19-3248

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK LEGAL ASSISTANCE GROUP,
Plaintiff-Appellant,

v.

BOARD OF IMMIGRATION APPEALS, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, UNITED STATES DEPARTMENT OF JUSTICE,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

AMICUS CURIAE BRIEF FROM ANIMAL WELFARE INSTITUTE AND FARM SANCTUARY

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CORPORATE DISCLOSURE STATEMENT

The Animal Welfare Institute and Farm Sanctuary are non-profit, non-stock corporations. They have no parent corporations, and no publicly traded corporations have any ownership interest in them.

/s/ William N. Lawton
William N. Lawton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Amici Animal Welfare Institute ("AWI") and Farm Sanctuary are non-profit organizations that promote the welfare and humane treatment of animals, including animals raised for human consumption. To that end, *Amici* regularly rely on the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to obtain information about the United States Department of Agriculture's ("USDA") implementation of statutes that regulate the treatment of animals fated for human consumption.

Amici submit this brief to inform the Court of their pending litigation, *Animal Welfare Institute v. U.S. Dep't of Agric.* ("*AWI v. USDA*"), No. 6:18-cv-06626-MAT-MWP (W.D.N.Y. filed Aug. 23, 2018), which, like this case, seeks to enforce FOIA's affirmative disclosure mandate, 5 U.S.C. § 552(a)(2), by requiring an agency to post certain records online. This Court's resolution of the current appeal will profoundly impact *Amici*'s litigation and the implementation of FOIA more generally. Affirming the district court's ruling that courts lack authority to order agencies to publish records online would misconstrue FOIA's plain terms and—as *Amici*'s experience demonstrates—would inappropriately shift the burden of implementing that statute onto the public, which cannot afford to shoulder duties that Congress assigned to federal agencies.[1]

[1] No party's counsel authored this brief in whole or part. No party or its counsel contributed funds for the preparation of this brief. No person other than *Amici* and their counsel contributed funds for the preparation or filing of this brief.

I. STATUTORY BACKGROUND

A. FOIA's Affirmative Disclosure Mandate

Congress enacted FOIA "to clarify and protect the right of the public to information." S. Rep. No. 1219 (1964). In addition to requiring agencies to provide information upon a "request for records," 5 U.S.C. § 552(a)(3), FOIA includes an affirmative disclosure mandate requiring agencies to make certain information "available for public inspection" without any request, *id.* § 552(a)(2). To modernize this mandate, in 1996 Congress required agencies to publish such information "in an electronic format," *id.*, by providing "on-line access to Government information," H.R. Rep. No. 104-795, at 11 (1996).[2]

FOIA's affirmative disclosure mandate applies to four categories of records, which are all implicated by the issue in this appeal—whether courts can order agencies to post records online, rather than merely ordering the production of records to an individual plaintiff. These four categories include: "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases," 5 U.S.C. § 552(a)(2)(A); "statements of policy and interpretations which have been adopted by the agency and are not published in the

[2] Because FOIA previously required agencies to make such records available in physical reading rooms, 5 U.S.C. § 552(a)(2) is sometimes referred to as a "reading-room provision." *Amici* use the term affirmative disclosure mandate to denote that FOIA requires publication online and without any request.

Federal Register," *id.* § 552(a)(2)(B); and "administrative staff manuals and instructions to staff that affect a member of the public." *Id.* § 552(a)(2)(C).

As at issue in *Amici*'s case, FOIA mandates affirmative disclosure of "copies of all records, regardless of form or format," that have been "released to any person," and "that because of the nature of their subject matter . . . are likely to become the subject of subsequent requests for substantially the same records," or "that have been requested 3 or more times." *Id.* § 552(a)(2)(D). These are known as "frequently requested records." *See, e.g.*, *Animal Legal Def. Fund v. U.S. Dep't of Agric.* ("*ALDF v. USDA*"), 935 F.3d 858, 862 (9th Cir. 2019).

By requiring agencies to make records "available for public inspection in an electronic format," 5 U.S.C. § 552(a)(2), Congress intended "to encourage on-line access to Government information" so that "the public can more directly obtain and use Government information." H.R. Rep. No. 104-795, at 11. Congress aimed "to prompt agencies to make information available affirmatively on their own initiative in order to meet anticipated public demand for it." S. Rep. No. 104-272, at 13 (1996). Congress intended this mandate to "result in fewer FOIA requests, thus enabling FOIA resources to be more efficiently used" and reducing agency delays in responding to requests, which "continue as one of the most significant FOIA problems." H.R. Rep. No. 104-795, at 11–13.

B. Legal Requirements for Humane Treatment of Animals Slaughtered for Human Consumption

Amici's litigation concerns records of the USDA's implementation of the Humane Methods of Slaughter Act ("HMSA"), 7 U.S.C. §§ 1901–1907, and the Poultry Products Inspection Act ("PPIA"), 21 U.S.C. §§ 451–472. The HMSA reflects "the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods." 7 U.S.C. § 1901. Under the HMSA, livestock must be "rendered insensible to pain" before slaughter. *Id.* § 1902(a). The USDA's Food Safety and Inspection Service ("FSIS") gathers and maintains records of the implementation of the HMSA.

