UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HISTORY ASSOCIATES INCORPORATED, Plaintiff, v. FEDERAL DEPOSIT INSURANCE CORPORATION, Defendant.	Case No. 1:24-cv-1857-ACR

MEMORANDUM IN OPPOSITION TO HISTORY ASSOCIATES INCORPORATED'S CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT I AND IN FURTHER SUPPORT OF THE FDIC'S MOTION TO DISMISS COUNT II OF THE AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

Statutes

Rules

Regulations

Executive Orders

Other Authorities

INDEX OF EXHIBITS

Exhibit No.[1]	**Description**
Exhibit 9	Redacted FDIC Declaration No. 4
Exhibit 10	Redacted FDIC Declaration No. 5

[1] The FDIC's opening memorandum referenced eight exhibits. Because the two exhibits attached to this memorandum supplement those already submitted to the Court, the FDIC lists them as Exhibits 9 and 10.

INTRODUCTION

History Associates Inc.'s ("HAI") Opposition confirms several things. As for Count I, HAI seemingly agrees that (1) the FDIC conducted an adequate search for documents responsive to its pause-letter request, (2) the FDIC's redactions cover information falling within Exemptions 4 and 8, and (3) the FDIC justified nearly all its redactions under the foreseeable-harm standard. *See* Mem. in Supp. of HAI's Cross-Mot. for Summ. J. on Count I, Opp'n to FDIC's Mot. for Summ. J. on Count I, and Opp'n to FDIC's Mot. to Dismiss Count II ("HAI Opp.") 38, Dkt. No. 76-1. After receiving over 200 documents totaling over 800 pages in response to its Freedom of Information Act ("FOIA") request—all with carefully tailored redactions designed to protect banks' identities and commercial information—HAI now only challenges select redactions that the FDIC applied to "the amount of the percentage cap imposed by a bank on deposits from crypto companies" and "the names of public blockchains the banks proposed to use." HAI Opp. 36. But the FDIC's declarations satisfy the FDIC's obligation to engage in a foreseeable-harm analysis for both sets. And even if FOIA required more, the FDIC has supplemented those submissions with additional declarations further elaborating on the foreseeable harm linked with removing redactions over these two types of information.

As for Count II, the Opposition verifies that HAI has not pled a viable policy-or-practice claim. Despite listing the FDIC's four alleged practices under a single count, HAI admits that its Amended Complaint alleges four *separate* policy-or-practice claims. *See* HAI Opp. 7-8. Moreover, HAI tacitly recognizes that none of these four claims survive Rule 12(b)(6) on their own. Instead, HAI resorts either to (1) swapping the Amended Complaint's allegations with new ones related to written FDIC policies and training materials, (2) ignoring legal criteria for stating a policy-or-practice claim, (3) selectively recasting its four claims as one super claim by using an

oversimplified throughline that all sought "crypto-related information," *see* HAI Opp. 28, or (4) falling back on potential parallel discovery as a cure-all for material gaps in the Amended Complaint's misplaced narrative. On the facts alleged—even those outside the Amended Complaint—none of these evasions persuade. Rather, the Opposition shows that *HAI* is the party trying "to move the goalposts"—not the FDIC. *See* HAI Opp. 28.

The Amended Complaint fares no better under Rule 12(b)(1). To start, HAI lacks Article III standing to pursue its claim that the FDIC has failed to preserve or has destroyed records. Like any other plaintiff, HAI must allege it has suffered an injury-in-fact. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). But HAI cannot point to any such injury because it conceded that the FDIC has *not* failed to preserve records responsive to its FOIA requests. Dkt. Nos. 48 ¶ 27; 50 at 9. And any future-injury allegations HAI *could* assert lack imminence because they depend on several unsettled future decision points; namely, how the FDIC processes future FOIA requests, HAI's dissatisfaction with the FDIC's responses, and HAI's election to seek administrative and judicial review.

HAI also can't evade this jurisdiction's caselaw on prudential ripeness. As the Opposition's cited materials show, "[n]o bright line rules in the [FDIC's written policies] compelled" the FDIC's "disputed action[s]." *See Cause of Action Inst. v. U.S. Dep't of Just.*, 999 F.3d 696, 705 (D.C. Cir. 2021). Therefore, this dispute lacks a sufficiently concrete setting for judicial review. Nor can HAI show that delaying judicial review will impose any hardship. If HAI thinks the FDIC's responses to any future FOIA requests HAI may file create a "reasonable inference" that the agency employs an unlawful FOIA policy, pattern, or practice, HAI is free to pursue its claims at that time when they are ripe. *See Am. Ctr. for L. & Just. v. Fed. Bureau of Investigation*, 470 F. Supp. 3d 1, 6 (D.D.C. 2020).

ARGUMENT

I. The Court Should Grant the FDIC's Motion for Summary Judgment and Deny History Associates' Cross-Motion for Summary Judgment on Count I.

Count I of the Amended Complaint is moot. *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982) (per curiam) ("Once the records are produced[,] the substance of the controversy disappears and becomes moot since the disclosure which the suit seeks has already been made." (citation omitted)). HAI no longer disputes that the FDIC has "fulfilled its statutory obligation to search for and produce redacted records responsive to [HAI's] pause-letter request." *Compare* Dkt. No. 37 ¶ 110 *with* HAI Opp. 36. Nor does it dispute that the FDIC's redactions cover information falling within Exemptions 4 and 8.[2] *Compare* Dkt. No. 37 ¶ 112 *with* HAI Opp. 38.

Instead, HAI limits its cross-motion for summary judgment to whether the FDIC's redactions of two "discrete categories of information from the pause letters" meet FOIA's foreseeable-harm requirement: (1) "the amount of the percentage cap imposed by a bank on deposits from crypto companies" and (2) "the names of public blockchains the banks proposed to use." HAI Opp. 36. The FDIC's declarations, however, "articulate both the nature of the harm" from releasing this information and "the link between the specified harm and specific information contained in the material withheld." *See Reps. Comm. for Freedom of the Press*, 3 F.4th at 369; *see also Machado Amadis v. U.S. Dep't of State*, 971 F.3d 364, 370 (D.C. Cir. 2020) (upholding

[2] HAI's Cross-Motion for Summary Judgment on Count I does state that "[t]he FDIC has not met its burden to show that the redacted information is subject to a FOIA exemption." HAI Opp. 37. But the Cross-Motion's substance only focuses on whether disclosing the redacted information "would result in any harm to an interest protected" by these exemptions. *Id.* 38-43. D.C. Circuit caselaw establishes that segregability of non-exempt information and foreseeable harm are sequential inquiries. *See Reps. Comm. for Freedom of the Press v. Fed. Bureau of Investigation*, 3 F.4th 350, 369 (D.C. Cir. 2021). Therefore, HAI has either conceded the segregability point or, alternatively, forfeited the argument by failing to develop it with analysis and citation to authority. *Talbot v. U.S. Dep't of State*, 315 F. Supp. 3d 355, 371 n.4 (D.D.C. 2018).

agency's foreseeable-harm analysis based on explanations provided in declaration); *see also* Redacted FDIC Declaration No. 2 ("Decl. 2") ¶¶ 6-7, Dkt. No. 72-7; Redacted FDIC Declaration No. 3 ("Decl. 3") ¶¶ 6-7, Dkt. No. 72-8.

The FDIC also has supplemented those submissions with additional declarations that specifically address the foreseeable harm linked with removing redactions over the percentage caps and the names of certain public blockchains. *Reps. Comm. for Freedom of the Press v. Fed. Bureau of Investigation*, No. 15-1392 (RJL), 2022 WL 1908841, at *3 (D.D.C. June 3, 2022) (on remand from the D.C. Circuit, holding that supplemental declarations providing more detail on foreseeable harm of disclosure cured deficiencies in original agency showing); Redacted FDIC Declaration No. 4 ("Decl. 4") ¶¶ 5-11, Exhibit 9; Redacted FDIC Declaration No. 5 ("Decl. 5") ¶¶ 5-10, Exhibit 10.[3]

1. **Percentage Caps**. HAI's foreseeable-harm arguments about the percentage caps do not address the most important (and undisputed) fact: the records show that the banks generated these figures themselves and provided them to the FDIC during the supervisory process. Disclosing confidential, non-public information of this type would straightforwardly "caus[e] genuine harm to [the banks'] economic or business interests" by revealing sensitive material about their business and risk-management strategies to customers, competitors, and the public-at-large. *See Greenspan v. Bd. of Governors of the Fed. Reserve Sys.*, 643 F. Supp. 3d 176, 189 (D.D.C. 2022) (quoting *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 113 (D.D.C. 2019)).[4] And relevant to any foreseeable-harm analysis under both Exemptions 4 and 8, "if [the

[3] Agencies can meet the foreseeable-harm requirement "on a category-by-category basis" so long as "the basis and likelihood of th[e] harm" are "independently demonstrated for each category." *Reps. Comm. for Freedom of the Press*, 3 F.4th at 369.

[4] Both parties agree that anonymity of the banks and their potential business partners should be maintained. Requiring more than two dozen banks and their business partners to file declarations

banks'] information were to be disclosed, [they] might be less likely to voluntarily disclose such information to the government again," *see id.*, especially when banks frequently exchange this information with the FDIC under an assurance of privacy, *see* 12 C.F.R. §§ 309.5(d)(8), 309.6; *see also* Dkt. No. 72-7 ("Banks would be less forthcoming in their communications with regulators if they knew that those communications were subject to public disclosure in a FOIA lawsuit and would be less inclined to include sensitive or confidential information, analyses, or commentary in their interactions with the FDIC."); Dkt. No. 72-8 (similar).[5]

Therefore, a ruling that makes proprietary business information like these elective percentage caps available under FOIA would disincentivize banks from providing similar information to the FDIC in the first instance. Decl. 4 ¶¶ 7, 9-11; Decl. 5 ¶¶ 8-10. It also would foreseeably harm the FDIC's examination process by making it less likely that banks will engage with the agency in an open and transparent manner regarding their commercial, operational, and regulatory-compliance activities.[6] Decl. 4 ¶ 9; Decl. 5 ¶ 8. Reflecting this, caselaw holds that the threatened chilling of communications between banks and their regulators qualifies as a "textbook articulation[]" of foreseeable harm under Exemptions 4 and 8. *See generally Greenspan*, 643 F. Supp. 3d at 189;

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stating that disclosure of their identities and their business information would cause foreseeable harm to them would, in and of itself, harm the businesses and defeat the purpose of the redactions.

[5] Other financial regulators (and law firms) describe the breadth and scope of Exemption 8—and the harm that could result to the supervisory relationship from publishing supervisory documents—in similar terms. *See, e.g.*, *Leopold v. Dep't of Just.*, No. 19-cv-3192-RC (D.D.C.), Dkt. Nos. 54-5, 54-6 at 9-16.

[6] "[A]n agency's burden under the foreseeable harm requirement may be more easily met when invoking . . . privileges and exemptions for which the risk of harm through disclosure is more self-evident and the potential for agency overuse is attenuated." *Reps. Comm. for Freedom of the Press v. U.S. Customs & Border Prot.*, 567 F. Supp. 3d 97, 120 (D.D.C. 2021). Here, the FDIC's use of Exemptions 4 and 8 falls into this category because Congress intended, among other purposes, "to ensure that [financial] institutions continue to cooperate with regulatory agencies without fear that their confidential information will be disclosed." *Bloomberg, L.P. v. S.E.C.*, 357 F. Supp. 2d 156, 170 (D.D.C. 2004).

cf. In re Subpoena Served Upon Comptroller of the Currency, 967 F.2d 630, 634 (D.C. Cir. 1992) ("Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank in expressing their concerns about the bank. These conditions simply could not be met as well if communications between the bank and its regulators were not privileged."); *United States v. Provident Nat'l Bank*, 41 F.R.D. 209, 210 (E.D. Pa. 1966) ("As it is now, the banks feel free to 'tell all' to the examiner, but if these reports became public, this 'tell all' feeling could cease. The banks might feel it necessary to protect themselves against any adverse observation by an examiner if such reports were to be freely disclosed.").

But the foreseeable harm following disclosure does not stop there. The altered supervisory dynamic would foreseeably harm the FDIC's broader supervisory and regulatory abilities. For example, information gleaned from proactive bank submissions to the FDIC—covering topics like banks' strategic plans, counterparty exposures, risk profiles, and risk-management programs—frequently informs the substance of broader regulatory or supervisory efforts, e.g., by "informing the considerations underlying a notice of proposed rulemaking." Decl. 4 ¶ 10; Decl. 5 ¶ 9. It can also inform FDIC staff's decision to issue guidance about an emerging banking risk, e.g., "by promoting staff's ability to view banks' compliance or risk-management frameworks in real time, assess those frameworks' effectiveness on a bank-specific or industry-wide basis, and consider whether to issue guidance." Decl. 4 ¶ 10; Decl. 5 ¶ 9. But chilled communications with banks would lead to the FDIC receiving less timely and less comprehensive information and, in turn, would lead to less informed rules and guidance. These "focused," "concrete," and foreseeable harms further show that the FDIC has met its burden here. *See Reps. Comm. for Freedom of the Press*, 3 F.4th at 370.

HAI responds that, because the FDIC unredacted information revealing the *existence* of various bank deposit caps, revealing the *amount* of those caps would neither "materially increase[] the risk of the bank being identified" nor "harm the FDIC's supervisory relationship with any bank." HAI Opp. 39. But HAI offers no support for those assertions, and the FDIC's declarations show that releasing these figures would foreseeably harm the FDIC's supervisory relationships with the banks that shared them by frustrating the agency's ability to understand and assess other similar risk-management controls on a cooperative and ongoing basis. Decl. 4 ¶¶ 9-11; Decl. 5 ¶¶ 8-10.

2. **Names of Public Blockchains**. HAI does not dispute that preserving a bank's anonymity implicates "an interest protected by" Exemption 8. *See* HAI Opp. 42; 5 U.S.C. § 552(a)(8)(A). However, HAI asserts that the FDIC "impermissibly redacted the names of public blockchains" because these blockchains "have no relationship with any bank or the FDIC" and because removing the redactions "would reveal nothing about the bank's identity." HAI Opp. 39-40. But HAI views those redactions through a too-narrow lens.

