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 SUPPORT OF HISTORY ASSOCIATES' CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT I, IN OPPOSITION TO THE FDIC'S MOTION FOR SUMMARY JUDGMENT ON COUNT I, AND IN OPPOSITION TO THE FDIC'S MOTION TO DISMISS COUNT II

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Exhibit A	Excerpt of May 29, 2025 Hearing Transcript
Exhibit B	Excerpts of FDIC's FOIA Training Slides

INTRODUCTION

Coinbase commenced this FOIA campaign (through History Associates) to bring to light Operation Choke Point 2.0—an effort by Defendant FDIC and other agencies in the prior Administration to debank and cripple the crypto industry. Although the FDIC initially stonewalled, this Court's orders forced the agency to release crucial records revealing the government's attempt to exile crypto companies from banks and traditional financial services. Those records revealed, in the current FDIC Acting Chair's own words, that banks' efforts to engage with crypto companies "were almost universally met with resistance" by the FDIC—"ranging from repeated requests for further information, to multi-month periods of silence as institutions waited for responses, to directives from supervisors to pause, suspend, or refrain from expanding all crypto- or blockchain-related activity."[1] Those revelations have opened a window for the public into the federal government's unlawful debanking efforts—exactly the kind of transparency FOIA was enacted to foster.

The FDIC's actions before and during this litigation, however, have uncovered unlawful policies or practices that the FDIC systematically applies to FOIA requests. History Associates therefore amended its complaint to assert FOIA policy-or-practice claims and seek declaratory and injunctive relief preventing the FDIC from using its unlawful policies or practices to stymie History Associates' other, related FOIA requests pending before the FDIC. Information subsequently disclosed by the FDIC in this litigation—including its FOIA policies and manuals—has only confirmed Coinbase's concerns. Targeted discovery is needed to complete the puzzle and would enable the Court to resolve this controversy on the merits once and for all.

But the FDIC now seeks to avoid accountability for its FOIA missteps by moving for a pleading-stage dismissal of History Associates' fact-laden FOIA policy-or-practice claims. Rather

[1] Press Release, FDIC Releases Documents Related to Supervision of Crypto-Related Activities (Feb. 5, 2025), https://bit.ly/3IBscbz.

than resolve the dispute efficiently in light of the record already partially developed—as History Associates proposed and the Court suggested at the most recent hearing—the FDIC insists on threshold litigation over the adequacy of History Associates' amended complaint. That effort fails.

The FDIC makes two basic arguments for dismissing History Associates' policy-or-practice claims on the pleadings. Neither has merit. First, the FDIC argues that History Associates has failed to plausibly allege a single unlawful FOIA policy or practice. But its argument rests entirely on a heightened pleading standard of the FDIC's own invention. Under the actual pleading standard, History Associates' policy-or-practice allegations pass with flying colors. And they would survive even the FDIC's manufactured, arbitrarily heightened test. The corroborating evidence that the FDIC (under the Court's orders) has provided to History Associates since the filing of the amended complaint only further confirms those allegations.

Second, the FDIC argues that the policy-or-practice claims are prudentially unripe. But the FDIC's central contention—that History Associates' claims impermissibly focus on the FDIC's *future* noncompliance with FOIA—miscasts the policy-or-practice claims. History Associates challenges the FDIC's *existing* unlawful FOIA policies that the agency *has* applied and is *currently* applying to History Associates' pending requests. That is a concrete legal dispute requiring this Court's intervention. The FDIC's ripeness argument is also at war with the purpose of the policy-or-practice doctrine: to ensure agencies' future compliance with FOIA even when they seek to strategically moot FOIA cases by producing the requested documents in litigation.

In addition to seeking dismissal of the FDIC's policy-or-practice claims, the FDIC asks the Court to bless the agency's over-redactions of the pause letters that prompted this litigation. But in two discrete but critical respects, the agency's redactions remain overreaching. This Court should review and reject the FDIC's omissions.

The parties' positions on the proper handling of History Associates' FOIA request in this case and others in the pipeline are far apart. But the question of which path forward would be most efficient and lead most directly to resolution of the merits—reflecting the already-disclosed facts and the narrow subset necessary to complete the picture—is not close. After all, even if the Court deemed History Associates' policy-or-practice allegations deficient, the information uncovered since the filing of the operative complaint would entitle History Associates to file a further amended complaint. The Court should avert that needless threshold skirmishing. It should deny the FDIC's motions to dismiss and for summary judgment and order targeted discovery.

BACKGROUND

A. The FDIC Categorically Denies History Associates' FOIA Request for Pause Letters

For several years, federal financial regulators, including the FDIC, engaged in a coordinated effort to strangle the crypto industry. ECF 37 ¶¶ 2, 35-41. A key part of the government's war on crypto was Operation Choke Point 2.0—an effort by the FDIC and other federal regulators to prevent banks from offering or engaging in digital-asset activities and to deprive the crypto industry of the banking services it needs (like most businesses) to operate. *Id.* ¶¶ 5, 42-48.

Seeking to bring the FDIC's role in that unlawful scheme to light, Coinbase retained Plaintiff History Associates to file a series of FOIA requests seeking records from the FDIC related to digital assets. ECF 37 at 1. One of those requests sought "pause letters" that the FDIC sent to supervised financial institutions, asking them to pause crypto-related activities indefinitely. *Id.* ¶¶ 2, 55-65. The FDIC's Office of Inspector General had revealed the existence of the pause letters in an October 2023 report, in which it criticized the letters as inconsistent with previous FDIC guidance on crypto-related activities. *Id.* ¶¶ 2, 43-46. History Associates submitted a FOIA request seeking copies of "all 'pause letters.'" *Id.* ¶¶ 8, 56.

But even though the OIG's report had already revealed the existence of the pause letters—and had even quoted from them—the FDIC refused even to confirm their existence. Instead, the FDIC "categorically denied" the FOIA request without even "search[ing] for records responsive to" it. FDIC Mot. 12. The agency's denial letter stated that, "[b]y its very nature, the information that you requested, if it exists and could be located, … would be exempt from disclosure under FOIA Exemptions 4 and 8," which cover confidential commercial information and matters related to bank examination, operating, or condition reports, respectively. ECF 37-2 at 1 (citing 5 U.S.C. § 552(b)(4), (8)). The denial letter also included a boilerplate statement that "it is reasonably foreseeable that disclosure would harm an interest protected by" a FOIA exemption. *Id.*

History Associates administratively appealed the FDIC's denial. ECF 37 ¶ 59. In response, the FDIC defended its categorical determination. The FDIC stated that its initial denial letter "was based upon a determination that the type of records being requested would be exempt, rather than making exemption determinations on a document-by-document basis." ECF 37-3 at 6. The agency then attempted to justify that approach under Exemption 8 alone by citing case law approving narrow categorical denials under other FOIA exemptions. *Id.* at 5-6 & n.13. Purporting to apply that case law, the FDIC asserted that a categorical determination was appropriate here "[g]iven the description of the 'pause letters' in the OIG report" as "supervisory guidance from the FDIC." *Id.* at 7. Based on that description, the FDIC concluded, "there is no question that the 'pause letters' would … fall entirely within the 'all-inclusive' scope of Exemption 8 and would not include any segregable, non-exempt material," obviating the need for the agency even to review the documents individually (or even search for them). *Id.*

The FDIC also declined to review the pause letters individually to assess whether the agency could disclose any information without harming an interest protected by Exemption 8, as required by the FOIA Improvement Act of 2016. 5 U.S.C. § 552(a)(8)(A)(i); ECF 37-3 at 7. It instead concluded, again based solely on the description of the pause letters, that disclosure of the letters "would, necessarily," "harm important interests protected by FOIA Exemption 8." ECF 37-3 at 7.

B. This Court Rejects The FDIC's Categorical Determination And Repeatedly Orders The Agency To Produce Redacted Pause Letters

History Associates sued the FDIC for unlawfully withholding the pause letters in June 2024. ECF 1. In its answer and in an initial filing in this case, the FDIC stood by its categorical withholding of the pause letters under Exemption 8. ECF 13 at 7.

This Court disagreed. At the first pre-motion conference in this case, the Court stated that it was "hard to believe that there's nothing in the letters that can't be shown if you have redactions." ECF 25-1 at 9. The Court therefore instructed the FDIC to produce a Vaughn index and redacted pause letters. *Id.* at 9-10, 14-18. But the FDIC initially produced only a Vaughn index and refused to produce *any* redacted pause letters, prompting this Court to reinforce its prior order. Nov. 4, 2024 Minute Order.

In November 2024, the FDIC produced 23 redacted pause letters, which confirmed that the agency's categorical withholding was inappropriate. Yet those letters were so heavily redacted that, following an in camera review, this Court expressed "concern[] with what appears to be FDICs lack of good-faith effort in making nuanced redactions" and ordered the FDIC to "re-review the documents" and "make more thoughtful redactions." Dec. 12, 2024 Minute Order.

C. The FDIC's Subsequent Productions Reveal Additional Fundamental Problems With The FDIC's FOIA Processes

In January 2025, the FDIC produced revised versions of the pause letters with fewer redactions—a subset of which History Associates continues to challenge as inconsistent with FOIA. *See, e.g.*, ECF 37 ¶ 72; *infra* 36-43. But that production brought to light additional, even more fundamental problems with the FDIC's treatment of the pause-letter request. First, the revised production contained two additional pause letters, revealing that the agency's first search was inadequate. *See* ECF 37 ¶ 74. Second, the FDIC revealed that it had adopted an untenable reading of the scope of the FOIA request. History Associates sought "[c]opies of all 'pause letters' described in the OIG report," but the FDIC narrowly construed the request to be for only pause letters "shared with the OIG." *Id.* ¶ 75 (emphasis omitted). Those revelations—as well as public allegations of document destruction aired elsewhere—gave History Associates concern that the FDIC's response to the pause-letter request was still incomplete and a product of unlawful FOIA policies or practices.