The PPIA prevents the sale of "adulterated" poultry products, which contain any substance that renders the product "unsound, unhealthful, unwholesome, or otherwise unfit for human food." 21 U.S.C. §§ 451, 453. Poultry processing facilities must "be operated in accordance with such sanitary practices" as will prevent adulterated products, *id*. § 456, and FSIS must inspect these facilities and processed poultry, *id*. § 455. FSIS requires that poultry facilities must operate "in accordance with good commercial practices," 9 C.F.R. § 381.65, "which means that [poultry] should be treated humanely." Treatment of Live Poultry Before Slaughter, 70 Fed. Reg. 56,624 (Sept. 28, 2005). FSIS gathers and maintains records of the implementation of the PPIA.

II. FACTUAL BACKGROUND TO *AMICI*'S LITIGATION

A. Frequent FOIA Requests for HMSA and PPIA Records

Amici's mission of promoting the humane treatment of animals entails educating the public about how the vast majority of animals fated for human consumption currently endure living conditions and slaughter processes that do not treat animals humanely, contrary to Congress's intent. *See* Declaration of Dena Jones, Ex. A, ¶ 2. Accordingly, *Amici* have for many years routinely submitted FOIA requests to the USDA for records of its implementation of the HMSA and PPIA. *Amici* use these records to monitor and document the USDA's implementation of its statutory duties, to educate the public about inhumane or unsafe conditions in the U.S. food system, and to advocate for reforms to promote the humane treatment of animals. *Id.* ¶¶ 9–12, 17.

In particular, *Amici* have routinely requested Noncompliance Records ("NR") and Memoranda of Interview ("MOI") under the HMSA and PPIA. *Id.* These are critically important records reflecting the USDA's implementation of these statutes through inspections of regulated facilities. An NR documents a facility's failure to meet statutory or regulatory standards and may constitute evidence in a subsequent enforcement action. Likewise, an MOI summarizes an interview between an inspector and a regulated entity, and may describe non-compliance events or trends, notify a regulated entity of enforcement actions, or

document other issues such as a new inspection practice. MOIs may also memorialize a facility's response to the USDA's findings. *Id.* ¶¶ 7–9.

Amici have for many years routinely requested these records through FOIA. Over the last seventeen years, while working for Farm Sanctuary and AWI, Dena Jones has submitted numerous FOIA requests for records under the HMSA. Since 2012, Ms. Jones has also regularly requested records under the PPIA. Currently, *Amici* submit a FOIA request to USDA every three months, requesting the most recent batch of these records. *Id.* ¶¶ 10–12.

These records are also often requested by other advocates, journalists, and members of the public. Although some requests focus on specific facilities or regions, *Amici* and others often simply request all NRs and MOIs under the statutes for a specific time period. The USDA's publicly available FOIA logs show that it has received at least 135 such categorical requests since 2009, and that the public has requested all such records created by the USDA between 2004 and the present. *Id.* ¶¶ 13–15.

Although the USDA often fails to act within FOIA's twenty working-day deadline, the agency does—eventually—release these records. However, the delay in releasing records substantially diminishes their utility. For example, in 2018, AWI received a set of records that were nearly a year old by the time the USDA released them in response to AWI's FOIA request. In *Amici*'s experience, such

stale records are substantially less useful in educating the public, suggesting more effective enforcement, or advocating for reforms. *Id.* ¶¶ 16–21.[3]

Despite the USDA's own FOIA logs revealing numerous requests for NRs and MOIs under the HMSA and PPIA, the agency denies that they are frequently requested records subject to FOIA's affirmative disclosure mandate and does not make them available online. *Id.* ¶ 25.

B. *Amici*'s Efforts to Publicize HMSA and PPIA Records

Because public education is a critical aspect of *Amici*'s efforts to improve the treatment of animals, *Amici* devote considerable resources to publicizing information they (eventually) receive in response to FOIA requests. *Amici* use such information in reports describing the implementation of the HMSA and PPIA, educating the public about the welfare of livestock and poultry at slaughter, and promoting media coverage of these issues. *Id.* ¶ 17.

Additionally, because the USDA fails to affirmatively disclose NRs and MOIs under the HMSA and PPIA by posting those records online, *Amici* have attempted to fill this gap. *Id.* ¶ 22. Thus, in 2012, AWI began expending its own

[3] Lengthy delays in responding to FOIA requests are common. The USDA's most recent FOIA report, from 2018, shows that FSIS took on average 69.42 days to release information in response to a "simple" FOIA request, 161.31 days to respond to a "complex" request, and 102.6 days to respond to an administrative appeal. USDA, *Freedom of Information Act Annual Report FY 2018*, at 30, https://www.dm.usda.gov/foia/reading.htm#reports.

resources to maintain an online database of HMSA records. However, AWI could not afford to maintain this database, either in terms of staff time spent processing and uploading records or in terms of the cost of maintaining a large website. Consequently, AWI was forced to abandon this endeavor after roughly two years. *Id.*

