permanently enjoined Defendants from further failing to adhere to the statutory deadlines for adjudicating A-File FOIA requests, as set forth in 5 U.S.C. §§ 552(a)(6)(A) and (B); ordered Defendants, within sixty days, to make determinations on all A-File FOIA requests in USCIS's and ICE's backlogs; and ordered quarterly compliance reports. *Id*. at 1196.

Columbia, 707 F.Supp.3d 1, 7 (D.D.C. 2023) (quoting *Inova Health Care Servs. for Inova Fairfax Hosp. v. Omni Shoreham Corp.*, No. 20-784 (JDB), 2023 WL 5206142, at *5 (D.D.C. Aug. 14, 2023)); *see also Fleck v. Dep't. of Veterans Affairs Off. of Inspector Gen.*, 651 F.Supp.3d 46, 51 (D.D.C. 2023) ("This standard 'leave[s] a great deal of room for the court's discretion' and 'amounts to determining 'whether reconsideration is necessary under the relevant circumstances.'" (quoting *Williams v. Savage*, 569 F. Supp. 2d 99, 109 (D.D.C. 2008)).

Notably, Rule 54(b) reconsideration is "distinct from" and includes "more flexibility" than the standards governing reconsideration of final judgments. *Cobell*, 802 F.3d at 26 (quoting *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004)); *see also Afghan and Iraqi Allies v. Blinken,* 103 F.4th 807, 813-14 (D.C. Cir. 2024) (explaining that Rule 54(b) more "latitude to modify its rulings in ongoing cases" than other procedural rules). "The burden is on the moving party to show that reconsideration is appropriate and that harm or injustice would result if reconsideration were denied." *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 893 F. Supp. 2d 258, 268 (D.D.C. 2012).

IV. THE COURT SHOULD RECONSIDER THE DISMISSAL OF PLAINTIFFS' FOIA CLAIM AGAINST DHS.

A. The District Court Erroneously Treated Plaintiffs' Policy or Practice FOIA Claim Against DHS as a Claim Related to a Specific FOIA Request and Thus Applied the Wrong Standard and Analysis.

1. Policy or practice claims are distinct from claims related to specific FOIA requests.

The D.C. Circuit long has recognized that, in addition to claims seeking relief related to specific FOIA requests, a plaintiff may assert a "claim that an agency *policy or practice* will impair the party's lawful access to information in the future." *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988). The challenged policy or practice need not be formal

nor explicitly violate FOIA; even "informal agency conduct" that results in a "persistent failure to adhere to FOIA's requirements" is actionable. *Judicial Watch, Inc. v. DHS*, 895 F.3d 770, 777-78, 780 (D.C. Cir. 2018); *see also Nightingale*, 507 F. Supp. 3d at 1207 (citing *Judicial Watch*); *cf. Newport Aeronautical Sales v. Dep't of the Air Force*, 684 F.3d 160, 164 (D.C. Cir. 2012) (acknowledging the viability of a policy-or-practice claim); *Center for the Study of Servs. v. U.S. Dep't of Health and Human Servs.*, 874 F.3d 287, 292 (D.C. Cir. 2017) (same).

In assessing a policy or practice claim in this Circuit, courts must determine whether a "policy or practice" exists that produces a "pattern of prolonged delay" and "will interfere with [the plaintiff's] right under FOIA to promptly obtain non-exempt records from the agency in the future." *Judicial Watch*, 895 F.3d at 780. Such systemic "unreasonable delays in disclosing non-exempt documents' violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses." *Id.* at 778 (quoting *Payne*, 837 F.2d at 494); *cf. Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19 (1974) (calling the courts the "enforcement arm" of the FOIA).