During a January 2025 hearing held to address these issues (among others), this Court asked the FDIC "[w]ho took the incredibly narrow illogical view of [History Associates'] FOIA request." ECF 37-1 at 3. Yet even the FDIC official who had signed the FOIA appeal-denial decision, who argued for the FDIC at that hearing, was unable to answer. *Id.* This Court also asked the FDIC whether it had put in place a litigation hold to protect the documents subject to the FOIA request. *Id.* at 5. The FDIC admitted that it had not done so—an admission it confirmed in a later hearing while also indicating that it lacks any policy of issuing litigation holds in response to FOIA requests or even FOIA litigation. *Id.*; ECF 38-1 at 9. The Court then ordered the FDIC to produce any remaining pause letters. ECF 37-1 at 24; Jan. 22, 2025 Minute Order.

D. The FDIC's Additional Documents Reveal An Anti-Crypto Campaign And Draw Scrutiny From The Public And Congress

The FDIC's subsequent production confirmed the inadequacy of the agency's prior efforts. On February 5, the FDIC (under new leadership) produced 790 pages of additional documents, including numerous additional pause letters. *See* ECF 32. The FDIC's Acting Chair also issued a statement explaining that the "documents … show that requests from these banks were almost universally met with resistance, ranging from repeated requests for further information, to multi-month periods of silence as institutions waited for responses, to directives from supervisors to pause, suspend, or refrain from expanding all crypto- or blockchain-related activity." Press Release, FDIC Releases Documents Related to Supervision of Crypto-Related Activities (Feb. 5, 2025), https://bit.ly/3IBscbz.

The release received substantial news coverage. *See, e.g.*, Jeff Gapusan, *Operation Chokepoint 2.0: FDIC Documents Confirm Crypto Bias*, Forbes (Feb. 5, 2025), https://bit.ly/4eZHz9T; *FDIC Releases Documents on Crypto Supervision of Banks*, American Bankers Association Banking Journal (Feb. 5, 2025), http://bit.ly/4fhe5oc. And Congress subsequently held hearings on topics related to the pause letters. *See* Operation Choke Point 2.0: The Biden Administration's Efforts to Put Crypto in the Crosshairs, Hearing Before H. Comm. on Fin. Servs., 117th Cong. (Feb. 6, 2025); Investigating the Real Impacts of Debanking in American, Hearing Before S. Banking Comm. (Feb. 5, 2025).

E. History Associates' Amended Complaint Challenges The FDIC's Redactions And Unlawful FOIA Policies Or Practices

The revelations of the FDIC's disconcerting handling of the pause-letter FOIA request gave rise to serious concerns about the FDIC's approach to FOIA requests more generally—of acute interest to Coinbase and History Associates, which have many other crypto-debanking-related requests still pending before the FDIC (among other agencies). With the Court's leave, History Associates filed an amended complaint. Jan. 22, 2025 Minute Order; ECF 37. The amended complaint alleges—based on the FDIC's handling of this and other FOIA requests History Associates has filed, ECF 37 ¶¶ 96-105—that the FDIC has four unlawful FOIA policies or practices:

1. an unlawful policy or practice of making blanket assertions that bank supervisory records are categorically subject to Exemption 8 and therefore purportedly immune to disclosure. ECF 37 ¶ 120.

2. an unlawful policy or practice of construing FOIA requests narrowly, rather than liberally as FOIA requires. *Id.* ¶ 121.

3. an unlawful policy or practice of failing to conduct a search reasonably calculated to uncover all responsive records within the agency's possession or control. *Id.* ¶ 122.

4. an unlawful policy or practice of failing to take necessary steps to ensure that records responsive to FOIA requests are properly preserved, including implementing litigation holds when a FOIA suit is brought. *Id.* ¶ 123.

The amended complaint also continues to press the original claim for the pause letters—now limited to challenging the FDIC's unwarranted redactions. Specifically, the amended complaint alleges that the FDIC improperly continues to redact information not protected by FOIA, including "the names of public blockchains that the banks were seeking to use." ECF 37 ¶ 114.

F. The Court Orders An Information-Sharing Process That Eventually Yields Evidence Corroborating History Associates' Policy-or-Practice Claims

At a February 2025 hearing, this Court stayed the FDIC's deadline to answer the amended complaint so that the parties could engage in an informal information-sharing process with swift, biweekly productions. *See* ECF 38-1 at 15, 17. The Court observed that the agency at that juncture seemed to have changed tack and "been properly motivated now, both by a new chair and some press as to their practices, to work cooperatively with" History Associates on resolving its policy-or-practice claims. *Id.* The Court also stated that, if "during the course of that cooperation" History Associates is "not satisfied that [it is] getting the full story, then certainly come back to me and I'm happy to order a 30(b)(6) [deposition] very quickly." *Id.* at 15.

For most of the information-sharing process, the FDIC was unwilling to cooperate in giving History Associates the information needed to investigate its policy-or-practice claims. *See* ECF 44 at 9-13; ECF 48 at 2-6. But at the eleventh hour—after History Associates had moved to lift the stay—the FDIC produced certain of its internal divisions' FOIA policies. *See* ECF 53-1.

Those policies corroborated History Associates' allegations and raised additional questions warranting further investigation. For example, a FOIA policy of the FDIC's division of Risk Management Supervision states that any responsive document implicating "FOIA Exemption (b)(8)" should be "withheld in full," and that the FDIC has "[n]o duty to segregate factual from analytical or deliberative material" when applying Exemption 8. ECF 53-1 at 18, 29, 32. That supports History Associates' allegation that the FDIC has a policy of categorically denying requests under Exemption 8. The policies also indicate that it is the responsibility of FDIC "employees in the divisions and offices" to interpret FOIA requests and search for responsive records, but do not instruct them to construe requests liberally or on proper search techniques. *Id.* at 120-21. And the policies say nothing at all about employees' duty to preserve records subject to FOIA requests or reference *any* policy with respect to instituting and abiding by litigation holds.

G. The FDIC Files A Motion To Dismiss The Policy-or-Practice Claims

After this Court dissolved the stay at History Associates' request, the parties offered competing proposals for resolving this case. History Associates filed a motion for tailored document discovery and a targeted 30(b)(6) deposition and proposed proceeding thereafter with cross-motions for summary judgment, which would comprehensively resolve the case after one set of briefing. ECF 53, 60. The FDIC, by contrast, proposed proceeding piecemeal by filing a motion to dismiss History Associates' policy-or-practice claims and a motion for summary judgment on the pause-letter claim. ECF 57.

At a pre-motion conference, this Court stated that it had "a hard time understanding how I'm going to be able to" resolve the case "on 12(b)(6)" because History Associates' policy-or-practice allegations are "rife with factual determinations." Ex. A at 24. The Court suggested that the FDIC could "just do summary judgment all at once" so that there would be "a lot less briefing." *Id.* at 66. The Court further explained that it was "very happy to have pre-motion discovery where

I don't think the motion is going to succeed," *id.* at 45, and thus ordered the FDIC to produce additional documents related to the policy-or-practice claims (including FOIA training materials) in advance of filing its motion, *see* May 29, 2025 Minute Order.

The FDIC produced the additional documents on July 7. Those documents further support History Associates' claims, including by failing to instruct employees to interpret FOIA requests liberally. On July 9, the FDIC elected to proceed with its piecemeal approach to resolving this case by filing a motion to dismiss History Associates' policy-or-practice claims along with a motion for summary judgment on the pause-letter claim. ECF 72.

LEGAL STANDARD

"In evaluating a motion to dismiss," the court determines whether the plaintiff has pleaded "the elements" of its claim "with adequate factual support to state a claim to relief that is plausible on its face." *Sanchez v. Off. of State Superintendent of Educ.*, 45 F.4th 388, 395 (D.C. Cir. 2022) (internal brackets, quotation marks, and citations omitted). "[T]he court must accept the plaintiff's factual allegations as true and draw all reasonable inferences in the plaintiff's favor." *Id.* In the context of a FOIA "policy or practice claim," the plaintiff must allege facts "that could signal the agency has a policy or practice of ignoring FOIA's requirements." *Jud. Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 780 (D.C. Cir. 2018).

"Summary judgment may be granted only when the moving party … is able to show that there is 'no genuine dispute as to any material fact.'" *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 584 (D.C. Cir. 2020) (quoting Fed. R. Civ. P. 56(a)). In FOIA cases, that requires the agency "to establish beyond factual dispute that its failure to produce responsive records"—or "any reasonably segregable portion of a record"—"comes outside the mandate of FOIA … by a factually indisputable right to protection under one of the statutory exemptions." *Id.* at 583-84 (brackets and citation omitted).

ARGUMENT

I. This Court Should Deny The Motion To Dismiss The Policy-or-Practice Claims

History Associates has more than adequately pleaded that the FDIC's mistreatment of the pause-letter request at issue here stemmed from unlawful agency FOIA policies or practices. And History Associates' challenges to those discrete policies and practices are ripe for judicial resolution. More fundamentally, the FDIC's code-pleading attacks on History Associates' policy-or-practice allegations have been overtaken by *evidence* surfaced through informal discovery directed by the Court. The FDIC's motion inefficiently invites the Court to ignore that already-developed evidence and to indulge the fiction that the agency's actual FOIA policies and practices are still under shroud. Instead of accepting that invitation to move the case pointlessly backwards, the Court should direct the FDIC to comply with History Associates' contemporaneous motion for targeted discovery, and then decide the case on cross-motions for summary judgment.

