IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No.: 08-1548 (CKK)
THE HONORABLE RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION

INTRODUCTION

In passing the Presidential Records Act of 1978, 44 U.S.C. §§ 2201-2207 ("PRA"), Congress "declin[ed] to give outsiders the right to interfere with [the Vice President's] recordkeeping practices, . . . presumably rel[ying] on the fact that subsequent [Vice] Presidents would honor their statutory obligations to keep a complete record of their administrations." Armstrong v. Bush, 924 F.2d 282, 290 (D.C. Cir. 1991). Consistent with that finding, courts have concluded that the PRA does not furnish private parties with either a right to seek the Vice President's compliance with the PRA or a remedy for any perceived violations, and have concluded that the PRA is a statute that precludes judicial review under the Administrative Procedure Act, 5 U.S.C. § 701.

Nonetheless, on precisely those grounds, plaintiffs urge this Court to review the "policies and guidelines implementing the PRA with respect to the records of the Vice President." Am.

Compl. ¶¶ 47-72. On at least three threshold grounds that deprive this Court of subject matter jurisdiction, each of plaintiffs' claims must be dismissed. First, the Presidential Records Act does not provide plaintiffs any private rights or remedies for perceived PRA violations and plaintiffs may not rely on the PRA for relief, or as a ground on which to seek declaratory or mandamus relief. Armstrong v. Bush, 721 F. Supp. 343, 348-49 (D.D.C. 1989), rev'd in part on other grounds, 924 F.2d 282 (D.C. Cir. 1991).

Second, because the APA applies only to "agencies," and furthermore excepts from review actions where "statutes preclude judicial review," or where "agency action is committed to agency discretion by law," plaintiffs are entitled to no relief here. 5 U.S.C. §§ 701(a)(1), 701(a)(2). Neither the Office of the Vice President nor the Vice President is an "agency" within the meaning of the APA and neither may be sued for relief under it. In addition, consistent with separation of powers principles, the "PRA precludes judicial review of the [Vice] President's recordkeeping practices and decisions" under controlling D.C. Circuit law. Armstrong v. Bush, 924 F.2d 282, 291 (D.C. Cir. 1991) ("Armstrong I"). The D.C. Circuit did not alter that conclusion in permitting judicial review of "guidelines describing which existing materials will be treated as presidential records in the first place," which is properly limited to the context of adjudicating judicially-reviewable Federal Records Act and Freedom of Information Act claims. Armstrong v. Bush, 1 F.3d 1274, 1294 (D.C. Cir. 1993) (Armstrong II). As the D.C. Circuit later confirmed, "record-keeping requirements of the FRA are subject to judicial review and enforcement; ***those of the PRA are not***." Armstrong v. Bush, 90 F.3d 553, 556 (D.C. Cir. 1996). For the same reasons, the Vice President's implementation of the PRA is committed to his discretion by law and unreviewable under the APA.

Third, plaintiffs fall far short of bearing their burden of showing a "substantial probability" that they present a case or controversy within the meaning of Article III of the Constitution. Sierra Club v. Environ. Protection Ag., 292 F. 3d 895, 899 (D.C. Cir. 2002). Indeed, they cannot because the record establishes that the OVP has applied the PRA to all "documentary materials, or any reasonably segregable portion thereof, created or received by the [Vice] President, his immediate staff, or a unit or individual of the [Office of the Vice President] whose function is to advise and assist the [Vice] President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory or other official or ceremonial duties of the [Vice] President." 44 U.S.C. § 2201(2). Because the OVP (comprised of employees and officers, including the Vice President) have complied fully with their obligations under the PRA, plaintiffs can claim no injury upon which to stake their claims. Nor do plaintiffs establish that their claimed injuries are imminent as opposed to conjectural. See Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 44 (1976). Indeed, none has established that it previously submitted FOIA requests for *vice presidential* records from past administrations or proves that it will seek the records at issue in this litigation in the future. Just as courts in this circuit have dismissed like claims for absence of standing, this Court must do the same.

Plaintiffs invite this Court to intrude on the day-to-day operations of the Vice President and to delve into the "separation of powers concerns that were implicated by legislation regulating the conduct of the [Vice] President's daily operations" that Congress "sought assiduously to minimize." Armstrong I, 924 F.2d at 290. Because the PRA "accords the [Vice] President virtually complete control over his records during his term in office," and because no

law provides this Court with subject matter jurisdiction to accept plaintiffs' invitation, plaintiffs' claims must be dismissed in their entirety. Id.

In the alternative—and only if the Court does not dismiss any of plaintiffs' claims for lack of jurisdiction or failure to state a claim upon which relief may be granted for the grounds described above—defendants are entitled to summary judgment on each of the claims. The OVP has complied fully with the PRA through recordkeeping guidance that requires preservation of all vice presidential records as defined in the PRA. And no policy or guideline purportedly issued by any other defendant changes the result. Summary judgment should be granted on behalf of all defendants.

BACKGROUND

I. The Presidential Records Act of 1978

Sections 2201 through 2207 of title 44 of the United States Code, commonly called the Presidential Records Act of 1978 or PRA, sets forth a scheme for the preservation and disclosure of vice presidential records. Section 2207 provides that "Vice-Presidential records shall be subject to the provisions" of the PRA "in the same manner as Presidential records," and that "the duties and responsibilities of the Vice President, with respect to Vice-Presidential records, shall be the same as the duties and responsibilities of the President under [the PRA] with respect to Presidential records." Id.

Under the PRA, the Vice President is thereby directed to take "all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory or other official or ceremonial duties are adequately documented and that such records are maintained . . . ." 44 U.S.C. §§ 2203(a), 2207. The PRA defines "vice presidential records" to be "documentary materials, or any reasonably segregable

portion thereof, created or received by the [Vice] President, his immediate staff, or a unit or individual of the [Office of the Vice President] whose function is to advise and assist the [Vice] President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the [Vice] President." Id. § 2201(2). The PRA expressly excludes from the scope of "vice presidential records" any "official records of an agency (as defined in section 552(e) of Title 5, United States Code); personal records; stocks of publications and stationery; or extra copies of documents produced only for convenience of reference, when such copies are clearly so identified." Id. § 2201(2)(B). The PRA further defines "personal records" as documentary materials of "a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the [Vice] President." Id. § 2201(3).

During the Vice President's term, "the PRA accords [him] virtually complete control over his records during his term of office." Armstrong v. Bush, 924 F.2d 282, 290 (D.C. Cir. 1991). Accordingly, the PRA does not authorize the Archivist to "promulgate guidelines or regulations to assist [the Vice President] in the development of a records management system," and does not permit the Archivist to "inspect the [Vice] President's records or survey the [Vice] President's records management practices." Id. Nor does the Archivist have the "authority to veto the [Vice] President's disposal decisions." Id. Only upon the conclusion of the Vice President's term of office does the Archivist assume responsibility for the custody, control, and preservation of, and access to, the vice presidential records of that Vice President. 44 U.S.C. § 2203(f)(1).

II. The Office of the Vice President and Compliance with the Presidential Records Act

The vice presidency of Richard B. Cheney commenced at noon on January 20, 2001 and will conclude at noon on January 20, 2009. In the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the Vice President, employees and officers, including the Vice President, of the Office of the Vice President ("OVP") have, since January 20, 2001, created or received records and have maintained them as vice presidential records under the PRA. And the OVP has been carrying out—and intends to continue to carry out—section 2207 with respect to vice presidential records until the conclusion of the vice presidency of Richard B. Cheney, when the Archivist assumes custody, control, and an obligation to preserve the records. Indeed, the OVP has applied the PRA to all "documentary materials, or any reasonably segregable portion thereof, created or received by the [Vice] President, his immediate staff, or a unit of individual of the [Office of the Vice President] whose function is to advise and assist the [Vice] President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory or other official or ceremonial duties of the [Vice] President." 44 U.S.C. § 2201(2); see also Ex. 2, Deposition Transcript of Claire M. O'Donnell at 128:17-129:1 ("O'Donnell Dep. Tr.").

In addition, the OVP has not relied upon Executive Order 13,233 or any guidelines issued by the other defendants to exclude any vice presidential records from the requirements of section 2207. Specifically, the OVP has not excluded from its obligations under section 2207 any vice presidential records that relate to the constitutional, statutory, or other official or ceremonial duties of the Vice President as the President of the Senate, as plaintiffs specifically allege. As a result, the OVP has carried out—and intends to continue to carry out—section 2207

with respect to vice presidential records, for all of the Vice President's official functions as the PRA requires. Indeed, the OVP intends to deposit with the Archivist the vice presidential records of the vice presidency of Richard B. Cheney within its possession, custody or control by the conclusion of the vice presidency of Richard B. Cheney.