In contrast, courts assess FOIA claims seeking relief related to a specific FOIA request or requests under entirely different standards depending on, *inter alia*, whether the issue pertains to proper filing of the request, an agency's failure to timely respond, or the improper withholding of records. *See, e.g.*, *Yeager v. Drug Enf't Admin.*, 678 F.2d 315, 326 (D.C. Cir. 1982) (assessing whether requestor reasonably described requested records); *Burka v. U.S. Dep't of Health and Human Servs.*, 87 F.3d 508, 515-21 (D.C. Cir. 1996) (assessing whether agency properly withheld records pursuant to an exemption to FOIA); *Seavey v. U.S. Dep't of Justice*, 266 F. Supp. 3d 241, 245 (D.D.C. 2017) (assessing whether agency made a timely determination as to a FOIA request). Understandably, for such individual FOIA actions, courts require the submission

of a proper FOIA request to trigger an agency's obligation to respond. *See, e,g.*, Dkt. 59 at 15 (citing *LaVictor v. Trump*, No. 19-cv-01900-TNM, 2020 WL 2527192, at *2 (D.D.C. May 18, 2020); *Ghassan v. U.S. Dep't of Justice*, No. 22-cv-01615-RDM, 2023 WL 1815650, at *2 (D.D.C. Feb. 8, 2023); *Rae v. Hawk*, No. 98-cv-01099-TPJ, 2001 WL 37155163, at *2 (D.D.C. Mar. 7, 2001)). With respect to FOIA claims based on specific FOIA requests, the court examines the propriety of the request and the agency's specific response or delay, not any policies or practices underlying a persistent failure or agency conduct that has led to a policy or practice of unreasonable delay. *Id*.

2. Plaintiffs allege a policy or practice FOIA claim against DHS.

Plaintiffs' amended complaint alleges that DHS is an integral partner with CBP, sharing responsibility for the policy or practice of untimely responses to CBP FOIA requests. DHS has an ongoing obligation to ensure CBP's compliance with the FOIA, including by allocating sufficient financial and staffing resources. Dkt. 42 ¶¶ 8, 25, 30, 38, 81, 91, 108. DHS is aware of CBP's backlog, *id*. ¶¶ 5, 8, 29, and 31; in fact, it introduced the SecureRelease processing system that CBP uses purportedly "to process records faster," *id*. ¶ 6. Additionally, DHS publishes annual reports which detail the backlog for each of its components, including CBP. *See, e.g.*¸ *Id.* ¶¶ 3, 5-6, 29. DHS has a policy that FOIA does not impose an affirmative obligation requiring CBP to make determinations within FOIA's timeframes. *Id*. ¶¶ 1, 39, 40, 82, 93, 105. Finally, as an administrator and enforcer of immigration laws and the prosecuting entity in removal proceedings, DHS has a distinct advantage over Plaintiffs and putative class members because it has access to all their immigration records but forces them to wait months to obtain these same records from CBP. *Id.* ¶¶ 25, 42; *see also Nightingale*, 507 F. Supp. 3d at 1199 & n.2 (discussing "information asymmetry that hinders plaintiffs in successfully applying for immigration benefits,

challenging removal orders, or seeking release from detention"). Accordingly, on its face, the amended complaint alleges that DHS has a "policy or practice" that produces a "pattern of prolonged delay" of the release of CBP records and "interfere[s] with [Plaintiffs'] right[s] under FOIA to promptly obtain non-exempt records from the agency in the future." *Judicial Watch*, 895 F.3d at 780.

3. The district court erred in analyzing Plaintiffs' policy or practice claim against DHS as if it were a claim related to a specific FOIA request.

In dismissing Plaintiffs' FOIA claim against Defendant DHS, the district court erroneously assessed Plaintiffs' FOIA claim against DHS as if it were related to a specific FOIA request, rather than under the standard for a *policy or practice claim*. *See* Dkt. 59 at 15 (stating "[t]he FOIA claim against DHS is dismissed because Plaintiffs do not allege that they submitted any FOIA requests to DHS"); *id*. at 16 ("Here, Plaintiffs do not allege that they submitted any FOIA requests to DHS."). Accordingly, the court incorrectly concluded that because "DHS did not receive a FOIA request from any of the Plaintiffs to which DHS allegedly failed to respond in a timely manner. . . . DHS did not improperly withhold agency records, and under Section 552 this Court does not have the authority under FOIA to devise remedies and enjoin DHS." *Id*.