Applying the "mosaic theory," courts have recognized that requesters or others could assemble separate disclosures of otherwise innocuous information to reveal information otherwise exempt from disclosure. *See Shapiro v. U.S. Dep't of Just.*, 239 F. Supp. 3d 100, 115 (D.D.C. 2017) (as applied to Exemption 7(E), noting the mosaic theory "finds support in both Supreme Court and D.C. Circuit precedent recognizing that bits and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself." (cleaned up)). Here, revealing the public blockchains—in concert with other already-unredacted

information like dates, the FDIC regional office from which the letter issued,[7] and details regarding the business activity under consideration—could reveal the underlying bank's identity. Decl. 4 ¶¶ 8; Decl. 5 ¶ 7. To that end, the FDIC's declarations identify this risk and attest how public disclosure would foreseeably harm the FDIC's ability to perform its statutory responsibilities as a bank supervisor. Specifically, the declarants explain how they "believe it is reasonably foreseeable that divulging the names of the banks or *altering the redactions in the records released to Plaintiff in a manner that would allow identification of the names of the banks* or their potential customers or business partners would negatively affect the FDIC's supervisory relationships with both the institutions whose name was divulged and banks in general."[8] And events coinciding with this case show these harms go beyond the hypothetical. *See* Webinar, *Using AI and Other Modern Tech: Analyzing the FDIC Pause Letters*, RegReform, Davis Wright Tremaine LLP (Mar. 14, 2025), https://bit.ly/4fhvuNp.

II. History Associates Fails to State Any of Its Four Separate Policy-or-Practice Claims.

HAI's Amended Complaint fails to state any of the four separate and distinct policy-or-practice claims that it alleges against the FDIC: (1) construing FOIA requests too narrowly ("Narrow Construction Claim"), (2) applying a categorical approach to FOIA Exemption 8 to avoid searching, reviewing, and segregating records ("Categorical Denial Claim"), (3) failing to conduct reasonable searches ("Search Claim"), and (4) failing to take steps necessary to ensure that records responsive to FOIA requests are properly preserved ("Preservation Claim").

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[7] The FDIC has various regional offices and twos offices in Washington, D.C., and Arlington, VA. Day-to-day supervisory responsibility for banks under the FDIC's purview is generally allocated on a geographic basis among the regional offices, with various types of support from the Washington office. Decl. 4 ¶ 1.

[8] Dkt. Nos. 72-7 (emphasis added); 71-8 (same); *see also* Dkt. No. 72-4 ("[R]emoving the redactions applied . . . would increase the likelihood of revealing the identity of banks and third-parties with which banks were engaged."); Decl. 4 ¶ 5 (same); Decl. 5 ¶ 5 (same).

A. History Associates' Opposition Relies on Allegations Outside the Amended Complaint.

"The purpose of a motion to dismiss is to assess the validity of the *pleadings*." *Henthorn v. Dep't of Navy*, 29 F.3d 682, 688 (D.C. Cir. 1994). Given this purpose, courts generally cannot rely on facts outside the complaint when evaluating a motion to dismiss under Rule 12(b)(6).[9] *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995). Nor can a plaintiff "amend his or her complaint by the briefs in opposition to a motion to dismiss." *Kingman Park Civic Ass'n v. Gray*, 27 F. Supp. 3d 142, 160 n.7 (D.D.C. 2014). Yet HAI invites the Court to do precisely that, using the Opposition to reframe its policy-or-practice claims with new allegations based on incomplete snippets of FDIC policies and training materials. HAI Opp. 15-26. "This tactic is clearly impermissible." *Calvetti v. Antcliff*, 346 F. Supp. 2d 92, 107 (D.D.C. 2004). While HAI may feel that circumventing the Federal Rules of Civil Procedure is more "efficient," HAI Opp. 3, that is not permissible, *see* Fed. R. Civ. P. 15(a)(2) (requiring plaintiffs to seek consent from defendant or leave from the court to file a second amended complaint). This Court lacks authority to consider these new allegations unless a complaint reflecting them is properly before it, which is not the case here. *See Arbitraje Casa de Cambio, S.A. de C.V. v. U.S. Postal Serv.*, 297 F. Supp. 2d 165, 170 (D.D.C. 2003).

B. Caselaw Confirms Numerosity, Similarity, and Unlawfulness as Relevant Criteria for Assessing History Associates' Policy-or-Practice Claims.

Consistent with Rule 12(b)(6) and Rule 15(a)(2), the FDIC's motion to dismiss is directed

[9] When deciding whether a complaint states a claim, courts "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint[,] and matters of which [it] may take judicial notice." *Equal Emp. Opportunity Comm'n v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). Courts may also "consider documents specifically referenced *in the complaint* where the authenticity of the document[s] is not questioned." *Louis v. Hagel*, 221 F. Supp. 3d 40, 43 (D.D.C. 2016) (emphasis added) (quotation omitted).

at the claims asserted in the Amended Complaint—the only claims at issue in this lawsuit. Rather than challenge any formal or express policies, the Amended Complaint asks the court to infer the existence of alleged informal practices based on how the FDIC treated HAI's FOIA requests. Dkt. No. 37 ¶¶ 92-105. Given those allegations, the FDIC's motion focuses—rightly—on whether the Amended Complaint alleges sufficient facts to allow "the reasonable inference" that the agency has adopted an unlawful FOIA policy, pattern, or practice. *See Am. Ctr. for L. & Just.*, 470 F. Supp. 3d at 6.

As set forth in the FDIC's motion, in assessing that inferential question, courts in this jurisdiction "have reached a consensus" on four relevant criteria: (1) numerosity, (2) similarity between requests, (3) similarity between agency responses, and (4) the presence of an unlawful FOIA practice. *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Hous. & Urb. Dev.*, 415 F. Supp. 3d 215, 224-25 (D.D.C. 2019); *see also Citizens for Resp. & Ethics in Wash. v. Dep't of Just.*, 772 F. Supp. 3d 1, 12 (D.D.C. 2025) ("*CREW*"); *Am. Ctr. for L. & Just.*, 470 F. Supp. 3d at 6; *Khine v. U.S. Dep't of Homeland Sec.*, 334 F. Supp. 3d 324, 333 (D.D.C. 2018), *aff'd*, 943 F.3d 959 (D.C. Cir. 2019). But when faced with these criteria, which expose the defects in its claims, HAI incorrectly contends that numerosity and similarity are merely FDIC "invent[ions]" and asserts that "an agency's denial of even a single FOIA request could signal that the agency has a policy or practice of ignoring FOIA's requirements." HAI Opp. 14.

HAI's position is contrary to the above-referenced caselaw and disregards the crucial roles that numerosity and similarity play in evaluating policy-and-practice claims. Plaintiffs must plead facts showing permitting the reasonable inference that an agency has a policy or practice that "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 numerosity and similarity criteria—most recently

explored in a published decision in *CREW*, 772 F. Supp. 3d at 12—inform a court's analysis on that point. For example, the more alleged violations of a similar type, the more likely that an agency adheres to an impermissible policy or practice, and the more likely those alleged violations will recur.

To that end, courts have rejected other plaintiffs' similar efforts to establish a reasonable inference of such future impairment based on two or fewer alleged FOIA violations, as HAI attempts here.[10] Simply put, "with so few anecdotes at play, other benign and 'more likely explanations' readily take the fore." *See Am. Ctr. for L. & Just. v. U.S. Dep't of State*, 249 F. Supp. 3d 275, 285-86 (D.D.C. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009)); *see also CREW*, 772 F. Supp. 3d at 9 ("CREW has alleged no more than two instances of challenged conduct . . . which is likely insufficient to establish a consistent policy or practice."); *Citizens for Resp. & Ethics in Wash.*, 415 F. Supp. 3d at 224 ("[A] plaintiff cannot state a valid claim arising out of a single incident[.]"); *Scudder v. CIA*, 281 F. Supp. 3d 124, 129 (D.D.C. 2017) ("[P]olicy or practice cases in this district since *Payne Enterprises* have required plaintiffs to show more than one violation of FOIA."); *Muttitt v. U.S. Cent. Command*, 813 F. Supp. 2d 221, 223, 231 (D.D.C. 2011) ("[A]n allegation of a single FOIA violation is insufficient as a matter of law to state a claim for relief based on a policy, pattern, or practice of violating FOIA."). Similarly, courts have also turned away policy-or-practice claims like HAI's where either the plaintiff's cited FOIA requests or the agency's FOIA responses were not similar enough to reasonably infer that the alleged practice

[10] While not directly tied to whether a plaintiff states a policy-or-practice claim, these criteria also speak to whether a plaintiff has Article III standing to pursue the claim in federal court at all. *See Nat'l Sec. Couns. v. CIA*, 931 F. Supp. 2d 77, 92 (D.D.C. 2013) ("[E]ven assuming that an alleged policy or practice exists and some FOIA requesters may have been subject to that policy, FOIA plaintiffs must establish that they have personally been subject to the alleged policy to have standing to challenge it.").

would affect future FOIA requests. *See, e.g.*, *CREW*, 772 F. Supp. 3d at 16, 17 ("doom[ing]" plaintiff's claim of "pattern or practice" against the agency based on three requests that received non-uniform treatment); *Am. Ctr. for L. & Just.*, 470 F. Supp. 3d at 7-8 (rejecting plaintiff's effort to infer a practice based on "three novel kinds of requests"); *see also infra* pp. 16-18 (discussing HAI's policy-or-practice claims in reference to similarity of requests and responses).

HAI next tries to avoid numerosity and similarity altogether by grafting new allegations about written FDIC policies and training materials onto the Amended Complaint. *See generally* HAI Opp. 15-26. Again, these allegations are not properly before the Court. Moreover, even if they were, numerosity and similarity remain relevant criteria when evaluating allegations related to written agency policies—including those in this case.

As a threshold matter, a plaintiff must allege sufficient facts to support "the reasonable inference" that the agency applies the written policy in the way the plaintiff *believes* the policy is applied. *See Am. Ctr. for L. & Just.*, 470 F. Supp. 3d at 6; *see also* HAI Opp. 32 ("Every policy-or-practice claim requires proof that an agency in fact has an unlawful policy or practice[.]"). But HAI has not alleged those facts here because the FDIC's responses to the various FOIA requests referenced in the Amended Complaint do not show the FDIC applying its written policies in the manner alleged. Rather, the materials referenced in the Amended Complaint show that the FDIC responded to those requests in different ways. Dkt. Nos. 37-2, -3, -6, -7, -9, -11 (FDIC response letters to HAI's cited FOIA requests). In these situations, a plaintiff cannot make a "plausible" (as opposed to only a "conceivable") showing that alleged FOIA violations will recur in the future based on (1) a limited number of FOIA requests seeking different types of records and receiving different FDIC responses and (2) conclusory allegations that the FDIC applies a written policy in a manner facially inconsistent with the responses it actually received and at odds with the written

policy's actual language. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see infra* pp. 21-30 (discussing HAI's misplaced reliance on FDIC written policies and training materials).

Similarly, HAI bases its Search Claim and its Narrow Construction Claim on the *absence* of certain language in the FDIC's written policies. HAI Opp. 20-24. However, here the factual allegations about the number of violations, the similarity between the FOIA requests, and the similarity between the agency's responses are necessary to support any reasonable inference that the alleged "policy-by-negative-implication" exists such to permit the "reasonable inference" that the alleged FOIA policy or practice exists. *See CREW*, 772 F. Supp. 3d at 7. And no allegations in the Amended Complaint—anchored as they are in discrete examples of alleged FOIA violations rather than formal written policies—support any such "reasonable inference" here. *See infra* p. 20 (assessing the Amended Complaint's Search Claim and its Narrow Construction Claim allegations).[11]

At bottom, the Opposition suggests a novel and unjustified pleading standard: that merely referencing an agency's written policies means numerosity and similarity considerations *never* apply. *See* HAI Opp. 12-15. That is not the law. This Court should reject that position and continue to follow caselaw in this jurisdiction that consistently assesses policy-or-practice claims like those

[11] HAI cites *Newport Aeronautical Sales v. Department of Air Force* as an example where the plaintiff stated a policy-or-practice claim rooted in an agency's written policy that allegedly violated FOIA. 684 F.3d 160 (D.C. Cir. 2012). Specifically, the plaintiff challenged an agency "practice of denying FOIA requests for [certain types of] data . . . and thus requiring [requesters] to seek the data under the restrictive terms of" another statute. *Id.* at 164. Effectively, the plaintiff had alleged that the agency was unambiguously implementing, following, and applying a clear written policy to its repeated FOIA requests. *Id.* at 163. That posture differs from this case, where HAI's Opposition relies on alleged policies that are *not* reflected in FDIC written materials. *See infra* pp. 21-30 (analyzing HAI's discussion of FDIC written policies). Even so, the plaintiff had established that it had many requests subjected to the written FOIA policy. *See Newport Aeronautical Sales*, 684 F.3d at 163. And the D.C. Circuit still upheld dismissal of the claim because the challenged policy "d[id] not violate FOIA." *Id.* at 168.

in the Amended Complaint through reference to numerosity, similarity between requests, similarity between agency responses, and unlawfulness.

C. History Associates' Efforts to Satisfy These Criteria Overstate the Amended Complaint's Allegations.

Rather than engage with this jurisdiction's law on policy-or-practice claims and the criteria of numerosity, similarity, and unlawfulness, HAI tries to avoid them altogether. *See* HAI Opp. 26-30. For example, HAI tries to have it both ways by (1) claiming that "each" of its alleged policy-or-practice claims meet the appropriate pleading standard, but then (2) proceeding to analyze all four as if they were a single claim. *Compare* HAI Opp. 27-30 *with* HAI Opp. 7-8 (admitting that the Amended Complaint alleges four separate policy-or-practice claims). The FDIC's opening memorandum already explained why that maneuver falls flat: the content of the requests, responses to the requests, and allegedly unlawful practices are neither numerous enough nor sufficiently alike to allege the patterns of conduct needed to survive Rule 12(b)(6). FDIC Mem. in Supp. of FDIC's Mot. for Summ. J. on Count I and Mot. to Dismiss Count II of Pl.'s Am. Compl. ("FDIC Mem.") 25-40, Dkt. No. 72-1. The FDIC will not rehash that showing again here, but it will answer HAI's specific arguments in turn.