A. History Associates Has Amply Alleged Its Policy-or-Practice Claims

The FDIC principally contends that the amended complaint's examples of the FDIC's applying unlawful FOIA policies are not numerous or similar enough to substantiate the four alleged unlawful policies or practices. But the FDIC's invented "numerosity" and "similarity" requirements are meritless and mistake *one* way to show a policy or practice—by establishing a "pattern"—for the *exclusive* way to do so. Under the correct standard, the amended complaint alleges more than enough facts to show what matters: The FDIC's mistreatment of the pause-letter FOIA request stems not from an isolated mistake, but from unlawful policies or practices that will affect History Associates' currently pending FOIA requests. In any event, the amended complaint meets the FDIC's contrived pleading requirements as well. The agency's written policies obtained during the information-sharing process (which, if needed, a further amended complaint could easily incorporate) confirm that showing and underscore the futility of the FDIC's motion.

1. The FDIC's Motion Is Premised on an Erroneous Pleading Standard

The FDIC hinges its Rule 12(b)(6) argument on the notion that, "in order to plead a policy or practice claim," a plaintiff "must establish (1) numerosity, (2) similarity between its requests, (3) similarity in the agency's responses, and (4) an unlawful FOIA practice" that violates "binding precedent." FDIC Mot. 26, 34; *see also id.* at 27-42. But there is no support in FOIA, Rule 12(b)(6), or controlling precedent for any (let alone all) of those pleading requirements.

Under Rule 12(b)(6), all a plaintiff must do to survive a motion to dismiss is plead the elements of a claim "with adequate factual support to state a claim to relief that is plausible on its face." *Sanchez v. Off. of State Superintendent of Educ.*, 45 F.4th 388, 395 (D.C. Cir. 2022) (citation and quotation marks omitted). A claim "is facially plausible when the complaint contains factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation and quotation marks omitted).

The D.C. Circuit set forth the contours of a FOIA policy-or-practice claim long ago in *Payne Enterprises, Inc. v. United States*, 837 F.2d 486 (D.C. Cir. 1988): "So long as an agency's refusal to supply information evidences a policy or practice" of "some … failure to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials, a party's challenge to the policy or practice cannot be mooted by the release of the specific documents that prompted the suit." *Id.* at 491 (footnote omitted); *see also Jud. Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 777-78 (D.C. Cir. 2018) (describing *Payne* as "settled law"). A FOIA plaintiff can obtain a declaration that the agency has an ongoing policy or practice of violating FOIA and an injunction prohibiting the agency from applying that policy or practice going forward. *See Payne*, 837 F.2d at 495 (remanding "with instructions to enter a declaratory judgment for Payne"); *Jud. Watch*, 895 F.3d at 777 (FOIA "does not limit the district court's inherent injunctive powers"). The policy-or-practice doctrine thereby prevents agencies from "escap[ing] judicial review of its compliance with FOIA" by simply "mooting the litigation" by releasing the documents at issue (as the FDIC sought to do here). *Jud. Watch*, 895 F.3d at 779, 782.

The pleading standard for policy-or-practice claims tracks the nature of the claim. As the D.C. Circuit has explained, a "plaintiff states a plausible policy or practice claim under *Payne* by alleging" facts "that could signal the agency has a policy or practice of ignoring FOIA's requirements" that "will interfere with [the plaintiff's] right under FOIA to promptly obtain non-exempt records from the agency in the future." *Jud. Watch*, 895 F.3d at 780. In other words, to survive a motion to dismiss, a plaintiff need only allege facts plausibly suggesting that an agency's response to a FOIA request could be a manifestation of an unlawful policy or practice rather than an "isolated mistak[e] by agency officials." *Id.* at 778.

The FDIC mistakenly attempts to superimpose additional pleading requirements, but none is grounded in the law. It claims that a plaintiff must (1) identify at least three FOIA requests (2) that seek a "narrowly defined class of documents," (3) that elicited similar responses from the agency, and (4) that reflect a policy "contrary to 'binding precedent.'" FDIC Mot. 25-26, 34 (citation and emphasis omitted). Those invented requirements lack any legal basis and make little sense.

For example, of course a plaintiff asserting a policy-or-practice claim must identify a FOIA policy or practice that is unlawful. But there is no heightened, qualified-immunity-style requirement that the alleged FOIA policy already be foreclosed by controlling case law. Nor would such a requirement advance the core purpose of policy-or-practice claims of preventing an agency from evading judicial review of FOIA violations by belatedly disclosing the records at issue. Indeed, that requirement would insulate an unlawful but novel FOIA policy or practice from review.

The purported requirements that a plaintiff identify "numerous" and "similar" FOIA requests fare no better. Those invented pleading requirements derive from the FDIC's mistaken view that a FOIA plaintiff must establish a "pattern" in order to plausibly allege an unlawful FOIA policy or practice. FDIC Mot. 25. To be sure, showing a pattern of agency misconduct is one way a plaintiff can plausibly allege a policy-or-practice claim. *See, e.g.*, *Citizens for Resp. & Ethics in Washington v. U.S. Dep't of Just.*, 772 F. Supp. 3d 1, 12 (D.D.C. 2025) ("*CREW*"); *Am. Ctr. for L. & Just. v. FBI*, 470 F. Supp. 3d 1, 6 (D.D.C. 2020). And to be clear, History Associates *has* adequately alleged a pattern of misconduct here, as explained below, *infra* 26-30. But the FDIC cites no case holding that a pattern of three or more similar FOIA denials is the *only* way to plausibly allege an unlawful FOIA policy or practice.

Nor could that be the law, since there are many ways 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." *Jud. Watch*, 895 F.3d at 780. For example, an agency's denial letter might refer to a written policy. *See, e.g.*, *Newport Aeronautical Sales v. Dep't of Air Force*, 684 F.3d 160, 163-64 (D.C. Cir. 2012) (explaining that a written policy—"Directive 5230.25"—established the agency's policy of denying FOIA requests for information subject to the Directive). Or an agency's legal analysis justifying its denial might indicate that it has adopted a policy or practice inconsistent with FOIA—as the FDIC did in its categorical application of Exemption 8 here. *See infra* 15-18. Or an agency's "unexplained" delays in processing FOIA requests could reveal an unlawful policy or practice. *Jud. Watch*, 895 F.3d at 780.

The bottom line is that, contrary to the FDIC's contention, there is more than one way to plausibly allege an unlawful FOIA policy or practice. Any set of facts that, taken as true, permits the plausible inference that the agency's FOIA violation was the result of a policy or practice rather than an "isolated mistak[e]" gets the plaintiff past the pleading stage. *Payne*, 837 F.2d at 491.

2. History Associates' Allegations Plausibly Allege Unlawful Policies or Practices

Measured by the proper pleading standard, History Associates' amended complaint easily passes muster for each of the four alleged unlawful policies or practices. The evidence that History Associates has already gathered through this Court's orders about the agency's actual policies and practices both confirms those allegations and demonstrates the futility and inefficiency of the FDIC's effort to quibble with the adequacy of the pleadings at this stage of the case.

a. The FDIC Unlawfully Makes Categorical Determinations When Applying Exemption 8

The amended complaint plausibly alleges that the FDIC has: (1) a policy or practice of making categorical determinations under Exemption 8, at least when responding to requests (like the pause-letter request) that seek bank supervisory documents, and (2) that the agency's policy or practice violates FOIA. That suffices to state the Exemption 8 policy-or-practice claim.

The FDIC has a policy of making categorical determinations under Exemption 8. The FDIC's written decisions responding to the pause-letter request, attached as exhibits to the amended complaint, suffice on their own to plausibly allege that the FDIC has a policy or practice of making categorical determinations under Exemption 8 for bank supervisory documents.

The FDIC does not dispute that it made a categorical withholding determination, both in its initial denial letter and in its denial of History Associates' administrative appeal. Nor could it. In the initial denial letter, the agency refused to disclose a single word of any pause letter (or even search for them) on the ground that a pause letter, "[b]y its very nature," would be "exempt from disclosure under" Exemption 8. ECF 37-2 at 1. And in its appeal-denial letter, the FDIC acknowledged that its initial "decision to withhold was based upon a determination that the type of records being requested would be exempt, rather than making exemption determinations on a document-by-document basis." ECF 37-3 at 6.

The FDIC defended its categorical withholding in terms suggestive of a broader policy. In multiple paragraphs of legal analysis in its appeal-denial letter—including a section titled "Categorical Determination"—the agency claimed broad authority under Supreme Court and D.C. Circuit precedent to deny FOIA requests categorically. ECF 37-3 at 6. And the FDIC asserted that it could exercise that authority here "[g]iven the description of the 'pause letters' in the OIG report" as "supervisory guidance from the FDIC." *Id.* at 7. Based on that description, the FDIC concluded that "there is *no question* that the 'pause letters' would … fall entirely within the 'all-inclusive' scope of Exemption 8 and would not include any segregable, non-exempt material." *Id.* (emphasis added). The agency thus did not view this as a borderline case for applying the categorical approach, notwithstanding the large amounts of segregable information the FDIC subsequently disclosed.