The district court failed to recognize that Plaintiffs' policy or practice FOIA claim is not contingent upon submission of a FOIA request to DHS and thus, could not be analyzed under the test for an individual FOIA claim. The test to establish a policy or practice claim logically excludes consideration of an individual claim because it concerns whether the challenged conduct results in a "persistent failure to adhere to FOIA's requirements." *Judicial Watch*, 895 F.3d at 777-78, 780; *see also Hajro v. USCIS*, 811 F.3d 1086, 1102 (9th Cir. 2016) ("We clarify that the Article III requirements for a *specific* FOIA request claim and a *pattern or practice* claim differ from each other.") (emphasis in original). Here, the challenged agency conduct leading to

the "persistent failure to adhere to FOIA's requirements" is conduct by *both* CBP and DHS. With respect to DHS, that conduct includes, *inter alia*, its failure, as the parent agency, to provide oversight, to prioritize and leverage resources, and to coordinate a backlog reduction plan so that CBP can comply with FOIA. *See supra* Section IV.A.2; *see also infra* Section IV.A.4. Plaintiffs also challenge both agencies' position that FOIA's deadlines are not affirmative obligations, *see* Dkt. 42 ¶¶ 1, 10, 37, 39-40, 82, 93, 105, but rather are simply "a condition" precedent to district court jurisdiction and subject to "considerable [agency] discretion . . . to determine when it needs more time to respond to requests," *see supra* n.16. As the parent agency, DHS has ultimate responsibility to properly interpret FOIA and to ensure that CBP follows the law. *See infra* Section IV.A.4; *see also Nightingale*, 507 F. Supp. 3d at 1204 n.10. Because Judge Thompson misapprehended Plaintiffs' FOIA claim, she erroneously relied on cases involving FOIA claims related to specific FOIA requests, and did not apply the standard for a pattern and practice claim. Dkt. 59 at 15 (citing *LaVictor*, 2020 WL 2527192, at *2; *Ghassan*, 2023 WL 1815650, at *2; *Rae,* 2001 WL 37155163, at *2).

The court also improperly relied on the "decentraliz[ation]" regulations, which require FOIA requestors to file *specific* FOIA requests with the relevant component agency. Dkt. 59 at 15-16 (citing 6 C.F.R. §§ 5.1(c), 5.3(a), 5.4(a)). But like the cases on which the court relied, those regulations apply to specific requests, not policy or practice claims, with one critical exception. The decentralization regulations specifically provide that "[t]he rules in this subpart should be read in conjunction with the text of the FOIA." 6 C.F.R. § 5.1(a)(2). As such, consistent with the statutory text of FOIA, namely 5 U.S.C. § 552(a), as interpreted by the Supreme Court and courts of appeals, the regulations cannot be read to preclude courts from issuing declaratory and injunctive relief for policy or practice claims that are not contingent on

any particular FOIA request.

In *Renegotiation Board v. Bannercraft Clothing Co.*, defense contractors sued to enjoin the Renegotiation Board (RB) from withholding documents relevant to contract renegotiations and from conducting further renegotiation proceedings until RB produced the documents. 415 U.S. at 6. The Supreme Court held that, "[w]ith the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court." *Id*. at 20. The Court relied on the "broad language of the FOIA," "the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do," and the district court's role as the "enforcement arm" of FOIA. *Id*. at 19-20; *see also Payne*, 837 F.2d 494-95 (ordering, on remand, declaratory relief and consideration of a prospective injunction to remedy the Air Force's practice of refusing to release bid abstracts); *Long v. U.S. Internal Revenue Serv.*, 693 F.2d 907, 910 (9th Cir. 1982) (reversing the denial of a prospective injunction prohibiting agency from continuing to withhold and delay disclosure of non-exempt documents and instructing the court to "carefully draft[]" an injunction to "insure against lengthy delays in the future"); *Nightingale*, 507 F. Supp. 3d at 1213-14 (enjoining DHS and component agencies' pattern or practice of violating FOIA's statutory deadlines to process requests for immigration case files).

The district court further erred by finding that the district court's decision in *Nightingale* "has no bearing on whether a plaintiff can bring a FOIA claim without first submitting a valid FOIA request to the agency," claiming that "[t]hat question was not before the *Nightingale* court." Dkt. 59 at 16. But this again ignores that Plaintiffs here, like the plaintiffs in *Nightingale*, raise a policy or practice claim against DHS and not a claim regarding one specific FOIA request where DHS failed to promptly disclose records. Consistent with such a claim, in *Nightingale*, Judge