III. Plaintiffs' Amended Complaint

In their four-count Amended Complaint, plaintiffs seek judicial review of the "policies and guidelines implementing the PRA with respect to the records of the vice president," as well as defendants' "implementation of those policies and guidelines" under the PRA. Am. Compl. ¶¶ 49-50. Plaintiffs allege that the Office of the Vice President has not been maintaining all vice presidential records within the meaning of the PRA, allegedly by relying on language from Executive Order 13,233, purportedly limiting PRA requirements to "executive records of the Vice President." Id. ¶¶ 27-28. Relying on assertions that the Vice President is not a part of the Executive Branch and inferring from those assertions that records created by the Vice President are not "executive records," plaintiffs allege "on information and belief" only that the OVP has "adopted policies and guidelines that exclude from the reach of the PRA all but a narrow category of vice presidential records created or received in the very limited circumstances in which the vice president deems himself to be acting as part of the Executive Branch." Id. ¶ 35; see also id. ¶ 57. Similarly, plaintiffs allege that defendants "exclude from the reach of the PRA records generated or received by vice presidents in their congressional capacities, i.e., when they preside over the Senate and break a tie in the Senate votes." Id. ¶ 37. Plaintiffs contend that "Vice President Cheney will take with him as personal papers or otherwise dispose of a significant percentage of those records, including records that pertain to the carrying out of his legislative duties and functions." Id. ¶ 41; see also id. ¶ 44.

In Claim One, plaintiffs seek relief from the Vice President, OVP and the Executive Office of the President under the PRA and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, requesting a declaration that "guidelines . . . implementing the PRA in a manner that excludes from its reach the records that the vice president and his office create and receive in the course of conducting activities relating to or having an effect on the carrying out of the vice president's constitutional, statutory or other official or ceremonial duties and their implementation of those guidelines are contrary to law." Id. ¶ 52. On those same grounds, plaintiffs seek mandamus relief against the Vice President and OVP in Claim Two, 28 U.S.C. § 1361, asserting an entitlement to enforcement of the Vice President's "statutory duty to treat as subject to the PRA all records of the vice president and his office that relate to the exercise of his constitutional, statutory, and other official or ceremonial duties." Id. ¶ 58. In Claim 3, plaintiffs seek a declaration that alleged guidelines of the National Archives and Records Administration ("NARA") and the Archivist are unlawful to the extent they exclude "legislative records" from the scope of the PRA. In addition, plaintiffs seek APA review of the Archivist's guidelines purportedly excluding legislative records from the PRA, 5 U.S.C. § 706, and APA review of the "vice president's and OVP's guidelines implementing the PRA in a manner that excludes from its reach all of the records that the vice president and his office create and receive." Id. ¶¶ 63, 64. In Claim Four, plaintiffs seek mandamus relief against the Archivist and NARA.

ARGUMENT

Federal Rule of Civil Procedure 12(b)(1) permits a defendant to move to dismiss a claim on the ground, among others, that the court lacks subject matter jurisdiction because the plaintiffs lack standing, or because the United States has not waived its sovereign immunity. In contrast to a motion to dismiss brought under Rule 12(b)(6), when a party moves to dismiss a complaint for

lack of subject matter jurisdiction under Rule 12(b)(1), a court may consider the motion based on the complaint standing alone or, where necessary, on the complaint "supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Herbert v. Nat'l Acad. of Sci., 974 F.2d 192, 197 (D.C. Cir. 1992). Upon motion, the plaintiff then bears the burden to prove by a preponderance of the evidence that the court has jurisdiction to hear its claims. Indeed, it is "presume[d] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 n.3 (2006). When reviewing a motion to dismiss for lack of jurisdiction, "the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Kowal v. MCI Commun. Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). In the court's analysis, plaintiffs' "factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion." Blancett v. United States Bureau of Land Mgmt., No. 04-2152, 2006 WL 696050 (D.D.C. March 20, 2006) (internal quotations and citations omitted).

To withstand a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007) (footnote omitted) (citations omitted). In evaluating the sufficiency of the complaint, the Court considers only "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the Court] may take judicial notice." See

EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997). The rules of pleading require factual allegations "plausibly suggesting," and "not merely consistent with," the elements of a valid claim for relief, and plaintiffs must comply with the "threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'show that the pleader is entitled to relief.'" See Bell Atl. Corp., 127 S. Ct. at 1966.

If (and only if) any of plaintiffs' claims are not dismissed for the reasons elaborated below, summary judgment on behalf of the defendants is appropriate because the pleadings and the evidence establish that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" under Federal Rule of Civil Procedure 56(c). Id. In a case involving a challenge to a "final agency action" under the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"), however, the standard set forth in Rule 56(c) "does not apply because of the limited role of a court in reviewing the administrative record." Sierra Club v. Mainella, 459 F. Supp. 2d 76, 89 (D.D.C. 2006). "Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." Id. at 89-90. "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." Id.

I. The PRA Does Not Provide A Judicially-Enforceable Right to Pursue Private Actions in Federal Court

The court lacks subject matter jurisdiction over plaintiffs' PRA, declaratory judgment and mandamus claims because the PRA does not provide a private right enforceable through private remedies. See Am. Compl. ¶¶ 52, 58, 65, 71-72. First, it is axiomatic that courts may not infer

causes of action absent clear language establishing both a federal right and remedy. In a consistent line of cases beginning with Cannon v. Univ. of Chicago, 441 U.S. 677 (1979), the Supreme Court has made clear that absent language that clearly creates judicially-enforceable rights, courts must not imply a cause of action. Indeed, the Supreme Court recently emphasized that implying rights of action "runs contrary to the established principle that the jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation." Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, 128 S. Ct. 761, 772-73 (2008) (internal quotation marks and citation omitted). Accordingly, absent an intent to create a judicially-enforceable right, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter[.]" Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001).

Consistent with this established law, the Supreme Court held in Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980), that the Federal Records Act does not create any private enforceable rights. Instead, the Court explained that the Federal Records Act was intended "not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole." Id. at 149. Accordingly, the Supreme Court held that the FRA had "not vested federal courts with jurisdiction to adjudicate" FRA compliance "upon suit by private party." Id. at 149-50. So too here with the PRA. "For purposes of the private right of action inquiry, the PRA is largely indistinguishable from the FRA; accordingly, . . . no private action may be maintained directly under either statute in federal court." Armstrong v. Bush, 721 F. Supp. 343, 348-49 (D.D.C. 1989), rev'd in part on other grounds, 924 F.2d 282 (D.C. Cir. 1991).

The PRA does not provide a private right or a private remedy necessary to support plaintiffs' claims against any of the defendants.[1] Although Congress generally "sought to establish the public ownership of presidential records and ensure the preservation of presidential records for public access after the termination of a President's term in office" through the PRA, Armstrong v. Bush, 924 F.2d 282, 290 (D.C. Cir. 1991), no language in the PRA creates rights that may be claimed by plaintiffs for vice presidential compliance with the PRA, nor provides for private enforcement of its terms. See 44 U.S.C. §§ 2201-2207. Like the FRA, the PRA merely "proscribes certain conduct," and "does not create or alter any civil liabilities."[2] Kissinger, 445 U.S. at 148. As the D.C. Circuit concluded, "it is difficult to conclude that Congress intended to allow courts, at the behest of private citizens, to rule on the adequacy of the [Vice] President's record management practices or overrule his records creation, management, and disposal decisions."[3] Armstrong v. Bush, 924 F.2d at 290. Absent a private right enforceable in court

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[1] Neither Armstrong I nor Armstrong II address whether the PRA provides a ***private right of action***. Instead, both address only whether the PRA is a statute that precludes judicial review ***under the APA***. As controlling law establishes, no private right or remedy exists in the PRA. Thus, it is indisputable that even the "classification" issues plaintiffs contend are appropriate for ***APA review*** remain foreclosed for direct review under a direct cause of action brought under the PRA. Nonetheless, as shown below, plaintiffs' reliance on language from Armstrong II to seek judicial review of purported "classification" issues under the APA is not permissible for PRA-, as opposed to FRA- or FOIA-, based claims. Armstrong II stands for the limited holding that courts, in appropriate circumstances when presented with appropriate FRA or FOIA-based claims, may review "guidelines defining presidential records ***under the rubric of substantive FOIA law***" to ensure that federal records were not shielded from the reach of FOIA by being classified as presidential records. Thus even Armstrong II does not at all disturb the conclusion that no private right of action exists under the PRA.