Currently, AWI uses the records from its regular FOIA requests to maintain a much less detailed "Humane Slaughter Plant Suspension List," which documents when, and for how long, the USDA has suspended operations at specific facilities. However, AWI can only afford to update this list sporadically. *Id.*[4]

AWI also expends significant resources responding to requests for records that *Amici* believe the USDA is obliged under FOIA to make available online. However, because the USDA neither makes this information available online nor responds promptly to FOIA requests, advocates, journalists, and students often send requests to AWI. AWI must then redirect staff from other projects to compile and transmit records to the requester. AWI expends resources to do so because it is unreasonably difficult for the public to obtain this information in a timely manner from the USDA, and because *Amici* believe this information should be publicly—and promptly—available. *Id.* ¶ 21.

[4] AWI, *Humane Slaughter Plant Suspension List*, https://awionline.org/sites/default/files/uploads/documents/fa-hsplantsuspensionlist.pdf

C. *Amici*'s Efforts to Compel USDA to Place HMSA and PPIA Records Online

Based on numerous routine FOIA requests for NRs and MOIs under the HMSA and PPIA, as well as FSIS's own representations, *Amici* believe these are frequently requested records subject to FOIA's affirmative disclosure mandate. Hence, *Amici* have attempted first to persuade, and then to compel, the USDA to comply with FOIA by publishing these records online. *Id.* ¶ 24.

1. Amici's FOIA Request

First, *Amici* submitted a FOIA request to the USDA asking the agency both to provide the most recent batch of records under section (a)(3) of FOIA and to make these records available online under section (a)(2). *Amici* specifically explained why FOIA's affirmative disclosure mandate applies to these records. Likewise, *Amici* advised the agency that merely providing records under section (a)(3) would not satisfy the agency's obligations to post these records online under section (a)(2), and thus would not constitute a complete response to the request. *Id.* ¶ 27.[5]

[5] *Amici* submitted this request to inform the USDA of its obligations under FOIA's affirmative disclosure mandate and to provide the agency an opportunity to comply with the statute—despite the fact that FOIA did not require *Amici* to do so. *Compare* 5 U.S.C. § 552(a)(3) (requiring agencies to make records available "upon any request for records") *with id.* § 552(a)(2) (requiring that agencies "shall make available for public inspection in an electronic format" certain records without requiring any "request for records"); *see also Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 756 (D.C. Cir. 1978) (en banc) (records encompassed by (a)(2) must be

In response, the USDA only released records to *Amici* under section (a)(3) and failed to acknowledge *Amici*'s request under section (a)(2). Consequently, *Amici* submitted an administrative appeal advising the USDA that ignoring this critical aspect of the request violated the agency's duties under FOIA. *Id.* ¶¶ 28–29.

The USDA responded to the appeal by stating that it was "considering" *Amici*'s request and would contact *Amici* "when a final determination is made." However, the USDA provided no determination nor any date by which it would do so—thus flouting FOIA's requirement for a timely and reasoned response to *Amici*'s request. *Id.* ¶ 30; *see also* 5 U.S.C. § 552(a)(6)(A)(i)(I) ("Each agency, upon any request for records made under paragraph . . . (2) . . . shall . . . determine within 20 [working] days . . . whether to comply with such request and shall immediately notify the person making such request of . . . such determination and the reasons therefor").

2. Amici's Lawsuit under Section (a)(2) of FOIA

Because the USDA failed to provide any reasoned determination in response to *Amici*'s (a)(2) request, *Amici* filed suit in 2018, challenging the USDA's

made "automatically available for public inspection; *no demand is necessary*" (emphasis added)).

violation of FOIA and seeking an order requiring the agency to post the records at issue online. *See AWI v. USDA*, ECF No. 1.

The USDA moved to dismiss, arguing *inter alia* that the district court should adopt the D.C. Circuit's ruling that FOIA does not authorize courts to compel agencies to post information online. *Id.*, ECF No. 6, at 11–13; *id.*, ECF No. 12, at 3–9; *see also Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Justice* ("*CREW*"), 846 F.3d 1235, 1243–44 (D.C. Cir. 2017).

Amici opposed dismissal, explaining that FOIA authorizes courts to enforce its mandates, including its requirement that agencies post records online, and that Supreme Court and Second Circuit precedent supports this view. *AWI v. USDA*, ECF No. 9, at 11–22. *Amici* also explained that the D.C. Circuit's view is incorrect for numerous reasons, *id.*, as discussed below.

The district court denied the USDA's motion to dismiss and rejected the D.C. Circuit's constricted view of FOIA's judicial review provision. *Id.*, ECF No. 14, at 14–17. Judge Telesca found that "[d]espite out-of-circuit case law holding to the contrary, a plain reading of [5 U.S.C. § 552(a)(4)(B)] seems to suggest that a district court has both the authority to enjoin the agency from withholding records (i.e., injunctive relief), and to order the production of any agency records withheld from a particular plaintiff, which would appear to cover the reading room provision." *Id.* Judge Telesca also found that under the D.C. Circuit's rule, "there

is virtually no meaningful remedy for parties aggrieved under the reading room provision," and that this outcome "runs contrary to Section 552's purpose." *Id.*

Amici's litigation is currently proceeding toward summary judgment. However, if this Court affirms the district court in this appeal, *Amici* will be unable to obtain the relief they principally seek, i.e. an order requiring the USDA to post information online.