Throughout this litigation, moreover, the agency has never argued that this categorical determination was an "isolated mistak[e]." *Payne*, 837 F.2d at 491. To the contrary, the FDIC has steadfastly claimed that it has expansive authority to deny FOIA requests categorically under Exemption 8—including that it need not search for documents it believes to be categorically exempt. *E.g.*, FDIC Mot. 34-35 (defending categorical approach); *id.* at 12 n.6 (contending that "not conducting a search when the agency believes the documents are categorically exempt from disclosure is not improper or illegal"). The FDIC also has refused to acknowledge that its categorical determination was inappropriate *even as to the pause letters*, despite the segregable information it has since disclosed. Instead, the agency asserts that all of its disclosures in this case were "discretionary" rather than compelled by FOIA. *E.g.*, *id.* at 2, 3, 6, 10; *see also* ECF 72-2 at 3-5.

The agency's continued defense of its categorical approach makes this case analogous to *Newport Aeronautical*, where the existence of a written policy, codified in a regulation, sufficed to allege the agency had an improper FOIA policy or practice. *See* 684 F.3d at 163-64. In both cases, the agency's defense of its practice—by reference either to a regulation or to purportedly supportive case law—plausibly established that the agency's decision was not an isolated mistake, but rather the result of a deliberate, generally applicable decision about how to respond to certain FOIA requests. If the FDIC continues to believe that it is consistent with FOIA for the agency to withhold "supervisory guidance from the FDIC" based solely on the descriptions of the documents—and that the pause letters are *unquestionably* categorically exempt—it is hard to imagine why the agency would not be routinely applying that categorical approach to all bank supervisory documents. After all, it is far easier for the agency to deny FOIA requests categorically rather than searching for responsive documents and reviewing them for segregable information.

The FOIA policies that History Associates has obtained from the FDIC since filing the amended complaint confirm what the FDIC's words and actions in this case suggest. For example, the FDIC produced a policy of its division of Risk Management Supervision, which "maintains the supervisory correspondence that go back and forth with banks," like the pause letters. ECF 37-1 at 7. That policy states that any responsive document implicating "FOIA Exemption (b)(8)" should be "withheld in full." ECF 53-1 at 32 ("withheld in full, i.e. citing FOIA Exemption (b)(8)"). The same policy also states that the FDIC has "[n]o duty to segregate factual from analytical or deliberative material" when applying Exemption 8 and describes Exemption 8 in sweeping terms—calling it "all-inclusive" and the FDIC's "own FOIA exemption … to maintain the confidentiality of [its] work." *Id.* at 18, 29. Another policy the FDIC has produced reveals that 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. *Id.* at 178-79.

Although such evidence is unnecessary at the motion-to-dismiss stage, it underscores that the FDIC's effort to dismiss this case on the pleadings is an empty exercise. Rather than tussle over the plausibility of allegations that have since been corroborated and bolstered by actual evidence of the FDIC's FOIA policies, the parties should proceed with targeted additional discovery to complete the record on the scope of the FDIC's policies, as History Associates has explained in its contemporaneously filed motion for discovery. The parties could then litigate, and the Court could definitively resolve, the merits in cross-motions for summary judgment.

The FDIC's Exemption 8 policy is unlawful. The FDIC's policy of categorically denying FOIA requests under Exemption 8 is unlawful because it "ignor[es] FOIA's requirements." *Jud. Watch*, 895 F.3d at 780. In the FOIA Improvement Act of 2016, Congress put an end to the kind of blunderbuss rejection of FOIA requests the FDIC undertook here and that its policy directs its staff to apply. That enactment requires agencies to "take reasonable steps necessary to segregate and release nonexempt information," and it forbids them from "withhold[ing] information" unless "the agency reasonably foresees that disclosure would harm an interest protected by an exemption." 5 U.S.C. § 552(a)(8)(A). It is typically impossible for an agency to evaluate whether reasonably segregable information exists or whether disclosing it would be harmless if the agency does not conduct the kind of "document-by-document" review that the FDIC admittedly refused to conduct here. ECF 37-2 at 1. Deciding that an entire category of records contains no segregable portions that must be disclosed based merely on the "type of records" often will result in the agency withholding information that FOIA requires it to disclose, as this case demonstrates.

In arguing otherwise, the FDIC relies on cases upholding categorical denials under Exemptions 5 and 7. *See* FDIC Mot. 34-35 (citing *U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 777 (1989); *FTC v. Grolier Inc.*, 462 U.S. 19, 27-28 (1983); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 241 (1978)). But those cases approved categorical determinations for narrow sets of documents. *Robbins Tire* involved "witness statements in pending unfair labor practice proceedings." 437 U.S. at 236. *Reporters Committee* concerned "law enforcement records or information about a private citizen … when the request seeks no 'official information.'" 489 U.S. at 780. And *Grolier* involved only attorney "work-product materials." 462 U.S. at 27.

None of those cases approaches the circumstances here. History Associates plausibly alleges (and the evidence supports) that the FDIC has a policy of categorically denying requests seeking any bank-supervisory documents. By the FDIC's own reckoning, that category encompasses nearly *two million* documents at the FDIC alone—and likely millions more at other federal regulators with supervisory relationships. FDIC Mot. 12 n.7.

Carving out such a sweeping category of documents from the 2016 amendment's segregability and foreseeable-harm requirements would neuter them as applied to Exemption 8. It would also be wildly overinclusive, as demonstrated by the many redactions of innocuous material the FDIC made to the supervisory documents it produced in this case. Under the FDIC's approach, all of the information it disclosed in response to this Court's orders—disclosures that prompted congressional hearings—could be forever withheld from public view. That is flatly inconsistent with FOIA's purpose of "open[ing] agency action to the light of public scrutiny." *U.S. Dep't of Just. v. Tax Analysts*, 492 U.S. 136, 142 (1989).

The FDIC suggests that the "breadth" of Exemption 8 justifies a broad categorical approach, FDIC Mot. 34, but it cites no case under Exemption 8 approving the kind of expansive categorical approach that History Associates has plausibly alleged here. Indeed, the *only* case the agency cites that has approved a categorical determination under Exemption 8 predates the FOIA Improvement Act of 2016. *Pub. Invs. Arb. Bar Ass'n v. SEC*, 930 F. Supp. 2d 55, 60 (D.D.C. 2013). And even that case involved discrete categories of documents, such as those related to the SEC's review of FINRA's "selection, appointment, and replacement" of FINRA arbitrators, its "pre-approval background check[s] on arbitrator applicants," and its processes for "deciding causal challenges to an arbitrator's appointment." *Id.* No case supports the FDIC's policy of refusing to review all bank supervisory documents for non-exempt or harmless information.

b. The FDIC Fails to Construe FOIA Requests Liberally

The amended complaint also more than adequately alleges that the FDIC has a policy or practice of failing to construe FOIA requests liberally. The D.C. Circuit has repeatedly held that, although a FOIA "requester must 'reasonably describe[]' the records sought, 5 U.S.C. § 552(a)(3), an agency also has a duty to construe a FOIA request liberally." *Nation Mag., Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (citing, *e.g.*, *Truitt v. Dep't of State*, 897 F.2d 540, 545 (D.C. Cir. 1990)); *see also Inst. for Just. v. IRS*, 941 F.3d 567, 572 (D.C. Cir. 2019) ("our case law has often repeated that an agency has a duty to construe a FOIA request liberally" (quotation marks omitted)); *Callaway v. U.S. Dep't of Treasury*, 2009 WL 10184495, at *1 (D.C. Cir. June 2, 2009) (per curiam) (summarily vacating summary judgment granted to agency for failure to liberally interpret the FOIA request). That requirement derives from "the liberal standard for identification [of records] that Congress intended" in FOIA. *Truitt*, 897 F.2d at 545 (quoting S. Rep. No. 93–854, 93d Cong., 2d Sess. 10 (1974)). The FDIC does not deny that it has an obligation to construe FOIA requests liberally. It argues only that History Associates has failed to sufficiently allege an agency policy or practice of construing requests more narrowly than FOIA requires. But History Associates' allegations easily clear that bar.

The agency's treatment of History Associates' pause-letter request is a case in point. The FDIC construed History Associate's request for "'[c]opies of all pause letters described in' the OIG report" as confined to seeking only copies of pause letters *shared with* the OIG in preparing its report. ECF 37 ¶ 97. As this Court recognized, that was a "narrow" and "illogical view" of the request. ECF 37-1 at 3. And it was a view endorsed not by a low-level FOIA employee but by the FDIC's senior counsel in this case, who signed the agency's appeal-denial letter. *See* ECF 37-3 at 8; FDIC Mot. 46. As the FDIC's later productions revealed, its narrow construction led it to miss numerous pause letters. *See, e.g.*, FDIC Records—Correspondence Related to Crypto-Related Activities (Feb. 5, 2025), https://bit.ly/4hu1Vsi ("Feb. 5 Production"), at 3, 6, 11, 22, 29, 37, 45, 58, 72, 75, 87, 94, 99, 116, 119, 137, 164, 173, 189, 198, 238, 246, 252, 270.

But, although the FDIC's handling of the pause-letter request is a stark example, it is not alone. History Associates also has alleged that the FDIC narrowly construed one of History Associates' separate crypto-debanking-related FOIA requests. ECF 37 ¶ 98. Although that request sought *all* agency communications related to a particular crypto-related policy statement, the FDIC interpreted the request to seek only documents and communications of "the FDIC Board of Directors and/or FDIC Staff who would be reasonable custodians of the requested documents." ECF 37-7. That unilaterally adopted, narrow construction, which resulted in the agency finding "no records" in response to the request, *id.*, bolsters the plausible inference that the FDIC's failure to liberally construe the pause-letter request was not an isolated mistake but rather a manifestation of an agency practice of narrowly construing requests.