1. **Numerosity**. HAI suggests that the FDIC's reliance on *CREW v. U.S. Department of Justice*, 772 F. Supp. 3d 1 (D.D.C. 2025), and *Khan v. U.S. Department of Homeland Security*, No. 22-2480 (TJK), 2023 WL 6215359 (D.D.C. Sept. 25, 2023), is misplaced. Although HAI admits that both decisions "express[] serious doubt as to whether only two separate instances [of alleged FOIA misconduct] could amount to a detectable pattern," *CREW*, 772 F. Supp. 3d at 16; *see also Khan*, 2023 WL 6215359 at *7, HAI contends that those opinions "provide[] no sound basis" for that conclusion. HAI Opp. 27. Not so. Absent a written policy that unambiguously violates FOIA on its face—and the written FDIC policies that HAI cites do not—other courts in this jurisdiction

are definitive that plaintiffs must "show more than one violation of FOIA" to state a policy-or-practice claim. *E.g.*, *Scudder*, 281 F. Supp. 3d at 129. And just as in *CREW*, the Amended Complaint must allege more than two instances of violative FOIA conduct to plead a "*detectable* pattern" or "*established* practice" sufficient to state a policy-or-practice claim. *See CREW*, 772 F. Supp. 3d at 16-17 (emphasis added).

HAI also misunderstands the effects of its decision to forego traditional administrative or judicial review for two of its cited FOIA requests.[12] HAI Opp. 28. Despite not giving the FDIC any chance to address HAI's concerns through that review, it now implores the Court to support a roundabout collateral attack on these requests—namely, by citing them to bolster otherwise numerically insufficient policy-or-practice claims—because "[m]any unlawful practices . . . may not be apparent from the face of the FOIA-request denial and may not alert the requester of the basis to appeal." HAI Opp. 28. D.C. Circuit caselaw, however, counsels otherwise. *See generally Dettman v. U.S. Dep't of Just.*, 802 F.2d 1472, 1476 n.8 & 1477 (D.C. Cir. 1986) (noting that plaintiff's decision to forgo administrative review meant the agency "never had a fair opportunity to resolve" the plaintiff's issues "prior to being ushered into litigation").

Even if FOIA requesters could reopen unexhausted requests in this way—and HAI cites no authority to support that outcome—the facts as alleged do not satisfy HAI's own rule. Specifically, HAI cites these two requests to prop up its Narrow Construction Claim and its Search Claim, maintaining that the no-records responses it received meant the FDIC's interpretation of its request and search for records *had* to be unlawful. Dkt. No. 37 ¶ 101. But HAI knew about the no-records

[12] The Amended Complaint references five FOIA requests, which the FDIC's opening memorandum classified as "FOIA 1" through "FOIA 5." FDIC Mem. 5-6 (describing these five FOIA requests based on topic, agency treatment, and whether HAI filed an administrative appeal). This memorandum adopts the same classification.

response on receipt of the FDIC's decision. Under HAI's own logic, it was "alert[ed] . . . of the basis to appeal" at that time—not some indeterminate point after the time for filing a FOIA challenge expired. HAI Opp. 28.

2. **Similarity between requests**. HAI next creates an overgeneralized throughline—seeking information about "'a coordinated effort' by 'federal financial regulators' to 'cut off the digital-asset industry from the banking sector,'" HAI Opp. 28-29 (citation omitted)—to establish similarity between the requests underlying all four of the FDIC's alleged FOIA practices. But, as the FDIC's opening memorandum details, the FOIA requests that form the basis for HAI's policy or practice claim required the FDIC to search for (1) different types of documents in (2) different storage locations that (3) raised different exemption-related questions and (4) required different internal stakeholders to complete their processing. *See, e.g.*, FDIC Mem. 1-4, 33, 36, 38-39. If HAI's approach wins out, these material differences get entirely brushed aside.

Rather than confront these differences, HAI cites a paragraph in *CREW* that it suggests "hold[s] that requests are sufficiently similar to plausibly allege a pattern of misconduct so long as they '[a]re about the same subject matter.'" HAI Opp. 29 (emphasis omitted) (quoting *CREW*, 772 F. Supp. 3d at 12). HAI, however, overlooks *CREW*'s next paragraph reaffirming that "[f]or a pattern to be substantively sufficient, it should concern repeated requests for a narrowly defined class of documents." 772 F. Supp. 3d at 12 (cleaned up) (citation omitted). Of course, the Amended Complaint's cited FOIA requests are not limited to those seeking "a narrowly defined class of documents." Rather, they cover requests for letters (FOIA 1), working-group charters and meeting minutes (FOIA 2), communications about a blog post (FOIA 3), communications about a joint statement on liquidity risks (FOIA 4), and communications about a policy statement issued by another regulator (FOIA 5). *See* FDIC Mem. 5-6 (chart summarizing the Amended Complaint's

cited FOIA requests); *see also Am. Ctr. for L. & Just.*, 470 F. Supp. 3d at 7-8 (rejecting a plaintiff's similar effort to "describe the [agency]'s behavior at a[n] [impermissibly] higher level of generality").

3. **Similarity between responses**. HAI's argument regarding this criterion only cites its Categorical Denial Claim, HAI Opp. 29, and makes no effort to demonstrate similarity between the FDIC's responses to the FOIA requests underlying HAI's Narrow Construction Claim, its Search Claim, and its Preservation Claim. *Id.* The Court may therefore "treat [HAI's] failure to oppose" the FDIC's similarity arguments on these three claims "as a decision to concede those arguments." *See, e.g.*, *Nat'l Sec. Couns. v. CIA*, 898 F. Supp. 2d 233, 268 (D.D.C. 2012), *aff'd*, 969 F.3d 406 (D.C. Cir. 2020).

That concession aside, HAI's similarity argument fails on the merits. The problem is in part a misapprehension of what constitutes a categorical denial. A categorical denial refers to situations where an agency claims that a category of records is exempt from disclosure under FOIA and the agency does not search for, review, or analyze individual documents. *See, e.g.*, *Jurdi v. United States*, 485 F. Supp. 3d 83, 92 (D.D.C. 2020). An agency's decision to withhold a document in full (rather than redacting it), however, does not by itself mean that the agency did so on a categorical basis. For example, an agency could search for, review, and analyze a document but then conclude that withholding that document in full remains appropriate under FOIA. That result is not a categorical denial. Yet HAI tries to cast the result of its FOIA request for certain meeting minutes (FOIA 2) as such, despite the FDIC conducting a search for the meeting minutes,

reviewing the results, initially determining that they were subject to withholding in full, and informing HAI of the same.[13]

Likewise, the fact that two FOIA requests—here, HAI's request for communications relating to a blog post (FOIA 3) and a policy statement from another regulator (FOIA 5)—result in no records being released "doesn't give rise to a rational inference" that the two responses "share[] a similar" root cause, i.e., that either or both involved categorical denials. *Cf. United States v. Makkar*, 810 F.3d 1139, 1144 (10th Cir. 2015). And contrary to HAI's suggestion, the FDIC's treatment of FOIA 2 does not raise a factual question—Exhibit E to the Amended Complaint definitively shows that the FDIC did not take a categorical approach with respect to that request. *See* Dkt. No. 37-5. As such, the FDIC's dissimilar treatment toward the only two FOIA requests that HAI cites as support for this allegation necessarily renders the claim "insufficient as a matter of law." *See Muttitt*, 813 F. Supp. 2d at 231.

4. **Unlawfulness**. HAI's unlawfulness discussion largely reiterates FOIA maxims, arguing that the FDIC must "(1) construe FOIA requests [for documents] liberally, (2) conduct reasonable searches in response to FOIA requests, and (3) take steps to preserve documents that are subject to FOIA requests." HAI Opp. 30. But stopping there leaves half the question unanswered. A plaintiff must not only allege that a legal requirement exists under FOIA—as HAI seems to suggest—but also allege facts signifying that the agency's alleged policy or practice violates that requirement. *See CREW*, 772 F. Supp. 3d at 15; *see also Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 610 n.9 (D.C. Cir. 2017) ("On a motion to dismiss for failure to state a claim, we are not required to credit

[13] This FOIA request remains on administrative remand for the agency to reconsider whether any non-exempt information in the meeting minutes is segregable from exempt information. FDIC Mem. 5.

a bald legal conclusion that is devoid of factual allegations and that simply parrots the terms" of the cause of action). On that latter front, HAI's Amended Complaint falls short.

Consider HAI's Narrow Construction Claim. The Amended Complaint roots this claim in the FDIC's treatment toward two FOIA requests, one of which HAI declined to seek traditional administrative or judicial review. *See* FDIC Mem. 5-6, 35-36. Echoing numerosity considerations, reliance on unexhausted FOIA requests to prove an unlawful FOIA policy or practice is unjustified. *See supra* pp. 15-16 (discussing HAI's decision to forgo traditional administrative and judicial review for two cited FOIA requests). And a single alleged FOIA violation "is insufficient as a matter of law" to state a policy-or-practice claim. *Muttitt*, 813 F. Supp. 2d at 231.

But even taking the second unexhausted request on its terms, HAI argues that the no-records response it received self-evidently proves that the FDIC interprets *all* FOIA requests in a way that violates the statute. *See* HAI Opp. 21. The law paints a different picture.

For example, courts agree that "[a]n agency need not honor a FOIA request that requires an unreasonably burdensome search." *Am. Fed'n of Gov't Emps. v. Dep't of Com.*, 907 F.2d 203, 209 (D.C. Cir. 1990). Rather, the request must enable the agency "to determine precisely what records are being requested." *Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607, 610 (D.C. Cir. 1997) (quotation omitted); *see also Dale v. Internal Revenue Serv.*, 238 F. Supp. 2d 99, 104 (D.D.C. 2002) ("Broad, sweeping requests lacking specificity are not sufficient."). On a case-by-case basis, FOIA therefore allows—and encourages—an agency to "narrowly construe [a] request into something reasonable" to avoid "a senseless and inefficient" result that sends the agency and the requester "back to square one." *See Zorn v. U.S. Dep't of Just.*, No. 24-cv-03360, 2025 WL 35929,

at *4, *5 (D.D.C. Jan. 6, 2025) (quotation omitted).[14] To that end, Exhibit G of the Amended Complaint—a copy of the FDIC's response letter to HAI regarding FOIA 3—shows pragmatism, not unlawfulness, in practice. *See* Dkt. No. 37-7 (FDIC interpreted the request referencing "all . . . communications" as seeking communications of FDIC personnel "*who would be reasonable custodians* of the requested documents" (emphasis added)).

HAI's Search Claim and its Preservation Claim are also flawed. As to the former, HAI's Search Claim makes the conclusory assertion that a search's outcome meant the search was *per se* unlawful (and therefore implicitly indicative of an agency practice). Dkt. No. 37 ¶¶ 99-101. But "FOIA is not a wishing well;" an agency need only conduct a good-faith search that is reasonably calculated to uncover all relevant records. *Clemente v. Fed. Bureau of Investigation*, 867 F.3d 111, 118 (D.C. Cir. 2017). And courts in this jurisdiction repeatedly reject unlawful-search claims based on *ipso facto* inferences no different than those HAI offers here. FDIC Mem. 40-42 (collecting cases). And HAI's Preservation Claim hinges on allegations about when the FDIC issued a litigation hold in this case, even though HAI concedes that (1) the FDIC did not destroy or fail to preserve records in this case and (2) FOIA does not necessarily require a litigation hold for an agency to uphold any request-specific document-preservation obligation arising under the statute. *See* FDIC Mem. 30-31; *see also infra* pp. 33-36 (discussing HAI's litigation-hold theory).

Finally, HAI constructs a straw man by arguing that the FDIC applies a categorical approach to requests for "*all*" types of "bank supervisory documents" implicating Exemption 8 and that this practice violates FOIA. HAI Opp. 30 (emphasis added). Materials before the Court show

[14] *See also* 5 U.S.C. § 552(a)(3) (requiring that records sought under FOIA be reasonably described); 12 C.F.R. § 309.5(b)(3) ("A request for identifiable records shall reasonably describe the records in a way that enables the FDIC's staff to identify and produce the records with reasonable effort and without unduly burdening or significantly interfering with any of the FDIC's operations.").

otherwise. *See infra* pp. 21-30 (discussing FDIC FOIA processing policies and procedures). Even so, the Supreme Court has approved agencies' decisions to apply a categorical approach when answering FOIA requests in many circumstances. *See, e.g.*, *U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 777 (1989); *see also* FDIC Mem. 34-35 (collecting cases). These cases remain good law and show that the suitability of a categorical determination turns on fact-specific, case-by-case grounds rather than generalized allegations about a policy or practice.

Lower courts also echo the Supreme Court on this point, opining that an agency's appropriate use of a categorical approach can "serve the interest of preservation of judicial economy by relieving the court of the obligation of carrying out a case-by-case examination of documents where the FOIA request[s] seeks production of a narrow category of documents whose production would predictably or inevitably" undermine the harm protected by the exemption. *See Jurdi*, 485 F. Supp. 3d at 92 (citation omitted); *see also Graff v. Fed. Bureau of Investigation*, 822 F. Supp. 2d 23, 31 (D.D.C. 2011) (categorical exemptions "should be encouraged as a means of enabling agencies to meet their formidable FOIA obligations in a timely fashion"). Likewise, courts have upheld agencies' decisions to categorically withhold material falling under Exemption 8. *See, e.g.*, *Pub. Invs. Arb. Bar Ass'n v. U.S. Sec. & Exch. Comm'n*, 930 F. Supp. 2d 55, 60, 71-72 (D.D.C. 2013) (approving categorical withholding of "documents relating to audits, inspections, and reviews conducted by the SEC"), *aff'd*, 771 F.3d 1 (D.C. Cir. 2014). And HAI does not cite any court decision even after Congress enacted the FOIA Improvement Act of 2016 holding that categorically withholding material under Exemption 8 is *per se* unlawful.

D. The FDIC's Written FOIA Policies Do Not Further History Associates' Ability to State a Claim.

Even if HAI could use its Opposition to replead its policy-or-practice claims, none of the cited written policies and training materials insulate its conclusory allegations from Rule 12(b)(6).

1. The FDIC's Document Releases Undercut History Associates' Categorical Denial Claim.

To start, HAI fails to plausibly allege that the FDIC's written policies instruct agency staff to categorically deny all requests for bank supervisory material using Exemption 8. HAI Opp. 15. As a practical matter, the releases underlying this claim show the written policies don't require agency staff to do so. In stark contrast to HAI's starting assumption, the FDIC exercised its discretion and chose to release far more than the "pause letters" that HAI requested under FOIA 1. While the FDIC recognizes that the Court ordered the agency to release "any other pause letters that might exist beyond those shared with the OIG," Dkt. No. 33 at 10:3-6, the FDIC went well beyond that and reviewed "all supervisory communications with banks that sought to offer crypto-related products or services."[15] The resulting releases—totaling more than 200 records—cover a wide range of bank-supervisory materials in addition to "pause letters," including: (1) correspondence that proceeded and followed a bank's receipt of a "pause letter"; (2) visitation findings and reports; (3) Matters Requiring Board Attention; (4) targeted review results; (5) internal FDIC memoranda to file (not shared with an institution); (6) email correspondence with banks; (7) interim bank contacts; (8) acknowledgement letters to banks that were not engaged in, did not plan to engage in, or withdrew from crypto-related activity; (9) internal examination planning memoranda (not shared with banks); and (10) bank-generated business and marketing reports and presentations (given by banks to the FDIC). February 5 Press Release; *see also* FDIC, *FOIA Reading Room* (last updated Aug. 18, 2025), https://www.fdic.gov/foia/foia-reading-room.