SUMMARY OF ARGUMENT

FOIA authorizes courts to enforce its mandates, 5 U.S.C. § 552(a)(4)(B), including the mandate to make certain information "available for public inspection in an electronic format," *id* § 552(a)(2). The district court erred by holding that courts may only order production of records to an individual, which misconstrues FOIA's plain language, ignores precedent, and inappropriately shifts the burden of implementing FOIA from agencies to the public. This Court should not adopt the D.C. Circuit's narrow view of judicial authority, which deprives courts of the enforcement authority Congress intended and deprives the public of any meaningful remedy for agencies' statutory violations. Instead, this Court should find, like the Ninth Circuit, that courts have "the authority to order an agency to post records in an online reading room." *ALDF v. USDA*, 935 F.3d at 869.

ARGUMENT

I. CONGRESS AUTHORIZED COURTS TO ORDER AGENCIES TO PUBLISH INFORMATION ONLINE

FOIA "makes the District Court the enforcement arm of the statute" and empowers courts to use their traditional "broad equitable power" to devise appropriate remedies to enforce its mandates. *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 19–20 (1974). FOIA's text, structure, and purpose—as well as precedent from the Supreme Court and several circuits—all demonstrate that Congress authorized courts to "order an agency to post records in an online reading room." *See ALDF v. USDA*, 935 F.3d at 869 (reaching this conclusion "by following familiar lodestars: text, structure and precedent"); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Prot. Agency*, 846 F.3d 492, 512 (2d Cir. 2017) ("examin[ing] the statutory text, structure, and purpose").

A. FOIA's Plain Text Authorizes Courts to Order Agencies to Publish Information Online

FOIA authorizes courts "to enjoin the agency from withholding agency records *and* to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B) (emphasis added). Congress's choice of the conjunctive "and" unambiguously empowers courts to issue injunctive relief beyond merely compelling production of records *to an individual*

complainant. *See NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 718 (2001) ("The 'and' bears emphasis because it was a true conjunctive"); *Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Germany*, 615 F.3d 97, 115 (2d Cir. 2010) ("The usual meaning of the word 'and' is conjunctive.").

Had Congress intended to limit courts' authority to merely ordering records to an individual, as the district court found, "Congress could easily have said so." *Kucana v. Holder*, 558 U.S. 233, 248 (2010); *see also United States v. City of New York*, 359 F.3d 83, 96 (2d Cir. 2004) ("Congress could easily have said that the benefits at issue in this case may not be considered wages, but it did not."). For example, Congress could have omitted the clause "to enjoin the agency from withholding agency records" or stated that courts may "enjoin the agency from withholding records *by ordering* the production of any agency records improperly withheld from the complainant." Instead, Congress chose the conjunctive "and."

In interpreting FOIA's judicial review provision, this Court "'must give effect to every word of a statute wherever possible.'" *United States v. Halloran*, 821 F.3d 321, 333 (2d Cir. 2016) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004)). Accordingly, this Court must give meaning to the clause "to enjoin the agency from withholding agency records," to the conjunctive "and," and to the clause "to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). Moreover, "the use of different words"

in the two clauses "strongly suggests that different meanings were intended." *United States v. Mason*, 692 F.3d 178, 182 (2d Cir. 2012).

Accordingly, the phrase "enjoin the agency from withholding records" must have a different meaning from "order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). In light of these fundamental principles of statutory interpretation, the Ninth Circuit was correct to "interpret the words 'to enjoin the agency from withholding agency records' to mean what they say: FOIA authorizes district courts to stop the agency from holding back records it has a duty to make available, which includes requiring an agency to post § 552(a)(2) documents online." *ALDF v. USDA*, 935 F.3d at 869. This Court should find the same.

B. FOIA's Structure Confirms that Congress Authorized Courts to Enforce FOIA's Publication Mandates

The Ninth Circuit also correctly found that "FOIA's structure confirms what the text of the judicial-review provision makes plain: district judges can order agencies to comply with their obligations under § 552(a)(2)." *Id.* at 871–73. Rather than recap the Ninth Circuit's persuasive reasoning, *Amici* further explain how "the statute's 'duty-breach' structure," *id.* at 871, demonstrates that courts can order agencies to publish materials online.