Orrick discussed at great length DHS' contributions to the systemic failure of its component agencies, including DHS' oversight role, DHS' failure to ask for "specifically-designated funding for FOIA processing," 507 F. Supp. 3d at 1206, DHS' contributions to "a patchwork of short-term fixes," *id.*, and DHS' acknowledgment that delayed FOIA processing in immigration cases "adversely impacts [noncitizens], delays immigration proceedings, and potentially extends detention." *Id*. at 1208 (alternation in original). Judge Orrick also specifically rejected the notion that DHS could disclaim its role in plaintiffs' pattern and practice claim based on decentralization of the FOIA process, calling it "[n]onsense" and stating that "DHS is responsible for providing oversight of its component FOIA programs." *Id*. at 1204 n.10. Thus, contrary to Judge Thompson's conclusion, Judge Orrick was aware that specific FOIA requests had not been filed with DHS "in compliance with" the decentralization regulations, Dkt. 59 at 16, but nevertheless correctly understood that neither these nor the decentralization regulations are relevant to a policy or practice claim against DHS.

4. DHS is a required party to Plaintiffs' FOIA claim.

The definition of a "required party" under the Federal Rules of Civil Procedure provides a framework for this Court to assess whether DHS is a required defendant to Plaintiffs' FOIA claim. Under Rule 19, a party is required and must be joined if:

> (A) in that [party]'s absence, the court cannot accord complete relief among existing parties; or
>
> (B) that [party] claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party]'s absence may:
>
> (i) as a practical matter impair or impede the [party]'s ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1)(A)-(B). Application of the rule requires a fact-based, case-specific inquiry. *See, e.g.*, *Kickapoo Tribe of Indians of Kickapoo Rsrv. in Kan. v. Babbitt*, 43 F.3d 1491, 1405 (D.C. Cir. 1995) ("The rule calls for a pragmatic decision based on practical considerations in the context of particular litigation."); *Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 390 (D.D.C. 2017) ("Determining whether a person is a required party in a lawsuit is a fact-specific inquiry that can only be determined in the context of particular litigation."); *Capitol Med. Ctr., LLC v. Amerigroup Maryland, Inc.*, 677 F. Supp. 2d 188, 192 (D.D.C. 2010) ("Consideration of joinder under Rule 19 'can be complex, and determinations are case specific.'") (citation omitted)).

Plaintiffs' allegations establish that DHS is a required defendant to their FOIA claim, *see supra* Sections IV.A.2 & A.3. Under similar circumstances, the D.C. Court of Appeals recognized the viability of a pattern or practice claim against a parent agency for its component's noncompliance with FOIA. *See Payne*, 837 F.2d at 494 ("The Secretary's inability to deal with [its component's] officers' noncompliance with the FOIA, and the Air Force's persistent refusal to end a practice for which it offers no justification, entitle Payne to declaratory relief.").

Congress vested the Secretary of DHS—a Cabinet level agency—with authority over and responsibility for the functions of all organizational units within DHS. *See* 6 U.S.C. § 112(a). As such, the Secretary is charged with "control, direction, and supervision of all employees and of all the files and records" of DHS. 8 U.S.C. § 1103(a)(2). DHS has delegated the Secretary's authority over agency-wide FOIA compliance to its Chief FOIA Officer, who has responsibility for, *inter alia*, "[m]onitor[ing] implementation of the FOIA throughout DHS"; "[k]eep[ing] the Secretary, DHS General Counsel, and the Attorney General appropriately informed of the agency's performance in implementing the FOIA"; "[r]ecommend[ing] to the Secretary such

adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of FOIA"; "[r]eview[ing] and report[ing] to the Attorney General on the agency's performance in implementing the FOIA"; and "[o]ffer[ing] training to agency staff regarding their responsibilities under FOIA." DHS, Directive 262-11, Freedom of Information Act Compliance, 2 (Apr. 16, 2017)[19]; *see also* DHS, Instruction No. 262-11-002, Freedom of Information Act Reporting Requirements, 2 (Nov. 14, 2018) (stating that the Chief FOIA Officer, *inter alia*, "[m]onitors the status of Component FOIA programs and make recommendations as necessary to improve implementation"); 5 U.S.C. § 552(j)(2) (describing the responsibilities of agencies' Chief FOIA Officers).[20]

Consistent with the above-referenced directives, DHS itself repeatedly has acknowledged its pivotal role in the FOIA processing of *its component agencies*. For example, DHS has acknowledged that:

- "FOIA backlogs have continued to be a systemic problem at DHS." Exh. D, DHS, Departmental Freedom of Information Act (FOIA) Backlog Reduction Plan: 2020-2023, at 88276 (Nov. 8, 2019).