[15] *See* Press Release, FDIC, FDIC Releases Documents Related to Supervision of Crypto-Related Activities (Feb. 5, 2025) ("February 5 Press Release"), https://fdic.gov/news/press-releases/2025/fdic-releases-documents-related-supervision-crypto-related-activities.

These events do not reflect an FDIC attempt to "escap[e] judicial review" of its FOIA compliance by releasing records. HAI Opp. 12-13. Rather, they show what FDIC leadership described in the February 5 Press Release—a "commitment to enhance transparency, beyond what is required by [FOIA]." HAI may note that the FDIC took these actions only because new agency leadership directed it to do so. But any relief awarded for a policy-and-practice claim is forward-looking—making the new leadership's actions highly relevant.

Likewise, when HAI requested an interdivisional working group's charter and meeting minutes (FOIA 2), the FDIC initially released the charter in part, but searched for, reviewed, and withheld the meeting minutes in full under FOIA Exemptions 5 and 8. Dkt. No. 37-6. This request does not reflect a categorical denial. *See supra* pp. 17-18. Moreover, the FDIC remanded FOIA 2 to the FOIA Privacy Group in response to HAI's administrative appeal so it could reconsider the meeting minutes, Dkt. No. 37-5, further showing that the FDIC does not have a "policy of refusing to review all bank supervisory documents for non-exempt or harmless information," HAI Opp. 20.[16] At bottom, HAI alleges only one example where the FDIC categorically denied a request. One example isn't enough to allege "an *ongoing* failure to abide" by FOIA. *See CREW*, 772 F. Supp. 3d at 8 (emphasis added) (cleaned up); *see also Muttitt*, 813 F. Supp. 2d at 231.

2. History Associates' Selective Parsing of Language from FDIC Training Materials Cannot Rescue Its Inadequately Pled Policy-or-Practice Claims.

HAI's effort to allege a violative FOIA policy by bootstrapping FDIC written materials into the Amended Complaint also fails. In doing so, HAI cherry-picks words and passages from two

[16] The FDIC's Annual Report does not distinguish how many times the agency has categorically denied supervisory business information pursuant to FOIA Exemption 8. However, the annual report does reflect a decline in the FDIC's use of Exemption 8 in any context (partial release, withholding in full, categorical) from 5.58% of responses in 2022 to 1.83% of all responses in 2024. *See generally* FDIC, *FOIA Reports* (last updated Mar. 8, 2024), https://www.fdic.gov/foia/foia-reports.

documents: first, a file titled "RMS General Operating Procedures for Freedom of Information Act," and second, a file titled "DRR Freedom of Information Act and Privacy Act (FOIA/PA) Manual." Dkt. No. 53-1 at 2, 171. But HAI misstates or disregards large portions of these documents—in some cases, even overlooking parts of sentences—to create impressions of imagined policies that are refuted by the documents themselves.

i. History Associates Does Not Adequately Allege that the FDIC has a Formal Policy of Categorically Denying All FOIA Requests for Supervisory Information Under Exemption 8.

As discussed, a categorical denial does not involve a records search. This means that, under HAI's theory, the FDIC allegedly does not search for records because it reflexively and unlawfully shields all supervisory bank information using Exemption 8. But the selective excerpts that HAI now cites neither show that the FDIC employs this practice nor establish that the agency's policies-as-written violate FOIA. Rather, the language that HAI's Opposition omits from those documents refutes its position.

HAI first argues that the FDIC categorically denies all requests for supervisory bank documents because another document from the FDIC's Division of Risk Management Supervision ("RMS") describes Exemption 8 as "all-inclusive" and the FDIC's "own FOIA [E]xemption." HAI Opp. 17. But courts in this jurisdiction similarly describe Exemption 8 as "particularly broad and all-inclusive." *James Madison Project v. Dep't of the Treasury*, 478 F. Supp. 3d 8, 14 (D.D.C. 2020) (quoting *Consumers Union of U.S., Inc. v. Heimann*, 589 F.2d 531, 533 (D.C. Cir. 1978)); *Pub. Invs. Arb. Bar Ass'n*, 930 F. Supp. 2d at 62. That an RMS document recognizes the breadth and the all-inclusiveness of Exemption 8 by repeating language from longstanding caselaw is not indicative of a practice that is inconsistent with FOIA.

Further, the RMS document does not describe Exemption 8 as the *FDIC's* "own FOIA exemption." Rather, the document correctly describes Exemption 8 as *RMS's* "own FOIA exemption . . . to maintain the confidentiality of [its] work." Dkt. No. 53-1 at 18. This is not a distinction without a difference. Exemption 8 covers much of RMS's work and protects information "contained in or related to examination, operating, or condition reports." 5 U.S.C. § 552(b)(8). Within the FDIC, RMS is primarily charged with preparing the information contained in or related to such reports so that the FDIC can regulate and supervise financial institutions. *See generally* FDIC, *RMS Management Manual of Examination Policies* (Mar. 2025), bit.ly/3UZp6km. Thus, an RMS document explaining that Exemption 8 maintains the confidentiality of work conducted by that division is an accurate description of the exemption and does not indicate that the FDIC's policies relating to that exemption violate FOIA.

Notably, nowhere does the RMS document instruct FDIC employees to forgo searching for supervisory bank information by categorically denying requests under Exemption 8. Dkt. No. 53-1 at 18-19. Indeed, the RMS document never mentions categorial denials. On the contrary, the document repeatedly directs RMS employees to search for—or direct others to search for—responsive records. Dkt. No. 53-1 at 14 (instructing employees to "[d]etermine if any responsive record(s) exist" and to provide the Washington and Regional Offices with "a deadline for responding to you or providing the responsive documents" (emphasis omitted)), and 18 (instructing employees to "provide estimated hours expended on search, review, approval, and redacting/applying exemptions to responsive records").

Moreover, the RMS document spends three-plus pages explaining when and how RMS should track the time it expends performing searches for fee calculation purposes. Dkt. No. 53-1 at 9-12. And the document gives specific instructions to search for and maintain copies of

responsive records should RMS recommend a full release, partial release, or withholding in full. *Id.* at 6 (instructing RMS personnel when "recommending a record be denied in whole or in part"); 14 (instructing RMS personnel when RMS recommends "releasing responsive records partially or in full"); 17 (stating more generally that RMS should "[p]rovide . . . recommendations to release (partial or in full) or withhold records in response to the FOIA Request(s)"). In short, the document neither directly nor indirectly instructs RMS to forgo searching for responsive records and to reflexively deny FOIA requests pursuant to a categorical denial (where no search is performed) under Exemption 8.

Moreover, HAI's Opposition does not mention other written policy documents contradicting its allegations. For example, an internal FDIC March 2019 Newsletter titled "How You Can Assist with a Freedom of Information Act (FOIA) Request" states: "A note of caution: do not prematurely withhold records from a search because in your view they potentially fall under an exemption." Dkt. No. 53-1 at 121. In that same vein, the FDIC Legal Division's Corporate Operations Page regarding "FOIA and Privacy Act Requests" and the FDIC Division of Complex Institution Supervision and Resolution's ("CISR") "Draft Freedom of Information Act" states that "[p]rocessing a FOIA request typically requires conducting a reasonable search for responsive records and marking any sensitive information for redaction or other appropriate action." Dkt. No. 53-1 at 134, 140, 142.

HAI next tries to allege that a similar policy exists with the FDIC's Division of Resolution and Receivership ("DRR"). In doing so, HAI directs this Court to what it describes as a policy where "a FOIA officer can seek permission to 'respond without searching for or locating the records' if the officer believes the records will fall categorically within Exemption 8." HAI Opp. 17-18. But read in its entirety, that paragraph states no such thing:

> Would DRR recommend full withholding of the responsive records, or will partial or full release be recommended?
>
> - If no part of the record would be releasable, or even acknowledging the fact that we have located a record would in and of itself constitute a release of Privacy Act information or exempt information, the FOIA Coordinator can ask Legal if DRR can respond without searching for or locating the records. If records are partially releasable, the DRR redaction recommendations are made in FOIAXpress.

Dkt. No. 53-1 at 178-179.[17]

Finally, the four pages that follow HAI's quoted language are specifically titled "Chapter 3 *Search and Retrieval* of Records" and "Chapter 4 *Review* of Records." *Id*. at 180-183 (emphasis added). These sections describe a detailed process for searching and reviewing records. Therefore, this document does not support the reasonable inference that the FDIC avoids searching for and reviewing responsive records every time a requestor seeks supervisory bank information.

ii. History Associates Does Not Adequately Allege that the FDIC has a Formal Policy of Refusing to Review Bank Supervisory Documents for Non-Exempt Information.

HAI alleges that because the FDIC categorically denies all requests for supervisory information under Exemption 8, it must have a policy of disregarding FOIA's segregability requirement. In support, HAI cites a lone excerpt from the above-referenced RMS document, which reads: "[n]o duty to segregate factual from analytical or deliberative material" when applying Exemption 8. HAI Opp. 17. But this sentence reflects an accurate distillation of this jurisdiction's district-court cases and was taken from the Department of Justice Guide to the Freedom of Information Act. *Compare id. with* Dep't of Just. Guide to FOIA, Exemption 8, at 7 (2025 ed.),

[17] Similarly, two pages earlier, the same DRR document describes the division's third "Goal and Guiding Principle[]" as "[p]erform[ing] professional, reasonable record searches." Dkt. No. 53-1 at 176.

https://www.justice.gov/jmd/media/1239296/dl?inline (citing *Bloomberg, L.P. v. U.S. Sec. & Exch. Comm'n*, 357 F. Supp. 2d 156, 170 (D.D.C. 2004)).

Moreover, HAI overlooks other parts of the same document that affirmatively address segregability. For example, the document states

> [i]f the requested record[s] contain[] both exempt and nonexempt information, *the nonexempt portions that may reasonably be segregated from the exempt portions will be released to the requester*. Records will be redacted, when appropriate, to implement the nine exemption(s).

Dkt. No. 53-1 at 21 (emphasis added). Likewise, the next paragraph—which appears nowhere in HAI's Opposition—is titled the "Discretionary Release of Exempt Information." *Id.* But RMS is not the only FDIC division whose policies discuss segregability. The FDIC CISR division's draft FOIA policy reminds its personnel that under FOIA, agencies should "consider whether partial disclosure of information is possible whenever [it] determine[s] that full disclosure is not possible and [it] should take reasonable steps to segregate and release nonexempt information." *Id.* at 143.

iii. History Associates Does Not Adequately Allege that the FDIC has a Formal Policy of Refusing to Review Bank Supervisory Documents for Foreseeable Harm.

Finally, HAI erroneously infers that the FDIC's alleged misuse of Exemption 8 categorical denials means the FDIC's policies do not require the foreseeable-harm analysis enacted under the FOIA Improvement Act of 2016. HAI Opp. 18. But the materials cited in the Opposition contradict that inference. Most glaringly, the FDIC included a foreseeable-harm analysis in its seven-page response initially denying HAI's administrative appeal related to the "pause letters." Dkt. No. 37-3. In that response, the FDIC set out the context for the "pause letters" as described by the OIG Report. *Id.* at 2-4. Citing several passages from the OIG Report, the FDIC described the "significance of crypto-assets in the global and United States financial systems" and how these

supervisory communications are consistent with the FDIC's general efforts "to assess the safety and soundness, consumer protection, and financial stability implications of [bank] activities before providing supervisory feedback." *Id.* at 2-4. After establishing this context, the FDIC engaged in a foreseeable-harm analysis discussing how disclosing the "pause letters" would "reveal information about the particular banks" and why this disclosure would "impair the informal and ongoing supervisory relationship between regulators and bank management and staff." *Id.* at 6. In other words, the FDIC laid out what HAI alleges the FDIC has a policy of not doing—namely, how the FDIC analyzed the foreseeable harm of disclosing specific types of bank supervisory records (in this case, FDIC supervisory communications discussing banks' crypto-related activities).[18]

Notably, HAI cites no passages from the FDIC's policy documents in support of this specific allegation. While the FDIC agrees with HAI that references to the agency's policy documents remain inappropriate at the motion-to-dismiss stage (albeit for different reasons), to the extent the Court considers them, those same documents repeatedly reference foreseeable-harm standards generally and as applied to Exemption 8 specifically.[19] Again, HAI has to take these policies as

[18] To the extent that the FDIC, under new management, subsequently and discretionarily released information in the "pause letters" and other documents, it did not waive, forfeit, or compel the release of more records in response to new or other requests. *Abtew v. U.S. Dep't of Homeland Sec.*, 808 F.3d 895, 900 (D.C. Cir. 2015).

[19] Dkt. Nos. 53-1 at 7 (instructing RMS personnel to "ensure that the correct exemption(s) and Foreseeable Harm Standards are included" in the event of a denial in whole or in part); 18 (instructing RMS personnel to "[i]nclude appropriate Foreseeable Harm Standards if FOIA Exemptions apply"); 21-29 ("Chapter 3: Exemptions and Foreseeable Harm Standards," including for Exemption 8); 52 (email regarding "Foreseeable Harm Confirmation Process"); 55 (March 15, 2022 Freedom of Information Act Guidelines stating agencies "should confirm in response letters to FOIA requestors that they have considered foreseeable harm standard[s]"); 60-62 (all "Foreseeable Harm Standards"); 117 (March 2019 FDIC News article quoting FDIC FOIA Government Information Specialist discussing the factors considered in "applying or not applying the exemptions" including "foreseeable harm expressed by the custodial divisions or divisions who have supplied the records."); 121 (March 2019 FDIC News article instructing FDIC personnel to review the Foreseeable Harm standards when providing their analysis and recommendations); 147 (instructing CISR employees that a document "should not be withheld from a FOIA requestor unless

they are written—not how HAI speculated they would be written. Therefore, even if the Court considers these policies at the motion-to-dismiss stage, they refute any reasonable inference that the FDIC employs an unlawful FOIA policy surrounding the foreseeable-harm analysis.