FOIA contains two basic mechanisms for how agencies "shall make available to the public information," 5 U.S.C. § 552(a). First, in sections (a)(1) and

(a)(2), FOIA requires agencies to make information publicly available in the Federal Register or online, respectively. *See* 5 U.S.C. § 552(a)(1) ("Each agency shall . . . publish in the federal register" certain information); *id.* § 552(a)(2) ("Each agency … shall make available for public inspection in an electronic format" certain information). Second, in section (a)(3), FOIA mandates that agencies must provide to individual requesters non-exempt, responsive information that has not already been made publicly available. *See id.* § 552(a)(3) ("Except with respect to the records made available under paragraphs (1) and (2) of this subsection . . . each agency, upon any request for records . . . shall make the records promptly available"). Thus, FOIA's two fundamental mechanisms are making information publicly available and responding to individual requests.

Next, in section (a)(4), FOIA provides for judicial review with two clauses authorizing courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." *Id.* § 552(a)(4)(B). The most logical way to read these two clauses is that each corresponds to one of FOIA's mechanisms for disseminating information. Because the first clause, "to enjoin the agency from withholding records," does not refer to any individual entity from which information is withheld, this clause is best read as authorizing courts to compel agencies to publicly disseminate information under sections (a)(1) and (a)(2). Conversely, because the second

clause, "to order the production of any agency records improperly withheld from the complainant," does refer to an individual "complainant" from which records were withheld, this clause is best read to authorize courts to compel agencies to respond to individual FOIA requests under section (a)(3). Notably, this reading of section (a)(4)(B) follows the structure of the statute, which first requires agencies to make certain information publicly available and then requires agencies to provide other information upon request.

C. FOIA's Purpose Supports Courts' Authority to Order Agencies to Publish Information Online

FOIA's purpose also reveals congressional intent to provide courts with broad equitable authority, including authority to order agencies to publish information online. The Supreme Court and this Court consistently emphasize FOIA's aim to promote *public* access to government information. *See, e.g.*, *Bannercraft*, 415 U.S. at 17 ("The Second Circuit has described the Act's 'ultimate purpose' as one 'to enable *the public* to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope and procedure of federal governmental activities" (quoting *Frankel v. S.E.C.*, 460 F.2d 813, 816 (2d Cir. 1972) (emphasis added)); *see also Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (FOIA "is to be construed broadly to provide information *to the public* in accordance with its purposes" (emphasis added)). Following the statutory purpose to allow public

access to information, this Court should read section 552(a)(4)(B) to authorize courts to enforce the statute's mandate that agencies publish certain information online. *See Bannercraft*, 415 U.S. at 19 (noting that FOIA "makes the District Court the enforcement arm of the statute").

D. The Supreme Court and Other Circuits Have Identified and Exercised Broad Enforcement Authority Under FOIA

The Supreme Court has rejected a narrow reading of FOIA that would limit courts to merely ordering production to individual complainants. Because "Congress was principally interested in opening administrative processes to the scrutiny of the press *and general public*," the Court rejected the idea that "compelled production was intended to be the exclusive enforcement method" under FOIA. *Bannercraft*, 415 U.S. at 17–20 (emphasis added). The Court instead found that "[t]he broad language of the FOIA, with its obvious emphasis on disclosure," the fact that "Congress knows how to deprive a court of broad equitable power when it chooses to do so," and the fact that FOIA "makes the District Court the enforcement arm of the statute," all show that Congress did not seek to "limit the inherent powers of an equity court." *Id.* at 19–20. The Court found no reason to doubt that district courts' "broad equitable authority" allows them not only to compel production of records, but also, in proper cases, to enjoin agency action "until the court determines that the [plaintiff] is or is not entitled to information it claims under the FOIA." *Id.* at 16–20. Because courts' authority

extends to enjoining agency actions while a FOIA case is pending, *id.*, that authority must, *a fortiori*, allow courts to order an agency to do *exactly what FOIA's plain text requires*—i.e. make records "available for public inspection in an electronic format." 5 U.S.C. § 552(a)(2).

Adhering to *Bannercraft*, the Ninth Circuit recently held that FOIA provides "district courts with the authority to order an agency to post records in an online reading room." *ALDF v. USDA*, 935 F.3d at 869; *see also id.* at 873 (discussing *Bannercraft*). Because the Ninth Circuit's reasoning about FOIA's "text, structure, and precedent," *id.* at 869, is extensive and persuasive, this Court should concur.

Likewise, other circuits have in fact ordered publication of records to enforce section (a)(2). For example, the Fifth Circuit affirmed an order requiring an agency to make records available for public "inspection and copying" under section 552(a)(2). *Stokes v. Brennan*, 476 F.2d 699, 700 (5th Cir. 1973).[6] Moreover, the D.C. Circuit itself—contrary to its later rulings discussed below—also compelled records to be "produced for public inspection" under section 552(a)(2). *Am. Mail Line Ltd. v. Gulick*, 411 F.2d 696, 702–03 (D.C. Cir. 1969). Indeed, the D.C. Circuit reasoned that "Congressional intent (although not spelled

[6] Congress has since amended 5 U.S.C. § 552(a)(2), which then required agencies to make certain records available for "public inspection and copying," to now require agencies to make records available for "public inspection *in an electronic format*," i.e. by posting them online.

out directly anywhere) seems to have been that judicial review would be available for a violation of any part of the Act." *Id.* at 701. Similarly, in *Irons v. Schuyler*, the D.C. Circuit held that "the opinions and orders referred to in Section 552(a)(2) . . . are required to be made available, and that *such requirement is judicially enforceable*." 465 F.2d 608, 614 (D.C. Cir. 1972) (emphasis added).