- Allowing component agencies to individually attempt to respond to FOIA requests without overarching coordination exacerbates backlogs and delays, pointing to "the challenges created by decentralized operations." *Id.* at 88281.

- "The solutions Components regularly rely on—hiring contractors, authorizing overtime, and initiating a surge as the end of the fiscal year draws near—only serve to improve statistics temporarily." *Id*. at 88279.

- Solutions isolated to a single component agency simply push the backlog to other agencies. *See* Exh. B at 161:15-17; 165: 11-13. .

- "[T]he DHS FOIA program needs a unified approach that accounts for differences in the

[19] *Available at* https://www.dhs.gov/sites/default/files/publications/Directive%20262-11%20Freedom%20of%20Information%20Act%20Compliance%20April%202017.pdf (last visited Jan. 30, 2025).

[20] *Available at* https.//www.dhs.gov/sites/default/files/publications/FOIA%20Reporting%20Requirements.pdf (last visited Jan. 30, 2025).

type and volume of requests received across the agency." Exh. D at 88281.

- DHS is charged with the critical role of mediating conflicting component agency approaches and ensuring greater coordination. Exh. B at 109:5-113:1; Exh. C at 37 ("I think that we have played a vital role in having those discussions over the years.").

In an expert declaration, the then Deputy Chief FOIA Officer for the DHS Privacy Office stated that the DHS Privacy Office "has assisted its components with processing certain types of requests in order to reduce outstanding backlogs," "is responsible for providing oversight of the DHS component FOIA programs," "monitors the performance of Component FOIA offices through monthly reports and conversations with FOIA officers," "will offer the assistance of its staff to Components with the largest backlogs and compatible processing systems," "collects information and publishes reports regarding FOIA operations across the Department and its components," "recommends changes to component policies and practices to maintain compliance with privacy and records access laws," "issues performance metrics . . . [which] set clear goals for the number of requests components are expected to process," and "assists components, . . . with coordinating to address systemic challenges facing the DHS FOIA Program." *See* Exh. E, Decl. of James V.M.L. Holzer ¶¶ 4, 7-12. Notably, the DHS Privacy Office has insisted that it must control all aspects of FOIA processing for all component agencies:

> Key to addressing some of the challenges created by decentralized operations is clarifying the DHS Chief FOIA Officers authorities and delineating Component responsibilities through management policies directives and instructions Specifically the DHS Privacy Office *must have* influence in the recruitment selection and rating of Component FOIA Officers and insight into the Components FOIA budgeting process and any plans to reorganize FOIA operations.

Exh. D at 88281 (emphasis added).

Moreover, DHS has touted its role in CBP's FOIA processing as exemplary of the "frequent[] . . . management and processing support" it provides to components to "assist[]

Components with backlog reduction efforts." *Id*. at 88279 ("Another example is the DHS Privacy Office's intensive backlog reduction efforts in collaboration with CBP and ICE—that eliminated approximately 6,000 requests from the DHS backlog at the end of FY 2018."); Exh. E ¶ 8 ("In FY 2020, FOIA analysts in the Privacy Office processed approximately 9,500 FOIA requests for U.S. Customs and Border Patrol (CBP), reviewing over 45,000 pages of CBP records."); DHS, Fiscal Year 2023 Freedom of Information Act Report to the Attorney General of the United States and the Director of the Office of Government Information Services 2 (Mar. 2024) ("[T]he DHS Privacy Office strategically deployed resources to support the DHS FOIA Program by, for example, providing direct assistance to U.S. Customs and Border Protection (CBP) . . . .").