3. History Associates Does Not Adequately Allege a Policy for the FDIC to Narrowly Construe Requests and/or Conduct Inadequate Searches for Records in Violation of FOIA.[20]

To be "plausible on its face," the amended complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556, 570). Here, HAI does not allege sufficient facts to draw a reasonable inference that the FDIC has a policy of conducting inadequate searches for records—either because it construed HAI's requests too narrowly or for some other reason. Instead, HAI offers only "wholly conclusory" allegations. *See Twombly*, 550 U.S. at 561.

Specifically, HAI's Amended Complaint relies on FOIAs 1, 3, 4, and 5 to allege that the FDIC inadequately searches for records. Setting aside that these FOIA requests each sought dissimilar records and received dissimilar responses, *see* FDIC Mem. 29-31, 32-34, 36, 38-40, HAI's Amended Complaint also alleges no actual facts showing that the FDIC performed inadequate searches for FOIAs 3 and 5. That is of no surprise, as HAI did not seek administrative or judicial review of these FOIA requests, where it could have raised concerns related to search adequacy,

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the agency can identity a foreseeable harm or legal bar to disclosure"); 147-149 (CISR Foreseeable Harm Standards for all exemptions); and 195 (DRR document instructing personnel that any suggestions for redaction or withholdings of responsive records are according to Foreseeable Harm Standards).

[20] Although HAI tries to assert a separate policy-or-practice claim under which the FDIC construes requests too narrowly, neither the Amended Complaint nor the Opposition explain how this alleged policy would be unlawful unless it resulted in an inadequate search. In any event, both alleged policies fail for the same reasons. Accordingly, the FDIC addresses both together.

generally, or search terms or custodians, specifically.[21] Instead, HAI insists that this Court draw HAI's preferred inference (a policy or practice) from a result (too few or no records released) even though HAI elected not to develop any record to support that conclusion. HAI Opp. 24. In doing so, HAI alleges only conclusory assertions that do not "nudge[]" its claim "across the line from conceivable to plausible." *See Twombly*, 550 U.S. at 570. And in any event, HAI's inferences based solely on the fruit of the FDIC's searches for FOIAs 3 and 5 are unreasonable. *See Watkins L. & Advoc., PLLC. v. U.S. Dep't of Justice*, 78 F.4th 436, 444 (D.C. Cir. 2023) (the adequacy of a FOIA search "is generally determined not by the fruits of the search, but the appropriateness of the methods used to carry out the search" (citation omitted)).

Put another way, HAI asks this Court to short-circuit established FOIA review mechanisms for individual requests and let it assert a policy-or-practice claim based on unexhausted requests. But its proposed procedure lacks an appropriate limiting principle. Under HAI's approach, agencies could find themselves perpetually subjected to policy-or-practice claims even when the requestor (1) never put the agency on notice regarding why it disagreed with the agency's initial response and (2) never gave the agency an opportunity to address those concerns before consuming judicial time and resources. The FOIA statute's operation and purpose do not support this inefficient circumvention of the statute's traditional review mechanisms. *See* FDIC Mem. 37-38 (discussing exhaustion caselaw).

Lacking facts to plead an FDIC practice that violates FOIA, HAI asks the Court to speculate that such a policy exists based on the supposed absence of language in the FDIC's policy and training materials. Specifically, HAI insists that the FDIC must employ unlawful practices because

[21] FOIA 4 is on administrative appeal. As such, HAI's reliance on FOIA 4 as an example of the FDIC's inadequate-search practice is premature when the FDIC continues to process the request in the normal course. Therefore, the same arguments that apply to FOIAs 3 and 5 apply here.

the agency's written policies and training materials do not tell employees "to construe requests liberally" or "how to conduct proper searches." HAI Opp. 20-22. In doing so, HAI asks this Court to infer that FDIC employees are engaged in a concerted effort to violate FOIA based on *language that does not appear in its policies or training materials*. And again, HAI ignores the passages throughout these same documents directing FDIC employees to know and adhere to FOIA law.[22]

Finally, HAI insists that the Court can reasonably infer the FDIC's alleged inadequate-search practices because the agency did not release records from certain platforms like Microsoft Teams. Caselaw undercuts the plausibility of this logical leap. Not releasing a specific type of record (or any records, for that matter) does not inherently violate FOIA.[23] FOIA requires only that the agency perform a reasonable search—an inquiry best suited to the specifics of each request. *People for the Ethical Treatment of Animals*, 800 F. Supp. 2d at 177. And here, materials referenced in the Amended Complaint show that the FDIC met that standard. *E.g.*, Dkt. No. 37-7 (response letter to FOIA 3). Again, HAI could have raised any concerns about these searches using traditional administrative and judicial-review mechanisms provided under FOIA. But it cannot

[22] Dkt. No. 53-1 at 55-58 (March 15, 2022 Freedom of Information Act Guidelines), 86 (instructing FDIC employees to do an independent review of documents even when documents contain labels such as "Controlled//FDIC Internal Only"); 140 (summarizing the purpose and requirements of FOIA and directing FDIC employees to comply with FDIC's FOIA and Privacy Act directives).

[23] *People for the Ethical Treatment of Animals v. Bureau of Indian Affs.*, 800 F. Supp. 2d 173, 182 (D.D.C. 2011) (rejecting the argument that the Bureau had a pattern or practice of conducting improper searches based on a fruitless search); *Boggs v. United States*, 987 F. Supp. 11, 20 (D.D.C. 1997) (noting that the role of the court is to determine the reasonableness of the search, "not whether the fruits of the search met plaintiff's aspirations"); *see also Murray v. Lappin*, No. 09-00992 DAR, 2011 WL 3438883, at *4 (D.D.C. Aug. 5, 2011) ("A plaintiff's speculation as to the existence of additional records responsive to a FOIA request, absent support for his allegations of agency bad faith, does not render an agency's search inadequate."); *Elliott v. U.S. Att'y Gen.*, No. 06-1128, 2006 WL 3191234, at *2-3 (D.D.C. Nov. 2, 2006) (concluding that an agency "conducted a search that was reasonable" even though no records were located); *Accuracy in Media, Inc. v. Nat'l Transp. Safety Bd.*, No. 03-00024, 2006 WL 826070, at *6 (D.D.C. Mar. 29, 2006) (finding meritless argument that "search was *ipso facto* inadequate" because no records were found).

turn around and resurrect those same requests to bolster an inadequately pled policy-or-practice claim, especially when HAI's core issue—the no-records response—was manifest on receipt of the FDIC's response. *See supra* pp. 15-16.

4. This Court Should Dismiss History Associates' Preservation Claim Under Either Rule 12(b)(1) or Rule 12(b)(6).

HAI's Preservation Claim fails under both Article III and the FOIA statute.

A. **Standing**. The claim should be dismissed under Rule 12(b)(1) because HAI lacks constitutional standing to bring it. Under Article III, a plaintiff's standing is a necessary "predicate to any exercise of [the Court's] jurisdiction." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996).[24] Like any other plaintiff, HAI "bears the burden of establishing the three elements that make up the . . . Article III standing: injury-in-fact, causation, and redressability." *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1362 (D.C. Cir. 2012) (citing *Lujan*, 504 U.S. at 560). HAI comes up short because it cannot allege a concrete injury-in-fact.

To meet this requirement, HAI must point to "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (cleaned up). Because HAI seeks injunctive relief, "past harm will not suffice." *See Nat. Res. Def. Counsel, Inc. v. U.S. Env't Prot. Agency*, 383 F. Supp. 3d 1, 8 (D.D.C. 2019). Instead, HAI must go further and establish "some present or imminent injury" to establish their standing. *Id.* But here, differences between the past, present, and future prove academic because HAI can cite none of the above. *See Summers v. Earth Island Inst.*, 555 U.S.

[24] While the FDIC did not raise this issue in its opening memorandum, "Article III standing is a jurisdictional requirement that cannot be waived by the parties." *Cherry v. Fed. Commc'ns Comm'n*, 641 F.3d 494, 497 (D.C. Cir. 2011).

488, 499 (2009) ("Standing . . . is not an ingenious academic exercise in the conceivable . . . [but] requires . . . a factual showing of perceptible harm.") (cleaned up).

Starting in the past, HAI already conceded it has *no* evidence that the FDIC failed to preserve or destroyed records responsive to FOIA 1. Dkt. Nos. 48 ¶ 27; 50 at 9. And as for any alleged present or future injuries, the FDIC issued a litigation hold in this case within two weeks of when document-destruction allegations surfaced (notwithstanding the credibility issues surrounding those allegations). Dkt. No. 38-1 at 11:22-12:1. While appreciating that the FDIC's issuance followed colloquies with this Court, the agency implemented the litigation hold and it remains in place today.

At bottom, HAI alleges it will suffer harm from an FDIC policy or practice that has never harmed it. And any future-injury allegations HAI *could* assert remain speculative and hypothetical because they depend on a series of future events that may never come to pass:

1. HAI submits a FOIA request;
2. HAI's FOIA request relates to records not appropriately covered by the FDIC's existing document-preservation policies;
3. HAI disagrees with the FDIC's initial responses to its FOIA request;
4. The FDIC declines to supplement its response should HAI pursue an administrative appeal;
5. Case-specific facts suggest that HAI intends to challenge the FDIC's FOIA response in federal court;
6. HAI files a challenge in federal court;
7. The FDIC does not issue a litigation hold over records falling within the challenged FOIA request's terms; and

8. HAI makes non-speculative allegations that the FDIC's existing document-preservation policies are inadequate and that the lack of a litigation hold will result in the spoliation of responsive record.[25]

Given the above, HAI effectively asks the Court to "unconstitutionally render an advisory opinion" that the FDIC's existing document-preservation policies violate FOIA. *See Fla. Audubon Soc. 'y*, 94 F.3d at 663. But HAI can cite no persuasive reason why this Court should "circumvent the 'bedrock constitutional principle' that its jurisdiction extends only to those cases in which the plaintiffs have suffered or will imminently suffer an injury in fact." *Nat'l Whistleblower Ctr.*, 839 F.3d at 49 (quoting *Dominguez*, 666 F.3d at 1362).

B. **Failure to State a Claim**. The Court can also dismiss this claim under Rule 12(b)(6) because HAI cannot connect any agency duty to issue litigation holds with the FOIA statute. Policy-or-practice claims under FOIA require plaintiffs to show that an agency has "some policy or practice that constitutes an ongoing failure to *abide by the terms of the FOIA*." *Am. Ctr. for L. & Just.*, 249 F. Supp. 3d at 281 (emphasis added) (citation omitted). The FOIA statute, however, "does not impose a document retention requirement on agencies." *Landmark Legal Found. v. Env't Prot. Agency*, 272 F. Supp. 2d 59, 66 (D.D.C. 2003); *Wadelton v. Dep't of State*, 208 F. Supp. 3d 20, 28 (D.D.C. 2016) (same). Rather, courts observe that agencies' document-preservation duties under the FOIA statute cover a targeted range of conduct: constraining agencies from intentionally or purposefully transferring or destroying documents to circumvent an already-received FOIA request. *See Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 155 n.9 (1980); *Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009). HAI makes no such

[25] *See Nat'l Whistleblower Ctr. v. Dep't of Health & Hum. Servs.*, 839 F. Supp. 2d 40, 46 (D.D.C. 2012); *see also Union of Concerned Scientists v. U.S. Dep't of Energy*, 998 F.3d 926, 930 (D.C. Cir. 2021) (noting "reluctan[ce] to find standing based on predictions of how agencies will exercise discretion in future proceedings"); *Nat'l Sec. Couns.*, 931 F. Supp. 2d at 92-93 (summarizing caselaw and observing that plaintiffs alleging future injury must show that they have pending requests "that are likely to implicate [the challenged] policy or practice").

allegation. Nor can it, given the breadth of the FDIC's disclosure in response to its FOIA requests. *See Am. Ctr. for L. & Just.*, 249 F. Supp. 3d at 284-85 (challenge to an agency's FOIA policies and practices must rest on "concrete allegations").

Moreover, HAI has admitted that FOIA does not require litigation holds and has recognized that FOIA provides agencies with discretion in *how* they meet any document-preservation obligations. *See* Dkt. No. 72-6, at 22:3-5 ("I don't think there's a case saying you absolutely need a litigation hold, but you need something, and we don't think they have anything."). To that end, the Amended Complaint reflects no concrete or specific allegations suggesting that the FDIC's existing document-preservation policies will adversely affect HAI's other FOIA requests. *See* Dkt. No. 38-1 at 11:22-12:1 (describing FDIC's issuance of a broad and comprehensive legal hold that remains in place). And as the litigation hold issued in this case proves, nothing in the FDIC's current policies prevents the agency from issuing one in future FOIA cases, as appropriate. *See Nat'l Sec. Couns.*, 898 F. Supp. 2d at 277 (ruling that allegations of a "loose practice" are not enough to state a policy-or-practice claim under FOIA).

III. D.C. Circuit Caselaw Undermines History Associates' Ripeness Arguments.

"[T]he doctrine of prudential ripeness ensures that Article III courts make decisions only when they have to, and then, only once." *Am. Petrol. Inst. v. Env't Prot. Agency*, 683 F.3d 382, 387 (D.C. Cir. 2012). When assessing prudential ripeness, courts "focus on two aspects: the 'fitness of the issues for judicial decision' and the extent to which a decision will cause 'hardship to the parties.'" *Id.* (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). HAI cannot meet either prong because its Amended Complaint effectively "asks [this Court] to declare" in the abstract "that [the FDIC]'s alleged polic[ies] . . . cannot be lawful under any circumstances." *See Cause of Action Inst.*, 999 F.3d at 704; *see also* HAI Opp. 32 ("Those policies and practices 'cannot

be lawful under any circumstances' and thus are ripe for judicial review."). Hearing HAI's challenge now "could thus interfere with the system that Congress specified for the agency to reach" specific, case-by-case FOIA decisions. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 736 (1998). In short, "[t]he operation of FOIA is better grasped when viewed in light of a particular application." *See Cause of Action Inst.*, 999 F.3d at 704 (cleaned up). And because HAI's allegations rely on several unexhausted or pending FOIA requests, this Court should grant the FDIC's motion to dismiss the Amended Complaint under Rule 12(b)(1). *See Pub. Citizen Health Rsch. Grp. v. Food & Drug Admin.*, 740 F.2d 21, 31 (D.C. Cir. 1984) (noting that a central purpose of the prudential-ripeness doctrine is to give agencies space to "alter a tentative position").