[2] Indeed, the only private action contemplated by the PRA is for a former President to assert his rights or privileges over records scheduled for disclosure by an Archivist. 44 U.S.C. § 2204(e).

[3] The absence of a private right of action for plaintiffs to pursue their claims against the Archivist and the National Archives and Records Administration is clear, too, by the absence of any authorization for the Archivist to promulgate guidelines regarding "the scope of Vice President Cheney's records subject to the PRA." Am. Compl. ¶ 72. As this Circuit recognized, "although the FRA authorizes the Archivist to promulgate guidelines and regulations to assist the agencies in the development of a records management system, the PRA lacks an analogous provision." Armstrong, 924 F.2d at 290; see also 44 U.S.C. § 2206 (authorizing the Archivist to promulgate regulations for disposal pursuant to 44 U.S.C.

against the government, this Court lacks subject matter jurisdiction over plaintiffs' PRA claims and they must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).[4] See, e.g., Am. Compl. ¶ 2 (relying on 28 U.S.C. § 1331 for subject matter jurisdiction); Steel Co. v. Citizens for a Better Environ., 523 U.S. 83, 89 (1998) (explaining that courts lack subject matter jurisdiction over causes of action that are insubstantial or "foreclosed by prior decisions of this Court"); Clements v. Gonzales, 496 F. Supp. 2d 70, 73 n.6 (D.D.C. 2007) (dismissing for lack of subject matter jurisdiction because of the absence of a private right of action).

Because the PRA does not provide plaintiffs a private right to pursue here, they lack a cause of action to pursue any declaratory judgment as well, and the court lacks subject matter jurisdiction over the declaratory judgment requests in claims one and three. 28 U.S.C. §§ 2201-2202; Am. Compl. ¶¶ 52, 65. It is well-settled that "the availability of [declaratory] relief presupposes the existence of a judicially remediable right." Schilling v. Rogers, 363 U.S. 666, 677 (1960). The PRA creates no judicially remediable rights to review the Vice President's record keeping or management decisions. As the Supreme Court has explained, the Declaratory Judgment Act is "*procedural only*." Skelly Oil Co., 339 U.S. at 671 (emphasis added). Through the provisions of the Act, Congress did not enlarge the "kinds of issues which give right to entrance to federal courts," or "impliedly repeal[] or modif[y]" the "limited subject matters which alone Congress had authorized the District Courts to adjudicate." Id. at 672. Rather, Congress simply "enlarged the range of *remedies* available in federal court" and only for *existing* judicially remediable issues. Id. (emphasis added); see also C&E Serv., Inc. v. District of Columbia Water & Sewer Auth., 310 F.3d 197, 201 (D.C. Cir. 2002); College Sports Council v.

§ 2203(f)(3) and for the logistics of processing and releasing records of former Presidents, there is no analogous provision to promulgate regulations regarding an incumbent's recordkeeping).

Gov't Accountability Office, 421 F. Supp. 2d 59, 70 (D.D.C. 2006) ("Because the plaintiff has not stated any claims upon which relief can be granted, neither the Declaratory Judgment Act nor the All Writs Act are of any value in evaluating the Court's ability to entertain this action."); Superlease Rent-A-Car, Inc. v. Budget Rent-A-Car, Inc., Civ. No. 89-0300, 1989 WL 39393, *3 (D.D.C. Apr. 13, 1989) (explaining that the Act "provides no independent cause of action. The plaintiff must assert an interest in itself, *which the law recognizes.* In other words, the plaintiff must first have a cognizable cause of action under the contracts, which is precisely what defendants claim does not exist.").

Even if the absence of a private right in the PRA did not preclude plaintiffs' mandamus claims, they must be dismissed because the PRA does not provide a "clear and compelling duty" owed to plaintiffs. In re Cheney, 406 F. 3d 723, 729 (D.C. Cir. 2005). Jurisdiction under 28 U.S.C. § 1361 "is strictly defined. . . . Mandamus is 'drastic'; it is available only in 'extraordinary situations'; it is hardly ever granted; those invoking the court's mandamus jurisdiction must have a 'clear and indisputable right to relief; and even if the plaintiff overcomes all these hurdles, whether mandamus relief should issue is discretionary." Id. Mandamus relief is appropriate only if a plaintiff has a clear right to relief, the defendants have a clear duty to act, and there is no other adequate remedy available to the plaintiff. PDK Labs, Inc. v. Reno, 134 F. Supp. 2d 24, 34 (D.D.C. 2001). The duty "to be performed by the agency must be 'ministerial and the obligation to act peremptory, and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable." Id. A ministerial duty "is one that admits of no discretion, so that the official in question has no authority to determine whether to perform the duty." Swan v. Clinton, 100 F.3d 973, 977 (D.C. Cir. 1996).

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[4] For the same reasons, the claims should be dismissed for failure to state a claim under Rule 12(b)(6).

The PRA provides only that the Vice President "shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as [Vice] Presidential records pursuant to the requirements of this section and other provisions of law." 44 U.S.C. § 2203. The section fairly exudes deference to the Vice President to "take all such steps as may be necessary," without defining any clear or ministerial duty appropriate for mandamus relief, or providing plaintiffs any "clear right to relief." Cf. Webster v. Doe, 486 U.S. 592, 600-01 (1988) (finding phrase "shall deem such termination necessary or advisable in the interests of the United States" to "fairly exude[] deference to the Director").

Even if the Court were to find subject matter jurisdiction to entertain plaintiffs' PRA, declaratory judgment and mandamus claims, for the reasons set forth above, plaintiffs also fail to state a claim upon which relief may be granted and they must be dismissed pursuant to Rule 12(b)(6).

II. The Administrative Procedure Act Does Not Provide For Judicial Review of Plaintiffs' Claims

Plaintiffs' only surviving claim—alleged under the Administrative Procedure Act, see Am. Compl. ¶¶ 63, 64—must be dismissed against all defendants as well.[5] Because the APA applies only to "agencies," and excepts from review actions where "statutes preclude judicial review," or where "agency action is committed to agency discretion by law," plaintiffs are entitled to no relief here. 5 U.S.C. §§ 701(a)(1), 701(a)(2).

[5] Plaintiffs' APA claims are alleged in paragraphs 63 and 64 against only the Vice President, the OVP, the Archivist and NARA. Am. Compl. ¶¶ 63-64. But an APA claim raised against "EOP" would be dismissed for the same reasons set forth below.

A. The Office of the Vice President and Vice President Are Not "Agencies" Within the Meaning of the APA

The Administrative Procedure Act provides for judicial review only of "agency action." 5 U.S.C. § 702. Neither the Vice President nor the Office of the Vice President is an "agency" for the purposes of the APA. Am. Compl. ¶ 64. Accordingly, this Court lacks subject matter jurisdiction over plaintiffs' APA claims against the Vice President and OVP. Cf. Benavides v. United States Marshal Service, Civ. No. 07-1732, 2008 WL 1869014, *1 n.1 (D.D.C. Apr. 28, 2008) (noting court lacked subject matter jurisdiction over FOIA claims against non "agency").