Here, DHS easily meets the Rule 19's definition of a "required party" under all prongs. First, as established, DHS has a critical role in all aspects of FOIA operations conducted by its component agencies, including issuance of directives, performance metrics, backlog reduction planning, selection and evaluation of FOIA officers, allocation of budgetary and staffing resources, and plans to reorganize. *See supra* pp. 19-21; *see also Nightingale*, 507 F. Supp. 3d at 1204 & n.10. As such, any injunction against CBP should also include DHS to ensure that DHS leverages its resources and responsibilities to ensure CBP fulfills its obligations under FOIA, and thereby provide "complete relief." Fed. R. Civ. P. 19(a)(1)(A); *cf. Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103, 112-13 (D.D.C. 2009) ("The Court of Appeals has broadly characterized necessary parties as "those 'affected by the judgment and against which in fact it will operate . . . .'") (alteration in original) (citation omitted). Second, for these same reasons, DHS has an interest in CBP's processing and in defending its policy positions with respect to FOIA compliance. Accordingly, CBP is not suited to protect DHS' interest as a practical matter

given that it is a distinct agency, albeit a component agency. *See* Fed. R. Civ. P. 19(a)(1)(B)(i). Finally, absent reinstating Plaintiffs' FOIA claim against DHS, any injunction against CBP subjects it to a substantial risk of incurring double and/or multiple obligations from DHS with respect to FOIA processing, including metric, resources, and processing. *See* Fed. R. Civ. P. 19(a)(1)(B)(ii).

* * * * *

In sum, the district court wrongly analyzed the claim as if it were related to a specific FOIA request and failed to treat the FOIA claim alleged by Plaintiffs against DHS as a pattern or practice claim. DHS is a required party to Plaintiffs' FOIA claim because it shares responsibility for CBP's systemic failures and disavows its affirmative FOIA obligations. Thus, this Court should reinstate DHS as a defendant to Plaintiffs' FOIA claim.

B. The District Court Erred in Narrowly Interpreting the Term "Agency" as Applying Only to CBP.

A district court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U.S.C. § 552(a)(4)(B). While the district court did not address the statute's meaning of the term "agency," the court necessarily understood it to refer only to CBP. Dkt. 52 at 15-17. This was in error. Throughout FOIA, Congress frequently employed the term "agency" to refer to the government entity with ultimate responsibility for enforcing FOIA and not solely the components of such government entities. Because DHS has ultimate responsibility over each of its components' FOIA divisions, *see supra* Section IV.A.4, the term "agency" as used § 552(a)(4)(B) must be read to include DHS. Moreover, and significantly, Congress did not limit the scope of § 552(a)(4)(B) to the particular agency that received the FOIA request.

"Agency" is defined broadly in the statute as "each authority of the United States,

whether or not it is within or subject to review by another agency," subject to exceptions not relevant here. 5 U.S.C. § 551(1); *see also id.* § 552(f)(1) (defining "agency" for purposes of FOIA to include "any executive department"). Both DHS and CBP are agencies under this definition. In certain FOIA provisions, however, Congress specifically intended that the term "agency" apply only to the parent entity and not each component of that entity. For example, several provisions require each agency to publish rules in the Federal Register. *See, e.g.*, 5 U.S.C. § 552(a)(1), (a)(4)(A)(i). Only DHS, and not each of its components, has published such regulations. *See, e.g.*, 6 C.F.R. § 5.1(a)(1) ("This subpart contains the rules that the Department of Homeland Security follows in processing requests for records under the Freedom of Information Act"); *see also* DHS, Freedom of Information Act Regulations, 81 Fed. Reg. 83625 (Nov. 22, 2016) ("The Secretary of Homeland Security has authority under 5 U.S.C. §§ 301, 552, and 552a, and 6 U.S.C. § 112(e), to issue FOIA and Privacy Act regulations.").

Similarly, Congress directed that "each agency" submit annual reports regarding "the number of FOIA determinations made by the agency;" the number of FOIA requests pending "before the agency;" the number of FOIA requests "received by the agency;" the "average number of days for the agency to respond to a request;" and similar information. 5 U.S.C. § 552(e)(1). Only DHS, and not each of its components, submits these annual reports. *See, e.g.*, Dkt. 42 ¶¶ 3, 5-6, 29. In such reports, DHS includes statistics for each component, treating FOIA requests and determinations made by such components as its own for purposes of the statutory reporting requirements. *Id*.

Further, Congress directed that "[e]ach agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level)." 5 U.S.C. § 552(j)(1). Only DHS, and not its components, including CBP, has appointed such an officer.

See DHS Leadership, https://www.dhs.gov/leadership (last updated Jan. 30, 2025); *cf.* CBP, Commissioner's Office, https://www.cbp.gov/about/leadership-organization/commissioners-office (last modified Jan. 29, 2025).