A. History Associates' Claims Are Not Fit for Judicial Decision.

Even though HAI acknowledges that this case presents "legal questions" with other "embedded" factual ones, it argues that these factual questions "change[] nothing relevant to ripeness." HAI Opp. 32-33. This view starts from a false premise. Under the fitness prong, courts consider whether the issue presented is "purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Devia v. Nuclear Regul. Comm'n*, 492 F.3d 421, 424 (D.C. Cir. 2007) (citation omitted). Here, the questions presented are neither purely legal—as HAI admits—nor sufficiently concrete because the policy-or-practice claims' legal adequacy turns on how the FDIC will address HAI's pending or anticipated requests.

Take HAI's FOIA request for certain meeting minutes, which it cites as an example of the FDIC's allegedly unlawful practice surrounding categorical denials. Attachments to the Amended Complaint make clear that the FDIC's response to this request was not a categorical denial (i.e., where no search for or review of documents occurred). *See* Dkt. No. 37-6. Nevertheless, if the

FDIC ultimately releases material responsive to HAI's FOIA request for certain meeting minutes, then HAI *cannot* as a matter of law rely on that request as an example of a categorical denial. Because the Amended Complaint alleges only one other example of an improper categorical denial (the request for "pause" letters), HAI needs to—but does not—allege facts about the FDIC's treatment toward *other* FOIA requests to properly state that policy-or-practice claim. *See Muttitt*, 813 F. Supp. 2d at 223.

Nor does the existence of written FDIC policies cited in HAI's Opposition insulate the policy-or-practice claims from the prudential-ripeness doctrine. As the FDIC explained, "[n]o bright line rules in the [FDIC's written policies] compelled" the FDIC's "disputed action[s]." *See Cause of Action Inst.*, 999 F.3d at 705; *see supra* pp. 21-30. Therefore, this case remains on all-fours with D.C. Circuit precedent. For example, in *Cause of Action Institute* the D.C. Circuit dismissed a similarly broad policy-or-practice claim on prudential ripeness grounds because the complaint limited its allegations to the agency's theoretical application of a guidance document to all future FOIA requests, i.e., "declare that [the] alleged policy . . . cannot be lawful under any circumstances." *Cause of Action Inst.*, 999 F.3d at 704-05. The court opined that it did "not have sufficient confidence in [its] powers of imagination to affirm such a negative," reasoning that "determination of the scope of the purported policy in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Id.* (cleaned up) (quoting *Texas v. United States*, 523 U.S. 296, 301 (1998)). The same reasoning applies here. HAI does not cite any "bright line rules" in the FDIC's written policies "compell[ing]" the alleged FOIA misconduct. *See id.* at 705. Thus, this dispute lacks a sufficiently concrete setting for judicial review.

In similar fashion, HAI conflates prudential ripeness with its "standing" to bring these policy-or-practice claims. HAI Opp. 33-34. But *Cause of Action Institute* undercuts this false equivalency, too. *See generally* 999 F.3d at 703-05 (dismissing policy-or-practice claim as unripe after holding that plaintiff had standing to challenge the agency's action). HAI's only cited case—*Tipograph v. Department of Justice*, 146 F. Supp. 3d 169 (D.D.C. 2015)—both predates *Cause of Action Institute* and did not analyze how a requester's standing to bring a policy-or-practice claim interacts with the prudential-ripeness doctrine. *See generally id.* at 175-77. Simply put, HAI provides no persuasive reason for fusing Article III standing with prudential ripeness. *See Simmonds v. Immigr. & Naturalization Serv.*, 326 F.3d 351, 357 (2d Cir. 2003) (distinguishing constitutional standing and ripeness from prudential ripeness, noting that the former "prevent[] courts from declaring the meaning of the law in a vacuum" while the latter forms "a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination").

Developments arising after this lawsuit commenced further highlight the need to wait until HAI alleges more facts on how the FDIC treated its other FOIA requests. For example, HAI's policy-or-practice claims hinge on allegations that the FDIC has adopted an "ongoing" policy to prevent the digital-asset industry from accessing the banking system and to impair FOIA requestors' access to crypto-related information. *See* HAI Opp 28-29; *see also Am. Ctr. for L. & Just.*, 249 F. Supp. 3d at 281. But recent governmental actions refute the allegation that any such policy exists. Several executive orders issued earlier this year support the growth of digital assets and target debanking and other matters of interest to the cryptocurrency industry. Exec. Order No. 14,178, 90 Fed. Reg. 8,647 (Jan. 23, 2025) ("It is . . . the policy of my Administration to support the responsible growth and use of digital assets, blockchain technology, and related technologies

across all sectors of the economy[.]"); Exec. Order No. 14,331, 90 Fed. Reg. 38,925 (Aug. 7, 2025) ("It is the policy of the United States" that "[b]anking decisions must . . . be made on the basis of individualized, objective, and risk-based analyses.").[26] Similarly, the Acting Chairman of the FDIC recently issued a statement that the agency is "actively reevaluating [its] supervisory approach to crypto" generally and "commit[ting] to enhance transparency" under FOIA specifically. Statement, Acting Chairman Travis Hill, FDIC Releases Documents Related to Supervision of Crypto-Related Activities (Feb. 5, 2025), bit.ly/4lp85eb.[27]

Moreover, both HAI's counsel and this Court have recognized the FDIC's good-faith efforts to release records responsive to FOIA 1 during this case. *See* May 29, 2025 Tr. 23:4-7 (HAI counsel noting "[t]hat's when the [new] administration came in, and they . . . produced, eventually, the full set of documents."); Dkt. No. 42 at 7:1-11 (the Court observing "there is sort of the proverbial new sheriff in town" and that the Court "guess[ed] . . . it's a priority for the new administration to get all this information out there"); Dkt. No. 76-2 at 67:16-68:1 ("I will say that as I recall, I was not particularly pleased with FDIC early on, but I do feel like you all have done a lot of work to try to get it right and to move this along, and you've acted in, I think, serious good faith since earlier in this litigation. And I am appreciative of that. I am cognizant that you, in good faith, worked to get them a lot of documents and that you, in good faith, went and did your searches.

[26] The FDIC's Acting Chairman issued a statement "fully support[ing]" the Executive Order, noting that "debanking law-abiding customers is unacceptable and regulators must work to end it." Statement, Acting Chairman Travis Hill, Statement from Acting Chairman Travis Hill on Executive Order Titled "Guaranteeing Fair Banking For All Americans" (Aug. 8, 2025), bit.ly/3HuJI0W.

[27] "The Court can take judicial notice of facts in the public record, such as government documents, if their accuracy can be readily determined from reliable sources." *Democracy Forward Found. v. White House Off. of Am. Innovation*, 356 F. Supp. 3d 61, 69 n.6 (D.D.C. 2019) (noting that "facts included in Executive Orders are the type of facts of which the Court may take judicial notice").

I believe you when you say that you provided discretionary documents that you thought that they would want but weren't necessarily called for by their FOIA request. So thank you.").

Given these developments, HAI effectively asks the Court to issue future-focused declaratory and injunctive relief based on (1) multiple pending FOIA requests and (2) an alleged viewpoint that the government—including the FDIC—has expressly disavowed. That strategy does not plead a colorable policy-or-practice claim; it seeks an advisory opinion on a matter that would benefit from a more concrete factual setting. *See Nat'l Conf. of Cath. Bishops v. Smith*, 653 F.2d 535, 539-542 (D.C. Cir. 1981) (per curiam).

B. Withholding Judicial Review Will Not Harm History Associates.

HAI asserts that withholding judicial review will impose hardship because it "has turned repeatedly to FOIA to bring to light undisclosed agency hostility toward digital assets." HAI Opp. 35. As HAI recognizes, the hardship prong asks whether the challenged action is likely to have a "direct and immediate impact" on the plaintiff's "primary conduct." *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967); *see also* HAI Opp. 35 (citing *Payne Enters., Inc.*, 837 F.2d at 494). But "[u]nlike in cases allowing pre-enforcement review, the actions challenged here do not require [HAI] 'to engage in, or to refrain from, any conduct.'" *Nat'l Treasury Emps. Union v. Vought*, --- F.4th ----, No. 25-5091, 2025 WL 2371608, at *14 (D.C. Cir. Aug. 15, 2025) (quoting *Texas v. United States*, 523 U.S. 296, 301 (1998)). Rather, HAI can continue filing FOIA requests regardless of how the Court rules on the FDIC's Rule 12(b)(1) motion. *See Cause of Action*, 999 F.3d at 705 (finding delay would not impose hardship on plaintiff because it was not operating under a "require[ment] to engage in, or to refrain from, any conduct" (citation omitted)).

The only hardship that HAI may face is a hypothetical one: choosing to file another lawsuit after making a potential future FOIA request, exhausting traditional administrative and judicial

remedies, and continuing to disagree with how the FDIC processed the request. "This is hardly the type of hardship which warrants immediate consideration of an issue presented in abstract form." *Cause of Action*, 999 F.3d at 705 (quoting *Webb v. Dep't of Health & Hum. Servs.*, 696 F.2d 101, 107 (D.C. Cir. 1982)). And it "resides quite far from the 'paradigm' ripeness case" because the FDIC's FOIA policies do not require HAI "to undertake 'immediate action to their detriment.'" *See Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 85 F. Supp. 3d 250, 273 (D.D.C. 2015) (quoting *Chamber of Com. of U.S. v. Reich*, 57 F.3d 1099, 1101 (D.C. Cir. 1995) (per curiam)); *see also Am. Hist. Ass'n v. Nat'l Archives & Recs. Admin.*, 310 F. Supp. 2d 216, 228-29 (D.D.C. 2004) (finding no hardship to delaying review of presidential-records request even though plaintiffs were "engaged on an ongoing basis in the study of presidential records" and "regularly request[ed] and ma[d]e use of presidential and vice presidential records held by" the agency).

Next, HAI says it would experience hardship because the FDIC "could moot case after case by simply disclosing the requested documents" in response to litigation and that this hypothetical course of conduct "would not result in any changes to the agency's unlawful policies or practices." HAI Opp. 35.[28] But again, HAI does not show how this case differs from *Cause of Action Institute*, which held that the plaintiff would suffer "no legally cognizable 'hardship'" under materially similar circumstances. 999 F.3d at 705. It also makes little logical sense. "If the [FDIC]'s change in course" as to a specific FOIA request "went only to mootness" of the traditional FOIA claim—rather than also to ripeness of a potential policy-or-practice claim—"then the ripeness doctrine would be futile." *Nat'l Treasury Emps. Union*, 2025 WL 2371608, at *14 n.7. And if HAI's "fears

[28] This view ignores FOIA's statutorily mandated administrative-appeals procedures, which are recognized as an important part of the FOIA process for requesters and agencies alike. Dep't of Just. Guide to FOIA, Procedural Requirements – Administrative Appeals, at 79-82 (2025 ed.), bit.ly/3HweQNz.

come to pass"—namely, that the FDIC's responses to its future FOIA requests somehow permit the reasonable inference of an unlawful FOIA policy, pattern, or practice based on mooting individual FOIA requests through administrative review—it "may 'protect all of their rights and claims by returning to court when the controversy ripens.'" *Id.* at *14 (quoting *Atl. States Legal Found. v. Env't Prot. Agency*, 325 F.3d 281, 285 (D.C. Cir. 2003)).

CONCLUSION

The Court should grant the FDIC's motion for summary judgment on Count I and motion to dismiss Count II of the Amended Complaint.

DATED: August 27, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2025, I caused a true and correct copy of the foregoing to be filed with the Clerk for the U.S. District Court for the District of Columbia through the ECF system. Participants in the case who are registered ECF users will be served through the ECF system, as identified by the Notice of Electronic Filing.

/s/ Michael K. Morelli
Michael K. Morelli

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HISTORY ASSOCIATES INCORPORATED, Plaintiff, v. FEDERAL DEPOSIT INSURANCE CORPORATION, Defendant.	Case No. 1:24-cv-1857-ACR

FDIC'S STATEMENT OF MATEIAL FACTS NOT IN DISPUTE, COUNTER-STATEMENT OF DISPUTED FACTS, AND STATEMENT OF ADDITIONAL MATERIAL FACTS NOT IN DISPUTE ON COUNT I

In support of Defendant Federal Deposit Insurance Corporation's ("FDIC") Motion for Summary Judgment and Opposition to Plaintiff History Associates Incorporated's ("HAI") Cross-Motion For Summary Judgment on Count I of the Amended Complaint, and pursuant to Local Civil Rule 7(h)(1) and this Court's Standing Order, Dkt. No. 6 at § 7(j), the FDIC respectfully submits this Statement of Material Facts Not in Dispute, Counter-Statement of Disputed Facts, and Statement of Additional Material Facts Not in Dispute.

FDIC'S JULY 9, 2025, STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

FDIC Statement of Material Fact	HAI Response
1. On November 8, 2023, Plaintiff History Associates Inc. ("Plaintiff") submitted a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") to the Federal Deposit Insurance Corporation ("FDIC"). Dkt. No. 37 ¶ 56; Decl. 1 ¶ 9.	Admitted.
2. Plaintiff's FOIA request sought: Copies of all "pause letters" described in the attached October 2023 FDIC Office of Inspector General report titled "FDIC Strategies Related to Crypto-Asset Risks" Dkt. No. 37-2, p.1; Decl. 1 ¶ 9.	Admitted.
3. As described in the OIG Report, the FDIC sent those "pause letters" between "March 2022 and May 2023" as part of the FDIC's "review of financial institutions' crypto-related activities[.]" Dkt. No. 37-3 at p. 3; Exhibit 3 at p. 5.	Admitted that this is what the OIG report says.
4. On January 22, 2024, the FDIC denied Plaintiff's November 8, 2023 FOIA request. Dkt. No. 37-2, p. 1; Decl. 1 ¶ 9.	Admitted.
5. On March 25, 2024, Plaintiff administratively appealed the FDIC's denial. Dkt. No. 37 ¶ 59; Decl. 1 ¶ 10; Exhibit 1.	Admitted.
6. By letter dated May 8, 2024, the FDIC denied Plaintiff's administrative appeal. Dkt. No. 37 ¶ 62; Decl. 1 ¶ 10.	Admitted.
7. Plaintiff filed suit in this Court on June 27, 2024 to compel release of the requested documents. Dkt. Nos. 1, 37 ¶ 65.	Admitted.
8. The FDIC filed its answer on August 7, 2024. Dkt. No. 13.	Admitted.