Under well-established law, the President is not an "agency" subject to suit under the APA. Franklin v. Massachusetts, 505 U.S. 788, 802-03 (1992). Because of "respect for the separation of powers and the unique constitutional position of the President," the Supreme Court found that "textual silence" in 5 U.S.C. § 551(1) defining "agency," was "not enough to subject the President to the provisions of the APA." Id. at 800-01. Because of the absence of a clear statement that Congress intended to encompass the President within the meaning of "agency," the Supreme Court declined to subject the President to the terms of the APA. Id. The logic of Franklin requires the same result here for the Vice President and his office, and has been confirmed by courts expressly holding that the Vice President and OVP are not "agencies" within the meaning of the Freedom of Information Act.[6] See, e.g., Banks v. Lappin, 539 F. Supp. 2d 228 234 (D.D.C. 2008) (dismissing action for lack of subject matter jurisdiction

[6] The definition of "agency" in the Freedom of Information Act, 5 U.S.C. § 552(f)(1), expands on the definition of "agency" in the APA. Thus an entity that is not an "agency" within the meaning of FOIA cannot be an agency within the meaning of the APA. See Meyer v. Bush, 981 F.2d 1288, 1292 (D.C. Cir. 1993) (noting that prior to 1974 amendments to FOIA, the term "agency" in FOIA had been adopted from the definition of "agency" in the APA).

because Vice President and Office of the Vice President are not "agencies" within the meaning of FOIA).[7]

Because plaintiffs cannot receive relief under the APA directly against the Office of the Vice President or the Vice President, plaintiffs cannot establish any entitlement to relief under the APA against either the Archivist or NARA. As elaborated below, plaintiffs' claimed injuries cannot be redressed by seeking APA relief from the Archivist and NARA because neither has the authority "to veto the [Vice] President's disposal decisions," "inspect the [Vice] President's records or survey the [Vice] President's records management practices." Armstrong, 924 F.2d at 290; see also 44 U.S.C. § 2203 (providing no authority for the Archivist to overturn any records management decisions by the Vice President or to amend or change the Vice President's record keeping guidelines). Neither NARA nor the Archivist may supervise the Vice President or his office for PRA compliance, and no order from this Court may mandate it.[8] Accordingly, plaintiffs are unable to show redressability for their claims: "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000) (internal citation omitted). Where "the necessary elements of causation . . . hinge on the independent choices of a . . . third party . . . it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 938 (D.C. Cir. 2004) (quoting Lujan,

[7] For the same reasons, plaintiffs lack a cause of action and their APA claims must be dismissed pursuant to Rule 12(b)(6).

[8] In fact, Ms. Smith testified that she was unaware of any written documents or guidance that NARA has issued further defining or explaining the scope of the PRA with respect to vice presidential records. Ex. 3, Smith Rough Dep. Tr. at 29:9-14; id. at 185:15-186:20 (testifying that NARA relies on the definition of vice presidential records in the PRA).

504 U.S. at 562) (internal quotation marks omitted). Plaintiffs cannot do so here and their APA claims against all defendants must be dismissed.

B. The PRA Precludes Judicial Review

Even if the agency status of the Vice President did not bar relief on plaintiffs' APA claims, the PRA itself forecloses judicial review under the APA. Because the PRA is one of the "statutes that preclude judicial review," no APA review of the Vice President's compliance with the PRA is permissible. 5 U.S.C. § 701(a)(1). As this Circuit explained, "permitting judicial review of the [Vice] President's compliance with the PRA would upset the intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns." Armstrong I, 924 F.2d at 290.

Through the PRA, Congress "sought to establish public ownership of [vice] presidential records and ensure the preservation of [vice] presidential records for public access after the termination of a [Vice] President's term in office," though Congress was likewise "keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the [Vice] President's daily operations." Id. The PRA therefore requires the Vice President "to maintain records documenting the policies, activities and decisions of his administration, ***but leav[es] the implementation of such a requirement in the [Vice] President's hands***." Id. (emphasis added). Accordingly, the PRA "assiduously . . . minimize[s] outside interference with the day-to-day operations of the [Vice] President and his closest advisors and" ensures the Vice President's "***control*** over [vice] presidential records during the [Vice] President's term in office." Id. (emphasis added). The PRA "accords the [Vice] President virtually complete control over his records during his term of office." Id. Based on these limitations in the PRA, as well as the "cautious authority for the Archivist and Congress to question the [Vice] President's disposal

decisions and the lack of any authority to interfere with his records management practices," this Court concluded that the PRA was not intended to "allow courts, at the behest of private citizens, to rule on the adequacy of the [Vice] President' records management practices or overrule his records creation, management, and disposal decisions." Id. In sum, this Circuit held that

> In declining to give outsiders the right to interfere with White House recordkeeping practices, Congress presumably relied on the fact that subsequent Presidents would honor their statutory obligations to keep a complete record of their administrations. We will not second-guess that decision or upset the political compromises it entailed. Allowing judicial review of the President's general compliance with the PRA at the behest of private litigants would substantially upset Congress' carefully crafted balance of presidential control of records creation, management, and disposal during the President's term in office and public ownership and access to the records after the expiration of the President's term. We therefore hold that the PRA precludes judicial review of the President's recordkeeping practices and decisions."

Id. at 290-91.

The D.C. Circuit did not alter in Armstrong II its conclusion from Armstrong I that claims grounded on the PRA may not be adjudicated under the APA. Armstrong II, 1 F.3d at 1292. Rather, the Court merely held in Armstrong II that courts could review "guidelines defining presidential records ***under the rubric of substantive FOIA law***" to ensure that federal records were not shielded from the reach of FOIA by being classified as "presidential records." Id. (emphasis added). In other words, although Armstrong I foreclosed judicial review of ***PRA claims***, it did not foreclose courts from reviewing ***FRA- or FOIA-based claims***, and examining any relevant guidelines to determine the scope of the federal records at issue on those ***FRA- or FOIA-based*** claims. Armstrong II thus stands for the limited holding that Armstrong I does shield in all circumstances presidential guidelines from review when an appropriate FRA- or FOIA-based claim, which is judicially reviewable, calls those guidelines into question. Armstrong II did not, however, disturb the panel's conclusion in Armstrong I that claims seeking

direct review of PRA compliance—distinct from FRA- or FOIA-based claims alleging overbreadth of guidelines defining presidential records—remain immune from judicial review.

Examining the lower court decision on review in Armstrong II confirms the limitations of Armstrong II and its inapplicability here. As made clear through the district court opinion on review in Armstrong II, the plaintiffs in Armstrong II filed a second amended complaint to conform with the limits of Armstrong I by presenting only FRA- or FOIA-based claims. Armstrong v. Bush, 139 F.R.D. 547, 550 (D.D.C. 1991) ("In the second amended complaint, the plaintiffs allege that: (1) substantial amounts of the information on the preserved PROFS tapes constitute "agency records" subject to the FOIA, and that the defendants have improperly withheld those agency records which are not exempt from disclosure under the FOIA; (2) the guidelines issued by the Executive Office of the President ("EOP") and the NSC are arbitrary and capricious in violation of the FRA because they authorize destruction of agency records; (3) certain general schedules, promulgated by the Archivist, which authorize the disposal of certain electronic records after the lapse of specified periods of time, are arbitrary and capricious because they authorize the disposal of agency records; and (4) the Archivist has violated his statutory duty to initiate action to stop improper destruction of agency records on the PROFS system. See Second Amended Complaint at 11-14."). The plaintiffs there did not, however, seek judicial review of a PRA-claim under the APA or raise any claims grounded on the PRA. As the plaintiffs stated, their "Second Amended Complaint, in response to the court of appeals' conclusion that judicial review of compliance with the Presidential Records Act is not available, ***omits plaintiffs' claims for relief under that Act***." See Ex. 4, Armstrong v. Bush, Civ. No. 89-0142, Mot. for Leave to File Am. Compl. & 2d Am. Compl. at 1 (emphasis added).

In the course of discovery on those FRA- and FOIA-based claims, the Armstrong plaintiffs requested access to presidential records guidelines from the National Security Council, which at the time was thought to create both FRA and PRA records, on "types of records [that] should be preserved as agency records pursuant to the FRA, but others [as] 'Presidential records' pursuant to the PRA, or 'convenience records.'" 139 F.R.D. at 551. In that context, the plaintiffs argued "that the classification scheme as it distinguishes among the various types of records directly bears on the adequacy of the guidelines for preserving ***records under the FRA***, since Presidential records are not governed by FRA procedures and involve different rules of preservation and public access." Id. (emphasis added). The defendants, in turn, broadly argued "that the question of how Presidential records are classified is one that was specifically held not subject to judicial review by the Court of Appeals and is therefore beyond the scope of discovery." Id. The district court agreed with defendants and concluded "that PRA precludes judicial review of the President's recordkeeping practices and decisions." Id.

It is that sweeping conclusion with which the D.C. Circuit disagreed in Armstrong II. As the Armstrong II panel explained, the "Armstrong I opinion does not stand for the unequivocal proposition that all decisions made pursuant to the PRA are immune from judicial review." Armstrong II, 1 F.3d 1293. In limited circumstances where the scope of presidential guidelines may encompass federal records, those "guidelines describing which existing materials will be treated as presidential records in the first place" may be subject to judicial review pursuant to FRA or FOIA-based claims, and even then only "under the rubric of substantive FOIA law" to ensure that federal records are not encompassed within the guidelines. Id. at 1293, 1294. As the Armstrong III court confirmed after Armstrong II was issued, Armstrong I remains good law.