Although this Court has not directly considered whether FOIA authorizes courts to order agencies to publish records online, circuit precedent supports this view by implication. Indeed, this Court appears to have assumed that it *can* order agencies to publish records online, because in the instances in which it has declined to do so, it has never stated that it lacks that authority; instead, this Court has found that certain records do not fall within the categories that FOIA requires agencies to publish. *See Viacom Int'l., Inc. v. FCC*, 672 F.2d 1034, 1042–43 (2d Cir. 1982) (records that do not fall within 552(a)(2) need not be disclosed); *Mehta v. INS.*, 574 F.2d 701, 705 (2d Cir. 1978) (records need not be published under § 552(a)(1) because they are not "substantive rules of general applicability"); *Int'l Paper Co. v. Fed. Power Comm'n*, 438 F.2d 1349, 1359 (2d Cir. 1971) (memoranda that are not "final orders" need not be disclosed under 552(a)(2)); *Polymers, Inc. v. NLRB*, 414 F.2d 999, 1006 (2d Cir. 1969) ("internal advisory document" need not be disclosed under section (a)(2)). *Amici* know of no

precedent from this Court casting doubt on judicial authority to order agencies to publish information online.

E. The District Court Interpreted FOIA Incorrectly

The district court misconstrued FOIA's text and failed to consider the statute's structure or purpose or the precedent described above. The district court concluded that "[t]he jurisdictional grant in § 552(a)(4)(B) does not say anything about enjoining an agency to require publication of withheld records," JA62–63, by reasoning that "the term 'withholding' suggests, in the context of the statute, that the records were withheld from a complainant." *Id.* However, the district court failed to recognize that "the structure and purposes of the Act … indicate[] that Congress used the word ['withhold'] in its usual sense." *Kissinger v. Reporters Comm. for the Freedom of the Press*, 445 U.S. 136, 151 (1980); *see also U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150 (1989) ("Nothing in the history or purposes of FOIA counsels contorting this word beyond its usual meaning.").[7]

[7] The district court also erred by relying on *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), which does not concern FOIA at all, but instead concerns courts' authority to compel action unlawfully withheld or unreasonably delayed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1). *Id.* at 61–65. The district court's reliance on this case is irreconcilable with its finding that no relief is available under the APA because FOIA provides an adequate remedy. Moreover, even if *Norton* has any applicability, the relief requested in this case (and *Amici*'s) is a far cry from a "general order[] compelling compliance with broad statutory mandates." 542 U.S. at 66. An order compelling an agency to post specific records online is a discrete, specific order, and does not "inject[] the judge into day-to-day agency management." *Id.*

To ascertain the meaning of words in FOIA that are not specifically defined, courts "as usual, [] ask what the term's ordinary, contemporary, common meaning was when Congress enacted FOIA in 1966." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019). The contemporary, common meaning of "withhold" is "to hold back" or "to refrain from granting, giving, or allowing." Webster's Seventh New Collegiate Dictionary 1026 (1963); *see also Argus Leader*, 139 S.Ct. at 2363 (citing this dictionary). In light of this definition, the Ninth Circuit correctly "interpret[ed] the words 'to enjoin the agency from withholding agency records' to mean what they say: FOIA authorizes district courts to stop the agency from *holding back* records it has a duty to make available, which includes requiring an agency to post § 552(a)(2) records online." *ALDF v USDA*, 935 F.3d at 869 (emphasis added). However, this definition does not support the district court's restrictive reading.

The district court's reasoning is also far less persuasive than Judge Telesca's. Unlike the district court, Judge Telesca properly based his ruling on "a plain reading" of section 552(a)(4)(B), finding that the D.C. Circuit's rule leaves "virtually no meaningful remedy for parties aggrieved under the reading room

provision," contrary to "Section 552's purpose." *AWI v. USDA*, ECF No. 14, at 17.[8]

II. CONSTRUING FOIA TO BAR JUDICIAL ENFORCEMENT OF FOIA'S AFFIRMATIVE DISCLOSURE MANDATE WOULD INAPPROPRIATELY BURDEN THE PUBLIC WITH DUTIES CONGRESS ASSIGNED TO FEDERAL AGENCIES

FOIA requires that "[e]ach agency . . . shall make available for public inspection in an electronic format" certain specific information. 5 U.S.C. § 552(a)(2). Because Congress expressly assigned this duty to federal agencies, this Court should not adopt a reading of the statute that, as a practical matter, foists this duty onto the public. *See Tax Analysts*, 492 U.S. at 153 ("Congress surely did not envision agencies satisfying their disclosure obligations under the FOIA simply by handing requesters a map and sending them on scavenger expeditions throughout the Nation."); *see also Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837,