FDIC Statement of Material Fact	HAI Response
9. In its November 4, 2024 Minute Order, the Court ordered the FDIC to "review the 23 pause letters to determine what portions should be redacted and to produce the redacted letters to Plaintiff by November 22, 2024." November 4, 2024 Minute Order.	Admitted.
10. Pursuant to this Court's November 4, 2024 Minute Order, the FDIC reviewed the 23 "pause letters" to determine whether any portion of the letters could be segregated and released. The FDIC discretionarily released 23 redacted letters to Plaintiff's counsel on November 22, 2024. Dkt. No. 26-1.	Admitted in part and denied in part. History Associates admits that the FDIC released 23 redacted letters on November 22, 2024, but History Associates denies that the FDIC did so "discretionarily." Instead, the FDIC did so due to its obligations under the Freedom of Information Act and this Court's November 4, 2024 Minute Order. ECF 26 at 1; November 4, 2024 Minute Order.
11. On December 12, 2024, following an *in camera* review of four letters, the Court ordered the FDIC "to re-review the documents" and release them with new redactions to Plaintiff by January 3, 2025. December 12, 2024 Minute Order.	Admitted.
12. The FDIC re-reviewed the original 23 "pause letters" and two additional letters and discretionarily released all 25 letters with revised redactions to Plaintiff's counsel on January 3, 2025. Dkt. No. 27-2.	Admitted in part and denied in part. History Associates admits that the FDIC released 25 redacted letters on January 3, 2025, but History Associates denies that the FDIC did so "discretionarily." Instead, the FDIC did so due to its obligations under the Freedom of Information Act and this Court's December 12, 2024 Minute Order. December 12, 2024 Minute Order
13. FDIC leadership changed following the change in administrations. *See, e.g.*, Statement from Acting Chairman Travis Hill, FDIC (Jan. 21, 2025), https://www.fdic.gov/news/press-releases/2025/statement-acting-chairman-travis-hill.	Admitted.
14. The FDIC performed numerous searches for documents related to its supervision of crypto-related activities. Decl. 1 ¶¶ 19-22, 24-25; Dkt. Nos. 38 ¶¶ 11, 13-16; 44 ¶¶ 7-8; and 48 ¶¶ 21-22.	Admitted.

FDIC Statement of Material Fact	HAI Response
15. These searches were conducted in the Regional Automated Document Distribution Application ("RADD"). Decl. 1 ¶¶ 19, 24.	History Associates lacks the information necessary to evaluate this statement of fact, and therefore denies it.
16. RADD is a document imaging, routing, and storage system that captures, indexes, distributes, and electronically stores supervisory business records for covered institutions. Decl. 1 ¶ 19.	Admitted.
17. The RADD is the official recordkeeping system for supervisory business records such as bank correspondence. Decl. 1 ¶ 20.	Admitted.
18. RADD records are subject to a 30-year retention schedule (with some exceptions not relevant here), backed up daily, and retrievable, if necessary, when deleted from the RADD. Decl. 1 ¶ 21; Exhibit 7 at p.2.	History Associates lacks the information necessary to evaluate this statement of fact, and therefore denies it.
19. On February 5, 2025, the FDIC made a discretionary release of 175 records to the FDIC FOIA Reading Room. *FOIA Reading Room*, FDIC (last visited July 9, 2025), https://www.fdic.gov/foia/foia-reading-room ("FDIC FOIA Reading Room").	Admitted in part and denied in part. History Associates admits that the FDIC released additional records, including additional pause letters, on February 5, 2025, but History Associates denies that that the release was "discretionary." The FDIC's release of additional records was due to its obligations under the Freedom of Information Act and this Court's January 22, 2025 Minute Order. ECF 31 at 1; January 22, 2025 Minute Order
20. On February 21, 2025, the FDIC discretionarily released 8 additional records to the FDIC FOIA Reading Room. FDIC FOIA Reading Room.	Admitted in part and denied in part. History Associates admits that the FDIC released additional records, including additional pause letters, on February 21, 2025, but History Associates denies that that the FDIC did so "discretionarily." The FDIC's release of additional records was due to its obligations under the Freedom of Information Act and this Court's January 22, 2025 Minute Order. ECF 31 at 3-4; January 22, 2025 Minute Order

FDIC Statement of Material Fact	HAI Response
21. On March 14, 2025, the FDIC re-released its February 21 release with fewer redactions and discretionarily released two more records to the FDIC FOIA Reading Room. FDIC FOIA Reading Room.	Admitted in part and denied in part. History Associates admits that the FDIC released additional records, including additional pause letters, on March 14, 2025 and that it re-released the records released on February 21, 2025, with fewer redactions, but History Associates denies that that the FDIC did so "discretionarily." The FDIC's release of additional pause letters was due to its obligations under the Freedom of Information Act and this Court's January 22, 2025 Minute Order. January 22, 2025 Minute Order
22. On March 14, 2025, the FDIC advised Plaintiff that it had completed its releases in response to its FOIA requests. Dkt. No. 48-1; Decl. 1 ¶ 18.	Admitted.
23. At a May 29, 2025, hearing the Court inquired "do you have all the documents now that you claim you should have from the original FOIA request?" To which Plaintiff's counsel responded: "as to Count 1, I think they've -- we do not dispute that they provided the full universe of documents." And later in a further response to the Court, Plaintiff's counsel added: "I think -- in terms of responsive to our pause letter request, yeah, I think we do have the full -- we think the full universe of documents." May 29, 2025 Hearing Transcript at 18:6-10 and 23:10-15, Exhibit 4 (transcript excerpts).	Admitted.
24. In the aggregate, the FDIC discretionarily released more than 800 pages totaling over 200 records. Decl. 1 ¶ 13; FDIC FOIA Reading Room.	Admitted in part and denied in part. History Associates admits that the FDIC released more than 800 pages totaling over 200 records, but History Associates denies that the FDIC did so "discretionarily." Instead, the FDIC did so due to its obligations under the Freedom of Information Act and this Court's orders.

FDIC Statement of Material Fact	HAI Response
25. In these records, the FDIC redacted information pursuant to Exemptions 4, 6, and 8. Dkt. Nos. 28 ¶ 2; 44 ¶ 10, 48 ¶ 21; Decl. 1 ¶ 17.	Admitted in part and denied in part. The FDIC redacted information in the pause letters released on January 3, 2025, pursuant to Exemption 8 only; the FDIC did not claim to redact anything pursuant to Exemptions 4 or 6 until its motion for summary judgment. ECF 28 at 5-7.
26. Redactions applied under FOIA Exemption 4 and 8 include information that would: (a) identify a particular bank; (b) identify third-parties with which a bank had entered into or was considering entering into a business relationship; or (c) divulge confidential commercial information about a bank or third-party. Decl. 1 ¶ 28.	History Associates lacks the information necessary to evaluate this statement of fact, and therefore denies it.
27. Examples of redactions applied under Exemptions 4 and 8 include: (a) bank names, bank logos, and other information that, alone or in combination with other information, could reasonably reveal an institution's identity, (b) bank-specific business relationships with third parties—actual or contemplated, and (c) records containing information submitted by banks to the FDIC in the course of the FDIC's supervisory activity, including confidential commercial information. Decl. 1 ¶ 28.	History Associates lacks the information necessary to evaluate this statement of fact, and therefore denies it.
28. Public disclosure of information redacted under Exemptions 4 and 8 would increase the likelihood of revealing the identity of banks and third-parties with which banks were engaged. Decl. 1 ¶ 30; Decl. 2 ¶ 6; Decl. 3 ¶ 6.	Denied. The FDIC has not established, at a minimum, that public disclosure of (1) the percentage cap imposed by a bank on deposits from crypto companies; and (2) the names of public blockchains banks proposed to use would increase the likelihood of revealing the identity of banks. Decl. 1; Decl. 2; Decl. 3

FDIC Statement of Material Fact	HAI Response
29. At least one entity has utilized artificial intelligence to analyze the productions in this case to identify (but not disclose) the underlying banks. Decl. 1 ¶ 31.	Denied. Attorneys at a law firm have stated that they used artificial intelligence to analyze the productions in this case to identify one of the recipient banks, but the attorneys did not reveal the identity of the bank so their assertion cannot be confirmed. Decl. 1 ¶ 31.
30. Public disclosure of information redacted under Exemptions 4 and 8 would foreseeably harm the FDIC's supervisory relationships with banks. Decl. 1 ¶ 31; Decl. 2 ¶¶ 4-7; Decl. 3 ¶¶ 4-7.	Denied. The FDIC has not established, at a minimum, that public disclosure of (1) the percentage cap imposed by a bank on deposits from crypto companies; and (2) the names of public blockchains banks proposed to use would foreseeably harm the FDIC's supervisory relationships with banks. Decl. 1; Decl. 2; Decl. 3.
31. Redactions applied under FOIA Exemption 6 included information pertaining to individuals, personal information, signatures, and work cell phone numbers. Decl. 1 ¶ 29.	History Associates lacks the information necessary to evaluate this statement of fact, and therefore denies it.
32. Public disclosure of the information redacted under Exemption 6 would foreseeably harm individuals by revealing their personal privacy information. Decl. 1 ¶ 29, 32.	History Associates lacks the information necessary to evaluate this statement of fact, and therefore denies it.
33. All reasonably segregable, non-exempt responsive information subject to FOIA has been produced to the Plaintiff. Decl. 1 ¶ 28; Decl. 2 ¶¶ 5-7; Decl. 3 ¶¶ 5-7.	Denied. The FDIC can reasonably segregate and disclose additional information from the pause letters, including (1) the percentage cap imposed by a bank on deposits from crypto companies; and (2) the names of public blockchains banks proposed to use. ECF 27-2 at 11, 24, 25; ECF 48-2 at 51, 67, 81, 91, 92

HAI'S COUNTER-STATEMENT OF MATERIAL FACTS

FDIC Response	HAI Statement of Material Fact
Admitted in part and denied in part. Denied to the extent this statement implies that all banks subject to FDIC supervision had deposit caps or that the FDIC required or suggested that banks impose a deposit cap. Otherwise admitted that the cited records reference a bank's cap on digital-asset-related deposits. Dkt. No. 48-2 at 51, 67, 81, 91, 92	The FDIC disclosed the existence of a deposit cap in records it released on February 21, 2025. ECF 48-2 at 51, 67 81, 91, 92
Admitted.	The FDIC redacted the percentage of the deposit cap from records it released on February 21, 2025. ECF 48-2 at 51, 67 81, 91, 92
Admitted in part and denied in part. Denied to the extent this statement implies that Exemptions 4 and 8 do not apply to this information. Otherwise admitted that the FDIC applied the foreseeable-harm standard and assessed that releasing these caps' existence would not allow the public to identify the bank at issue. Decl. 1 ¶¶ 30-32	Disclosing the existence of the deposit cap did not allow the public to identify the bank at issue or harm the FDIC's supervisory relationships. *See* Decl. 1; Decl. 2; Decl. 3
Admitted in part and denied in part. Denied that disclosing the percentage of the deposit cap would not foreseeably harm the FDIC's supervisory relationships with banks. The FDIC's public disclosure of information of this character would make it less likely that banks will engage with the agency in an open and transparent manner in the future and, in turn, foreseeably harm the FDIC's supervisory relationships. Otherwise admitted that disclosing the percentage of the deposit cap would not foreseeably allow the public to identify the bank at issue. Decl. 4 ¶¶ 7, 9-11; Decl. 5. ¶¶ 8-10	Disclosing the percentage of the deposit cap would not foreseeably allow the public to identify the bank at issue or harm the FDIC's supervisory relationships. *See* Decl. 1; Decl. 2; Decl. 3

FDIC Response	HAI Statement of Material Fact
Denied and irrelevant. The released records reflect that certain banks had caps related to digital-asset-related deposits but do not show that all banks subject to FDIC supervision had such caps or that the FDIC required or suggested that banks impose a deposit cap. This statement and the cited article supporting it are irrelevant to whether the FDIC appropriately responded to History Associates' FOIA request. Dkt. No. 48-2 at 51, 67, 81, 91, 92	The FDIC required or suggested that the bank impose the deposit cap referenced in the released records. ECF 48-2 at 51, 67 81, 91, 92; Veronica Irwin, *Regulators Are Limiting Banks Serving Crypto Clients. Does That Violate the Law?*, Unchained (Oct. 8, 2024), https://bit.ly/41zFvPs
Admitted in part and denied in part. Admitted in part because the FDIC redacted certain public blockchains where a bank's identity would likely be discoverable based on a combination of the public-blockchain name and other available information. Denied in part because the FDIC did not redact certain public blockchains (e.g., Bitcoin, Ethereum) where it determined that a bank's identity was not likely to be discoverable based on a combination of the public-blockchain name and other available information. Decl. 4 ¶¶ 7-8; Decl. 5 ¶¶ 7	The FDIC redacted the names of public blockchains from records released on January 3, 2025. ECF 27-2 at 11, 24, 25
Admitted that the referenced link defines public blockchains using these characteristics, among others.	A public blockchain is a digital ledger that publicly records digital-asset transactions on the Internet and runs blockchain-based applications. Coinbase, *What Is a Blockchain?*, https://tinyurl.com/52ec4ace
Admitted that the referenced link defines public blockchains using these characteristics, among others.	A public blockchain is an open-source software protocol that can be used by anyone with an Internet connection and is often operated in a decentralized manner. Coinbase, *What Is a Blockchain?*, https://tinyurl.com/52ec4ace

FDIC Response	HAI Statement of Material Fact
Denied. Revealing these public blockchains, when taken in concert with other available information, could reveal the underlying bank's identity, undermine the FDIC's credibility with the banks and the industry, and would foreseeably harm the supervisory exchange of information and ideas. Decl. 4 ¶¶ 7-8, 10-11; Decl. 5 ¶¶ 7	Disclosing the public blockchains referred to in the records released on January 3, 2025, would not foreseeably allow the public to identify any of the banks at issue or harm the FDIC's supervisory relationships. *See* Decl. 1; Decl. 2; Decl. 3
The FDIC lacks the information necessary to evaluate this statement of fact and therefore denies it.	Large language artificial intelligence models like the one used by the law firm referenced in the FDIC's declaration are well known to make up facts (i.e. "hallucinate") *See* Decl. 1 ¶ 31; Ben Fritz, *Why Do AI Chatbots Have Such a Hard Time Admitting 'I Don't Know'?*, Wall. St. J. (Feb. 11, 2025), http://bit.ly/4kF1YSG