Armstrong v. Bush, 90 F.3d 553, 556 (D.C. Cir. 1996). "[R]ecord-keeping requirements of the FRA are subject to judicial review and enforcement; those of the PRA are not." Id. at 556.

This prohibition on review of PRA claims is consonant with the reach of the APA. As Kissinger and its progeny make clear, no private right of action exists under the PRA. See discussion infra part I. And under the APA, only "agencies" may be sued for relief. Because the "coverage of the FRA is coextensive with the definition of 'agency' in the FOIA," any PRA-covered entity would not be an "agency" within the meaning of FOIA and could not be sued under the APA for PRA relief. See Armstrong III, 90 F.3d at 556 ("The FRA describes a class of materials that are federal records subject to its provisions, and the PRA describes another mutually exclusive set of materials that are subject to a different and less rigorous regime."). This absence of available parties to sue under the APA[9] simply underscores what Armstrong I teaches and what Armstrong II leaves intact: no APA review may obtain for claims seeking review of PRA compliance.[10]

Here, plaintiffs do not allege any FRA- or FOIA-based claims, or allege that the Vice President's recordkeeping guidelines sweep in FRA covered records within their scope, unlawfully shielding federal records from judicial review. See generally Am. Compl. Plaintiffs instead raise only PRA-based claims. As such, plaintiffs' claims are squarely foreclosed by Armstrong I. They present exactly the request "for judicial review of the [Vice] President's compliance with the PRA at the behest of private litigants" that Armstrong I forbids. Because

[9] And as shown above and elaborated below, plaintiffs' claimed injuries cannot be redressed by seeking relief against "agencies" like the National Archives or the Archivist because neither has the authority to manage the Vice President's recordkeeping practices or supervise his guidelines.

[10] At the time of Armstrong I and Armstrong II, the "agency" status of the National Security Council had not been determined for the purposes of FOIA and the FRA. In Armstrong III, the D.C. Circuit made clear that the NSC is not an agency within the meaning of FOIA. Accordingly, its records

plaintiffs' claims "substantially upset Congress' carefully crafted balance of presidential control of records creation, management and disposal during the President's term of office," they remain prohibited by Armstrong I, are not reviewable under the APA, and must be dismissed.[11]

As a result, plaintiffs' APA claims regarding PRA compliance remain unreviewable, and the inapplicability of the waiver of sovereign immunity provided in the APA poses an additional jurisdictional defect. See, e.g., Council on American Islamic Relations v. Ballenger, 444 F.3d 659, 661 (D.C. Cir. 2006). Where, as here, a statute precludes review under the APA, the APA does not waive the United States's sovereign immunity. See 5 U.S.C. § 701(a)(1) (explaining that the APA applies except to the extent that "statutes preclude judicial review"); Heckler v. Chaney, 470 U.S. 821, 828 (1985) (noting that APA review is inappropriate unless a plaintiff "clear[s] the hurdle of § 701(a)"); High Country Citizens Alliance v. Clarke, 454 F.3d 1177, 1181 (10th Cir. 2006) ("In other words, before the waiver of sovereign immunity under § 702 applies, 'a party must first clear the hurdle of § 701(a).' "); Tozzi v. EPA, 148 F. Supp. 2d 35, 43 (D.D.C. 2001) ("The APA's sovereign immunity waiver does not apply where a statute has explicitly precluded judicial review."). Without a waiver of sovereign immunity, the Court lacks subject matter jurisdiction and the claims must be dismissed under Federal Rule of Civil Procedure 12(b)(1).

C. Even if the Vice President and the OVP Were Construed as Agencies under the APA, PRA Compliance would be Committed to their Discretion by Law

In addition to the above bars to suit, APA review would not be permissible because PRA compliance for vice presidential records is committed to the Vice President's discretion by law.

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were subject to the PRA and not the FRA or FOIA. Consequently, the NSC is now not subject to suit under the APA or for claims pursuant to the PRA.

[11] Because the Court lacks subject matter jurisdiction over these APA claims seeking review under the PRA, plaintiffs' APA claims should be dismissed pursuant to Rule 12(b)(1). For the same reasons,

5 U.S.C. § 701(a)(2). "Agency" action is unreviewable, when, as here, "statutes are drawn in such broad terms that in a given case there is no law to apply." S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945). "Even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." Heckler v. Chaney, 470 U.S. 821, 830 (1985). Even if statutes set forth criteria to be considered in agency action, action is not reviewable if that criteria is not "judicially manageable." Nat'l Federal of Fed. Employees v. United States, 905 F.2d 400, 405 (D.C. Cir. 1990). Courts have thus concluded that actions are not reviewable under the APA where the language of the statute, structure of the statutory scheme, objectives of the statute, legislative history and the nature of the administrative action permit broad agency discretion. See, e.g., Hammond v. Comptroller of the Currency, 878 F. Supp. 1438, 1445 (D. Kan. 1995) (citing Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984)); see also Cappadora v. Celebrezze, 356 F.2d 1, 5-6 (2d Cir. 1966) (analyzing whether the practical requirements of the task to be performed, absence of available standards or even the fact that no useful purpose could be served by judicial review precluded APA review). Such actions are not reviewable under the APA and must be dismissed. See Webster v. Doe, 486 U.S. 592, 600-01 (1988).

For all the reasons discussed above, as set forth in Armstrong I, the language of the PRA, structure of the statutory scheme, objectives of the statute, legislative history and the nature of the "administrative action" permit broad discretion on the part of the Vice President. The Vice President alone may determine what constitutes vice presidential records or personal records,

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plaintiffs fail to state a claim upon which relief may be granted and must be dismissed pursuant to Rule 12(b)(6).

how his records will be created, maintained, managed and disposed, and are all actions that are committed to his discretion by law. Armstrong I, 924 F.2d at 290 (PRA ensures the Vice President's "control over [vice] presidential records during the [Vice] President's term in office); (PRA leaves "implementation of [PRA] in the [Vice] President's hands); (PRA does not provide for the Archivist to promulgate guidelines and regulations to assist the Vice President in the development of a records management system); (Archivist lacks authority to inspect the Vice President's records or survey the Vice President's management practices); (Archivist has no authority to veto any disposal decision); ("PRA accords the [Vice] President virtually complete control over his records during his term of office."); (PRA does not permit "outsiders the right to interfere with White House recordkeeping practices).

III. Plaintiffs' Lack of Standing Requires that their Claims be Dismissed

Even if plaintiffs had raised viable claims, they lack standing to assert them, and plaintiffs' claims must be dismissed under Rule 12(b)(1) for failure to establish constitutional standing. "The judicial power of the United States . . . is not an unconditioned authority" but is limited by Article III of the Constitution. Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 471 (1982). That Article "confines the federal courts to adjudicating actual 'cases' and 'controversies.'" Allen v. Wright, 468 U.S. 737, 750 (1984). In the absence of an actual case or controversy, the Court is without jurisdiction to decide the case. See Warth v. Seldin, 422 U.S. 490, 499 (1975); see also Poe v. Ullman, 367 U.S. 497, 502 (1961). Thus, a court must ensure that its authority is invoked where there is "a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity," id. at 503 – a requirement "founded in concern about the proper – and properly limited – role of the courts in a democratic society." Warth, 422 U.S.

at 498. Otherwise, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." Id. at 500.

"[C]ourts have developed a series of principles termed 'justiciability doctrines,' among which are standing, ripeness, mootness, and the political question doctrine." Nat'l Treas. Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996). These doctrines consist of both "prudential elements which Congress is free to override and core component[s] which are essential and unchanging part[s] of the case-or-controversy requirement of Article III." Id. (internal quotations omitted). This action implicates a core component of that requirement – standing – whose absence requires dismissal of plantiffs' claims.

Article III standing requires that a plaintiff have suffered "an (1) injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical--(2) which is fairly traceable to the challenged act, and (3) likely to be redressed by a favorable decision." Nat'l Treasury Employees' Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (internal quotation marks and citation omitted); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," Lujan, 504 U.S. at 560, and "the party invoking federal jurisdiction bears the burden of establishing its existence." Steel Co., 523 U.S. at 104. In fact, this court must presume the absence of jurisdiction "unless the contrary appears affirmatively from the record." DaimlerChrysler, 547 U.S. at 342 n.3. Plaintiffs here lack actual injury and cannot establish that any injury is "actual

or imminent, not conjectural or hypothetical" for their claims against all defendants; and fail to establish traceability or redressability against the EOP, NARA and Archivist.