[8] Unlike the district court here, Judge Telesca also properly considered this Court's precedent construing 552(a)(4)(B). *AWI v. USDA*, ECF No. 14, at 15–16. This Court construed section 552(a)(4)(B) as "referenc[ing] remedial power, *not subject-matter jurisdiction*." *Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542, 566 (2d Cir. 2016) (emphasis added). Accordingly, the district court here could not legitimately dismiss this case under Rule 12(b)(1). *Id.* at 567. Moreover, because "a court can grant any relief to which a prevailing party is entitled, whether or not that relief was expressly sought in the complaint," *Powell v. Nat'l Bd. Of Med. Exam'rs*, 364 F.3d 79, 86 (2d Cir. 2004), the district court also could not properly dismiss this case under Rule 12(b)(6). *See, e.g., Burkina Wear, Inc. v. Campagnolo, S.R.L.*, No. 07-Civ-3610, 2008 WL 1007634, at *3 (S.D.N.Y. April 9, 2008) ("[T]he fact that some relief may be warranted is sufficient to preclude dismissal under Rule 12(b)(6).").

842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, *as well as the agency*, must give effect to the unambiguously expressed intent of Congress." (emphasis added)).

The district court's ruling, and the D.C. Circuit's, inappropriately shifts the burden of publishing records online from agencies to the public. If courts cannot remedy an agency's violation of FOIA's affirmative disclosure mandate through an order requiring the agency to comply with the statute by publishing records online, then members of the public who believe that such records belong online—where the records are most broadly and readily accessible—have no real recourse but to post them online at their own expense.

Amici's experience, described above, illustrates the impracticability and unfairness of that system. Based on long experience with NRs and MOIs under the HMSA and PPIA that demonstrates widespread public interest in these records, *Amici* strongly believe these records belong online. However, *Amici* simply cannot afford to post them online; indeed, the high cost of doing so forced AWI to abandon that effort. Although *Amici* attempt to fill some of the gap left by the USDA's failure to place these records online or to respond promptly to FOIA requests, these efforts consume these non-profit organizations' limited resources and detract from other important projects. Congress directed federal agencies to make information available online and did not intend this duty to fall to the public.

Amici's experience also demonstrates why Congress acted equitably and sensibly in ordering agencies to place records online. Federal agencies have resources that members of the public lack; that USDA *can afford* to post information online is proven by the fact that it *does* post some information. *See* Jones Decl., ¶ 23 (noting that FSIS makes certain records publicly available online within two weeks of agency action). Moreover, if agencies comply with Congress's directive, they will achieve Congress's goal of reducing the number of FOIA requests; for example, *Amici* would no longer have to submit requests for records under the HMSA and PPIA every three months. *See* H.R. Rep. 114–391, at 11 (2015) ("increased disclosure may reduce the drain on resources required to respond to repetitive requests").

Finally, *Amici*'s experience also demonstrates why the district court's ruling deprives the public of any "meaningful remedy." *AWI v. USDA*, ECF No. 14, at 17. The only remedy available would be an order requiring production of records to *Amici*. However, even a prospective production order would not cure *Amici*'s inability to post these records online, nor relieve *Amici*'s burden of responding to requests from other members of the public frustrated with the USDA's failure to make this information promptly available. Thus, the only remedy available under the district court's ruling would neither honor FOIA's plain text nor cure the harms

caused to *Amici* by the USDA's failure to comply with FOIA's affirmative disclosure mandate.

III. THE D.C. CIRCUIT'S INTERPRETATION OF FOIA IS FRAUGHT WITH ERROR

The district court relied on two cases from the D.C. Circuit: *Kennecott Utah Copper v. U.S. Dep't of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), and *CREW*, 846 F.3d 1235. JA61–62. However, because these cases flout FOIA's plain language, purpose, and binding precedent, this Court should not adopt the D.C. Circuit's approach.

A. *Kennecott* Conflicts With Precedent

As discussed, courts have "broad equitable authority" to enjoin an agency from violating FOIA. *Bannercraft*, 415 U.S. at 17–20. Indeed, FOIA does not "limit the inherent powers of an equity court." *Id.* However, the D.C. Circuit *entirely ignored* this longstanding precedent when it held in *Kennecott* that FOIA "did not authorize the district court to order publication," but instead merely authorized courts to "[p]rovid[e] documents to the individual." 88 F.3d at 1203. *Kennecott* is irreconcilable with the Supreme Court's rejection of the idea that "compelled production was intended to be the exclusive enforcement method" under FOIA. *Bannercraft*, 415 U.S. at 18–20. Because *Kennecott* conflicts with Supreme Court precedent, it was wrongly decided. *See Tax Analysts*, 492 U.S. at 151 ("Congress sought to insulate [FOIA] from judicial tampering and to preserve

its emphasis on disclosure by admonishing that the availability of records to the public is not limited, except as *specifically* stated." (emphasis in original)).