The evidence that History Associates has obtained from the FDIC since amending the complaint confirms again History Associates' allegations that these cramped constructions of FOIA requests stem from systemic dysfunction. A necessary first step for an agency to comply with

FOIA's requirement to construe requests liberally is for the agency to instruct its employees reviewing FOIA requests that they must construe requests liberally. An agency's duty to "construe a FOIA request liberally," *Nation Mag.*, 71 F.3d at 890, is critical to preventing frustration of FOIA's purposes. But that obligation may not be obvious to agency staff not steeped in FOIA case law. For an agency to discharge that duty, the agency must therefore ensure that its employees are aware of and understand that requirement—through training, guidance, or otherwise. Yet the FDIC's policies and training materials say *nothing* about construing requests liberally. Nor do they convey the substance of the liberal-construction requirement—for example, by telling employees to adopt a broader interpretation of a request over a narrower one when in doubt.

To the contrary, the FDIC's policies are at best confusing and at worst push employees towards disclosing *less* than FOIA requires. For example, the policy of the FDIC's division of Risk Management Supervision instructs FOIA employees to "only provide what is 'reasonably interpreted,'" and it then points employees to the policy's appendix for the definition of "reasonably interpreted." ECF 53-1, at 19. But while the appendix indeed lists "reasonably interpret" as a defined term, it provides no *definition*, *id.* at 49—an omission the agency has confirmed is no fluke, ECF 70 ¶ 26 ("there is no final version of the policy that defines the requested terms"). A FOIA employee easily could understand that policy to require putting a thumb on the scale *against* production, or at a minimum interpreting the request neutrally, rather than interpreting it liberally as FOIA demands.

Thus, although History Associates' pleadings more than suffice on their own, the supporting evidence History Associates has since obtained both confirms that the FDIC systematically fails to comply with FOIA's liberal-construction requirement and all but guarantees that the FDIC will not be able to dismiss this policy-or-practice claim on the pleadings.

c. The FDIC Inadequately Searches for Responsive Records

The amended complaint further adequately alleges a policy or practice of failing to conduct adequate searches in response to FOIA requests. Once an agency properly construes the scope of a FOIA request, it must make "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 584 (D.C. Cir. 2020). The FDIC does not dispute that FOIA requires it to conduct a reasonable search, and History Associates has plausibly alleged that the agency has a policy or practice of failing to discharge that duty.

Once again, the agency's response to the pause-letter request here is illustrative. It took *four* court orders and *six* productions for the FDIC to identify and produce all documents responsive to History Associates' relatively narrow pause-letter request. The FDIC found 23 pause letters in its first search in November, then 25 in January, and later *dozens* more.[2]

And, once again, the pause-letter request is not alone. History Associates has alleged that the FDIC turned up an implausibly low number of records in response to several separate requests related to other crypto-debanking-related issues. ECF 37 ¶¶ 100-101. For example, the FDIC found zero records discussing a highly publicized Federal Reserve crypto-related policy statement that mentioned the FDIC 20-plus times. ECF 37-11. The FDIC also has not produced a single document from collaboration platforms such as Microsoft Teams in response to any of History Associates' FOIA requests, ECF 37 ¶ 101, despite its productions repeatedly referring to Teams. *E.g.*, Feb. 5 Production at 390-91, 404-07, 580-83, 639-41, 746. Together, these instances are more than enough to allege a policy or practice of conducting insufficient searches.

[2] *See* Sept. 18, 2024 Minute Order; Nov. 4, 2024 Minute Order; Dec. 12, 2024 Minute Order; Jan. 22, 2025 Minute Order.

The FDIC argues that courts have often rejected the inference that an agency's search was inadequate because it failed to turn up records. FDIC Mot. 40-42. That may be true when courts are evaluating the adequacy of a search in response to a single FOIA request. *See, e.g.*, *Watkins L. & Advoc., PLLC v. U.S. Dep't of Just.*, 78 F.4th 436, 444 (D.C. Cir. 2023); *Clemente v. FBI*, 867 F.3d 111, 118 (D.C. Cir. 2017). But here, the question is whether the FDIC's clearly inadequate search for pause letters was an isolated mistake or the result of an agency policy or practice. In that context, additional examples of the agency turning up an implausibly low number of records at least raise an inference of an insufficient search process.

That pleading-stage inference has already been bolstered by the FDIC's subsequently produced policies. The FDIC apparently assigns FOIA requests to "employees in the divisions and offices [to] conduct the searches" for responsive records. ECF 53-1, at 120-21; *see also* Ex. B, at 68 (training slide explaining that "Identified [record] Custodians … conduct search" in the FOIA-request work flow). But, just as its policies and training materials do not instruct those employees to construe requests liberally, they likewise fail to instruct employees on how to conduct proper searches. For example, neither the policies nor training materials instruct employees on how to construct search terms, provide guidance on which document repositories to search for different kinds of requests, or explain how to search the FDIC's various record repositories. *See* Ex. B, at 41-44, 109-16. Given such threadbare guidance, FDIC staff cannot be "reasonably expected to produce the information requested." *Evans*, 951 F.3d at 584.

d. The FDIC Lacks Adequate Document-Preservation Procedures

Finally, History Associates has plausibly alleged that the FDIC has a policy or practice of failing to take the steps necessary to ensure that records responsive to FOIA requests are properly preserved. The FDIC does not dispute that an agency must preserve documents that are the subject of pending FOIA requests. *See Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1004 (D.C. Cir.

2009) (agency cannot "intentionally transfer[] or destroy[] a document after it has been requested under FOIA"). That obligation is heightened once a FOIA request becomes the subject of FOIA litigation. In those circumstances, like any party facing actual or imminent litigation, the agency must "prevent the destruction of" the responsive "documents by issuing a litigation hold on the documents." *United States ex rel. Miller v. Holzmann*, 2007 WL 781941, at *2 n.2 (D.D.C. Mar. 12, 2007); *see also Nunnally v. District of Columbia.*, 243 F. Supp. 3d 55, 73 (D.D.C. 2017) ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."). Failing to do so can constitute "negligent conduct" that "should be deemed sanctionable." *Holzmann*, 2007 WL 781941, at *2 n.2.

History Associates' amended complaint plausibly alleges that the FDIC lacks sufficient preservation mechanisms. Its senior counsel acknowledged that a litigation hold was not instituted in response to this lawsuit and was unaware that litigation holds are required once a FOIA lawsuit is initiated. *See* ECF 37 ¶ 103; ECF 37-2 at 5-8. Subsequent to the filing of the amended complaint, moreover, FDIC counsel represented to the Court that the agency has no policy of issuing litigation holds in response to FOIA lawsuits generally—albeit based on the mistaken understanding that FOIA cases are APA cases. *See* ECF 38-1 at 10 (FDIC Counsel asserting that "in APA cases where there is a closed record the FDIC does not routinely issue legal holds"). *But see* 5 U.S.C. § 552(a)(4)(B) (providing for a "de novo" determination of whether the agency must produce the records). And that representation is confirmed by the FDIC's policies and training materials, which say nothing about instituting litigation holds or otherwise preserving documents.

The FDIC argues that this claim must fail unless History Associates alleges that the agency in fact "failed to preserve or deliberately destroyed documents" responsive to one of its requests.

FDIC Mot. 29. But that misunderstands the policy or practice at issue. History Associates is not alleging that the FDIC has a policy or practice of destroying responsive documents, but rather that it has inadequate document-preservation measures in place, which in turn creates an undue risk that documents will be lost. Alleging actual document destruction is not necessary to plausibly plead that the agency's document-preservation process is defective.

The FDIC also suggests that a litigation hold is unnecessary because the agency's RADD database has a 30-year retention policy. FDIC Mot. 31. But the nature of that database's retention policy is a factual question that cannot be resolved on the pleadings. And regardless, the FDIC overstates RADD's protections. RADD's retention policy has an exception with a much shorter retention schedule for certain "workpapers." ECF 72-9, at 2. The agency says that exception is "not relevant here" but provides no further explanation. ECF 72-4 ¶ 21 The retention schedule also states that copies of documents imported into RADD should not be deleted if "subject to a preservation notice or legal hold"—indicating that the FDIC recognizes that litigation holds are appropriate to ensure preservation of documents even for records within RADD in at least some circumstances. ECF 72-9 at 1. The FDIC also admits that certain "employees, contractors, and former contractors can permanently delete documents from the RADD and its archive." FDIC Mot. 13 n.8. And the agency nowhere suggests that *other* FDIC databases—for example, Microsoft Teams chat logs—have comparable retention policies. As History Associates has explained in its motion for discovery, these unanswered factual questions (among others) demand a targeted 30(b)(6) deposition. They are not grounds for dismissal on the pleadings.

3. History Associates' Allegations Also Satisfy the FDIC's Invented Pleading Requirements

Although the foregoing more than suffices to show that History Associates has plausibly pleaded each policy-or-practice claim under the governing standards, History Associates' amended complaint would also meet the FDIC's invented policy-or-practice pleading standard. For each of the policy-or-practice claims, History Associates has alleged numerous instances of the FDIC violating FOIA in similar ways when responding to crypto-debanking-related FOIA requests.

Numerosity. The FDIC first contends that a policy-or-practice plaintiff must point to "'repeated requests.'" FDIC Mot. 25-26 (emphasis omitted) (quoting *CREW*, 772 F. Supp. 3d at 12). History Associates has done that. It has alleged two instances of the FDIC categorically withholding bank supervisory documents, two instances of the FDIC failing to construe requests liberally, and four instances of the FDIC inadequately searching for documents (including multiple rounds of inadequate searches in this case alone). *See* ECF 37 ¶¶ 93-101. As for document preservation, the FDIC has conceded that it has a policy of refusing to issue litigation holds across the board. *See supra* 25.