A. Plaintiffs Lack Imminent Injury

Plaintiffs cannot demonstrate standing because they have not shown that they would be injured even if OVP was failing to comply with the terms of the PRA (which it is not). Plaintiffs can only assert a speculative or hypothetical interest in seeking future access to vice presidential records years from now. It is well established that speculative or hypothetical claims of injury are insufficient to confer standing. See Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 44 (1976) ("unadorned speculation will not suffice to invoke the federal judicial power"). Rather, the alleged injury "must be certainly impending," Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (internal quotation marks and citations omitted), and "real and immediate." City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). "Although the fact that harm or injury may occur in the future is not necessarily fatal to a claim of standing[,] ... [such circumstances can] lessen the concreteness of the controversy and thus mitigate against a recognition of standing." United Transp. Union v. I.C.C., 891 F.2d 908, 913 (D.C. Cir.1998) (internal quotation marks omitted). Thus, when a party alleges future injury alone, the party "must demonstrate a realistic danger of sustaining a direct injury[.]" Id. (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

This court rejected in similar circumstances plaintiffs' standing to challenge an executive order governing records disposition based on the speculativeness of future harm arising from future requests for records. Although the court recognized that there existed "a significant likelihood that plaintiffs will again seek access to presidential records, and face indeterminate delays in accessing them," it did not find such allegations sufficient for standing. Am. Historical

Ass'n v. Nat'l Archives & Records Admin., 310 F. Supp. 2d 216, 228 (D.D.C. 2004), later opinion Am. Historical Ass'n v. Nat'l Archives & Records Admin, Civ. No. 01-2447, 2007 WL 2822027 (D.D.C. Oct. 1, 2007). As the court explained,

> [T]he Court cannot find that this future injury is sufficiently imminent, and not conjectural and hypothetical. At this stage, Plaintiffs have no outstanding requests for presidential records . . . . This Court, however, is not prescient, and cannot know at this point in what way the facts will reveal themselves when Plaintiffs themselves, or indeed other interested parties, seek the records . . . .

Id. 310 F. Supp. 2d at 228. Plaintiffs here, too, suffer from the same defect. Because claims of speculative future harm from future, indeterminate record requests are inadequate to confer standing, plaintiffs lack standing as to all of their claims.

In CREW v. Department of Homeland Security, this court also dismissed a case for CREW's lack of standing for prospective declaratory and injunctive relief. Civ. No. 06-0883, Slip. Op. at 7-10 (D.D.C. Dec. 17, 2007) (RCL). Although the court acknowledged that CREW had alleged past injuries arising from denial of access to records because of allegedly inadequate recordkeeping practices, it stated that such "past injury-in-fact . . . does not in and of itself give CREW standing to seek prospective relief." Id. at 7. In concluding that CREW lacked standing, the court dismissed CREW's claims that it would be subject to continuing injury because it would continue to use FOIA to gain access to agency records.

> These alleged future injuries – while certainly plausible – are too speculative and remote at this point to give CREW standing to seek prospective relief. . . . Most notably, CREW does not allege anywhere in its complaint or opposition brief that it has a FOIA request pending with the DHS or that it intends to file a specific FOIA request with the DHS for WAVES records in the near future. Without this information, the Court cannot say that the alleged future injury is either real or imminent. That CREW may one day file another FOIA request with the DHS does not represent a cognizable, palpable injury which presents a case or controversy for the Court to consider.

Id. at 24. Thus, although informational injury could be adequate for some claims, the court concluded that prospective relief required a further showing. "While there [was], admittedly, a reasonable probability that CREW will seek these records in the future, this presumption is not enough to establish an imminent, non-speculative injury-in-fact." Id.

Plaintiffs' only alleged injuries are that they will be denied access to "historical presidential and vice presidential records in a timely fashion, including the records of the current administration when they become available for public review." Am. Compl. ¶¶ 6-12. None, however, alleges that it has ever filed a FOIA request for vice presidential records from past administrations, much less that it will be specifically seeking FOIA requests for this Vice President's (as opposed to the President's) records in the future when they become available pursuant to the PRA. But even if it had, such entirely hypothetical and speculative assertions about future requests for records are insufficient to confer Article III standing.

B. Plaintiffs Lack Any Injury-in-Fact

No "case or controversy" exists here over which the Court may appropriately exercise jurisdiction because plaintiffs have no injury on which to rely. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998). First, despite plaintiffs' contention "upon information and belief" that the Office of the Vice President and Vice President have not followed section 2207 with respect to vice presidential records, the Office of the Vice President and Vice President have complied with the PRA. See Am. Compl. ¶¶ 35-37. Plaintiffs therefore lack any actual injury to invoke this Court's jurisdiction, see Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992), and have no "legally cognizable interest in the final determination of the underlying questions of fact and law." Davis, 440 U.S. at 632.

The OVP has been complying with—and intends to continue to comply with—section 2207 with respect to "documentary materials, or any reasonably segregable portion thereof, created or received by the [Vice] President, his immediate staff, or a unit or individual of the [Office of the Vice President] whose function is to advise and assist the [Vice] President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the [Vice] President." 44 U.S.C. § 2201(2). As demonstrated by the Declaration and Supplemental Declaration, and confirmed by the Second Supplemental Declaration and the deposition, of Assistant to the Vice President and Deputy Chief of Staff Claire M. O'Donnell, the Office of the Vice President correctly applies section 2207 of title 44 to vice presidential records. See Second Supp. Decl. of Claire M. O'Donnell ("2d Supp. Decl."). There are no vice presidential records that the Office of the Vice President has excluded from the scope of the PRA through its guidance or policies regarding vice presidential records. See 2d Supp. Decl. ¶¶ 4-5; see also Supp. Decl. ¶ 5. The O'Donnell declarations and deposition testimony reflect that the Office of the Vice President applies section 2207 to all documentary materials that constitute vice presidential records as defined by the Presidential Records Act. See generally Ex. 1 (compiling declarations of Ms. O'Donnell and Ms. Smith submitted to establish absence of irreparable harm for preliminary injunction briefing). Specifically:

- Ms. O'Donnell testified that all official records received or created by the OVP are treated as vice presidential records under the PRA. See Ex. 2, Dep. Tr. of Claire M. O'Donnell, 37:15-38:1 ("Q: And what is your understanding of the documents that the Vice President is required to transfer to NARA at the end of his administration? A: All of his executive and legislative files. Q: Okay. Do you have any more specific understanding than that? A: Any documents that he has either created or received in his official functions."); 55:16-20 ("Again, every document that we receive or create in our capacities, meaning the staff of the Vice President, to assist him in his duties are to be kept for the Presidential Records Act."); 54:6-9 (same); 99:19-100:22 (explaining that OVP's guidance is to transfer all vice presidential records as defined under the PRA that have been created or generated during the vice

presidency of Richard B. Cheney); 102:7-103:14 (explaining that "for all practical purposes, everything is considered official" and maintained under the PRA, except "something really personal in your personal life outside of anything official," like "a bank statement or a thank you note for a wedding reception); 119:11-12 ("[I]t's the general policy everything is a presidential record."); 128:17-129:1 (Q: "If a document is covered by the PRA, and by that I mean if a document is vice presidential, if it meets the definition of vice presidential, of a vice presidential record within the meaning of the PRA, is it your understanding that that document has to be preserved? A: Yes."); 136:12-16 ("I know that, again in general, everything that is prepared by any staff member for the Vice President or by the Vice President is considered a [vice] presidential record."); 139:5-140:2 (explaining that "guidance that the staff that we trust" has been given is to preserve records that have been created by the Vice President's staff); 140:8-12 ("I believe all documents, all documents in the Vice President's office, created or received by the Vice President or the Vice President's staff are being kept under the Presidential Records Act."); 141:4-7 ("To the best of my knowledge, like all other records, if records have been prepared for the Vice President, they are being kept under the Presidential Records Act"); 141:17-19 (same); 142:6-14 (same); 142:18-143:6 (same); 144:22-145:8 (same); 147:11-13 (same); 147:20-149:2 (same); 151:5-8 ("If an employee of the Office of the Vice President keeps records that have to do with the Vice President's executive or legislative duties, they are kept for the PRA); 156:18-21 ("I believe that any documents that have been created or received by the Vice President and her staff or his staff are considered [vice] presidential documents."); 77:15-22 ("I could only answer that I don't get into the legalese of all the Vice President's duties. We view it that everything he does he is doing on behalf of the President and that's our practice and that's the guidance I give to people that, everything you are doing here is in support of the Vice President and it's considered a [vice] Presidential document."); 78:9-13 ("Again, if he is – I don't get into the legalese. If there are documents created, or received on behalf of his duties, and if he sits on that board because he is Vice President, then we would consider it a [vice] Presidential document."); 78:14-79:2 (similar).