FDIC'S AUGUST 27, 2025, STATEMENT OF ADDITIONAL MATERIAL FACTS NOT IN DISPUTE

FDIC Statement of Material Fact	HAI Response
34. The FDIC has offices in Washington, D.C. and Arlington, VA, as well as regional offices throughout the country. Decl. 4 ¶ 1.	
35. Day-to-day supervisory responsibility for banks under the FDIC's purview is generally allocated on a geographic basis among the regional offices, with various types of support from the Washington office. Decl. 4 ¶ 1.	
36. Revealing the public blockchains cited by HAI, when taken in concert with other available information and in view of search-related technology advancements, could reveal the underlying bank's identity. Decl. 4 ¶ 8; Decl. 5 ¶ 7.	
37. Revealing the underlying bank's identity would foreseeably harm the FDIC's supervisory relationships with the banks that provided information related to these public blockchains and frustrate the agency's ability to engage with banks on a cooperative and on-going basis. Decl. 4 ¶ 8; Decl. 5 ¶ 7	
38. The percentages of the deposit caps cited by HAI are considered confidential financial information that was provided to the FDIC as part of the examination and supervisory process. Decl. 4 ¶ 9-10; Decl. 5 ¶ 8-9¶	
39. The FDIC's public disclosure of a bank's confidential, proprietary, financial information would cause foreseeable harm by making it less likely that banks will engage with the agency in an open and transparent manner regarding their commercial, operational, and regulatory-compliance activities, in a manner consistent with the FDIC's statutory supervisory authority. Decl. 4 ¶ 9; Decl. 5 ¶ 8	

FDIC Statement of Material Fact	HAI Response
40. The FDIC's public disclosure of these percentage caps would foreseeably harm the FDIC's supervisory relationships with banks that provided them and frustrate the agency's ability to evaluate other similar risk-management controls on a cooperative and on-going basis. Decl. 4 ¶ 9; Decl. 5 ¶ 8	
41. Information gleaned from cooperative supervisory exchanges frequently informs the substance of broader regulatory or supervisory efforts. Decl. 4 ¶ 10; Decl. 5 ¶ 9	
42. Information gleaned from cooperative supervisory exchanges can also inform FDIC staff's decision to issue guidance about an emerging banking risk. Decl. 4 ¶ 10; Decl. 5 ¶ 9	
43. Revealing the bank's identity, releasing records in a manner that would allow the bank to be identified, or releasing the banks' confidential business information (i.e., the percentage caps) would potentially undermine the FDIC's credibility with the banks and the industry, would potentially cause a chill in the relationship between the FDIC and the banks, and would foreseeably harm the supervisory exchange of information and ideas. Decl. 4 ¶¶ 10-11; Decl. 5 ¶¶ 9-10	
44. The full and frank exchange of information between the FDIC and the entities it supervises is paramount to the success of the agency's supervisory duties. Decl. 4 ¶ 11; Decl. 5 ¶ 10	

DATED: August 27, 2025

Respectfully submitted,

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Counsel
/s/Michael K. Morelli
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Counsel for Defendant Federal Deposit Insurance Corporation

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2025, I caused a true and correct copy of this document to be filed with the Clerk for the U.S. District Court for the District of Columbia through the ECF system. Participants in the case who are registered ECF users will be served through the ECF system, as identified by the Notice of Electronic Filing. I hereby further certify that a true and correct copy of this document was emailed Plaintiff's counsel pursuant to Section 7(j)(v) of this Court's standing order.

/s/ Michael K. Morelli
Michael K. Morelli

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HISTORY ASSOCIATES INCORPORATED, Plaintiff, v. FEDERAL DEPOSIT INSURANCE CORPORATION, Defendant.	Case No. 1:24-cv-1857-ACR

REDACTED SUPPLEMENTAL DECLARATION OF [redacted] IN SUPPORT OF THE FDIC'S MOTION FOR SUMMARY JUDGMENT

I, [redacted], pursuant to 28 U.S.C. § 1746, declare the following:

1. I am currently employed by the Federal Deposit Insurance Corporation (FDIC) as [redacted] RMS promotes stability and public confidence in the nation's financial system through examining and supervising insured financial institutions, leading sound policy development, and monitoring and responding to existing and emerging risks. As reported in our 2024 Annual Report, the FDIC acts as the primary federal regulator for over 2,800 banks and savings associations and conducted approximately 1,200 Risk Management examinations in 2024. The FDIC has offices in Washington, DC and Arlington, VA, as well as regional offices throughout the country. Day-to-day supervisory responsibility for banks under the FDIC's purview is generally allocated on a geographic basis among the regional offices, with various types of support from the Washington office.

2. In this position, I serve as [redacted]

[redacted]

3. I adopt and incorporate here my July 9, 2025, Declaration in Support of the FDIC's Motion for Summary Judgment on Count I. I submit this Supplemental Declaration in further support of the FDIC's Motion for Summary Judgment on the issue of whether it would cause foreseeable harm if the FDIC unredacted two types of information in records which the FDIC previously released, specifically: i) the amount of the percentage cap imposed by banks on deposits from crypto companies and ii) the names of public blockchains the banks proposed to use. The statements contained in this Supplemental Declaration are based on my personal knowledge and upon information provided to me in my official capacity.

4. I have been informed that the FDIC's aim in redacting records in this case has been to maximize transparency about its supervisory communications with banks that sought to offer crypto-related products or services without divulging the identity of the banks, potential or actual customers of the banks, potential or actual business partners of the banks, or confidential business information of the banks.

5. Based on my experience as [redacted] at the FDIC, I believe it is reasonably foreseeable that divulging the names of the banks or altering the redactions in the records released to Plaintiff in a manner that would allow identification of the names of the banks or their potential customers or business partners would negatively affect the FDIC's supervisory relationships with both the institutions whose name was divulged and banks in

general. Specifically, even though bank names and other information were redacted from the "pause letters," I am aware that certain third parties have claimed to have used artificial intelligence to identify the banks that received the "pause letters." *Using AI and Other Modern Tech: Analyzing the FDIC Pause Letters*, RegReform, Davis Wright Tremaine Webinar (Mar. 14, 2025), https://bit.ly/4fhvuNp.

6. In my experience, banks would be less forthcoming in their communications with regulators if they knew that those communications were subject to public disclosure in a FOIA lawsuit and would be less inclined to include sensitive or confidential information, analyses, or commentary in their interactions with the FDIC. I also believe financial institutions would take disclosure of their identities or information that could result in the disclosure of their identities into account when considering assurances of confidentiality in 12 C.F.R. § 309 of the FDIC rules and regulations.

7. My staff and I reviewed the redactions identified by History Associates Incorporated pertaining to some public blockchains and the percentage caps.

8. I believe that revealing the public blockchains in these instances, when taken in concert with other available information (e.g., the identity of the bank's supervisor, the dates of the records, the regional office from which the records were issued, and details regarding a bank's business activity under consideration) and my understanding of search-related technology advancements could reveal the underlying bank's identity. This would foreseeably harm the FDIC's supervisory relationships with the banks that provided information and frustrate the agency's ability to engage with banks on a cooperative and on-going basis.

9. I consider the percentage caps reflected in these records to be the bank's confidential financial information that was provided to the FDIC as part of the examination and

supervisory process. Based on my experience, the FDIC's public disclosure of a bank's confidential, proprietary, financial information of this character would cause foreseeable harm by making it less likely that banks will engage with the agency in an open and transparent manner regarding their commercial, operational, and regulatory-compliance activities, in a manner consistent with our statutory supervisory authority (*see* 12 U.S.C. § 1820(b) of the Federal Deposit Insurance Act). Releasing these percentage caps would foreseeably harm the FDIC's supervisory relationships with the banks that provided them and frustrate the agency's ability to evaluate other similar risk-management controls on a cooperative and on-going basis.

10. Information gleaned from cooperative supervisory exchanges—including banks' strategic plans, counterparty exposures, risk profiles, and risk-management programs—frequently informs the substance of broader regulatory or supervisory efforts, e.g., by informing the considerations underlying a notice of proposed rulemaking. It can also inform FDIC staff's decision to issue guidance about an emerging banking risk, e.g., by promoting staff's ability to view banks' compliance or risk-management frameworks in real time, assess those frameworks' effectiveness on a bank-specific or industry-wide basis, and consider whether to issue guidance. Based on my experience, revealing the bank's identity, releasing records in a manner that would allow the bank to be identified, or releasing the banks' confidential business information (i.e., the percentage caps) would potentially undermine the FDIC's credibility with the banks and the industry, would cause a chill in the relationship between the FDIC and the banks, and would foreseeably harm the supervisory exchange of information and ideas.

11. During my career at the FDIC, I have participated in hundreds of examinations and other supervisory interactions with banks under the FDIC's supervisory authority. Based on my experience, I believe that the full and frank exchange of information between the FDIC and

the entities it supervises is paramount to the success of the agency's supervisory duties. I believe disclosure of the names of banks or information that would reveal bank names or confidential financial information such as the percentage caps would chill that exchange of information and hinder the ability of the agency to meet its statutory duties.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed on this 27th day of August 2025, in [redacted]

[redacted]
Federal Deposit Insurance Corporation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HISTORY ASSOCIATES INCORPORATED, Plaintiff, v. FEDERAL DEPOSIT INSURANCE CORPORATION, Defendant.	Case No. 1:24-cv-1857-ACR

REDACTED SUPPLEMENTAL DECLARATION OF [redacted] IN SUPPORT OF THE FDIC'S MOTION FOR SUMMARY JUDGMENT

I, [redacted], pursuant to 28 U.S.C. § 1746, declare the following:

1. I am employed by the Federal Deposit Insurance Corporation (FDIC) as [redacted] DCP promotes public confidence in the nation's financial system by supervising insured financial institutions to ensure they treat consumers and depositors fairly and operate in compliance with federal consumer protection laws. As reported in the FDIC's 2024 Annual Report, the FDIC acts as the primary federal regulator for over 2,800 banks and savings associations and conducted approximately 800 Consumer Compliance and/or Community Reinvestment Act (CRA) examinations in 2024.

2. In this position, I [redacted]

[redacted]

3. I adopt and incorporate here my July 9, 2025, Declaration in Support of the FDIC's Motion for Summary Judgment on Count I. I submit this Supplemental Declaration in further support of the FDIC's Motion for Summary Judgment on the issue of whether it would cause foreseeable harm if the FDIC unredacted two types of information in records which the FDIC previously released, specifically: i) the amount of the percentage cap imposed by banks on deposits from crypto companies and ii) the names of public blockchains the banks proposed to use. The statements contained in this Supplemental Declaration are based on my personal knowledge and upon information provided to me in my official capacity.

4. I have been informed that the FDIC's aim in redacting documents in this case has been to maximize transparency about its supervisory communications with banks that sought to offer crypto-related products or services without divulging the identity of the banks, potential or actual customers of the banks, potential or actual business partners of the banks, or confidential business information of the banks.

5. Based on my experience as [redacted] at the FDIC, I believe it is reasonably foreseeable that divulging the names of the banks or altering the redactions in the records released to Plaintiff in a manner that would allow identification of the names of the banks or their potential customers or business partners would negatively affect the FDIC's supervisory relationships with both the institutions whose name was divulged and banks in general. Specifically, even though bank names and other information were redacted from the "pause letters," I am aware that certain third parties have claimed to have used artificial intelligence to identify the banks that received the "pause letters." *Using AI and Other Modern*

Tech: Analyzing the FDIC Pause Letters, RegReform, Davis Wright Tremaine Webinar (Mar. 14, 2025), https://bit.ly/4fhvuNp.

6. In my experience, banks would be less forthcoming in their communications with regulators if they knew that those communications were subject to public disclosure in a FOIA lawsuit and would be less inclined to include sensitive or confidential information, analyses, or commentary in their interactions with the FDIC. I also believe financial institutions would take disclosure of their identities or information that could result in the disclosure of their identities into account when considering assurances of confidentiality in 12 C.F.R. § 309 of the FDIC rules and regulations.

7. I believe that revealing the public blockchains in these instances, when taken in concert with other available information (e.g., the identity of the bank's supervisor, the dates of the records, the regional office from which the records were issued, and details regarding a bank's business activity under consideration) and my understanding of search-related technology advancements could reveal the underlying bank's identity. This would foreseeably harm the FDIC's supervisory relationships with the banks that provided information and frustrate the agency's ability to engage with banks on a cooperative and ongoing basis.

8. I consider the percentage caps reflected in these records to be the bank's confidential financial information that was provided to the FDIC as part of the examination and supervisory process. Based on my experience, the FDIC's public disclosure of a bank's confidential, proprietary, financial information of this character would cause foreseeable harm by making it less likely that banks will engage with the agency in an open and transparent manner regarding their commercial, operational, and regulatory-compliance activities, in a manner consistent with our statutory supervisory authority (*see* 12 U.S.C. § 1820(b) of the Federal

Deposit Insurance Act). Releasing these percentage caps would foreseeably harm the FDIC's supervisory relationships with the banks that provided them and frustrate the agency's ability to evaluate other similar risk-management controls on a cooperative and ongoing basis.

9. Information gleaned from cooperative supervisory exchanges—including banks' strategic plans, counterparty exposures, risk profiles, and risk-management programs—frequently informs the substance of broader regulatory or supervisory efforts, e.g., by informing the considerations underlying a notice of proposed rulemaking. It can also inform FDIC staff's decision to issue guidance about an emerging banking risk, e.g., by promoting staff's ability to view banks' compliance or risk-management frameworks in real time, assess those frameworks' effectiveness on a bank-specific or industry-wide basis, and consider whether to issue guidance. Based on my experience, revealing the bank's identity, releasing records in a manner that would allow the bank to be identified, or releasing the banks' confidential business information (i.e., the percentage caps) would potentially undermine the FDIC's credibility with the banks and the industry, would cause a chill in the relationship between the FDIC and the banks, and would foreseeably harm the supervisory exchange of information and ideas.

10. During my career at the FDIC, I have participated in hundreds of examinations and other supervisory interactions with banks under the FDIC's supervisory authority. Based on my experience, I believe that the full and frank exchange of information between the FDIC and the entities it supervises is paramount to the success of the agency's supervisory duties. I believe disclosure of the names of banks or information that would reveal bank names or confidential financial information such as the percentage caps would chill that exchange of information and hinder the ability of the agency to meet its statutory duties.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed on this 27th day of August 2025, in [redacted]

[redacted]
Federal Deposit Insurance Corporation