The FDIC therefore tries to ratchet up its numerosity requirement. It first asserts that "two FOIAs are not enough to establish numerosity." FDIC Mot. 31; *see also id.* at 27-28, 33, 35. But the agency provides no sound basis for its at-least-*three*-FOIAs rule. It points to an inapposite Supreme Court decision stating that, "[i]n common parlance, two of anything do not generally form a 'pattern.'" *Id.* at 28 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985)). But that decision was interpreting a statute that used the *word* "pattern" ("pattern of racketeering activity" in RICO). Nothing in FOIA or D.C. Circuit precedent uses the word "pattern" in defining a policy-or-practice claim. *See supra* 14. The FDIC also cites *Khan v. U.S. Dep't of Homeland Sec.*, 2023 WL 6215359 (D.D.C. Sept. 25, 2023), in support of its at-least-three-FOIAs rule. But *Khan* held only that two languishing FOIA requests did not suffice to plausibly allege an agency practice "of untimely adjudication of FOIA requests," given that the agencies "had responded to" six of the plaintiff's eight requests. *Id.* at *6-7 (quotation mark omitted). The agency's reliance on *CREW*, 772 F. Supp. 3d 1, is equally misplaced. There, the court in dicta cited *Khan*, and expressed "doubt as to whether only two separate instances could amount to a detectable pattern." *Id.* at 16. As discussed, however, that doubt is unwarranted and flows from a misreading of *Khan* and misplaced focus on the word "pattern."

Attempting to move the goalposts still further, the FDIC argues that a denial of a FOIA request cannot count toward its contrived three-FOIA-denials threshold unless the plaintiff appealed the denial within the agency. FDIC Mot. 35-38. But that conflates the requirements for obtaining judicial relief for a particular FOIA request (administrative exhaustion) with the standard for pleading an unlawful FOIA policy or practice. Policy-or-practice claims focus on an agency's conduct, and an agency's handling of a request in an initial decision can reflect its policy or practice no less than its adjudication of an administrative appeal. Indeed, *Payne*, the leading policy-or-practice case, involved an agency's practice of denying requests on invalid grounds that were repeatedly (but belatedly) corrected on administrative appeal. 837 F.2d at 489. Disregarding FOIA denials that are not administratively appealed would also eviscerate the policy-or-practice doctrine. Many unlawful practices—including failing to interpret FOIA requests properly, to conduct adequate searches, or to preserve records—may not be apparent from the face of the FOIA-request denial and may not alert the requester of the basis to appeal.

Similarity of requests. The FDIC's second proffered pleading requirement—"similarity between its requests"—likewise is satisfied here. FDIC Mot. 26. As this Court recognized at the May 29, 2025 pre-motion conference, all of the FOIA requests that History Associates filed with the FDIC are similar in that they seek "crypto-related information." Ex. A at 25. More specifically, as History Associates explained in the amended complaint, the requests all seek to unearth information about "Operation Choke Point 2.0—a coordinated effort" by "federal financial regulators" to "cut off the digital-asset industry from the banking sector." ECF 37 ¶ 38.

The FDIC's argument (Mot. 33) that the only similarity between the requests is that "each happens to make high-level references to crypto or digital assets" is belied by the text of the requests. *See* ECF 37-2; ECF 37-4; ECF 37-7; ECF 37-9; ECF 37-11. And more broadly the FDIC's argument contradicts its own cited cases, which hold that requests are sufficiently similar to plausibly allege a pattern of misconduct so long as they "[a]re about the same *subject matter*." *CREW*, 772 F. Supp. 3d at 12 (emphasis added) (six requests seeking "publicly disclosed investigations into third parties" were sufficiently similar). The crypto-debanking-related requests that History Associates submitted to the FDIC certainly satisfy that "same subject matter" standard.

Similarity of responses. The FDIC's third manufactured pleading requirement—"similarity in the agency's responses," FDIC Mot. 26—also provides no basis for dismissing any of History Associates' policy-or-practice claims. Consider the agency's two categorical Exemption 8 determinations alleged in the amended complaint. When withholding both the pause letters and the meeting minutes of its Crypto Asset Working Group, the FDIC relied on Exemption 8 to withhold the records in full without considering whether it had to disclose any segregable portions of those records. The FDIC's argument (Mot. 31-32) that it did not make a categorical determination—despite withholding the meeting minutes in full—is a quintessential factual dispute that cannot be resolved on a motion to dismiss. The fact that on administrative appeal its senior counsel in this case remanded the request to the FOIA officer with instructions to conduct an unspecified "further assessment"—which has languished with no progress for six months—only raises further questions about the propriety of the initial decision. ECF 37-6.

The FDIC's responses to the remaining requests also share similar traits discussed above. The agency adopted unilateral and textually unjustifiable narrowing constructions of two of History Associates' FOIA requests without consulting History Associates. *See supra* 21. Its four inadequate searches were sufficiently similar in the only way they could be—they all produced an implausibly low number of responsive documents. *See supra* 23. And the FDIC's apparent policy of failing to implement litigation holds across the board is definitionally similar. *See supra* 25.

Violates binding precedent. Finally, even if History Associates had to show that the FDIC's policies or practices violated "binding precedent"—a qualified-immunity-style requirement that the agency nowhere justifies—History Associates has done so. The FDIC does not dispute that binding precedent requires it to: (1) construe FOIA requests liberally, (2) conduct reasonable searches in response to FOIA requests, and (3) take steps to preserve documents that are subject to FOIA requests. And binding precedent holds that a categorical approach may be used "[o]nly when the range of circumstances included in the category characteristically supports an inference that the statutory requirements for exemption are satisfied." *Nation Mag.*, 71 F.3d at 893 (quotation marks and brackets omitted). That is not the case for the FDIC's broadly constructed category of all bank supervisory documents.

4. If The Court Dismisses any Policy-or-Practice Claims, History Associates Should Be Granted Leave to Amend its Complaint

If the Court determines that History Associates has not adequately pleaded any of its policy-or-practice claims, dismissal should be without prejudice and with leave to amend. "Leave to amend a complaint 'shall be freely given when justice so requires,' Fed. R. Civ. P. 15(a), and dismissal with prejudice should be granted only when the trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency."

Jarrell v. U.S. Postal Serv., 753 F.2d 1088, 1091 (D.C. Cir. 1985) (some quotation marks omitted); *see Belizan v. Hershon*, 434 F.3d 579, 583 (D.C. Cir. 2006) (same).

That is not the case here. Since filing the amended complaint, History Associates has received from the FDIC copies of its written policies and training materials, which (as discussed) corroborate History Associates' allegations. If this Court finds any deficiency in the allegations in the amended complaint, the proper remedy would be to allow History Associates to amend the complaint to conform to the since-obtained evidence. That would "allow[] maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities," as the Federal Rules envision. *Belizan*, 434 F.3d at 583 (quotation marks omitted); *see, e.g.*, Fed. R. Civ. P. 1, 15(a)(2), (b)(1).

But the Court need not and should not go through the empty exercise of dismissing the amended complaint just so that History Associates can amend it again to incorporate evidence that is already before the Court. The far more efficient course is to deny the agency's motion to dismiss, allow the targeted additional discovery History Associates needs (as identified in its contemporaneous motion for discovery), and proceed to cross-motions for summary judgment.

B. The Policy-or-Practice Claims Are Ripe

The FDIC separately seeks to avoid confronting History Associates' policy-or-practice claims on the merits by contending that they are prudentially unripe for judicial review. That contention is meritless. The prudential ripeness doctrine requires a court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967). And the second of those factors comes into play "only if the fitness of the issue for judicial resolution is in doubt." *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739 n.13 (D.C. Cir. 1990) (per curiam). Both factors strongly favor reaching the merits of History Associates' policy-or-practice claims. The FDIC's contrary arguments would, again, largely nullify the D.C. Circuit's policy-or-practice doctrine.

1. The Policy-or-Practice Claims Are Fit for Judicial Review

The "fitness requirement is primarily meant to protect 'the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting.'" *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012). That factor focuses on whether the disputed issue is "legal" rather than factual, "whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Id.*

The FDIC does not dispute that this case presents legal questions. And for good reason: To resolve policy-or-practice claims, the court must decide whether the agency's policies or practices that the plaintiff alleges and eventually proves violate FOIA. And as explained above, that is true of each of the FDIC's policies and practices that History Associates has alleged: (1) categorically denying FOIA requests for bank supervisory documents under Exemption 8; (2) failing to instruct its employees to construe FOIA requests liberally; (3) failing to provide guidance to employees on how to conduct searches; and (4) refusing to implement litigation holds or otherwise take adequate steps to preserve records subject to a FOIA lawsuit. Those policies and practices "cannot be lawful under any circumstances" and thus are ripe for judicial review. *Cause of Action Inst. v. U.S. Dep't of Just.*, 999 F.3d 696, 704 (D.C. Cir. 2021).

That those legal questions embed factual questions about the existence of the policies or practices changes nothing relevant to ripeness. Every policy-or-practice claim requires proof that an agency in fact has an unlawful policy or practice, yet the D.C. Circuit has rejected ripeness challenges to policy-or-practice cases as far back as *Payne*. *See* 837 F.2d at 492-94; *see also SOME, Inc. v. Hanover Ins. Co.*, 2021 WL 2935893, at *6 n.2 (D.D.C. July 13, 2021) ("[O]bviously prudential deferral is not necessary simply because factual disputes require resolution.”). Those subsidiary factual questions do not change the ultimate inquiry: whether the agency’s acts or omissions add up to an unlawful FOIA policy or practice—the kind of fundamentally legal question courts resolve every day.

Here, moreover, the embedded factual questions are concrete. To decide them, this Court will need to examine specific examples of FOIA denials, the FDIC’s written policies, and other evidence establishing the existence of the FDIC’s existing policies and practices. There is nothing theoretical or abstract about that inquiry.