Likewise, *Kennecott* conflicts with prior D.C. Circuit precedent. Indeed, in reaching the "strange" conclusion that Congress commanded agencies to publish records but denied courts the authority to compel publication, *Kennecott*, 88 F.3d at 1202–03, the D.C. Circuit failed to recognize that it previously reached *precisely the opposite conclusion*. *See Irons*, 465 F.2d at 614 ("Section 552(a)(2) . . . is judicially enforceable"); *Gulick*, 411 F.2d at 701 ("Congress was . . . not attempting to limit judicial review; *otherwise, Congress would have created a right without a remedy*." (emphasis added)).

Kennecott's conflict with *Gulick* is egregious—partly because *Kennecott* cited *Gulick* without recognizing the conflict. *See Kennecott*, 88 F.3d at 1202 (citing *Gulick* only once in passing). *Kennecott* stressed that "Congress has provided an alternative means of encouraging agencies to fulfill their obligations to publish materials in the Federal Register" by stating that absent such publication an agency may not enforce such rules. 88 F.3d at 1203. However, *Gulick* specifically found that Congress did not intend this remedy "to be an exclusive one," reasoning that "[s]urely Congress did not intend to protect parties against an agency relying on a decision or order as precedent for future agency action *without providing a process by which the agency could be compelled to disclose the contents of the*

decision or order." 411 F.2d at 701–02 (emphasis added). Directly contradicting *Kennecott*, *Gulick* held that a record "clearly falls within the confines of 5 U.S.C. § 552(a)(2)(A) and consequently *it must be produced for public inspection*." 411 F.2d at 703 (emphasis added). Because *Kennecott* thus conflicts with the D.C. Circuit's own precedent, it was wrongly decided. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) ("One three-judge panel [] does not have the authority to overrule another three-judge panel of the court.").

B. *CREW* Relies on *Kennecott* Without Curing Its Errors

The other case the district court cited, *CREW*, 846 F.3d 1235, is likewise flawed, largely due to its explicit reliance on *Kennecott*. Thus, although recognizing *Bannercraft*'s holding that FOIA preserves courts' broad equitable authority, *CREW*, 846 F.3d at 1241–42, the D.C. Circuit nevertheless found itself constrained by *Kennecott*. *Id.* at 1243 ("Given *Kennecott's* construction of section 552(a)(4)(B), . . . a court has no authority under FOIA to issue an injunction mandating that an agency 'make available for public inspection' documents subject to the reading-room provision"). Failing *again* to consider *Gulick*'s contrary ruling, *CREW* anomalously concluded that even though FOIA requires agencies to make certain records "available for *public* inspection in an electronic format," 5 U.S.C. § 552(a)(2) (emphasis added), courts may order agencies to provide records "only to [an individual plaintiff]," and not "to the public." 846 F.3d at 1244.

The D.C. Circuit's ruling that a FOIA plaintiff may obtain injunctive relief that features broad remedies "except disclosure to the public," *id.*, makes no sense as an ostensible legal remedy for a violation of a duty to make records "available for *public inspection*," 5 U.S.C. § 552(a)(2) (emphasis added), and wrongly ignores *Gulick*'s reasoning that "Congress was . . . *not attempting to limit judicial review*; *otherwise, Congress would have created a right without a remedy*." 411 F.2d at 701 (emphasis added). Likewise, the D.C. Circuit's holdings make no legal or practical sense, because they foist onto private litigants the responsibility for public dissemination of government records that Congress expressly assigned to federal agencies.

C. The Ninth Circuit Correctly Rejected the D.C. Circuit's Narrow View of FOIA

In ruling that courts *can* order agencies to publish records online, the Ninth Circuit extensively and persuasively explained why the D.C. Circuit's view is groundless. *See ALDF v. USDA*, 935 F.3d at 874 ("We appreciate our sister circuit's analysis . . . but do not agree"). The Ninth Circuit found the D.C. Circuit's case law inconsistent, noting the conflict between *Gulick*, *Kennecott*, and *CREW*. *See id.* at 874–75 (discussing *Gulick*, *Kennecott*, and *CREW*). Likewise, the Ninth Circuit discerned further "tension" from "an even newer D.C. Circuit case" that appears to construe *CREW* narrowly. *Id.* at 876 (citing *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 922 F.3d 480 (D.C. Cir. 2019)). Thus,

the Ninth Circuit found that "D.C. Circuit law on this issue does not seem settled," *id.*, and properly rejected an approach that "render[s] § 552(a)(2) a dead letter" because "an agency would have no enforceable duty to post" materials online, *id.* at 875. This Court should do the same.

CONCLUSION

FOIA empowers courts to enforce its mandates, including the mandate that agencies post records online. The D.C. Circuit's unpersuasive contrary view, adopted by the district court, inappropriately burdens the public with the duty to disseminate information that Congress specifically assigned to federal agencies. Following FOIA's plain text, Supreme Court precedent, and the weight of authority from other circuits, this Court should hold that Congress authorized courts to order agencies to comply with FOIA by posting information online.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), and Second Circuit Local Rules 29.1(c) and 32.1(a)(4), I certify that this brief complies with the typeface and volume limitations set forth in Federal Rule of Appellate Procedure 32. This brief contains 6,997 words, exclusive of those parts of the brief not required to be included in the calculation by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ William N. Lawton
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