Given that the term "agency" as used in FOIA includes DHS, and because DHS treats its components' FOIA operations as its own, the term "agency" as used in § 552(a)(4)(B) must be read as inclusive of DHS. As such, DHS—as well as CBP—withheld the requested records, and Plaintiffs' FOIA claim is properly filed against DHS.

C. Alternatively, If the Court Declines to Reinstate Plaintiffs' FOIA Claim Against DHS, It Must Reinstate Plaintiffs' APA Claims, so Plaintiffs Have a Remedy Against DHS.

If this Court were to hold that Plaintiffs cannot pursue their FOIA claim against DHS, their only remedy with respect to Defendant DHS would be through their APA claims. Thus, the absence of a FOIA remedy to resolve Plaintiffs' claims against DHS would eliminate the sole basis upon which the district court dismissed Plaintiffs' APA claims—the conclusion that FOIA provided an adequate remedy for all of Plaintiffs' claims. *See* Dkt. 59 at 6 ("Here, FOIA unambiguously would provide adequate relief for Plaintiffs' APA claims."); *see also id*. at 4-7. In so holding, the court erroneously ignored Plaintiffs' specific claims against DHS, the significant role that DHS plays in overseeing and managing its component's FOIA operation, and the impact that having no ability to proceed with a claim against DHS would have on the remedy sought by Plaintiffs. Consequently, if this Court declines to reinstate Plaintiffs' FOIA claim against DHS, it should reconsider the dismissal of Plaintiffs' APA claims against DHS.

Plaintiffs first APA claim seeks relief under 5 U.S.C. § 706(1) with respect to Defendant DHS for "fail[ing] to ensure Defendant CBP complies with its obligations under the FOIA to make determinations on requests for individual records within the statutory period and to make

records 'promptly available.'" Dkt. 42 ¶ 81 (citing 5 U.S.C. § 552(a)(3)(A), (a)(6)(A)(i), (B)(i)); ¶ 8 (alleging that DHS "has failed to allocate sufficient financial or staffing resources" for CBP to handle FOIA requests); ¶ 38 (similar); ¶ 82 ("Defendants" (plural), "have a policy that 5 U.S.C. § 552(a)(6)(A)(i) and (B)(i) do not impose an affirmative obligation or require the agency to make a determination within the 30-business-day specified statutory timeframe"); ¶ 84 (Defendants' failure "to fulfill [their] statutory obligations under FOIA constitutes agency action unlawfully withheld or unreasonably delayed"); ¶ 86 (seeking to "compel Defendants to make determinations and make records available in accordance with the APA."); *see also supra* p. 7.

Plaintiffs' second APA claim incorporates the allegations of DHS' failure to ensure that CBP complies with its legal obligations and that its nationwide policy that the FOIA does not impose an obligation to make timely FOIA determinations. *Id*. ¶¶ 10, 39-40, 82. Plaintiffs allege that Defendants' nationwide policy or practice is arbitrary and capricious, not in accordance with law, short of statutory right, and/or without observance of procedure required by law, in violation of 5 U.S.C. § 706(2)(A), (C) and (D), and request that it be set aside. *Id.* ¶¶ 91-100.

In this District, FOIA actions that fall "outside the scope of [5 U.S.C.] § 552(a)(4)(B) [ ] are reviewed under the standards set forth in § 706 of the APA." *Pub. Citizen, Inc. v. Lew*, 127 F. Supp. 2d 1, 9 (D.D.C. 2000) (relying on D.C. Circuit cases analyzing "reverse-FOIA claim"); *see also Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221, 228-29 (D.D.C. 2011) (explaining, but distinguishing, *Public Citizen* after court found that it had jurisdiction under FOIA). Consistent with this precedent, in the absence of a FOIA claim against DHS, Plaintiffs urge this Court to permit them to move forward with their APA claims against this Defendant.

V. CONCLUSION

For the foregoing reasons, this Court should reconsider and vacate the Northern District of California's decision dismissing Plaintiffs' FOIA claim against DHS.[21]

Respectfully submitted,

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Dated: January 31, 2025

[21] In the alternative, the Court should reinstate Plaintiffs' APA claims against DHS so that Plaintiffs' have an adequate remedy to their policy or practice challenge. Dkt. 59 at 4-7.

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2025, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of for the District of Columbia by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

s/Trina Realmuto
Trina Realmuto
National Immigration Litigation Alliance