The FDIC argues that its processing of certain requests “remains ongoing” and that “facts have not developed to the point that Plaintiff can identify a sufficient number of past examples to support a policy or practice claim.” FDIC Mot. 42-43. But that is just a recast version of the FDIC’s argument for a heightened pleading standard, and it fails for the same reasons already discussed.

The FDIC also contends that History Associates’ “apprehension that the agency maintains policies or practices that *may* lead to future noncompliance” is too “amorphous” a “basis for a FOIA policy or practice claim.” FDIC Mot. 43. But as the FDIC recognizes in the previous sentence of its brief, History Associates is not pointing to possible future noncompliance in the abstract. Rather, History Associates has alleged that it will be harmed because it “‘has pending and soon-to-be-submitted FOIA requests with FDIC that are likely to be subject to the FDIC’s unlawful policies or practices.’” *Id.* (quoting ECF 37 ¶ 124). It is well settled that such allegations establish History Associates’ standing to challenge an agency’s policies or practices. *See, e.g.*, *Tipograph v. Dep’t of Just.*, 146 F. Supp. 3d 169, 176 (D.D.C. 2015) (“One way for a plaintiff to make this showing [of standing] is to ‘demonstrate that [it has] pending FOIA requests that are likely to implicate the policy or practice.'" (citation and emphasis omitted)). But if those same allegations sufficient to support standing also rendered the claims unripe, the policy-or-practice doctrine would be self-defeating.

Equally unavailing is the FDIC's contention that History Associates' claims are unripe because they are "premised on future events" that "'may not occur as anticipated.'" FDIC Mot. 45 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). History Associates alleges that the FDIC has *existing* unlawful FOIA policies and practices that the agency is *currently* applying to History Associates' pending FOIA requests. That those policies and practices may also be applied in the future only increases the need for judicial review of History Associates' claims today.

Finally, the FDIC argues that the "alleged practices are too broad to assess in the abstract." FDIC Mot. 44. But the FDIC can make that argument only by mischaracterizing the alleged unlawful policies and practices. History Associates is not alleging that it is unlawful for Exemption 8 to be "applied broadly," *id.*, but rather that the FDIC may not reflexively make categorical determinations under Exemption 8 for all bank supervisory documents. Likewise, History Associates is not alleging that the FDIC must refrain from construing FOIA requests "more narrowly than a requester would prefer" or from using a "search approach with which the requester disagrees." *Id.* Instead, History Associates alleges merely that the FDIC must provide *some* guidance to its employees about FOIA's liberal-construction standard and how to reasonably search for responsive documents. Nor is History Associates arguing that the FDIC's document-preservation practices are "universally unlawful," *id.*, but instead that it violates FOIA for the FDIC to refuse to implement litigation holds or other adequate preservation measures in response to FOIA lawsuits. Properly construed, the alleged policies and practices are concrete and fit for judicial review.

2. Dismissal Would Cause Hardship to History Associates

Because the "issue[s] [are] fit for judicial decision," this Court "need not evaluate the hardship to the parties" and can "proceed" to decide "the merits." *Beach Commc'ns, Inc. v. FCC*, 959 F.2d 975, 986 n.18 (D.C. Cir. 1992) (quotation marks omitted). But even if the fitness question were close and required consideration of hardship, History Associates "has demonstrated sufficient hardship to outweigh any institutional interests in the deferral of review." *Payne*, 837 F.2d at 493 (quotation marks omitted).

Payne is dispositive on this point. There, the D.C. Circuit held that the alleged unlawful FOIA policy had a "direct and immediate impact" that "rises to the level of hardship" because "Payne relies heavily and frequently on FOIA to conduct work that is essential to the performance of certain of [its] primary institutional activities." 837 F.2d at 494 (quotation marks omitted). So too for History Associates—which is in the business of submitting FOIA requests, ECF 37 ¶ 15—and Coinbase, which (through History Associates) has turned repeatedly to FOIA to bring to light undisclosed agency hostility toward digital assets. History Associates and Coinbase thus have an especially strong "interest in prompt consideration of allegedly unlawful agency action." *Muckrock, LLC v. CIA*, 300 F. Supp. 3d 108, 121 (D.D.C. 2018).

The FDIC argues that delay will cause no harm because History Associates need only "file another suit." FDIC Mot. 45 (quoting *Cause of Action Inst.*, 999 F.3d at 705). But if the FDIC has its way, filing another FOIA lawsuit would not result in any changes to the agency's unlawful policies or practices. Instead, the agency could moot case after case by simply disclosing the requested documents (after drawn-out litigation and court orders compelling disclosure) without changing its unlawful policies and practices. That outcome is precisely what policy-or-practice claims are designed to prevent.

Moreover, there is urgency to the debanking-related FOIA requests that Coinbase engaged History Associates to submit. History Associates filed its requests years ago in order to shed light on the FDIC's role in the federal government's war on crypto under the prior Administration. The documents disclosed during this litigation have advanced Congress's and the public's understanding of Operation Choke Point 2.0 and have led to congressional hearings and reform efforts. *See supra* 7. And debate is ongoing now in Congress and the public square about how to regulate digital assets. History Associates and Coinbase accordingly need to pursue their FOIA requests for further disclosures *now* to facilitate the regulatory and legislative changes necessary to ensure that federal banking regulators do not backslide into debanking industries they disfavor. That too is a "sufficient hardship to outweigh any institutional interests in the deferral of review." *Payne*, 837 F.2d at 493 (quotation marks omitted).

II. The Court Should Grant History Associates Summary Judgment On Count I And Require The FDIC To Remove Certain Redactions From The Pause Letters

On Count I—which challenges the FDIC's response to the pause-letter FOIA request—History Associates has largely prevailed, and the remaining dispute is narrow. As a result of this Court's orders, the FDIC belatedly fulfilled its statutory obligation to search for and produce redacted records responsive to History Associates' pause-letter request. History Associates does not contest most of the redactions to the letters the FDIC has produced. But History Associates does dispute whether the FDIC's redactions of two discrete categories of information from the pause letters comport with FOIA: (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.[3]

[3] The particular examples of those redactions History Associates has identified are listed in Appendix A, but the FDIC should be ordered to reveal *all* information falling within the categories History Associates has identified.

FOIA does not permit the FDIC to redact those two categories of information. The FDIC has not met its burden to show that the redacted information is subject to a FOIA exemption and that its disclosure would result in any harm to an interest protected by a FOIA exemption. The Court therefore should require the FDIC to re-produce all of the pause letters without redacting those two categories of information.[4]

A. The FDIC Bears the Burden To Justify Its Redactions

FOIA creates a "strong presumption in favor of disclosure." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). As amended in 2016, it requires an agency to disclose "[a]ny reasonably segregable portion of a record" unless that portion is exempt from disclosure *and* its disclosure "would harm an interest protected by the exemption." 5 U.S.C. § 552(a)(8)(A)(i), (b). "Congress added the distinct foreseeable harm requirement to foreclose the withholding of material unless the agency can 'articulate both the nature of the harm [from release] and the link between the specified harm and specific information contained in the material withheld.'" *Reps. Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369 (D.C. Cir. 2021) (quoting H.R. Rep. No. 391, 114th Cong., 2d Sess., at 9 (2016)).

The FDIC bears the burden of proof on both aspects. "[I]n order to be entitled to summary judgment, the [FDIC] need[s] to establish beyond any genuine dispute that the" redacted information can be withheld under FOIA. *Evans*, 951 F.3d at 586. That means it must "show that a [redaction] fits within the exemption." *Watkins L.*, 78 F.4th at 451. And the agency must "identify the nature of the harm and show that it will likely result from disclosure of the particular infor-

[4] However the Court resolves Count I, History Associates intends to seek attorneys' fees under FOIA because it "has substantially prevailed" by virtue of the FDIC's production of the redacted pause letters, 5 U.S.C. § 552(a)(4)(E)(i), regardless of whether those products were in response to the Court's orders or reflected "voluntary or unilateral" action by the agency, *id.* § 552(a)(4)(E)(ii).

mation the [FDIC] seek[s] to withhold." *Hum. Rts. Def. Ctr. v. U.S. Park Police*, 126 F.4th 708, 714 (D.C. Cir. 2025).

B. The FDIC Has Not Met Its Burden To Justify Its Redaction Of Two Categories Of Information

The FDIC seeks to withhold the redacted information under Exemptions 4 and 8. FDIC Mot. 15-20. Exemption 4 covers "matters that are … trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Exemption 8 applies to "matters that are … contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." *Id.* § 552(b)(8).[5] To justify the redactions, the FDIC must establish that disclosing the redacted information would foreseeably "harm an interest protected by" Exemptions 4 or 8. *Id.* § 552(a)(8)(A). The FDIC has failed to carry that burden with respect to two discrete categories of information.

1. Disclosing the Two Categories of Information Would Be Harmless

The FDIC cannot show that any harm would follow from disclosing the two categories of currently redacted information: (1) the numerical percentage deposit cap imposed by a bank on deposits from crypto companies; and (2) the names of public blockchains banks proposed to use.