- She also explained, contrary to plaintiffs' allegations, that the Vice President's legislative records are being managed under the PRA. Id. at 61:17-22 (explaining that legislative records are treated "the same as the executive records are kept. Everything is considered a document that has to be kept or filed."); see also Ex. 3, Smith Rough Dep. Tr. at 199:6-9 ("They confirmed to NARA that in response to a question we asked that they were treating records that Cheney created in the Senate office as vice presidential record."); 202:10-15 ("NARA specifically asked Gary Stern [NARA's general counsel], asked how were they treating legislative or records created in the Senate office and they responded over I think it was several conversations, not all of which I were involved in, that they were treating them as vice presidential record."); 203:7-12 (same).

- And she further explained that the guidance provided to the Vice President with regard to PRA obligations did not differ from the guidance provided to other OVP staff. Ex. 2, O'Donnell Dep. Tr. at 79:22-80:5 (stating that Vice President "supports the guidance that I have been asked to give out and the processes, processes that we follow"); 87:21-88:6 (stating that it is the intent of the Vice President to include "all of the papers, records, notes,

> recordings, memo that the Vice President has created since January 20, 2001, . . . as vice presidential materials turned over to NARA under the Presidential Records Act").

Simply put, there are no "policies and guidelines that exclude from the reach of the PRA all but a narrow category of vice presidential records created or received in the very limited circumstances in which the vice president deems himself to be acting as part of the executive branch," Am. Compl. ¶ 35; it is not true that "Vice President Cheney and the OVP will destroy, transfer, or otherwise dispose of many of the vice president's records under the theory they are personal records and therefore not covered by the PRA or subject to any other record keeping law or obligation," id ¶ 44; there is no validity to the claim that "legislative records" are treated as personal by this Vice President; and it is not true that the OVP and Vice President have been violating the terms of the PRA by relying on guidelines that do not classify vice presidential records in accord with the definition set forth in the PRA. See generally Ex. 1, Ex. 2, Ex. 3. As established in the following exchange, the Vice President and OVP have applied guidance that complies fully with the PRA:

> Question: If a document is covered by the PRA, and by that I mean if a document is vice presidential, if it meets the definition of vice presidential, of a vice presidential record within the meaning of the PRA, is it your understanding that that document has to be preserved?
>
> Answer: Yes.

Ex. 2, O'Donnell Dep. Tr. 128:17-129:1.[12] In short, plaintiffs have no injury upon which to stake their claims.

Plaintiffs nonetheless have alleged that the language used in the declarations deliberately omit assurances about PRA compliance for documentary materials that may have been received or generated by the Vice President in carrying out some alleged functions that are not either the

[12] See also Ex. 3, Smith Rough Dep. Tr. at 111:8-10 ("I'm not aware of any Cheney documents that are carved out and are not being managed by the Office of the Vice President").

Vice President's functions (1) "specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities" or (2) as President of the Senate. Seizing on the language "specially assigned," plaintiffs have claimed that the Vice President performs some other functions that are not "specially assigned by the President," and that the documentary material relating to or having an effect on those functions are not being maintained under the PRA.[13]

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[13] The description of the Vice President's executive functions as those "specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities" is a well-recognized term of art taken from 3 U.S.C. § 106. Indeed, memoranda from the Assistant Attorney General for the Office of Legal Counsel, Walter Dellinger, use the exact same term of art. Assistant Attorney Dellinger observed that "[t]he Vice President has no constitutional or statutory responsibilities as an executive branch officer, and the common understanding that his executive role is limited to advising and assisting the President (as determined by each President) is confirmed by the statute authorizing appropriations or other assistance and services for the Vice President, . . . 3 U.S.C. § 106." 18 U.S. Op. Off. Legal Counsel 10, *1 (1994). The Vice President undertakes executive-related activities -- all covered by section 2207 as "constitutional, statutory or other official or ceremonial duties of the Vice President" – all of which are considered to be "specially assigned by the President in the discharge of executive duties and responsibilities." The "specially assigned" language is a term of art found in 3 U.S.C. § 106 that refers to all of the Vice President's executive activity (because a Vice President has no executive-related responsibilities whatsoever unless the President assigns them to the Vice President). In using the "specially assigned" language, the Office of the Vice President did not narrow or limit what falls within the scope of the Vice President's executive-related functions, all of which are encompassed by section 2207. As Ms. O'Donnell provides in her Second Supplemental Declaration and confirmed in her deposition, the "Office of the Vice President construes these categories broadly, so that all of the Vice President's functions as Vice President fall within either of those two categories." 2d Supp. Decl. ¶ 5.

Likewise, plaintiffs' counsel herself submitted a brief to the court as an attorney for the Department of Justice explaining that the Vice President performs either functions "specially assigned" to him by the President or functions as President of the Senate. See Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Gp., Civ. No. 01-1540, Dkt. 34 (Defs.' Mot. to Dismiss) at 13 ("The Vice President has responsibilities to assist the President with the President's executive duties. See 3 U.S.C. § 106 (recognizing Vice President's function of assisting President with Executive responsibilities). . . . Moreover, the Vice President's important constitutional role in the legislative branch, see U.S. Const. art. I, § 3, cl. 4, . . . further supports the view that the Vice President is not an agency under the APA."); see also id. at 16 ("The Constitution establishes the office of Vice President, see U.S. Const. art. II, § 1, cl. 1, but gives the Vice President no specific executive duties. Indeed, Congress, in authorizing staff and other assistance for the Vice President, indicated that such staff was provided 'in order to enable the Vice President to provide assistance to the President in connection with the performance of functions specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities.' 3 U.S.C. § 106(a) (emphasis added).").

As the declarations reflect and as confirmed in the deposition, the Vice President has no official functions other than those "specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities" and those as President of the Senate, and no documentary materials that meet the definition of vice presidential records are being excluded from the reach of the PRA. 2d Supp. Decl. ¶ 7; Supp. Decl. ¶ 6; Ex. 2, O'Donnell Dep. Tr. at 84:16-19 (Q: "Okay. And are there any other responsibilities that he has? A: Everything would fall under those two categories, everything else he does."). Moreover, notwithstanding plaintiffs' attempt to limit the reach of the phrase "specially assigned by the Vice President by the President in the discharge of executive duties and responsibilities," the record makes clear that the phrase was intended to cover all of the Vice President's duties but for his duties as the President of the Senate. See also id. at 83:18-84:1 (Q: Is it your understanding that everything that the Vice President does in his executive capacity is specially assigned by the President? A: In general terms and in specific terms, yes. It's all – they are all assigned by the President); 172:10-22 ("Q: "The Vice President relies in substantial part on OVP personnel for support in the performance of his official functions. What, as used herein, what does the term official functions include? A: All of his executive and legislative functions. Q: And does that term differ in any way from those functions that are specially assigned by the President? A: It encompasses those functions, specially assigned."); 66:12-22 ("He is there to take on responsibilities that the President assigns to him. He has no other responsibilities other than to assist and work for the President. . . . When we first came into office, that's what we were told. We were there as Vice Presidential staff to assist the Vice President in carrying out his function in working for the President."); 73:5-10 ("And how does this definition, by this definition I mean Vice Presidential support of Presidential functions differ from the specially assigned definition that you offered in the current

litigation? A: For me, it doesn't differ."); see also id. at 78:14-79:2 (responding specifically to questions about the Vice President's duties on the National Security Council, "They are part of his executive duties"); 78:1-13 (explaining that any documentary material created in connection with the Vice President's duties with regard to the Smithsonian Institution would be considered vice presidential records). As Ms. O'Donnell explained, however, whether a specific function is considered "executive" or "legislative" is immaterial in implementing the PRA: "all documents, all documents in the Vice President's office, created or received by the Vice President's staff are being kept under the Presidential Records Act." Id. at 140:8-12; 74:8-13 (explaining that one does not need to determine whether a particular activity constitutes vice presidential support of presidential functions); 70:13-71:3 (explaining that recordkeeping guidance under the PRA does not use "specially assigned" language). And documentary materials meeting the definition of vice presidential record relating to both those executive and legislative functions are being treated as vice presidential records under the PRA.[14]