Percentage cap. The FDIC cannot justify its redaction of the numerical percentage deposit cap imposed by a bank on deposits from crypto companies. *See, e.g.*, ECF 48-2 at 51 (bank "placed a cap on digital asset-related deposits to [redacted] of total deposits"). The FDIC has disclosed the *existence* of the deposit cap but continues to redact the *percentage* of the cap. The percentage of the cap could provide important evidence of the FDIC's debanking activities—for example, if

[5] The FDIC also argues (FDIC Mot. 20-21) that certain redacted information is protected by Exemption 6, which applies to certain "personnel … files." 5 U.S.C. § 552(b)(6). But that exemption appears to be inapplicable to the two categories of information that History Associates is challenging.

it corroborates public reporting that the FDIC informally imposed a 15% crypto deposit cap on banks. *See, e.g.*, Veronica Irwin, *Regulators Are Limiting Banks Serving Crypto Clients. Does That Violate the Law?*, Unchained (Oct. 8, 2024), https://bit.ly/41zFvPs.

The FDIC's motion nowhere defends its redaction of the deposit-cap percentage, even though History Associates has repeatedly argued that the redaction is "unjustified." *E.g.*, ECF 48 at 6-7; ECF 44 at 4-5. In a prior filing, however, the agency argued that the percentage of the cap can be withheld under FOIA because the percentage "was, in this case, self-imposed and shared in a bank-authored document," rendering it per se "confidential and proprietary business information … exempt from disclosure under FOIA Exemptions 4 and 8." ECF 48 at 13. But even if the percentage cap were "self-imposed" by financial institutions—rather than a result of the FDIC's pressure tactics—the agency has already disclosed the *existence* of the deposit cap. And it has never explained why the percentage of the cap should be treated differently under FOIA.

At a minimum, it is hard to see how disclosing the cap's percentage could possibly "harm an interest protected by" Exemptions 4 or 8 now that the existence of the cap has been revealed. 5 U.S.C. § 552(a)(8)(A). There is no reason to believe that revealing the numerical percentage of the cap materially increases the risk of the bank being identified or would harm the FDIC's supervisory relationship with any bank. The FDIC certainly has offered no such explanation.

Public blockchains. The FDIC also impermissibly redacted the names of public blockchains. A public blockchain is a digital ledger that publicly records digital-asset transactions on the Internet and runs blockchain-based applications. *See* Coinbase, *What Is a Blockchain?*, http://bit.ly/4faayHW. It is not a company, but rather open-source software that can be used by anyone with an Internet connection and is often operated in a decentralized manner. By design, public blockchains have no relationship with any bank or the FDIC and are used by millions of people and institutions. *See* Ledger Academy, *What Is a Public Blockchain?*, http://bit.ly/4mlehF7. Major public blockchains include Bitcoin, Ethereum, Solana, and the XRP Ledger. A private blockchain, by contrast, is a digital ledger that sometimes *does* have an identifiable owner.

In several records, the FDIC redacted the name of the public blockchain that the bank was proposing to use in order to offer crypto-related products or services. For example, one record states that a bank's proposed crypto token "will operate on the [redacted] a decentralized public Blockchain, rather than on the [redacted], a private, permissioned Blockchain." ECF 27-2 at 11; *see also id.* at 24-25 (referring to a "public [redacted] blockchain").

As with the percentage of the deposit cap, the FDIC's motion nowhere justifies its redactions of the names of public blockchains, even though History Associates has repeatedly objected to those redactions. *See* ECF 44, at 4; ECF 48, at 6-7. Nor is any justification apparent. Revealing that a bank planned to use a particular public blockchain (like Ethereum) is roughly akin to revealing that the bank intended to use a specific browser (like Google Chrome). Both are simply pieces of software used by millions of people and businesses for various purposes, except that a public blockchain is even *more* widely available because of its permissionless, decentralized nature. That a bank intended to use a particular public blockchain would reveal nothing about the bank's identity, because anyone can use that same public blockchain. That is especially true because the FDIC *prevented* the banks from actually using these blockchains. Nor would it reveal anything about what the bank intended to do with the blockchain (since public blockchains support many applications). Thus, the FDIC cannot meet its burden of showing that disclosing the names of public blockchains would "harm an interest protected by" Exemptions 4 or 8. 5 U.S.C. § 552(a)(8)(A).

2. The FDIC's Declarations Are Too Generic To Establish Foreseeable Harm

In an effort to meet its burden under FOIA, the FDIC has submitted three declarations by FDIC employees that purport to explain why the cited FOIA exemptions apply and why disclosure of the redacted information would harm an exemption-protected interest. But where, as here, an agency seeks to rely on a declaration to meet its burden of proof under FOIA, the declaration must provide a "detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document." *Watkins L.*, 78 F.4th at 451. The agency also must explain "the nature of the harm" it believes will "result from disclosure of the particular information the agenc[y] seek[s] to withhold." *Hum. Rts. Def. Ctr.*, 126 F.4th at 714. An "overly vague or sweeping [affidavit] will not, standing alone, carry the government's burden." *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009). Here, the FDIC's conclusory declarations do not justify its redactions.

Two of the declarations assert (in the same formulaic terms) that "divulging the names of the banks or altering the redactions in the documents 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." ECF 72-7 ¶ 6; ECF 72-8 ¶ 6. The third declaration avers that "removing the redactions applied under FOIA Exemptions 4 and 8 would increase the likelihood of revealing the identity of banks and third-parties with which banks were engaged." ECF 72-4 ¶ 30.

The declarations are insufficient to justify the two categories of redactions to which History Associates objects for the simple reason that they do not address those specific redactions at all. That failure to "correlat[e] … the particular part[s] of [the] withheld document[s]" with the claimed exemptions violates FOIA. *Watkins L.*, 78 F.4th at 451. The FDIC had every opportunity to address those redactions. History Associates objected to the redactions in the amended complaint, *see* ECF 37 ¶ 72, and in later joint status reports, *see* ECF 44 at 4; ECF 48 at 6-7. And were there any doubt, the FDIC could have asked which redactions History Associates intended to challenge. Instead, the FDIC opted to prepare declarations seeking to justify thousands of unchallenged redactions, which were bound to be "overly vague." *Larson*, 565 F.3d at 864.

The declarations' lack of specificity also means that they necessarily fail to articulate how disclosing those categories of "particular information" would harm an interest protected by Exemption 4 or 8. *See Hum. Rts. Def. Ctr.*, 126 F.4th at 714. The two materially identical declarations assert that the FDIC's supervisory process would be harmed *if* a bank's name were "divulg[ed]" or redactions were altered in a manner that revealed "the names of the banks or their potential customers or business partners." ECF 72-7 ¶ 6. But they say nothing about *whether* altering any specific redactions would lead to the identification of banks or their business partners, let alone that revealing a deposit-cap percentage or the name of public blockchains would do so.

The third declaration makes a blanket assertion that "removing the redactions" would "increase the likelihood" of identifying banks or third-party partners. ECF 72-4 ¶ 30. But "[n]owhere does the [d]eclaration use reasonably specific detail to demonstrate that the information withheld logically" would have that effect. *Watkins L.*, 78 F.4th at 451 (quotation marks omitted). Instead, the declaration appears to make that assertion as to all of the redactions throughout the hundreds of pages of documents—precisely the sort of "overly … sweeping" assertion that cannot carry the government's burden. *Larson*, 565 F.3d at 864.

The declaration also cites a law-firm webinar in which attorneys claimed to have used a large-language artificial-intelligence model to determine the identity of one bank that received a pause letter. ECF 72-4 ¶ 31 (citing *Using AI and Other Modern Tech: Analyzing the FDIC Pause Letters*, RegReform, Davis Wright Tremaine Webinar (Mar. 14, 2025), https://bit.ly/4fhvuNp). The attorneys, however, did not identify the bank or the pause letter analyzed, so there is no way of knowing whether the law firm succeeded in correctly identifying the bank. And it is well known that large language models "regularly get basic facts wrong" and, as some have put it, "halluci-nat[e]." 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; *see also* Cade Metz & Karen Weise, *A.I. Is Getting More Powerful, But Its Hallucinations Are Getting Worse*, N.Y. Times (May 6, 2025), https://bit.ly/4nOeqSU.

But even if other information that the FDIC has already disclosed has been used to identify a bank, it does not follow that the percentage of a deposit cap or the name of a public blockchain likewise could be used to do so, and the FDIC has not explained why it would. An agency cannot discharge its "independent and meaningful burden" of articulating an exemption-related harm from disclosure by simply incanting "artificial intelligence." *Reps. Comm.*, 3 F.4th at 369. That is far too "'speculative'" a basis for the FDIC "to withhold information." *Id.* (quoting S. Rep. No. 4, 114th Cong., 1st Sess., at 8 (2015)).

CONCLUSION

The Court should deny the FDIC's motion to dismiss Count II, grant History Associates summary judgment as to Count I, and order the FDIC to release the January 3, 2025, and revised February 21, 2025, productions without redacting the information set forth above.

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Respectfully submitted,

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APPENDIX

The table below lists representative examples of each category of redactions within the documents the FDIC has produced to date that violate FOIA.

Category of Redactions	Excerpts of Redactions	Record Cite
The percentage cap imposed by a bank on deposits from crypto companies	"placed a cap on digital asset-related deposits to [redacted] of total deposits"	ECF 48-2 at 51
	"limits Digital Asset on balance sheet deposits to [redacted] of total deposits"	ECF 48-2 at 67
	"on balance sheet deposits from clients in the digital assets vertical are limited to no more than [redacted] of on balance sheet deposits"	ECF 48-2 at 81
	"[redacted] limit for on-balance sheet deposits"	ECF 48-2 at 91
	"limits its total Digital Asset business deposit exposure to [redacted] of total Deposits"	ECF 48-2 at 92
Names of public blockchains	"will operate on the [redacted] a decentralized public Blockchain"	ECF 27-2 at 11
	"mitigate potential risks posed by the public [redacted] Blockchain"	ECF 27-2 at 24
	"whether there are any dependencies on the public [redacted] blockchain"	ECF 27-2 at 25