The plaintiffs bear the burden of showing a "substantial probability" that they have been injured. Sierra Club v. Environ. Protection Ag., 292 F. 3d 895, 899 (D.C. Cir. 2002). Plaintiffs have not come close to showing a "substantial probability" of the existence of injury through their speculative and baseless declarations, Declaration of Stanley I. Kutler ¶ 7 ("I believe the

[14] At the deposition of Ms. O'Donnell, plaintiffs' counsel focused in large part on the specific implementation of the guidance that the Office of the Vice President provides to staff regarding the Presidential Records Act, and whether Ms. O'Donnell personally knew whether specific documents were being preserved under the PRA. Ex. 2, O'Donnell Dep. Tr. at 126:10-157:20. However, even claims appropriately brought under the FRA do not permit such record-by-record judicial review. Armstrong I, 924 F.2d at 293-94 ("[E]ven if a court may review the adequacy of an agency's guidelines [under the FRA], agency personnel will implement the guidelines on a daily basis. Thus agency personnel, not the court, will actually decide whether specific documents . . . constitute "records" under the guidelines. [M]ost importantly, the only issue the court would be asked to consider, i.e., the adequacy of appellants' recordkeeping guidelines and directives, is clearly appropriate for judicial review."). Regardless, as established above, the PRA proscribes any inquiry into the Vice President's recordkeeping guidelines or practices for claims grounded in the PRA.

vice president may well plan to abscond with his records when he leaves office."); Declaration of Anna Kasten Nelson ¶ 5 ("[T]here is legitimate fear that he will defy the PRA and either destroy his records or secrete them[.]"), which is the only "evidence" plaintiffs have submitted in this case. And although "the party invoking federal jurisdiction bears the burden of establishing its existence," Steel Co., 523 U.S. at 104, defendants have borne the burden of conclusively establishing that plaintiffs lack injury. Indeed, in light of this conclusive record, nothing plaintiffs show can rebut even this court's presumption that jurisdiction is lacking as they cannot show "the contrary . . . affirmatively from the record." Daimler Chrysler, 547 U.S. at 342 n.3.

C. Plaintiffs' Injuries are not Fairly Traceable to Any Alleged Actions by NARA, the Archivist or "EOP" or Redressable By Seeking Relief Against Them

The absence of traceability from the alleged injury to relief sought from NARA, the Archivist or EOP, is clear. Even assuming that plaintiffs asserted cognizable injuries, and even assuming OVP was failing to comply with its obligations under the PRA (which it is not), plaintiffs could not obtain relief from NARA, the Archivist, or EOP. Rather, the "links in the chain of causation between the [alleged] conduct and the asserted injur[ies] are far too weak for the chain as a whole to sustain the appellants' standing." Allen v. Wright, 468 U.S. 737, 759 (1984). "Where "the necessary elements of causation . . . hinge on the independent choices of the regulated [or managed] third party," e.g., the Vice President, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 938 (D.C. Cir. 2004) (quoting Lujan, 504 U.S. at 562) (internal quotation marks omitted). Plaintiffs fall far short of their burden.

It is indisputable that by statute and this Circuit's instructions, the Vice President has the authority to implement the terms of the PRA and alone maintains "control over [vice]

presidential records during the [Vice] President's term in office," and that the Archivist lacks the authority to promulgate guidelines and regulations to assist the agencies in the development of records management systems, or to veto any disposal decisions of the Vice President. Armstrong I, 924 F.32d at 290. Thus any perceived injury, even if it existed, is not traceable to any alleged actions of NARA, the Archivist or "EOP." See also Ex. 3, Smith Rough Dep. Tr. at 29:9-14 (NARA does not provide written guidance on definition of vice presidential record); id. at 185:15-186:20 (testifying that NARA relies on the definition of vice presidential records in the PRA); Decl of Nancy Kegan Smith, Director of the Presidential Materials Staff in the Office of the Presidential Libraries ¶ 4; Ex. 1, O'Donnell Decl. ¶ 7 (OVP does not rely on Executive Order 13233 of November 1, 2001 or any guidelines issued by defendants to exclude any vice presidential records of the vice presidency of Richard B. Cheney from the requirements of section 2207 of title 44).

Nor can plaintiffs show redressability against these defendants – "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000) (internal citation omitted). For the same reasons set forth above, there is not a substantial likelihood, indeed no likelihood, that their requested relief will remedy their alleged injuries. See Free Enterprise Fund, 2007 WL 891675 at *5.

D. Plaintiffs Lack Prudential Standing to Pursue their APA Claims

Finally, prudential standing "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987). These prudential concerns require that a "plaintiff's grievance must

arguably fall within the zone of interests protected or regulated by the statutory provision . . . invoked in the suit." Bennett v. Spear, 520 U.S. 154, 162 (1997). Even if plaintiffs' suit did not fatally suffer from the deficiencies outlined above, plaintiffs cannot show that their claims are among those that are envisioned by the PRA. "Here, it cannot reasonably be inferred that Congress intended to permit this suit under [the PRA], because [plaintiffs] have no basis upon which to rest a private right of action under [the PRA]." Am. Fed. of Gov't Employees, 321 F.3d at 143. Thus, for the same reasons that an implied right of action cannot be inferred from the language, structure or history of the Act, plaintiffs lack prudential standing to pursue claims under the statute or the APA.[15] Id. at 144 (rejecting APA claim for same reason that plaintiffs lacked prudential standing to pursue a claim under the statute); see also Fed. for Am. Immigration Reform, Inc. v. Reno, 93 F.3d 897, 902-03 (D.C. Cir. 1996). Accordingly, plaintiffs' APA claims must be dismissed under Rule 12(b)(6) as well.

IV. Summary Judgment Should Be Granted On Behalf of the Defendants On Any Claims That Survive the Motion to Dismiss

To the extent any claims survive the threshold motion to dismiss defenses, summary judgment on those claims should be granted in favor of all the defendants. Plaintiffs seek a declaration that "the guidelines of all defendants that exclude from the scope of the PRA records of the vice president and his office created and received in the course of conducting activities relating to or having an effect on the carrying out of his constitutional, statutory or other official or ceremonial duties violate federal law." Am. Compl. at 23 (prayer for relief); id. ¶¶ 52 (Claim One), 64-65 (Claim Three). Yet, as established by the declarations and deposition testimony in this case, as described in detail supra at Part III. B, no such guidelines exclude this Vice

[15] Nor does Armstrong I dictate that plaintiffs have prudential standing for the types of claims that plaintiffs allege here—as opposed to FRA claims seeking review of presidential guidelines that are alleged to sweep in federal records improperly. Armstrong I, 924 F.2d at 287-88.

President's vice presidential records from the scope of the PRA. See 2d Supp. Decl. ¶¶ 4-5; see also Supp. Decl. ¶ 5; Ex. 2, Dep. Tr. of Claire M. O'Donnell, 37:15-38:1 ("Q: And what is your understanding of the documents that the Vice President is required to transfer to NARA at the end of his administration? A: All of his executive and legislative files. Q: Okay. Do you have any more specific understanding than that? A: Any documents that he has either created or received in his official functions."); Statement of Material Facts ¶¶ 2-5. In short, the record establishes that the OVP has applied the PRA to all "documentary materials, or any reasonably segregable portion thereof, created or received by the [Vice] President, his immediate staff, or a unit or individual of the [Office of the Vice President] whose function is to advise and assist the [Vice] President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory or other official or ceremonial duties of the [Vice] President." 44 U.S.C. § 2201(2); see discussion supra at part III.B. Thus there is "no genuine issue as to any material fact" that defendants' guidelines comply with federal law and do not exclude from the scope of the PRA records of the vice president and his office created and received in the course of conducting activities relating to or having an effect on the carrying out of his constitutional, statutory or other official or ceremonial duties.

For the same reasons, plaintiffs are not entitled to any injunctive or mandamus relief that defendants should "refrain from implementing guidelines that exclude from the scope of the PRA records of the vice president and his office created and received in the course of conducting activities relating to or having an effect on the carrying out of his constitutional, statutory or other official or ceremonial duties." Am. Compl. at 23-24 (prayer for relief); id. ¶¶ 58 (Claim Two), 63-64 (Claim Three), 71-72 (Claim Four). Accordingly, summary judgment should be

granted on behalf of defendants to the extent that the Court finds that any claims survive defendants' motion to dismiss. See Statement of Material Facts ¶¶ 2-5.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss, or, in the alternative, for summary judgment, should be granted.

Respectfully submitted this 8th day of December, 2008.

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